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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 96 TAX RETURNS, AUDITS, AND PROTESTS

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31-96 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers audits (also called "examinations") of individual income tax returns, as well as tax protests and the administrative procedures to dispute deficiency assessments by the Internal Revenue Service. It discusses the requirements of practice before the IRS and examines the audit process, including examination selection criteria, types of audits, appealing within the IRS, appealing to the Tax Court or to the district court, collection alternatives (installment agreements and offers in compromise), and settlement and closing agreements. The chapter also discusses the attorney-client privilege in the context of tax proceedings and the statutory federal tax practitioner-client privilege. This chapter focuses on transactional or administrative processes, as opposed to tax litigation.

Procedural guides include step-by-step guides to practice before the IRS, including:

- Responding to initial notices and requests.
- Requesting technical advice.
- Handling correspondence, office, and field audits.
- Handling appeals within the IRS.
- Responding to a 90-Day Letter (notice of deficiency).
- Terminating accrual of interest on deficiencies.
- Abating interest assessments.
- Settlement and closing agreements.
- Compromise.
- Claims for credits or refunds.

Although the chapter focuses on federal procedures, it also addresses Franchise Tax Board audit and appeal procedures. For more detailed coverage of California tax matters, including audits and appeals, see *California Forms of Pleading and Practice*, Ch. 540, *Taxes and Assessments* .

Forms include IRS forms and other forms related to powers of attorney, consents to extend time to assess tax, requests for technical advice, protests of federal tax deficiencies, claims for refund, offers in compromise, collection forms, waivers, settlement, and closing agreements. FTB forms include protests, appeal from an FTB decision, and claims for refund.

This chapter emphasizes coverage of individual income tax audits. It does not cover the problems or procedures involved in audits of other types of taxes or jeopardy assessments (for example, corporate slush fund examinations or problems involving excise and employment taxes paid by businesses). Neither does it discuss criminal proceedings or investigations by the Intelligence Division of the Internal Revenue Service. For a detailed discussion of those issues as well as appellate proceedings, see Rabkin & Johnson, *Current Legal Forms with Tax Analysis*(Matthew Bender).



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§ 96.01 California Statutes

California Taxpayers' *Bill of Rights*. *Rev. & Tax. Code § 7080 et seq.*

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Deductions generally. *Rev. & Tax. Code §§ 17073, 17073.5, 17076, 17201 et seq.*

Individual returns generally. *Rev. & Tax. Code § 18501 et seq.*

Amended returns. *Rev. & Tax. Code § 18622.*

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Power of examination; subpoenas. *Rev. & Tax. Code § 19504.*

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Disclosure of standards for selection of returns for examination not required. *Rev. & Tax. Code § 19544.*

Legal Topics:

For related research and practice materials, see the following legal topics:

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Collection, liens, and seizure. *I.R.C. § 6301 et seq.*

Limitations on assessment and collection. *I.R.C. §§ 6501-6504.*

Additions to tax; accessible penalties. *I.R.C. § 6651 et seq.*

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Confidentiality privileges relating to taxpayer communications. *I.R.C. § 7525.*

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Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 96.07 Annotations

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For related research and practice materials, see the following legal topics:

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Ch. 62, *Attachment* .

Ch. 220, *Dissolution of Marriage and Related Proceedings* , Pt. VII (Tax Effects).

Ch. 254, *Executions and Enforcement of Judgments* .

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Ch. 76, *Examinations*.

Ch. 77, *Practice Before the IRS, Guidance and Settlements*.

Ch. 78, *Limitations Periods Applicable to Government Action*.

Ch. 79, *Deficiencies and Tax Court Litigation*.

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Ch. 83, *Liens*.

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Ch. 85, *Interest*.

Ch. 86, *Civil Penalties Other Than Fraud*.

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Ch. 88, *Criminal Penalties and Procedures*.

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 A. Practice Before IRS and FTB

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§ 96.10 Governing Law and Procedural Guidelines

The federal income tax law is contained in Title 26 of the United States Code, Subtitle F, Procedure and Administration [I.R.C. § 6001 et seq.]. The Internal Revenue Service (IRS) also produces publications that contains useful information about the examination (audit) process (*e.g.*, IRS Pub. No. 556, *Examination of Rights, Appeal Returns, and Claims for Refund*). These publications can be viewed and downloaded from the IRS website at www.irs.gov. The Internal Revenue Manual (IRM) provides basic procedures, guidance, and requirements for use by revenue agents and tax auditors [*see Capitol Fed. Sav. & Loan Ass'n v. Comm'r (1991) 96 T.C. 204, 216-220* for a general discussion of the circumstances under which IRS may be bound by its procedural rules)]. This handbook offers essential information about how agents are instructed to treat taxpayers. The entire IRM is available on the IRS website at www.irs.gov/irm.

The California Personal Income Tax Law is contained in *Rev. & Tax. Code § 17001 et seq.* Administration of franchise and income tax laws, including the Personal income Tax Law and the Corporation Tax Law, is governed by *Rev. & Tax. Code § 18401 et seq.* The Franchise Tax Board's (FTB) various audit manuals are available on the FTB's website, at www.ftb.ca.gov/aboutFTB/manuals/index.html.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law
 Federal Tax Administration & Procedure
 Administration
 General Overview
 Tax Law
 State & Local
 Taxes
 Administration & Proceedings
 General Overview



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31-96 California Legal Forms--Transaction Guide § 96.11

§ 96.11 "Practice" Defined

Practice before the IRS encompasses "all matters connected with presentation to the Internal Revenue Service or any of its personnel relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service." These presentations include the "preparation and filing of necessary documents, correspondence with and communications to the Internal Revenue Service, and the representation of a taxpayer at conferences, hearings, and meetings" [*Treas. Reg. § 601.501(b)(10)*; see *31 C.F.R. § 10.2(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAdministrationGeneral Overview



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31-96 California Legal Forms--Transaction Guide § 96.12

§ 96.12 Representation in Tax Proceedings

Treasury Regulations contained in 26 C.F.R. pt. 601 govern conference and practice requirements. Treasury Department Circular No. 230, codified at 31 C.F.R. pt. 10 contains additional regulations governing practice before the IRS [*see § 96.120*].

Generally, practice before the IRS is limited to [*see Treas. Reg. §§ 601.501(a), 601.509; see also § 96.200* (IRS Form 2848, Power of Attorney)]:

- Attorneys [*see Treas. Reg. § 601.502(b)(1)*] (any person who is a member in good standing of the bar of the highest court of any state, possession, territory, commonwealth, or the District of Columbia)].
- Certified public accountants [*see Treas. Reg. § 601.502(b)(2)*] (any person who is qualified to practice as a certified public accountant in any state, possession, territory, commonwealth, or the District of Columbia)].
- Enrolled agents [*see Treas. Reg. § 601.502(b)(3)*] (individuals who have passed an IRS examination and who are enrolled to practice before IRS)].

An attorney need not be "enrolled" to practice before the IRS [*Treas. Reg. § 601.502(b)(1); 31 C.F.R. § 10.3(a)*].

Representatives permitted a limited practice, with and without enrollment, before the IRS include:

- Enrolled actuaries [*see Treas. Reg. § 601.502(b)(4)*] (any individual who is enrolled as an actuary by and is in active status with the Joint Board for the Enrollment of Actuaries pursuant to 29 U.S.C. § 1242]. Practice of an enrolled actuary is limited to issues generally in the area of employee plans [*see 31 C.F.R. § 10.3(d)(2)*].
- Various specified individuals. Individuals may represent themselves [*31 C.F.R. § 10.7(a)(1)*] and

may otherwise appear before the IRS without enrollment in specified categories of cases [*Treas. Reg. § 601.502(b)(5)*; *see 31 C.F.R. § 10.7(c)*]. For example, an individual may represent, without compensation, a member of his or her immediate family. An individual may represent another individual who is a bona fide officer or regular full-time employee of a corporation or other specified organizations [*31 C.F.R. § 10.7(c)(1)(i), (iv)*]. Representatives from commercial tax preparation firms may accompany a taxpayer to an audit, but they usually cannot argue a taxpayer's case [*see 31 C.F.R. § 10.7(c)(1)(viii)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureGeneral Overview



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31-96 California Legal Forms--Transaction Guide § 96.13

§ 96.13 Choosing a Representative

The circumstances of the tax proceeding may dictate which, if any, representative should act on the taxpayer's behalf. A taxpayer may choose to represent himself or herself in a simple correspondence audit [*see* § 96.32[2]]. In more complicated audits, appeals, or collections, it may be advisable to involve both an accountant and an attorney. If the taxpayer faces potential exposure to a fraud charge, an attorney may be the best choice to protect the taxpayer's interests. For discussion of the role of privilege in selecting a representative, see §§ 96.15 and 96.16.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax Law Federal Tax Administration & Procedure General Overview



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31-96 California Legal Forms--Transaction Guide § 96.14

§ 96.14 Power of Attorney

IRS Form 2848 (Power of Attorney) [*see* § 96.200] is the practitioner's authorization to deal with the IRS on behalf of a client with respect to specified tax matters [*see* *Treas. Reg.* §§ 601.501(b)(6), 601.503(b)(1); *Treas. Reg.* § 601.504(a) (situations in which power of attorney is required); *see also* § 96.120].

Examiners may not require the taxpayer to accompany an authorized representative at an examination interview, absent an administrative subpoena [*I.R.C.* § 7521(c)]. However, "the taxpayer's voluntary presence at the interview can be requested through the representative as a means to expedite the examination process" [IRM 4.10.3.2.1].

PRACTICE TIP:

Generally, clients should not accompany their representatives to an audit, because the client may offer additional information that the representative does not want disclosed. Therefore, a representative should be intimately familiar with the relevant facts and records. Otherwise, the examiner may request the taxpayer's presence and use an administrative subpoena, if necessary.

FTB Form 3520 (Power of Attorney) [*see* § 96.230], the analogous California form is the practitioner's authorization to deal with the FTB on behalf of a client.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Tax Law Federal Tax Administration & Procedure General Overview



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31-96 California Legal Forms--Transaction Guide § 96.15

§ 96.15 Confidentiality of Taxpayer Communications: Attorney-Client Privilege

One consideration in choosing an attorney to represent the taxpayer traditionally has been the additional protection potentially available under attorney-client privilege. The elements of the federal privilege are well-established in federal common law [*see United States v. Flores (9th Cir. 1980) 628 F.2d 521, 526 (collecting cases)*]. In sum, a client holds a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications between the client (or the client's representatives) and the client's attorney (or certain representatives of the attorney) when the communications were made to facilitate the rendition of professional legal services [*see United States v. Chen (9th Cir. 1996) 99 F.3d 1495, 1501-1502, cert. denied, 520 U.S. 1167 (1997)*; *see generally* Moore's Federal Practice(3d ed.), Ch. 26, *General Provisions Governing Discovery; Duty of Disclosure* (civil cases); Ch. 616, *Discovery and Inspection* (criminal cases) (Matthew Bender 3d ed.)]. Similarly, under California law, the attorney-client privilege, governed by *Evid. Code §§ 950-962*, is a privilege that generally protects against the disclosure of confidential communications between the client and the client's attorney [*see Evid. Code § 954; see generally* California Forms of Pleading and Practice, Ch. 191, *Privileges and Other Discovery Limitations* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Legal Ethics Client Relations Confidentiality of Information Tax Law Federal Tax Administration & Procedure General Overview



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31-96 California Legal Forms--Transaction Guide § 96.16

§ 96.16 Rules Relating to Accountants and Other Tax Practitioners

[1] Extension of Confidentiality Privilege to Federally Authorized Tax Practitioners

The attorney-client privilege formerly was limited to communications between a taxpayer and the taxpayer's attorney [see, e.g., *United States v. Arthur Young & Co.* (1984) 465 U.S. 805, 817 (rejecting work product immunity for independent auditor's tax work papers; creation of privilege was "misplaced" and in conflict with "clear intent of Congress"); *Couch v. United States* (1973) 409 U.S. 322, 335 ("no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases")], while communications between a taxpayer and a tax practitioner other than an attorney were protected only when the tax practitioner was working as the attorney's representative [see *United States v. Judson* (9th Cir. 1963) 322 F.2d 460, 462 (statement of client's net worth and related work papers prepared by accountant were protected by attorney-client privilege when they were "prepared at the [client's] attorney's request, in the course of an attorney-client relationship, for the purpose of advising and defending his clients;" see also *United States v. Bell* (N.D. Cal. 1994) 95-1 U.S. Tax. Cas. (CCH) & 50,006, 1994 U.S. Dist. Lexis 17408, 24-25, 74 A.F.T.R.2d (RIA) 7271 (remanding case for in camera review of accountant reports and related correspondence to determine if documents were prepared in conjunction with rendition of legal advice)]. Accordingly, communications between an accountant or other tax practitioner and the taxpayer generally were not protected under the privilege. However, the confidentiality privilege has been extended by federal and by California statute to federally authorized tax practitioners [see [2], [3], below].

[2] Federal Statutory Privilege

The Internal Revenue Service Restructuring and Reform Act of 1998 (Pub. L. No. 105-206, 112 Stat. 685) extended the traditional attorney-client privilege of confidentiality to tax advice given to a client-taxpayer (or potential client-taxpayer) by any individual authorized under federal law to practice before the IRS [I.R.C. § 7525(a)(1), (3)(A)]. These federally authorized tax practitioners include certified public accountants, enrolled agents, and enrolled actuaries [I.R.C. § 7525(a)(3)(A); see 31 U.S.C. § 330]. Tax advice means advice given by tax practitioners, within the scope of their practice, on matters regulated by the Internal Revenue Code [I.R.C. § 7525(a)(3)(B)]. The privilege may be asserted only in noncriminal tax proceedings before the IRS and in the federal courts with respect to noncriminal tax matters in proceedings in which the IRS is a party [I.R.C. § 7525(b)(2)]. The privilege may not be asserted to prevent

the disclosure of information to any regulatory body other than the IRS, such as the SEC or national and state boards of accountancy [see *I.R.C. § 7525(a)(2)*; IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 § 3411 (Senate Committee Report)]. In addition, the privilege does not apply to written communications between tax practitioners and certain corporate representatives regarding the promotion of corporate tax shelters [*I.R.C. § 7525(b)(2)*; see *I.R.C. § 6662(d)(2)(C)(ii)* ("tax shelter" defined)].

The privilege is effective with regard to communications made on or after July 22, 1998 [IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 § 3411(c)].

Under the privilege, "[w]ith respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner" [*I.R.C. § 7525(a)(1)*; see § 96.15]. The statutory privilege does not modify the attorney-client privilege, other than to extend it to tax practitioners. Accordingly, communications between a taxpayer and an authorized tax practitioner are privileged only if the communications would have been privileged between an attorney and the attorney's client or prospective client [*United States v. Frederick* (7th Cir. 1999) 182 F.3d 496, 502, cert. denied, 528 U.S. 1154 ("[n]othing in the new statute suggests that these nonlawyer practitioners are entitled to privilege when they are doing other than lawyers' work;" verifying accuracy of return during audit is accountant's work and remains so even if performed by attorney)]. For example, information disclosed to an attorney for the purpose of preparing a tax return generally is not privileged [IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 § 3411 (Senate Committee Report); see *United States v. Bell* (N.D. Cal. 1994) 95-1 U.S. Tax.Cas. (CCH) & 50,006, 1994 U.S. Dist. Lexis 17408, 24-25, 74 A.F.T.R.2d (RIA) 7271 ("[i]f the unnamed accountant was indeed primarily engaged to assist [defendant] with the preparation of its tax returns, the reports produced pursuant to that engagement would not be privileged under either Rule 24(b)(4)(B) or the work product doctrine. The reports would also forgo protection under the attorney-client privilege, which only protects communications relating to the rendition of legal advice, not to the discharge of ordinary business tasks.")].

The privilege may be waived in the same manner as the attorney-client privilege [IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 § 3411 (Conference Committee Report); see California Forms of Pleading and Practice, Ch. 191, *Discovery: Privileges and Other Discovery Limitations* (Matthew Bender)].

Questions about the privilege remain to be resolved by future litigation. For example, the statute does not provide guidance in distinguishing noncriminal administrative and court proceedings from criminal cases and proceedings. The extent to which the work product doctrine will apply to written materials prepared by federally authorized tax practitioners also remains unresolved [see *Fed. R. Civ. P. 26(b)(3)* (work product rule provides qualified immunity for materials prepared in anticipation of litigation by party, attorney, or other representative of party); see generally Moore's Federal Practice(3d ed.), Ch. 26, *General Provisions Governing Discovery; Duty of Disclosure* (civil cases); and Ch. 616, *Discovery and Inspection* (criminal cases) (Matthew Bender)].

[3] California Statutory Privilege

In modified conformity to federal income tax law [see *I.R.C. § 7525*; IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685; see also [2], above], the California legislature has extended the attorney-client privilege of confidentiality [see *Evid. Code §§ 950-962*] to communications with respect to tax advice between a client-taxpayer and a federally authorized tax practitioner [*Rev. & Tax Code §§ 7099.1(a)(1), 21028(a)(1)*; *Unemp. Ins. Code § 13019(a)(1)*].

"Federally authorized tax practitioner" means any individual who is authorized under federal law to practice before the IRS [*Rev. & Tax Code §§ 7099.1(a)(3)(A), 21028(a)(3)(A)*; *Unemp. Ins. Code § 13019(a)(3)(A)*]. Persons who may become federally authorized tax practitioners include certified public accountants, enrolled agents, and enrolled actuaries [see *31 U.S.C. § 330*; *31 C.F.R. § 10.3*]. "Tax advice" means advice given by an individual with respect to a

state tax matter. Tax advice may include federal tax advice related to a state tax matter [Rev. & Tax Code §§ 7099.1(a)(3)(B), 21028(a)(3)(B); *Unemp. Ins. Code* § 13019(a)(3)(B)]. For these purposes, "federal tax advice" means advice given by individuals within scope of their authority to practice before IRS on noncriminal matters [Rev. & Tax Code §§ 7099.1(a)(3)(B), 21028(a)(3)(B); *Unemp. Ins. Code* § 13019(a)(3)(B)].

The privilege may be asserted only in noncriminal tax proceedings before the State Board of Equalization, the FTB, or the Employment Development Department [Rev. & Tax Code §§ 7099.1(a)(2), 21028(a)(2); *Unemp. Ins. Code* § 13019(a)(2)]. The privilege does not apply to written communications between tax practitioners and certain corporate representatives regarding the promotion of corporate tax shelters [Rev. & Tax Code §§ 7099.1(b), 21028(b); *Unemp. Ins. Code* § 13019(b); see Rev. & Tax Code §§ 7099.1(a)(3)(C), 21028(a)(3)(C) ("tax shelter" defined); *Unemp. Ins. Code* § 13019(a)(3)(C) (same)]. In addition, the privilege may not be asserted to prevent the disclosure of information in any proceeding to revoke (or otherwise discipline) any license or right to practice by any governmental agency [Rev. & Tax Code §§ 7099.1(b), 21028(b); *Unemp. Ins. Code* § 13019(b)].

The privilege is effective with regard to communications made on or after January 1, 2001 until its repeal [Rev. & Tax Code §§ 7099.1(c), (d), 21018(c), (d); *Unemp. Ins. Code* § 13019(c), (d)]. The privilege is also effective for communications made on or after October 11, 2009 [Rev. & Tax Code §§ 7099.1(c), 21018(c); *Unemp. Ins. Code* § 13019(c); see Stats. 2009, ch. 411 (urgency legislation effective October 11, 2009)]. Accordingly, this leaves a (presumably unintended) gap from January 1, 2009 through October 10, 2009, leaving communications made during that time period unprotected under the privilege.

Under the privilege, the same statutory protections of confidentiality that apply to a communication between a taxpayer and an attorney [see *Evid. Code* §§ 950-962] also apply to a communication between a taxpayer and any federally authorized tax practitioner [Rev. & Tax Code §§ 7099.1(a)(1), 21028(a)(1); *Unemp. Ins. Code* § 13019(a)(1)]. Like the federal statutory privilege, this privilege does not modify the attorney-client privilege, other than to extend it to tax practitioners. Accordingly, communications between a taxpayer and an authorized tax practitioner are privileged only if the communications would have been privileged between an attorney and the attorney's client [see [2], above].

[4] Accountants and Other Tax Practitioners As Attorney's Representatives

Communications to an accountant or other tax practitioner will be protected under the lawyer-client privilege if it can be shown that the accountant was employed, preferably by the attorney, to assist the attorney in the attorney's rendition of legal services [see Sup. Ct. Standard 503(a)(3) (representative of lawyer)]. "What is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal advice from the lawyer*. If what is sought is not legal advice but only accounting service ... or if the advice sought is the accountant's rather than the lawyer's, no privilege exists" [*United States v. Gurtner* (9th Cir. 1973) 474 F.2d 297, 298-299, quoting *United States v. Kovel* (2d Cir. 1961) 296 F.2d 918, 922; accord *Cavallaro v. United States* (1st Cir. 2002) 284 F.3d 236, 247, 246-249]. Moreover, the fact that an attorney confers with an accountant or investment banker to obtain information in order to better advise his or her client is insufficient to give rise to the privilege [*United States v. Ackert* (2d Cir. 1999) 169 F.3d 136, 139; accord *United States v. Chevron Texaco Corp.* (N.D. Cal. 2002) 241 F. Supp. 2d 1065, 1071-1072; see also *United States v. Gurtner* (9th Cir. 1973) 474 F.2d 297, 299]. Because the purpose of the privilege is "to encourage clients to make full disclosure to their attorneys" [*Fisher v. United States* (1976) 425 U.S. 391, 403, 96 S. Ct. 1569, 48 L. Ed. 2d 39], the privilege protects communications between a client and an attorney [see *Cavallaro v. United States* (1st Cir. 2002) 284 F.3d 236, 247 (presence of accountant while client relates complicated tax story to lawyer does not destroy privilege when accountant is "necessary, or at least highly useful," for effective consultation between client and lawyer, but only when communication is made for purpose of obtaining legal advice; privilege does not apply when client is seeking accounting services or accountant's advice)], not communications that prove important to an attorney's legal advice to the client [see *United States v. Ackert* (2d Cir. 1999) 169 F.3d 136, 139; *United States v. Chevron Texaco Corp.* (N.D. Cal. 2002) 241 F. Supp. 2d 1065, 1071-1072 (communications between attorney and third party do not become privileged solely because they are important to attorney's ability to represent client)].

Rather, the attorney-client privilege protects a client and his or her accountant or the accountant and the client's attorney when the accountant's role is to clarify communications between attorney and client [see *United States v. Ackert* (2d Cir. 1999) 169 F.3d 136, 139; *United States v. Chevron Texaco Corp.* (N.D. Cal. 2002) 241 F. Supp. 2d 1065, 1071-1072]. Thus, for example, communications with an accountant may be privileged if the accountant were hired by the attorney to assist the attorney in understanding the client's financial information [see, e.g., *United States v. Judson* (9th Cir. 1963) 322 F.2d 460, 462-463 (privilege applied to accountant who prepared client's net worth statement, at attorney's request, to help attorney advise and defend client); *United States v. Chevron Texaco Corp.* (N.D. Cal. 2002) 241 F. Supp. 2d 1065, 1072 (privilege extends only to communications with third parties that are necessary to effectuate client's consultation)].

[5] Tax Practitioner's Work Papers May Be Privileged Under Certain Circumstances

Under former law, the attorney-client privilege generally did not protect the work papers of an accountant or other tax practitioner from a tax investigation [see generally *United States v. Arthur Young & Co.* (1984) 465 U.S. 805, 816-818, 104 S. Ct. 1495, 79 L. Ed. 2d 826 (no attorney-client or work product privilege protects tax accrual work papers of independent auditor from IRS summons); see, e.g., *Beckler v. Superior Court* (9th Cir. 1978) 568 F.2d 661, 662 (attorney to whom taxpayer client had transferred documents could rely only on state attorney-client privilege)]. The extent to which the work-product doctrine will apply to written materials prepared by federally authorized tax practitioners [see [2], above] remains unresolved [see *Fed. R. Civ. P. 26(b)(3)* (work product rule provides qualified immunity for materials prepared in anticipation of litigation by party, attorney, or other representative of party); see generally Moore's Federal Practice(3d ed.), Ch. 26, *General Provisions Governing Discovery; Duty of Disclosure* (civil cases) and Ch. 616, *Discovery and Inspection* (criminal cases) (Matthew Bender)].

If, however, the accountant or other tax practitioner has been retained by counsel or by the client at counsel's direction [see [4], above], work papers and reports of the accountant may be protected by the attorney-client privilege [Petersen, *Attorney-Client Privilege in Internal Revenue Service Investigations*, 54 Minn. L. Rev. 67, 90-91 (1969); see also Holthus, *Caveat Taxpayer: How and Why the IRS May Examine Your Books, Your Accountant, and Even Your Attorney*, 12 Pepp. L. Rev. 769 (1985)]. In addition, if the client can show that the client instructed the accountant to retain counsel and that all communications were in contemplation of the accountant's briefing of counsel, the communication should be protected [see Sup. Ct. Standard 503(b)(4)].

As a practical matter, to protect the client (who is likely to be ignorant of the law of privileges), a competent tax practitioner, recognizing that any communications between the client and the practitioner will be discoverable, should recommend that the client retain an attorney and that accounting or tax services be provided only at the attorney's direction [Petersen, *Attorney-Client Privilege in Internal Revenue Service Investigations*, 54 Minn. L. Rev. 67, 90-91 (1969)]. However, problems in the application of the lawyer-client privilege to a tax preparer's worksheets may still persist. For example, a taxpayer cannot, by hiring a lawyer to do tax preparation, obtain greater protection from government investigators than a taxpayer who does not use a lawyer as a tax preparer. "Communications from a client that neither reflect the lawyer's thinking nor are made for the purpose of eliciting the lawyer's professional advice or other legal assistance are not privileged" [*United States v. Frederick* (7th Cir. 1999) 182 F.3d 496, 500 (information furnished to lawyer as tax preparer was not privileged because it was provided for preparation of clients' tax return, not for preparation of brief or opinion letter); accord *United States v. Torf* (*In re Grand Jury Subpoena*) (9th Cir. 2003) 357 F.3d 900, 909-910 (communications of consultant hired to help attorney assess manufacturer's civil and criminal liability were not privileged, citing *Frederick* with approval)]. Even if an attorney's legal thinking "infects his worksheets, that does not cast the cloak of privilege over the worksheets; they are still accountant's worksheets, unprotected no matter who prepares them" [*United States v. Frederick* (7th Cir. 1999) 182 F.3d 496, 501, cert. denied, 528 U.S. 1154 (2000) (worksheets created by attorney in preparing clients' tax return were not privileged even though lawyer simultaneously represented clients in tax audit)].

Whether the privilege applies to documents, numerical or otherwise, prepared in connection with the audit of a tax return also presents a difficult question. The Seventh Circuit addressed the issue by defining two different kinds of work involved in preparing for audits. A practitioner who is "merely verifying the accuracy of a return" is doing "accountant's work" even if the representative is a attorney. However, if the taxpayer attends the audit accompanied by an attorney "who is there to deal with issues of statutory interpretation or case law," the attorney is doing attorney's work, and the attorney-client privilege may attach [*United States v. Frederick* (7th Cir. 1999) 182 F.3d 496, 502 , cert. denied, 528 U.S. 1154 (2000) (documents at issue fell into first category of work and thus were not privileged) accord *United States v. Torf* (In re Grand Jury Subpoena) (9th Cir. 2003) 357 F.3d 900, 909-910] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsPersonal Service AgreementsEvidencePrivilegesAccountant-Client PrivilegeGeneral OverviewTax LawFederal Tax Administration & ProcedureGeneral Overview



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[Reserved]

§§ 96.17[Reserved]



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§ 96.30 Purpose of Tax Audit

A tax audit is intended to determine if income, expenses, and credits are being reported accurately [*Examination of Returns, Appeal Rights, and Claims for Refund* (IRS Pub. No. 556); see *Rev. & Tax. Code § 19504* (ascertaining correctness of returns and determining or collecting tax liability)]. The various district directors of the Internal Revenue Service (IRS) are responsible for making all inquiries necessary to the determination and assessment of federal taxes [*Treas. Reg. § 301.6201-1*]. However, the Commissioner may direct other IRS officials to make specific inquiries concerning assessments [*Treas. Reg. § 301.6201-1*].

On the state level, the personal income tax law is administered by the Franchise Tax Board (FTB). The FTB may audit returns and determine correct tax liability [*Rev. & Tax. Code § 19504*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Tax Administration & Procedure Audits & Investigations General Overview



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§ 96.31 Selection of Returns for Audit

[1] Disclosure of Examination Selection Criteria Is Not Required

Neither the IRS nor the FTB is required to disclose the standards used for the selection of returns to be audited (or the data used to determine those standards) if the agency has determined that disclosure of that information will seriously impair the assessment, collection, or enforcement under the tax laws [*I.R.C. § 6103(b)(2)(B)*; *Rev. & Tax. Code § 19544*; *see I.R.C. § 6110(b)(1)(B)* (exceptions to public inspection of written disclosures)].

[2] IRS Examination Selection Criteria

A tax return can be selected for audit in several ways. The most common ways include [IRS Pub. No. 556, at 2]:

- Computer Scoring (the Discriminatory Inventory Function System).
- Questionable treatment of an item on the return.
- Market Segment Specialization Program.
- Information received from other sources on potential non-compliance with tax laws or inaccurate filing, including:
 - Media.
 - Public record.
 - Informant.

The most common method of selecting a return for audit is based on the "Discriminant Functions Systems Program" (DIF). A computer program (DIF) assigns a numeric score to each individual, corporate, and partnership tax return. The

return can be selected for examination if it receives a high DIF score. A high score means there is a significantly greater potential for an examination of the return that might result in a change in income tax liability [IRS Pub. No. 556, at 2]. A high score does not mean there is something "wrong" with the return [see IRS Pub. No. 556, at 2]. Guidelines used by the DIF program are not disclosed to the public [see [1], *above*].

The DIF score originated with the "Taxpayer Compliance Measurement Program" (TCMP). The TCMP audit consisted of a line-by-line audit of a tax return [see *United States v. Flagg* (8th Cir. 1980) 634 F.2d 1087, 1088-1089, *cert. denied*, 451 U.S. 909 (1981) (describing TCPM)]. The IRS has since developed the National Research Program (NRP), which it claims is a less intrusive and burdensome system of maintaining compliance. During its first year (2002), the NRP involved the audits of approximately 50,000 taxpayers. Of the 50,000 returns selected, only 2,000 were line-by-line examinations with "reasonable substantiation" required, as opposed to the mandatory substantiation requirement under the old TCMP system [see Tax Administration: IRS Is Implementing the National Research Program as Planned, General Accounting Office Report No. GAO-010614 (July 16, 2003)].

A return also may be selected for examination on the basis of information received from third parties (*e.g.*, W-2 and 1099 forms) that does not match the information reported on the taxpayer's return. [IRS Pub. No. 556, at 2; see *Rosato v. Comm'r* (1967) 26 T.C.M. (CCH) 1156, T.C. Memo. 1967-226]. The return also may be selected for examination to address both the questionable treatment of an item and to study the behavior of similar taxpayers (a market segment) in handling a tax issue [IRS Pub. No. 556, at 2].

The Internal Revenue Manual provides the following factors to be considered when identifying a "large, unusual, or questionable" (LUQ) item [IRM 4.10.2.3.1]:

- Comparative size of the item--an expense item of \$6,000 with total expenses of \$30,000 would be a large item; however, if total expenses are \$300,000, the item generally would not be considered a large item.
- Absolute size of the item--despite the comparability factor, size by itself may be significant. For example, a \$50,000 item may be significant, even though it represents a small percentage of taxable income.
- Inherent character of the item--although the amount of an item may be insignificant, the nature of the item may be significant; for example, airplane expenses claimed on a plumber's Schedule C.
- Evidence of intent to mislead--this may include missing, misleading or incomplete schedules, or incorrectly showing an item on the return.
- Beneficial effect of the manner in which an item is reported--expenses claimed on a business schedule rather than claimed as an itemized deduction.
- Relationship to other items--incomplete transactions identified on the tax return. For example, the taxpayer reported sales of stock but no dividend income.
- Whipsaw Issues--whenever there is a transaction between two parties and characteristics of the transaction will benefit one party and harm the other. Examples include alimony versus child support, sale versus rental/royalty, employee versus independent contractor status, gift versus income.
- Automatic adjustments--obvious errors, omissions, or items subject to thresholds and/or limitations.
- Missing items--items not shown on the return that normally would appear on the returns of similar

taxpayers. This applies not only to the examination of income, but also to expenses and deductions that would result in tax changes favorable to the taxpayer.

[3] Abusive Tax Shelters

In the past, many higher-earning individuals sought tax shelter investments that were designed to produce a current loss rather than a profit. The loss could then be used on the individual's tax return to cancel out earnings that otherwise would have been taxed at a high-bracket tax rate. Ideally, tax shelter investments would generate "paper losses" produced by the tax law, rather than an actual cash loss. The 1986 Tax Reform Act [Pub. L. No. 99-514, 100 Stat. 2085 (1986)] cracked down on tax shelter investments by restricting losses produced by passive activities. A passive activity is a limited partnership or another business entity in which the taxpayer does not participate on a regular, continuous, and substantial basis [see *I.R.C. § 469(c)*]. Losses produced by a passive activity cannot be used to offset earned income or investment income; the losses can be used only to offset other passive activities [see *generally I.R.C. § 469*]. The IRS continues to devote substantial efforts to identifying abusive tax shelters [see *Rev. Proc. 83-78, 1983-2 C.B. 595* (procedure for advising investors); see also *I.R.C. § 6700* (penalties for promoting abusive tax shelters); *I.R.C. § 6701* (penalties for aiding and abetting the understatement of tax liability)].

I.R.C. §§ 6700 and 6701 impose civil penalties, not criminal penalties. Therefore, an IRS action to recover the penalties is not abated by the death of a taxpayer [*Reiserer v. United States* (9th Cir. 2007) 479 F.3d 1160, 1164] .

[4] California Examination Criteria

Like the IRS, the FTB employs several methods to select returns for audit. In California, personal returns may be selected for audit based on patterns of income, loss, and deductions that indicate a likelihood of error. The FTB also normally audits returns for which it receives a federal audit report from the IRS. Like the IRS, the FTB continues to target abusive tax shelters [see *Rev. & tax Code § 19777* (penalties for failure to disclose reportable transactions relating to abusive tax shelters) see also "Abusive Tax Shelters" at www.ftb.ca.gov/law/tax_shelter/index.html].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Tax Administration & Procedure Audits & Investigations General Overview



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§ 96.32 Types of Audit

[1] Time and Place of Examination

A tax audit begins when the IRS notifies the taxpayer that his or her tax return has been selected for audit. The notice includes the type of audit and the records to be assembled to clarify or support specified items reported on the return. IRS Pub. No. 556 emphasizes the importance of gathering the requested records before the audit interview [*see* IRS Pub. No. 556, at 3].

The IRS determines the place and type of audit [*I.R.C. § 7605(a); Treas. Reg. § 301.7605-1(a)-(d)*]. The audit may take place by correspondence, at the taxpayer's home or place of business, at an Internal Revenue office, or the office of the attorney or other practitioner representing the taxpayer [*see* [2]-[4], *below*]. The IRS will consider, on a case-by-case basis, written requests by taxpayers or their representatives to transfer the examination to a place other than the one set by the IRS [*Treas. Reg. § 301.7605-1(e); see Treas. Reg. § 301.7605-1(f)* (transfer to IRS office to protect officers and employees), *Treas. Reg. § 301.7605-1(g)* (initiation of transfer by IRS)].

A taxpayer who wants an attorney or other authorized practitioner [*see* §§ 96.12, 96.13] to be present and represent the taxpayer during the examination must file a written authorization [*see* § 96.14].

[2] Correspondence Audits

In a "correspondence audit," the taxpayer is asked to explain or send supporting evidence by mail. Correspondence audits are conducted when warranted by "the nature of questionable items and by the convenience and characteristics of the taxpayer" [*Treas. Reg. § 601.105(b)(2)(ii)*]. Issues are typically interest expense, taxes, charitable contributions, medical expenses, and simple miscellaneous itemized deductions.

The taxpayer has the option of requesting a meeting with an examiner to discuss any matter that the taxpayer believes cannot be adequately resolved through correspondence. If the taxpayer does so, the case is transferred to the taxpayer's district office. A taxpayer who disagrees with the adjustments proposed by the examiner may pursue any of the appeal processes ordinarily available [*see* § 96.50].

[3] Office Audits

In an office audit, the taxpayer is requested to visit the district offices of the IRS, bring certain records in support of his or her return, and discuss the issues with an IRS auditor. Office audits may be directed at a small number of items, or at an entire individual or business return, and the issues raised by the examiner are likely to be more complex than those raised in a correspondence audit. During the interview, the taxpayer has the right to point out to the examiner any amounts included in the return that are not taxable, and any deductions that the taxpayer failed to claim on the return [*Treas. Reg. § 601.105(b)(2)(ii)*]. The IRS has the right to conduct a field examination [*see* [4], *below*], if the auditor determines that one is necessary [*Treas. Reg. § 601.105(b)(2)(ii)*], but this is not the usual course of events.

PRACTICE TIP:

A taxpayer may avoid visiting the IRS office for an audit if it is chiefly a matter of verifying deductions claimed on the tax return. The taxpayer can contact the auditor and ask to send in copies of the canceled checks or other evidence of payment. If the auditor agrees, the taxpayer should send the information so that it arrives before the scheduled time of examination. If everything is in order, the taxpayer may save a trip to the office.

Issues are typically Schedule A deductions, along with more complicated issues such as travel expenses, employee business expenses, and educational expenses. The auditor may expand the scope of the examination [*see* IRM 4.10.3.2 (examiner must access the facts and apply judgment in determining the scope of the audit)].

[4] Field Audits

In a "field audit," the examination of the taxpayer's books and records takes place at the taxpayer's home or office. The place of examination is the location at which "the original books, records, and source documents are maintained" [IRM 4.10.2.7.6]. An examiner checks the entire return filed by the taxpayer and examines all supporting books, papers, records, and memoranda. If the return presents an engineering or appraisal problem (such as depreciation or depletion deductions, gains or losses on the sale or exchange of property, or losses on account of abandonment, exhaustion, or obsolescence), it may be investigated by an engineer agent, who makes a separate report [*Treas. Reg. § 601.105(b)(3)*]. An examiner retains the right to tour the taxpayer's business to establish facts that can only be ascertained by a direct visit, regardless of where the examination takes place [*Treas. Reg. § 301.7605-1(d)(3)(iii)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 96.33 Repetitive or Unnecessary Examinations Are Prohibited

A taxpayer may not be subjected to unnecessary examinations or investigations. Only one inspection of a taxpayer's books may be made for each taxable year, unless an authorized IRS officer, after investigation, notifies the taxpayer in writing that an additional inspection is necessary [*I.R.C. § 7605(b)*; *Treas. Reg. § 301.7605-1(h)*].

Similarly, the IRS has a policy discouraging the audit of returns submitted by individuals whose returns have been audited in either or both the preceding two years if that audit resulted in either a small change or no change. However, this policy cannot be used as a bar to a present audit involving substantive audit changes for either or both of the earlier two years' returns, even though the earlier audits resulted in no change or small changes [*Tucker v. Comm'r* (1983) 45 *T.C.M. (CCH)* 1347, *T.C. Memo* 1983-210 ; *Chapman v. Comm'r* (1982) 43 *T.C.M. (CCH)* 511, *T.C. Memo* 1982-68] .

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 96.34 Scope of Audit

[1] Relevant Material

During audits, the IRS and the FTB may request that the taxpayer produce material relevant to the agency's inquiries [see *I.R.C. § 7602(a)*; *Rev. & Tax. Code § 19504(a)*]. The scope of the proceeding and the determination of the relevance of evidence is broader in a tax audit than in a trial [*United States v. Rugeiro* (9th Cir. 1970) 425 F.2d 1069, 1071] . The IRS has broad powers of discovery in implementing its statutory mandate to investigate tax liability [*De Masters v. Arend* (9th Cir. 1963) 313 F.2d 79, 86-87 , writ dismissed, 375 U.S. 936 (1963) ; see *I.R.C. § 7601*].

[2] Uncooperative Representatives

If a taxpayer's representative has unreasonably delayed or hindered an audit by failing to furnish necessary and nonprivileged information after repeated requests, the IRS examiner may request permission of his or her immediate supervisor to contact the taxpayer directly. If permission is granted, the IRS must give written notice to both the taxpayer's representative and the taxpayer, along with a request that the taxpayer provide the non-privileged information. The district director also may refer the matter for possible disciplinary action against the uncooperative representative, in accordance with Treasury Department Circular 230, 31 C.F.R., pt. 10 [*Treas. Reg. § 601.506(b)*; see § 96.120].

[3] Examination of Witnesses

Examiners may question persons with knowledge relevant to the audit. The IRS has the power to issue a summons to take the testimony of any person under oath concerning (1) the correctness of any return; (2) filing a return when none has been filed; (3) determining tax liability; or (4) collecting any tax liability [*I.R.C. § 7602(a)*].

The IRS has broad discretion in the use of its summons power. For example, in one case, a summons was enforced against an attorney who simply mailed a letter to a district director with which was enclosed a check for a substantial amount of money on behalf of an unknown taxpayer. An examiner was assigned to discover the name of the taxpayer and the years covered by the check and to determine whether further proceedings would be necessary. When

questioned, the attorney informed the examiner that the matter had been referred to him by another attorney, whose name he refused to divulge, and that he had no personal knowledge of the details. Since part of the examiner's duties in pursuing the investigation was to determine if the correct tax had been paid and if fraud penalties were due [see *I.R.C. § 7601(a)*], the summons was enforced [*Tillotson v. Boughner* (7th Cir. 1964) 333 F.2d 515, 517 , cert. denied, 379 U.S. 913 (1964)] .

Similarly, in California, to carry out its statutory duty to administer the tax laws, the FTB may require a person having knowledge concerning the subject of an audit to appear before it and give testimony under oath [*Rev. & Tax. Code § 19504(b)*]. To compel the appearance of witnesses, the FTB has the power to issue subpoenas or subpoenas duces tecum [*Rev. & Tax. Code § 19504(c), (d)*].

[4] Examination of Records

The IRS has the power to issue a summons to examine books, papers, records, or other data relevant to any of the following [*I.R.C. § 7602(a)*]:

- The correctness of any return.
- Filing a return when none has been filed.
- Determining tax liability.
- Collecting any tax liability.

When the genuineness of a document or some element of a document (such as a signature) is at issue, the Internal Revenue has the right to make copies of the documents concerned [*United States v. Stamp* (D.C. Cir. 1971) 458 F.2d 759, 777 , cert. denied, 409 U.S. 842 (1972) ; *Boren v. Tucker* (9th Cir. 1956) 239 F.2d 767, 771-772] .

Similarly, in California, the FTB may require any taxpayer or entity to make available for examination, or copying at a specified time and place, any books, papers, or other data that may be relevant to the administration of the tax laws. Any demand to a financial institution must comply with the California Right to Financial Privacy Act (*Gov. Code § 7460 et seq.* [*Rev. & Tax. Code § 19504(a)*]).

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAudits & InvestigationsGeneral OverviewTax LawFederal Tax Administration & ProcedureAudits & InvestigationsDisclosure of Information (IRC secs. 6103-6104, 6108-6110, 6713, 7213, 7216, 7431, 7435)General Overview



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§ 96.35 Taxpayer's Options on Conclusion of Audit

[1] IRS Audits

If the IRS agrees to accept the taxpayer's return as filed, the IRS will send a letter to the taxpayer a few weeks later stating that the examiner proposed no changes to the return [IRS Pub. No. 556, at 4]. If the examiner has proposed changes to the return, the IRS will send a notice of tax examination changes [*see* § 96.209]. If the taxpayer agrees with the examiner's proposed changes contained in the examination report [*see* § 96.209], the taxpayer will sign an agreement form [*see* § 96.209] prepared by the IRS [*Treas. Reg. § 601.105(b)(4)*]. If the taxpayer owes additional tax and pays it when the agreement is signed, interest is generally calculated from the due date of the tax return to the date of payment [IRS Pub. No. 556, at 5]. If the taxpayer agrees with the proposed adjustments, but does not immediately pay any additional tax owed, the IRS will mail the taxpayer a bill showing the tax due [*see Treas. Reg. § 601.105(b)(4)*]. In that case, interest is charged from the due date of the return until the date of the bill. If the taxpayer pays the additional tax within 10 business days of the billing date (or 21 calendar days, if the amount due is less than \$100,000), no further interest or penalties is added [IRS Pub. 556, at 5].

Even if the taxpayer signs an acceptance of a proposed overassessment, the district director or the director of the regional service center remain free to assess a deficiency. On the other hand, the taxpayer who has given a waiver may still claim a refund of any part of the deficiency assessed against and paid by the taxpayer. The taxpayer's acceptance of an agreed overassessment does not prevent the taxpayer from filing a claim and bringing suit for an additional sum, nor does it preclude the government from maintaining a suit to recover an erroneous refund. However, as a matter of practice, waivers or acceptances ordinarily result in the closing of a case, insofar as the government is concerned [*Treas. Reg. § 601.105(b)(4)*]. The concessions made by an examiner during an audit for one tax year do not bind the IRS for future tax years [*Lewis v. Comm'r (9th Cir. 1977) 560 F.2d 973, 977*] .

PRACTICE TIP:

In deciding whether to agree to an examiner's proposed adjustments, an attorney or other practitioner should carefully review the agent's work papers, to determine how the examiner arrived at the amount owed. The practitioner should also make sure the examiner identifies the Treasury Regulation, Internal Revenue Code Section, or ruling on which the examiner bases the deficiency proposal. The practitioner

should be prepared to discuss the relevant law and the facts of each issue. Even though the examiner may be sympathetic to the taxpayer's position, he or she may be reluctant to change his or her mind about a proposed assessment for fear that the examiner's manager, or the review staff, will return the case for correction. Careful documentation and presentation of arguments in writing by the practitioner will help the examiner write his or her work papers in a way that avoids any question about the examiner's decisions. In addition, if the taxpayer appeals the examiner's findings, this written record will be sent with the examination report to the reviewing officer and to any other IRS officials who participate in subsequent settlement or redetermination proceedings.

[2] FTB Audits

A taxpayer who disagrees with the FTB's proposed adjustments to his or her tax liability following an audit will be informed of his or her right to protest the auditor's findings [FTB, *General Tax Audit Manual*, § 13000 et seq.]. For a discussion of the taxpayer's protest and appeal rights, see § 96.51. For detailed discussion of appeal within the FTB and a California taxpayer's judicial remedies, see California Forms of Pleading and Practice, Ch. 540, *Taxes and Assessments* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 96.36 Deficiency Assessments

[1] Federal Law

[a] "Deficiency" Defined

A tax "deficiency" is the excess of the tax (income, estate, gift, or excise) over the sum of the amount shown as the tax by the taxpayer on the return, and the amounts previously assessed or collected without an assessment as a deficiency, and reduced by the amount of any rebates made [*I.R.C. § 6211(a)*; *Treas. Reg. § 301.6211-1(a)*; *Rev. & Tax. Code § 19043*; *see I.R.C. § 6211(b)(2)*; *Rev. & Tax. Code § 19043(b)(2)* (rebate defined)]. Expressed as a mathematical equation, a "deficiency" is shown as follows [*see Kurtzon v. Comm'r (1952) 17 T.C. 1542, 1548*] :

$$\begin{array}{l} \text{Correct tax} \\ - (\text{Tax return} + \text{Prior assessments} - \text{Rebates}) \\ = \text{Deficiency} \end{array}$$

A "deficiency" also exists if there is an increase in a late filing penalty that results in an increase in tax liability [*Rev. Rul. 78-20, 1978-1 C.B. 441*].

An appeal to the Tax Court may be made only *after* a deficiency has been assessed [*Crowther v. Comm'r (9th Cir. 1959) 269 F.2d 292, 293* ; *see § 96.50[4]*]. The Tax Court's jurisdiction is based on the determination of the deficiency by the IRS, not on the mere existence of a deficiency [*Scar v. Comm'r (9th Cir. 1987) 814 F.2d 1363, 1367-1368* ; *Hannan v. Comm'r (1969) 52 T.C. 787, 790-791* ; *see § 96.50[4]*].

[b] Summary Record of Deficiency

The summary record of deficiency assessment identifies the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. In the case of a tax shown on a taxpayer's return, the amount of the assessment must be the amount shown on that return. In all other cases, the assessment must be the amount shown on the supporting list or record. The date of the assessment is the date on which the assessment officer signs the

summary record. On request, the IRS will furnish the taxpayer with a copy of the pertinent parts of the summary record of assessment [*Treas. Reg. § 301.6203-1*]. If any assessment is incomplete or incorrect, the district director or director of the regional service center may make a supplemental assessment [*Treas. Reg. § 301.6204-1*].

[c] Arbitrary Deficiency Assessments

A taxpayer may attempt to avoid an assessment in Tax Court by asserting that it is arbitrary (i.e., that the assessment is without evidentiary foundation). An assessment is "arbitrary" if it is not reasonable under all the existing facts. Whether or not the taxpayer attempted to interfere with the efforts of the IRS to make a precise determination of the deficiency, if any, is not dispositive of the issue [*Chaum v. Comm'r (1977) 69 T.C. 156, 161-162*] .

There is a presumption that any deficiency assessment against a taxpayer is correct [*Weimerskirch v. Comm'r (9th Cir. 1979) 596 F.2d 358, 359*] . However, before the IRS can rely on this presumption, it must produce some substantive evidence showing that the taxpayer received the income on which the deficiency is based [see *Weimerskirch v. Comm'r (9th Cir. 1979) 596 F.2d 358, 360*] . Absent that showing, the assessment may be characterized as arbitrary and, accordingly, not upheld by the Tax Court. This issue arises most frequently when the IRS charges a taxpayer with receipt of income from an illegal activity such as gambling [see *United States v. Janis (1976) 428 U.S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046*] or drug dealing [see *Weimerskirch v. Comm'r (9th Cir. 1979) 596 F.2d 358, 362*] .

[2] California Law

As soon as practicable after a return is filed, the FTB will examine the return and determine the correct amount of tax [*Rev. & Tax. Code § 19032*]. If, after examination, the FTB determines that the tax shown due on the return is less than the amount owed, it will mail a deficiency notice to the taxpayer [*Rev. & Tax. Code § 19033(a)*; see *Rev. & Tax. Code § 19033(e), (f)* (notices issued on or after January 1, 2008 must include postmark)]. The deficiency determination may, in no case, be arbitrary or without foundation. [*Rev. & Tax. Code § 19033(a)*]. When a taxpayer's return is available, the FTB may not assess or collect a deficiency without relying on the return [*Wertin v. FTB (1998) 68 Cal. App. 4th 961, 976, 80 Cal. Rptr. 2d 644* (FTB's issuance of notice of proposed assessment of tax deficiency without reviewing tax returns for relevant year rendered FTB's assessment invalid)].

The FTB ordinarily must examine the original or amended return or related electronically stored return data, unless the return or return data has been destroyed or cannot be located after reasonable effort [*Rev. & Tax Code § 19033(b)*; see *Rev. & Tax Code § 19033(c)* ("electronically stored data" defined); *Rev. & Tax Code § 19033(d)* (effective for notices of deficiency proposed to be assessed on or after January 1, 2001)]. If the return or return data has been destroyed or cannot be located, the FTB will request the taxpayer to provide a paper or electronic copy of the return. If the taxpayer fails to provide a copy within 30 days from the date of the request, or within 60 days if the first 30-day period has been extended another 30 days for reasonable cause, the requirements of *Rev. & Tax Code § 19033(b)(1)*, requiring that the Board examine the original, amended return, or electronically stored return data, will not apply [*Rev. & Tax Code § 19033(b)(2)*; see *Rev. & Tax Code § 19033(d)* (effective for notices of deficiency proposed to be assessed on or after January 1, 2001)].

California examiners are instructed to obtain, evaluate, and record information throughout the audit process. These steps are repeated until the auditor and his or her supervisor are satisfied that a valid conclusion has been reached and an audit report can be prepared that would withstand a challenge. In California, no precise, step-by-step order or manner of examination is followed. The determination of how a particular case should be approached and how the information gathering, evaluating, and recording is conducted is determined by the auditor on a case-by-case basis [see *FTB, General Tax Audit Manual, § 7000 et seq.* (working a case/case unit)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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6211-6216) Assessment of Deficiencies



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§ 96.37 Cooperation Between State and Federal Taxing Authorities

[1] Confidentiality of Returns

In general, the contents of income tax returns are confidential [*see I.R.C. § 6103; Rev. & Tax. Code § 19542*]. However, the contents of income tax returns may be disclosed when disclosure is specifically authorized by law [*see I.R.C. § 6103(a); Rev. & Tax. Code §§ 19542-19570; see also Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 720, 21 Cal. Rptr. 2d 200, 854 P.2d 1117 (bank and corporation tax); Webb v. Standard Oil Co. (1957) 49 Cal. 2d 509, 513, 319 P.2d 621 (personal income tax)*]. Such disclosure generally facilitates the administration or enforcement of the tax laws or serves a public policy considered more important than confidentiality [*see, e.g., I.R.C. § 6103(c)-(o)*].

All information developed during an audit, except that obtained from public sources, is confidential. It is the responsibility of the auditor to prevent unauthorized disclosure of information and to maintain security during the audit procedure [*see I.R.C. § 6103(a); Rev. & Tax. Code § 19542; see also FTB Disclosure Manual, §§ 1100, 1110*].

[2] Exchange of Information

Federal and state taxing authorities exchange information concerning tax returns pursuant to agreements coordinating tax administration between the two levels of government [*I.R.C. § 6103(d)(1)*]. On the written request of the Audit Division of the FTB, the IRS will release information contained in federal returns (or copies of the entire returns) to an appropriate representative designated in the request. The information or returns are released only for the purpose of, and to the extent necessary in, conducting the state audit [*I.R.C. § 6103(d)(2)*].

After a state or federal audit has been concluded, information regarding any increase or decrease in tax liability is shared with the other agency. The taxpayer must report each change or correction on his or her federal tax return, or the results of any renegotiation with the IRS, to the FTB within six months after the date of each final federal determination [*Rev. & Tax. Code § 18622(a)*]. A taxpayer filing an amended return with the IRS also must file an amended return within six months with the FTB [*Rev. & Tax. Code § 18622(b)*]. Likewise, any change on the state tax return may affect the federal return [*see I.R.C. § 6103(d)(1)*].

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[Reserved]

§§ 96.38[Reserved]



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§ 96.50 Appealing Within IRS

[1] Immediate Resolution Options

If the taxpayer disagrees with the examiner's proposed changes, the examiner will explain the taxpayer's rights [*see* IRS Pub. No. 1, *Your Rights as a Taxpayer*]. If the examination has taken place at an IRS office, the taxpayer may request an immediate meeting with the examiner's supervisor to explain the taxpayer's position. If a settlement cannot be reached within the supervisor at this meeting, or if the examination took place outside an IRS office, the examiner will explain the taxpayer's appeal rights under the appeals procedure and will "close" the case and forward it for processing [*Treas. Reg. § 601.105(c)(1)(ii)*; *see* IRS Pub. No. 556, at 4].

The IRS also offers fast track mediation to help taxpayers resolve disputes from examinations (audits) [*see* §§ 96.30-96.35], offers in compromise [*see* § 96.61], trust fund recovery actions, and other collection actions [IRS Pub. No. 556, at 4]. Most cases that are not docketed in any court qualify for fast track mediation. Mediation can take place at the requested conference with a supervisor, or later. The process involves an appeals officer who has been trained in mediation [IRS Pub. No. 556, at 4]. This process is discussed in detail in IRS Pub. No. 3605, *Fast Track Mediation: A Process for Prompt Resolution of Tax Issues*.

Appeal within the IRS is available to taxpayers as long as the basis of their dispute with the examiner's findings comes within the scope of the internal revenue laws. Taxpayers who base their positions on moral, religious, political, conscientious, constitutional, or other similar grounds cannot avail themselves of the appellate procedures within the IRS and must pursue their positions in court [*Rev. Proc. 68-12, 1968-1 C.B. 763*; *see* IRS Pub. No. 556, at 4]. The appeals process is described in [2]-[4], *below*. For step-by-step procedures to be followed to appeal within the IRS or to the Tax Court, *see* §§ 96.141 and 96.145.

In most cases, a taxpayer is eligible to take his or her case to court, if the taxpayer and the IRS do not reach an agreement at the appeals conference, or if the taxpayer does not want to appeal to the IRS Office of Appeals [IRS Pub. No. 556, at 8; *see* [4], [5], *below*]. However, a case petitioned to the Tax Court normally will be considered for settlement by the Appeals Office before the Tax Court hears the case [IRS Pub. No. 556, at 9].

[2] 30-Day Letter

If the taxpayer does not agree with the examiner's proposed changes, the examiner will close the case [see [1], *above*]. Within a few weeks of the closing conference, the taxpayer will receive the following [IRS Pub. No. 556, at 4]:

- A letter, known as a 30-day letter, notifying the taxpayer of his or her rights to appeal the proposed changes within 30 days.
- A copy of the examination report explaining the examiner's proposed changes [see § 96.209].
- An agreement or waiver form.
- A copy of IRS Pub. No. 5, *Your Appeal Rights and How to Prepare a Protest If You Don't Agree* [IRS Pub. No. 556, at 4; *Treas. Reg. § 601.105(d)(1)*].

The taxpayer generally has 30 days from the date of the 30-day letter to inform the IRS that he or she will accept or appeal the proposed changes. The method used to appeal generally depends on the dollar amount of the proposed changes. The following general rules apply [*Treas. Reg. § 601.105(d)(2)*]:

- An oral request is sufficient to transfer a case to the Appeals Office in an office audit or a correspondence examination.
- In a field examination, if the proposed tax (including penalty and interest) is \$2,500 or less, a written request is not required.
- For a field examination in which the amount of proposed tax is between \$2,500 and \$10,000 a written request is optional.
- For a field examination in which the amount exceeds \$10,000 a written request is required.

PRACTICE TIP:

Typically it takes several months for an appeal to be transmitted to the Office of Appeals. An appeals officer will contact the taxpayer (or the taxpayer's representative) by telephone or in writing to schedule a date for the appeals conference. The conference is typically in person at the local IRS Appeals Office. A conference may also be held by telephone at the discretion of the Appeals Officer.

If the taxpayer takes no action, on expiration of the 30-day period the IRS usually will issue a formal notice of deficiency, or "90-day letter."

[3] 90-Day Letter

A "90-day letter," or notice of deficiency, is a letter from the IRS to a taxpayer whose return is being audited or has been audited, stating, among other things, the amount of the deficiency determined by the I.R.S. The 90-day letter notifies the taxpayer that the deficiency will be collected unless he or she files a timely petition to the Tax Court. The letter must include a notice to the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate, and the location and phone number of the appropriate office. The 90-day letter is sent to the taxpayer by certified or registered mail [*I.R.C. § 6212(a)*]. After the 90-day letter is sent, all options for settlement of the matter within the Audit Division of the IRS are foreclosed to the taxpayer [see *I.R.C. § 6213(a)*].

The taxpayer has the option of filing a petition with the Tax Court for a redetermination of the deficiency [*I.R.C. §*

6213(a); see *Treas. Reg. § 301.6213-1(a)(1)*). The petition must be filed within 90 days (or 150 days if the letter is addressed to a person outside the United States) from the date the 90-day letter is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day). Any petition filed with the Tax Court on or before the last date specified in the notice of deficiency will be treated as timely filed [*I.R.C. § 6213(a)*]. With specified exceptions, no proceeding for the collection of the assessed deficiency may be made within the 90- or 150-day period [*I.R.C. § 6213(a)*; *Treas. Reg. § 301.6213-1(a)(2)*; see *Treas. Reg. § 301.6213-1(b)* (exceptions to restrictions on assessment); see also *Fayeghi v. Comm'r* (9th Cir. 2000) 211 F.3d 504, 506-507 (tax court lacked authority to enjoin collection of taxes pursuant to motion to restrain collection; *I.R.C. § 6213(a)* did not apply because tax at issue was not "deficiency")]. Further, no additional deficiency may be determined with respect to income tax for the same taxable year [*Treas. Reg. § 301.6212-1(c)*].

[4] Tax Court Jurisdiction

A formal determination of a deficiency from the IRS is a prerequisite to Tax Court jurisdiction over any dispute between the IRS and a taxpayer [*Crowther v. Comm'r* (9th Cir. 1959) 269 F.2d 292, 293] . Because there is no statutory or regulatory requirement for the contents of a notice of deficiency [see 3], above], disputes about what constitutes a notice of deficiency occasionally arise. Examples of correspondence that have been determined *not* to constitute deficiency notices and provide bases for Tax Court jurisdiction include:

- 30-day letters [*Estate of Gillespie v. Comm'r* (1994) 103 T.C. 395, 397 ; *Estate of Adamczyk v. Comm'r* (1981) 41 T.C.M. (CCH) 1596, T.C. Memo. 1981-259] .
- A letter notifying a taxpayer that certain tax shelter items would be disallowed [*Benzvi v. Comm'r* (11th Cir. 1986) 787 F.2d 1541, 1543] .
- A letter rejecting the taxpayer's offer of a compromise [*Mall v. Comm'r* (1981) 41 T.C.M. (CCH) 1568, T.C. Memo. 1981-253] .
- Notification by the IRS that an additional amount of tax is due because of a mathematical error on the return. That notice does not constitute a 90-day letter or notice of deficiency [*Treas. Reg. § 301.6213-1(b)(1)*].

The IRS, with the taxpayer's consent, may rescind a notice of deficiency. A rescinded notice is not treated as a notice of deficiency for purposes of the restrictions on further deficiencies and collection proceedings during the period for appeal to the Tax Court. If the statute of limitations were suspended when the deficiency notice was issued, the rescission operates as a non-retroactive termination of the suspension. At the time of the rescission, the statute begins to run again from the point at which it was suspended. The taxpayer has no right to file a petition to the Tax Court on the basis of a rescinded notice of deficiency [*I.R.C. § 6212(d)*].

If the full amount of the tax is paid before the notice of deficiency is mailed, no deficiency exists, thus precluding Tax Court jurisdiction over the matter [*Conklin v. Comm'r* (10th Cir. 1990) 897 F.2d 1027, 1029-1030 ; *McConkey v. Comm'r* (4th Cir. 1952) 199 F.2d 892, 893-894] . However, the taxpayer can still appeal to the district court or the Court of Federal Claims [see generally IRS Pub. No. 556, at 12; see also [5], below].

[5] District Court and Court of Federal Claims Jurisdiction

Generally, the district court and the Court of Federal Claims will hear cases only after the tax is paid and the taxpayer has filed a claim for a credit or refund [see *I.R.C. § 7422*; IRS Pub. No. 556, at 12]. However, neither court has jurisdiction to adjudicate claims that relate to promoting an abusive tax shelter, or aiding and abetting the understatement of tax liability [see IRS Pub. No. 556, at 12; see also *I.R.C. §§ 6700* (penalties for promoting abusive

tax shelters), 6701 (penalties for aiding and abetting the understatement of tax liability)].

The taxpayer may file a claim with the IRS for a credit or refund. If the claim is completely or partially disallowed, the taxpayer should receive a notice of claim disallowance. If the IRS does not act on the claim within six months from the date the claim was filed, the taxpayer may then file suit for a refund [*see generally* IRS Pub. No. 556, at 12].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)General OverviewTax LawFederal
Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)Notice of Appeal



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31-96 California Legal Forms--Transaction Guide § 96.51

§ 96.51 Appealing Within FTB

A taxpayer who disagrees with a notice of deficiency issued by the FTB must file a written protest, specifying in the protest the grounds on which it is based within 60 days after the mailing of each notice of proposed deficiency [*Rev. & Tax Code § 19041(a)*; see § 96.231]. If no protest is filed, the amount of the proposed deficiency assessment becomes final after the 60-day period expires [*Rev. & Tax Code § 19042*].

If a protest has been filed, the FTB will reconsider the deficiency assessment and, if the taxpayer requested it in the protest, will grant the taxpayer or his or her representative an oral hearing [*Rev. & Tax. Code § 19044*]. The FTB's action on the protest is final after 30 days from the date the FTB mails notice of its action to the taxpayer, unless within that 30-day period the taxpayer files a written appeal with the FTB [*Rev. & Tax. Code § 19045(a)*; see *Rev. & Tax. Code § 19047* (hearing of appeal; notice of determination); § 96.231].

For state tax purposes, any amount of tax in excess of that disclosed by the return, due to a mathematical error, is not a deficiency assessment. The taxpayer has no right to protest or appeal based on this type of notice. However, the amount of tax erroneously omitted in the return may be assessed and collected in the same manner as a deficiency assessment [*Rev. & Tax. Code § 19051*].

For a detailed discussion of appeal within the FTB and a California taxpayer's judicial remedies, see *California Forms of Pleading and Practice*, Ch. 540, *Taxes and Assessments* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Tax Administration & Procedure Tax Court (IRC secs. 7441-7491) General Overview Tax Law Federal Tax Administration & Procedure Tax Court (IRC secs. 7441-7491) Courts of Review General Overview



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31-96 California Legal Forms--Transaction Guide §§ 96.52-96.59

[Reserved]

§§ 96.52[Reserved]



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31-96 California Legal Forms--Transaction Guide § 96.60

§ 96.60 Installment Agreements

[1] Availability

The IRS is authorized to enter into installment agreements with any taxpayer if the IRS determines that an installment agreement would facilitate full or partial collection of a tax liability [*I.R.C. § 6159(a)*; *see I.R.C. § 7122(d)* (administrative review and appeal)]. Under some circumstances, the IRS is *required* to enter into an installment agreement [*see I.R.C. § 6159(c)*; discussed in [2], [3], *below*]. An installment agreement does not reduce the tax liability, or any interest or penalty. However, during the installment agreement, other enforcement actions, such as liens or levies, are held in abeyance [*Treas. Reg. § 301.6159-1(d)*].

[2] Guaranteed Installment Agreement

A "guaranteed installment agreement" is available if [*I.R.C. § 6159(c)*; IRM 5.14.5.3]:

- The liability is \$10,000, or less (excluding penalties and interest).
- Within the previous five years, the taxpayer has not failed to file or to pay, nor entered an installment agreement under *I.R.C. § 6159*.
- If requested by the IRS, the taxpayer submits financial statements, and the IRS determines that the taxpayer is unable to pay the tax due in full.
- The installment agreement provides for full payment of the liability within three years; and
- The taxpayer agrees to continue to comply with the tax laws and the terms of the agreement for the period (up to three years) that the agreement is in place.

[3] Streamlined Installment Agreement

A "streamlined installment agreement" is available if [IRM 5.14.5.2]:

- The aggregate unpaid balance of assessments is \$25,000 or less. The unpaid balance of assessments includes tax, assessed penalty and interest, and all other tax assessments, but does not include accrued penalty and interest.
- If pre-assessed taxes are included, the pre-assessed liability plus unpaid balance of assessments is \$25,000 or less.
- The aggregate unpaid balance of assessments will be fully paid in 60 months, or the agreement will be fully paid before the collection statute expiration date (CSED), whichever comes first [see IRM 5.14.2.1 (CSED extensions)].

[4] Installment Agreement for Deficiencies Over \$25,000

If the deficiency exceeds \$25,000, the IRS will request financial information [see §§ 96.213, 96.214 (forms)] and, based on established guidelines, will set the amount to be paid monthly [see IRM 5.14.2.2].

[5] Partial Payment Installment Agreement

On January 1, 2005, the IRS implemented an additional payment option, known as the Partial Payment Installment Agreement. This payment option became possible with the passage of the American Jobs Creation Act of 2004 (Pub Law No. 108-357, 118 Stat. 1418). This legislation allows the IRS to enter into installment agreements that result in full or partial payment of the tax liability [see *I.R.C. § 6159(a), (d)*]. Previously, taxpayers who could not fully pay their outstanding tax liabilities could only enter into an agreement with the IRS if it resulted in full payment of the liability [see former *I.R.C. § 6159*]. This left taxpayers unable to meet this criterion with limited payment options.

Taxpayers who request a PPIA must provide complete and accurate financial information that will be reviewed and verified. Taxpayers will also be required to address equity in assets that can be used to reduce or fully pay the amount of the outstanding liability [see *I.R.C. § 6159*; www.irs.gov/businesses/small/article/0,,id=136207,00.html]. In addition, taxpayers granted PPIAs will be subject to a subsequent financial review every two years. As a result of this review, the amount of the installment payments could increase or the agreement could be terminated, if the taxpayer's financial condition improves [see *I.R.C. § 6159(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureSettlementsGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesCollection (IRC secs. 6301-6317)General Overview



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§ 96.61 Offers in Compromise

[1] Who May Authorize Compromise

In some circumstances, the IRS may accept an amount less than the full amount a taxpayer owes [see [2], *below*]. The IRS Commissioner has the power to accept a lesser amount in any civil or criminal tax case before referring the case to the Justice Department for prosecution or defense [I.R.C. § 7122(a)]. The Attorney General, or its delegate, also may compromise a case after reference to the Justice Department [I.R.C. § 7122(a)]. For a procedural guide to making offers in compromises, see § 96.142. For a copy of the IRS form (Form 656), see § 96.212.

[2] Grounds for Compromise

The IRS may accept an offer in compromise for any of the following reasons:

- There is doubt about the amount owed (or whether the taxpayer owes it) [*Treas. Reg. § 301.7122-1(b)(1)*; see IRS Pub. No. 556, at 7-8].
- There is doubt about whether the taxpayer can pay the amount owed based on his or her financial situation [*Treas. Reg. § 301.7122-1(b)(2)*; see IRS Pub. No. 556, at 8].
- Acceptance of an offer in compromise will "promote effective tax administration," because full collection would cause the taxpayer economic hardship [*Treas. Reg. § 301.7122-1(b)(3)(i)*; see IRS Pub. No. 556, at 8; see also *Treas. Reg. § 301.6343-1(b)(4)* (meaning of "economic hardship")].
- Acceptance of an offer in compromise will "promote effective tax administration," because the taxpayer's case presents compelling reasons that the IRS determines are a sufficient basis for compromise [*Treas. Reg. § 301.7122-1(b)(3)(ii)*; see IRS Pub. No. 556, at 8].

In determining whether to accept or reject an offer in compromise on the ground that acceptance would promote effective tax administration, the IRS must consider several nonconclusive factors, including the taxpayer's record of

overall compliance with the tax laws [see *Treas. Reg. § 301.7122-1(c)(3)(i), (ii)* (nonconclusive factors to be considered in evaluating these offers); *Treas. Reg. § 301.7122-1(c)(3)(ii), (iii)* (examples)].

In addition, the IRS may not reject an offer in compromise from a "low income" taxpayer solely on the basis of the amount of the offer [*I.R.C. § 7122(d)(3)(A)*]. If an offer in compromise is based on doubt as to liability, the IRS may not reject an offer solely because the IRS is unable to locate the taxpayer's return or return information to verify the liability [*I.R.C. § 7122(d)(3)(B)(i)*]. Moreover, if an offer in compromise is based on doubt about liability, the taxpayer is not required to provide a financial statement [*I.R.C. § 7122(d)(3)(B)(ii)*].

[3] Development and Application of IRS Guidelines

The IRS has developed guidelines for determining whether an offer in compromise is adequate and should be accepted to resolve a dispute [see *I.R.C. § 7122(d)(1)*]. The guidelines include national and local living expense standards published by the IRS [see *I.R.C. § 7122(d)(2)(A)*; *Treas. Reg. § 301.7122-1(c)(2)(i)*]. However, the IRS must evaluate the individual facts and circumstances presented by each taxpayer's case, and may not apply the guidelines if their use would result in the taxpayers not having adequate means to pay basic living expenses [*I.R.C. § 7122(d)(2)(B)*; *Treas. Reg. § 301.7122-1(c)(2)(i)*].

[4] Independent Review of Rejected Offers

All proposed rejections of offers in compromise must receive an independent administrative review before the proposed rejection is communicated to the taxpayer [see *Treas. Reg. § 301.7122-1(f)(2)*]. The taxpayer may appeal any rejection of an offer in compromise to the IRS Office of Appeals [see *I.R.C. §§ 6159(d), 7122(e)*; *Treas. Reg. § 301.7122-1(f)(5)*].

[5] Moratorium on Levies While Offer Is Evaluated

The IRS generally will not levy a taxpayer's property during the following periods [*I.R.C. § 6331(k)(1)(A)*; *Treas. Reg. § 301.7122-1(g)(1)*; see *I.R.C. § 6331(k)(3)*; *Treas. Reg. § 301.7122-1(g)(3), (4)* (exceptions for jeopardy assessments and offers submitted solely for purposes of delay)]:

- While the IRS is evaluating the offer.
- Within 30 days immediately after the offer is rejected.
- While the IRS considers a timely-filed appeal from the rejection of the offer.

The statute of limitations on collection will be suspended while levy is prohibited for the reasons listed above [*Treas. Reg. § 301.7122-1(i)(1)*].

If the IRS rejects the original offer and the taxpayer submits a revised offer within 30 days after the offer is rejected, the IRS generally will not levy the taxpayer's property while it considers the revised offer [*I.R.C. § 6331(k)(1)(B)*; *Treas. Reg. § 301.7122-1(g)(2)*].

[6] Written Notice of Rejection of Offer

For offers in compromise submitted on or after 60 days from May 17, 2006 (the date of enactment of the Tax Increase Prevention and Reconciliation Act of 2005), an offer in compromise is deemed to be accepted if the offer is not rejected before 24 months after the date of submission [*I.R.C. § 7122(f)*]. However, any period during which any tax liability that is the subject of the offer in compromise is in dispute in a judicial proceeding is not taken into account in determining the expiration of the 24 month period [*I.R.C. § 7122(f)*]. For offers in compromise not subject to the

foregoing rules, an offer is not rejected until the I.R.S. issues a written notice to the taxpayer (or the taxpayer's representative), advising of the rejection, the reasons for the rejection, and the right to an appeal [*Treas. Reg. § 301.7122-1(f)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Tax Law Federal Tax Administration & Procedure Settlements Closing Agreements & Compromises (IRC secs. 7121-7124) Compromises Tax Law Federal Tax Administration & Procedure Tax Credits & Liabilities Collection (IRC secs. 6301-6317) General Overview



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§ 96.62 Offer in Compromise Procedure

An offer to compromise a tax liability must be submitted according to the procedures, and in the form and manner prescribed by the IRS [*Treas. Reg. § 301.7122-1(d)(1)*]. Form 656, Offer in Compromise, is the official compromise agreement [*see § 96.212*]. The offer must be submitted on the current version of the form [*see § 96.212[2]* (Instructions)].

In a case construing the requirement that the offer in compromise be in writing, the taxpayer had reached an oral agreement concerning tax liability for two tax periods. When the IRS subsequently issued a deficiency notice covering those tax periods, the taxpayer appealed to the Tax Court, arguing that the previous oral agreement, which purported to settle the tax liability for those years, constituted a binding compromise. Alternatively, the taxpayer argued that the IRS was equitably estopped from assessing the deficiency because the taxpayer had relied on the oral agreement and changed his position to his detriment. The Tax Court rejected the taxpayer's arguments, holding that the director of international operations, with whom the oral agreement was reached, lacked authority to bind the IRS because of the regulatory requirement that offers and acceptances of compromises be in writing [*Boulez v. Comm'r (D.C. Cir. 1987) 810 F.2d 209, 214-215* , *cert. denied*, 484 U.S. 896 (1987) ; *see, e.g., Estate of Carberry v. Comm'r (2d Cir. 1991) 933 F.2d 1124, 1127*] .

The circuit court affirmed the ruling of the Tax Court, finding that when a compromise of tax liability is at issue, the need for rigorous compliance with pertinent regulations may be at its greatest, since not only the integrity of the public coffers but also public faith in the equitable enforcement of the tax laws hangs in the balance [*Boulez v. Comm'r (D.C. Cir. 1987) 810 F.2d 209, 219* , *cert. denied*, 484 U.S. 896 (1987)] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsSettlement
AgreementsGeneral OverviewTax LawFederal Tax Administration & ProcedureSettlementsGeneral OverviewTax
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31-96 California Legal Forms--Transaction Guide § 96.63

§ 96.63 Record of Compromise

Except in civil cases involving assessments of \$50,000 or less (including any interest, additional amount, addition to the tax, and assessable penalties), any accepted compromise settlement requires an opinion of the Chief Counsel of the IRS. That opinion must be kept on file and will include a statement of [I.R.C. § 7122(b)]:

- The amount of the tax assessed;
- The amount of interest, additional amount, addition to the tax, or assessable penalty, imposed by law on the taxpayer; and
- The amount actually paid in accordance with the terms of the compromise.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure
Settlements
Settlement Agreements
General Overview
Tax Law
Federal Tax Administration & Procedure
Settlements
Closing Agreements & Compromises (IRC secs. 7121-7124)
Compromises
Tax Law
Federal Tax Administration & Procedure
Tax Credits & Liabilities
Collection (IRC secs. 6301-6317)
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31-96 California Legal Forms--Transaction Guide §§ 96.64-96.69

[Reserved]

§§ 96.64[Reserved]



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31-96 California Legal Forms--Transaction Guide § 96.70

§ 96.70 IRS Closing Agreements

The IRS may enter into a closing agreement with a taxpayer for any taxable period when it appears advantageous to the case, or if the taxpayer shows sufficient reasons for wanting a closing agreement and the IRS determines there will be no disadvantage to the government in entering into the agreement [*Treas. Reg. § 301.7121-1(a)*; see *I.R.C. § 7121(a)*].

Once it is approved, a closing agreement is "final and conclusive" [*Treas. Reg. § 301.7121-1(c)*]. Unless there is a showing of fraud or malfeasance, the case may not be reopened on the matters agreed on, and the agreement may not be modified by any government employee [*I.R.C. § 7121(b)*; *Treas. Reg. § 301.7121-1(c)(1)*]. In any action, or proceeding, the agreement or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance with the agreement may not be annulled, modified, set aside, or disregarded [*Treas. Reg. § 301.7121-1(c)*]. However, a closing agreement for a taxable period ending after the date of the agreement must contain a recitation that it is subject to any change in, or modification of, the law enacted after the date of the agreement and made applicable to the taxable period [*Treas. Reg. § 301.7121-1(c)(2)*].

For a procedural guide to reaching a closing agreement, see § 96.143]. For closing agreement forms, see §§ 96.217 (applicable to specific items) and 96.218 (applicable to tax liability for an entire tax period).

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureSettlementsClosing Agreements & Compromises (IRC secs. 7121-7124)General OverviewTax LawFederal Tax Administration & ProcedureSettlementsClosing Agreements & Compromises (IRC secs. 7121-7124)Closing Agreements



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31-96 California Legal Forms--Transaction Guide § 96.71

§ 96.71 FTB Closing Agreements

The FTB, or any person with written authorization from the FTB, may enter into a written agreement regarding tax liability. If the FTB approves the agreement, it will be final and conclusive. As is the case with a federal closing agreement [*see* § 96.70], unless there is a showing of fraud, malfeasance, or a representation of a material fact (1) the case will not be reopened as to any matters agreed on, or the agreement modified, by any officer, employee, or agent of the State of California; and (2) in any suit, action, or proceeding, the agreement or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance with the agreement will not be annulled, modified, set aside, or disregarded [*Rev. & Tax. Code § 19441(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Tax Administration & Procedure Settlements Closing Agreements & Compromises (IRC secs. 7121-7124) Closing Agreements



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31-96 California Legal Forms--Transaction Guide §§ 96.72-96.99

[Reserved]

§§ 96.72[Reserved]



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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

31-96 California Legal Forms--Transaction Guide § 96.100

§ 96.100 Facts

NOTE:

The following preliminary determinations assume that the client is an individual, not an entity.

1. Taxpayer's name, address, telephone number, and e-mail address.
2. Taxpayer's current marital status.
3. Taxpayer's marital and filing status at time return in question was filed.
4. If taxpayer is divorced or separated and spouse with whom joint return was filed has established separate residence:
 - a. Address of that separate residence.
 - b. Identity of individual, if any, representing ex-spouse in audit.
5. Taxpayer's social security number.
6. Taxpayer identification number, if any, of trust under which taxpayer received payments as beneficiary.
7. Sources of taxpayer's income for the audit year, for example:
 - a. Wages.

- b. Dividends.
- c. Interest.
- d. Rents.
- e. Annuity.
- f. Disability payments, if taxable.

NOTE:

Payments from an employer for illness or temporary disability are fully taxable. However, worker's compensation is exempt. If the taxpayer is permanently disabled, he or she may be able to exclude disability payments made to a plan to the extent that the taxpayer contributed to the plan [see I.R.C. § 104]. In addition, there is a tax credit, computed on Form 1040, Schedule R, that may exclude a portion of the employer provided disability payments from tax.

- g. Distributions from individual retirement account (IRA).
 - h. Royalties.
 - i. Alimony.
 - j. Proceeds from sale of capital assets (for example, stocks, real estate).
 - k. Gambling proceeds.
8. Deductions taken on tax return.
 9. Any other deductions available but not taken on return.
 10. Any credits against income.
 11. Identity of individuals who have knowledge concerning any aspect of transactions relevant to tax year(s) under examination.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureGeneral OverviewTax LawFederal Tax Administration & ProcedureAdministrationGeneral Overview



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31-96 California Legal Forms--Transaction Guide § 96.101

§ 96.101 Documents

1. Notice of examination (audit) from Internal Revenue Service (IRS) and/or Franchise Tax Board (FTB).
2. 30-day letter if one has been sent [*see* §§ 96.50[2], 96.113].
3. 90-day letter if one has been sent [*see* §§ 96.50[3], 96.114].

NOTE:

Once a 90-day letter is issued, taxpayer's settlement options are restricted and he or she has a limited time in which to file a petition with the Tax Court [*see I.R.C. §§ 6212, 6213; see also* § 96.50[3]]. An attorney (or other practitioner) retained to represent the taxpayer at this point must make critical decisions concerning the merits of the case within a short time.

4. Record of deficiency assessment, if any.

NOTE:

On request, the IRS will provide a taxpayer with the pertinent parts of a record of assessment, containing the name of the taxpayer, the date of the assessment, the character of the liability assessed, the taxable period, and the amounts assessed [*see Treas. Reg. § 301.6203-1*].

5. Copies of returns for years on which audit is being conducted.
6. Form 1099 (statements of income and dividend payments).

7. Form W-2 (wage and withholding tax statement).
8. Form W-2G (statement of withholding from gambling winnings).
9. Form W-2P (statement of annuity payments).
10. Form 5498 (statement of IRA distributions).
11. Copies of any other relevant form reporting income.
12. Copies of tax returns for three years preceding year of return under examination and for subsequent year, if filed.
13. Transaction slips and statements from brokerage accounts.
14. Records concerning any deductions claimed.
15. Letter, if any, concerning prospective use of deduction based on "abusive tax shelter" [*see Rev. Proc. 83-78, 1983-2 C.B. 595 ; see also § 96.31[3]*].
16. If audits of taxpayer's returns for either or both of the two preceding years resulted in little or no change in the taxpayer's liability, copies of documents evidencing resolutions of those audits.

NOTE:
If audits for either one or both of the preceding two years resulted in little or no change in the taxpayer's liability, the proposed audit might be avoided [*see § 96.33*].
17. Copies of closing agreements, if any, from prior years [*see §§ 96.70, 96.71*].
18. Copy of information document request, if any, issued by FTB.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Tax Administration & ProcedureGeneral Overview



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31-96 California Legal Forms--Transaction Guide §§ 96.102-96.109

[Reserved]

§§ 96.102[Reserved]



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31-96 California Legal Forms--Transaction Guide § 96.110

§ 96.110 Limitations Periods

1. Did taxpayer file return for the year(s) subject to audit?

NOTE:

Although I.R.C. § 6211(a)(1)(A) defines tax deficiencies with reference to the amount of tax shown on the return, a deficiency can be assessed even if no return was filed [*Hartman v. Comm'r* (1975) 65 T.C. 542, 546] .

2. Has federal statute of limitations on assessment and collection expired for tax year at issue?

NOTE:

In general, any tax must be assessed within three years after the return was filed [I.R.C. § 6501(a); Treas. Reg. § 301.6501(a)-1(a)]. For purposes of assessing tax liability against a shareholder in a Subchapter S corporation, the federal limitations period runs from the date of filing the shareholder's return, not from the date of filing the corporation's return [*Bufferd v. Comm'r* (1993) 506 U.S. 523, 529, 113 S. Ct. 927, 122 L. Ed. 2d 306] . For purposes of assessing tax liability against a partner in a partnership, the federal limitations period runs from the date the liable partner's return was filed, not from the date the partnership's return was filed [*Charlton v. Comm'n* (9th Cir. 1993) 990 F.2d 1161, 1163 ; see also *Bufferd v. Comm'r* (1993) 506 U.S. 523, 529, 113 S. Ct. 927, 122 L. Ed. 2d 306] .

3. If more than three years have passed since return was filed, do any of following exceptions to statute of limitations apply [I.R.C. § 6501(c); see Treas. Reg. § 301.6501(c)-1]?

- a. Return was false or fraudulent.

NOTE:

When a return was filed with the intent to evade tax, the tax may be assessed, or a judicial proceeding to collect the tax may be commenced without assessment, at any time after the return is filed [I.R.C. § 6501(c)(1); Treas. Reg. § 301.6501(c)-1(a)].

b. Taxpayer willfully attempted to evade tax.

NOTE:

If there has been a willful attempt in any manner to defeat or evade tax, the tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time [I.R.C. § 6501(c)(2); Treas. Reg. § 301.6501(c)-1(b)].

c. Taxpayer failed to file return.

NOTE:

If no return was filed, the IRS may assess the tax or begin a judicial proceeding to collect the tax without assessment, at any time after the date on which the return should have been filed [I.R.C. § 6501(c)(3); Treas. Reg. § 301.6501(c)-1(c)].

d. Taxpayer extended time for assessment by written agreement with the district director or assistant regional commissioner [I.R.C. § 6501(c)-1(d); Treas. Reg. § 301.6501(c)-(d); see §§ 96.204, 96.205].

e. Tax results in changes in certain income tax or estate tax credits [see I.R.C. § 6501(c)(5)].

f. IRS has received written document, signed by taxpayer, showing he or she owes additional amount of tax for tax year at issue [see I.R.C. § 6501(c)(7)].

NOTE:

If, within the 60-day period ending on the day the statute of limitations would otherwise expire, the IRS receives a written document, signed by the taxpayer, showing an additional tax liability for the tax year at issue, the period of assessment of this additional amount does not expire before the day 60 days after the date on which the IRS receives the document [I.R.C. § 6501(c)(7)].

g. Taxpayer is liable for gift tax on certain gifts not shown on return [see I.R.C. § 6501(c)(9); Treas. Reg. § 301.6501(c)-1(e)].

h. Taxpayer failed to notify IRS of certain foreign transfers [see I.R.C. § 6501(c)(8)].

i. Private foundation status was terminated [I.R.C. § 6501(c)(6); see I.R.C. § 507 (private foundation status)].

j. Gain was attributable to taxpayer's election not to recognize gain following involuntary conversion, making statutory period for assessment three years from date taxpayer notifies IRS of either [I.R.C. § 1033(a)(2)(C)(i); see I.R.C. § 1033(a)(2)(C)(ii) (exceptions)]:

(1) Replacement of converted property; or

(2) Taxpayer's intention not to replace converted property.

k. Gain following involuntary conversion resulted from exercise of election to purchase replacement property or stock before beginning of last taxable year for the election, making limitations period same as that applicable to assessments for deficiencies for that last taxable year [*I.R.C. § 1033(a)(2)(D)*].

4. If FTB has notified taxpayer of audit, has California statute of limitations on proposed deficiency assessments expired?

NOTE:

A deficiency assessment must ordinarily be mailed to the taxpayer within the four years following the filing of the return to which it relates [*Rev. & Tax. Code § 19057(a)*]. For purposes of determining the correct limitations period, any return that is filed before the last permissible day for filing is deemed to have been filed on that last day [*Rev. & Tax. Code § 19066(a)*]. The running of the limitation period is suspended under specific circumstances [*see, e.g., Rev. & Tax. Code §§ 19057(b)* (certain Chapter 11 bankruptcy cases), (c) (FTB's receipt of certain taxpayer documents), (d) (exempt organizations later determined to be taxable organizations), 19064 (certain cases involving subpoenas)].

5. If more than four years have passed since California return was filed, will assessment fall within one of following exceptions to statute of limitations?

a. Return was false or fraudulent [*see Rev. & Tax. Code § 19057(a)*].

b. Taxpayer failed to report (or did report, but not on a timely basis) a change or correction made by the IRS in amount of taxpayer's gross income or deductions for any year or failed to file (or did file, but not on a timely basis) amended California return for any year in which amended federal return was filed [*Rev. & Tax. Code § 19060; see Rev. & Tax. Code § 18622* (time limits for reporting changes or corrections and for filing amended return)].

NOTE:

If the taxpayer does not notify the FTB of changes or corrections made by the IRS, or does not file an amended California return after filing an amended federal return [*see Rev. & Tax. Code § 18622*], a notice of proposed deficiency assessment resulting from the adjustment may be mailed to the taxpayer at any time [*Rev. & Tax. Code § 19060(a)*]. If the taxpayer does report changes or corrections made by the IRS or does file a required amended California return but does either on an untimely basis [*see Rev. & Tax. Code 18622(b)* (six-month time period)], a proposed deficiency assessment may be mailed to the taxpayer within four years from the date the taxpayer or the IRS notified the FTB of those changes or corrections or filed that amended return [*Rev. & Tax. Code § 19060(b)*].

c. Taxpayer failed to include in gross income amount that [*Rev. & Tax. Code § 19058(a)*]:

(1) Should have been included in gross income; and

(2) Exceeds 25 percent of amount of gross income stated in return.

NOTE:

If the taxpayer omits an amount in excess of 25 percent of his or her gross income, the state has six years in which to mail a notice of deficiency assessment [*Rev. & Tax. Code § 19058(a)*]. An amount will not be considered "omitted from gross income" if

that amount was disclosed in the return or in a statement attached to the return in a manner adequate to apprise the FTB of the nature and amount of the item [Rev. & Tax. Code § 19058(b)(2)].

d. Assessment is attributable to any partnership item of federally registered partnership [*see Rev. & Tax. Code § 19063*].

e. Time for assessment was extended by written consent of taxpayer [*see Rev. & Tax. Code § 19067*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureGeneral Overview



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31-96 California Legal Forms--Transaction Guide § 96.111

§ 96.111 Federal Summons and State Subpoena

1. Was any summons served on taxpayer by IRS [*Treas. Reg. § 301.7603-1(a)*]:

NOTE:

On an application for enforcement of the summons, a certificate of service signed by the person serving the summons constitutes evidence of the facts stated in the summons [*Treas. Reg. § 301.7603-1(a)*]. A taxpayer who ignores a summons issued by the IRS may be subject to an attachment action [*Treas. Reg. § 301.7604-1*].

- a. Was it attested?

- b. Was it delivered by hand to person to whom it was directed, or left at that person's last usual residence?

NOTE:

An IRS employee designated by the Commissioner is authorized to serve a summons in connection with examinations [*Treas. Reg. § 301.7603-1(b)*; see *I.R.C. § 7602*].

- c. Was it reasonably certain in description of any books, papers, records, or other data that must be produced?

2. Was taxpayer served with subpoena or subpoena duces tecum from FTB and, if so, was it properly signed by FTB member [*Rev. & Tax. Code § 19504(c), (d)*]?

NOTE:

The FTB may compel the testimony of any person and/or the production of documents in its attempts to collect taxes [see *Rev. & Tax. Code* § 19504(a), (b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureGeneral OverviewTax LawFederal Tax Administration & ProcedureAudits & InvestigationsAdministrative Summons (IRC secs. 6038A, 6038C, 6331, 6503, 7210, 7402, 7602-7605, 7609-7611)General Overview



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31-96 California Legal Forms--Transaction Guide § 96.112

§ 96.112 Audit Proceeding

1. Where and when will audit be held?

NOTE:

The IRS determines the time and place of an examination (audit) [I.R.C. § 7605(a); Treas. Reg. § 301.7605-1(a)-(d)]. When a summons is served, the date fixed for the taxpayer's appearance before an IRS officer or employee must be no less than 10 days from the date of the summons [I.R.C. § 7605(a); Treas. Reg. § 301.7605-1(b)(2)]. The IRS will consider, on a case-by-case basis, written requests by taxpayers or their representatives to transfer the examination to a place other than the one set by the IRS [Treas. Reg. § 301.7605-1(e); see Treas. Reg. § 301.7605-1(f) (transfer to IRS office to protect officers and employees), (g) (initiation of transfer by IRS)].

2. Is scheduled location inconvenient for taxpayer for any reason (e.g., is location of records in field audit outside district where audit is scheduled)?
3. Is there any matter on which guidance is necessary to determine proper application of internal revenue laws, related statutes, and regulations because [Treas. Reg. § 601.105(b)(5)(iii)(a)]:

NOTE:

The district director may request "technical advice" from the national office to be used in connection with an audit [Treas. Reg. § 601.105(b)(5)(iii)]. Technical advice is provided by the IRS to assist examiners in closing cases and establishing and maintaining consistent holdings among the districts [Treas. Reg. § 601.105(b)(5)(iii)(a)]. While technical advice is sought at the district director's discretion, the taxpayer or his or her representative may request referral of the matter on one of the grounds listed in (a) or (b), below. For a procedural guide to

submitting a request for technical advice, see § 96.122.

- a. There is lack of uniformity as to disposition of issue?
- b. Issue is so unusual or complex as to warrant attention of National Office?

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAudits & InvestigationsGeneral Overview



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31-96 California Legal Forms--Transaction Guide § 96.113

§ 96.113 30-day Letter

1. Has taxpayer received 30-day letter from IRS?
2. If 30-day letter has been issued, is it in taxpayer's best interests to request conference at IRS Office of Appeals?

NOTE:

The IRS encourages appeals conferences rather than immediate resort to judicial proceedings. A case petitioned to the Tax Court will normally be considered for settlement by an appeals office before the Tax Court hears the case [IRS Pub. 556, at 9].

3. Is filing of written protest to proposed changes in taxpayer's liability necessary?

NOTE:

For a list of the circumstances under which written protests are necessary, see § 96.141.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAdministrationGeneral OverviewTax LawFederal Tax Administration & ProcedureAudits & InvestigationsGeneral Overview



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31-96 California Legal Forms--Transaction Guide § 96.114

§ 96.114 90-day Letter (Notice of Deficiency)

1. If taxpayer has not yet received 90-day letter, is it in taxpayer's best interests to execute waiver of restrictions on assessment and collection of deficiency [*see* § 96.216]?

NOTE:

If the taxpayer executes a waiver of restrictions on assessment and collection of a deficiency, he or she relinquishes the right to receive a 90-day letter and consequently loses the opportunity to pursue an appeal to the Tax Court [*see* § 96.216]. The attorney representing the taxpayer must weigh the circumstances of the particular case to determine if any advantage will be gained by signing the waiver.

2. If taxpayer has already received notice arguably constituting 90-day letter, is it in best interests of taxpayer to attempt to characterize notice as:

NOTE:

There is no prescribed form or content for a notice of deficiency. All that a notice of deficiency need do is identify the taxpayer, show that a deficiency was determined, state the taxable year involved, and set forth the amount of the deficiency [*Pasternak v. Comm'r (6th Cir. 1993) 990 F.2d 893, 897*] . Thus, characterization of correspondence from the IRS as a notice of deficiency or as a defective notice of deficiency often depends on the taxpayer's strategy.

- a. Defective (and thus forestalling amount of time in which action must be taken)?
- b. 90-day letter (thus creating immediate jurisdiction for appeal to Tax Court)?

3. If notice of deficiency was received from FTB [see *Rev. & Tax. Code* § 19033]:

NOTE:

On the California level, a "notice of deficiency" is the equivalent of a "90-day letter" on the federal level. When a taxpayer's return is available, the FTB may not assess or collect a deficiency without relying on the return [*Wertin v. FTB* (1998) 68 Cal. App. 4th 961, 971-974, 80 Cal. Rptr. 2d 644 (FTB's issuance of notice of proposed assessment of tax deficiency without reviewing tax returns for relevant year rendered FTB's assessment invalid)].

a. Was it mailed within appropriate limitations period [see § 96.110]?

b. Does the notice include a postmark, if issued for deficiency on or after January 1, 2008 [see *Rev. & Tax. Code* § 19033(e), (f)]?

c. Does it specify all of the following [*Rev. & Tax. Code* § 19034]:

(1) Reasons for proposed additional assessment?

(2) Computation of proposed additional assessment?

(3) Date determined by FTB to be last date on which taxpayer may file written protest under *Rev. & Tax Code* § 19041?

NOTE:

Failure to include this date will not invalidate a notice that is otherwise valid [*Rev. & Tax Code* § 19034(b)].

4. Has taxpayer already signed waiver of restrictions on assessment?

NOTE:

For a discussion of the consequences of this type of waiver, see § 96.216.

5. If statute of limitations on assessment is about to run, is it advisable to consent to extension of time within which to make assessment [see §§ 96.204, 96.205]?

NOTE:

IRS policy is to request extensions of assessment periods when the audit is not yet complete and the statute of limitations is about to expire. If the taxpayer refuses to consent to the extension, the IRS may simply proceed to issue a 90-day letter with the information it has, rather than let the limitations period expire. Because internally developed procedural guidelines of the IRS do not have the force of law, an attorney representing a taxpayer in this position should be aware that the examiner need not make the request for an extension and that it is unlikely a taxpayer could successfully use this as a basis to challenge the propriety of a 90-day letter that was not preceded by a request for an extension [see *Ward v. Comm'r* (9th Cir. 1986) 784 F.2d 1424, 1431 ; *Luhning v. Glotzbach* (4th Cir. 1962) 304 F.2d 560, 564-565] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAdministrationGeneral OverviewTax LawFederal Tax Administration
& ProcedureTax Credits & LiabilitiesDeficiencies (IRC secs. 6211-6216)General Overview



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31-96 California Legal Forms--Transaction Guide §§ 96.115-96.119

[Reserved]

§§ 96.115[Reserved]



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31-96 California Legal Forms--Transaction Guide § 96.120

§ 96.120 Practice Before IRS

NOTE:

Any attorney who is unfamiliar with practice before the IRS should review IRS Pub. No. 216, *Conferences and Practice Requirements*, available at www.irs.gov.

1. File with IRS one of following documents indicating practitioner's appointment as taxpayer's representative:

- a. IRS Form 2848, Power of Attorney and Declaration of Representative [*Treas. Reg. § 601.503(b)(1)*; see § 96.200].
- b. Power of attorney other than IRS Form 2848, together with completed IRS Form 2848 executed by representative [see *Treas. Reg. § 601.503(b)*].

NOTE:

The attorney should indicate on line 4 of the form whether it will be used for a specific use not recorded in the centralized authorization file (CAF). Examples of specific issues include, but are not limited, to the following [see IRS Form 2848, Instructions]:

- **Requests for a private letter ruling or technical advice.**
- **Applications for an Employer Identification Number (EIN).**
- **Claims filed on IRS Form 843, Claim for Refund and Request for Abatement.**

■ **Corporate dissolutions.**

■ **Requests to change accounting methods or periods.**

2. Keep in mind following duties and restrictions [see 31 C.F.R. pt. 10], relating to practice before IRS:

a. Do not neglect or refuse to submit, or attempt to interfere with, efforts of IRS to obtain, records or information concerning dispute [31 C.F.R. § 10.20(a)].

NOTE:

An attorney may attempt to prevent the IRS from gaining access to records or information if he or she believes in good faith and on reasonable grounds that the records or information is privileged [31 C.F.R. § 10.20(a)].

b. Advise client promptly if it appears that he or she has made error in or omission from return, document, affidavit, or other paper that client is required to execute [31 C.F.R. § 10.21].

c. Exercise diligence in [31 C.F.R. § 10.22]:

(1) Preparing or assisting in preparation of, approving, and filing papers related to client's case.

(2) Determining correctness of oral and written representations made to IRS.

(3) Determining correctness of oral and written representations made to clients concerning any matter administered by IRS.

d. Do not unreasonably delay prompt disposition of any matter before IRS [31 C.F.R. § 10.23].

e. Do not accept assistance from [31 C.F.R. § 10.24]:

(1) Person under disbarment or suspension from practice before IRS, if assistance relates to matter constituting practice before IRS [see §§ 92.11, 96.120].

(2) Any former government employee in violation of provisions of any federal law [see, e.g., 31 C.F.R. § 10.25 (practice by former government employees, their partners and associates)].

g. If licensed as notary, do not notarize any documents submitted in matters for which you are representing taxpayer before IRS [31 C.F.R. § 10.26].

h. Do not charge unconscionable fees [31 C.F.R. § 10.27(a)].

i. Do not represent parties with conflicting interests without first [31 C.F.R. § 10.29(b)].

(1) Determining that practitioner will be able to provide competent, diligent representation to all affected clients.

(2) Determining that representation is not prohibited by law.

(3) Obtaining informed, written consent to representation from all directly interested parties.

j. Observe all advertising and solicitation restrictions [*see 31 C.F.R. § 10.30*].

k. Do not negotiate refund checks made out to taxpayer [*see 31 C.F.R. § 10.31*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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31-96 California Legal Forms--Transaction Guide § 96.121

§ 96.121 Initial Notices and Requests

1. After taxpayer has executed power of attorney [*see* § 96.200]:
 - a. File original or photocopy in each office in which taxpayer will be represented.
 - b. Be prepared to supply additional copies on request.
2. If return under examination was filed jointly and spouses have subsequently separated and established separate residences, notify District Director:
 - a. That taxpayers have separated.
 - b. Of address of separate residence.
3. If taxpayer's returns for one or both of last two tax years resulted in small or no change, notify IRS immediately [*see* § 96.33].

NOTE:

The IRS discourages repetitive audits of these types of returns [*see* § 96.33]. Thus, it is in the interests of the taxpayer to attempt to short-circuit the audit if at all possible.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Tax Administration & Procedure Audits & Investigations General Overview



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31-96 California Legal Forms--Transaction Guide § 96.122

§ 96.122 Technical Advice

1. If guidance is required concerning correct application of internal revenue laws, related statutes, and regulations, ask district director to submit request for technical advice to National Office [*see Treas. Reg. § 601.105(b)(5)(iii)*; *see also § 96.206*].

NOTE:

This request should be made at the earliest possible stage of the audit. Taxpayers are encouraged to make the request in writing, setting forth the facts, law, and arguments on the issue concerning which advice is sought. However, the taxpayer may make the request orally [*Treas. Reg. § 601.105(b)(5)(iii)(a)*].

2. If district director submits matter to National Office, either of own volition or on taxpayer's request, submit statement [*Treas. Reg. § 601.105(b)(5)(iii)(g)*]:

NOTE:

If the district director submits the request without having been asked to do so by the taxpayer, the taxpayer will be informed of the referral and of his or her right to a conference in the National Office. The taxpayer will be asked to indicate whether he or she desires a conference in the event of an adverse decision [*Treas. Reg. § 601.105(b)(5)(iii)(h)*].

- a. Explaining taxpayer's position of the issues.
- b. Citing precedents that taxpayer believes apply to the case.
- c. Requesting National Office conference in event of proposed adverse decision.

3. If district director declines to refer matter to National Office, consider [see *Treas. Reg.* § 601.105(b)(5)(iv)(b)]:

a. Appealing decision by submitting the following to examining officer within 10 calendar days of being advised of decision [see *Treas. Reg.* § 601.105(b)(5)(iv)(b); see also § 96.207]:

(1) Statement of facts.

(2) Statement of law.

(3) Arguments with respect to issue.

(4) Reasons matter should be referred to National Office.

b. Submitting written request for extension of time within which to appeal [see *Treas. Reg.* § 601.105(b)(5)(iv)(b); see also § 96.208].

NOTE:

The request for an extension of time within which to appeal must be justified by the taxpayer and approved by the Chief of the Examination Division [Treas. Reg. § 601.105(b)(5)(iv)(b)].

4. If National Office conference has been requested, be prepared for conference no later than 21 days after request is submitted [see *Treas. Reg.* § 601.105(b)(5)(v)(a)].

NOTE:

The National Office will notify a taxpayer of the time and place of the conference when, after reviewing the request, it appears that adverse advice will be given to the taxpayer. If conferences are being arranged for more than one request for technical advice with respect to the same taxpayer, the National Office will attempt to arrange schedules for the convenience of the taxpayer. The conference arrangements will be made by telephone, if possible [Treas. Reg. § 601.105(b)(5)(v)(a)].

5. Within 21 days following conference at National Office, if any, furnish to National Office written record of any of the following that may have been discussed at conference but were not adequately presented in writing [Treas. Reg. § 601.105(b)(5)(v)(d)]:

NOTE:

Extensions of the 21-day time limit will be allowed only if justified in writing by the taxpayer and approved by the appropriate technical branch chief [Treas. Reg. § 601.105(b)(5)(v)(d)].

a. Additional data.

b. Lines of reasoning.

c. Precedents.

6. If taxpayer wishes to receive update on status of his or her case at National Office, contact Director, Individual Tax

Division, (202) 556-3767 or (202) 556-3788 [*Treas. Reg. § 601.105(b)(5)(v)(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureGeneral OverviewTax LawFederal Tax Administration &
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31-96 California Legal Forms--Transaction Guide § 96.123

§ 96.123 Correspondence Audit

1. Review form letter containing examiner's findings [*see Treas. Reg. § 601.105(c)(1)(i)*; § 96.209].
2. If it appears that issues raised by IRS cannot be resolved through correspondence, request meeting with examiner at district office.
3. If examiner's findings are acceptable, advise taxpayer to sign and return agreement provided by IRS [*see Treas. Reg. § 601.105(c)(1)(i)*].
4. If examiner's findings are not acceptable, take one of steps outlined in letter, such as request for meeting with Appeals Officer [*see Treas. Reg. § 601.105(c)(1)(i)*].

NOTE:

The taxpayer will be granted an Appeals Office conference without having to file a written protest to the examiner's findings [*Treas. Reg. § 601.105(c)(1)(i)*].

5. When taxpayer has decided which course of action to take, notify district director of that decision [*see Treas. Reg. § 601.105(c)(1)(i)*].

NOTE:

For a list of the appellate options, see § 96.141.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureGeneral OverviewTax LawFederal Tax Administration & ProcedureAdministrationGeneral OverviewTax LawFederal Tax Administration & ProcedureAudits &

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31-96 California Legal Forms--Transaction Guide § 96.124

§ 96.124 Office Audit

1. Assemble all documents that:
 - a. Were requested in audit notice.
 - b. Were not requested in audit notice but that might support taxpayer's return.
2. Contact potential witnesses, if any, with knowledge of transactions relevant to tax year(s) under examination.

NOTE:

At the early stages of an office audit, the taxpayer normally will not need to seek the supporting testimony or declarations of witnesses. However, it is good practice to determine (if possible) whether the witnesses will provide favorable or damaging testimony. For example, if an important witness would provide damaging testimony or testimony that would not support the taxpayer's position, pursuing a case through several appellate levels may be inadvisable.

3. Either:
 - a. Meet with examiner at IRS office designated in notice; or
 - b. If meeting at designated office would be inconvenient, request transfer of case to another district office [see *Treas. Reg. § 301.7605-1(e)*; § 96.112, & 1].
4. If taxpayer disagrees with examiner's proposed adjustments, consider examiner's explanation of alternatives, including immediate conference with Appeals Officer [see *Treas. Reg. § 601.105(c)(1)(ii)*].

5. If taxpayer does not request immediate conference with Office of Appeals, await receipt of examination report and 30-day letter (transmittal letter) [see *Treas. Reg. § 601.105(c)(1)(ii)*].

6. On receipt of 30-day letter, consider available alternatives detailed in letter, and either [see *Treas. Reg. § 601.105(c)(1)(ii)*]:

a. Take no action; or

NOTE:

If the taxpayer takes no action following receipt of the examination report and the 30-day letter, he or she will receive a notice of deficiency (90-day letter) on the expiration of 30 days.

b. Decide what course of appellate action to take, and notify district director of that decision.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAdministrationGeneral OverviewTax LawFederal Tax Administration & ProcedureAudits & InvestigationsGeneral Overview



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31-96 California Legal Forms--Transaction Guide § 96.125

§ 96.125 Field Audit

1. Review all documents, records, and other materials relevant to tax year(s) under examination, and:
 - a. Organize them in logical manner at convenient location on taxpayer's premises.
 - b. Give assigned examiner access to those premises.
2. If, at conclusion of examination, taxpayer does not agree with examiner's proposals, be prepared for some delay in proceeding while case is submitted for appropriate review to [*Treas. Reg. § 601.105(c)(2)(i)*]:
 - a. District Centralized Services; and/or
 - b. Quality Review.
3. Await receipt of examination report and 30-day letter [*Treas. Reg. § 601.105(c)(2)(i)*; see § 96.50[2]].
4. Consider alternative procedures explained in 30-day letter, and [*Treas. Reg. § 601.105(c)(2)(i)*]:
 - a. Take no action.

NOTE:

If the taxpayer takes no action following receipt of the examination report and the 30-day letter, he or she will receive a notice of deficiency (90-day letter) on the expiration of 30 days [*see* § 96.126].

- b. Decide what course of appellate action to take, if any, and notify district director of that decision.

Legal Topics:

For related research and practice materials, see the following legal topics:

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31-96 California Legal Forms--Transaction Guide § 96.126

§ 96.126 90-Day Letter (Notice of Deficiency)

1. Review notice to ensure that it was sent to taxpayer.

NOTE:

Except in cases in which a fiduciary is handling the examination of a deceased taxpayer's return [see I.R.C. § 6903], the 90-day letter must be sent to the taxpayer at his or her last known address, even when the taxpayer is deceased, under a legal disability, or, in the case of a corporation, has terminated its existence [Treas. Reg. § 301.6212-1(b)(1)].

2. If appropriate, notify district director for Internal Revenue district in which joint return was filed that spouses have since established separate residences.

NOTE:

Unless the district director is notified that spouses have established separate residences, he or she may send a 90-day notice to either spouse at the spouse's last known address. However, if notification has been made, a duplicate notice of the original of the joint notice will be sent to the separate residence by either registered or certified mail [Treas. Reg. § 301.6212-1(b)(2)].

3. Determine advisability of appeal to Tax Court [see §§ 96.50[4], 96.145].

NOTE:

If an appeal is made to the Tax Court, no additional deficiency may be determined with respect to (1) income tax for the same taxable year; (2) gift tax for the same calendar period [see Treas. Reg. § 25.2502-1(c)(1)]; and (3) estate tax with respect to the taxable estate of the same decedent [Treas. Reg. § 301.6212-1(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAdministrationTax Payment & Tax Return Requirements (IRC secs. 6071-6091, 6151-6167)Place to File ReturnsTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesDeficiencies (IRC secs. 6211-6216)General Overview



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31-96 California Legal Forms--Transaction Guide § 96.127

§ 96.127 Terminating Accrual of Interest on Deficiencies

1. If it appears that there will be deficiency assessment (even though exact amount remains under dispute), consider sending money to cover all or part of assessment to stop interest from accruing [see IRS Pub. No. 556, at 5]:

NOTE:

When a payment is made during the audit, interest will stop accruing on the amount of the deficiency covered by the payment on the date the IRS receives the payment. Because of the compounding rules, interest will continue to accrue on accrued interest even though the underlying tax has been paid. To stop the accrual of both tax and interest, the taxpayer must make a payment or deposit for both the tax and the interest that has accrued as of the date of payment or deposit [IRS Pub. No. 556, at 5].

a. Paying tax; or

NOTE:

If the tax is paid and it ultimately develops that there was an overpayment, the taxpayer will have to file a claim for a refund in order to recover this type of payment [*I.R.C. § 7422(a)*; see § 96.211].

b. Making deposit in form of cash bond.

NOTE:

A deposit does not earn interest. If it is returned to the taxpayer, no interest will be included [IRS Pub. No. 556, at 5].

2. If taxpayer makes deposit, keep in mind that it will be returned on taxpayer's request, without filing a claim for refund, unless the IRS:

NOTE:

If a deficiency is later assessed for the period and type of tax for which a returned deposit was made, interest will be calculated as if the funds were never on deposit [IRS Pub. No. 556, at 5].

- a. Assesses a tax liability.
- b. Determines that return will jeopardize collecting future deficiency.
- c. Determines that deposit should be applied against another tax liability.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAudits & InvestigationsGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesDeficiencies (IRC secs. 6211-6216)General Overview



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31-96 California Legal Forms--Transaction Guide § 96.128

§ 96.128 Abating Interest Assessments

1. Request abatement of interest assessment on [*I.R.C. § 6404(e)(1)*]:

NOTE:

Interest assessments arising from errors and delays will be abated only if the errors and delays were in no way attributable to the taxpayer [*I.R.C. § 6404(e)(1)*].

a. Any deficiency attributable in whole or in part to error or delay by IRS officer or employee.

b. Delayed payment of tax when delay was attributable to IRS officer or employee performing in "dilatory" manner.

2. If taxpayer received erroneous refund check, make sure interest is not charged on assessed amount for any time before date IRS demands repayment [*see I.R.C. § 6404(e)(2)*] unless:

a. Taxpayer or related party in any way caused erroneous refund to be made; or

b. Erroneous refunds exceed \$50,000.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesCivil Penalties (IRC secs. 6651-6751)General Overview



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31-96 California Legal Forms--Transaction Guide §§ 96.129-96.139

[Reserved]

§§ 96.129[Reserved]



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31-96 California Legal Forms--Transaction Guide § 96.140

§ 96.140 Procedures Within Audit Division

1. If taxpayer agrees with examiner's findings:
 - a. Sign form indicating agreement to changes in return [*see* § 96.209; *see also* § 96.216 (substantially similar to waiver that must be signed by taxpayer)].
 - b. Pay any additional tax owed.
2. If taxpayer disagrees with examiner's findings, request immediate meeting with examiner's supervisor and, if agreement is reached, follow steps in (1), *above*.
3. If agreement is not reached with examiner's supervisor at federal level, be prepared to receive and consider advisable response to:
 - a. 30-day letter notifying taxpayer of his or her right to appeal proposed adjustments within 30 days [*see* § 96.50[2]].
 - b. Copy of examination report explaining proposed adjustments [*see* § 96.209].
 - c. Agreement or waiver form [*see* §§ 96.209, 96.216].
 - d. Copy of IRS Pub. No. 5, *Your Appeal Rights and How to Prepare a Protest If You Don't Agree*.
4. If agreement is not reached with audit supervisor at state level, be prepared to receive and consider advisable response to [*see* FTB *Internal Procedures Manual Tax Audit Manual*, § 13100]:

- a. Notice of Proposed Adjustments, detailing computation of adjustments.
- b. Written explanation of basis for proposed adjustments.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAdministrationGeneral OverviewTax LawFederal Tax Administration
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31-96 California Legal Forms--Transaction Guide § 96.141

§ 96.141 Conferences Within Office of Appeals

1. If taxpayer wishes to pursue possible settlement or compromise of case within IRS, submit written request for appeals conference to director of district in which audit was conducted.

NOTE:

The IRS encourages taxpayers to pursue resolution through appeals conferences before pursuing judicial remedies [see IRS Pub. No. 556, at 9].

2. Prepare written protest of federal report if [*see generally* IRS Pub. No. 5; *see also* § 96.210]:

a. Proposed adjustment in tax liability is more than \$2,500 for any tax periods involved;
or

b. If examination was conducted in any manner other than:

(1) Correspondence.

(2) In Internal Revenue office by tax auditor.

3. Be certain written protest contains all of following [*see* IRS Pub. No. 5; *see also* § 96.210]:

a. Statement that taxpayer wishes to appeal examiner's findings to Office of Appeals.

b. Taxpayer's name and address.

c. Date and symbols from letter showing proposed adjustments and findings being protested.

d. Tax periods or years involved.

- e. Itemized schedule of adjustments to which taxpayer does not agree.
- f. Statement of facts supporting taxpayer's position on any issue over which there is dispute.

NOTE:

This statement must be made under penalty of perjury. The IRS suggests alternative declarations for use in the statement of facts: one for use when the taxpayer prepares the protest, and another for use by a representative handling the protest on the taxpayer's behalf [*see* § 96.210].

- g. Statement outlining law or other authority on which taxpayer's position is based.
4. If Office of Appeals conference were requested, await notification of time and place at which conference is scheduled to take place.
5. Prepare written protest of state assessment [*see Rev. & Tax. Code § 19041; see § 96.231*]:
- a. Within 60 days after mailing of notice of additional tax proposed to be assessed.

NOTE:

If no protest is filed, a state assessment becomes final upon the expiration of 60 days from the date the notice of assessment was mailed [*Rev. & Tax. Code § 19042*].

- b. Stating grounds on which protest is based.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAdministrationGeneral OverviewTax LawFederal Tax Administration & ProcedureAudits & InvestigationsGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)General Overview



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31-96 California Legal Forms--Transaction Guide § 96.142

§ 96.142 Compromise

1. Explore possibilities of compromise of proposed assessment with IRS if there is [*I.R.C. § 7122(a)*]; see *Treas. Reg. § 301.7122-1(c)*]:

NOTE:

The IRS Commissioner has the power to accept a lesser amount in any civil or criminal tax case before referring the case to the Justice Department for prosecution or defense [*I.R.C. § 7122(a)*]. The Attorney General, or its delegate, may also compromise a case after reference to the Justice Department [*I.R.C. § 7122(a)*].

a. Doubt about taxpayer's liability; or

b. Doubt about collectibility of tax even if it is assessed.

c. No doubt about liability or collectibility, but either:

(1) Collection of full liability would cause taxpayer economic hardship [*see Treas. Reg. § 301.6343-1(b)(4)* (meaning of "economic hardship")]; or

(2) Regardless of taxpayer's financial circumstances, case presents compelling reasons that IRS determines are a sufficient basis for compromise.

2. If compromise offer is made orally, immediately confirm offer in writing [*see § 96.212*].

NOTE:

The requirement that compromises of tax cases be in writing is rigorously enforced. Oral compromises will not be upheld [*Boulez v. Comm'r (D.C. Cir. 1987) 810 F.2d 209, 218-219* , cert.

denied, 484 U.S. 896 (1987) ; see Treas. Reg. § 301.7122-1(d)(1).

3. If taxpayer is prepared to make compromise offer based on doubt about liability or collectibility [see *Treas. Reg. § 301.7122-1(b)*], complete IRS Form 656 (Offer in Compromise) [see § 96.212] and either or both Form 433-A [see § 96.213], if taxpayer is individual, and Form 433-B [see 96.214], if taxpayer is business.

NOTE:

The taxpayer should not send financial information for an offer based solely on doubt as to liability [see I.R.C. § 7122(d)(3)(B)(ii)]. Any offer of compromise should be made in good faith. Frivolous offers or offers submitted for the purpose of delaying collection will be returned by the IRS [see Treas. Reg. § 301.7122-1(f)(5)(ii), (g)(4)].

4. If taxpayer is prepared to make compromise offer when there is no doubt about liability or collectibility, but when either collection of full liability would create economic hardship [see *Treas. Reg. § 301.6343-1(b)(4)* ("economic hardship" defined)], or, regardless of taxpayer's financial circumstances, exceptional circumstances exist [see § 96.212[2] (Instructions)]:

a. Complete IRS Form 656 (Offer in Compromise) indicating the taxpayer's offer amount [see § 96.212].

NOTE:

Complete Item 9 of Form 656 [**see § 96.212[2]**], clearly explaining why paying the liability in full would create an economic hardship or result in an unfair or inequitable situation for the taxpayer. For further discussion of compromise based on these issues, see § 96.212[1][d].

b. Complete IRS Form 433A, Collection Information Statement for Individuals and attach it to IRS Form 656-A [see § 96.215].

c. If applicable, complete IRS Form 433B, Collection Statement for Businesses.

5. Make payment in one of three ways [see IRS Form 656 (Offer in Compromise) (see § 96.212)]; *Treas. Reg. § 301.7122-1(e)(3)*:

NOTE:

Partial payment generally is required with the submission of an offer in compromise [see I.R.C. § 7122(c)(1); I.R.C. § 7122(c)(2)(C) (exceptions)]. A lump sum offer in compromise (that is, any offer of payments made in 5 or fewer installments) must be accompanied by the payment of 20 percent of the amount of the offer [I.R.C. § 7122(c)(1)(A)]. Any periodic payment offer in compromise must be accompanied by payment of the amount of the first proposed installment [I.R.C. § 7122(c)(2)(A)].

a. Cash (paid in 90 days or less);

b. Short-term deferred payment (more than 90 days, up to 24 months); or

c. Deferred payment (offers with payment terms over remaining statutory period for collecting tax owed).

NOTE:

In the case of installment offers, keep in mind that if a final payment on an accepted compromise offer is contingent on the immediate or simultaneous release of a tax lien in whole or in part, that final payment will have to be made in accordance with the forms, instructions, or procedures prescribed by the IRS [Treas. Reg. § 301.7122-1(e)(4)].

6. If desired, withdraw offer of compromise at any time before its acceptance [see *Treas. Reg. § 301.7122-1(d)(3)*].
7. Be prepared to waive running of statutory period of limitations on both (or either) assessment and collection of tax liability with respect to which compromise offer is made for [see *I.R.C. §§ 633(i)(5), (k)(3), 6502; Treas. Reg. § 301-7122-1(g)* see also §§ 96.110 (limitations period), 96.204, 96.205 (IRS waiver forms)].

NOTE:

The statute of limitations on collection is suspended during the period in which IRS is prohibited from making a levy or otherwise enforcing collection against the liability that is the subject of the offer in compromise [Treas. Reg. § 301.7122-1(h)(1)].

8. If taxpayer is notified in writing that compromise offer is accepted, be prepared to [see *Treas. Reg. § 301.7122-1(e)*]:
 - a. Enter into collateral agreement proposed by IRS.
 - b. Post security deemed necessary for protection of government's interests.
9. If taxpayer's compromise offer is rejected or if taxpayer decides to withdraw offer, make sure that any amount submitted with offer is refunded [see *Treas. Reg. § 301.7122-1(f)*].

NOTE:

If the IRS rejects an offer of compromise, the taxpayer will be notified of the rejection in writing [see *Treas. Reg. § 301.7122-1(f)(1)*]. The taxpayer has right to appeal the decision to the Office of Appeals within 30 days from the date of the rejection letter [Treas. Reg. § 301.7122-1(f)(5)(i)].

10. Determine if taxpayer wishes to submit another offer.

NOTE:

If the offer is increased and the taxpayer's financial situation remains unchanged, additional financial information need not be submitted unless the original offer is more than six months old. However, the taxpayer must provide updated financial information when the original offer is more than six months old or when the taxpayer's financial situation changes [see § 96.212[2]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAdministrationGeneral OverviewTax LawFederal Tax Administration & ProcedureSettlementsGeneral OverviewTax LawFederal Tax Administration & ProcedureSettlementsClosing Agreements & Compromises (IRC secs. 7121-7124)General Overview



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31-96 California Legal Forms--Transaction Guide § 96.143

§ 96.143 Settlement and Final Closing Agreements

1. If taxpayer and examiner or Appeals Officer agree to settle tax liability, attempt to finalize agreement by showing that [*see I.R.C. § 7121; Treas. Reg. § 301.7121-1(a); see also §§ 96.217, 96.218; Rev. Proc. 68-16, 1968-1 C.B. 770*]:

NOTE:

If a settlement is reached, it will normally be in the taxpayer's best interests to memorialize it in a final closing agreement. However, the IRS may be reluctant to enter into this type of agreement unless it is convinced the interests of the government will not be adversely affected [*see Treas. Reg. § 301.7121-1(a)*].

a. There is advantage to having case permanently and conclusively closed.

b. There are "good and sufficient reasons" for wanting case closed, and there is no disadvantage to government in consummating agreement.

2. Determine whether closing agreement will be drafted to cover [*see Treas. Reg. § 301.7121-1(b)*]:

a. Entire tax period [*see § 96.218*].

b. One or more separate items affecting tax liability [*see Form 96.217*].

c. Both specific items and liability for entire tax period.

NOTE:

There is no IRS form designed to be used as a combination closing agreement. If a

combination agreement is necessary, the final page of Treasury Form 906 [*see* § 96.217] should be used as the final page of the combination agreement [*Rev. Proc. 68-16, 1968-1 C.B. 770*].

3. Prepare closing agreement by requesting and completing IRS Form 866 [*see* § 96.218] or IRS Form 906 [*see* § 96.217].

NOTE:

Closing agreements must be executed on the forms prepared by the IRS [Treas. Reg. § 301.7121-1(d)]. If multiple taxpayers sign the agreement (for example, in the case of a joint return), two additional copies must be prepared for each additional party [*Rev. Proc. 68-16, 1968-1 C.B. 770*].

4. If closing agreement relates to deficiency assessment of \$500 or more, specify [I.R.C. § 7121(b)]:

a. Amount of tax assessed.

b. Amount of interest, additional amount, addition to tax, or assessable penalty, imposed by law on taxpayer against whom tax is assessed.

c. Amount actually paid in accordance with terms of compromise.

5. If space on IRS Form 866 [*see* § 96.218] or 906 [*see* § 96.217] is insufficient for contents of agreement [*Rev. Proc. 68-16, 1968-1 C.B. 770*]:

a. Submit entire agreement on plain bond paper containing all printed provisions on Form 866 or 906; or

b. After completing first page of Form 906, insert clearly identified pages containing additional material between first and second pages of that form.

6. In first paragraph of agreement, specify taxpayer's name, address, and taxpayer identification number [*Rev. Proc. 68-16, 1968-1 C.B. 770*].

7. If it is necessary to include attachments [*Rev. Proc. 68-16, 1968-1 C.B. 770*]:

a. Clearly identify each attachment; and

b. Number top of each page.

8. Do not alter or erase any significant portion of agreement [*Rev. Proc. 68-16, 1968-1 C.B. 770*].

9. If change to agreement becomes necessary after IRS has received agreement, make sure that taxpayer dates and initials each page on which change was made [*Rev. Proc. 68-16, 1968-1 C.B. 770*].

10. Do not include in agreement [*Rev. Proc. 68-16, 1968-1 C.B. 770*]:

a. Conditions.

NOTE:

One exception to the rule that a closing agreement may contain no conditions exists

for a condition stating that another closing agreement between the IRS and a related taxpayer will be accepted if it is concurrently submitted and deemed to be acceptable [*Rev. Proc. 68-16, 1968-1 C.B. 770*].

- b. Provision requiring taxpayer to take some action in future concerning his or her tax liability.
- c. Provision relating to interest unless taxpayer's liability for interest was specifically resolved by agreement.

11. When agreement is complete:

NOTE:

If the IRS forms are not used, the page on which the signatures appear must contain at least two lines of the provision that immediately precedes the signatures [*Rev. Proc. 68-16, 1968-1 C.B. 770*].

- a. Have taxpayer(s) sign at end of agreement.

NOTE:

If the taxpayer's representative wishes to sign on the taxpayer's behalf, he or she must be specifically authorized to do so under the power of attorney filed with the IRS, a copy of which must be submitted [*Rev. Proc. 68-16, 1968-1 C.B. 770* ; **see** § 96.200].

If spouses are entering into the agreement, one may sign as the agent of the other only if the signing spouse evidences authority under a power of attorney executed by the other spouse. Otherwise, both spouses' signatures must appear on the agreement [*Rev. Proc. 68-16, 1968-1 C.B. 770*].

- b. Make sure that Internal Revenue officer specifically delegated by Commissioner signs on behalf of government [see *Treas. Reg. § 601.202(c)(4)* (list of designated officers)].

12. If taxpayer wishes final and conclusive agreement concerning liability for California income tax for any taxable period [Rev. & Tax. Code § 19441; see § 96.33]:

- a. Prepare agreement to be submitted to:

- (1) FTB; or

- (2) Person authorized in writing by FTB to make agreements with taxpayers concerning their tax liability.

- b. Obtain approval of FTB.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAdministrationGeneral OverviewTax LawFederal Tax Administration & ProcedureSettlementsGeneral OverviewTax LawFederal Tax Administration & ProcedureSettlementsClosing Agreements & Compromises (IRC secs. 7121-7124)Closing Agreements



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31-96 California Legal Forms--Transaction Guide § 96.144

§ 96.144 Claims for Credits or Refunds

1. If taxpayer determines that he or she is entitled to credit or refund for federal tax period under examination, act promptly to ensure that claim is filed within later of [I.R.C. § 6511(a), (c)(1); *see Treas. Reg. § 301.6402-2(a)*; *see also § 96.211*]:

- a. Three years from time that return was filed;
- b. Two years from time that tax was paid; or
- c. If taxpayer executed agreement to extend assessment period [*see I.R.C. § 6501(c)(4)*], within six months after expiration of extension.

2. Complete Form 1040X for refund of federal tax [*see Treas. Reg. § 301.6402-3(a)(2)*; *see also § 96.211*].

3. If taxpayer determines that he or she is entitled to credit or refund for state tax period under examination, act promptly to ensure that claim is filed within later of [*Rev. & Tax. Code § 19306*; *see § 96.233*]:

NOTE:

The ordinary limitation period is described below; however, different periods may apply under particular circumstances [*see Rev. & Tax. Code §§ 19308, 19311-19314*; *see also § 96.233*].

- a. Period ending four years from date return was filed (if filed within time prescribed by *Rev. & Tax. Code § 18567* or *18604*, whichever is applicable);

b. Period ending four years from last day prescribed for filing return (determined without regard to any extension of time for filing return); or

c. One year from date overpayment of tax was made.

4. Complete Form 540X for refund of state tax [*see* § 96.233].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Tax Administration & Procedure Tax Credits & Liabilities General Overview



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31-96 California Legal Forms--Transaction Guide § 96.145

§ 96.145 Appeal to Tax Court

1. If taxpayer has received 90-day letter from IRS, consider filing appeal to Tax Court when:

NOTE:

The appellant taxpayer has the burden of proving that the amount of the deficiency assessment is incorrect [*Kiesel v. United States* (8th Cir. 1976) 545 F.2d 1144, 1146] .

- a. Dispute involves complex question of tax law.
 - b. There is any reason to believe that Tax Court would be more receptive to taxpayer's position than would IRS examiner and/or appeals officer.
2. If taxpayer decides to take case to Tax Court, prepare petition and file within 90 days from date of deficiency notice [*see § 96.50[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureTax Court (IRC secs. 7441-7491)General OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesGeneral Overview



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31-96 California Legal Forms--Transaction Guide § 96.146

§ 96.146 Appeal to State Board of Equalization

1. If taxpayer disagrees with assessments contained in FTB's Notice of Action, take following steps within 30 days from date of that notice:

- a. Prepare and submit two copies of following documents to State Board of Equalization (Board) in Sacramento [*Rev. & Tax. Code § 19046; see § 96.232*]:
 - (1) Appeal; and

NOTE:

On receipt of the appeal, the Board of Equalization will provide one copy of the appeal and one copy of any supporting documents to the FTB [*Rev. & Tax. Code § 19046*].

- (2) Any supporting documentation.

- b. Prepare for oral hearing before Board.

2. After receiving notification of Board's determination, either [*Rev. & Tax. Code § 19048*]:

- a. Agree with determination and pay additional tax, if necessary; or
- b. File petition for rehearing within 30 days from receipt of determination.

NOTE:

The determination of the Board becomes final on the expiration of 30 days from the time it is rendered unless, within that 30-day period, the taxpayer or the FTB files a petition for a rehearing with the Board. If a petition for rehearing is filed, the

decision of the Board will become final on the expiration of 30 days from the day the Board issues its opinion of the petition [Rev. & Tax. Code § 19048].

3. If determination of Board is unsatisfactory to taxpayer, consider petition to California Superior Court.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawState & Local TaxesGeneral Overview



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31-96 California Legal Forms--Transaction Guide § 96.147

§ 96.147 Payments on Compromises

1. Ensure that client makes correct payment to IRS.
2. If final payment on accepted settlement offer is contingent on immediate or simultaneous release of tax lien in whole or in part, make sure that payment is made to IRS in accordance with forms, instructions, or procedures prescribed by IRS [*Treas. Reg. § 301.7122-1(e)(4)*]; under prior law, those payments were required to be made in one of following forms [former *Treas. Reg. § 301.7122-1(d)(1)*]:
 - a. Cash;
 - b. Certified cashier's or treasurer's check drawn at bank or trust company incorporated under laws of United States, or any state, territory or possession; or
 - c. United States postal bank, express, or telegraph money order.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureSettlementsGeneral OverviewTax LawFederal Tax Administration & ProcedureSettlementsClosing Agreements & Compromises (IRC secs. 7121-7124)Compromises



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31-96 California Legal Forms--Transaction Guide § 96.148

§ 96.148 Revocation of Appointment of Representative

1. If taxpayer wishes to revoke appointment of representative to handle his or her interests before IRS, prepare statement to that effect and make sure that it:
 - a. Lists name and address of each representative whose authority is being revoked.
 - b. Is signed by taxpayer.
 - c. Is sent to each IRS offices in which appointment is on file.
2. Arrange for appointment of new representative, if desired [*see* § 96.200].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawAgency RelationshipsTypesGeneral OverviewTax LawFederal Tax Administration & ProcedureGeneral Overview



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31-96 California Legal Forms--Transaction Guide § 96.149

§ 96.149 Collection on Assessment

1. Advise taxpayer that IRS or FTB may institute judicial proceedings or levy to collect assessment at any time within 10 years after assessment was made [*I.R.C. § 6502(a)*; *Rev. & Tax. Code § 19371*].

NOTE:

This limitations period is suspended during the pendency of a deficiency notice (that is, 90 or 150 days). If a deficiency assessment is appealed to the Tax Court, the limitations period is suspended until 60 days after the Tax Court decision becomes final [*Treas. Reg. § 301.6503(a)-1(a)(1)*].

2. If acceptable to taxpayer and requested by IRS, execute additional extensions of limitations period [*see Treas. Reg. § 301.6502-1(a)(2)(iii)*; *see also §§ 96.204, 96.205*]:

NOTE:

There is no limit on the number of extensions that may be agreed on [*see Treas. Reg. § 301.6502-1(a)(2)*].

a. In writing.

b. Before expiration of period previously agreed on.

3. Advise taxpayer whose California assessment has become final to [*Rev. & Tax. Code § 19049*]:

NOTE:

Effective for notices of deficiency issued on or after January 1, 2008, the notice must be mailed in such manner that it includes a postmark[*Rev. & Tax. Code §*

19049(c), (d)].

- a. Expect to receive notice and demand for payment from FTB; and
- b. Pay assessment within 15 days.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAdministrationGeneral OverviewTax LawFederal Tax Administration
& ProcedureTax Credits & LiabilitiesCollection (IRC secs. 6301-6317)General Overview



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31-96 California Legal Forms--Transaction Guide § 96.150

§ 96.150 Miscellaneous Procedures

1. When audit of federal return is concluded, be prepared to respond to inquiries of FTB concerning same or similar issues [*see* § 96.37[2]].
2. If taxpayer files amended federal income tax return [§ 96.211], be sure to have taxpayer do following within six months [*Rev. & Tax. Code* § 18622]:
 - a. File similarly amended return with FTB [*see* § 96.233]; and
 - b. Pay any additional tax that may be due or claim refund, if any, due [*see* § 96.144].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAudits & InvestigationsGeneral OverviewTax LawFederal Tax Administration & ProcedureReturn Preparers (IRC secs. 6060, 6107, 6694-6696, 6713, 7216, 7407, 7427)General Overview



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31-96 California Legal Forms--Transaction Guide §§ 96.151-96.199

[Reserved]

§§ 96.151[Reserved]



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31-96 California Legal Forms--Transaction Guide § 96.200

§ 96.200 Power of Attorney and Declaration of Representative [IRS Form 2848]

[1] Comment

[a] Use of Form

This form [IRS Form 2848] is a power of attorney that a taxpayer uses to empower an agent to represent him or her before the Internal Revenue Service (IRS) with respect to specified tax matters [*see Treas. Reg. § 601.504(a)* (situations in which power of attorney is required)]. Only a person recognized to practice before the IRS may be designated [*see* 96.11]. Form 2848, and instructions for completing and filing it, may be obtained from the IRS, and are available online at the IRS website, www.irs.gov. The IRS will accept a power of attorney other than IRS Form 2848 only if the power of attorney meets certain requirements detailed by regulation [*see Treas. Reg. § 601.503(b)(2)*]. The form is reproduced in [2], *below*, along with the official IRS instructions.

A taxpayer's representative must execute a written declaration and attach it to the taxpayer's power of attorney [*Treas. Reg. § 601.502(c)*]. Part II of this form, properly completed, satisfies the requirement of the representative's declaration [*see Treas. Reg. § 601.503(b)(1)*].

This form allows the attorney in fact to perform essentially all the acts the taxpayer could perform.

If the taxpayer does not want to appoint a representative, but does wish to authorize another individual or an entity to inspect and/or receive confidential tax information relating to the taxpayer, the taxpayer should use IRS Form 8821 [*see* § 96.201].

For the analogous FTB for form use in California state tax matters, see § 96.230.

[b] Contents of Form

The form is largely self-explanatory. Some items of note include:

- More than one authorized representative may be appointed [see IRS Form 2848, § 2].
- Specific types of tax and specific tax years or periods must be listed [see IRS Form 2848, § 3]. A single power of attorney may cover more than one type of tax and more than one tax period. "Blanket" powers of attorney, covering "all types of taxes" or "all taxable years" are not acceptable. For example, "Income taxes (Form 1040) for 2002, 2003, 2004, and Payroll taxes (Form 941) for 2003 and 2004" would be correct. However, "all tax matters--2003/12, 2004/12" or "Income tax--2002 and subsequent years" would not be correct.
- If more than one representative is to receive copies of written communications, that fact must be noted [see IRS Form 2848, § 7].
- Form 2848 will revoke all previous powers of attorney, unless the previous representative is identified on this form, or a copy of the power of attorney to remain in effect is attached to this form.

[2] FORM

Power of Attorney and Declaration of Representative [IRS Form 2848]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Tax Law Federal Tax Administration & Procedure Audits & Investigations General Overview



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31-96 California Legal Forms--Transaction Guide § 96.201

§ 96.201 Tax Information Authorization [IRS Form 8821]

[1] Comment

[a] Use of Form

This form [IRS Form 8821] is used by a taxpayer who wishes to authorize another individual or an entity to inspect and/or receive confidential tax information relating to the taxpayer [*see I.R.C. § 6103(c); Treas. Reg. §§ 301.6103(c)-1, 601.501(b)(15)*]. The authorization will apply to the type of tax and the years or periods specified in the form. The form is a disclosure authorization only and cannot be used to appoint a representative. If the taxpayer wishes to authorize an individual to represent the taxpayer's interests before the IRS, the taxpayer must complete IRS Form 2848 [*see § 96.200; see also Treas. Reg. § 601.504(a)*] (situations in which power of attorney is required)]. Form 8821, and instructions for completing and filing it, may be obtained from the IRS, and are available online at the IRS website, www.irs.gov.

A taxpayer may file a tax information authorization without using this form. However, the authorization must contain all of the information required on this form [*see [2], below (General Instructions to IRS Form 8821)*].

A taxpayer may also use a nonwritten consent authorizing the disclosure of tax returns and return information to a third party assisting the taxpayer in resolving tax related matters. Thus, for example, the taxpayer can orally consent to disclosures by the IRS to a person accompanying the taxpayer to meetings or interviews with the IRS, or participating in a telephone conversation with the taxpayer. When the taxpayer is present, either physically or on the telephone, the taxpayer will be able to consent to the disclosure knowingly and voluntarily without the need for further expressing that intent in writing. The IRS is required to take reasonable steps to confirm the identity of the taxpayer and the designee before disclosing tax returns and return information [*Treas. Reg. § 301.6103(c)-1(c)*].

[b] Filing

The taxpayer must file the form with each IRS office in which the taxpayer wants the appointee to inspect and/or receive confidential tax information on the taxpayer's behalf. The taxpayer may file the authorization by mail, by fax, or

electronically [see [2], *below* (General Instructions to IRS Form 8821)]. If the authorization is filed for a matter currently pending before an IRS office, the taxpayer must file the authorization with that office [see [2], *below* (General Instructions to IRS Form 8821)].

[c] Revocation of Previous Authorizations

As indicated in Paragraph 6 of this form, filing a tax information authorization automatically revokes all previously filed tax information authorizations covering the same tax matters and time periods covered by the newly filed form. However, the taxpayer may prevent a revocation from occurring by checking the appropriate box in Paragraph 6.

[2] FORM

Tax Information Authorization [IRS Form 8821]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Tax Law Federal Tax Administration & Procedure Audits & Investigations General Overview



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31-96 California Legal Forms--Transaction Guide § 96.202

§ 96.202 Request for Copy of Tax Return [IRS Form 4506]

[1] Comment--Use of Form

This form [IRS Form 4506] is used by a taxpayer to request a copy of his or her tax return. If the taxpayer had the return prepared by a paid preparer, the preparer should be able to provide a copy. However, if a taxpayer does not have, or is unable to obtain, a copy of his or her tax return, and the IRS has notified the taxpayer that it will examine (audit) the return, the taxpayer (or the taxpayer's representative) should obtain copies of the return to be examined, and copies of any other returns for which the statute of limitations has not expired [*see I.R.C. § 6501(a); Treas. Reg. § 301.6501(a)-1(a); see also § 96.110*].

[2] FORM

Request for Copy of Tax Return [IRS Form 4506]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Tax Administration & ProcedureAdministrationGeneral Overview



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31-96 California Legal Forms--Transaction Guide § 96.203

§ 96.203 Request for Transfer of Examination

[1] Comment--Use of Form

This form is a request for the transfer of an examination (audit) from the district in which the taxpayer resides to another district. It may be used to request a change of venue for an office examination or a field audit [see § 96.32].

Sometimes a return may be examined more quickly and conveniently if the audit is conducted in a district other than the one in which the taxpayer lives. For example, if the taxpayer must produce substantial documentary evidence, records, or books, it may be preferable to conduct the audit in the district where those materials are located [see IRS Pub. No. 556, at 3-4]. In this case, the taxpayer may use this form to request a change of district.

[2] FORM

Request for Transfer of Examination

Request for Transfer

[On practitioner's letterhead:]

_____[date]
United States Treasury Department
Internal Revenue Service
Office of the District Director
_____[address]

RE: Taxpayer: _____ [name]
Taxpayer Identification Number: _____
Address: _____
Type of Tax: _____
Tax Years ending: _____

Dear Sir or Madam:

I represent the above-referenced taxpayer in the audit of _____[his or her] return for the [type of tax] and the tax period ending _____[date].

The examination has been scheduled for _____[date], at the IRS district office located in _____[city], California. I would like to request that the examination be transferred to the district office in _____[city] and rescheduled. Taxpayer's return can be examined more quickly and conveniently in the [requested district office], because [specify reasons].

Form 2848, authorizing me to represent the taxpayer in this matter, is on file with your office.

Thank you for your attention. I look forward to hearing from you at your earliest convenience

Sincerely,

_____[representative's signature]

[typed name]

[title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAdministrationGeneral OverviewTax LawFederal Tax Administration & ProcedureAudits & InvestigationsExaminations (IRC secs. 7601-7606, 7608-7613)General Overview



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31-96 California Legal Forms--Transaction Guide § 96.204

§ 96.204 Consent to Extend Time to Assess Tax [IRS Form 872]

[1] Comment

[a] Use of Form

This form [IRS Form 872] is a consent to extend the statute of limitations for the assessment of tax. An extension of the statute of limitations using this form sets a fixed time limit in which the IRS must either issue a notice of deficiency, decide not to assess additional tax, or negotiate a new extension. The IRS will likely ask a taxpayer to sign Form 872 when the assessment period will expire before the audit is complete.

For coverage of applicable statutes of limitation, see § 96.110. For a form that waives (rather than extends) the statute of limitations until the taxpayer gives the IRS notice that he or she is revoking the waiver, see § 96.205.

[b] When to Extend Statute of Limitations

Whether to extend the statute of limitations should be given careful consideration. One "advantage" of extending the statute is that the IRS will not be forced to issue a notice of deficiency that might be more detrimental to the taxpayer than a carefully negotiated 30-day letter. On the other hand, extending the statute will give the examiner more time to uncover potentially damaging issues. If the IRS has failed to discover damaging issues, or has not been diligent in its examination, it may be to the taxpayer's advantage to refuse to extend the statute of limitations. In addition, the extension should not be granted (1) before the audit has begun; (2) if the audit has been completed and further negotiations appear to be futile; or (3) if there will be no settlement negotiations until the 90-day letter is issued.

The taxpayer may be placed in a difficult position by an examiner who threatens to disallow deductions or otherwise make an adverse finding unless the taxpayer executes a waiver of the limitations period. While a waiver executed under duress will not be effective, the facts of each case must be examined to determine whether duress existed. The IRS is afforded broad leeway in this regard [*see, e.g., Shireman v. Comm'r (2004) 87 T.C.M. (CCH) 1448, T.C. Memo 2004-155* (when examiner threatened to take legally authorized actions if taxpayer did not sign waiver, neither duress nor coercion existed and waiver was valid); *Narragansett Wire Co. v. Comm'r (1973) 32 T.C.M. (CCH) 643, T.C.*

Memo 1973-135 (same)].

[c] Representative's Execution of Extension

The practitioner representing the taxpayer may sign this consent form on the taxpayer's behalf, provided the action is authorized by a properly filed Form 2848 [see [2], *below* (instructions); *see also* § 96.200 (IRS Form 2848)].

[d] Effect on Taxpayer's Appeal Rights

The execution of this form will not prevent the taxpayer from subsequently exercising the right to appeal a deficiency assessment once it has been issued. For a discussion of appeal rights, see §§ 96.50, 96.141, 96.145.

[e] Modification of Form; Restricted Consent

Accompanying documents (drafted either by the government or by the taxpayer) may condition or modify the waiver of the statute of limitations [see *United States v. Hodgekins* (N.D. Ind. 1993) 832 F. Supp. 1255, 1260 ; *Neilson v. Harrison* (7th Cir. 1942) 131 F.2d 205, 209] . The taxpayer should also consider a restricted consent, limited to one issue. This would protect the taxpayer from new issues being raised by the IRS.

[2] FORM

Consent to Extend Time to Assess Tax [IRS Form 872]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAdministrationGeneral Overview



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31-96 California Legal Forms--Transaction Guide § 96.205

§ 96.205 Special Consent to Extend Time to Assess Tax [IRS Form 872-A]

[1] Comment--Use of Form

This form [IRS Form 872-A] is a waiver of the statute of limitations for the assessment of tax. A waiver is effective until the taxpayer gives the IRS notice on Form 872-T (Notice of Termination of Special Consent to Assess Tax) or another appropriate form that the taxpayer is revoking the waiver. The issuance of a 90-day letter by the IRS also terminates this waiver [*see* [2], *below*]. Practitioners generally prefer IRS Form 872 [*see* § 96.204], because it extends the statute for a fixed time, rather than an indefinite one.

For coverage of applicable statutes of limitation, see § 96.110.

[2] FORM

Special Consent to Extend Time to Assess Tax [IRS Form 872-A]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Tax Administration & ProcedureAdministrationGeneral Overview



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31-96 California Legal Forms--Transaction Guide § 96.206

§ 96.206 Request for Technical Advice

[1] Comment

[a] Use of Form

This form is a request for technical advice from the National Office of the IRS. The IRS provides technical advice to assist examiners in closing cases and establishing and maintaining consistent holdings among the districts [*Treas. Reg. § 601.105(b)(5)(i)(a)*]. An attorney may request technical advice at time during the examination, but it is preferable to request advice at the earliest possible stage [*Treas. Reg. § 601.105(b)(5)(ii)(b)*]. A request should be made if a point arises on which the application of the law is unclear and an answer concerning that application will determine the strategy for the future handling of the audit.

This form should be submitted to the examiner conducting the audit. After considering the taxpayer's request, the examiner will either submit the request to the district director or will inform the taxpayer that, in his or her opinion, the circumstances do not warrant submission of the request to the National Office [*Treas. Reg. § 601.105(b)(5)(iii)(a)*]. For an outline of the procedures to be followed in appealing a decision not to refer a request for technical advice, see § 96.122. For a representative letter of appeal and a discussion of the appeal process, see § 96.207.

For a list of the procedures available when a request for technical advice has been granted and the advice from the National Office is adverse to the taxpayer, see § 96.122.

[b] Areas in Which Technical Advice May Be Requested

Technical advice may be requested on any technical or procedural question arising in connection with the audit of a return or a taxpayer's claim for a refund or credit [*Treas. Reg. § 601.105(b)(5)(ii)*].

[c] Circumstances Warranting Request for Technical Advice

A request for technical advice may be made by, or on behalf of, a taxpayer to clarify the correct application of the

internal revenue laws, related statutes, and/or regulations to a particular set of facts. Clarification may be necessary when there is lack of uniformity among the districts or decisions concerning the issue or because the issue presented is unusual or complex. Technical advice does not include memoranda on matters of general technical application furnished to district offices when the issues are not raised in connection with the examination of a specific taxpayer's return [*Treas. Reg. § 601.105(b)(5)(i)(a), (iii)(a)*].

Only the director of the district where the audit is conducted may submit a request for technical advice to the National Office [*Treas. Reg. § 601.105(b)(5)(iii)(a)*]. Therefore, a taxpayer seeking advice must convince the examiner conducting the audit that the circumstances warrant submission of the request.

[2] FORM

Request for Technical Advice

[On practitioner's letterhead:]

_____[date]
 United States Treasury Department
 Internal Revenue Service, Examination Division
 _____[examiner's name]
 _____[address]

RE: Request for Technical Advice

Taxpayer: _____[name]

Taxpayer Identification Number: _____

Address: _____

Dear _____[examiner's name] :

The above-referenced [taxpayer is an individual who filed an individual return or taxpayers are spouses who filed a joint return] for the tax period ending on _____[date]. This tax return [has been scheduled for or is presently under] examination in your office.

[Choose among the following:]

[EITHER:]

This audit has presented an unusual and complex problem concerning the application of [*specify the appropriate Internal Revenue Code section, other related statute, or regulation*] to the following facts: [*explain in detail*].

[OR]

A question has been presented in this audit concerning the application of [*specify the appropriate Internal Revenue Code section, other related statute, or regulation*]. The different districts and the appellate authorities that have considered this question have been inconsistent in its resolution. For example, [*give detailed examples*].

[CONTINUE:]

Accordingly, the taxpayer asks that you clarify this matter by preparing and submitting a Form 4463 (Request for Technical Advice), or other appropriate paperwork necessary to a Request for Technical Advice from the National Office, in accordance with the provisions of *Treasury Regulations Section 601.105(b)(5)*.

Form 2848, authorizing me to represent the taxpayer in this matter, is on file with your office.

Thank you for your attention.

Sincerely,

_____ [attorney's signature]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAdministrationGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
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31-96 California Legal Forms--Transaction Guide § 96.207

§ 96.207 Appeal of Refusal to Submit Request for Technical Advice

[1] Comment

[a] Use of Form

This form is an appeal from the district director's refusal to submit a request for technical advice to the National Office of the IRS. An examiner who has declined to submit a request for technical advice to the National Office pursuant to a taxpayer's request [see § 96.206] must inform the taxpayer of his or her decision [*Treas. Reg. § 601.105(b)(5)(iii)(a)*]. Within 10 calendar days, a taxpayer who wishes to further pursue the matter must appeal that decision or file a request for an extension of time within which to appeal the decision [*Treas. Reg. § 601.105(b)(5)(iv)(b)*].

For a procedural guide outlining the actions to take when a request for technical advice has been granted and the advice from the National Office is adverse to the taxpayer, see § 96.122.

[b] Required Contents

An appeal of an examiner's decision not to submit a request for technical advice must contain [*Treas. Reg. § 601.105(b)(5)(iv)(b)*]:

- A statement of facts.
- A statement of law.
- Arguments with respect to the issue.
- An explanation of the reasons why the taxpayer believes the matter should be referred to the National Office.

[c] Appeal Process

The examiner will submit the appeal and accompanying statements to the Chief of the Examination Division, along with a statement outlining the examiner's reasons why the matter should not be referred to the National Office. Based on consideration of the statements submitted by the taxpayer and by the examiner, the Chief will determine whether the matter should be referred. If the Chief determines that technical advice is not warranted, he or she will notify the taxpayer in writing that he or she intends to deny the request, giving the specific reasons for that decision. The taxpayer has 15 days from receipt of the letter in which to notify the Chief of the Examination Division whether he or she agrees with the denial. The taxpayer has no right to appeal the decision. However, if the taxpayer disagrees with the proposed denial, all data relating to the issue for which technical advice has been sought, including the taxpayer's written request [see § 96.206] and statements, will be submitted to the National Office for review. The review will be solely on the basis of the written record and no conference on the matter will be held in the National Office. After the review is complete, the district office will be notified whether the proposed denial is approved or disapproved [*Treas. Reg.* §§ 601.105(b)(5)(iv)(c), (d)].

[d] Suspension of Proceedings Pending Review

While the appeal and accompanying statements are under review in the National Office, the district office will suspend action on the issue, provided that the position of the government is not prejudiced by that suspension. The National Office will notify the district director of its decision with 30 days from the date the data was received [*Treas. Reg.* § 601.105(b)(5)(iv)(d)].

[2] FORM

Appeal of Refusal to Submit Request for Technical Advice

[On practitioner's letterhead:]

_____[date]
 United States Treasury Department
 Internal Revenue Service, Examination Division
 _____[examiner's name]
 _____[address]

RE: Taxpayer: [name]
 Taxpayer Identification Number: _____
 Address: _____
 Type of Tax: _____
 Tax Years ending: _____
 Dear _____ [name of examinee] :

The above-referenced [taxpayer is an individual who filed an individual return or taxpayers are spouses who filed a joint return] for the tax period ending on _____[date], which [has been scheduled for or is presently under] examination in your office.

By letter dated _____, the taxpayer asked that a request for technical advice be submitted to the National Office concerning: [specify issue(s)]. On _____[date], you informed the taxpayer of your determination that a request for technical advice was not warranted in this situation.

Pursuant to *Treasury Regulations Section 601.105(b)(5)(iv)*, the taxpayer appeals that determination. The basis for this appeal is set forth in the Statement of Facts, Principles of Law, and Arguments, in Attachment A to this letter.

We understand that proceedings on the matter about the technical advice is sought will be suspended pending the review of this appeal by the Chief of the Examination Division.

Form 2848, authorizing me to represent the taxpayer in this matter, is on file with your office.

Sincerely,

_____ [attorney's signature]
[typed name]

Attachment A

Statement of Facts: *[Explain factual background giving rise to issue on which technical advice is sought.]*

Principles of Law: *[Cite authorities governing point on which technical advice is sought.]*

Arguments: *[Explain why law, as discussed in preceding section, appears inconsistent or explain why point is so complex or unusual that the attention of the National Office is warranted.]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAdministrationGeneral Overview



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31-96 California Legal Forms--Transaction Guide § 96.208

§ 96.208 Request for Extension of Time to Appeal Refusal of Request for Technical Advice**[1] Comment--Use of Form**

This form is a request for an extension of time in which to appeal the examiner's refusal to submit a request for technical advice to the National Office. It must be submitted within 10 calendar days from the date on which the taxpayer is advised of the examiner's determination [*Treas. Reg. § 601.105(b)(5)(iv)(b)*]. For an example and discussion of a request for technical advice, see § 96.206. For an appeal of a refusal to submit a request, see § 96.207.

Any request for an extension of time within which to appeal must be justified by the taxpayer and approved by the Chief of the Examination Division [*Treas. Reg. § 601.105(b)(5)(iv)(b)*].

[2] FORM**Request for Extension of Time to Appeal Refusal of Request for Technical Advice**

Request for Extension of Time to Appeal of Refusal
to Submit Request for Technical Advice

[On practitioner's letterhead:]

_____ [date]

United States Treasury Department

Internal Revenue Service, Examination Division

_____ [examiner's name]

_____ [address]

RE: Taxpayer: [name]

Taxpayer Identification Number: _____

Address: _____

Type of Tax: _____

Tax Years ending: _____

Dear _____ [*name of examiner*] :

The above-referenced [taxpayer is an individual who filed an individual return *or* taxpayers are spouses who filed a joint return] for the tax period ending on _____ [*date*], which [has been scheduled for *or* is presently under] examination in your office.

On _____ [*date*], you informed the taxpayer of your determination that a request for technical advice from the National Office on the question of [*specify issue(s) on which technical advice was requested*] was not warranted.

An appeal of the determination not to forward the request for technical advice will be filed and, pursuant to *Treasury Regulations Section 601.105(b)(5)(iv)*, the taxpayer requests an extension of time in which to file that appeal. An extension of time is necessary because [*specify reason why appeal could not be prepared within 10-day period*].

Form 2848, authorizing me to represent the taxpayer in this matter, is on file with your office.

Sincerely,

_____ [*attorney's signature*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Tax Administration & Procedure Administration General Overview



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31-96 California Legal Forms--Transaction Guide § 96.209

§ 96.209 Income Tax Examination Changes [IRS Form 4549]

[1] Comment

[a] Use of Form

This form [IRS Form 4549] is a report issued by the IRS on completion of an individual income tax examination, showing the proposed examination changes. The form includes a consent to assessment under which the taxpayer relinquishes his or her rights to appeal within the IRS or to the Tax Court [*see* [2], *below*].

[b] Closed Cases

An attorney who receives this report on behalf of a client-taxpayer and determines that the report is acceptable should request a final closing agreement from the IRS in order to ensure that the matter will not be reopened [*see* §§ 96.70, 96.217, 96.218].

A case is deemed "closed" at the district level when the taxpayer is notified in writing following the district conference, if any, that his or her return has been accepted or that certain specified adjustments have been made [Rev. Proc. § 85-13, 1985-1 C.B. 514]. If a 90-day letter [*see* § 96.50[3]] was issued in the case, the case is considered "closed" when the period for filing a petition with the Tax Court expires and no petition was filed [Rev. Proc. § 85-13, 1985-1 C.B. 514].

[c] Reopening Closed Cases

The IRS may reopen a closed case if no final closing agreement were executed with respect to that case [*see* §§ 96.70, 96.217, 96.218]. The Chief of the Examination Division or the Chief of the Compliance Division must approve the reopening of a case. That approval will be granted only if (1) there was fraud, malfeasance, collusion, concealment, or misrepresentation of a material fact, or (2) a substantial error was involved in the closing of the case [Rev. Proc. § 85-13, 1985-1 C.B. 514].

[2] FORM

Income Tax Examination Changes [IRS Form 4549]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAdministrationGeneral Overview



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31-96 California Legal Forms--Transaction Guide § 96.210

§ 96.210 Protest of Federal Tax Deficiency and Request for Hearing

[1] Comment

[a] Use of Form

This form is a letter that may be used to protest a proposed federal tax deficiency. The form contains alternative provisions requesting a hearing before the IRS Office of Appeals or the Audit Division.

[b] Notice of Deficiency

A notice of a tax deficiency may be mailed to a taxpayer at any time during an examination [*see* §§ 96.32, 96.36]: while the examination is in progress, after it has been completed, or even during compromise negotiations [*Cataldo v. United States* (2d Cir. 1974) 501 F.2d 396, 397 ; *Rosenberg v. Comm'r* (10th Cir 1971) 450 F.2d 529, 531] .

After the examiner has conducted the examination, he or she will discuss the proposed deficiency with the taxpayer. If the taxpayer agrees to the deficiency, the taxpayer will be asked to execute a Form 870 or a Form 870-AD. Form 870 is a waiver of restrictions on assessment. It is not a formal settlement agreement, although it is rarely reversed. Form 870-AD is almost the equivalent of a closing agreement. Form 870-AD is further discussed in § 96.216.

If the taxpayer does not agree to the deficiency, the IRS will issue a 30-day letter, stating the amount of the deficiency, the basis for the deficiency assessment, and a statement that the taxpayer has 30 days from the date of the letter to request a conference or a hearing [*see* § 96.50[2]].

[c] Options Available to Taxpayer

After a taxpayer has received a 30-day letter, he or she may do one of the following:

- Pay the assessed deficiency and sign the waiver form enclosed with the letter [*see* § 96.209].

- Request a district conference [see [d], *below*].
- Request a hearing before the Office of Appeals [see [e], *below*].
- Wait for the IRS to issue a 90-day letter, and then either file a petition with the Tax Court [see § 96.50[3], [4]]; or pay the assessment and then claim a refund and, when it is denied, file an action for a refund in the District Court or Court of Claims, as applicable [see *I.R.C. § 7422*; see also [g], *below*].

[d] Request for District Conference

If the taxpayer wants a district conference with the Audit Division, he or she must submit a written request for the conference within 30 days from the date of the 30-day letter. A written protest must accompany the request if a field audit was conducted. A written protest is unnecessary when there has been an office audit or the proposed deficiency is less than \$2,500 [see IRS Pub. No. 5; § 96.50[2]].

In determining whether a district conference is advisable, the attorney should keep in mind that the authority at the district level is limited to a resolution of factual questions. If the dispute is over a legal issue, that issue will not be resolved. The attorney should also keep in mind that the conference may result in the disclosure of additional bases for tax liabilities that might not otherwise have been brought to the attention of the IRS.

[e] Request for Appellate Hearing

If a legal issue underlies the controversy, a hearing before the IRS Office of Appeals should be requested. However, there is always the risk that previously undiscovered tax deficiencies may be unearthed during the hearing. Thus, when large amounts are involved, an attorney should seriously consider advising the client to pay the deficiency assessment and having the tax year in question closed.

The taxpayer must file a written request for a hearing [see [2], *below*]. In representing the taxpayer during the hearing, the attorney should be familiar with the rules governing conduct of the Office of Appeals during the hearing [see *Treas. Reg. § 601.106(d)(3)* (conference and practice requirements)]. The Office is prohibited from discriminating among taxpayers and is required to strictly and impartially adhere to the applicable law. If there are substantial questions of law and/or fact, the Office Division must seriously consider offering to settle the dispute on a basis that fairly reflects the relative merits of the opposing positions. If the taxpayer makes a good faith offer to settle, which is nonetheless unacceptable to the IRS, the IRS Appeals representative should communicate its position and provide the taxpayer with an evaluation of the case in a manner that will enable the taxpayer to ascertain the type of settlement offer that might be recommended for acceptance [*Treas. Reg. § 601.106(f)(1), (2)*].

[f] Failure to Request Hearing

If the taxpayer does not reply to the 30-day letter, the IRS will issue a 90-day letter, after which the taxpayer will have 90 days in which to either pay the assessment or file a petition with the Tax Court for a resolution of the dispute [*I.R.C. §§ 6212(a), 6213(a)*; see *Fayeghi v. Comm'r (9th Cir. 2000) 211 F.3d 504, 506-507* (tax court lacked authority to enjoin collection of taxes pursuant to motion to restrain collection; *I.R.C. § 6213(a)* did not apply because tax at issue was not a "deficiency")]. That notice must include a notice to the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office [*I.R.C. § 6212(a)*]. If the taxpayer takes no action within the 90-day period, the IRS will take action to collect the deficiency. The IRS may attempt collection in any of several manners, including liens [see *I.R.C. § 6321*], levies, seizures, and sales of property [see *I.R.C. § 6331*]. An explanation of collection procedures is beyond the scope of this chapter.

When the controversy is based on an IRS revenue ruling, a request for a hearing may be inadvisable because the Office

of Appeals is bound to follow the ruling. A taxpayer who wishes to pursue the matter should file a petition with the Tax Court or the district court. Before filing in district court, the taxpayer must have paid the deficiency and filed a claim for a refund [see § 96.50[4]] which was denied by the IRS [I.R.C. § 7422(a); see *Treas. Reg.* § 301.6402-2(a)(1)].

[g] Payment of Deficiency

If the taxpayer pays the deficiency, he or she may bring an action for refund in either the federal district court or in the Court of Claims. Generally, the venue for refund actions is the former.

The question whether to litigate in the Tax Court (without prior payment) or in the district court (with prior payment) depends on the nature of the dispute and the question of law involved. If a complex legal issue is involved, a proceeding in Tax Court is generally preferable because that court deals exclusively in that area of law and is better equipped to understand the nature of the controversy. However, if the dispute involves a question of fact or a legal issue concerning which existing law is not consistent among all circuits, it may be preferable to pay the tax and bring an action for a refund in the district court or Court of Claims. Payment has the added advantage of stopping the running of interest on the deficiency.

[h] Preparation of Written Protest

Written protests must be prepared for all cases except those in which (1) the proposed increase or decrease in tax, or claimed refund, does not exceed \$2,500 for the tax period involved; or (2) the examination was conducted by correspondence or in an office audit [IRS Pub. No. 5, *Your Appeal Rights and How to Prepare a Protest If You Don't Agree*; see § 96.32[2]].

When a written protest is necessary, it should be sent within the time specified in the letter transmitting the report of examination. The protest should include all of the following [IRS Pub. No. 5]:

- A statement that the taxpayer wishes to appeal the findings of the examiner to the Appeals Office.
- The taxpayer's name and address.
- The date and symbols from the letter transmitting the proposed adjustments and findings that are being protested.
- The tax periods or years involved.
- An itemized schedule of the adjustments with which the taxpayer disagrees.
- A statement of facts, declared under penalty of perjury, supporting the taxpayer's position in any contested factual issue.
- A statement outlining the law or other authority on which the taxpayer is relying.

The declaration of facts must be made under penalty of perjury. If the protest is prepared by the taxpayer, he or she should add the following declaration: "Under penalties of perjury, I declare that the facts presented in my written protest, which are set out in the accompanying statement of facts, schedules, and other attached statements, are to the best of my knowledge and belief, true, correct, and complete." If the protest is prepared by the attorney, he or she may substitute a declaration stating (1) that the attorney prepared the protest and accompanying documents; and (2) whether he or she knows personally that the protest and accompanying documents are true and correct [IRS Pub. No. 5].

The written protest must be executed by the taxpayer or his or her representative [IRS Pub. No. 5].

[2] FORM

Protest of Federal Tax Deficiency and Request for Hearing

[On practitioner's letterhead]

_____[date]

U.S. Treasury Department
Internal Revenue Service
District Director

_____[address]

RE: Taxpayer: _____ [name]

Address: _____

Type of Tax: _____

Tax Years ending: _____

Dear Sir or Madam:

This letter protests the findings of the IRS, specified in the examination report forwarded to the above-referenced taxpayer with a 30-day letter dated _____.

That letter contained the following proposed adjustments for the following tax years: Code _____
Adjustment _____ Year ending _____.

The taxpayer specifically protests the following findings: [specify].

The taxpayer bases _____ [his or her] position on the following facts: [specify taxpayer's position concerning facts giving rise to the dispute].

The taxpayer bases _____ [his or her] position on the following authority: [specify supporting legal authority].

The taxpayer requests a hearing before the Office of Appeals of the Regional Commissioner's office [or a conference with a member of the Conference Staff of the Audit Division of the District Director's Office].

Form 2848, authorizing me to represent the taxpayer in this matter, is _____ [on file with your office or attached to this protest].

Sincerely,

_____[attorney's signature]

[typed name]

Taxpayer's Verification

Under penalties of perjury, I declare that the facts presented in my written protest, which are set out in the accompanying statement of facts, schedules, and other attached statements, are to the best of my knowledge and belief, true, correct, and complete.

Executed at _____, California, on _____[*date*].

_____[*taxpayer's signature*]

[*typed name*]

Attorney's Verification

I declare that I prepared this protest and the accompanying documents. I further declare that I [do or do not] personally know the protest and accompanying documents are true and correct.

Executed at _____, California, on _____[*date*].

_____[*attorney's signature*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAdministrationGeneral OverviewTax LawFederal Tax Administration
& ProcedureTax Credits & LiabilitiesDeficiencies (IRC secs. 6211-6216)General Overview



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31-96 California Legal Forms--Transaction Guide § 96.211

§ 96.211 Claim for Refund (Amended Income Tax Return) [IRS Form 1040X]

[1] Comment

[a] Use of Form

This form [IRS 1040X] must be used to amend individual income tax return [*Treas. Reg. § 301.6402-3(a)(2)*; see *Treas. Reg. § 301.6402-3(e)* (rules for nonresident aliens)]. The form and instructions may be obtained from the IRS, and are available online at the IRS website, www.irs.gov.

For a form to be used in claiming a refund of California state taxes, see § 96.233.

[b] Effect of Amended Return on California Income Tax

A taxpayer who files an amended federal income tax return must file a similarly amended California return with the FTB within 90 days, and pay any additional tax that may be due [*18 Cal. Code Reg. § 19059(b)*].

[c] Time Within Which Claim for Refund Must Be Filed

If a return has been filed, any claim for a tax credit or refund must be filed within three years from the time the return was filed, or two years from the time the tax was paid, whichever is later. When no return was filed, the claim for a tax credit or refund must be filed within two years from the time the tax was actually paid [*I.R.C. § 6511(a)*].

If, before the statute of limitations for assessment of a tax expires, the IRS and the taxpayer agree in writing to extend that date, the tax may be assessed at any time before expiration of the date agreed on [*see I.R.C. § 6501(c)(4)*]. When the parties agree to an extension of the assessment date, the period for filing a claim for a tax credit or refund is the later of six months after the extended assessment date or two years after the payment of the tax [*I.R.C. § 6511(c)*].

[d] Limit on Amount of Refund

The amount of a refund is limited by statute. If the claim is filed within the three-year period following the filing of the return, the refund cannot exceed the portion of the tax paid within that period [I.R.C. § 6511(b)(2)(A)]. If the claim was not filed within the three-year period but was filed within two years of the date the tax was paid, the refund cannot exceed the amount of the tax that was paid within that two-year period [I.R.C. § 6511(b)(2)(B)].

[e] Investigation of Amended Return

When a claim for a refund is filed, the entire return for the year (including matters otherwise barred by the statute of limitations) for which the claim is filed is open for investigation, but only for the purpose of determining whether there was an overpayment of taxes [*Lewis v. Reynolds* (1932) 284 U.S. 281, 283, 52 S. Ct. 145, 76 L. Ed. 293] . Therefore, in investigating the claim, the IRS is entitled to consider all matters that would increase or decrease income or deductions. However, matters barred by the statute of limitations can only be raised to the extent of the amount of the refund and cannot be used as the basis for assessing a deficiency against the taxpayer.

PRACTICE TIP:

If a taxpayer files a false return but later files a nonfraudulent amended return, the filing of the amended return will not cause the statute of limitations to begin running, and the IRS may assess tax at any time [*Badaracco v. Comm'r* (1984) 464 U.S. 386, 395, 104 S. Ct. 756, 78 L. Ed. 2d 549] .

[f] Filing Actions for Refunds

A taxpayer may elect to pursue a refund either by way of an appeal in the Tax Court or in an action in the federal district court [see *Flora v. United States* (1960) 362 U.S. 145, 148, 80 S. Ct. 630, 4 L. Ed. 2d 623] .

Before a taxpayer may file an action for recovery of any tax payment, he or she must first file a claim for a refund [I.R.C. § 7422(a)]. An action in the district court for a refund based on a deficiency raised in an examination of the taxpayer's return may only be brought if the taxpayer has paid the entire amount of the deficiency, since a partial payment would not enable the taxpayer to maintain an action for a refund [see *Flora v. United States* (1960) 362 U.S. 145, 177, 80 S. Ct. 630, 4 L. Ed. 2d 623] .

[g] Filing by Taxpayer's Representative

Claims for refunds may be filed by authorized representatives, as well as by the taxpayer.

If the taxpayer who filed the original return has died, the legal representative may file for a refund and, when doing so, must attach to the claim certified copies of the letters testamentary or of administration evidencing his or her authority [Treas. Reg. § 301.6402-2(e)]. For a general discussion of the authority of executors and administrators, see Ch. 61, *Will Drafting and Complete Will Forms* .

If an agent of the taxpayer files a claim for a refund, he or she must be authorized under a power of attorney to act on the taxpayer's behalf and that power of attorney must be attached to the claim [see § 96.200].

[2] FORM

Claim for Refund (Amended Income Tax Return) [IRS Form 1040X]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesCredits, Overassessments & Refunds (IRC
secs. 6401-6427)General Overview



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31-96 California Legal Forms--Transaction Guide § 96.212

§ 96.212 Offer in Compromise [IRS Form 656]

[1] Comment

[a] Use of Form

This form [IRS Form 656] is the official IRS compromise agreement. The taxpayer must use this form to make an offer to pay less than the full amount of liability owed in any civil or criminal case [see [2], *below* (Instructions); *Treas. Reg. § 301.7122-1(d)(1)*; see also *I.R.C. § 7122(a)*].

Copies of this form may be obtained from any district office of the IRS, by calling (800) 829-1040 or by downloading the form from the IRS website, www.irs.gov.

[b] Additional Forms Required

If the taxpayer submits an offer in compromise based on doubt as to collectibility, the taxpayer must also submit Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals [see § 96.213], or Form 433-B, Collection Information Statement for Businesses [see § 96.214]. If the taxpayer is an individual who operates a business, the taxpayer must submit both forms. However, the taxpayer should not send financial information for an offer based solely on doubt as to liability [see *I.R.C. § 7122(d)(3)(B)(ii)*; *Treas. Reg. § 301.7122-1(e)(1)*].

For further discussion of offers in compromise, see § 96.61. For a step-by-step procedural guide for making a compromise offer, see § 96.142.

[c] Nature of Compromise

The Secretary of the Treasury and the Attorney General or his or her delegate may compromise any civil or criminal case arising under the internal revenue laws [*I.R.C. § 7122(a)*]. On proper acceptance by the IRS, an offer of compromise becomes a binding contract [*Aviation Corp. v. United States* (Ct. Cl. 1942) 97 Ct. Cl. 550, 575-576, 46 F. Supp. 491 ; *Castle v. United States* (1937) 17 F. Supp. 515, 84 Ct. Cl. 300, 311] .

There is a distinction between a compromise and a settlement of a tax case. A "compromise" is appropriate only when (1) the taxpayer admits a tax liability but is financially unable to satisfy that liability; or (2) there is doubt as to liability [see *Rev. Proc. 80-6, 1980-1 C.B. 586*]. On the other hand, the term "settlement" refers to the process in which a taxpayer who disagrees with the findings of an examiner at the conclusion of an audit attempts to finally resolve his or her case within the IRS [see § 96.35[1]].

[d] Offer Based on Issues of Equity and Economic Hardship

The IRS may accept an offer in compromise to "promote effective tax administration," because full collection would cause the taxpayer economic hardship [*Treas. Reg. § 301.7122-1(b)(3)(i)*; see IRS Pub. No. 556, at 7-8; see also *Treas. Reg. § 301.6343-1(b)(4)* (meaning of "economic hardship")], or because the taxpayer's case presents compelling reasons that the IRS determines are a sufficient basis for compromise [*Treas. Reg. § 301.7122-1(b)(3)(ii)*; see IRS Pub. No. 556, at 7-8].

In determining whether to accept or reject an offer in compromise on the ground that acceptance would promote effective tax administration, the IRS must consider several nonconclusive factors, including the taxpayer's record of overall compliance with the tax laws [see *Treas. Reg. § 301.7122-1(c)(3)* (nonconclusive factors to be considered in evaluating these offers); see also *Treas. Reg. § 301.7122-1(c)(3)(iii)* (examples)].

If a taxpayer bases his or her offer on issues of equity and economic hardship, the taxpayer must complete Item 9 on Form 656 [see [2], below], explaining the taxpayer's exceptional circumstances and why requiring payment of the tax liability in full would create an economic hardship or be unfair. The taxpayer must also attach to Form 656 any documents to help support his or her exceptional circumstances [see [2], below (Instructions)].

[e] Waiver and Extension of Statute of Limitations

When the taxpayer signs an offer, he or she agrees to suspend the statute of limitations on collection for all the tax periods of the offer [see *I.R.C. § 6331(i)(5)*; *Treas. Reg. § 301.7122-1(i)(1)*]. The IRS may also require the extension of the statute of limitations on assessment. However, in any case in which waiver of the running of the statute of limitations on assessment is sought, the IRS must notify the taxpayer of the right to refuse to extend the period of limitation or to limit the extension to particular issues or particular periods of time [*Treas. Reg. § 301.7122-1(i)(2)*].

A waiver of the statute of limitations is effective even if the offer is ultimately rejected by the IRS [see *United States v. Brown (E.D. Pa. 1964) 225 F. Supp. 414, 415*, *aff'd*, *337 F.2d 858 (3d Cir. 1964)*].

[2] FORM

Offer in Compromise [IRS Form 656]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureSettlementsGeneral OverviewTax LawFederal Tax Administration & ProcedureSettlementsClosing Agreements & Compromises (IRC secs. 7121-7124)Compromises



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31-96 California Legal Forms--Transaction Guide § 96.213

§ 96.213 Collection Information Statement for Wage Earners and Self-Employed Individuals [Form 433-A]

[1] Comment--Use of Form

This form [IRS Form 433-A] must be submitted by an individual taxpayer who is submitting an offer in compromise based on doubt as to collectibility on Form 656 [*see* § 96.212[1][b]]. If the taxpayer is an individual who operates a business, the taxpayer must also submit Form 433-B, Collection Information Statement for Businesses [*see* § 96.214].

For further discussion of the offer in compromise process, see § 96.212[1].

[2] FORM

Collection Information Statement for Wage Earners and Self-Employed Individuals [Form 433-A]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Tax Administration & ProcedureGeneral Overview



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31-96 California Legal Forms--Transaction Guide § 96.214

§ 96.214 Collection Information Statement for Businesses [Form 433-B]

[1] Comment--Use of Form

This form [IRS Form 433-B] must be submitted by a business that is submitting an offer in compromise based on doubt as to collectibility on Form 656 [*see* § 96.212[1][b]]. If the taxpayer operating the business is an individual, the taxpayer must also submit a Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals [*see* § 96.213].

[2] FORM

Collection Information Statement for Businesses [Form 433-B]

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Legal Topics:

For related research and practice materials, see the following legal topics:
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31-96 California Legal Forms--Transaction Guide § 96.215

§ 96.215 Income Certificate for Offer in Compromise Application Fee [IRS Form 656-A]

[1] Comment--Use of Form

This form [IRS Form 656-A] is for use by a taxpayer to request an exception, based on income, to the application fee required for the Offer in Compromise. Offers without either the required fee or a completed Form 656-A will not be accepted for processing [see IRS Form 656 (Instructions), reproduced in § 96.212]. Step five in the instructions to Form 656 further discusses this form [see IRS Form 656 (Instructions), reproduced in § 96.212].

[2] FORM

Income Certificate for Offer in Compromise Application Fee [IRS Form 656-A]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

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31-96 California Legal Forms--Transaction Guide § 96.216

§ 96.216 Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment [IRS 870-AD]

[1] Comment

[a] Use of Form

This form [IRS Form 870-AD] is a waiver of the restriction on assessment and collection of a tax deficiency. It operates as a waiver to the protections normally afforded by a 90-day letter under *I.R.C. § 6213(a)*, because its effect is to waive the taxpayer's right to receive that 90-day letter [*see § 96.50[3]*]. The execution and filing of this form thus renders any proposed deficiency subject to immediate assessment and collection [*see Quigley v. IRS (D.C. Cir. 1960) 289 F.2d 878, 880*] .

This form is used by the IRS Office of Appeals. If the case is still in the audit division, IRS Form 870 should be used.

[b] Conditional Waivers

The form itself provides for the prompt payment of deficiencies and that the taxpayer will not file any claim for refund or credit [*see [2], below*]. The form also provides that if the Commissioner accepts this offer, the IRS will not reopen the case absent any of the following [*see [2], below*]:

- Fraud, malfeasance, concealment or misrepresentation of material fact.
- An important mistake in mathematical calculation.
- Deficiencies or overassessments resulting from certain partnership and business allowances.
- An excessive tentative allowance of a carryback.

This limitation constitutes a condition, and therefore does not become executory on filing. Rather, the form must first be

accepted by, or on behalf of, the Commissioner before it becomes effective [*see Godchaux v. United States (E.D. La. 1952) 102 F. Supp. 266, 269*].

[2] FORM

**Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment
[IRS Form 870-AD]**

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

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31-96 California Legal Forms--Transaction Guide § 96.217

§ 96.217 Closing Agreement on Final Determination Covering Specific Matters [IRS Form 906]

[1] Comment

[a] Use of Form

This form [IRS Form 906] is a final closing agreement covering specific matters under examination. This form would be used, for example, when the parties are unable to agree on an unqualified liability figure for a past taxable year, but may want to reach a final determination regarding taxable income only.

For a closing agreement that determines the tax and liability for each type of tax and period listed on the agreement [IRS Form 866], see § 96.218. If parties want to set forth their agreement on both liability and specific matters, they should use both Forms 906 and 866.

[b] Effect of Agreement

When this form is completed and properly executed by the taxpayer and the Commissioner (or a person to whom the Commissioner has given written authorization), the taxpayer's liability on the covered matters will be conclusively determined, unless there is a showing of fraud, malfeasance, or misrepresentation of a material fact [*I.R.C. § 7121(b)(1); Treas. Reg. § 301.7121-1(c)*]. Moreover, the agreement cannot be modified by the government, and the determination, assessment, collection, payment, abatement, refund, or credit covered by the agreement cannot be set aside in any other proceeding [*I.R.C. § 7121(b)*]. However, a closing agreement with respect to a taxable period ending subsequent to the date of the agreement is subject to any change in, or modification of, the law enacted subsequent to the date of the agreement and made applicable to the taxable period, and each closing agreement must recite this fact [*Treas. Reg. § 301.7121-1(c)*].

A final closing agreement operates as a mutual release. It binds both the taxpayer and the IRS, regardless of the fact that there is no mutual consideration [*Proctor v. White (D. Mass. 1939) 28 F. Supp. 161, 167*] . Although the final closing agreement is conclusive between the taxpayer and the IRS concerning the matters it covers, its terms are not binding on third parties [see *Phillips v. Comm'r (3d Cir. 1949) 178 F.2d 270, 271 , writ denied, 339 U.S. 932 (1950)*] .

For further discussion of final closing agreements, see § 96.70. For a procedural guide to be used to determine whether the IRS is likely to agree to enter into a final closing agreement, see § 96.143.

[c] Other Documents as Final Closing Agreements

Any taxpayer who wishes to effect a final closing agreement with the IRS should take care to use this form or, if appropriate under the circumstances, Form 866 [*see* § 96.218]. Some taxpayers have unsuccessfully attempted to assert that final closing agreements were made by way of other documents in which the taxpayer relinquished a right or made a notation indicating an understanding that the matter was conclusively disposed of [*see, e.g.*, *Uinta Livestock Corp. v. United States* (10th Cir. 1966) 355 F.2d 761, 765 (Form 870-AD) ; *Howard v. Comm'r* (1956) 15 T.C.M. (CCH) 1152, T.C. Memo 1956-219 (check with notation indicating that payment fully satisfied tax liability)]. Accordingly, it is very important to leave no doubt that the arrangement reached was in fact a final closing agreement within the meaning of I.R.C. § 7121. Toward this end, the appropriate IRS form should be used.

[2] FORM

Closing Agreement on Final Determination Covering Specific Matters [IRS Form 906]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law
Federal Tax Administration & Procedure
Settlements
Closing Agreements & Compromises (IRC secs. 7121-7124)
Closing Agreements



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31-96 California Legal Forms--Transaction Guide § 96.218

§ 96.218 Agreement as to Final Determination of Tax Liability for Entire Tax Period [IRS Form 866]

[1] Comment--Use of Form

This form [IRS Form 866] is a final closing agreement that determines the tax and liability for each type of tax and period listed on the agreement. For a final closing agreement applicable to tax liability arising from specific limited events [IRS Form 906], see § 96.217.

For further discussion of final closing agreements, see § 96.217. For a procedural guide to be used to determine whether the IRS is likely to agree to enter into a final closing agreement, see § 96.143.

[2] FORM

Agreement as to Final Determination of Tax Liability for Entire Tax Period [Treas. Form 866]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Tax Administration & ProcedureSettlementsGeneral Overview



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31-96 California Legal Forms--Transaction Guide §§ 96.219-96.229

[Reserved]

§§ 96.219[Reserved]



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31-96 California Legal Forms--Transaction Guide § 96.230

§ 96.230 Power of Attorney Declaration for Franchise Tax Board [FTB Form 3520]

[1] Comment

[a] Use of Form

This form is the Franchise Tax Board's power of attorney form [Form FTB 3520], which authorizes one or more designated persons to represent a taxpayer before the Franchise Tax Board. It is the California counterpart to IRS Form 2848 [*see* § 96.200], which serves a similar function in federal proceedings. The official instructions are reproduced here along with the form. This form is available online at the forms and publications page of the FTB's website, located at www.ftb.ca.gov. Additional information on the use of power of attorney in FTB proceedings is located on the power of attorney page on the FTB website, which is located at www.ftb.ca.gov/law/Poa/index.html.

This form is used to grant an individual the power to receive confidential tax information or to represent a taxpayer before the FTB. It can also be used to authorize an individual to receive information for non tax-related issues administered by the FTB, such as homeowner and renter assistance and child support collection.

[b] Alternatives

In lieu of this form, the FTB will accept IRS Forms 2848 [*see* § 96.200] and 8821 [*see* § 96.201], provided those forms are modified to state clearly that they apply to FTB proceedings. The FTB will also accept a joint FTB/Board of Equalization power of attorney form (Form BOE 392), properly completed, as well as general or durable power of attorney declarations, and handwritten authority documents. However, in order to be acceptable, those documents must include specified items, including a clear statement that that the power applies to FTB matters. For a detailed list of the required contents of such a power of attorney, see "Purpose of Form" in the official instructions reproduced in [2], *below*.

[c] Completing the Form

The official instructions reproduced in [2], *below*, contain detailed information on completing the form, and are largely

self-explanatory. Note that multiple representatives may be designated if desired. Note also that the taxpayer must specify the tax years or periods covered by the power; the powers of the named representative are limited to those tax years specified. Past years can be listed; however, the power can be extended only to those future time periods that end not later than three years from the current year.

Specific limitations or deletions may be made to the acts otherwise authorized. Unless the powers of the representatives are limited, they will have the powers to do all of the following:

- Receive and inspect confidential tax information.
- Represent the taxpayer in matters before the FTB.
- Sign waivers that extend the statutory period for assessment of determination of taxes.
- Execute settlement agreements.
- Execute closing agreements.

The taxpayer, owner, officer, receiver, administrator, or trustee for the taxpayers must sign the declaration. If it is a joint power of attorney, both spouses must sign. If the form is not signed and dated, the FTB will return it. The form should be mailed to the address shown in the instructions, or may be faxed to the FTB.

[2] FORM

Power of Attorney Declaration for Franchise Tax Board [FTB Form 3520]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law State & Local Taxes Administration & Proceedings Audits & Investigations



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DIVISION VII: PERSONAL TRANSACTIONS
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31-96 California Legal Forms--Transaction Guide § 96.231

§ 96.231 Protest of State Tax Deficiency

[1] Comment

[a] Use of Form

This form is a protest of a tax deficiency proposed by the California Franchise Tax Board (FTB). When a taxpayer disagrees with the adjustments proposed by a state auditor, the auditor will explain the protest procedures available to the taxpayer [*see FTB, General Tax Audit Manual*, § 16210 et seq.].

A taxpayer who disagrees with a deficiency assessment must file a written protest within 60 days after the mailing of each notice of additional tax proposed to be assessed [*see Rev. & Tax. Code § 19041(a)*; *see, e.g., Werten v. FTB (1998) 68 Cal. App. 4th 961, 80 Cal. Rptr. 2d 644* (taxpayers protested notice of proposed assessment on grounds that FTB issued it without reviewing plaintiffs' tax returns; assessment was held invalid)].

Any protest filed on or before the last date specified for filing by the FTB in any notice of proposed deficiency assessment (according to *Rev. & Tax Code § 19034*) will be treated as timely filed [*Rev. & Tax Code § 19041(b)*].

[b] Required Contents

Unlike the written protest under federal law [*see § 96.210[1][h]*], a state protest of a deficiency assessment need not be verified or made under oath. The only specific requirement for a state protest is that it specify the grounds on which the protest is based [*see Rev. & Tax. Code § 19041(a)*].

[c] Action Following Filing of Protest

If the taxpayer files a protest to a deficiency assessment, the FTB will reconsider the assessment and, if the taxpayer requested it in the protest, will grant the taxpayer or his or her representative an oral hearing [*Rev. & Tax. Code § 19044*]. These hearings are informal and are usually conducted in Sacramento or at one of the larger district offices. If the taxpayer does not request a hearing, the protest officer assigned to the case will contact the taxpayer, by letter,

indicating the material that must be submitted to support the protest [see FTB, *General Tax Audit Manual*, § 16300].

When the FTB has reached a decision, it will mail a Notice of Action to the taxpayer [see *Rev. & Tax Code* § 19045(a); see also FTB, *General Tax Audit Manual*, § 16240].

[d] Appeal

The action taken by the FTB on a protest is final, and the assessment payable, 30 days from the date that the Notice of Action is mailed to the taxpayer, unless within that 30-day period the taxpayer appeals in writing from the action of the FTB to the Board of Equalization [see *Rev. & Tax. Code* §§ 19045-19048]; see also § 96.232.

As an alternative to appealing the decision of the FTB, the taxpayer who still disagrees with the proposed adjustments may pay the deficiency and file a claim for a refund [see FTB, *General Tax Audit Manual*, § 16270].

[2] FORM

Protest of State Tax Deficiency

[On practitioner's letterhead]

_____ [date]

Franchise Tax Board
Protest Section
Sacramento, California 95867

RE: Taxpayer: _____ [name]

Address: _____

Type of Tax: _____

Tax Years ending: _____

Dear Sir or Madam:

The taxpayer named above protests the findings of the FTB set forth in the deficiency assessment sent to the taxpayer dated _____ [date].

The taxpayer disagrees with and protests the following findings: [specify disputed findings].

The taxpayer bases _____ [his or her] position on the following facts: [specify].

The taxpayer bases _____ [his or her] position on the following legal grounds: [specify].

[If taxpayer wants a hearing, add:]

The taxpayer requests a hearing in which to present oral arguments on the merits of this protest.

[CONTINUE:]

FTB Form 3520, authorizing me to represent the taxpayer in this matter, is on file with your office.

By: _____ [*signature*]
[*typed name*]
[*title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawState & Local TaxesAdministration & ProceedingsAudits & InvestigationsTax LawState & Local
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31-96 California Legal Forms--Transaction Guide § 96.232

§ 96.232 Appeal From Decision of FTB

[1] Comment

[a] Use of Form

This form is an appeal from an adverse decision by the FTB on a taxpayer's written protest concerning deficiency assessment. For a form and discussion of this type of protest, see § 96.231.

Two copies of the appeal and two copies of any supporting documents must be addressed and mailed to the State Board of Equalization in Sacramento, California. On receipt of the appeal, the Board of Equalization must provide one copy of the appeal and one copy of any supporting documents to the FTB [*Rev. & Tax. Code § 19046*].

[b] Presentation of Appeal

If an appeal to the State Board of Equalization is filed, the taxpayer will be afforded an opportunity to assemble and submit additional information in support of his or her position. An oral hearing will be scheduled unless it is waived by both the taxpayer and the FTB [*see Rev. & Tax. Code § 19044*; FTB, *General Tax Audit Manual*, § 16230].

[c] Action by the Board of Equalization

After receipt of the appeal, the Board of Equalization will decide the matter and will notify the taxpayer and the FTB of its determination and its reasoning in reaching that determination [*Rev. & Tax. Code § 19047*]. The determination of the Board becomes final on the expiration of 30 days from the time it is rendered unless, within that 30-day period, the taxpayer or the FTB files a petition for a rehearing with the Board. If a petition for rehearing is filed, the decision of the Board will become final on the expiration of 30 days from the day the Board issues its opinion on the petition [*Rev. & Tax. Code § 19048*].

[2] FORM

Appeal From Decision of FTB*[On practitioner's letterhead:]*

_____[*date*]
 State Board of Equalization
 Sacramento, California

RE: Taxpayer: _____
 Address: _____
 Taxpayer identification number: _____
 Type of Tax: _____
 Tax years ending: _____
 Dear Sir or Madam:

The above referenced taxpayer[s] appeal[s] the determination of the FTB concerning the deficiency assessed against [that *or* those] taxpayer[s] and requests a redetermination of that assessment.

A copy of the assessment is attached to this appeal as Exhibit A.

1. The [taxpayer is an individual who filed an individual return *or* taxpayers are spouses who filed a joint return] for the above-referenced tax years. The returns for those years are on file with the Franchise Tax Board in Sacramento, California.
2. The deficiency assessment was issued by the Franchise Tax Board on _____ [*date*]. It was received by the taxpayer[s] on _____ [*date*], and shows assessed deficiencies [*or* a deficiency] in the amounts [*or* amount] of \$ _____ for the tax year _____.
3. The taxpayers posit that the Franchise Tax Board has made the following errors in assessing the deficiencies [*or* deficiency] described in Paragraph 2: [*specify*].

On the grounds described in this appeal, the taxpayer[s] maintains(s) that [*specify, for example, there is no deficiency in income tax due for the year*], and the taxpayer therefore requests a determination to that effect from the Board of Equalization.

An extra copy of this letter of appeal is enclosed for your transmittal to the Franchise Tax Board.

[If supporting documentation is enclosed, add:]

Also enclosed are two copies each of the following documents submitted in support of this appeal: [*describe documents*].

[*CONTINUE:*]

FTB Form 3520, authorizing me to represent the taxpayer in this matter, is on file with your office.

Sincerely,

_____ [*firm name, if any*]

By: _____ [*signature*]

[*typed name*]

[*title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawState & Local TaxesAdministration & ProceedingsGeneral Overview



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31-96 California Legal Forms--Transaction Guide § 96.233

§ 96.233 Claim for Refund [FTB Form 540X]

[1] Comment

[a] Use of Form

This form [FTB Form 540X] is an amended return to be used by a taxpayer who is entitled to receive a refund of some portion of taxes paid to the FTB. This form is available from the FTB and may be downloaded from the FTB website, at www.ftb.ca.gov/forms.

[b] Statute of Limitations for Filing Form

Generally, this form must be filed within the following time periods [*Rev. & Tax. Code § 19306*]:

- A period ending four years from the date the return was filed (if filed within time prescribed by *Rev. & Tax. Code § 18567* or *18604*, whichever is applicable);
- A period ending four years from last day prescribed for filing return (determined without regard to any extension of time for filing return); or
- One year from the date of the overpayment.

However, different time limitations apply under specific circumstances designated by statute [*see Rev. & Tax. Code §§ 19308, 19311-19314*].

For a form [IRS 1040X] to be used in claiming a refund of federal taxes, see § 96.211.

[c] Requirements for Claim for Refund

Every claim for a refund of state taxes must [*Rev. & Tax. Code § 19322*]:

- Be in writing.
- State the specific grounds on which the claim is founded.
- Be signed by either the taxpayer or his or her authorized representative.

[2] FORM**Claim for Refund [FTB Form 540X]**

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 97.syn Synopsis to Chapter 97: PRIVATE LOANS AND ANNUITIES

§ 97.01 Related Forms With Tax Analysis

§ 97.02 Related California Forms

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[1] Constitution

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§§ 97.05-97.06 [Reserved]

§ 97.07 Law Reviews

§ 97.08 Text References

[1] Matthew Bender Sources

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§ 97.09 [Reserved]

§ 97.10 Private Loans

[1] In General

[2] Intra-Family Loans

§ 97.11 Below-Market Loans

[1] Federal Gift Tax Treatment

[2] Income Tax Treatment

§ 97.12 Deductibility of Interest

§ 97.13 Taxation of Unearned Income of Children

§ 97.14 Forgiveness of Debts

§ 97.15 Private Annuities

[1] In General

[2] Uses

[3] Distinguished From Trusts

[4] Tax Treatment

§§ 97.16-97.99 [Reserved]

§ 97.100 Facts for Private Loans

Scope

§ 97.101 Documents for Private Loans

Scope

§ 97.102 Facts for Private Annuities

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§ 97.103 Documents for Private Annuities

Scope

§§ 97.104-97.109 [Reserved]

§ 97.110 Necessary Parties

Scope

§ 97.111 Private Loans

Scope

§ 97.112 Private Annuities

Scope

§§ 97.113-97.119 [Reserved]

§ 97.120 Preparation of Promissory Note

Scope

§ 97.121 Execution of Promissory Note

Scope

§§ 97.122-97.129 [Reserved]

§ 97.130 Preparation of Annuity Contract

Scope

§ 97.131 Preparation of Schedule A (Description of Property Transferred)

Scope

§ 97.132 Execution of Annuity Contract

Scope

§ 97.133 Transfer of Stocks

Scope

§§ 97.134-97.139 [Reserved]

§ 97.140 Retention of Documents

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§ 97.141 Recording of Documents

Scope

§ 97.142 Forgiveness of Debts and Bad Debts

Scope

§§ 97.143-97.199 [Reserved]

§ 97.200 Interest-Free Note

[1] Comment

[a] Use of Form

[b] Below-Market Loans

[c] Bad Debts and Forgiveness of Debts

[d] Joint and Several Liability

[2] FORM

Interest-Free Note

§ 97.201 Secured Interest-Bearing Note

[1] Comment

[a] Use of Form

[b] Security

[c] Extension of Time

[d] Interest Payments

[e] Usury Laws

[2] FORM

Secured Interest-Bearing Note

§ 97.202 Guarantor Clause

[1] Comment--Use of Form

[2] FORM

Guarantor Clause

§§ 97.203-97.209 [Reserved]

§ 97.210 Annuity Contract for Sole Annuitant

[1] Comment

[a] Use of Form

[b] Nature of Annuity Agreement

[c] Life Annuities

[d] Term Annuities

[e] Assignment

[f] Income Tax Consequences to Annuitant

[i] In General

[ii] Capital Gain

[iii] Exclusion for Sale of Personal Residence

[iv] Recovery of Basis

[v] Unearned Income of Child

[g] Income Tax on Secured Annuities

[h] Loss Deductions Disallowed

[i] Gift Tax Consequences to Annuitant

[j] Estate Tax Consequences to Annuitant

[k] Tax Consequences to Obligor

[l] Use of Private Annuity as Planning Device

[m] Installment Sale as Alternative

[2] FORM

Annuity Contract for Sole Annuitant

§ 97.211 Joint and Survivor Annuity Contract

[1] Comment

[a] Use of Form

[b] Tax Consequences

[i] To Annuitant

[ii] To Obligor

[c] Alternative to Joint and Survivor Annuity

[2] FORM

Joint and Survivor Annuity Contract

§ 97.212 Optional Clause for Designation of Beneficiary

[1] Comment--Use of Form

[2] FORM

Optional Clause for Designation of Beneficiary

§ 97.213 Optional Clause for Payments in Case of Disability of Annuitant

[1] Comment--Use of Form

[2] FORM

Optional Clause for Payments in Case of Disability of Annuitant

§ 97.214 Optional Clause Indicating That Payments Are Not Dependent on Income From Property

[1] Comment--Use of Form

[2] FORM

Optional Clause Indicating That Payments Are Not Dependent on Income From Property

§ 97.215 Security Clause

[1] Comment

[a] Use of Form

[b] Tax Drawbacks of Secured Annuity

[2] FORM

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31-97 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers loans and annuity agreements between private individuals.

The discussion of private loans focuses on simple loan transactions, tax treatment of below-market loans, and the use of private loans as a tool for family tax planning. For analysis and forms covering commercial loans and more complex private loans, see Ch. 55, *Commercial Paper and Other Methods of Fund Transfers*. For discussion of consumer credit transactions, see Ch. 45, *Consumer Installment Loans and Credit Sales*. This chapter does not cover loans secured by real property. For analysis and forms relating to security transactions involving real property, see Ch. 25, *Real Estate Loans*; Ch. 25A, *Security Instruments for Real Estate Financing*; Ch. 25B, *Subordination, Assumption, and Assignment*; Ch. 25C, *Release and Reconveyance*; and Ch. 25D, *Foreclosure*.

The discussion of private annuities focuses on the advantages and disadvantages of annuities as a personal planning device, the use of annuities in family tax planning and property management strategies, and the characterization of annuity payments for tax purposes. For an overview of employee benefits, see Ch. 1D, *Overview of Employee Benefits*; see also Ch. 85, *Employment Agreements*. For annuity provisions appearing in wills, see Ch. 63, *Will Provisions*. For coverage of annuity provisions appearing in charitable trusts, see Ch. 74, *Split-Interest Charitable Trusts*.

The transaction guide provides a checklist of information that should be obtained before drafting a loan or annuity agreement, including the parties' financial status, their tax concerns, and the terms they want the agreement to cover. Detailed instructions for determining the tax consequences of the proposed transaction are also included, as well as drafting instructions and follow-up procedures.

Loan forms include simple interest-free term and demand notes, a secured interest-bearing note, and an optional guarantor clause. Annuity forms include both sole annuitant and joint and survivor annuitant agreements, with optional provisions for the designation of a beneficiary under a term annuity, the payment of an annuity to an annuitant who has become disabled or incompetent, and clarification of the source of payments.



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§ 97.01 Related Forms With Tax Analysis

Rabkin & Johnson, Current Legal Forms (Matthew Bender)

Ch. 5C, *Letters of Credit and Commercial Paper*, Part B, Form 5C.15 (promissory notes).

Ch. 10, *Husband, Wife, and Family Transactions*, Form 10.24A (family annuity).

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Bank Activities General Overview Estate, Gift & Trust Law Annuities General Overview Insurance
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§ 97.02 Related California Forms

California Legal Forms (Matthew Bender).

Ch. 42, *Secured Transactions*, § 42.200 (security agreement).

Ch. 45, *Consumer Installment Loans and Credit Sales*, § 45.220 (promissory note with Truth-in-Lending disclosures).

Ch. 55, *Negotiable Instruments*, §§ 55.200-55.207 (promissory notes), 55.220-55.310 (individual promissory note provisions).

Ch. 60, *Estate Planning*, §§ 60.200-60.207 (estate planning questionnaires and work sheets).

Ch. 60A, *Gifts*.

Ch. 63, *Will Provisions*, §§ 63.508-63.510 (annuity provisions in wills).

Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

California Forms of Pleading and Practice (Matthew Bender).

Ch. 385, *Negotiable Instruments*.

Ch. 568, *Usury*, §§ 568.120 (recovery of usurious interest), 568.121 (defenses).

California Points and Authorities (Matthew Bender).

Ch. 166, *Negotiable Instruments*.

Ch. 222, *Suretyship*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewEstate, Gift & Trust LawAnnuitiesGeneral OverviewInsurance
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§ 97.03 California Sources

[1] Constitution

Usury. *Cal. Const., art. XV, § 1.*

[2] Statutes

Assignment of rights under annuity contract. *Civ. Code § 1457.*

Assignment of obligations under annuity contract. *Civ. Code § 1458.*

Consideration for annuity contract. *Civ. Code § 1550.*

Statute of frauds. *Civ. Code § 1624; Com. Code § 2201.*

Guarantee agreements. *Civ. Code § 2787 et seq.; Com. Code § 3416.*

Applicability of commercial code to private loans. *Com. Code § 2102.*

Negotiable Instruments (UCC). *Com. Code § 3101 et seq.*

Requirements for negotiable instruments. *Com. Code § 3104.*

Unconditional promise to repay loan. *Com. Code § 3106.*

Demand note defined. *Com. Code § 3108(a).*

Term note defined. *Com. Code § 3108(b)*.

Joint and several liability on promissory note. *Com. Code § 3116*.

No state gift tax. *Rev. & Tax. Code § 13301*.

Gross income includes interest and annuity payments. *Rev. & Tax. Code § 17071*.

Taxation of annuities governed by federal statutes. *Rev. & Tax. Code § 17081*.

Deductibility of interest governed by federal statutes. *Rev. & Tax. Code § 17201*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewEstate, Gift & Trust LawAnnuitiesGeneral Overview



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§ 97.04 Federal Sources

[1] Statutes

Interest payments included in gross income. *I.R.C. § 61(a)(4)*.

Annuity payments. *I.R.C. § 72*.

Personal interest deduction. *I.R.C. § 163*.

Loss deductions.

Transfers for profit. *I.R.C. § 165*.

Bad debts. *I.R.C. § 166*.

Disallowance of loss on exchange between related taxpayers. *I.R.C. § 267*.

Installment sales. *I.R.C. § 453*.

Trust income. *I.R.C. §§ 671-679*.

Short-term capital gain defined. *I.R.C. § 1222(1)*.

Determination of applicable federal rate. *I.R.C. § 1274(d)*.

Estate taxes.

Gifts within three years of death. *I.R.C. § 2035*.

Transfers with retention of life estate. *I.R.C. § 2036*.

Annuity payments. *I.R.C. § 2039*.

Gifts.

Definition; annual exclusion. *I.R.C. § 2503.*

Valuation. *I.R.C. § 2512.*

Below-market loans. *I.R.C. § 7872.*

Gift treatment. *I.R.C. § 7872(a).*

Types of transactions covered. *I.R.C. § 7872(c).*

Limitations on applicability of section. *I.R.C. § 7872(d).*

Definitions. *I.R.C. § 7872(e), (f).*

[2] Regulations

Interest payments. *Treas. Reg. § 1.61-7.*

Annuities. *Treas. Reg. § 1.72-2.*

Actuarial tables. *Treas. Reg. § 20.2031-10.*

Forgiveness of debts. *Treas. Reg. § 25.2511-1(a).*

Gift tax on interest-free loans. *Treas. Reg. § 25.2512-4.*

Transfers free of donative intent. *Treas. Reg. § 25.2512-8.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Bank Activities General Overview Banking Law Bank Expansion Banking Interests Banking Law National Banks Interest & Usury Interest



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§ 97.07 Law Reviews

Comment, *Dickman and Code Section 7872: The Death Knell to Interest-Free and Below-Market Loans*, 19 Akron L. Rev. 703 (1986).

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Orbach & Levenson, *Planning for Tax Advantages Under Proposed Below-Market Loan Regs*, 64 J. Tax'n. 144 (1986).

Carlson, *Personal and Business Planning: The Impact of a Low-Interest Loan*, 44 New York University Institute On Federal Taxation 35.1 (1986) (Matthew Bender).

Evans, *Estate Planning Through Loans, Sales and Annuities*, 43 New York University Institute On Federal Taxation 48.1 (1985) (Matthew Bender).

Comment, *"Stern v. Commissioner: Who's in Control Here?"* 38 Tax Law. 689 (1985).

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawNational BanksGeneral OverviewBanking LawNational BanksInterest & UsuryInterest



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31-97 California Legal Forms--Transaction Guide § 97.08

§ 97.08 Text References

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Rabkin & Johnson, Federal Income, Gift, and Estate Taxation (Matthew Bender).
Ch. 37, *Interest, Premium, and Discount*, § 37.04A.
Ch. 63, *Annuities*, § 63.07.

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Ch. 4, *Gifts*, § 4.35.
Ch. 18, *Annuities*, § 18.10.

Rice, California Family Tax Planning 2d, Ch. 17, *Intra-Family Business Transactions*; Ch. 18, *Tax Treatment of Annuities*, Pt. IV (Matthew Bender).

[2] Legal Encyclopedias

Witkin, Summary of California Law, vol. 1, *Contracts*; vol. 4, *Negotiable Instruments* (10th ed. 2005).
Vol. 1, "Contracts."
Vol. 3, "Negotiable Instruments."

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 97.10 Private Loans

[1] In General

Private loan transactions can vary in complexity from simple, short-term loans between friends or family members to long-term transactions involving several parties, extensive security and guarantor arrangements, and variable interest and repayment provisions. In all of these transactions, promissory notes are the primary instrument used to document the debt, the promise to pay, and the payment terms.

Loans between individuals differ from commercial loan transactions in that the parties often will not be dealing entirely "at arm's length." The lender may be a relative, friend, or employer of the borrower, and may be motivated to make the loan by factors other than a lucrative interest rate. The agreement may include below-market interest rates, or make no provisions for interest. The lender may extend the time for repayment without seeking additional interest payments, or decide to forgive the loan. These possibilities, and the tax consequences arising from them, should be carefully considered before the loan agreement is made.

[2] Intra-Family Loans

Depending on the forms they take, loans between family members may be useful in estate and tax planning. A loan from a family member in a high income tax bracket to a low income family member can shift the income produced by the loan to a lower tax rate, while preserving the principal within the family unit. However, *I.R.C.* § 7872, enacted in 1984, significantly reduced the usefulness of interest-free and low-interest loans in family tax strategies. Under that section, below-market loans are treated for federal tax purposes as if the lender had made a gift to the borrower of the forgone interest on the loan [see § 97.11]. The elimination of the personal interest deduction under *I.R.C.* § 163 has also diminished the utility of below-market loans [see § 97.12].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewBanking LawNational BanksInterest & UsuryInterest



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§ 97.11 Below-Market Loans

[1] Federal Gift Tax Treatment

Prior to the Tax Reform Act of 1984, the Internal Revenue Service took the position that an interest-free demand loan between family members was a taxable gift of the value of the use of the money lent [*see Rev. Rul. 73-61, 1973-1 C.B. 408 ; see also Treas. Reg. § 25.2512-5*]. The IRS position on this issue was long standing, but for years had not been accepted by the courts, leaving interest-free and low-interest loans attractive devices for spreading income among family members [*see Estate of Berkman (1979) 38 T.C.M. 183, 186 ; but see Crown v. Commissioner (7th Cir. 1978) 585 F.2d 234, 236 (holding that intra-family interest-free demand notes were nontaxable)*]. However, the IRS position was judicially sanctioned in a 1983 case involving a demand note, in which the court held that the lender had made a gift to the borrower of the forgone interest, in the tax year during which the loan transaction occurred [*Dickman v. C.I.R. (11th Cir. 1983) 690 F.2d 812, 819 , aff'd, 465 U.S. 330 (1984)*] .

In 1984, *I.R.C. § 7872* was adopted to govern the income and gift tax treatment of loans at below-market interest rates. For federal tax purposes, a "below-market loan" is (1) any demand loan on which interest is payable at less than the "applicable federal rate" [*I.R.C. § 7872(e)(1)(A)*; *see I.R.C. § 1274(d)* (applicable federal rate); *see also I.R.C. § 7872(f)(2)(B)* (demand loans)]; or (2) any term loan [*see I.R.C. § 7872(f)(6)* (definition)] in an amount exceeding the present value of all payments due under the loan [*I.R.C. § 7872(e)(1)(B)*; *see I.R.C. § 7872(f)(2)(A)* (term loans)]. The present value of the payments is determined by applying a discount rate equal to the applicable federal rate set by the Secretary of the Treasury for the date on which the loan was made [*I.R.C. § 7872(f)(1)*]. The federal short-term rate is applicable to loans with a term of not more than three years. The mid-term rate applies to loans with a term of between three and nine years, and the long-term rate applies to loans with a term in excess of nine years [*I.R.C. § 1274(d)*]. *I.R.C. § 7872* applies to gift and tax avoidance loans, compensation-related loans, corporation-shareholder loans, and other loans with interest arrangements that significantly affect the tax liability of either party [*I.R.C. § 7872(c)(1)*].

Under *I.R.C. § 7872*, the interest actually payable on a loan for any period during which the loan is outstanding is compared to the amount that would have been payable for that period had interest accrued at the applicable Federal rate and been payable annually on the last day of the calendar year. If the latter amount exceeds the actual interest properly allocable to that loan period, the excess is classified as "forgone interest" [*I.R.C. § 7872(e)(2)*; *see I.R.C. § 2872(a)(2)*];

see also *I.R.C. § 1274(d)* (applicable federal rate)]. In general, forgone interest on below-market loans between individuals (as opposed to persons and/or entities involved in compensation-based relationships) is treated as a gift from the lender to the borrower [see *I.R.C. § 7872(a)(1)*] and, as such, is subject to federal gift tax [for discussion of the federal gift tax and related planning considerations, see Ch. 60, *Estate Planning*, and Ch. 60A, *Gifts*]. In other words, the maker of a gift or demand loan is deemed to have made a gift of the uncharged interest up to the statutory federal rate. The gift is computed annually during the life of the loan [see *I.R.C. § 7872(a)(2)*]. The maker of a term loan is deemed to have made, on the date of the loan, a gift equal to the excess of the amount of the loan over the present value of all payments required to be made under the terms of the loan [*I.R.C. § 7872(b)(1)*; see *I.R.C. § 7872(f)(6)* ("term loan" is any loan other than a demand loan)].

A de minimis exception to the rules discussed in the preceding paragraph exempts gift loans between individuals, provided that the aggregate outstanding amount of all loans from the lender to the borrower does not exceed \$10,000 and that the proceeds of the loan are not used to buy income-producing assets [see *I.R.C. § 7872(c)(2)(A), (B)*]. When the total amount of all loans made to one borrower fluctuates, tax liability will be incurred only for those days on which the aggregate amount owed to one lender exceeds \$10,000 [*I.R.C. § 7872(c)(2)(A), (3)(A)*]. When determining the aggregate amount transferred by a single lender to a single borrower, spouses are treated as one person [*I.R.C. § 7872(f)(7)*].

[2] Income Tax Treatment

For income tax purposes, forgone interest on gift and demand loans is treated as having been transferred from the lender to the borrower and retransferred by the borrower to the lender as interest [*I.R.C. § 7872(a)*]. For these purposes, any loan that (1) is payable in full on the demand of the lender, (2) contains nontransferable interest arrangements that are conditioned on the future performance of substantial services by an individual, or (3) is made in the form of an extension of credit by use of a broadly available credit card is a demand loan [*I.R.C. § 7872(f)(5)*; Treas. Reg. § 1.7872-10(a)(5), (a)(6)]. The Internal Revenue Code also authorizes promulgation of Treasury Regulations specifying the extent to which a loan with an indefinite maturity date may be considered to be a demand loan [*I.R.C. § 7872(f)(5)*].

Any loan that is not a demand loan is a term loan [*I.R.C. § 7872(f)(6)*]. Term loans are treated as if, on the date the loan was made, the lender transferred and the borrower received a cash payment equal to the excess of the amount loaned over the current value of all payments due [*I.R.C. § 7872(b)(1)*].

The borrower will be treated for tax purposes as if he or she had actually paid the interest, and the lender will be treated as if he or she received income in an amount equal to the forgone interest (in the form of original issue discount, in the case of term loans) [see *I.R.C. § 7872(a), (b)*]. However, the borrower may not be able to claim a deduction for the forgone interest. Deductions for "personal interest" were eliminated after 1990 [*I.R.C. § 163(a), (h)*; see § 97.12]. Any forgone interest attributable to periods during a calendar year is deemed to have been transferred annually on the last day of the calendar year for both term and demand loans [*I.R.C. § 7872(a)(2)*].

There is a de minimis exception for compensation-related and corporation-shareholder loans, under which aggregate loans of \$10,000 or less are not subject to these income tax rules [*I.R.C. § 7872(c)(3)*]. This exception does not apply to loans arranged primarily for tax avoidance purposes [*I.R.C. § 7872(c)(3)*]. The de minimis exception for gift loans is the same as the exception for gift tax purposes [see § 97.11[1]]. In addition, when the aggregate gift loans between two individuals do not exceed \$100,000 and the borrower's annual net investment income is less than \$1,000, the forgone interest is not subject to taxation [*I.R.C. § 7872(d)(1)*] and the amount deemed to be retransferred by the borrower to the lender will not exceed the borrower's net investment income for the year [*I.R.C. § 7872(d)(1)(A), (E)(ii)*]. "Net investment income," for these purposes, is the excess of investment income over investment expense [*I.R.C. § 163(d)(4)*; see *I.R.C. § 7872(d)(1)(E)*]. If the annual net investment income limitation applies and the borrower has gift loans outstanding from more than one lender, net investment income will be allocated proportionally between lenders [*I.R.C. § 7872(d)(1)(C)*]. This exception will not apply to any loan arranged primarily for tax avoidance purposes [

I.R.C. § 7872(d)(1)(B)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 97.12 Deductibility of Interest

Prior to a 1987 amendment [Pub. L. No. 99-514, § 511(a)], all interest paid on a loan was deductible by the borrower [see former *I.R.C.* § 163]. However, the deductibility of so-called "personal interest" was phased out during 1987-1990, and completely eliminated for noncorporate taxpayers for tax years following 1990 [*I.R.C.* § 163(d)(6)(B), (h)(5)]. This phaseout and elimination of the interest deduction applies only to "personal interest," which is any interest that is *not* any of the following [*I.R.C.* § 163(h)(2)]:

- Paid or accrued on indebtedness properly allocable to a trade or business.
- Investment interest [see *I.R.C.* § 163(d) (limitation of investment interest)].
- Interest taken into account in computing income or loss from a passive activity [see *I.R.C.* § 469 (passive activity losses and credits limited)].
- Qualified residence interest [see *I.R.C.* § 163(h)(3) (qualified residence interest)].
- Interest on unpaid portions of any estate tax for which the taxpayer is liable [see *I.R.C.* §§ 2001 (estate tax), 6163 (extensions of time for payment of estate tax of value of reversionary or remainder interest in property), 6166 (extension of time for payment of estate tax when estate consists largely or interest in closely held business), 6601 (interest on underpayment, nonpayment, or extensions of time for payment of tax)].
- Interest on educational loans allowable as a deduction [see *I.R.C.* § 221 (interest on educational loans)].

Any interest received by a lender constitutes gross income and is taxable in the year received [*I.R.C.* § 61; *Treas. Reg.* § 1.61-7].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law National Banks Interest & Usury Interest Tax Law Federal Tax Administration & Procedure Tax Credits & Liabilities Interest (IRC secs. 6601-6631) General Overview



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§ 97.13 Taxation of Unearned Income of Children

Loans made to young children who subsequently realize unearned income from the loan proceeds may have income tax consequences for the family. The so-called "kiddie tax" applies to the net unearned income of any child who is under the age of 18 years and has at least one living parent at the close of the taxable year [*I.R.C. § 1(g)(1), (2)*]. Net unearned income is determined by computing the child's unearned income for the year and subtracting from it the sum of (1) the maximum standard deduction available for the child for the year under *I.R.C. § 63(c)(5)(A)*; and (2) the greater of the maximum standard deduction available for the child for the year or the amount of the child's itemized deductions, if any, directly relating to the production of the unearned income [*I.R.C. § 1(g)(4)*].

The amount of the maximum standard deduction available for the child under *I.R.C. § 63(c)(5)(A)* is indexed for inflation and changes from year to year [*I.R.C. § 63(c)(4)*]. "Unearned income" is very broadly defined to include any income other than wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered [*I.R.C. § 1(g)(4)(A)(i), 911(d)(2)*].

The rate of the "kiddie tax" is that of the custodial parent if the parents are not married, or the parent with the greater taxable income if the parents are married but filing separately [*I.R.C. § 1(g)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Income Tax ComputationGeneral OverviewTax LawFederal Income Tax ComputationCompensation & Welfare BenefitsTips, Wages & Other Compensation (IRC secs. 61, 3121, 3231)General Overview



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§ 97.14 Forgiveness of Debts

Forgiveness of a debt may have an impact on the income tax of the debtor and may have gift and estate tax implications for the lender.

Generally, under both federal and California law, a discharge of indebtedness constitutes taxable income to the debtor in the amount of the debt [*I.R.C. § 61(a)(12)*; *Rev. & Tax. Code § 17071*; see *Rev. & Tax. Code § 17024.5*]. However, if the discharge of the obligation is a gift from the lender to the debtor, the debtor will not be liable for income tax on the amount discharged [*I.R.C. § 102(a)*]. The discharge of a debt is considered to be a gift if the lender receives no consideration in return for agreeing to erase the debt [*Helvering v. American Dental Co. (1943) 318 U.S. 322, 331, 63 S. Ct. 577, 87 L. Ed. 785*] . The discharge of a debt is also excluded from the debtor's income for tax purposes if the debtor is insolvent and will remain insolvent after the discharge [*I.R.C. § 108(a)(1)(B)*].

Forgiveness of a debt owed by a solvent person will generally constitute a gift on which the lender will be liable for a gift tax [*Treas. Reg. § 25.2511-1(a)*]. When an interest-bearing loan is made and the obligation to pay the stated interest is discharged by the family member who made the loan, the amount of interest forgiven is a gift [*Republic Petroleum Corporation v. United States (E.D. La. 1975) 397 F. Supp. 900, 918*] .

In some instances the lender dies before the loan is repaid. If a decedent provides by will for cancellation of the loan, the amount still owed is treated as a specific bequest and is not valid against creditors of the decedent lender [*Prob. Code § 8851*].

Circumstances may arise when the likelihood of repayment seems remote and the lender would like to take a loss deduction based on the bad debt. Generally, deductions may be taken for nonbusiness bad debts during the taxable year in which they become worthless [*I.R.C. § 166(d)*]. Attempts to take loss deductions on bad debts owed by family members are carefully scrutinized by the Internal Revenue Service and the courts. If it is determined that the lender had no reasonable expectation of repayment at the time the loan was made, the deduction will be disallowed [see *Goldstein v. Commissioner (1980) 40 T.C.M. 752, T.C. Memo. 1980-273*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy LawState Insolvency LawsTax LawFederal Estate & Gift TaxesDeductionsGeneral OverviewTax
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CHAPTER 97 PRIVATE LOANS AND ANNUITIES
PART II. LEGAL BACKGROUND

31-97 California Legal Forms--Transaction Guide § 97.15

§ 97.15 Private Annuities

[1] In General

Annuities can be created by various instruments, including wills, deeds, and contracts [*Estate of Bourn (1938) 25 Cal. App. 2d 590, 598, 78 P.2d 193*] . An annuity contract is created when one party (the "annuitant") transfers money or property to another party (the "obligor") in return for periodic cash payments [*Manne v. Commissioner of Internal Revenue (8th Cir. 1946) 155 F.2d 304*] . No particular form is required to create an annuity contract. Consideration is required, as with any contract [see *Civ. Code § 1550*]. However, the court will not generally inquire into the sufficiency of consideration, or invalidate an annuity contract because the annuitant dies before any annuity payments have been made [*Coyne v. Pacific Mut. Life Ins. Co. (1935) 8 Cal. App. 2d 104, 47 P.2d 1079*] .

Private annuities differ from commercial annuities in that the obligor is a private party not regularly engaged in the business of selling annuities [*Ware v. Commissioner of Internal Revenue (5th Cir. 1947) 159 F.2d 542* ; for discussion of commercial annuities, see *Ch. 63, Will Provisions, § 63.508*].

Annuities may provide for payments for the duration of the annuitant's life, or for a term of years.

[2] Uses

Private annuities are most commonly used by older family members to transfer real property, stocks, or other family assets to younger family members. This arrangement provides the annuitant with a steady income and relief from property management responsibilities, while keeping the assets within the family. It may also reduce the annuitant's estate taxes, by removing assets from the estate during his or her lifetime. However, the annuitant may incur gift tax liability if the value of the annuity is less than the value of the property exchanged [*I.R.C. § 2512(b)*]; see § 97.112 and § 97.210[1].

A private annuity may be used when a third party has offered to buy property from the parents of adult children. If the parents do not wish to sell the property directly to the third party, they may elect to transfer it to their children in return for a private annuity, and the children thereafter can sell the property to the third party. However, this sale will be treated as a capital disposition and be subject to taxation under the rules relating to capital gains and losses [see *I.R.C. §*

1(h) (maximum capital gains rate)]. Further, if the sale is made within two years after the property is transferred to the children, the amount received by the children will be treated for income tax purposes as if it were received by the parents [see *I.R.C. § 453(e)* (second disposition by related persons within two years after first disposition)]. For further discussion of the income taxation of capital gains, see "Gain or Loss on Sale of Real Property--In General" and succeeding headings in the Legal Background to Ch. 23, *Real Property Sales Agreements*.

Private annuities are rarely used in non-family situations. This may be because secured annuities (those under which obligor's promise to make payments is secured by some asset, such as the property transferred to obligor under the annuity agreement) do not enjoy the same beneficial tax treatment as unsecured annuities [*Estate of Bell v. Commissioner* (1973) 60 T.C. 469] , and few people wish to transfer property outside of the family in exchange for an unsecured promise to make payments [see § 97.210[1][l]].

For a discussion of the use of annuities in wills, see Ch. 63, *Will Provisions*, §§ 63.508-63.5100.

[3] Distinguished From Trusts

An annuity contract gives rise to a right to fixed, periodic payments--the amount and the entitlement to payment are not dependent on the productivity of the property transferred. A situation in which the transferor retains a right to income from the property transferred will be treated as a trust rather than an annuity [see *Lazarus v. C.I.R.* (9th Cir. 1975) 513 F.2d 824] . The distinction is important because trust income is fully taxable [*I.R.C. §§ 671, 677(a)*], while only a portion of each annuity payment is taxable [*Rev. Rul. 69-74, 1969-1 C.B. 43* ; see § 97.210[f][i] et seq.]; and a purported annuity transaction that is treated as a trust for federal income tax purposes may generate undesirable estate and gift tax consequences for the annuitant [see *Lazarus v. C.I.R.* (9th Cir. 1975) 513 F.2d 824] .

A provision for fixed payments is not in itself determinative in distinguishing a trust from an annuity. If payments, although fixed, are "tied to" the amount of interest generated by the property transferred, they will be treated as payments of trust income [*Lazarus v. C.I.R.* (9th Cir. 1975) 513 F.2d 824 ; *Ray v. United States* (9th Cir. 1985) 762 F.2d 1361] . Other factors considered in determining whether payments received will be treated as annuity payments or distributions of trust income for federal tax purposes are the amount of control the annuitant/transferor retains over the property transferred [*LaFargue v. C.I.R.* (9th Cir. 1982) 689 F.2d 845] and the extent to which the annuitant/transferor observes the appropriate formalities in setting up the transaction [*Stern v. Commissioner* (9th Cir. 1984) 747 F.2d 555] .

[4] Tax Treatment

Tax treatment of annuity payments is covered generally by *I.R.C. § 72* and *Treas. Reg. § 1.72-2*, which treat annuity payments as part gross income and part return of investment [see § 97.210[1]]. Because private annuities are often unsecured and usually involve a transfer of property rather than cash, their tax treatment can be complicated and involves special rules. Payments under an unsecured annuity are divided into three parts: recovery of basis in the property transferred, capital gain, and regular income [*Garvey, Inc. v. United States* (Fed. Cir. 1984) 726 F.2d 1569 , cert. denied, 469 U.S. 823] . Secured private annuities are treated as commercial annuities for federal tax purposes [*Estate of Bell v. Commissioner* (1973) 60 T.C. 469] .

If the property exchanged has a current value greater than that of the annuity, gift tax consequences may also arise [*Estate of Bartman v. Commissioner* (1948) 10 T.C. 1073] . For a more detailed discussion of the tax aspects of private annuities, see § 97.210[1].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawAnnuitiesGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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31-97 California Legal Forms--Transaction Guide §§ 97.16-97.99

[Reserved]

§§ 97.16[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 97 PRIVATE LOANS AND ANNUITIES
PART III. TRANSACTION GUIDE
A. Client Interview--Facts And Documents

31-97 California Legal Forms--Transaction Guide § 97.100

§ 97.100 Facts for Private Loans

1. For lender and borrower:

- a. Name and age.
- b. Home address and telephone number.
- c. Business address and telephone number.
- d. Nature of business or occupation.
- e. Estimated yearly income and its sources.
- f. Marital status and name and age of spouse.

2. For guarantor:

- a. Name and age.
- b. Home address and telephone number.

NOTE:

To avoid possible jurisdictional problems, the guarantor should be a California resident.

- c. Business address and telephone number.
- d. Nature of business or occupation.

e. Assets owned and any liens or other restrictions on their sale.

3. Relationship between parties (including guarantor).

4. Outstanding loans between borrower and lender.

a. Total amount outstanding.

b. Dates, amounts, terms of each loan.

c. Any loans forgiven.

5. Reasons for loan.

a. Assistance to borrower.

b. Production of income for lender.

c. What loan will be used for.

6. For property to be used as security:

NOTE:

For analysis and forms relating to security transactions involving real property, see Chs. 25- 25D.

a. Description and fair market value.

b. Title holder and interest held.

c. Existing liens, encumbrances, restrictions on transfer.

7. Loan terms desired:

a. Amount to be borrowed.

b. Date funds needed by borrower.

c. Type of transfer.

(1) Cash.

(2) Check.

(3) Foreign currency.

(4) Other.

d. Amount of interest, if any.

NOTE:

Interest-free below-market loans will have tax consequences for both the lender and the borrower [**see** § 97.11].

e. Security for payments.

f. Payment arrangements.

(1) Term or demand note.

(2) Lump sum or installment payments.

(3) Payment dates, amounts.

(4) Provision for early or late payments [*see* § 97.111].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewContracts LawDebtor & Creditor Relations



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31-97 California Legal Forms--Transaction Guide § 97.101

§ 97.101 Documents for Private Loans

1. Copies of promissory notes used in previous transactions between the parties.
2. Parties' draft or outline of the loan agreement.
3. Title or other proof of ownership for property to be used as security.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewContracts LawDebtor & Creditor Relations



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31-97 California Legal Forms--Transaction Guide § 97.102

§ 97.102 Facts for Private Annuities

1. For annuitant and obligor:
 - a. Name and age.
 - b. Home address and telephone number.
 - c. Business address and telephone number.
 - d. Nature of business or occupation.
 - e. Estimated yearly income and its sources.
 - f. Marital status and name and age of spouse.
 - g. Living expenses and estimated special expenses.
 - h. Contemplated retirement age.
 - i. Any facts affecting annuitant's life expectancy.
2. Relationship between parties.
3. For property to be transferred in exchange for annuity:
 - a. Description and fair market value.

- b. All title holders and interests held.
- c. Existing liens, encumbrances, restrictions on transfer.
- d. Annuitant's tax basis [*see I.R.C. §§ 1012, 1016*].

4. Reasons for annuity:

- a. Income tax considerations.
- b. Removal of property from annuitant's estate.
- c. Production of income for annuitant.
- d. Transfer of property management responsibilities.

5. Annuity terms desired:

- a. Fixed term or life annuity.
- b. Sole or joint annuity.
- c. Amount and frequency of payments.

NOTE:

Annuity payments should not be tied to the amount of interest produced by the transferred property. If they are, the transaction will be treated as a trust rather than an annuity, resulting in adverse tax consequences [*I.R.C. §§ 671, 677(a); Rev. Rul. 69-74, 1969-1 C.B. 43 ; see § 97.15[3]*].

- d. Date payments are to begin.
- e. Assignability of rights and duties.
- f. Provision for payments after annuitant's death, in case of term annuity.
- g. Security for payments.

NOTE:

Secured annuities will be treated as commercial annuities for tax purposes and will not receive the tax benefits accorded private annuities [*Estate of Lloyd G. Bell (1973) 60 T.C. 469 ; see § 97.210[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawAnnuitiesGeneral Overview



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31-97 California Legal Forms--Transaction Guide § 97.103

§ 97.103 Documents for Private Annuities

1. Title or other proof of ownership for property to be transferred.
2. Proof of value of property to be transferred.

NOTE:

If the property transferred in exchange for the annuity is found to be significantly less than the parties stated at the time of the transfer, the transfer may be characterized as a gift for tax purposes [*I.R.C. § 2501*; *see § 97.210[1][i]*].

3. Any existing agreements between parties regarding subject matter of annuity agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawAnnuitiesGeneral Overview



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31-97 California Legal Forms--Transaction Guide §§ 97.104-97.109

[Reserved]

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31-97 California Legal Forms--Transaction Guide § 97.110

§ 97.110 Necessary Parties

1. Determine whether parents or guardians of any minor or incompetent parties must be joined.

NOTE:

Minors cannot enter into contracts involving real property interests [*Fam. Code § 6701(b)*]. This, and the broad power of minors to disaffirm their contracts generally [*Fam. Code § 6710*; *see* Ch. 100B, ***Contracts and Employment of Minors***], keep annuity contracts with minor parties from being a useful device. For a discussion of the issues involved in contracting with minors, see Ch. 100B, ***Contracts and Employment of Minors*** .

2. Ascertain identities of all owners of property to be transferred or advanced as security, including but not limited to:
 - a. Spouses, if community property involved.
 - b. Joint tenants.
 - c. Lienholders.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawAnnuitiesGeneral Overview



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31-97 California Legal Forms--Transaction Guide § 97.111

§ 97.111 Private Loans

1. Determine what type of loan is best suited to parties' needs [*see § 97.200[1] and § 97.201[1]*]:
 - a. Demand or term loan [*see § 97.200[1][a]*].

NOTE:

Term notes may be desirable to both parties because they provide specific dates for repayment. However, a demand note may be useful to the lender if the borrower's financial situation is unstable, because it allows the lender to assert a right to payment as soon as he or she receives an indication that obtaining payment may become problematic, without the necessity of waiting for an actual default by the borrower.

- b. Secured or unsecured loan.

NOTE:

The inclusion of a security clause will not affect the negotiability of a note [*Com. Code §§ 3104(a)(3), 3106(b)*]. Securing a loan can help prove its bona fide status, as well as protecting the lender's interest in repayment [*see § 97.201[1][a]*]. For analysis and forms relating to security transactions involving real property, see Chs. 25-25D.

- (1) Determine who is to retain custody of security.
 - (2) Determine restrictions to be placed on custodian's ability to transfer or encumber security during loan term.
 - (3) Determine whether security is to be insured during loan term [*see § 97.201[2], P 2*].

(4) Confirm fair market value of security.

NOTE:

The fair market value of the borrower's security (what a willing and reasonably knowledgeable buyer would pay, and a willing and reasonably knowledgeable seller would sell for [Treas. Reg. §§ 20.2031-(b), 25.2512-1]) is a factor in determining whether or not a gift has resulted when the parties have not intended to make one. If the security is not in fact worth what it is purported to be, it reduces the fair market value of the promissory note given in exchange for the loan [*Estate of Berkman* (1979) 38 T.C.M. 183, 187] .

2. Determine interest arrangements:

a. Market-rate loan.

NOTE:

Market-rate interest arrangements will be desirable if production of income for the lender is a primary purpose of the loan agreement, or if the lender wishes to avoid gift and income tax liabilities stemming from the transaction [*see* § 97.11].

(1) Determine which rate applies [*I.R.C. § 1274(d)*]:

(a) Federal short-term rate applies if loan term is three years or less.

(b) Federal mid-term rate applies if loan term is more than three years but not more than nine years.

(c) Federal long-term rate applies if loan term exceeds nine years.

(2) Contact Internal Revenue Service to ascertain applicable federal rate for month in which loan is to be made.

b. Below-market or interest-free loan.

NOTE:

Below-market or interest-free loans may be desirable if the lender's primary reason for making the loan is to assist the borrower, rather than to generate income in the form of interest payments. For a discussion of the gift and income tax consequences for below-market and interest-free loans, see below; see also § 97.11.

(1) For tax purposes, loan is below market if it is:

(a) Demand loan on which interest charged is less than would accrue at applicable federal rate [*I.R.C. § 7872(e)*; *see* (2)(a)(1), (2), *above*]; or

(b) Term loan under which amount loaned exceeds present value of all payments due [*I.R.C. § 7872(e)*].

NOTE:

See § 97.11 for determination of present value.

- (2) If loan is below market, determine amount of forgone interest for each tax year loan will be outstanding.

NOTE:

The amount of forgone interest is the difference between the amount actually paid and the amount that would be payable at the applicable federal rate if paid on the last day of the year [I.R.C. § 7872(e)].

- (3) Determine whether forgone interest will be treated as gift for federal income tax purposes; in order to escape classification as gift, all of following must be true [I.R.C. § 7872(c)]:

(a) Parties are individuals;

(b) Aggregate amount owed by lender to borrower does not exceed \$10,000; and

NOTE:

When the total amount of all loans made to one borrower fluctuates, tax liability will be incurred only for those days on which the aggregate amount owed to one lender exceeds \$10,000 [I.R.C. § 7872(c)(2)(A), (c)(3)(A)]. When determining the aggregate amount transferred by a single lender to a single borrower, spouses are treated as one person [I.R.C. § 7872(f)(7)].

(c) Loan proceeds are not used to purchase income-producing assets.

- (4) If forgone interest will be classified as a gift [see (3), *above*], determine whether loan will generate any federal gift tax liability.

NOTE:

If the total of all gifts made by the borrower to the lender during the tax year, including foregone interest, do not exceed the applicable annual exclusion amount [see I.R.C. § 2503(b); for discussion of the annual exclusion and the applicable exclusion amounts, which are adjusted annually for inflation, see Ch. 60A, *Gifts*, § 60A.32[4]], they may qualify for the annual exclusion. However, any gifts made by the borrower should be consistent with the borrower's general estate plan. For a discussion of estate planning issues, see Ch. 60, *Estate Planning*. For a general discussion of gifts and the federal gift tax, see Ch. 60A, *Gifts*.

- (5) Determine whether lender will be liable for income taxes on forgone interest--lender will be liable *unless* loan is:

(a) Compensation related or between corporation and shareholder, and not made for tax avoidance purposes [I.R.C. § 7872(c)(3)]; or

(b) Gift loan [see I.R.C. § 7872(f)(3) (definition)] meeting all three requirements listed in (3)(b)(3)(a)-(c), *above* [I.R.C. § 7872(c)(2)].

NOTE:

When the aggregate gift loans between two individuals do not exceed \$100,000 and the borrower's annual net investment income is less than \$1,000, the forgone interest is not subject to taxation [I.R.C. § 7872(d)(1)] and the amount deemed to be retransferred by the borrower to the lender will not exceed the borrower's net investment income for the year [I.R.C. § 7872(d)(1)(A), (E)(ii)]. "Net investment income," for these purposes, is the excess of investment income over investment expense [I.R.C. § 163(d)(3); see I.R.C. §

7872(d)(1)(E)]. If the annual net investment income limitation applies and the borrower has gift loans outstanding from more than one lender, net investment income will be allocated proportionally between lenders [I.R.C. § 7872(d)(1)(C)]. This exception will not apply to any loan arranged primarily for tax avoidance purposes [I.R.C. § 7872(d)(1)(B)].

c. Maximum permissible rates under usury laws [*see Cal. Const., art. XV, § 1*].

(1) If loan is for primarily personal, family, or household purposes, interest rate cannot exceed 10 percent.

(2) If loan is for other purposes, interest rate cannot exceed the higher of:

(a) 10 percent per annum, or

(b) 5 percent plus prevailing rate established by Federal Reserve Bank of San Francisco for 25th day of month preceding making of loan or execution of loan contract, whichever occurs earlier.

3. If borrower is a child, determine income tax consequences of loan to borrower.

a. Determine whether, at end of tax year, borrower [I.R.C. § 1(g)]:

(1) Is under 18 years of age, and

(2) Has at least one parent living.

b. Determine whether loan proceeds were used to produce unearned income (income not received as payment for personal services performed, or received as distribution of earnings or profits rather than allowance for services performed) [I.R.C. § 911(d)].

c. If both (a) and (b) *above* apply, determine tax rate to be applied to loan proceeds [I.R.C. § 1(g)(5)]:

(1) Parents' rate, if parents are filing jointly.

(2) Rate of parent with greater taxable income, if parents are filing separately.

(3) Rate of custodial parent, if parents are not married.

4. Determine guarantor arrangements, if any.

a. Determine whether guarantor clause would be desirable due to:

(1) Uncertain financial future of borrower;

(2) No security or inadequate security advanced for loan; or

(3) Lender's unwillingness to make gift of principal to borrower.

b. Determine whether guarantor's obligation is to be conditional or unconditional.

NOTE:

Unless otherwise stated in the terms of the agreement, the guarantor's obligation is unconditional and the lender may proceed against the guarantor without first giving notice or securing a judgment against the borrower [Civ. Code §§ 2806, 2807; Com. Code § 3419; *see* § 97.202[1]].

5. Determine whether additional provisions are needed to clarify and carry out client's objectives.

NOTE:

For more complex promissory notes and note provisions, see Ch. 25A, *Security Instruments for Real Estate Financing*, Ch. 43, *Commercial Loans*, and Ch. 55, *Negotiable Instruments*. For general contract provisions, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

a. If lender's primary purpose in extending loan is to earn interest income, or if borrower's financial status is unstable, consider including:

(1) Provision for interest on unpaid interest [see § 55.221].

(2) Provision for acceleration on default [see § 55.231].

(3) Provision for late charges [see §§ 25A.43, 55.240].

NOTE:

Before a lender may impose the first late charge on a delinquent payment of a loan secured by real property, the borrower must either be (1) notified in writing and given at least 10 days from the mailing of the notice in which to cure the delinquency or (2) informed, by a billing or notice sent for each payment due on the loan, of the date after which such a charge will be assessed [Civ. Code § 2954.5(a)]. The notice sent to the borrower must contain the amount of the late charge or the method by which it is calculated [Civ. Code § 2954.5(a)]. If a subsequent payment becomes delinquent, the borrower must be notified in writing that the charge will be imposed if payment is not received, or the borrower must be notified at least semiannually of the total amount of late charges imposed during the period covered by the notice [Civ. Code § 2954.5(b)]. For discussion, see § 25A.43[1].

b. Consider including provision extending time for payment of note payable at definite time [see § 55.260] if:

(1) Lender's primary purpose in making loan is to assist borrower.

(2) Late charges or other incentives to timely payment are not a concern.

c. If lender may be unavailable at time payment becomes due, consider including provision authorizing payment to lender's representative [see Ch. 55, *Negotiable Instruments*, § 55.282].

d. If prepayment would frustrate lender's purpose in making loan, consider including clause prohibiting or imposing penalties for prepayment [see Ch. 55, *Negotiable Instruments*, § 55.250].

e. If borrower wants assurance of right to prepay, consider clause allowing prepayment, with or without penalty [see §

55.251].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewContracts LawDebtor & Creditor Relations



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31-97 California Legal Forms--Transaction Guide § 97.112

§ 97.112 Private Annuities

1. Determine whether life annuity or term annuity would better accomplish client's goals.

NOTE:

The major advantage of a term annuity over a life annuity is that the exact amount to be paid can be determined at the onset of the agreement. Under a life annuity, there is a substantial risk of overpayment (if the annuitant outlives his or her life expectancy) or underpayment (if the annuitant does not live out his or her life expectancy) for the property transferred. The major disadvantage of a term annuity is that payments falling due after the annuitant's death will become part of his or her estate. For this reason, a term annuity is probably unsuitable for an annuitant whose primary purpose for entering into an annuity contract is to remove assets from his or her estate [*see* § 97.210[1][j]].

2. If more than one annuitant is involved, determine whether joint annuity or two single annuities would better serve clients' needs.

NOTE:

The use of separate annuities involves the extra step of dividing the property to be transferred, and requires the obligor to make two payments for each payment period. However, it allows each annuitant to manage his or her finances independently and to assign the right to receive annuity payments without the consent of the other [*see* §§ 97.211[1], 97.212[1]].

3. Determine annuitant's life expectancy [*see* Actuarial Tables, *Treas. Reg.* § 1.72-9].

NOTE:

For annuity contracts entered into after June 30, 1986, use Tables V (single annuitant)

and VI (joint annuitants) [*Treas. Reg. § 1.72-9*].

4. Determine whether there are any liens or other restrictions on sale of subject property.

NOTE:

Restrictions on the transfer of shares of stock are not valid against bona fide purchasers unless they appear on the face of the certificate or, in the case of uncertificated securities, in the initial transaction statement [*Corp. Code § 418*].

a. Obtain copy of last title insurance policy affecting real property.

b. If interview with parties or information on policy indicates potential problems, arrange for title search.

NOTE:

Title searches are usually undertaken by title companies. For a discussion of the guarantees generally provided by title insurance, see Ch. 26A, **Title Insurance**.

5. Determine federal gift tax treatment of annuity.

NOTE:

Generally, the establishment of a private annuity will be treated as a gift from the annuitant to the obligor to the extent that the value of the property transferred exceeds the value of the annuity [*Rev. Rul. 69-74, 1969-1 C.B. 43*]. If jointly owned property is transferred in exchange for a joint and survivor annuity, the value of the gift will have to be determined for each annuitant since the life expectancy of joint annuitants is rarely the same and the annuitant with the longer life expectancy will receive a greater interest in the entire value of the annuity. For further discussion of gift tax issues, see § 97.210[1][i].

a. Determine present value of annuity.

NOTE:

The determination of present value for gift and estate tax purposes will not be affected by the fact that the annuity is unsecured and therefore has no present value for income tax purposes [*Estate of Bartman v. Commissioner (1948) 10 T.C. 1073*]. To compute the present value of an annuity interest payable until the earlier of the lapse of a specific number of years or the death of an individual, see *Treas. Reg. § 25.2512-5(d)(2)(v)* [*Treas. Reg. § 20.2031-7(d)(2)(v)*].

(1) Multiply aggregate amount payable annually by proper annuity actuarial factor [*Treas. Reg. § 20.2031-7(d)(2)(iv)*].

NOTE:

The appropriate annuity actuarial factor is the one that corresponds to the applicable *I.R.C. § 7520* interest rate [*see Treas. Reg. § 20.7520-1(b)(1)(i)*] and annuity period. Although tables of annuity actuarial factors do not appear in *Treas. Reg. § 20.2031-7*, the tables are available in IRS Publication No. 1457, Actuarial Values, Book Aleph [*Treas. Reg. § 20.2031-7(d)(4)*]. Annuity actuarial factors may also be derived mathematically by subtracting the applicable remainder factor found in Table B (for term-of-years annuities)

or Table S (for one-life annuities) [*see Treas. Reg. § 20.2031-7(d)(6), (7) (tables)*] from 1.000000, and then dividing the result by the applicable *I.R.C. § 7520* interest rate expressed as a decimal number [*Treas. Reg. § 20.2031-7(d)(2)(iv)(A)*].

(2) If payments are to be made at end of semiannual, quarterly, monthly, or weekly periods, multiply product of annuity factor and aggregate annual amount by adjustment factor from Table K [*see Treas. Reg. § 20.2031-7(d)(6)*] for payments made at end of specified periods [*Treas. Reg. § 20.2031-7(d)(2)(iv)(B)*].

(3) If payments are to be made at beginning of annual, semiannual, quarterly, monthly, or weekly periods, multiply product of annuity factor and aggregate annual amount by adjustment factor from Table J [*see Treas. Reg. § 20.2031-7(d)(6)*] for payments made at beginning of specified periods [*Treas. Reg. § 20.2031-7(d)(2)(iv)(C)*].

b. If present value of annuity is substantially equal to fair market value of property exchanged for annuity, no gift taxes will result.

c. If present value of annuity is not substantially equal to fair market value of property exchanged for annuity, gift tax on excess will result unless:

(1) Transfer is shown to be free of donative intent and made in ordinary course of business [*Treas. Reg. § 25.2512-8*]; or

(2) Total gifts from annuitant to obligor for tax year, including excess of value of property over value of annuity, do not exceed applicable annual exclusion amount [*see I.R.C. § 2503(b)*]; for discussion of the annual exclusion and the applicable exclusion amounts, which are adjusted annually for inflation, *see Ch. 60A, Gifts, § 60A.32[4]*.

NOTE:

For additional discussion regarding avoiding gift tax on inter vivos transfers, see Ch. 60, *Estate Planning*, and Ch. 60A, *Gifts*.

d. Determine schedule of payments necessary to avoid gift tax characterization.

(1) Determine value of property to be transferred.

(2) Determine annuity actuarial factor for annuitant based on annuitant's age (for life annuity) or length of annuity term (for term annuity) [*Treas. Reg. § 25.2512-5(d)(2)(iv)(A)*; *see P 5a(1), above*].

(3) If annuity will be payable more often than annually, determine adjustment factor [*Treas. Reg. § 25.2512-5(d)(2)(iv)(B), (C)*; *see PP 5a(2), (3), above*].

(4) Determine annual annuity payment (divide value of property transferred by annuity factor or product of annuity and payment factors).

NOTE:

If payments are made more often than annually, the annual payment figure should be proportioned accordingly.

6. Determine estate tax consequences of annuity, if any.

NOTE:

Estate taxes will result if a term annuity is not paid off before the annuitant's death [*I.R.C. § 2033*], or if annuity payments are tied to the interest produced by the transferred property [*I.R.C. § 2036(a)*]; **see** § 97.210[1][j]. For a discussion of estate planning issues generally, see Ch. 60, ***Estate Planning***.

7. Determine income tax consequences to annuitant.

a. Unsecured annuities.

NOTE:

Each payment under an unsecured private annuity is divided into three portions for income tax purposes: (1) tax-free return of basis, (2) capital gain, and (3) regular income [*Rev. Rul. 69-74, 1969-1 C.B. 43*].

(1) Determine what portion of each payment is tax-free return of basis [*Rev. Rul. 69-74, 1969-1 C.B. 43*]:

(a) Determine expected return (annuitant's life expectancy) [*see Treas. Reg. § 1.72-9*], or term of annuity, multiplied by amount of yearly annuity payment.

(b) Determine exclusion ratio (annuitant's tax basis divided by expected return).

(c) Determine annual exclusion (product of annual payment figure and exclusion ratio).

(2) Determine what portion of each payment is taxable as capital gain:

NOTE:

Under a life annuity, a portion of each payment will receive capital gain treatment only until the annuitant reaches his or her life expectancy. Thereafter, the entire portion of each payment not excluded as return of basis will be treated as ordinary income [*Rev. Rul. 69-74, 1969-1 C.B. 43* ; **but see** § 97.210[1][f][i] et seq. (tax rate currently the same for capital gains and ordinary income)].

(a) Determine term of annuity.

NOTE:

For life annuities, see life expectancy table under *Treas. Reg. § 20.2031*; for term annuities, term is certain at the time the contract is entered into.

(b) Determine value of annuity (multiply term of annuity by annual payment amount).

NOTE:

For payment factors when payments are made more often than annually, see § 97.111.

(c) Divide value of annuity by number of years during which payments will be made.

(d) Determine whether annuitant is entitled to capital gains tax exclusion under *I.R.C. § 121*.

NOTE:

I.R.C. § 121 provides an exclusion of up to \$250,000 of gain from the sale of a taxpayer's personal residence (\$500,000 in the case of married taxpayers filing joint returns) [*I.R.C. § 121(b)(1), (2)*]. The residence must have been owned and used as the taxpayer's personal residence for periods aggregating at least two years during the five-year-period preceding the sale or exchange [*I.R.C. § 121(a)*]. This exclusion can be taken only once every two years [*I.R.C. § 121(b)(3)*].

The \$500,000 exclusion for joint returns applies if (1) either spouse meets the above-listed ownership requirements with respect to the property; (2) both spouses meet the use requirements with respect to the property; and (3) neither spouse is ineligible for the exclusion with respect to the property by reason of having claimed the exemption in connection with another sale or exchange during the preceding two-year period [*I.R.C. § 121(b)(2)(A), (3)*]. If a husband and wife filing jointly do not qualify for the \$500,000 exclusion because they do not satisfy the two-year ownership or use test, the available exclusion is the sum of the exclusions to which each spouse would be entitled if the spouses had not been married. For this purpose, each spouse will be treated as owning the property during the period that either spouse owned it [*I.R.C. § 121(b)(2)(B)*].

For discussion of other capital gains rules, see § 97.210[1][f][i] et seq.

b. Secured annuities.

NOTE:

There are two main differences between the income tax treatment of unsecured private annuities and that of secured private annuities. First, since a secured annuity has an ascertainable fair market value, any gain or loss on the transfer of property for annuity is fully taxable in the year in which the transfer occurs [*I.R.C. § 1001*; *Garvey, Inc. v. United States (Ct. Cl. 1984) 726 F.2d 1569*, **cert. denied**, 469 U.S. 823]. Second, the annuitant's investment in the contract is the fair market value of the property transferred, rather than the annuitant's basis in the property [*Estate of Bell v. Commissioner (1973) 60 T.C. 469*].

(1) Determine what portion of each payment is tax-free return of investment [*I.R.C. § 72(b)*]:

(a) Determine expected return to annuitant [see P a1(a), above].

(b) Determine exclusion ratio (fair market value of property transferred in exchange for annuity divided by expected return).

(c) Determine actual exclusion (product of annual payment and exclusion ratio).

(2) Determine capital gain or loss on transfer of property for annuity [*I.R.C. § 1001*]:

(a) Determine value of annuity (multiply term of annuity in years by annual payment).

NOTE:

The term of years used for a life annuity is the life expectancy of the annuitant under the actuary tables in *Treas. Reg. § 1.72-9*. Tables V (single annuitant) and VI (joint annuitants) should be used for annuity agreements entered into after June 30, 1986.

(b) Compare value of annuity to annuitant's adjusted basis in property transferred [see *I.R.C. § 1016*].

8. Determine income tax consequences to obligor.

a. Tax deduction for payments.

NOTE:

There is no tax deduction for annuity payments [*Bell v. Commissioner (8th Cir. 1982) 668 F.2d 448*], unless the obligor sells property at a loss before the annuity is paid off [*Sheridan v. Commissioner (1952) 18 T.C. 381, 384*].

b. Tax basis of property transferred to obligor in consideration for annuity, for purposes of sale [*Rev. Rul. 55-119, 1955-1 C.B. 352*].

(1) Value of all payments made, less depreciation, if property is sold after annuity is paid off.

(2) Sum of actual payments made plus estimated value of remaining payments, less depreciation, if property is sold before annuity is paid off.

c. Tax basis for depreciation purposes [*Rev. Rul. 55-119, 1955-1 C.B. 352*].

(1) Amount actually paid, or present value of expected payments, generally.

(2) "Extra" payments added to basis, if life annuitant outlives life expectancy.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawAnnuitiesGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Preliminary Determinations

31-97 California Legal Forms--Transaction Guide §§ 97.113-97.119

[Reserved]

§§ 97.113[Reserved]



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31-97 California Legal Forms--Transaction Guide § 97.120

§ 97.120 Preparation of Promissory Note

1. Select appropriate promissory note form.

NOTE:

See § 97.111, § 97.200[1][a], and § 97.201[1][a] for guidelines to choosing the proper note.

- a. Interest-free demand note [§ 97.200].
- b. Interest-free term note [§ 97.200].
- c. Interest-bearing note [§ 97.201].

2. Draft promissory note to include:

- a. Recitals.
- b. Name and address of each party:
 - (1) Lender.
 - (2) Borrower.
 - (3) Guarantor.
 - (4) Spouse of any party whose community property interests may be affected by transaction.

NOTE:

A spouse may not encumber community property that is the family residence, its furnishings, or the clothing of the other spouse or minor children without the written consent of the other spouse [Civ. Code § 100(c)].

c. Date and place of execution.

d. Amount of loan.

e. Interest provisions.

NOTE:

If the loan calls for payment of interest at the rate currently charged by banks and other financial institutions, the parties are unlikely to face any unusual tax problems. Interest payments received by the lender must be reported as gross income [I.R.C. § 61(a)(4)]. For tax years following 1990, the interest deduction for noncorporate borrowers has been eliminated [I.R.C. § 163(d)(6)(B), (h)(5); *see* § 97.12].

Loans made without interest or at an interest rate below the applicable federal rate may result in adverse gift or income tax consequences under I.R.C. § 7872 [*see* § 97.11].

f. Payment provisions.

(1) Frequency of payments.

(2) Dates and amounts of payments.

(3) Distinction between interest and principal provisions.

(4) Provisions for extensions or late payment penalties.

NOTE:

For form provisions regarding late payment penalties, interest on unpaid interest, and other adjustments in payment schedules, *see* Ch. 25A, ***Security Instruments for Real Estate Financing***, and Ch. 55, ***Negotiable Instruments***.

g. Security provisions.

NOTE:

For analysis and forms relating to security transactions involving real property, see Chs. 25- 25D.

(1) Sufficient description of any security.

(2) Arrangements for custody and insurance of security.

(3) Acknowledgment of or prohibition against encumbrances.

h. Additional provisions.

NOTE:

For additional provisions that may be desirable in promissory notes, see § 97.111. For more complex

promissory notes and note provisions, see Ch. 25A, *Security Instruments for Real Estate Financing* , Ch. 43, *Commercial Loans* , and Ch. 55, *Negotiable Instruments* . For general contract provisions, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralCommercial PaperContracts LawNegotiable InstrumentsGeneral Overview



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31-97 California Legal Forms--Transaction Guide § 97.121

§ 97.121 Execution of Promissory Note

1. Review draft with clients.

NOTE:

Unrepresented parties should be advised of their right to seek independent counsel before signing the note. If more than one party is represented by the same attorney (for example, if the borrower and the lender, or the borrower and the guarantor, consulted the attorney together), they should also be advised regarding the possibility of future conflicts of interest [*Cal. Rules Prof. Conduct, Rule 3-310; see Ch. 86, Agreements for Professional Services, § 86A.12[3]*].

2. Obtain signatures of all parties.

- a. Full names should be used.

- b. Specify if any person is signing in representative capacity [*e.g.*, guardian].

3. Provide each party with copy of signed note and retain copy for attorney's records.

NOTE:

In addition to providing each party with evidence of the loan agreement, a copy may be needed later for tax purposes.

4. Arrange for transfer of loaned funds to borrower.

- a. Verify performance of any conditions precedent to transfer (*e.g.*, delivery of security to lender).

b. Verify form in which funds are to be delivered.

(1) Cash.

(2) Check.

(3) Foreign currency.

(4) Other.

c. Set date and place of transfer.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralCommercial
PaperContracts LawNegotiable InstrumentsGeneral OverviewContracts LawNegotiable
InstrumentsEnforcementGeneral Overview



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31-97 California Legal Forms--Transaction Guide §§ 97.122-97.129

[Reserved]

§§ 97.122[Reserved]



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31-97 California Legal Forms--Transaction Guide § 97.130

§ 97.130 Preparation of Annuity Contract

1. Select appropriate agreement.

NOTE:

See § 97.112 and §§ 97.210-97.214, for guidelines to choosing the proper form.

- a. Annuity for sole annuitant [§ 97.210].
- b. Joint and survivor annuity [§ 97.211].

2. Draft agreement, including:

- a. Recitals.
- b. Date and place of execution.
- c. Payment schedule.
 - (1) Frequency of payments (*e.g.*, monthly or yearly).
 - (2) Date payments will be due (*e.g.*, first day of each month).
 - (3) Amount of each payment.

NOTE:

See § 97.112 for an explanation of the tax and financial planning considerations relevant to the establishment of the payment schedule, and a guide to determining the amount of

each payment.

d. Provision regarding assignability.

- (1) Annuitant's right to assign entitlement to payments.
- (2) Obligor's right to assign duty to make payments.

NOTE:

The typical private annuity agreement, which features a relative's unsecured promise to make payments, exposes the annuitant to some risk of nonpayment. The annuitant and his or her attorney should carefully consider whether or not the additional risk of allowing the obligor to assign the duty to make payments is acceptable.

e. Names and addresses of parties.

f. Appropriate additional provisions.

- (1) Provision allowing term annuitant to designate beneficiary of payments if he or she dies during term of annuity [see § 97.212].
- (2) Provision giving child obligor various options for making payments in event of disability of parent annuitant [see § 97.213].
- (3) Provision specifying payments not tied to income of property transferred [see § 97.214].

NOTE:

This type of provision may be useful if income-producing property was transferred in exchange for the annuity, to prevent the treatment of the transaction as a trust for tax purposes [see *I.R.C. §§ 671, 677*; see also § 97.15[3]].

- (4) Security provision [see § 97.215].

NOTE:

Private annuities are generally unsecured, since this allows the annuitant to spread the gain realized on the transfer of property for the annuity over the entire term of the annuity [see *Rev. Rul. 69-74, 1969-1 C.B. 43*]. The gain realized on secured annuities is fully taxed during the year of the transfer [*I.R.C. § 72(c)(1)*; see § 97.215[1]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions General Overview Estate, Gift & Trust Law Annuities General Overview



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31-97 California Legal Forms--Transaction Guide § 97.131

§ 97.131 Preparation of Schedule A (Description of Property Transferred)

1. Provide adequate legal description of property.
2. Include full disclosure of any liens, encumbrances, defects, or other matters affecting actual value of property.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewReal Property LawPurchase & SaleGeneral Overview



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31-97 California Legal Forms--Transaction Guide § 97.132

§ 97.132 Execution of Annuity Contract

NOTE:

For discussion of execution procedures, see § 97.121.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Execution Estate, Gift & Trust Law Annuities General Overview



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31-97 California Legal Forms--Transaction Guide § 97.133

§ 97.133 Transfer of Stocks

NOTE:

Various types of property can be exchanged for annuities. For general coverage of transfers of real property, see Ch. 23, ***Real Property Sales Agreements*** , and Ch. 27, ***Deeds and Recording*** .

1. Instruct annuitant to:

- a. Endorse stock certificate (or, for uncertificated securities, prepare and sign memorandum of assignment).
- b. Fill in obligor's name as transferee.
- c. Deliver certificate or memorandum of assignment to obligor.

NOTE:

An effective stock transfer requires endorsement by the transferor and delivery to the transferee [*Com. Code § 8309*].

2. Instruct obligor to register transfer with corporation promptly.

NOTE:

Until the transferee has registered the transfer with the corporation (which will cancel the old certificate and issue a new one in the transferee's name), the transferor retains all shareholder's rights [*Corp. Code § 185*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsShareholdersTransfers of SharesEstate, Gift & Trust LawAnnuitiesGeneral
Overview



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31-97 California Legal Forms--Transaction Guide §§ 97.134-97.139

[Reserved]

§§ 97.134[Reserved]



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31-97 California Legal Forms--Transaction Guide § 97.140

§ 97.140 Retention of Documents

1. Keep the following for attorneys' records:

- a. Drafts of loan or annuity agreement and collateral documents.
- b. Copies of proposed changes in agreement.
- c. Correspondence generated during drafting period and after execution of agreement.

2. Advise clients to retain for tax purposes:

- a. Tax returns for all years during which loan or annuity is in force.
- b. Any documents reflecting value of subject property, including but not limited to:
 - (1) Appraisers' statements.
 - (2) Bills of sale.
 - (3) Stock quotations.
 - (4) Offers to purchase subject property.

NOTE:

This type of documentation may be needed in the future to prove that amounts exchanged were comparable or that transaction was bona fide and not intended as a gift.

- c. Expert actuarial statements supporting any deviations from standard government tables used in computing annuity

values.

d. Yearly records of gifts, including amounts and names of donees.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawAnnuitiesGeneral Overview



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31-97 California Legal Forms--Transaction Guide § 97.141

§ 97.141 Recording of Documents

1. Determine whether transaction affected title to any real property:

NOTE:

For analysis and forms relating to security transactions involving real property, see Chs. 25- 25D.

- a. Real property transferred in exchange for annuity.
- b. Real property pledged as security for loan.
- c. Cancellation or modification of any annuity or loan agreement as described above.
- d. Other.

2. Advise clients to record any instrument affecting title to real property.

NOTE:

Any instrument that affects title to real property may be recorded [*Gov. Code § 27280(a)*]. The instrument must be recorded in the county where the property is located [*Civ. Code § 1169*]. If not recorded, a grant is void against a subsequent bona fide purchaser or encumbrancer of the property who records his or her interest first [*Civ. Code §§ 1107, 1214*]. For a further discussion of recording issues, see California Real Estate Law and Practice, Ch. 82, ***Recording of Instruments*** (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawGeneral OverviewReal Property LawPriorities & RecordingGeneral Overview



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31-97 California Legal Forms--Transaction Guide § 97.142

§ 97.142 Forgiveness of Debts and Bad Debts

1. If debt is forgiven:

a. Instruct lender to file gift tax return if sum of amount forgiven and all other gifts to borrower during tax year exceeds applicable annual exclusion amount [*see I.R.C. § 2503(b)*]; for discussion of the annual exclusion and the applicable exclusion amounts, which are adjusted annually for inflation, *see Ch. 60A, Gifts, § 60A.32[4]*.

b. Instruct borrower to report amount of forgiven debt as gross income for tax year [*I.R.C. § 61(a)(12)*] unless:

(1) Borrower is insolvent and will remain insolvent after debt is erased [*I.R.C. § 108(a)(1)(B)*]; or

(2) Forgiveness of debt was gift from lender to borrower [*I.R.C. § 102(a)*; *see § 97.14*].

2. If debt becomes worthless:

a. Advise lender that deduction may be taken if loan was for nonbusiness purposes [*see I.R.C. § 166(d)*].

b. Instruct borrower to report amount of debt as gross income for tax year [*I.R.C. § 61(a)(12)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Income Tax Computation Deductions for Losses Bad Debts (IRC sec. 166) General Overview Tax Law Federal Income Tax Computation Deductions for Losses Bad Debts (IRC sec. 166) Nonbusiness Debts



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31-97 California Legal Forms--Transaction Guide §§ 97.143-97.199

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DIVISION VII: PERSONAL TRANSACTIONS
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PART IV. FORMS
A. Private Loans

31-97 California Legal Forms--Transaction Guide § 97.200

§ 97.200 Interest-Free Note

[1] Comment

[a] Use of Form

This form is a simple interest-free promissory note. It contains two variations: a demand note and a term note. A "demand" note is one that either: (1) states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or (2) does not state any time of payment [*Com. Code § 3108(a)*]. A demand note is useful to the lender in a situation involving an unreliable borrower because it allows the lender to demand payment immediately, if circumstances warrant such action, without waiting for an actual default. A note that is payable at a definite time is commonly referred to as a term note [*see Com. Code § 3108(b)*].

This note may be used to evidence a loan between private individuals. It satisfies the basic requirements for a negotiable instrument [*see Com. Code § 3104(a)*]. To be negotiable, a writing must [*Com. Code § 3104(a)*; *see Com. Code § 3103(a)(5), (9)* ("maker" and "promise" defined)]:

- Be signed by the maker;
- Contain an unconditional promise to pay a certain amount of money;
- Be payable on demand or at a definite time;
- be payable to order or to the bearer; and
- With limited exceptions, not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money.

For a general discussion of promissory notes, and the applicable provisions of the California Commercial Code, see Ch. 55, *Commercial Paper and Other Methods of Fund Transfers* .

[b] Below-Market Loans

This note makes no provision for the payment of interest by the borrower. Interest-free and below-market loans between individuals will be treated for federal gift tax purposes as if the lender had made a cash gift to the borrower in the amount of the forgone interest [I.R.C. § 7872(a)(1), (b)(1), (f)]. "Foregone interest" is the difference between the interest actually charged and that which would have been generated if the applicable federal rate had been charged during the period of the loan [I.R.C. § 7872(e)(2)]. For income tax purposes, the lender will be treated as if he or she had actually received the forgone interest from the borrower [I.R.C. § 7872(a), (b)]. For a more detailed discussion of the tax consequences that will attend interest-free and below-market loans, see § 97.11.

[c] Bad Debts and Forgiveness of Debts

Loans between individuals sometimes remain unpaid for long periods or are forgiven by the lender. These events may have tax implications for the parties involved. In an intra-family situation, attempts to write off bad debts may be disallowed [see Alfred R. Goldstein (1980) 40 T.C.M. 752]. For a discussion of these issues, see § 97.14.

[d] Joint and Several Liability

When two or more people sign a promissory note, the signers are jointly and severally liable for payment of the note unless the instrument clearly specifies otherwise [Com. Code § 3116(a)].

[2] FORM**Interest-Free Note****INTEREST-FREE DEMAND NOTE**

_____[city], _____[state]
 _____[date]

Upon demand, I promise to pay the sum of \$ [amount of loan], bearing no interest, to the order of
 _____[name of lender].

_____[signature of borrower]
 [typed name]
 _____[address]

[OR]**INTEREST-FREE TERM NOTE**

_____[city], _____[state]
 _____[date]

I promise to pay the sum of [amount of loan], bearing no interest, to the order of [name of lender] on
 _____[date for repayment of loan].

_____[signature of borrower]
 [typed name]

_____ [address]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsDischarge & PaymentGeneral OverviewContracts LawNegotiable
InstrumentsDischarge & PaymentPaymentInterestContracts LawNegotiable InstrumentsEnforcementJoint & Several
Instruments



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DIVISION VII: PERSONAL TRANSACTIONS
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A. Private Loans

31-97 California Legal Forms--Transaction Guide § 97.201

§ 97.201 Secured Interest-Bearing Note

[1] Comment

[a] Use of Form

This form is a simple interest-bearing promissory note with an optional security clause. Paragraph 3 contains alternative provisions for repayment: the first requires payment of a lump sum; the second provides for regular installment payments throughout the term of the loan. Paragraph 4 contains a clause awarding attorneys' fees and costs to the prevailing party in any litigation relating to the note, and a clause providing for assumption of costs incident to defending the transaction in the event of a tax challenge.

This loan may be modified for transactions involving multiple borrowers or lenders. When two or more people sign a promissory note they are ordinarily jointly and severally liable for payment, unless the instrument clearly provides otherwise [*Com. Code § 3116(a)*].

For a coverage of notes secured by real property, see Ch. 25A, *Security Instruments for Real Estate Financing* . For additional examples of interest-bearing promissory notes, and notes dealing with more complex transactions, see Ch. 55, *Commercial Paper and Other Methods of Fund Transfers* .

[b] Security

The security provision in Paragraph 4, in addition to protecting the lender's interest in repayment, may help support a contention that the loan was bona fide, if the debt can not be collected and the lender wishes to take a loss deduction for it [*see Treas. Reg. § 1.166-1(c)*; *see also § 97.14*].

The fact that a loan is secured does not make the promise to pay conditional [*Com. Code §§ 3104(a)(3), 3106(b)*]. Accordingly, a secured promissory note is negotiable [*Com. Code § 3104(a)(3)*]. For a discussion of the requirements for negotiable instruments, see § 97.200[1]. For a discussion of the laws relating to sale of collateral security in the event of default on a loan, see Ch. 42, *Secured Transactions* .

[c] Extension of Time

The parties to a loan may wish to provide for an extension of time for repayment of the loan. Such a clause can be useful in a situation involving a borrower with an uncertain financial future and a lender willing to allow additional time for repayment but only under formal guidelines. The first alternative in Paragraph 3 of this form contains optional language indicating that the lender may extend the time for repayment. For a form providing for a time extension, see § 55.260 in Ch. 55, *Negotiable Instruments*.

[d] Interest Payments

This form provides for equal periodic payments of interest and principal. Some loans provide only for periodic payment of interest and reserve all principal payments for a specific due date. The parties' relative income and tax levels should be considered in order to determine the apportionment desired. For instance, a note requiring periodic payments of interest and reserving a lump sum principal payment for a specified due date might be desirable in a situation in which the borrower expects to be in a better financial position by the end of the term.

Before 1987, all interest paid on a loan was deductible by the borrower [see former *I.R.C.* § 163]. Between 1987 and 1991, the personal interest deduction was phased out [see § 97.12]. For tax years following 1990, the personal interest deduction for noncorporate taxpayers has been completely eliminated [*I.R.C.* § 163(d)(6), (h)(1), (5)]. This elimination applies only to "personal interest," which is any interest that is not either [*I.R.C.* § 163(h)(2)(A)-(E)]:

- Paid or accrued on debts properly allocable to a trade or business (other than in the performance of services as an employee);
- Incurred or continued on property held for investment [see *I.R.C.* § 163(d)];
- Accounted for in computing income or loss from a passive activity [see *I.R.C.* § 469];
- Paid or accrued on indebtedness secured by a qualified residence of the taxpayer [see *I.R.C.* § 163(h)(3)]; or
- Payable on certain unpaid portions of estate taxes for which the taxpayer is liable [see *I.R.C.* § 6601].

Interest payments received by a lender constitute gross income for the taxable year in which they are received [*I.R.C.* § 61; *Treas. Reg.* § 1.61-7].

California tax law, like federal law, treats interest payments as gross income [*Rev. & Tax. Code* § 17071], and deductibility of interest for California tax purposes is governed by *I.R.C.* § 163 [*Rev. & Tax. Code* § 17201; see *Rev. & Tax. Code* § 17024.5(a)(1)].

[e] Usury Laws

California Constitution, Article XV, Section 1, prohibits usurious interest rates. The interest rate on loans and forbearances (agreements to extend the time for repayment of an obligation) for primarily personal, family, or household expenses may not exceed 10 percent per annum [*Cal. Const.*, art. XV, § 1(1)]. The interest rate on other loans may not exceed the higher of 10 percent per annum, or 5 percent per annum plus the prevailing rate as established by the Federal Reserve Bank of San Francisco for the 25th day of the month preceding the making of the loan or the execution of the loan contract, whichever occurred earlier [*Cal. Const.*, art. XV, § 1(2)]. Usurious interest provisions are void [Stats. 1919, p. lxxxiii (*West's Ann. Civ. Code* § 1916-2)]. However, the obligation to repay the principal will be unaffected by the void interest provision [*Teichner v. Klassman* (1966) 240 *Cal. App. 2d* 514, 524, 49 *Cal. Rptr.* 742]

. There are various exceptions to the usury statute [*see Cal. Const., art. XV, § 1(2)*], but these exceptions generally do not apply to private loan situations.

Violation of the prohibition against usurious interest carries both civil and criminal penalties. In addition, a borrower who has paid usurious interest may recover treble damages from the lender [Stats. 1919, p. lxxxiii (West's Ann. Civ. Code § 1916-3); *see* California Forms of Pleading and Practice, ch. 568, *Usury* (Matthew Bender)].

[2] FORM

Secured Interest-Bearing Note

SECURED INTEREST-BEARING NOTE

_____[city], _____[state]
 _____[date]

Amount Loaned

1. For value received, _____[*name of borrower*] ("Borrower") promises to pay to the order of _____[*name of lender*] ("Lender") \$ [amount of loan], with interest at the rate of _____ percent simple interest per annum [*or state manner in which interest is to be computed*].

Security

2. In consideration for the loan, Borrower grants to Lender a security interest on the following property: [*describe property in detail*]. Borrower shall keep that property free from all liens and encumbrances [other than those specifically set forth herein] and shall maintain insurance against loss of the property.

Borrower warrants that Borrower is the sole owner of the above-described property, free from all liens and encumbrances [except the following: _____ (*specify nature and extent of any liens or encumbrances*)].

Time for Payment

3. This note shall be due on _____[*date*]. [At the option of Borrower, the due date of this note may be extended for a period no longer than the original payment period. Any extension shall be in writing and contain a specific statement of the new due date, which shall appear on the reverse side of this note.]

[OR]

3. This note shall be payable in [*specify frequency of installments, e.g., monthly*] installments of \$ [amount of installment payments], beginning on _____[*date first installment due*] and thereafter on the [*e.g., first*] day of each [*e.g., month*] until the entire amount is paid.

Costs and Fees

4. In the event of default and subsequent action to collect payment due under this note, the prevailing party shall be

entitled to recover reasonable attorneys' fees in addition to any other relief to which _____ [he or she or it] may be entitled.

In the event of a dispute regarding the effect of this note for tax purposes, between either party and any branch, department, or individual representative of the United States government or the government of any state or subdivision thereof, all costs incident to that dispute shall be borne by _____ [name].

BORROWER

_____ [signature of borrower]

[typed name]

_____ [address]

LENDER

_____ [signature of lender]

[typed name]

_____ [address]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsGeneral Overview



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31-97 California Legal Forms--Transaction Guide § 97.202

§ 97.202 Guarantor Clause

[1] Comment--Use of Form

This form is a guarantor clause that may be included on the reverse of a promissory note. The holder of the note should consider requiring a guarantor in a number of situations. For example, the borrower may be considered an unacceptable risk for default, or the loan might be unsecured or inadequately secured.

One who signs an instrument as a guarantor promises that if the instrument is not paid when due he or she will pay it according to its terms [*Com. Code § 3419(a), (b); but see Com. Code § 3419(d)* (exception if party guarantees collection only, rather than payment)]. The obligation of a guarantor may be enforced notwithstanding any statute of frauds and whether or not the guarantor receives consideration for the guaranty [*Com. Code § 3419(b); see Com. Code § 3605* (discharge of obligations)].

When the guaranty agreement is entered into at the same time as the original obligation, or forms part of the consideration for the loan and is entered into at the time of the lender's acceptance of the loan agreement, no other separate consideration for the guaranty is needed. In all other cases, there must be consideration for the guaranty [*Civ. Code § 2792*]. It is not necessary to mention the fact of consideration in the written guaranty [*Civ. Code § 2793*].

For further discussion of the effect and enforceability of a guaranty, see Ch. 55, *Negotiable Instruments* , and Ch. 79, *Suretyship, Guaranty, and Indemnity* .

[2] FORM

Guarantor Clause

Guarantor Clause

_____[*Name of guarantor*] ("Guarantor") hereby guarantees payment of the note appearing on the reverse side of this instrument. Guarantor agrees that the holder may proceed against Guarantor directly and

independently of the borrower, and that the cessation of the liability of the maker for any reason other than full payment, or any extension, renewal, forbearance, change of rate of interest, or acceptance, release, or substitution of security, or any impairment or suspension of the holder's remedies or rights against the maker, shall not in any way affect the liability of Guarantor.

Dated _____

GUARANTOR

_____ [*signature of guarantor*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsGeneral OverviewContracts LawNegotiable InstrumentsEnforcementJoint & Several InstrumentsContracts LawTypes of ContractsGuaranty Contracts



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31-97 California Legal Forms--Transaction Guide §§ 97.203-97.209

[Reserved]

§§ 97.203[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Private Annuities

31-97 California Legal Forms--Transaction Guide § 97.210

§ 97.210 Annuity Contract for Sole Annuitant

[1] Comment

[a] Use of Form

This form is a contract for a private annuity under which one person (the annuitant) transfers property to another person (the obligor) in return for the obligor's promise to make regular cash payments during the annuitant's life or a specified term. This type of annuity is generally used between family members. The annuitant typically is a parent and the obligors are one or more adult children [see § 97.15[2]]. If the annuity is for the benefit of a single annuitant, this form should be used. If the annuity is for the benefit of two or more annuitants, the joint and survivor annuity in § 97.211 should be used.

[b] Nature of Annuity Agreement

An annuity agreement is a contract between the annuitant and the obligor, and general contract principles will be applied to the agreement [Estate of Bourn (1938) 25 Cal. app. 2d 590, 78 P.2d 193]. Consideration must be given in return for the obligor's promise to make annuity payments [Civ. Code § 1550]. The courts will not usually inquire into the sufficiency of consideration given for an annuity, although a transaction involving property and payments not of equal value may have gift tax consequences [see § 97.210[1][i]]. An annuity contract may be established by an oral agreement, but the Statute of Frauds will preclude enforcement of the agreement unless it is possible for it to be performed within one year of its making [Civ. Code § 1624]. For a discussion of basic contract requirements, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

[c] Life Annuities

Under a life annuity, the annuity payments continue as long as the annuitant lives. The obligor assumes the risk that the annuitant will live beyond his or her life expectancy, and thus be entitled to "overpayment." This is in contrast to the situation under a life insurance contract, in which the insurer's risk is that the insured will live for fewer than the number of years stated in the actuarial tables. A life annuity can be converted to a term annuity if the parties so desire. However,

this conversion may change the annuitant's tax liability, since the amount to be paid under a term annuity can be determined with certainty and the annuitant's capital gain taxed ratably over the entire term of the annuity, while the amount to be paid under a life annuity is determined by the imprecise method of reference to life expectancy tables and taxed according to those figures [I.R.C. § 72(c)(3); see § 97.210[1][f]; see also *IRS Letter Ruling 7934023*].

[d] Term Annuities

Under a term annuity, the annuity payments continue for a fixed term of years. If the annuitant dies before the expiration of the term, the right to payments becomes a part of the estate, unless the instrument shows an intent that the payments be personal to the annuitant [*Union Nat'l Bank v. Hunter* (1949) 93 Cal. App. 2d 669]. For this reason, a term annuity may be unsuitable if the purpose of the annuity agreement is to avoid estate taxes by removing assets from the annuitant's estate during his or her lifetime. In the event that the annuitant dies long before the end of the term, the bulk of the annuity payments will be included in his or her estate. For further discussion of the estate tax consequences occurring when the annuitant dies before the expiration of the term, see § 97.210[1][j]. For a general discussion of estate tax issues, see Ch. 60, *Estate Planning* .

[e] Assignment

An annuitant may assign the right to receive annuity payments unless the agreement contains a clause to the contrary [Civ. Code § 1458]. The obligor may transfer the obligation to make payments only with the consent of the annuitant [Civ. Code § 1457]. Paragraph 3 of this form provides for assignment by either party on written notice, and gives alternative language prohibiting assignment by the obligor. For a more complete discussion of assignment of contractual rights and duties, see Ch. 76, *Assignment of Obligations* .

[f] Income Tax Consequences to Annuitant

[i] In General

Private annuities generally are subject to the income tax treatment set forth for commercial annuities under I.R.C. § 72, and *Treas. Reg.* § 1.72-2 [Treas. Reg. § 1.72-2(a)]. Each annuity payment is treated as partly a nontaxable return of the annuitant's investment and partly taxable interest [I.R.C. § 72]. The nontaxable portion is determined by dividing the annuitant's investment in the contract (the consideration paid for the annuity) by the expected return (the total amount the annuitant expects to receive under the annuity agreement) [I.R.C. § 72(b), (c)]. However, the taxation of private annuities is complicated by two facts: first, property rather than money is generally exchanged for the annuities; and second, the transactions are generally unsecured.

For income tax purposes, California treats annuities in the same manner as they are treated under federal law [Rev. & Tax. Code § 17081; see Rev. & Tax. Code § 17024.5].

For a step-by-step guide to determining the income tax treatment of annuity payments, see § 97.112.

[ii] Capital Gain

Revenue Ruling 69-74 [1969-1 C.B. 43] sets forth the manner in which the annuitant is taxed on payments received under an unsecured private annuity agreement. Since an unsecured promise to pay has no fair market value [*Garvey, Inc. v. United States* (Cl. Ct. 1984) 726 F.2d 1569, 1573 , cert. denied, 469 U.S. 823] , the capital gain, represented by the value of the annuity in excess of the transferor/annuitant's basis in the property transferred, is not taxed at the time of the transfer. Instead, it is reported ratably as received, over the term of the annuity. To determine what portion of each payment will receive capital gain treatment, the excess value of the annuity over the annuitant's basis is divided by the number of years during which the payments will be received [*Rev. Rul. 69-74, 1969-1 C.B. 43*].

Under a life annuity, the term used to determine capital gains treatment is the annuitant's life expectancy as computed using the actuarial tables in IRS Publication No. 1457, Actuarial Values, Book Aleph [*Treas. Reg. § 20.2031-7(d)(4)*]. If the annuitant lives beyond his or her life expectancy, the portion of each annuity payment that had been taxed as capital gain will be treated as ordinary income to the annuitant from that point forward. Under a term annuity, the number of payments to be made can be determined without reference to the Treasury Tables, and the capital gain will be taxed ratably over the entire term [*Rev. Rul. 69-74, 1969-1 C.B. 43*].

For taxable years ending on or after May 6, 2003, and before January 1, 2009 [see Pub. Law No. 108-27, §§ 301(a), (d), 303 (effective dates and sunset provisions)], the maximum rate of tax on the net capital gain of an individual, estate, or trust is 15 percent, or 5 percent for taxpayers in the 15-percent regular income tax bracket [*I.R.C. § 1(h)(1)(B)*]; for tax years beginning after December 31, 2007 and before January 1, 2009, a zero percent capital gains rate applies for taxpayers in the 15 percent regular income tax bracket [*I.R.C. § 1(h)(1)(B)*]. For taxable years that include May 6, 2003, the 15-percent (or 5-percent) rate applies only to amounts properly taken into account for the portion of the year on or after that date. This generally has the effect of applying the lower rates to capital assets sold or exchanged (and installment payments received) on or after May 6, 2003. In the case of gain and loss taken into account by a pass-through entity, the date taken into account by the entity is the appropriate date for applying this rule [Pub. Law No. 108-27, § 301(c)]. For tax years beginning after December 31, 2008, the lowest capital gains tax rate is 20 percent, or 10 percent for taxpayers in the 15-percent regular tax bracket [*I.R.C. § 1(h)(1)(B)*, before amendment by Pub Law No. 108-27; see Pub. Law No. 108-27, § 303 (sunset provision)]. Short-term capital gains are taxed at ordinary income tax rates [*I.R.C. §§ 1(h), 1222(11)*].

For transactions occurring after May 6, 1997 and in tax years ending before May 6, 2003 [see Pub. Law No. 108-27, §§ 301(a), (d), 303 (effective dates and sunset provisions)], the maximum long-term capital gains rate is 10 percent for taxpayers in the 15 percent bracket and 20 percent for taxpayers in the 28 percent tax bracket and above [*I.R.C. § 1(h)(1)(B), (C)*, before amendment by Pub Law No. 108-27]. Lower rates of 8 percent for taxpayers in the 15 percent bracket and 18 percent for taxpayers in the 28 percent bracket and above apply to transactions after December 31, 2000 [*I.R.C. § 1(h)(2)(A), (B)*, before amendment by Pub Law No. 108-27]. Short-term capital gains are taxed at ordinary income tax rates [*I.R.C. §§ 1(h), 1222(11)*].

[iii] Exclusion for Sale of Personal Residence

If the property transferred by the annuitant to the obligor is the annuitant's principal residence, and if during the five-year period ending on the date of the transfer the annuitant has owned and used the property as his or her principal residence for periods aggregating at least two years, up to \$250,000 of gain may be excluded from gross income (up to \$500,000 in the case of married persons filing a joint return) [*I.R.C. § 121(a), (b)* (applicable to transfers after May 6, 1997)]. However, this exclusion is available only once every two years [*I.R.C. § 121(b)(3)*].

[iv] Recovery of Basis

A portion of each annuity payment is classified as recovery of the annuitant's basis in the property transferred, and is not taxed. To determine this portion, the following exclusion ratio is used: the annuitant's investment in the contract (the adjusted basis in the property transferred) is divided by the expected return under the annuity contract. This percentage of each payment is excluded from taxation [*Rev. Rul. 69-74, 1969-1 C.B. 43*]. The expected total of payments under a life annuity is determined with reference to the annuitant's life expectancy under the Treasury Tables. This amount remains nontaxable throughout the term of the annuity, regardless of whether the annuitant lives beyond his or her life expectancy. The remaining portion of each annuity payment is taxed as ordinary income. Under a life annuity, this portion will increase once the entire capital gain has been reported (i.e., if the annuitant lives beyond his or her life expectancy).

[v] Unearned Income of Child

Special income tax rules apply if a parent transfers income-producing property to his or her child aged 18 or under in exchange for an annuity. The net unearned income of children who are under 18 years of age and have at least one parent living at the end of the tax year will be taxed at the tax rate of the parent or parents [I.R.C. § 1(g); see § 97.11[2]].

[g] Income Tax on Secured Annuities

Secured private annuities are treated like commercial annuities for income tax purposes [*Estate of Bell v. Commissioner* (1973) 60 T.C. 469] . The annuitant's investment in the contract will be the fair market value of the property rather than the basis, and the entire capital gain realized on the transaction will be taxed in the year of the sale [I.R.C. § 72(c)(1); see *Garvey, Inc. v. United States* (Cl. Ct. 1984) 726 F.2d 1569 , cert. denied, 469 U.S. 823] .

[h] Loss Deductions Disallowed

In order for a loss to be deductible, it must flow from a closed, bona fide business transaction [Treas. Reg. § 1.165-1(b)]. Unsecured annuities are not closed transactions [*Commissioner of Internal Revenue v. Kann's Estate* (3d Cir. [T.C.] 1949) 174 F.2d 357] ; thus, no immediate loss deductions will be allowed. A deduction for loss has also been denied on the ground that a private annuity agreement was not a transaction entered into for profit [*Rev. Rul. 71-492*, 1971-2 C.B. 127]. The sale of a residence that was being used as a home at the time of the sale is not considered a transaction entered into for a profit [Treas. Reg. § 1.165-9(a)]. Loss deductions will also be disallowed on some transactions between family members [see § 97.14].

In computing income for taxation purposes, California follows the federal rules [Rev. & Tax. Code § 17201].

[i] Gift Tax Consequences to Annuitant

If the fair market value of the property transferred in exchange for the annuity exceeds the present value of the annuity, the amount of the difference will be treated as an immediate gift to the obligor [I.R.C. § 2512(b); see *Rev. Rul. 69-74*, 1969-1 C.B. 43]. Accordingly, the annuitant will be liable for the gift tax, if any, imposed on the transfer [I.R.C. § 2501(a); see discussion under "Determination of Taxable Gifts for Federal Tax Purposes" in the Legal Background to Ch. 60A, *Gifts*], regardless of whether or not the annuity has a recognized present value for income tax purposes [*Estate of Koert Bartman* (1948) 10 T.C. 1073] . The imposition of gift tax may be avoided if the annuitant can show that despite the disparate values of the annuity and the property transferred, the transaction was made in the ordinary course of business and was free of donative intent [Treas. Reg. § 25.2512-8]. For example, there was held to be no gift tax liability in a case in which a taxpayer sold an oil lease to a family corporation in exchange for an annuity and relief from management responsibilities [E.B. Hull, T.C.M. 1962-199].

An annuitant can avoid gift taxes by arranging the annuity transaction so that the payments reflect a fair exchange for the property, and then simply giving the obligor, in a separate transaction, an annual gift that does not exceed applicable annual exclusion amount [see I.R.C. § 2503(b); for discussion of the annual exclusion and the applicable exclusion amounts, which are adjusted annually for inflation, see Ch. 60A, *Gifts*, § 60A.32[4]].

[j] Estate Tax Consequences to Annuitant

An annuity that provides for payments to continue only while the annuitant is alive generally will have no impact on the annuitant's estate. However, annuity contracts between parents and children often provide that the annuity payments will be equal to the income from the transferred property. For tax purposes, these contracts will be treated as trusts under which the annuitant has retained a life interest in income from his or her own property [see *Rev. Rul. 79-94*, 1979-1 C.B. 296]. Thus, the full value of the property will be included in the annuitant's estate [see I.R.C. § 2036(a); see also § 97.15[3]].

Under a term annuity that provides for payments to continue after the annuitant's death, the balance due at the annuitant's death will be included in the estate as a debt owed to the decedent [I.R.C. § 2033]. If the annuity agreement contains a provision directing that the payments due after the annuitant's death be paid to a beneficiary [see § 97.212], the value of any payments received by the beneficiary will be included in the annuitant's estate [I.R.C. § 2039(a)]. For a general discussion of estate tax issues, see Ch. 60, *Estate Planning*.

[k] Tax Consequences to Obligor

Annuity payments made by the obligor are capital expenditures to acquire property, and no part of the payments are deductible as interest under I.R.C. § 163 [*Bell v. Commissioner* (8th Cir. 1982) 668 F.2d 448 ; see also *Rev. Rul. 72-81, 1972-1 C.B. 98*].

For purposes of reporting gain or loss on the sale of transferred property, the obligor's basis depends on whether that property is sold before or after the annuity is fully paid. If the property is sold after the annuity is paid off, the obligor's tax basis is the value of all annuity payments made. If the property is sold before the annuity is paid off, the obligor's basis for determining gain is the value of all payments made plus the estimated value of the remaining payments to be made [see *Rev. Rul. 55-119, 1955-1 C.B. 352*].

If the obligor sells the property at a loss before the annuity is paid off, the obligor may deduct all payments made after the date of sale from his or her gross income [*Donald H. Sheridan* (1952) 18 T.C. 381, 384].

[l] Use of Private Annuity as Planning Device

There are several advantages to the private annuity as a personal planning device: it allows the transfer of property to the annuitant's heirs without the imposition of estate or gift taxes; the capital gain realized from the transaction is not immediately taxed [see I.R.C. § 72(b); see also *Rev. Rul. 69-74, 1969-1 C.B. 43*]; and the basis in the property transferred is stepped up at the time of the transfer, allowing for an increase in depreciation deductions [*Rev. Rul. 55-119, 1955-1 C.B. 352* ; see *Kaufman's, Inc.* (1957) 28 T.C. 1179].

However, the drawbacks of using a private annuity are also numerous. Because the transfer must be unsecured in order to spread the annuitant's gain over the term of the annuity [I.R.C. § 72; see *Garvey, Inc. v. United States* (Cl. Ct. 1984) 726 F.2d 1569 , cert. denied, 469 U.S. 823 ; see also § 97.210[1][f][ii]], the private annuity form is suitable only when the obligor's trustworthiness and financial stability are certain. In an inflationary economy, the purchasing power of a fixed annuity will progressively decline, and may become inadequate for the annuitant's needs. The fixed payment schedule will also be unresponsive to extraordinary expenses or changes in the annuitant's circumstances, and for this reason annuity payments probably should not be relied on as a sole source of income and support. For the obligor, the private annuity form may be unsatisfactory because it does not allow for deductions for interest payments [I.R.C. § 163(h); see § 97.210[k]]. The attorney advising prospective parties to a private annuity should determine the total financial impact of the proposed annuity, and should also consider alternative arrangements to accomplish the parties' objectives.

[m] Installment Sale as Alternative

When undesirable tax consequences render a private annuity impractical, an installment sale of property from parents to children may be an acceptable alternative. For income tax purposes, an "installment sale" is any disposition of property in which at least one payment is to be received after the close of the tax year in which the disposition occurs [I.R.C. § 453(b)(1)]. However, the installment method of reporting income [I.R.C. § 453(c)] is not permitted for sales of stock or securities that are traded on an established securities market [I.R.C. § 453(j)]. If the installment method is not permitted, the seller must report all installment payments as if they were received during the year in which the sale is made [I.R.C.

§ 453(k)].

For tax years prior to 1987, installment sales had an advantage over annuities in that the interest paid by the children, as purchasers, was generally deductible from their gross incomes [I.R.C. § 163(a)]. However, the deduction for personal interest was limited beginning in 1987, and eliminated after 1990 [I.R.C. § 163(h); see § 97.12]. The obligor under a private annuity may not deduct annuity payments from his or her gross income [see *Rev. Rul. 72-81, 1972-1 C.B. 98*]. Another advantage of an installment sale is that the income tax consequences to the obligor are determined on the date of the sale [see *Rev. Rul. 55-119, 1955-1 C.B. 352*].

On the other hand, certain tax problems not encountered in private annuities may attend installment sales. For example, I.R.C. § 453(e) imposes restrictions on second dispositions of installment sale property by related taxpayers. If a parent sells property to his or her child on an installment basis and that child disposes of the property before the parent has received all payments due, any gain realized by the child on that second disposition will be treated as income to the parent [see I.R.C. § 453(e)(1); see also I.R.C. §§ 318(a), 453(d)(1)]. The parent will be treated as having received that income as of the date the second disposition takes place [see I.R.C. § 453(e)(1)(B)]. If, however, the child disposes of the installment sales property, other than marketable securities, more than two years after the original sale, no gain on that second disposition will be imputed to the parent [see I.R.C. § 453(e)(2)(A)]. An installment sale may result in estate tax complications if the seller/parent dies before receiving all payments due under the sales contract, since the value of the remaining payments would be included in his or her gross estate [see I.R.C. §§ 2031, 2033]. Use of an annuity providing for payments to cease on the annuitant's death would guard against this result.

The impact of tax consequences attending installment sales and private annuities can be tempered by dividing the property to be transferred and conveying one portion under an installment sale contract and the other portion in exchange for an annuity. If the property cannot be physically divided, both transfers should pass undivided interests in that property. If, however, the property can be readily divided (for example, listed securities) it should be transferred in separate portions.

[2] FORM

Annuity Contract for Sole Annuitant

ANNUITY CONTRACT FOR SOLE ANNUITANT

_____ [name of annuitant], "Annuitant," and _____ [name of obligor], "Obligor," agree as follows:

Consideration

1. In consideration for the annuity payable under this Agreement, Annuitant has transferred to Obligor full title to the property described in Schedule A, attached to this Agreement and incorporated herein by reference.

Annuity Payments

[For a life annuity:]

2.(a) In consideration for the transfer described in Paragraph 1, Obligor agrees to pay to Annuitant the sum of \$ _____ per year for Annuitant's life [payable in 12 equal monthly installments of \$ _____]. Each installment shall be due on the [specify day, e.g., first] day of each [month or year],

commencing on _____ [date].

(b) If Obligor predeceases Annuitant, Obligor's estate shall be liable to Annuitant for the annuity payments set forth above. Obligor's estate may discharge this liability by purchasing a commercial annuity that will provide payments to Annuitant equal to those set forth above for the remainder of the annuity term, or by making a lump-sum payment to Annuitant in an amount equal to the sum of the payments outstanding under this Agreement.

(c) The payments provided under this Paragraph 2 shall terminate with the last payment preceding the Annuitant's death, or at Annuitant's death if no payments have been made. There will be no proration of payments at the time of Annuitant's death or any time thereafter.

[Or, for a term annuity:]

2. In consideration for the transfer described in Paragraph 1, Obligor agrees to pay to Annuitant the sum of \$ _____ per year [payable in 12 equal monthly installments of \$ _____], for a period of _____ years, commencing on _____ [date], with the last payment to be made on _____ [date]. If Annuitant dies during the term of this annuity, any annuity payments becoming due after Annuitant's death shall be paid to the beneficiary or beneficiaries designated in writing by Annuitant to receive those payments, or, if no beneficiary is designated by Annuitant, to Annuitant's estate.

[For an optional provision for designation of beneficiary, see § 97.212[2].]

Assignment

3. Annuitant's right to receive payments under this Agreement may be assigned in Annuitant's sole discretion, at any time during the term of this Agreement, by written notice to Obligor. Obligor's duties under this Agreement may not be assigned without the prior written consent of Annuitant or Annuitant's successor in interest under this Agreement [or Obligor's duties under this agreement may not be assigned].

Payments and Notices

4. Any notice or consent required or permitted to be given under this Agreement shall be given in writing. Any payment, notice, or consent required or permitted to be given or made under this Agreement may be given or made by personal delivery or by registered certified mail, postage prepaid, return receipt requested. Any notice or consent shall be deemed communicated as of actual receipt. Mailed payments, notices, and consents shall be addressed as set forth below, but each party may change _____ [his or her] address by written notice in accordance with this paragraph.

To Annuitant:

[name and designation]
_____ [address]

To Obligor:

[name and designation]
_____ [address]

Governing Law

5. All disputes regarding the construction of this Agreement and the rights and liabilities of the parties under it shall be governed by the laws of the State of California.

Effect on Successors and Assigns

6. Subject to any restriction against assignment in Paragraph 3, this Agreement shall inure to the benefit of, and shall be binding on, the parties' assigns, successors in interest, personal representatives, estates, heirs, and legatees.

Entire Agreement

7. This instrument contains the parties' entire agreement and supersedes any prior written or oral agreements between them concerning the same subject matter. There are no representations, agreements, or understandings between the parties regarding this subject matter that are not fully expressed in this instrument.

Executed on _____[*date*], at _____[*city*], California.

ANNUITANT

_____ [*signature of annuitant*]
[*typed name*]

OBLIGOR

_____ [*signature of obligor*]
[*typed name*]

SCHEDULE A

[*Attach detailed description of all property transferred to obligor in exchange for annuity payments.*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewEstate, Gift & Trust LawAnnuitiesGeneral Overview



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31-97 California Legal Forms--Transaction Guide § 97.211

§ 97.211 Joint and Survivor Annuity Contract

[1] Comment

[a] Use of Form

This form is an agreement for a joint and survivor annuity. A private joint and survivor annuity is most often created by the transfer of community property by parents to their children in return for the children's unsecured promise to pay the parents a fixed annuity during the joint lives of the parents and during the life of the survivor.

[b] Tax Consequences

[i] To Annuitant

The tax consequences of a joint and survivor annuity to the annuitants are similar to the tax consequences of an annuity to a sole annuitant, except that the computations are more involved since joint lives are involved [*I.R.C.* § 72; *Treas. Reg.* § 1.72-2; see § 97.210[1][f]]

[ii] To Obligor

The tax consequences of a joint and survivor annuity to the obligor are the same as for a sole annuity: none of the payments are deductible under *I.R.C.* § 163 [see *Bell v. Commissioner* (8th Cir. [T.C.] 1982) 668 F.2d 448 ; see also *Rev. Rul.* 72-81, 1972-1 C.B. 98] ; and the basis of the property for depreciation or for gain or loss on its sale by the obligor is dependent on the value of the annuity, with adjustments to the basis made in the same manner as for sole annuities [*Rev. Rul.* 55-119, 1955-1 C.B. 352 ; see § 97.210[1][k]].

[c] Alternative to Joint and Survivor Annuity

As an alternative to a joint and survivor annuity, the community property that is to be transferred for the annuity equally may first be divided between the husband and wife, and each spouse subsequently may transfer his or her one-half

interest in return for a separate annuity. Since the two annuitants may not have identical life expectancies, their fixed payment amounts are likely to differ if the value of the property transferred is to be exactly equal to the value of the annuity received.

The creation of two annuities rather than a joint and survivor annuity requires the extra step of dividing the subject property before transferring it to the obligor. It also creates extra work for the obligor, who must make payments under two separate agreements. However, the use of separate annuities may be desirable if the husband and wife are living apart from each other or prefer to manage their financial affairs separately. The use of separate annuities also allows each annuitant to assign his or her right to payments without the consent of the other.

[2] FORM

Joint and Survivor Annuity Contract

JOINT ANNUITY CONTRACT

_____ [name of wife] and _____ [name of husband], "Annuitants," and
 _____ [name of obligor], "Obligor," agree as follows:

Consideration

1. In consideration for the annuity payable under this Agreement, Annuitants have transferred to Obligor full title to the property described in Schedule A, attached to this Agreement and incorporated by reference.

Annuity Payments

[For a life annuity:]

2.(a) In consideration for the transfer described in Paragraph 1, Obligor agrees to pay to the Annuitants during their joint lives and to the surviving Annuitant during his or her surviving life, an annuity of \$ _____ per year [payable in 12 equal monthly installments of \$ _____. Each installment shall be due on the [specify day, e.g., first] day of each [month or year], commencing on _____ [date].

(b) If Obligor predeceases either or both of the Annuitants, Obligor's estate shall be liable to Annuitants or to the surviving Annuitant for the annuity payments set forth above. Obligor's estate may discharge this liability by purchasing a commercial annuity to provide payments equal to those set forth above for the remainder of the annuity term, or by making a lump-sum payment in an amount equal to the sum of the payments outstanding under this agreement.

(c) The payments provided under this Paragraph 2 shall terminate with the last payment preceding the death of the surviving Annuitant, or at his or her death if no such payment has been made. There shall be no proration of payments at the time of the surviving Annuitant's death or any time thereafter.

[Or, for a term annuity:]

2. In consideration for the transfer described in Paragraph 1, Obligor agrees to pay to the Annuitants, or to the survivor of them, if either should die before the term specified herein is completed, the sum of \$ _____ per year for a period of _____ years, commencing on _____ [date], with the last

payment to be made on _____[*date*]. Any annuity payments falling due under this Article II after both Annuitants have died shall be paid into the estate of the last survivor of them, or in equal amounts into each of their estates, if they die within [*e.g.*, 30] days of each other.

Assignment

3. Annuitants' right to receive payments under this Agreement may be assigned at any time during the term of this Agreement, by written notice signed by both Annuitants, or by the survivor of them, and delivered to Obligor. Obligor's duties under this Agreement may not be assigned without the prior written consent of both Annuitants, or, if one Annuitant is deceased, the prior written consent of the surviving Annuitant, or their successor(s) in interest under this Agreement.

Payments and Notices

4. Any notice or consent required or permitted to be given under this Agreement shall be given in writing. Any payment, notice, or consent required or permitted to be given or made under this Agreement may be given or made by personal delivery or by registered certified mail, postage prepaid, return receipt requested. Any notice or consent shall be deemed communicated as of actual receipt. Mailed payments, notices, and consents shall be addressed as set forth below, but any party may change _____[*his or her*] address by written notice to all other parties in accordance with this paragraph.

To Annuitants:

Husband

[*name and designation*]

_____[*address*]

Wife

[*name and designation*]

_____[*address*]

To Obligor:

[*name and designation*]

_____[*address*]

Governing Law

5. All disputes regarding the construction of this Agreement and the rights and liabilities of the parties under it shall be governed by the laws of the State of California.

Effect on Successors and Assigns

6. Subject to any restriction against assignment in Paragraph 3, this Agreement shall inure to the benefit of, and shall be binding on, the parties' assigns, successors in interest, personal representatives, estates, heirs, and legatees.

Entire Agreement

7. This instrument contains the parties' entire agreement and supersedes any prior written or oral agreements between them concerning the same subject matter. There are no representations, agreements, or understandings between the parties regarding this subject matter that are not fully expressed in this instrument.

Executed on _____[*date*], at _____[*city*], California.

ANNUITANTS

_____ [*signature of wife*]
[*typed name*]

_____ [*signature of husband*]
[*typed name*]

OBLIGOR

_____ [*signature of obligor*]
[*typed name*]

SCHEDULE A

[*Attach detailed description of all property transferred to obligor in exchange for annuity payments.*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewEstate, Gift & Trust LawAnnuitiesGeneral Overview



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31-97 California Legal Forms--Transaction Guide § 97.212

§ 97.212 Optional Clause for Designation of Beneficiary**[1] Comment--Use of Form**

This form is an optional clause directing the payment of a term annuity to an individual of the annuitant's choice in the event that the annuitant dies before the expiration of the annuity term. This clause should only be used in a term annuity, since under a life annuity payments do not continue after the annuitant's death. If a beneficiary is not designated, the annuity right will pass into the annuitant's general estate, as a debt owed the estate, at the time of the annuitant's death [see *Prob. Code* § 9650(a)(1)].

While both annuitants are living, both of their signatures should be required to change the beneficiary. If the requirement of both signatures is made absolute, it will prevent the surviving annuitant from changing the beneficiary after the death of his or her spouse. Depending on the annuitants' circumstances, this may be a necessary safeguard or an undesirable restraint on the survivor's ability to respond to events occurring after his or her spouse's death. This form contains optional language limiting the requirement for both signatures to the period during which both annuitants are alive.

For a discussion of the tax consequences of a term annuity when the annuitant dies before the expiration of the term, see § 97.210[1][j].

[2] FORM**Optional Clause for Designation of Beneficiary**

Designation of Beneficiary

(a) Any annuity payments that become due under this Agreement after the death of [both] Annuitant(s) shall be paid to _____ [name of beneficiary] ("Beneficiary"), _____ [street address],
_____ [city and state].

[For a sole annuitant:]

(b) Annuitant reserves the right to change the beneficiary under this Paragraph at any time during the term of this Agreement, by written notice to Obligor.

[Or, for joint annuitants:]

(b) Annuitants expressly reserve the right to change the beneficiary under this Paragraph at any time during the term of this Agreement, by written notice to Obligor. [While both Annuitants are living,] any such notice of a change of beneficiary must be signed by both Annuitants in order to be valid.

[Continue with the following:]

(c) Any unpaid annuity payments, with respect to which no designated beneficiary is living when those payments become due, shall be paid to the estate of Annuitant(s).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawAnnuitiesGeneral Overview



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31-97 California Legal Forms--Transaction Guide § 97.213

§ 97.213 Optional Clause for Payments in Case of Disability of Annuitant

[1] Comment--Use of Form

This is an optional annuity provision that gives the obligor various options for making payments in the event that the annuitant becomes legally, mentally, or physically unfit to administer his or her own affairs. This type of provision may be desirable if the obligor is a child of the annuitant. It should be inserted, if appropriate, as an additional clause under Paragraph 2 in § 97.210 or § 97.211.

Because it allows the obligor to exercise considerable discretion in directing annuity on behalf of the annuitant, this provision will generally be desirable only when the obligor is a close relative of the annuitant. A durable power of attorney [see *Prob. Code* §§ 4018, 4124] can be used to accomplish the same purpose served by this form, and can be tailored to limit the grant of authority according to the annuitant's wishes. For forms and discussion relating to durable powers of attorney, see Ch. 98, *Powers of Attorney* .

[2] FORM

Optional Clause for Payments in Case of Disability of Annuitant

[For a sole annuitant:]

If Annuitant is under a legal disability at the time any installment is due or is unable, in Obligor's opinion, to properly administer that installment because of illness or mental or physical disability, that installment may be paid either (1) directly to Annuitant; (2) to Annuitant's legally appointed guardian, conservator, or other legal representative; (3) to the spouse or any near relative of Annuitant to be applied for Annuitant's benefit; or (4) to any person or institution in payment for support, maintenance, or medical care provided to Annuitant.

[Or, for joint annuitants:]

Whenever any installment is payable to an Annuitant who is under a legal disability or, in the opinion of the Obligor, is unable to properly administer that installment because of illness or because of mental or physical disability, the installment may be paid (1) directly to the Annuitant; (2) to the legally appointed guardian, conservator, or other legal representative of the Annuitant; (3) to the spouse or any near relative of the Annuitant to be applied for the benefit of the Annuitant; or (4) to any person or institution in payment for support, maintenance, or medical care provided to the Annuitant.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawAnnuitiesGeneral OverviewEstate, Gift & Trust LawAnnuitiesEligibility for Assistance



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31-97 California Legal Forms--Transaction Guide § 97.214

§ 97.214 Optional Clause Indicating That Payments Are Not Dependent on Income From Property

[1] Comment--Use of Form

This form contains an express statement that the annuity payments are not to be tied to the income, if any, produced by the property transferred. It should be inserted, if appropriate, as an additional clause under Paragraphs 2 in §§ 97.210[2] and 97.211[2]. This form may be useful if there is a risk that income property exchanged for an annuity may not be as profitable to the obligor as the parties expect. It may also be useful if there is a danger, due to the arrangement of the payment schedule, that the annuity form will be disregarded and the transaction will be treated as a trust with a reservation of life income for federal tax purposes [*I.R.C. §§ 671, 677*; for discussion of this issue, *see § 97.15[3]*].

[2] FORM

Optional Clause Indicating That Payments Are Not Dependent on Income From Property

The parties to this Agreement agree that the annuity payments specified under this Paragraph 2 shall be paid in full under the terms of this Agreement, regardless of the amount of income, if any, produced by the property transferred to Obligor under Schedule A of this Agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawAnnuitiesGeneral Overview



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31-97 California Legal Forms--Transaction Guide § 97.215

§ 97.215 Security Clause

[1] Comment

[a] Use of Form

This form is an optional clause to secure the obligor's promise to make annuity payments. It should be added as an additional paragraph to the complete annuity agreements in §§ 97.210 and 97.211.

The annuitant is often given a security interest in the property transferred to the obligor in exchange for the annuity. This situation is different from the situation in which the annuitant retains a right to the income produced by the property transferred to the obligor. If a right to income is retained rather than a security interest, the transfer will be treated as a trust for tax purposes [*see I.R.C. §§ 671, 677; see also § 97.15[3]*].

[b] Tax Drawbacks of Secured Annuity

Secured private annuities are used infrequently because they do not enjoy the tax advantage of spreading the annuitant's capital gain over the term of the annuity, which is available in unsecured private annuity transactions [*see § 97.210[1][f]*]. Secured private annuities are treated according to the Internal Revenue Code provisions and Treasury Regulations for commercial annuities [*I.R.C. § 72; Treas. Reg. § 1.72-2; see Estate of Bell (1973) 60 T.C. 469*]. If an annuity is secured, a fair market value can be attached to the obligor's promise to make payments and the annuitant's capital gain will be fully realized in the year that the property is transferred [*I.R.C. § 1001(a); Garvey, Inc. v. United States (Cl. Ct. 1984) 726 F.2d 1569, cert. denied, 469 U.S. 823; see § 97.210[1][g]*].

For a more detailed discussion of secured interests generally, see Ch. 42, *Secured Transactions*.

[2] FORM

Security Clause

Security

In support of Obligor's promise to make the payments specified in this Agreement, Obligor grants to Annuitant a security interest in the following property: *[describe property in detail]*. Obligor shall keep that property free from all liens and encumbrances [other than those specifically set forth herein] and shall maintain insurance against loss of the property. Obligor warrants that Obligor is the sole owner of the property, free from all liens and encumbrances [except the following: _____ (*specify nature and extent of any liens or encumbrances*)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawAnnuitiesGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 98 POWERS OF ATTORNEY

31-98 California Legal Forms--Transaction Guide 98.syn

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.syn Synopsis to Chapter 98: POWERS OF ATTORNEY

§ 98.01 California Statutes

§ 98.02 Federal Statutes

§ 98.03 California Attorney General Opinions

§ 98.04 [Reserved]

§ 98.05 Law Reviews and Periodicals

§ 98.06 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 98.07-98.09 [Reserved]

§ 98.10 The Power of Attorney Law

[1] Enactment of New Power of Attorney Law

[2] Application of Power of Attorney of Law

§ 98.11 Definitions

[1] "Power of Attorney" Defined

[2] "Principal" Defined

[3] "Attorney in Fact" Defined

[4] "Durable Power of Attorney" Defined

§ 98.12 Persons Capable of Granting Power of Attorney

§ 98.13 Interpretation of Power of Attorney

§ 98.14 Statutory Form Power of Attorney

[1] In General

[2] Provisions in Statutory Form Power of Attorney

[3] Validity of Former Statutory Form Power of Attorney

§ 98.15 Recordation of Power of Attorney

§ 98.16 Execution of Instrument to Convey Real Property

§ 98.17 Modification of Power of Attorney

§ 98.18 Revocation and Termination of Power of Attorney

[1] In General

[2] Resignation of Attorney in Fact

[3] Acts Undertaken Without Knowledge of Principal's Death or Incapacity

[4] Acts of Attorney in Fact in Good Faith Reliance on Power

[5] Irrevocable Power of Attorney

[6] Revocation of Power Bestowed in Recorded Instrument

[7] Loss or Destruction of Instrument

[8] Temporary Incapacity of Principal or Attorney In Fact

[9] Revival

§§ 98.19-98.29 [Reserved]

§ 98.30 Attorney in Fact Distinguished From Attorney at Law

§ 98.31 Persons Capable of Acting as Attorney in Fact

§ 98.32 Authority of Attorney in Fact

[1] In General

[2] Multiple and Successor Attorney in Fact

[3] Relations With Third Parties

[4] General Power of Attorney

[5] Special Power of Attorney

[6] Springing Power of Attorney

[7] Affidavits of Authority

[8] Limiting Applicability of Statutes

§ 98.33 Duties and Liabilities of Attorney in Fact

[1] General Duties and Liabilities

[2] Duties Regarding Records and Accounts

§ 98.34 Court Enforcement of Duties of Attorney in Fact

[1] In General

[2] Jurisdiction and Venue

[3] Who May File Petition

[4] Purposes of Petition

[5] Notice of Hearing

§ 98.35 Delegation of Authority of Attorney in Fact

[1] In General

[2] Prior Law

[3] Substituted Attorney in Fact

§ 98.36 Compensation of Attorney in Fact

§§ 98.37-98.99 [Reserved]

§ 98.100 Facts

Scope

§ 98.101 Documents

Scope

§§ 98.102-98.109 [Reserved]

§ 98.110 Determining Capacity of Parties

Scope

§ 98.111 Determining Type of Power of Attorney to Be Created

Scope

§ 98.112 Limiting Court Enforcement of Power of Attorney

Scope

§ 98.113 Recording Power of Attorney

Scope

§§ 98.114-98.119 [Reserved]

§ 98.120 Drafting Power of Attorney

Scope

§ 98.121 Executing and Recording

Scope

§§ 98.122-98.129 [Reserved]

§ 98.130 Petition to Enforce Power of Attorney

Scope

§ 98.131 Substitution of Attorney in Fact

Scope

§ 98.132 Termination of Authority in Fact

Scope

§ 98.133 Revocation of Power of Attorney

Scope

§§ 98.134-98.199 [Reserved]

§ 98.200 Statutory Form Power of Attorney

[1] Comment

[a] Use of Form

[b] Validity of Nonstatutory Forms and Former Statutory Forms

[c] Applicable Law

[d] Limitation or Extension of Powers

[e] Springing Power of Attorney

[2] FORM

Statutory Form Power of Attorney

§ 98.201 General Power of Attorney

[1] Comment

[a] Use of Form

[b] Use of Phrase "for my Use and Benefit"

[c] Notice to Third Persons

[d] Termination of Attorney in Fact's Authority

[2] FORM

General Power of Attorney

§ 98.202 Special Power of Attorney

[1] Comment

[a] Use of Form

[b] General and Special Powers of Attorney

[c] Termination of Attorney in Fact's Authority

[d] Provision Making Power Irrevocable

[e] Acknowledgment

[2] FORM

Special Power of Attorney

§ 98.203 Joint Power of Attorney by Husband and Wife

[1] Comment

[a] Use of Form

[b] Power to Execute Power of Attorney

[c] Effect of Joint Power of Attorney

[2] FORM

Joint Power of Attorney by Husband and Wife

§ 98.204 Power of Attorney Empowering Counsel to Appear for Military Person in Adoption Proceedings

[1] Comment

[a] Use of Form

[b] Appearance by Spouse Also Residing With Adoptive Parent in Military Service

[c] Use of Acknowledgment

[2] FORM

Power of Attorney Empowering Counsel to Appear for Military Person in Adoption Proceedings

§ 98.205 Power to Petition for and Receive Legacy or Inheritance

[1] Comment

[a] Use of Form

[b] Court Scrutiny of Power of Attorney Containing Assignment of Heir's Interest

[c] Validity of Assignment of Heir's Interest

[2] FORM

Power to Petition for and Receive Legacy or Inheritance

§ 98.206 Power to Represent Creditor in Bankruptcy Proceedings

[1] Comment

[a] Use of Form

[b] Need for Written and Acknowledged Authorization

[2] FORM

Power to Represent Creditor in Bankruptcy Proceedings

§ 98.207 Special Power to Represent Principal Before Internal Revenue Service [IRS Form 2848]

[1] Comment--Use of Form

[2] FORM

Special Power to Represent Principal Before Internal Revenue Service [IRS Form 2848]

§ 98.208 Taxpayer's Authorization for Disclosure of Tax Information To Another Person or Entity [IRS Form 8821]

[1] Comment

[a] Use of Form

[b] Written Requests for or Consent to Disclosure of Tax Returns

[c] Requests for Information or Assistance

[d] Nonwritten Requests for Disclosure

[e] Filing

[f] Revocation of Previous Authorizations

[2] FORM

Tax Information Authorization [IRS Form 8821]

§§ 98.209-98.219 [Reserved]

§ 98.220 Power to Collect Debts and Compromise Claims

[1] Comment--Use of Form

[2] FORM

Power to Collect Debts and Compromise Claims

§ 98.221 Power to Sell and Convey Real Property

[1] Comment--Use of Form

[2] FORM

Power to Sell and Convey Real Property

§ 98.222 Power to Execute a Mortgage on Real Property

[1] Comment

[a] Use of Form

[b] Requirement That the Power Be in Writing and Recorded

[c] Necessity for Specific Power

[2] FORM

Power to Execute a Mortgage on Real Property

§ 98.223 Power to Exchange Real Property

[1] Comment--Use of Form

[2] FORM

Power to Exchange Real Property

§ 98.224 Power to Collect Rents

[1] Comment--Use of Form

[2] FORM

Power to Collect Rents

§ 98.225 Power to Sell Personal Property

[1] Comment--Use of Form

[2] FORM

Power to Sell Personal Property

§ 98.226 Power to Borrow Money and to Execute Promissory Note and Security Agreement

[1] Comment--Use of Form

[2] FORM

Power to Borrow Money and to Execute Promissory Note and Security Agreement

§ 98.227 Power to Manage Business

[1] Comment--Use of Form

[2] FORM

Power to Manage Business

§ 98.228 Power to Execute Negotiable Instruments

[1] Comment--Use of Form

[2] FORM

Power to Execute Negotiable Instruments

§§ 98.229-98.239 [Reserved]

§ 98.240 Notice of Revocation of Power of Attorney

[1] Comment

[a] Use of Form

[b] Revocability of Power of Attorney

[c] Effect of Revocation

[d] Effect of Provision Making Power Irrevocable

[2] FORM

Notice of Revocation of Power of Attorney

§ 98.241 Revocation of Power of Attorney Affecting Interest in Real Property

[1] Comment

[a] Use of Form

[b] Recordation Requirement

[2] FORM

Revocation of Power of Attorney Affecting Interest in Real Property

§ 98.242 Substitution of Attorney in Fact

[1] Comment

[a] Use of Form

[b] Power of Substitution

[c] Requirements for Valid Substitute Power of Attorney

[2] FORM

Substitution of Attorney in Fact

§ 98.243 Affidavit of Authority

[1] Comment--Use of Form

[2] FORM

Affidavit of Authority

§ 98.244 Certification of Copy of Power of Attorney

[1] Comment--Use of Form

[2] FORM

Certification of Copy of Power of Attorney

Reviewed by the Honorable Walter L. Blackwell IIIIn*

FOOTNOTES:

(n158)Footnote *. Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.



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DIVISION VII: PERSONAL TRANSACTIONS
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31-98 California Legal Forms--Transaction Guide Scope

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

Scope

Reviewed by the Honorable Walter L. Blackwell III^{n*} Scope

This chapter deals with powers of attorney. In 1994 the California Legislature enacted the Power Of Attorney Law. The law was generally moved from the Civil Code to the Probate Code. While there were no substantive changes of great magnitude, many provisions of the general law of agency that previously applied to powers of attorney were included in the new Power Of Attorney Law. This chapter reflects the new Power Of Attorney Law. This chapter does not cover durable powers of attorney [*see* Ch. 68, *Durable Powers of Attorney*].

The Legal Background contains a general discussion of the law relating to powers of attorney, including the creation, use, modification, revocation, and recording of powers of attorney. Coverage of the authority, duties, and responsibilities of attorneys in fact is also provided. The Transaction Guide provides checklists of facts and documents, determinations, and procedures relating to powers of attorney. The Forms section provides complete power of attorney forms, specific power of attorney provisions, and revocation and substitution forms.

The forms in this chapter are intended to serve as general drafting guides and should be modified to reflect the particular circumstances and the intentions of the parties. For discussion of powers of attorney to execute a lease, *see* Ch. 34A, *Prelease Forms*, §§ 34A.210, 34A.211. For discussion of durable powers of attorney, *see* Ch. 68, *Durable Powers of Attorney* .

FOOTNOTES:

(n159)Footnote *. Judge Blackwell is a judge of the San Bernardino County Superior Court in Barstow, California. He received a B.A. in Business Administration and Economics from the University of Redlands, and a J.D. from U.C.L.A. Before being elected to the Superior Court, Judge Blackwell practiced in the areas of business and real estate transactions and litigation. He was also Executive Vice President and General Counsel for a large financial institution.



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A. Primary Sources

31-98 California Legal Forms--Transaction Guide § 98.01

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.01 California Statutes

Execution by attorney in fact of instrument conveying real property. *Civ. Code § 1095.*

Acknowledgment by attorney in fact. *Civ. Code § 1189.*

Recordation providing constructive notice. *Civ. Code § 1213.*

Revocation of recorded power of attorney. *Civ. Code § 1216.*

Capacity to contract. *Civ. Code § 1556.*

Prohibition against power of attorney to confess judgment. *Civ. Code § 1804.1(c).*

Law of agency. *Civ. Code § 2295 et seq.*

"Agent" defined. *Civ. Code § 2295.*

Capacity to be or to appoint agent. *Civ. Code § 2296.*

Delegation of authority. *Civ. Code § 2304.*

Actual authority. *Civ. Code § 2316.*

Ostensible authority. *Civ. Code § 2317.*

General authority. *Civ. Code § 2318.*

Authority of agent. *Civ. Code § 2319.*

General or special terms. *Civ. Code § 2321.*

Obligations of principal to third parties. *Civ. Code § 2330 et seq.*

Obligations of agents to third parties. *Civ. Code § 2342 et seq.*

Delegation of agency. *Civ. Code § 2349 et seq.*

Methods of termination. *Civ. Code § 2355 et seq.*

Appointment of guardian ad litem. *Code Civ. Proc. § 373.*

Power of attorney to execute mortgage. *Civ. Code § 2933.*

Prohibition against power of attorney to confess judgment in conditional sale contract. *Civ. Code § 2983.7(b).*

Signature by authorized representative. *Com. Code § 3402.*

Incapacity of minor to create power of attorney. *Fam. Code § 6701(a).*

Attorney in fact representing military personnel in adoption proceedings. *Fam. Code § 8613.*

Power of attorney taken by industrial loan company. *Fin. Code § 18440.*

Power of attorney taken by small loan lender or broker. *Fin. Code § 24467.*

Recordation of instruments affecting title to or possession of real property. *Gov. Code § 27280.*

Acknowledgment of recorded instrument. *Gov. Code § 27287.*

Revocation of power of attorney to assign or collect wages. *Lab. Code § 300(e).*

Forgery of power of attorney. *Penal Code §§ 470, 473.*

Embezzlement of power of attorney. *Penal Code § 507.*

"Person" defined. *Prob. Code § 56.*

Power of Attorney Law. *Prob. Code § 4000 et seq.*

Definitions and general provisions. *Prob. Code § 4000 et seq.*

Powers of attorney generally. *Prob. Code § 4100 et seq.*

Uniform statutory form power of attorney. *Prob. Code § 4400 et seq.*

Health Care Decisions Law (governing durable powers of attorney for health care). *Prob. Code § 4600 et seq.* (effective July 1, 2000).

Judicial proceedings concerning powers of attorney. *Prob. Code § 4900 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview
Estate, Gift & Trust Law Powers of Attorney Durable Powers
Estate, Gift & Trust Law Powers of Attorney Limited Powers



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A. Primary Sources

31-98 California Legal Forms--Transaction Guide § 98.02

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.02 Federal Statutes

Authority of federal agency to require power of attorney as condition to settlement of controversy involving payment of money. *5 U.S.C. § 500(d)(4)*.

Fine or imprisonment for alteration or forgery of power of attorney. *28 U.S.C. § 495*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers



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A. Primary Sources

31-98 California Legal Forms--Transaction Guide § 98.03

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.03 California Attorney General Opinions

Exemption from license requirements for attorneys in fact does not apply to agents of subdivider selling lots for compensation. *18 Ops. Cal. Atty. Gen. 200 (1951)* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Governments State & Territorial Governments Licenses



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A. Primary Sources

31-98 California Legal Forms--Transaction Guide § 98.04

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[Reserved]

§ 98.04[Reserved]



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B. Secondary Sources

31-98 California Legal Forms--Transaction Guide § 98.05

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.05 Law Reviews and Periodicals

Gifts Under Power of Attorney Are Included in Estate, 20 Tax'n for Law. 295 (1992).

Cooney, Drafting Powers of Attorney for Success, 36(5) Prac. Law. 59 (1990).

Power of Attorney Can be Used to Disclaim Interest, 19 Tax'n for Law. 174 (1990).

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers



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B. Secondary Sources

31-98 California Legal Forms--Transaction Guide § 98.06

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.06 Text References

[1] Matthew Bender Sources

California Legal Forms (Matthew Bender)

Ch. 27, *Deeds and Recording* .

Ch. 34A, *Prelease Forms* .

Ch. 44, *Accounts Receivable Financing and Factoring* .

Ch. 55, *Negotiable Instruments* .

Ch. 68, *Durable Powers of Attorney* .

California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender).

California Points & Authorities, Ch. 182, *Principal and Agent* (Matthew Bender)

Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 5B, *Assignments and Delegation of Powers* (Matthew Bender).

[2] Additional Text References

Witkin, Summary of California Law, vol. 3, *Agency and Employment* (10th ed. 2005).

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers



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B. Secondary Sources

31-98 California Legal Forms--Transaction Guide §§ 98.07-98.09

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

[Reserved]

§§ 98.07[Reserved]



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A. Overview of Powers of Attorney

31-98 California Legal Forms--Transaction Guide § 98.10

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.10 The Power of Attorney Law

[1] Enactment of New Power of Attorney Law

In 1994 the California Legislature enacted the Power of Attorney Law [*see Prob. Code § 4000 et seq.*]. This legislation transferred the law governing powers of attorney from the Civil Code to the Probate Code, and drew provisions from other California statutes and the statutes of other states. For coverage of the source and effect of provisions in the new Power of Attorney Law, see Official California Law Revision Commission Comments to Power of Attorney Law, available from the CLRC at (415) 494-1335.

[2] Application of Power of Attorney of Law

Powers of attorney are governed by the Power of Attorney Law [*Prob. Code § 4000 et seq.*] and, to the extent not otherwise inconsistent with the Power of Attorney Law, the general law of agency [*see Prob. Code § 4051; see Civ. Code §§ 2019 et seq., 2295 et seq. (law of agency)*]. The Power of Attorney Law applies to the following [*Prob. Code § 4050(a)*]:

- Durable powers of attorney, other than powers of attorney for health care governed by *Prob. Code § 4600 et seq.*
- Statutory form powers of attorney [*see Prob. Code § 4400 et seq.*].
- Other powers of attorney that incorporate or refer to the Power of Attorney Law [*Prob. Code § 4050(a)*].

Durable powers of attorney are usually thought of as an estate planning device and therefore are not covered in this chapter. For coverage of durable powers of attorney, see Ch. 68, *Durable Powers of Attorney* .

The Power of Attorney Law does not apply to the following:

- Powers of attorney to the extent that the authority of the attorney in fact is coupled with an interest in the subject of the power of attorney [*Prob. Code § 4050(b)(1)*].
- Reciprocal or interinsurance exchanges and their contracts, subscribers, attorneys in fact, agents, and representatives [*Prob. Code § 4050(b)(2)*].
- Proxies given by an attorney in fact to exercise voting rights [*Prob. Code § 4050(b)(3)*].
- Durable powers of attorney for health care, which are governed by the Health Care Decisions Law [*Prob. Code §§ 4050(a)(1), 4651(a); see Prob. Code §§ 4600-4805*].

Certain provisions of the Power of Attorney Law may not be limited in a power of attorney [see *Prob. Code §§ 4155* (termination of authority of attorney in fact by incapacity of the principal), 4206 (certain matters affecting durable powers of attorney), 4207 (resignation of attorney in fact), 4236 (duties of attorneys in fact concerning records of transactions)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers



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A. Overview of Powers of Attorney

31-98 California Legal Forms--Transaction Guide § 98.11

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.11 Definitions

[1] "Power of Attorney" Defined

A "power of attorney" is a written instrument, however denominated, that is executed by a natural person having the power to contract and that grants authority to an attorney in fact. A power of attorney may be durable or nondurable [*Prob. Code § 4022*; see Ch. 68, *Durable Powers of Attorney*]. A power of attorney may grant authority by incorporating by reference the powers permitted by statute [*Prob. Code § 4263*].

In a power of attorney a principal may grant authority to an attorney in fact to act on the principal's behalf with respect to all lawful subjects and purposes or with respect to one or more express purposes [*Prob. Code § 4123*].

There is an apparent inconsistency in the Power of Attorney Law. Although *Prob. Code § 4022* does not require that a power of attorney be acknowledged or witnessed, *Probate Code Section 4121* declares that a power of attorney is "legally sufficient" only if it contains the date of its execution, is signed by the principal or is signed in the principal's name in the principal's presence at his or her direction, and is acknowledged before a notary public or signed by at least two witnesses [*Prob. Code § 4121*; see *Prob. Code § 4122*]. Therefore, when preparing a power of attorney, the best practice would be to have it acknowledged before a notary public or witnessed [see *Prob. Code § 4122*; see also *Civ. Code § 1189* (acknowledgments); see *Estate of Rabinowitz* (2003) 114 Cal. App. 4th 635, 638-640, 7 Cal. Rptr. 3d 722 (oral acknowledgment of power of attorney may be sufficient, and witnesses' signing of attestation clauses after principal's death may also be sufficient at least in absence of fraud)].

Case law provides that a power of attorney is a written authorization given by a principal to an agent to perform specified acts on behalf of the principal [*Rosenberg v. C. W. Clarke Co.* (1962) 200 Cal. App. 2d 178, 186, 19 Cal. Rptr. 191] . A power of attorney is, in effect, a formalized delegation of authority [18 Ops. Cal. Atty. Gen. 200, 201 (1951)] . The instrument by which the authority is granted is called a "power of attorney" [see *Frink v. Roe* (1886) 70 Cal. 296, 307, 11 P. 820] .

[2] "Principal" Defined

A "principal" is a natural person who executes a power of attorney [*Prob. Code § 4026*].

[3] "Attorney in Fact" Defined

An "attorney in fact" is a person granted authority to act for the principal in a power of attorney, regardless of whether the person is known as an attorney in fact, agent, or other term [*Prob. Code § 4014(a)*]. The term "attorney in fact" includes not only the originally appointed attorney in fact, but also successors, alternates, and persons delegated authority by an attorney in fact [*Prob. Code § 4014(b)*]. An attorney in fact is more than a mere agent. He or she is empowered to act in the place of the principal as to all acts necessary and proper for the transaction of business not of a legal character that is within the scope of the authority granted under the power of attorney [*see County of L. A. v. Stuyvesant Ins. Co. (1964) 227 Cal. App. 2d 428, 431, 38 Cal. Rptr. 713*].

[4] "Durable Power of Attorney" Defined

A "durable power of attorney" is a power of attorney by which a principal designates another person as attorney in fact in writing, and the power of attorney shows, by specified statements [*Prob. Code § 4124(a), (b)*] or otherwise, the principal's intent that the power remain exercisable regardless of the principal's subsequent incapacity [*Prob. Code §§ 4018, 4124(c)*]. Durable powers of attorney are covered in Ch. 68, *Durable Powers of Attorney*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers



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A. Overview of Powers of Attorney

31-98 California Legal Forms--Transaction Guide § 98.12

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.12 Persons Capable of Granting Power of Attorney

A power of attorney is a form of agency [*see Rosenberg v. C. W. Clarke Co. (1962) 200 Cal. App. 2d 178, 186, 19 Cal. Rptr. 191*]. Any person having the capacity to contract may appoint an agent [*Prob. Code § 4022*]. All natural persons, with the exception of minors, persons of unsound mind, and persons deprived of civil rights, are capable of contracting [*Civ. Code § 1556*], and, hence, may grant a power of attorney [*Prob. Code § 4022*]. Minors are expressly precluded from granting powers of attorney [*Fam. Code § 6701(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers



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A. Overview of Powers of Attorney

31-98 California Legal Forms--Transaction Guide § 98.13

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.13 Interpretation of Power of Attorney

The Power of Attorney Law [see *Prob. Code § 4000 et seq.*] applies to all powers of attorney. Except where the Power of Attorney Law provides a specific rule, the general law of agency also applies to powers of attorney [*Prob. Code § 4051*; see *Civ. Code §§ 2019 et seq., 2295 et seq.* (law of agency)].

Powers of attorney, being formal instruments, are subject to strict interpretation. They must be construed in accordance with the plain meaning of the language of the document without regard to extrinsic evidence. The authority conferred is not to be extended by implication beyond the natural and ordinary significance of the terms used [*Rosenberg v. C. W. Clarke Co.* (1962) 200 Cal. App. 2d 178, 186, 19 Cal. Rptr. 191] . Further, the document is not to be construed as authorizing acts beyond those specified, unless those acts are necessary and proper to carry out the powers expressly delegated [*Jay v. Dollarhide* (1970) 3 Cal. App. 3d 1001, 1020, 84 Cal. Rptr. 538 , overruled o.g., *Morris v. Thogmartin* (1973) 29 Cal. App. 3d 922, 930, 105 Cal. Rptr. 919 ; *Rosenberg v. C. W. Clarke Co.* (1962) 200 Cal. App. 2d 178, 186, 19 Cal. Rptr. 191] .

If a power of attorney provides that the Power of Attorney Law of this state governs the power of attorney or otherwise indicates that is the principal's intention, the Power of Attorney Law [see *Prob. Code §§ 4000 et seq.*] applies to acts and transactions inside and outside California if any of the following is satisfied [*Prob. Code § 4052(a)*]:

- The principal or attorney in fact was domiciled in California when the power of attorney was executed.
- The authority conferred on the attorney in fact relates to property, acts, or transactions in California.
- The acts or transactions of the attorney in fact occurred or were intended to occur in California.
- The power of attorney was executed by the principal in California.

- There is otherwise a reasonable relationship between California and the subject matter of the power of attorney.

If *Prob. Code § 4052(a)* does not apply to the power of attorney, the Power of Attorney Law governs the power of attorney and applies to the acts and transactions of the attorney in fact in California if (1) the principal was domiciled in California when he or she executed the power of attorney, or (2) the principal executed the power of attorney in California [*Prob. Code § 4052(b)*]. A power of attorney described in this section remains subject to the Power of Attorney Law despite any change in domicile or the principal or attorney in fact, or the removal from California of property that was the subject of the power of attorney [*Prob. Code § 4052(c)*].

If a principal grants inconsistent authority to one or more attorneys in fact in two or more powers of attorney, the authority granted last controls to the extent of the inconsistency. This rule of interpretation may not be limited in the power of attorney [*Prob. Code § 4130*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Interpretation Estate, Gift & Trust Law Powers of Attorney Limited Powers



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A. Overview of Powers of Attorney

31-98 California Legal Forms--Transaction Guide § 98.14

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.14 Statutory Form Power of Attorney

[1] In General

The Power of Attorney Law provides for uniform statutory form powers of attorney [see *Prob. Code § 4400 et seq.*]. In general, a uniform statutory form power of attorney is legally sufficient when the requirements of *Prob. Code § 4402* are satisfied and the form presented in *Prob. Code § 4401* is used. The requirements for completion of a uniform statutory power of attorney are strict and care must be taken in execution to ensure compliance. For example, placing an "X" rather than initialing specific powers on a uniform statutory power of attorney does not meet statutory requirements [see *Torres v. Torres (2006) 135 CA 4th 870 ; 37 CR 3d 754*]. However, any other form of power of attorney that complies with the requirements of law may be used instead of the form presented in *Prob. Code § 4401*, though in that case, the Uniform Statutory Form Power of Attorney Act is inapplicable [*Prob. Code § 4408*]. For a form for a uniform statutory form power of attorney, see § 98.200.

In general, the entire Power of Attorney Law applies to statutory form powers of attorney. However, if there is a conflict between specific and general provisions, the specific provisions of the Uniform Statutory Form Power of Attorney Act prevail [*Prob. Code § 4407; see Prob. Code § 4400 et seq.*].

A legally sufficient statutory form power of attorney is durable if language is included showing the intent of the principal that the power granted may be exercised regardless of later incapacity [*Prob. Code § 4404; see Ch. 68, Durable Powers of Attorney*].

[2] Provisions in Statutory Form Power of Attorney

A statutory form power of attorney may be drafted to take effect on the occurrence of a specified event or contingency, and it may specify the persons who have the power to determine whether the event or contingency has occurred [*Prob. Code § 4405(a), (b)*]. Third persons may be compelled to honor an attorney in fact's authority under a properly executed statutory form power of attorney [*Prob. Code § 4406*].

By executing a statutory form power of attorney, the principal empowers the attorney in fact act for him or her in a variety of specified ways [*Prob. Code § 4450*]. In addition, grants of power regarding real property transactions, personal property transactions, stock and bond transactions, commodity and option transactions, banking transactions, business operating transactions, insurance and annuity transactions, estate transactions, claims and litigation, personal and family transactions, governmental programs, retirement plan transactions, and tax matters also have particular specified effects [*see Prob. Code § 4451 et seq.*].

[3] Validity of Former Statutory Form Power of Attorney

A statutory form power of attorney executed at any time, using a form that complied with former *Civ. Code § 2450* or former Civil Code Part 4, Title 9, Chapter 3.5 [*see former Civ. Code § 2475 et seq.*], is valid [*Prob. Code § 4409(a), (b)*]. This is also true for a printed form of durable power of attorney under former Civil Code provisions [*see Prob. Code § 4102; see also Ch. 68, Durable Powers of Attorney*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Interpretation Estate, Gift & Trust Law Powers of Attorney Limited Powers



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31-98 California Legal Forms--Transaction Guide § 98.15

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.15 Recordation of Power of Attorney

A power of attorney to execute a mortgage must be recorded [*Civ. Code* § 2933]. Because instruments affecting title to or possession of real property are entitled to be recorded [*see Gov. Code* § 27280(a)], other powers of attorney affecting title to or possession of real property may be recorded [*Jones v. Marks* (1874) 47 Cal. 242, 246-247 ; *see Civ. Code* §§ 1215, 1216]. Instruments entitled to be recorded must be recorded in the county in which the real property affected by the instrument is situated [*Civ. Code* § 1169].

The purpose of recording is to give constructive notice of the contents of the instrument to subsequent purchasers and mortgagees of the property [*see Civ. Code* § 1213]. However, if a power of attorney for the sale of land is otherwise valid, it is good as between the parties to the transaction, whether or not it is recorded [*Delano v. Jacoby* (1892) 96 Cal. 275, 279, 31 P. 290] .

No fee may be imposed for the recordation of a power of attorney to act as the agent for a service member for the period he or she is in military service [*Mil. & Vet. Code* § 822].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Interpretation Estate, Gift & Trust Law Powers of Attorney Limited Powers



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31-98 California Legal Forms--Transaction Guide § 98.16

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.16 Execution of Instrument to Convey Real Property

When an attorney in fact executes an instrument transferring an estate in real property, he or she must subscribe the name of the principal as well as his or her own name as attorney in fact [*Civ. Code § 1095*]. Accordingly, an instrument purporting to transfer an estate in real property signed only by the attorney in fact, even if the words "attorney in fact for" the named principal are added, does not convey the principal's title to the real property [*Morrison v. Bowman* (1865) 29 Cal. 337, 352-353 ; *Mitchell v. Benj. Franklin B. & I. Corp.* (1936) 13 Cal. App.2d 447, 448, 57 P.2d 185] . An instrument conveying an interest in real property that is executed by an attorney in fact must be acknowledged before it can be recorded [see *Gov. Code § 27287*; *Civ. Code §§ 1188, 1189(a)*].

There is no statute specifying the manner in which an attorney in fact must execute instruments that do not transfer estates in real property [see *Title & Trust Co. v. Crocker First Nat. Bk.* (1933) 131 Cal. App. 487, 493, 21 P.2d 475 (holding that *Civ. Code § 1095* does not apply to checks)]. To avoid potential personal liability on an instrument, however, an attorney in fact must make known that he or she is executing the instrument in a representative capacity [see *Com. Code § 3402*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers Real Property Law Ownership & Transfer Powers of Attorney Real Property Law Purchase & Sale General Overview



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CHAPTER 98 POWERS OF ATTORNEY
PART II. LEGAL BACKGROUND
A. Overview of Powers of Attorney

31-98 California Legal Forms--Transaction Guide § 98.17

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.17 Modification of Power of Attorney

A principal may modify a power of attorney in accordance with the terms of the power of attorney or by an instrument executed in the same manner as a power of attorney may be executed [*Prob. Code § 4150(a)*]. However, modification does not bind an attorney in fact or third person without notice of the modification [*Prob. Code § 4150(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract ModificationsGeneral OverviewEstate, Gift & Trust LawPowers of AttorneyGeneral
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31-98 California Legal Forms--Transaction Guide § 98.18

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.18 Revocation and Termination of Power of Attorney

[1] In General

A principal may revoke a power of attorney in accordance with its terms or by a writing [*Prob. Code § 4151(a)*]. However, revocation does not bind an attorney in fact or third person without notice of the revocation [*Prob. Code § 4151(b)*].

Unless it is coupled with an interest in the subject of the power [*see [5], below; see also § 98.240 [1]*], the authority of an attorney in fact is terminated by the occurrence of any of the following as to every person who has notice [*Prob. Code § 4152(a), (b)*]:

- (1) In accordance with the terms of the power of attorney;
- (2) Extinction of the subject or fulfillment of the purpose of the power of attorney;
- (3) Revocation of the attorney in fact's authority [*see Prob. Code § 4153*];
- (4) Death of the principal, except in specified circumstances;
- (5) Removal of the attorney in fact;
- (6) Resignation of the attorney in fact;
- (7) Incapacity of the attorney in fact (except that temporary incapacity suspends attorney in fact's authority only during incapacity);

(8) Dissolution or annulment of the marriage of the attorney in fact and the principal [*see Prob. Code § 4154*]; or

(9) Death of the attorney in fact.

The principal's good faith sale of the property subject to the power of attorney also terminates the power [*Boehm v. Spreckels (1920) 183 Cal. 239, 248, 191 P. 5*] .

Unless the power of attorney expressly provides for a termination date, the power of attorney does not terminate merely due to the lapse of time [*Prob. Code § 4127*].

The authority of an attorney in fact may be revoked in any of the following ways [*Prob. Code § 4153(a)*]:

- (1) In accordance with the terms of the power of attorney;
- (2) When the principal informs the attorney in fact orally or in writing that the authority is revoked or under what circumstances it is revoked;
- (3) When the principal's legal representative, with court approval [*see Prob. Code § 4206*] informs the attorney in fact in writing of the revocation or under what circumstances it is revoked.

Notice of the revocation should be given to all with whom the attorney in fact has dealt [*see Prob. Code § 4153(b)* (revocation not effective as to those without notice of revocation)].

[2] Resignation of Attorney in Fact

An attorney in fact may resign by any of the following means [*Prob. Code § 4207(a)*]:

- (1) If the principal is competent, by giving notice to the principal;
- (2) If a conservator has been appointed, by giving notice to the conservator;
- (3) On written agreement of a successor attorney in fact, or as provided in the power of attorney; or
- (4) Pursuant to a court order.

[3] Acts Undertaken Without Knowledge of Principal's Death or Incapacity

The death of a principal who has executed a written power of attorney does not revoke or terminate the power as to the attorney in fact or any other person who, without actual knowledge of the death of the principal, acts in good faith under the power of attorney. Any action so taken, unless otherwise invalid or unenforceable, binds the principal's successors in interest [*Prob. Code § 4304(a)*].

The incapacity of a principal who has previously executed a written nondurable power of attorney does not revoke or terminate the power as to the attorney in fact or any other person who, without actual knowledge of the incapacity of the principal, acts in good faith under the power of attorney. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his or her successors in interest [*Prob. Code § 4304(b)*].

[4] Acts of Attorney in Fact in Good Faith Reliance on Power

An affidavit executed by an attorney in fact stating that he or she did not have actual knowledge at the time of exercising a power of attorney that the power had been terminated by the principal's revocation, death, or incapacity is conclusive proof of the nonrevocation or nontermination of the power of attorney as to acts undertaken in good faith reliance on it. This rule is applicable to all powers of attorney. If the attorney in fact's exercise of the power requires execution and delivery of an instrument that is recordable, the affidavit, when authenticated for recordation, may also be recorded [*Prob. Code* § 4305(a)]. An attorney in fact's affidavit that he or she did not have actual knowledge of the revocation or termination of the power is not operative with respect to termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity [*Prob. Code* § 4305(b); see § 98.32[7]].

[5] Irrevocable Power of Attorney

If a power is created for the benefit of the attorney in fact to protect some title or right in the attorney in fact or to secure performance to the attorney in fact, the attorney in fact rather than the principal is the person most concerned with the power [*Becket v. Welton Becket & Associates* (1974) 39 Cal. App. 3d 815, 820, 114 Cal. Rptr. 531] . In such a case, the power of attorney is said to be "coupled with an interest" and the principal no longer has the power to terminate the power at will; that is, the power of attorney becomes irrevocable [*Boehm v. Spreckels* (1920) 183 Cal. 239, 248, 191 P. 5] . To constitute a power coupled with an interest, a power of attorney must: (1) be held for the benefit of the attorney in fact rather than the principal; (2) be created to secure the performance of a duty to the attorney in fact or to protect a title in the attorney in fact; and (3) be created either simultaneously with the duty or title or for consideration [*Becket v. Welton Becket & Associates* (1974) 39 Cal. App. 3d 815, 820, 114 Cal. Rptr. 531] .

The mere recitation that the power of attorney is coupled with an interest is not enough to make the power irrevocable [see *Todd v. Superior Court of San Francisco* (1919) 181 Cal. 406, 414-417, 184 P. 684] . The interest must be in the subject matter of the power of attorney itself and not just in the proceeds of the power [*Woolley v. Embassy Suites, Inc.* (1991) 227 Cal. App. 3d 1520, 1532, 278 Cal. Rptr. 719] .

[6] Revocation of Power Bestowed in Recorded Instrument

A recorded power of attorney to convey or execute instruments affecting real property [see § 98.15] is not revoked by an act of the party by whom it was executed unless the instrument containing the revocation is also acknowledged or proved, certified, and recorded in the same office in which the instrument containing the power was recorded [*Civ. Code* § 1216].

[7] Loss or Destruction of Instrument

A power of attorney is not terminated by the mere loss or destruction of the instrument bestowing the power. In this case, the courts will permit secondary evidence, such as the testimony of witnesses, to establish the contents of the instrument and the nature and scope of the power so that the intentions of both principal and attorney in fact may be carried out. The will of the party who executed the power of attorney, not the paper it is printed on, that creates the power [*Posten v. Rasette* (1855) 5 Cal. 467, 469 ; *Culver v. Newhart* (1912) 18 Cal. App. 614, 624-625, 123 P. 975] .

[8] Temporary Incapacity of Principal or Attorney In Fact

When a power of attorney is terminated by the incapacity of the principal, a question may arise as to the effect of subsequent restoration of capacity. The general rule of law that terminates the authority of the attorney in fact during the period of the principal's total insanity [see *Civ. Code* § 2356(a)(3)] is subject to the qualification that if, on restoration to capacity, the principal ratifies or knowingly fails to repudiate the acts of the attorney in fact, the powers previously granted are considered merely to be suspended, and the principal is deemed to assent to the acts done by the attorney in fact [*S.F.C. Clearing-House v. MacDonald* (1912) 18 Cal. App. 212, 216, 122 P. 964] .

Similarly, while the incapacity of an attorney in fact terminates the power of attorney [see *Prob. Code* § 4152(a)(7)], with respect to temporary incapacity the power is terminated only with respect to acts undertaken during the period of incapacity [see *Clay v. Saute* (1956) 140 Cal. App. 2d 681, 685-686, 295 P.2d 914] .

[9] Revival

A written instrument of power of attorney that has been revoked by a written instrument may not be revived by a mere oral declaration of the principal; rather, a revoked power of attorney can be reinstated only by a new writing [*People v. Tufts* (1914) 167 Cal. 266, 268, 139 P. 78] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawPowers of AttorneyGeneral OverviewEstate, Gift & Trust LawPowers of AttorneyRevocation & Termination



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31-98 California Legal Forms--Transaction Guide §§ 98.19-98.29

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

[Reserved]

§§ 98.19[Reserved]



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B. Attorneys in Fact

31-98 California Legal Forms--Transaction Guide § 98.30

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.30 Attorney in Fact Distinguished From Attorney at Law

A power of attorney does not permit the attorney in fact to act as an attorney at law [*People ex rel. Dept. of Public Works v. Malone* (1965) 232 Cal. App. 2d 531, 536, 42 Cal. Rptr. 888] . An attorney in fact differs from an attorney at law by definition and by general customary treatment [*People ex rel. Dept. of Public Works v. Malone* (1965) 232 Cal. App. 2d 531, 537, 42 Cal. Rptr. 888] . The State Bar Act [see *Bus. & Prof. Code § 6000 et seq.*] restricts the practice of law in California to active members of the State Bar [*Bus. & Prof. Code § 6125*]. The term "practice of law" includes performing services in a court of justice, giving legal advice and counsel, and preparing legal instruments and contracts by which legal rights are secured, whether or not the matter involved is pending in a court [*State Bar of California v. Superior Court* (1929) 207 Cal. 323, 334-335, 278 P. 432] . An attorney in fact may not act as an attorney at law on behalf of a principal, even though the principal could appear in propria persona [*In re Marriage of Caballero* (1994) 27 Cal. App. 4th 1139, 1151, 33 Cal. Rptr. 2d 46] . A person who is not an active member of the State Bar and who practices law is guilty of a misdemeanor [*Bus. & Prof. Code § 6126(a)*].

An attorney in fact may bring an action on behalf of the principal only if the attorney in fact is appointed a guardian ad litem [*In re Marriage of Caballero* (1994) 27 Cal. App. 4th 1139, 1152, 33 Cal. Rptr. 2d 46] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust Law Powers of Attorney General Overview



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31-98 California Legal Forms--Transaction Guide § 98.31

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.31 Persons Capable of Acting as Attorney in Fact

Any person having the capacity to contract may act as an attorney in fact [*Prob. Code § 4200*]. The term "person" includes individuals as well as artificial entities such as corporations, partnerships, limited liability companies, and associations [*see Prob. Code § 56*]. Hence, minors, persons of unsound mind, and persons deprived of civil rights [*see Civ. Code § 1556*] may not be appointed as attorneys in fact.

The designation of an unqualified person as an attorney in fact does not affect the immunities of third parties or relieve the unqualified person of any applicable duties to the principal or his or her successor [*Prob. Code § 4201*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Interpretation



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B. Attorneys in Fact

31-98 California Legal Forms--Transaction Guide § 98.32

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.32 Authority of Attorney in Fact

[1] In General

Except when the rules relating to powers of attorney provide otherwise, the general law of agency applies to the authority of an attorney in fact under a power of attorney [*Prob. Code § 4051; see Civ. Code §§ 2019 et seq., 2295 et seq.* (law of agency)].

An attorney in fact may be given authority to act on the principal's behalf with respect to all lawful subjects and purposes [*Prob. Code § 4123*].

A principal may authorize an attorney in fact to do any acts that the principal might do, except those to which he or she is bound to give personal attention [*Civ. Code § 2304*]. An attorney in fact has the actual and ostensible authority that the principal confers on him or her [*Civ. Code § 2315*]. "Actual authority" is authority that the principal intentionally confers on the attorney in fact or that the principal either intentionally or by lack of ordinary care allows the attorney in fact to believe that he or she possesses [*Civ. Code § 2316*]. "Ostensible authority" is authority that a principal either intentionally or by lack of ordinary care causes or allows a third person to believe that the attorney in fact possesses [*Civ. Code § 2317*].

An attorney in fact has authority to do everything necessary and proper in the ordinary course of business to effect the purpose of the power of attorney [*Prob. Code §§ 4261, 4262*]. An attorney in fact is not, however, authorized to perform any act that constitutes a fraud on the principal [*Civ. Code § 2306*].

[2] Multiple and Successor Attorney in Fact

A principal may designate more than one attorney in fact in one or more powers of attorney [*Prob. Code § 4202(a)*]. Authority granted to two or more attorneys in fact is exercisable only by their unanimous action [*Prob. Code § 4202(b)*]. If a vacancy occurs, the remaining attorneys in fact may exercise the authority conferred as if they were the

only attorneys in fact [*Prob. Code § 4202(c)*]. If one of the attorneys in fact is unavailable, the remaining attorneys in fact may exercise the authority conferred as if they were the only attorneys in fact if such action is necessary to accomplish the purposes of the power of attorney or to avoid irreparable injury to the principal's interests [*Prob. Code § 4202(d)*].

An attorney in fact is not liable for the actions of other attorneys in fact unless he or she participates in, knowingly acquiesces in, or conceals a breach of fiduciary duty by another attorney in fact [*Prob. Code § 4202(e)*].

A principal may designate or grant authority to one or more successor attorneys in fact to act if the authority of a predecessor attorney in fact terminates [*Prob. Code § 4203(a), (b)*]. A successor attorney in fact is not liable for the actions of the predecessor attorney in fact [*Prob. Code § 4203(c)*].

[3] Relations With Third Parties

Third parties are required to give attorneys in fact the same rights and privileges that would be given to the principal if the principal were personally present and seeking to act. However, the third party need not give the attorney in fact rights and privileges to which the principal is not entitled [*Prob. Code § 4300*]. Third parties may deal with attorneys in fact as to subjects covered by the power of attorney even if the specific action of the attorney in fact is not set forth in the power of attorney [*Prob. Code § 4301*].

A third party may require, as a condition of dealing with an attorney in fact, that the attorney in fact provide proof of his or her identity and the current and permanent address of the principal [*Prob. Code § 4302*].

A third party who conducts activities through employees is not charged with actual knowledge of facts relating to a power of attorney or of a change in the attorney in fact's authority unless the information is received at a home office or other place where there is an employee with authority to act on the information and the employee has a reasonable time to act on the information using the procedures and facilities available in the regular course of operations. Knowledge given to an employee in one branch or office of a business that conducts business through multiple branches or offices is not attributable to an employee in a different branch or office [*Prob. Code § 4308*].

PRACTICE TIP:

Because knowledge between branches or offices is not attributed [*see Prob. Code § 4308*], an attorney in fact conducting business at different branches of the same bank should give all notices to the bank either to the main office or to all branches with which the attorney in fact does business.

A financial institution is not obligated to open a deposit account or to make a loan to an attorney in fact on behalf of a principal if the principal is not already a depositor or borrower of the financial institution [*Prob. Code § 4310*].

A third party is not required to enter into a transaction with an attorney in fact who has previously breached any agreement with the third party [*Prob. Code § 4309*].

[4] General Power of Attorney

If a power of attorney, other than in a statutory form power of attorney [*see § 98.200*], gives the attorney in fact general powers without limitation, the attorney in fact has all the authority to act that a person having the capacity to contract may carry out through an attorney in fact specifically authorized to take the action [*Prob. Code § 4261; see Prob. Code § 4260*].

A general power of attorney gives the attorney in fact full authority to transact any and all kinds of business for the principal [*Moore v. Gould (1907) 151 Cal. 723, 728, 91 P. 616*]. A general power includes almost every conceivable

mode of dealing with the principal's property, real and personal, tangible and intangible [*Kiekhoefer v. United States Nat. Bank* (1934) 2 Cal. 2d 98, 104, 39 P.2d 807 ; *Moore v. Gould* (1907) 151 Cal. 723, 727, 91 P. 616] . Thus, the authority of an attorney in fact acting under a general power of attorney extends to executing a renewal of a note and mortgage made by the principal [see *Moore v. Gould* (1907) 151 Cal. 723, 727-728, 91 P. 616] and to employing a person to superintend and conserve the property of the principal [see *Seymour v. Oelrichs* (1912) 162 Cal. 318, 321-323, 122 P. 847] .

A general power of attorney does not authorize the attorney in fact to do acts for his or her own benefit or for the benefit of a third person [*Bank of America v. Perry* (1940) 41 Cal. App. 2d 133, 136-137, 106 P.2d 53] . Furthermore, a general power of attorney does not authorize an attorney in fact to act in his or her own name unless it is in the usual course of business to do so, or to define the scope of his or her authority, or to do any act that a trustee is forbidden to do [Civ. Code § 2322; see Prob. Code § 16000 et seq. (obligations of trustees)].

A power of attorney does not give the attorney in fact the power to do any of the following unless it is specifically so provided in the power of attorney [Prob. Code § 4264]:

- To create, modify, or revoke a trust.
- To fund a trust not created by the principal or a person authorized by the principal to create a trust on the principal's behalf with property of the principal.
- To make or revoke a gift of the principal's property in trust or otherwise.
- To exercise the right to make a disclaimer on behalf of the principal unless it is the disclaimer of a detrimental transfer to the principal with the approval of the court.
- To create or change survivorship interests in the principal's property or property in which the principal has an interest.
- To designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death [see *Schubert* (2002) 95 Cal. App. 4th 100, 106, 115 Cal. Rptr. 2d 285 (attorney in fact who executed trust providing life estate in the decedent's residence to herself with remainder to decedent's grandchildren attempted to change beneficiary designation in violation of Prob. Code § 4264(f)).
- To make a loan to the attorney in fact.

A power of attorney is a general power unless it is specifically limited by the principal [see Prob. Code § 4261; Civ. Code § 2318]. When a power of attorney is given partly in general and partly in specific terms, the general authority gives no higher powers than those specifically mentioned [Civ. Code § 2321; see Prob. Code § 4262]. Thus, a power of attorney that authorized the attorney in fact to act for the principal on all matters, but contained a specific provision concerning the collection of securities from a particular brokerage firm, was held to be limited to that transaction [*Byer v. Canadian Bank of Commerce* (1937) 8 Cal. 2d 297, 302, 65 P.2d 67] .

An attorney in fact has all powers reasonably necessary to comply with Prob. Code § 4238 (duties relating to the disposition of records and property on termination of authority) [see Civ. Code § 2319 (authority of agent)].

[5] Special Power of Attorney

A principal may limit an attorney in fact's authority to that specified in the instrument [see Prob. Code § 4262; Civ.

Code §§ 2315, 2318]. Even under a special power of attorney, however, an attorney in fact has general authority as to third persons, unless they have actual or constructive notice of the restrictions on his or her authority [*Civ. Code § 2318; see Meister & Sons Co. v. Wood-Tatum Co. (1915) 26 Cal. App. 584, 587-588, 147 P. 981*]. Thus, when third parties have notice of restrictions on the authority of the attorney in fact, the principal is not bound by any actions of the attorney in fact that are beyond the scope of his or her authority [*Terminix Co. v. Contractors' State etc. Bd. (1948) 84 Cal. App. 2d 167, 171-172, 190 P.2d 24*].

[6] Springing Power of Attorney

A principal can limit the power of his or her attorney in fact by creating a "springing power of attorney"; that is, a power of attorney that provides that it will become effective at a specified future time or on the occurrence of a specified event or contingency, such as the principal's subsequent incapacity [*Prob. Code § 4030*]. The principal may designate one or more persons who, by a written declaration under penalty of perjury, have the power to determine conclusively that the specified event or contingency has occurred. The principal may designate the attorney in fact or another person to perform this function, either alone or jointly with other persons. If the springing power of attorney includes such a designation, the power of attorney will become effective when the person or persons designated execute a written declaration under penalty of perjury that the specified event or contingency has occurred, and persons acting in reliance on the declaration will not be liable to the principal or to any other person, regardless of whether the specified event or contingency has actually occurred [*Prob. Code § 4129(b)*].

[7] Affidavits of Authority

An attorney in fact may execute an affidavit [*see Code Civ. Proc. § 2003*] to the effect that at the time the attorney in fact did some act pursuant to the power of attorney, he or she did not have actual knowledge of termination or revocation of his or her authority to so act. The affidavit may be recorded if necessary [*Prob. Code § 4305; see § 98.243 (form for affidavit)*].

If acts are undertaken by third parties in good faith reliance on such an affidavit, the affidavit is conclusive proof of the nonrevocation or nontermination of the power at that time [*Prob. Code § 4305(a)*]. However, such an affidavit does not affect termination provisions actually contained in the power of attorney [*Prob. Code § 4305(b)*].

If an attorney in fact furnishes a third party an affidavit of authority and the third party refuses to accept the attorney in fact's authority, that third party is liable for the attorney's fees required to obtain court confirmation of the attorney in fact's authority unless the court determines the third party acted in good faith [*Prob. Code § 4306(a)*]. However, the third party has no obligation to request an affidavit of authority [*Prob. Code § 4306(b)*].

[8] Limiting Applicability of Statutes

A power of attorney may not limit the applicability of statutes stating they are not subject to limitation [*see, e.g., Prob. Code §§ 4130(b), 4155(c), 4206(c), 4207(b)*], or statutes relating to power of attorney warnings, operative dates of statutes, execution formalities, qualification of witnesses and attorneys in fact, and protection of third parties from liability [*Prob. Code § 4101(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Interpretation



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CHAPTER 98 POWERS OF ATTORNEY

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B. Attorneys in Fact

31-98 California Legal Forms--Transaction Guide § 98.33

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.33 Duties and Liabilities of Attorney in Fact

[1] General Duties and Liabilities

Generally, an attorney in fact has no duty to exercise the authority granted in a power of attorney [*Prob. Code § 4230(a)*]. If an attorney in fact acts for the principal in one or more particular transactions, the attorney in fact is not thereby obligated to act for the principal in subsequent transactions. However, an attorney in fact is obligated to complete any transaction he or she has commenced [*Prob. Code § 4230(b)*]. An attorney in fact with special skills has a duty to apply the full extent of those skills [*Prob. Code § 4237*].

If an attorney in fact agrees in writing to act for the principal, the agreement is enforceable against the attorney in fact as a fiduciary regardless of whether there was consideration for the agreement [*Prob. Code § 4230(c)*]. An attorney in fact must exercise the standard of care that would be observed by a prudent person dealing with the property of others [*Prob. Code § 4231(a)*]. If an attorney in fact is not compensated, he or she is not liable for loss to the principal's property unless the loss results from the attorney in fact's bad faith, intentional wrongdoing, or gross negligence [*Prob. Code § 4231(b)*]. However, if an attorney in fact possesses special skills or expertise or was designated an attorney in fact based on a representation that he or she possessed special skills or expertise, the attorney in fact will be held to the same standard of care to which others possessing the special skills or expertise are held [*Prob. Code § 4231(c)*].

An attorney in fact has a duty to act solely in the interest of the principal and to avoid conflicts of interest [*Prob. Code § 4232(a)*]. An attorney in fact does not violate that duty solely because he or she benefits from acting for the principal, has a conflicting interest in relation to the property, care of affairs of the principal, or acts in an inconsistent manner regarding his or her interests and those of the principal [*Prob. Code § 4232(b)*].

An attorney in fact must keep the principal's property separate and distinct from other property and clearly identified as belonging to the principal [*Prob. Code § 4233(a)*]. The principal's property is properly held if it is held either in the name of the principal or in the name of the attorney in fact as attorney in fact for the principal [*Prob. Code § 4233(b)*].

An attorney in fact, to the extent reasonably practical under the circumstances, has a duty to keep in regular contact with the principal, to communicate with the principal, and to follow the instructions of the principal [*Prob. Code § 4234(a)*]. However, with court approval, the attorney in fact may disobey the instructions of the principal [*Prob. Code § 4234(b)*].

If the principal becomes incapable of giving instructions to the attorney in fact or there is a question as to whether or not the principal has that capability, the attorney in fact may consult with the principal's spouse, physician, attorney, accountant, and other advisors and family members as to matters to be undertaken that concern the principal's personal affairs, welfare, family, property, and business interests. The person consulted is required to disclose relevant information to the attorney in fact, and such disclosure is not a waiver of any privilege that may apply [*Prob. Code § 4235*].

[2] Duties Regarding Records and Accounts

An attorney in fact has a duty to keep records of all transactions entered into on behalf of the principal [*Prob. Code § 4236(a)*].

An attorney in fact does not have a duty to make an account of transactions entered into on behalf of the principal, except in the following circumstances [*Prob. Code § 4236(b)*]:

- When requested to do so by the principal.
- When the power of attorney so requires.
- When requested to do so by the conservator of a living principal.
- When requested to do so by the personal representative or successor in interest of a deceased principal.
- Pursuant to court order.

The following persons have a right to examine and copy the records kept by an attorney in fact [*Prob. Code § 4236(c)*]:

- The principal.
- The conservator of the estate of a living principal.
- The personal representative or successor in interest of a deceased principal.
- Any person pursuant to a court order.

On termination of the authority of an attorney in fact, he or she must promptly deliver possession or control of the principal's property as follows [*Prob. Code § 4238(a)*]:

- If the principal is not incapacitated, to the principal or another person as he or she may direct.
- If the principal is incapacitated, to the following person in the following priority:
 - A qualified successor attorney in fact.

- As to any community property, to the principal's spouse.
- To the conservator or guardian of the principal's estate.
- If the principal is deceased, to the principal's personal representative or the principal's successors.

Copies of records relating to transactions concerning property undertaken on the principal's behalf must, if requested, be delivered to the person to whom possession or control of the property is delivered [*Prob. Code* § 4238(b)].

Termination of his or her authority does not relieve an attorney in fact of any duty to account for actions taken [*Prob. Code* § 4238(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Interpretation



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B. Attorneys in Fact

31-98 California Legal Forms--Transaction Guide § 98.34

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.34 Court Enforcement of Duties of Attorney in Fact

[1] In General

As a preliminary matter, a power of attorney is exercisable free of any judicial intervention [*Prob. Code § 4500* (effective July 1, 2000)]. However, the superior court, on petition by a proper party, has jurisdiction to enforce and adjudicate matters relating to a power of attorney [*see Prob. Code § 4500 et seq.* (effective July 1, 2000; replacing *Prob. Code § 4900 et seq.*, repealed effective July 1, 2000)]. To be enforced, a power of attorney must be written and must designate a natural person to act as attorney in fact [*Prob. Code § 4022*].

There is no right to a jury trial in proceedings concerning powers of attorney [*Prob. Code § 4504* (effective July 1, 2000)].

[2] Jurisdiction and Venue

The superior court has jurisdiction in judicial proceedings relating to powers of attorney [*Prob. Code § 4520(a)* (effective July 1, 2000)]. A person who acts as an attorney in fact under a power of attorney governed by the Power of Attorney Law is subject to personal jurisdiction concerning the power of attorney [*Prob. Code § 4522* (effective July 1, 2000)].

The proper county for proceedings regarding powers of attorney are determined in the following order [*Prob. Code § 4523* (effective July 1, 2000)]:

- The county in which the principal resides.
- The county in which the attorney in fact resides.
- A county in which property subject to the power of attorney is located.

- Any other county that is in the principal's best interest.

[3] Who May File Petition

Subject to the principals's right in a power of attorney to eliminate the authority of certain persons to petition the court for specified purposes [see *Prob. Code* § 4503 (effective July 1, 2000)], a petition regarding a power of attorney may be filed by any of the following [*Prob. Code* § 4540 (effective July 1, 2000)]:

- The attorney in fact.
- The principal.
- The spouse of the principal.
- A relative of the principal.
- The conservator of the person or estate of the principal.
- The court investigator of the county where the power of attorney was executed or where the principal resides.
- The public guardian of the county where the power of attorney was executed or where the principal resides.
- The personal representative or trustee of the principal's estate.
- The principal's successor in interest.
- A person who is requested in writing by an attorney in fact to take action.
- Any other interested person or friend of the principal.

[4] Purposes of Petition

A petition regarding a power of attorney (other than a durable power of attorney or power of attorney for health care) may be filed for any one or more of the following purposes [*Prob. Code* § 4541 (effective July 1, 2000)]:

- To determine whether the power of attorney is still effective or has terminated.
- To pass on the acts or proposed acts of the attorney in fact, including approval of authority to disobey the principal's instructions [see *Prob. Code* § 4234(b)].
- To compel the attorney in fact to submit his or her accounts or to report his or her acts as attorney in fact to the principal, the principal's spouse, the conservator of the person or the estate of the principal, or any other person as the court requires, if the attorney in fact has failed to submit an accounting and report within 60 days after written request from the person filing the petition.
- To declare that the power of attorney is terminated on a determination by the court (a) that the attorney in fact has violated or is unfit to perform the fiduciary duties under the power of attorney, (b)

that at the time of the court's determination, the principal lacks the capacity to give or to revoke a power of attorney, and (c) that the revocation of the attorney in fact's authority is in the best interests of the principal or the principal's estate.

- To approve the resignation of the attorney in fact.
- To compel a third person to honor the authority of an attorney in fact.

[5] Notice of Hearing

At least 15 days before the hearing, the petitioner must serve a copy of the notice of a hearing setting forth the time and place of the hearing, together with a copy of the petition, on the attorney in fact, if he or she is not the petitioner, and on the principal, if he or she is not the petitioner [*Prob. Code § 4544(a)* (effective July 1, 2000)]. If the petition seeks to compel action by a third person, it must also be served on the third person [*Prob. Code § 4544(b)* (effective July 1, 2000)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Interpretation



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CHAPTER 98 POWERS OF ATTORNEY

PART II. LEGAL BACKGROUND

B. Attorneys in Fact

31-98 California Legal Forms--Transaction Guide § 98.35

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.35 Delegation of Authority of Attorney in Fact

[1] In General

An attorney in fact may revocably delegate his or her authority to perform mechanical acts to one or more other persons qualified to exercise the authority delegated [*Prob. Code § 4205(a)*]. However, the attorney in fact remains responsible to the principal for the exercise or nonexercise of the delegated authority [*Prob. Code § 4205(b)*].

[2] Prior Law

Before passage of the Power of Attorney Law, the delegation of the authority of an attorney in fact was governed by *Civ. Code § 2349*. In addition to the delegable mechanical acts allowed by *Prob. Code § 4205(a)* [see [1], above], that section allows the authority of an agent to be delegated (unless specifically forbidden by the principal) [*Civ. Code § 2349(2)-(4)*]:

- When it is an act that the attorney in fact cannot lawfully perform, but that the sub-agent can lawfully perform;
- When it is the usage of the place to delegate such powers; and
- When the delegation is specially authorized by the principal.

The attorney in fact could not delegate his or her powers under any other circumstances [*Civ. Code § 2349*].

The Official California Law Revision Commission Comment to the Power of Attorney Law indicates that *Prob. Code § 4205* is taken from *Civ. Code § 2349*, without explaining the reason the additional allowable circumstances for delegation were omitted from *Prob. Code § 4205*. Therefore, delegation under the additional circumstances may or may not be permitted.

However, the Power of Attorney Law expressly incorporates the general law of agency, including Title 9 of the Civil Code, which contains *Civ. Code* § 2349 [*Prob. Code* § 4051]. Therefore, it is likely *Civ. Code* § 2349 applies to powers of attorney. If a delegation for the addition purposes is desired, it should be argued that the general law of agency contained in *Civ. Code* § 2349 applies to powers of attorney, because the Power of Attorney Law provides for it (by incorporating the law of agency) and does not directly conflict with it.

[3] Substituted Attorney in Fact

In accordance with the general law of agency, a lawfully substituted attorney in fact represents the principal in the same manner as the original attorney in fact. Moreover, the original attorney in fact is not responsible to third parties for the acts of the substituted attorney in fact [*Civ. Code* § 2351]. If, however, an attorney in fact appoints a substitute attorney in fact without authority to do so, the original attorney in fact becomes the principal of the substituted attorney in fact. Thus, the original principal has no connection with the substituted attorney in fact [*Civ. Code* § 2350].

For further discussion of substitution of an attorney in fact, see § 98.242[1].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Interpretation



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31-98 California Legal Forms--Transaction Guide § 98.36

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.36 Compensation of Attorney in Fact

An attorney in fact is entitled to reasonable compensation for services rendered to the principal as attorney in fact and for reasonable expenses incurred in acting as attorney in fact [*Prob. Code § 4204*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPowers of AttorneyGeneral Overview



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31-98 California Legal Forms--Transaction Guide §§ 98.37-98.99

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

[Reserved]

§§ 98.37[Reserved]



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PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

31-98 California Legal Forms--Transaction Guide § 98.100

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.100 Facts

PRACTICE TIP:

The attorney should encourage the client to explain in his or her own terms the reason for creating the power of attorney and the reason for selecting the particular individual who will serve as the attorney in fact.

1. Name and address of principal.
2. Reasons for creating power of attorney.
3. Name(s) and address(es) of attorney(s) in fact.
4. Name(s) and address(es) of successor attorney(s) in fact, if any.
5. Information about principal:
 - a. Age.
 - b. Whether of sound mind.
 - c. Whether deprived of civil rights.
6. Information about attorney(s) in fact:

- a. Age.
 - b. Whether of sound mind.
 - c. Whether deprived of civil rights.
7. Subject matter of power of attorney:
- a. Location and/or legal description of any real property subject to power.
 - b. Description of any personal property subject to power.
 - c. Description of principal's business or other affairs to be governed by power.
8. Scope of authority to be granted to attorney in fact:
- a. Whether authority is to be general or limited.
 - b. Any specific limitations on authority.
9. Persons with whom attorney in fact may deal in carrying out authority under power of attorney:
- a. All persons; or
 - b. Only specifically enumerated individuals.
10. Events or occurrences that will terminate power of attorney:
- a. Death of principal.
 - b. Incapacity of principal.
 - c. Revocation at will of principal.
 - d. Completion of particular transaction.
 - e. Lapse of specific amount of time.
 - f. Temporary incapacity of principal or attorney in fact.
11. Whether attorney in fact will have power to delegate any or all authority under any of the following circumstances:
- a. Under any circumstances (general power).
 - b. Only under specific circumstances.
 - c. When act is purely mechanical.
 - d. When attorney in fact cannot lawfully perform act but substitute can lawfully perform

act.

e. When local custom is to delegate authority.

12. Whether attorney in fact has an interest in subject of power:

a. Whether power is held for benefit of attorney in fact or principal;

b. Whether power is created to secure performance of duty to attorney in fact or to protect title in attorney in fact; and

c. Whether power is created either simultaneously with duty or title or for consideration.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers



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A. Client Interview--Facts and Documents

31-98 California Legal Forms--Transaction Guide § 98.101

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.101 Documents

1. Deeds, leases, mortgages, evidences of indebtedness, and other documents relating to any real property over which attorney in fact will have authority.
2. Stock certificates, bonds, promissory notes, records, books of account, licenses, registration certificates, and other documents relating to any personal property over which attorney in fact will have authority.
3. Any other specific documents the client intends the attorney in fact to execute or otherwise handle.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers Real Property Law Ownership & Transfer Powers of Attorney



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A. Client Interview--Facts and Documents

31-98 California Legal Forms--Transaction Guide §§ 98.102-98.109

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

[Reserved]

§§ 98.102[Reserved]



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B. Preliminary Determinations

31-98 California Legal Forms--Transaction Guide § 98.110

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.110 Determining Capacity of Parties

1. Does principal have capacity to appoint attorney in fact?

NOTE:

The principal must be a natural person [*Prob. Code § 4026*]. A person having the capacity to contract may appoint an attorney in fact [*Prob. Code § 4120*]. All persons, with the exception of minors, persons of unsound mind, and persons deprived of civil rights are capable of contracting [*Civ. Code § 1556*]. Minors are expressly precluded from granting powers of attorney [*Fam. Code § 6701(a)*].

a. Is principal over age 18 [*Civ. Code § 1556; Fam. Code §§ 6500, 6701*]?

b. Is principal of sound mind [*Civ. Code § 1556*]?

c. Is principal able to exercise his or her civil rights [*Civ. Code § 1556*]?

2. Does proposed attorney in fact have capacity to contract?

a. Is attorney in fact over age 18 [*Civ. Code § 1556; Fam. Code §§ 6500, 6701*]?

b. Is attorney in fact of sound mind [*Civ. Code § 1556*]?

c. Is attorney in fact able to exercise his or her civil rights [*Civ. Code § 1556*]?

NOTE:

Any person may be an agent [*Civ. Code* § 2296]. However, an attorney in fact must be a person with the capacity to contract [*Prob. Code* § 4200; **see** *Prob. Code* § 56 ("person" defined)]. The attorney in fact should be a specific person, not a generally described class of persons [*Civ. Code* § 1558].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties General Overview Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers



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B. Preliminary Determinations

31-98 California Legal Forms--Transaction Guide § 98.111

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.111 Determining Type of Power of Attorney to Be Created

1. Are client's purposes best served by power authorizing attorney in fact to transact any and all business for principal (general power of attorney)?

NOTE:

A power of attorney is a general power unless it is specifically limited by the principal [*Prob. Code § 4261; see Civ. Code § 2318*]. A general power of attorney authorizes the attorney in fact to do any acts the principal might do, except those to which the principal is bound to give personal attention [*Civ. Code § 2304*]. All rights and liabilities that would accrue to the attorney in fact from transactions within the scope of his or her actual [*see Civ. Code § 2316*] or ostensible [*see Civ. Code § 2317*] authority if they had been entered into on the attorney in fact's account, accrue to the principal [*Civ. Code § 2330*].

2. Are client's purposes best served by limiting attorney in fact's authority to particular transactions on behalf of principal (special power of attorney)?

NOTE:

A special power of attorney is one that does not bestow a general power, but rather grants the attorney in fact authority to engage in particular transactions on behalf of the principal [*see Prob. Code § 4262; Civ. Code §§ 2315, 2318*].

PRACTICE TIP:

Normally, it is best to create a special power of attorney, limited to those powers the principal wishes the attorney in fact to exercise.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers



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B. Preliminary Determinations

31-98 California Legal Forms--Transaction Guide § 98.112

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.112 Limiting Court Enforcement of Power of Attorney

NOTE:

A power of attorney may expressly eliminate the statutory right of certain persons, except the attorney in fact, the principal, the conservator of the principal's estate, or the public guardian [*see Prob. Code § 4903(b)*] to petition the court for enforcement of one or more of the authorized purposes of the proceeding [*Prob. Code § 4903; see Prob. Code § 4941* (purpose of petition)].

1. Are client's best interests served by limiting right of any of following persons authorized by statute to petition for court enforcement [*Prob. Code § 4903(a); see Prob. Code § 4940*]?

- a. Spouse of principal.
- b. Relative of principal.
- c. Conservator of person of principal.
- d. Court investigator of county where power of attorney was executed or where principal resides [*see Prob. Code § 1454*].
- e. Public guardian of county where power of attorney was executed or where principal resides.
- f. Personal representative or trustee of principal's estate.

- g. Principal's successor in interest.
- h. Person who is requested in writing by attorney in fact to take action.
- i. Any other interested person or friend of principal.

2. Are client's best interests served by limiting any of the following purposes for which statute permits proceeding to be initiated [Prob. Code § 4503 (effective July 1, 2000); *see Prob. Code § 4541* (effective July 1, 2000)]?

- a. Determining whether power is still effective or has terminated.
- b. Passing on acts or proposed acts of attorney in fact, including authority to disobey principal's instructions [*see Prob. Code § 4234*].
- c. Compelling attorney in fact to submit accounts or report acts as attorney in fact [*see Prob. Code § 4541(c)* (effective July 1, 2000)].
- d. Declaring that authority of attorney in fact is revoked on court determination that:
 - (1) Attorney in fact has violated or is unfit to perform fiduciary duties;
 - (2) Principal lacks capacity to give or revoke power of attorney; and
 - (3) Revocation of attorney in fact's authority is in best interests of principal or principal's estate.
- e. Approving resignation of attorney in fact [*see Prob. Code § 4541(e)* (effective July 1, 2000)].
- f. Compelling third person to honor authority of attorney in fact.

3. To limit statutory right to petition court for enforcement, ensure both of following are met [*Prob. Code § 4503(a)* (effective July 1, 2000)]:

- a. Power of attorney is executed by principal at time when principal has advice of lawyer licensed to practice law in state where power of attorney is executed; and
- b. Principal's lawyer signs statutory certificate about having informed principal of his or her rights in connection with power of attorney [*see Prob. Code § 4503(a)(1)* (effective July 1, 2000) (text of certificate)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers



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B. Preliminary Determinations

31-98 California Legal Forms--Transaction Guide § 98.113

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.113 Recording Power of Attorney

1. Must power be recorded?

NOTE:

A power of attorney to execute a mortgage must be recorded [*Civ. Code* § 2933].

2. If recording is optional, will client's best interests be served by recording power?

NOTE:

Powers of attorney affecting real property (other than to execute a mortgage) may be recorded [*see Gov. Code* § 27280(a); *Civ. Code* §§ 1215, 1216]. The purpose of recording is to give constructive notice of the contents of the instrument to subsequent purchasers and mortgagees of the property [*see Civ. Code* § 1213].

PRACTICE TIP:

As a practical matter, title insurance companies will require recording to give effect to instruments executed by attorneys in fact.

3. Where should power be recorded?

NOTE:

Instruments entitled to be recorded must be recorded in the county in which the real property is situated [*Civ. Code* § 1169].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Real Property Law Priorities & Recording General Overview



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31-98 California Legal Forms--Transaction Guide §§ 98.114-98.119

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

[Reserved]

§§ 98.114[Reserved]



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31-98 California Legal Forms--Transaction Guide § 98.120

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.120 Drafting Power of Attorney

1. Include introductory information [*see* §§ 98.201, 98.202]:

- a. Date of instrument.
- b. Name and address of principal.
- c. Name and address of attorney in fact.

2. Specify authority of attorney in fact:

- a. If power is general:
 - (1) State that attorney in fact has full authority to transact all business for principal [*see* § 98.201].
 - (2) Do not provide for specific transactions.

NOTE:

When a power of attorney is given partly in general and partly in specific terms, the general authority gives no higher powers than those specifically mentioned [*see Prob. Code* §§ 4261, 4262].

b. If power is special [*see* §§ 98.202, 98.204-98.208, 98.220-98.228]:

- (1) Specify purposes for which power is granted.

(2) Specify transactions attorney in fact may handle.

(3) Specify persons with whom attorney in fact may deal.

3. If power of attorney will be an irrevocable power coupled with an interest [*see* § 98.202]:

a. State that power is irrevocable.

b. State that power is coupled with an interest by stating each of following [*Becket v. Welton Becket & Associates* (1974) 39 Cal. App. 3d 815, 820, 114 Cal. Rptr. 531] :

(1) That power is held for benefit of attorney in fact rather than principal;

(2) That power is created to secure performance of duty to attorney in fact or to protect title in attorney in fact; and

(3) That power is created either simultaneously with duty or title or for consideration.

4. Include provisions governing substitution of attorney in fact:

a. If attorney in fact may not delegate power, state that attorney in fact does not have power of substitution [*see Civ. Code* § 2349].

b. If attorney in fact may delegate under some circumstances, specify circumstances [*see Civ. Code* § 2349].

c. If attorney in fact may delegate power, state that attorney in fact has full power of substitution [*see* § 98.201; *see also* § 98.242[1]].

5. If desired, limit right to judicial enforcement of power [*see Prob. Code* § 4500 *et seq.* (effective July 1, 2000; replacing former *Prob. Code* § 4900 *et seq.*, repealed effective July 1, 2000)].

a. If statutory right of some or all persons to petition court to enforce power of attorney is limited, state persons who will not have right [*Prob. Code* § 4503(a) (effective July 1, 2000); *see Prob. Code* § 4540 (effective July 1, 2000)]:

(1) Spouse of principal.

(2) Relative of principal.

(3) Conservator of person of principal.

(4) Court investigator of county where power of attorney was executed or where principal resides [*see Prob. Code* § 1454].

(5) Public guardian of county where power of attorney was executed or where principal resides.

- (6) Personal representative or trustee of principal's estate.
- (7) Principal's successor in interest.
- (8) Person who is requested in writing by attorney in fact to take action.
- (9) Any other interested person or friend of principal.

b. If statutory right to petition court to enforce power of attorney is eliminated for any specific purposes, set forth specific purposes, such as [*Prob. Code* § 4503(a) (effective July 1, 2000); *see Prob. Code* § 4541 (effective July 1, 2000)]:

- (1) Determining whether power is still effective or has terminated.
- (2) Passing on acts or proposed acts of attorney in fact, including authority to disobey principal's instructions [*see Prob. Code* § 4234].
- (3) Compelling attorney in fact to submit accounts or report acts as attorney in fact [*see Prob. Code* § 4541(c) (effective July 1, 2000)].
- (4) Declaring that authority of attorney in fact is revoked on court determination that:
 - (a) Attorney in fact has violated or is unfit to perform fiduciary duties;
 - (b) Principal lacks capacity to give or revoke power of attorney; and
 - (c) Revocation of attorney in fact's authority is in best interests of principal or principal's estate.
- (5) Approving resignation of attorney in fact [*see Prob. Code* § 4541(e) (effective July 1, 2000)].
- (6) Compelling third person to honor authority of attorney in fact.

c. If statutory right to petition court to enforce power of attorney is limited [*Prob. Code* § 4503(a) (effective July 1, 2000)]:

- (1) Ensure that power of attorney is executed by principal at time when principal has advice of lawyer licensed to practice in state where power of attorney is executed; and
- (2) Prepare certificate with substantially following language, which lawyer must sign [*Prob. Code* § 4503(a)(2) (effective July 1, 2000)]: "I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney."

6. Include language governing modification of power [*Prob. Code* § 4150].

7. Include language governing termination or revocation of power [*Prob. Code* §§ 4151-4155; *see* § 98.201].

8. Include acknowledgment [*see* § 98.200; *see Civ. Code* § 1189]:

a. If power is to be recorded [*Gov. Code* § 27287].

b. If power will not be recorded, include acknowledgment to enhance evidentiary quality of instrument, if desired [*see Evid. Code* § 1451], and to allow for later recordation.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers



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31-98 California Legal Forms--Transaction Guide § 98.121

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.121 Executing and Recording

1. Have principal execute power of attorney [*Prob. Code § 4121*]:
 - a. Include date of execution.
 - b. Include principal's signature:
 - (1) By principal; or
 - (2) In principal's name by other person:
 - (a) In principal's presence; and
 - (b) At principal's direction.
 - c. Acknowledge power of attorney before notary public or include signature of two witnesses.

NOTE:

There are specific requirements for who may be a witness to the execution of a power of attorney, and how a witness must sign [*see Prob. Code § 4122*].

2. If power of attorney will be recorded, make sure it is acknowledged before notary public [*Gov. Code § 27287*; *see Prob. Code § 4121(c)*].

NOTE:

Even if the power of attorney will not be recorded, acknowledgment will enhance its evidentiary value [

Evid. Code § 1451].

3. If power of attorney affects real property, record instrument in county where affected property is located.

NOTE:

A power of attorney to execute a mortgage must be recorded [*Civ. Code § 2933*]. Other powers affecting real property may be recorded [*see Gov. Code § 27280(a); Civ. Code §§ 1215, 1216*]. The purpose of recording is to give constructive notice of the contents of the instrument to subsequent purchasers and mortgagees of the property [*see Civ. Code § 1213*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers Real Property Law Priorities & Recording General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 98 POWERS OF ATTORNEY
PART III. TRANSACTION GUIDE
C. Procedural Guide

31-98 California Legal Forms--Transaction Guide §§ 98.122-98.129

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

[Reserved]

§§ 98.122[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 98 POWERS OF ATTORNEY

PART III. TRANSACTION GUIDE

D. Related and Subsequent Procedures

31-98 California Legal Forms--Transaction Guide § 98.130

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.130 Petition to Enforce Power of Attorney

NOTE:

Outlined below is a statutory procedure for court enforcement of the duties of an attorney in fact [*see Prob. Code § 4500 et seq.* (effective July 1, 2000), replacing *Prob. Code § 4900 et seq.* (repealed effective July 1, 2000)]. The remedies provided under this statutory scheme are cumulative and nonexclusive [*Prob. Code § 4501* (effective July 1, 2000); *see Prob. Code §§ 4500, 4502* (effective July 1, 2000)].

1. Review power of attorney to confirm it is enforceable by petition to court:

a. Does instrument qualify as a power of attorney?

NOTE:

A "power of attorney" is a written instrument, however denominated, that is executed by a natural person having the capacity to contract and that grants authority to an attorney in fact. It may be durable or nondurable [*Prob. Code § 4022*].

b. Does instrument contain restrictions that limit statutory right to petition court?

NOTE:

In general, certain persons designated by statute [*see Prob. Code § 4540* (effective July 1, 2000)] have the right to petition the court for specific purposes authorized by statute [*see Prob. Code § 4541* (effective July 1, 2000)]. However, subject to certain exceptions, this right may be eliminated by express provisions contained in the power of attorney, provided statutory requirements are satisfied [*Prob. Code*

§ 4503 (effective July 1, 2000); *see* P c, ***below***].

c. If instrument does contain restrictions, do restrictions comply with statutory requirements for enforceability?

(1) Provision eliminating right to petition does not apply to person or purpose specifically protected by statute [*see Prob. Code § 4503(b)* (effective July 1, 2000)].

(2) Power of attorney was executed by principal who was represented by licensed counsel and counsel signed certificate stating fact of representation [*see Prob. Code § 4503(a)(2)* (effective July 1, 2000); *see also § 98.120*, P 5c(2)].

2. Confirm petitioner is person authorized to file petition [*Prob. Code § 4540* (effective July 1, 2000)]:

- a. Attorney in fact.
- b. Principal.
- c. Spouse of principal.
- d. Relative of principal.
- e. Conservator of person or estate of principal.
- f. Court investigator of county where power of attorney was executed or where principal resides.
- g. Public guardian of county where power of attorney was executed or where principal resides.
- h. Personal representative or trustee of principal's estate.
- i. Principal's successor in interest.
- j. Person who is requested in writing by attorney in fact to take action.
- k. Any other interested person or friend of principal.

3. Determine whether petition is to be filed for one or more purposes authorized by statute [*Prob. Code § 4541* (effective July 1, 2000)]:

- a. Determining whether power is still effective or has terminated.
- b. Passing on acts or proposed acts of attorney in fact, including authority to disobey the principal's instructions.
- c. Compelling attorney in fact to submit accounts or to report acts as attorney in fact.
- d. Revoking power of attorney on determination that:
 - (1) Attorney in fact has violated or is unfit to perform fiduciary duties;
 - (2) Principal lacks capacity to give or revoke power of attorney; and

(3) Revocation of power is in best interests of principal or principal's estate.

e. Approving resignation of the attorney in fact.

f. Compelling third person to honor authority of attorney in fact.

4. Commence proceedings in superior court by filing a petition stating facts showing that petition is authorized [*Prob. Code § 4541* (effective July 1, 2000)] and, if known to petitioner, terms of power of attorney [*Prob. Code § 4542* (effective July 1, 2000)]; see California Forms of Pleading and Practice, ch. 427, *Principal and Agent* (Matthew Bender)].

NOTE:

The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the principal or the principal's estate [*Prob. Code § 4543* (effective July 1, 2000)].

5. Give notice of time and place of hearing [*Prob. Code § 4544(a)* (effective July 1, 2000)]:

a. At least 15 days before time set for hearing.

b. Together with copy of petition.

c. On following parties, if they are not petitioners:

(1) Attorney in fact.

(2) Petitioner.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers



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31-98 California Legal Forms--Transaction Guide § 98.131

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.131 Substitution of Attorney in Fact

NOTE:

This procedure is to be used if the attorney in fact wishes to substitute another attorney in fact in his or her If the principal wishes to substitute a new attorney in fact, the procedure is to terminate the existing power of attorney and create a new one.

1. Obtain copy of power of attorney.
2. Determine whether attorney in fact's power is delegable [*Prob. Code § 4205; see Civ. Code § 2349; see also § 98.35*]:
 - a. Is act purely mechanical?
 - b. Is act one that attorney in fact cannot lawfully perform but that substituted attorney in fact could lawfully perform?
 - c. Is it usage of place to delegate power?
 - d. Is delegation specifically authorized by principal?
 - e. Does written power of attorney expressly restrict right to delegate power, or extend right to other circumstances?
3. If attorney in fact may be substituted, draft substitute power of attorney [*see § 98.242*]:

- a. State name of principal.
 - b. State name of original attorney in fact.
 - c. State name of substitute attorney in fact.
 - d. If power of attorney was recorded, specify where.
 - e. State powers of attorney in fact under original power of attorney.
 - f. State powers delegated to substitute attorney in fact.
 - g. If substitute power of attorney is for specific term, state time or event on which power will revert to original attorney in fact.
 - h. Specify date of execution.
4. If substitute power of attorney will be recorded [*see Gov. Code § 27287*], have it acknowledged [*see Civ. Code § 1189; see also § 98.200*].
5. If original power of attorney was recorded, record substituted power of attorney.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawPowers of AttorneyGeneral OverviewEstate, Gift & Trust LawPowers of AttorneyDurable PowersEstate, Gift & Trust LawPowers of AttorneyLimited Powers



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D. Related and Subsequent Procedures

31-98 California Legal Forms--Transaction Guide § 98.132

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.132 Termination of Authority in Fact

1. Obtain copy of power of attorney.
2. Determine whether authority of attorney in fact under power of attorney has already terminated [*Prob. Code § 4152(a)*]:

NOTE:

If any of the following has occurred, the authority of an attorney in fact under a power of attorney is terminated [*see Prob. Code § 4152(a)*].

- a. Has power terminated by its terms?
- b. Has there been extinction of subject of power or fulfillment of purpose of power?
- c. Has there already been revocation of attorney in fact's authority?
- d. Has principal died?
- e. Has attorney in fact been removed?
- f. Has attorney in fact resigned?
- g. Is attorney in fact incapacitated?

h. Has there been dissolution or annulment of marriage of attorney in fact and principal [see *Prob. Code* § 4154]?

i. Is attorney in fact dead?

3. If authority of attorney in fact has not already terminated, draft instrument revoking power [see §§ 98.240, 98.241]:

a. Identify principal by name and address.

b. State that power is being revoked.

c. Identify power:

(1) State date power was created.

(2) State name of attorney in fact.

(3) Include brief statement of powers granted.

4. Revoke authority of attorney in fact in one of following ways [*Prob. Code* § 4153]:

a. In accordance with terms of power of attorney.

b. Principal informs attorney in fact orally or in writing.

c. Principal's legal representative informs attorney in fact in writing [see *Prob. Code* § 4206].

5. Notify attorney in fact of revocation [see *Prob. Code* § 4153]:

a. Give immediate oral notification.

b. As soon as possible, follow up with written notice and provide attorney in fact with copy of instrument revoking power.

PRACTICE TIP:

To preserve a record that the notice was received, the revocation may be mailed first class, return receipt requested.

6. Notify known individuals with whom attorney in fact has dealt or is likely to deal of revocation of power and provide them with copies of instrument revoking power [see P 3, above].

7. If power of attorney was recorded:

a. Have instrument revoking power acknowledged [*Gov. Code* § 27287; see *Civ. Code* § 1189; see also § 98.200].

b. Record instrument revoking power.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers Estate, Gift & Trust Law Powers of Attorney Revocation & Termination



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DIVISION VII: PERSONAL TRANSACTIONS
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31-98 California Legal Forms--Transaction Guide § 98.133

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.133 Revocation of Power of Attorney

1. Obtain copy of power of attorney.
2. Determine whether power of attorney has already been revoked [*Prob. Code § 4151(a)*]:
 - a. In accordance with its terms.
 - b. By written instrument.
3. If power of attorney is not already revoked, have principal execute written revocation [*Prob. Code § 4151(a)(2)*].
4. Prepare notice of revocation of power of attorney [*see § 98.240*], have principal execute it, and send it to attorney in fact and all interested parties.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawPowers of AttorneyGeneral OverviewEstate, Gift & Trust LawPowers of AttorneyDurable PowersEstate, Gift & Trust LawPowers of AttorneyLimited PowersEstate, Gift & Trust LawPowers of AttorneyRevocation & Termination



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31-98 California Legal Forms--Transaction Guide §§ 98.134-98.199

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

[Reserved]

§§ 98.134[Reserved]



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PART IV. FORMS

A. Complete Powers of Attorney

31-98 California Legal Forms--Transaction Guide § 98.200

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.200 Statutory Form Power of Attorney

[1] Comment

[a] Use of Form

This form is the statutory power of attorney form prescribed by the Uniform Statutory Form Power of Attorney Act [*Prob. Code § 4401*; see *Prob. Code § 4400 et seq.*]. The statutory form is legally sufficient if it complies with the following requirements [*Prob. Code § 4402*]:

- (1) The wording of the form substantially complies with the wording set forth in *Probate Code Section 4401* [see *Prob. Code § 4402(a)* (specified nonconforming language deemed acceptable)];
- (2) The form is properly completed; and
- (3) The principal's signature is acknowledged [see *Civ. Code § 1189*; Certificate of Acknowledgment at end of form].

Other statutory form powers of attorney may be used if they comply with the requirements of law [*Prob. Code § 4408*; see [b], *below*].

This form is not required to be witnessed [see *Prob. Code § 4402*].

[b] Validity of Nonstatutory Forms and Former Statutory Forms

The Uniform Statutory Form Power of Attorney Act does not affect or limit the use of any other form for a power of attorney. A form that complies with the requirements of any other law may be used in lieu of the statutory form. However, the Act will not apply if another form is used [*Prob. Code § 4408*].

California statutory short form powers of attorney [see former *Civ. Code* §§ 2450 *et seq.*, 2475 *et seq.*] executed before, on, or after the January 1, 1991 repeal of former *Civil Code* Sections 2450 *et seq.* and the January 1, 1995 repeal of former *Civil Code* Section 2475 *et seq.* continue to be valid in California [*Prob. Code* § 4409].

[c] Applicable Law

Court action against a third party who refuses to honor the agent's authority under a properly executed statutory form power of attorney is specifically authorized by statute [see *Prob. Code* § 4406]. In addition, statutory provisions concerning the nonliability of persons acting in good faith reliance on powers of attorney [see *Prob. Code* § 4301] and the lack of necessity to describe each item of personal property or parcel of real property to which a power of attorney applies [*Prob. Code* § 4123] are applicable to statutory form powers of attorney [*Prob. Code* § 4407].

[d] Limitation or Extension of Powers

The powers granted to an agent under a statutory form power of attorney are set forth in detail by statute [see *Prob. Code* §§ 4450 (general powers), 4451 (real property transactions), 4452 (personal property transactions), 4453 (stock and bond transactions), 4454 (commodity and option transactions), 4455 (banking and other financial institution transactions), 4456 (business operating transactions), 4457 (insurance and annuity transactions), 4458 (estate, trust, and other beneficiary transactions), 4459 (claims and litigation), 4460 (personal and family maintenance), 4461 (governmental benefits), 4462 (retirement plan transactions), 4463 (tax matters)].

The principal may limit or extend these statutory powers [*Prob. Code* § 4450]. He or she may also withhold altogether the power to handle certain types of transactions, such as real property transactions or business operating transactions [see *Prob. Code* §§ 4401, 4403; see also [2], *below*].

A statutory form power of attorney does not empower the agent to modify or revoke a trust created by the principal unless that power is expressly granted by the power of attorney. If this power is expressly granted, the trust may be modified or revoked by the agent only as provided in the trust instrument [*Prob. Code* § 4465].

The agent's powers are exercisable with respect to interests the principal acquires after the form is executed, as well as those the principal has at the time of execution, regardless of whether the power of attorney is executed, the powers are exercised, or the property covered by the power is located inside or outside California [*Prob. Code* § 4464].

[e] Springing Power of Attorney

A power of attorney that is to become effective at a future time, or on the occurrence of a specified event or contingency, is known as a "springing power of attorney" [*Prob. Code* § 4030]. Such a power may contain a provision designating one or more persons who, by written declaration under penalty of perjury, have the power to determine conclusively that the specified event or contingency has occurred [*Prob. Code* § 4129; see *Prob. Code* § 4405 (other methods may also be used to create springing powers of attorney)]. This provision may be included in the "Special Instructions" portion of the form [*Prob. Code* § 4405(c); see [2], *below*]. If this type of provision is used, it will become effective when the person or persons designated in the power of attorney execute the required declaration, and persons acting in reliance on the declaration will not be liable to the principal or to any other person, regardless of whether the specified event or contingency has actually occurred [*Prob. Code* § 4405(b)].

[2] FORM

Statutory Form Power of Attorney

UNIFORM STATUTORY FORM POWER OF ATTORNEY

(California Probate Code Section 4401)

NOTICE:

THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT (CALIFORNIA PROBATE CODE SECTIONS 4400-4465). IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, _____[your name and address], appoint [name and address of the person appointed, or of each person appointed if you want to designate more than one] as my agent (attorney in fact) to act for me in any lawful way with respect to the following initialed subjects:

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS.

TO GRANT ONE OR MORE, BUT FEWER THAN ALL, OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF EACH POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF IT. YOU MAY, BUT NEED NOT, CROSS OUT EACH POWER WITHHELD.

INITIAL

_____ (A) Real property transactions.

_____ (B) Tangible personal property transactions.

_____ (C) Stock and bond transactions.

_____ (D) Commodity and option transactions.

_____ (E) Banking and other financial institution transactions.

_____ (F) Business operating transactions.

_____ (G) Insurance and annuity transactions.

_____ (H) Estate, trust, and other beneficiary transactions.

_____ (I) Claims and litigation.

_____ (J) Personal and family maintenance.

_____ (K) Benefits from social security, medicare, medicaid, and other governmental programs, or civil or military service.

_____ (L) Retirement plan transactions.

_____ (M) Tax matters.

_____ (N) ALL OF THE POWERS LISTED ABOVE.

YOU NEED NOT INITIAL ANY OTHER LINES IF YOU INITIAL LINE (N).

SPECIAL INSTRUCTIONS:

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT. _____

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

This power of attorney will continue to be effective even though I become incapacitated.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE IF YOU BECOME INCAPACITATED.

EXERCISE OF POWER OF ATTORNEY WHERE MORE THAN ONE AGENT DESIGNATED

If I have designated more than one agent, the agents are to act _____

IF YOU APPOINTED MORE THAN ONE AGENT AND YOU WANT EACH AGENT TO BE ABLE TO ACT ALONE WITHOUT THE OTHER AGENT JOINING, WRITE THE WORD "SEPARATELY" IN THE BLANK SPACE ABOVE. IF YOU DO NOT INSERT ANY WORD IN THE BLANK SPACE, OR IF YOU INSERT THE WORD "JOINTLY," THEN ALL OF YOUR AGENTS MUST ACT OR SIGN TOGETHER.

I agree that any third party who receives a copy of this document may act under it. Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

Signed this _____ day of _____

_____ [your signature]

State of _____ County of _____

BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, THE AGENT ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

ACKNOWLEDGMENT

[Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):]

State of California

County of _____

On _____ [date], before me, _____ [name and title of officer taking acknowledgment], personally appeared [name(s) of person(s) signing instrument], [who proved to me on the basis of satisfactory evidence] to be the person[s] whose name[s] [is or are] subscribed to the within instrument and acknowledged to me that _____ [he or she or they] executed the same in _____ [his or her or their] authorized _____ [capacity or capacities], and that by _____ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

WITNESS my hand and official seal.

Signature [Seal]

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Limited Powers



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 98 POWERS OF ATTORNEY

PART IV. FORMS

A. Complete Powers of Attorney

31-98 California Legal Forms--Transaction Guide § 98.201

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.201 General Power of Attorney

[1] Comment

[a] Use of Form

This form is a traditional form of general power of attorney for use in California. It gives the attorney in fact broad and general powers to transact virtually any kind or nature of business in the name of the principal. Because of the sweeping powers contained in this type of general power and the absence of any limitation on its effective term, this type of power should be used with great caution and only in extraordinary circumstances where a precisely drafted special power of attorney would not be satisfactory.

PRACTICE TIP:

Normally, it is prudent to create a special power of attorney, limited to just those powers the principal wishes the attorney in fact to exercise.

[b] Use of Phrase "for my Use and Benefit"

The phrase "for my use and benefit," when used as part of the appointment clause at the commencement of the power of attorney, modifies and controls all the powers granted so that the exercise of any enumerated power, if not for the use and benefit of the principal, is not binding on the principal [*see New York Life Ins. Co. v. Daley (1914) 25 Cal. App. 376, 378-379, 143 P. 1033*]. In the *New York Life* case the court held that the exercise of a power of attorney to sign defendant's name to the note in payment of a premium for a life insurance policy was not for the use and benefit of defendant, because, even though defendant was the named beneficiary of the policy, she had no interest in it but a mere expectancy which could be changed at any time.

[c] Notice to Third Persons

An act done by the attorney in fact not for the use and benefit of the principal but for the use and benefit of the attorney in fact will nevertheless bind the principal if the third party with whom the attorney in fact deals has no knowledge or information sufficient to put him or her on inquiry that the agent is not acting for the use and benefit of the principal [*Roth v. Schaaf* (1957) 148 Cal. App. 2d 662, 666, 307 P.2d 421] . A party who gives a power of attorney to another, authorizing him or her in general terms to manage and transact all business matters of every nature and description in which the principal may be interested and to make, execute, and deliver promissory notes, bills, or bonds, will be held liable for all such securities executed in his or name by the attorney in fact, where they have reached the hands of an innocent holder although they may have been made for the private individual purpose of the attorney in fact [*Hellman v. Potter* (1855) 6 Cal. 13, 15] .

Although an agent can never have authority, either actual or ostensible, to do an act that is, and is known or suspected by the person with whom he deals, to be fraud on the principal [Civ. Code § 2306], there are many situations in which a fraud can be perpetrated on the principal by the agent without the third person's knowledge. For example, an attorney in fact who was given a broad and general power of attorney deceived a bank by simulating his principal's signature on a check. In rejecting the principal's claim that such an act constituted forgery and was therefore an unauthorized act, the court held that the attorney in fact had authority to sign the check in that manner by virtue of the broad powers conferred by the general power of attorney, and since the act of the agent was authorized, it was binding on the principal [*Kiekhoefer v. United States Nat. Bank* (1934) 2 Cal. 2d 98, 107-108, 39 P.2d 807] . For further discussion, see § 98.32[1].

[d] Termination of Attorney in Fact's Authority

This form includes an optional provision stating that the power of attorney will terminate on a specified date. Expiration of the stated term of a power of attorney is one of several events that terminates the power, as to every person having notice of the occurrence of that event [Prob. Code § 4152]; see § 98.18]. For examples of instruments revoking powers of attorney, see §§ 98.240 and 98.241.

[2] FORM

General Power of Attorney

When Recorded Mail To: _____ (For Recorder's Use Only)

GENERAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that I, _____ [name], residing at _____ [street address], City of _____, County of _____, State of California, nominate, constitute, and appoint _____ [name], residing at _____ [street address], City of _____, County of _____, State of California, my true and lawful attorney in fact, for me and in my name, place, and stead, and for my use and benefit;

To ask, demand, sue for, recover, collect, and receive all sums of money, debts, dues, accounts, legacies, bequests, interest, dividends, annuities, and demands of every type that are now or may later become due, owing, payable, or belonging to me and have, use, and take all lawful ways and means in my name or otherwise for the recovery thereof, by attachments, arrests, distress, or otherwise, and to compromise and agree for them and acquittances or other sufficient discharges for them;

For me and in my name, to make, seal, and deliver, to bargain, contract, agree for, purchase, receive, and take lands, tenements, hereditaments, and accept the possession of all lands, and all deeds and other assurances, in the law therefor, and to lease, let, demise, bargain, sell, remise, release, convey, mortgage, and hypothecate lands, tenements, and

hereditaments on the terms and conditions and under the covenants as _____[he or she] thinks fit;

Also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares, and merchandise, choses in action, and other property in possession or in action, and to make, do, and transact all and every kind of business of every nature and kind;

And also for me and in my name, and as my act and deed, to sign, seal, execute, deliver, and acknowledge the deeds, leases, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidence of debt, releases and satisfaction of mortgage, judgments and other debts, and other instruments in writing of every kind and nature that may be necessary or proper in the premises;

GIVING AND GRANTING to my attorney in fact full power and authority to do and perform every act necessary, requisite, or proper to be done in and about the premises as fully as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my attorney in fact may lawfully do or cause to be done by virtue of this power of attorney.

[Add if desired: All power and authority granted in this power of attorney will automatically terminate on _____ (date)].

IN WITNESS WHEREOF, I have signed my name to this power of attorney on _____[date].

_____[signature]

[typed name]

ACKNOWLEDGMENT

[Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):]

State of California

County of _____

On _____[date], before me, _____[name and title of officer taking acknowledgment], personally appeared [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument and acknowledged to me that _____[he or she or they] executed the same in _____[his or her or their] authorized _____[capacity or capacities], and that by _____[his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

WITNESS my hand and official seal.

Signature [Seal]

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of

Attorney Interpretation



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 98 POWERS OF ATTORNEY

PART IV. FORMS

A. Complete Powers of Attorney

31-98 California Legal Forms--Transaction Guide § 98.202

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.202 Special Power of Attorney

[1] Comment

[a] Use of Form

This form is a general form of special power of attorney. Spaces are provided in the first paragraph of the form for the enumeration of the powers granted to the attorney in fact and the limitations placed on those powers. For examples of specific powers that may be granted to an attorney in fact, see §§ 98.220 to 98.228. Those forms are illustrative, rather than exclusive, examples of powers that may be granted to an attorney in fact.

PRACTICE TIP:

It is prudent practice to create a special power of attorney, limited to just those powers the principal wishes the attorney in fact to exercise.

[b] General and Special Powers of Attorney

The difference between a general power of attorney and a special power of attorney is that a general power of attorney authorizes the attorney in fact to transact all business of the principal, while a special power of attorney limits the attorney in fact to certain specified acts or transactions [*Moore v. Gould* (1907) 151 Cal. 723, 728, 91 P. 616 ; see *Prob. Code* §§ 4261, 4262]. For an form for a general power of attorney, see § 98.201.

[c] Termination of Attorney in Fact's Authority

This form includes an optional provision stating that the power of attorney will terminate on a specified date. Expiration of the stated term of a power of attorney is one of several events that terminates the power, as to every person having notice of the occurrence of that event [*Prob. Code* § 4152]; see § 98.18]. For examples of instruments revoking powers of attorney, see §§ 98.240 and 98.241.

[d] Provision Making Power Irrevocable

This form contains an optional provision making the power of attorney irrevocable. Such a provision will be effective only if the power is "coupled with an interest" in the subject of the power [*Civ. Code* § 2356(a)]. To constitute a power coupled with an interest, a power of attorney must (1) be held for the benefit of the attorney in fact rather than the principal; (2) be created to secure the performance of a duty to the attorney in fact or to protect a title in the attorney in fact; and (3) be created either simultaneously with the duty or title or for consideration [*Becket v. Welton Becket & Associates* (1974) 39 Cal. App. 3d 815, 820, 114 Cal. Rptr. 531] . For further coverage, see § 98.240[1][b].

[e] Acknowledgment

While certain powers of attorney must be acknowledged [see, e.g., *Civ. Code* § 2933 (power to execute mortgage)], there is no general requirement that all powers of attorney be acknowledged. However, a power of attorney must either be acknowledged or witnessed [*Prob. Code* § 4121(c)].

Because acknowledgment is a prerequisite to recording a power of attorney [*Gov. Code* § 27287], a proper acknowledgment provides prima facie evidence of the facts recited in the certificate and of the genuineness of each signature appearing on the certificate [*Evid. Code* § 1451; see *Civ. Code* § 1190 (evidentiary effect of acknowledgment of instrument executed in behalf of incorporated or unincorporated entity)], and to avoid the need for witnesses [see *Prob. Code* § 4121(c)], it is recommended that powers of attorney be acknowledged.

The form of acknowledgment is specified by statute [see *Civ. Code* §§ 1188, 1189].

[2] FORM**Special Power of Attorney**

When Recorded Mail To: _____ (For Recorder's Use Only)

SPECIAL POWER OF ATTORNEY

I, _____ [name of principal], of _____ [city], _____ County, California, appoint _____ [name of attorney in fact] of _____ [street address], _____ [city], _____ County, California, as my attorney in fact to act in my place for the purposes of _____ [specify particular powers granted (see §§ 98.203-98.207, 98.220-98.228); if the principal wishes to reserve certain powers, add: except that _____ (he or she) will not have the power to _____ (specify powers reserved to principal)].

I further grant to my attorney in fact full authority to act in any manner both proper and necessary to the exercise of the foregoing powers, including [the full power of substitution and revocation or specify any restrictions, e.g., notice requirements, to be placed on substitution or revocation powers], and ratify every act that _____ [he or she] may lawfully perform in exercising those powers.

[Add if power of attorney is for limited time:]

This power of attorney is granted for a period of [specify, e.g., one year] and will become effective on _____ [date] and will terminate on _____ [date].

[Add if power of attorney is to be irrevocable:]

For [valuable consideration or specify consideration, e.g., the sum of \$1,000], receipt of which is acknowledged, I grant to my attorney in fact [specify interest in subject matter to which power of attorney relates, e.g., a one-third interest in my 500 shares of preferred stock in ABC Corporation]. I intend that this power of attorney be coupled with that interest. I declare this power of attorney to be irrevocable and renounce all right to revoke it or to appoint another person to perform the acts referred to in this instrument.

Executed on _____[date], at _____[city], California.

_____[signature]
[typed name]

ACKNOWLEDGMENT

[Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):]

State of California
County of _____

On _____[date], before me, _____[name and title of officer taking acknowledgment], personally appeared [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument and acknowledged to me that _____[he or she or they] executed the same in _____[his or her or their] authorized _____[capacity or capacities], and that by _____[his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

WITNESS my hand and official seal.

Signature [Seal]

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Interpretation



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 98 POWERS OF ATTORNEY

PART IV. FORMS

A. Complete Powers of Attorney

31-98 California Legal Forms--Transaction Guide § 98.203

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.203 Joint Power of Attorney by Husband and Wife

[1] Comment

[a] Use of Form

This form is a power of attorney to deal with property that is held jointly by both spouses or that is held in the name of one spouse, but in which the other spouse has a community property interest or other interest. This form does not contain any operative powers; these may be selected from §§ 98.220-98.228 or may be specially drafted to fit the particular needs of the situation.

[b] Power to Execute Power of Attorney

Any person who has the capacity to contract [*see Civ. Code § 1556*] has the power to execute a power of attorney [*Prob. Code § 4022*]. Minors are specifically precluded from making, executing, or revoking a power of attorney [*Fam. Code § 6701(a)*].

[c] Effect of Joint Power of Attorney

A joint power of attorney executed by a husband and wife has the effect of authorizing the conveyance of whatever interest either or both of the parties have in the property affected by the instrument [*Cousino v. Western Shore Lumber Co. (1918) 179 Cal. 1, 4, 175 P. 406*] . Thus, a joint power is effective to permit a transfer of the subject property despite its characterization as community property or as the separate property of either spouse.

[2] FORM

Joint Power of Attorney by Husband and Wife

When Recorded Mail To: _____ (For Recorder's Use Only)

JOINT POWER OF ATTORNEY

We, _____ [name of husband] and _____ [name of wife], husband and wife, of _____ [city], _____ County, State of California, hereby appoint _____ [name of attorney in fact] of _____ [city], _____ County, State of California, as our attorney in fact to act in our place for the purposes of [specify particular powers granted (see §§ 98.220-98.228); if the principals wish to reserve certain powers, add: except that _____ (he or she) will not have the power to _____ (specify powers reserved to principals)].

We further grant to our attorney in fact full authority to act in any manner both proper and necessary to the exercise of the foregoing powers, including [the full power of substitution and revocation or specify any restrictions, e.g., notice requirements, to be placed on substitution or revocation powers], and ratify every act that _____ [he or she] may lawfully perform in exercising those powers.

[Add if power of attorney is for limited time:]

This power of attorney is granted for a period of [specify, e.g., one year] and shall become effective on _____ [date] and shall terminate on _____ [date].

[Add if power of attorney is to be irrevocable:]

For [valuable consideration or specify consideration, e.g., the sum of \$1,000], receipt of which is acknowledged, we grant to our attorney in fact [specify interest in subject matter to which power of attorney relates, e.g., a one-half interest in our top fuel dragster]. We intend that this power of attorney be coupled with that interest. We declare this power of attorney to be irrevocable and renounce all right to revoke it or to appoint another person to perform the acts referred to in this instrument.

Executed on _____ [date], at _____ [city], California.

HUSBAND

_____ [signature of husband]

[typed name]

WIFE

_____ [signature of wife]

[typed name]

ACKNOWLEDGMENT

[Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):]

State of California

County of _____

On _____ [date], before me, _____ [name and title of officer taking acknowledgment],

personally appeared [*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument and acknowledged to me that _____ [he or she or they] executed the same in _____ [his or her or their] authorized _____ [capacity or capacities], and that by _____ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

WITNESS my hand and official seal.

Signature [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Interpretation



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 98 POWERS OF ATTORNEY

PART IV. FORMS

A. Complete Powers of Attorney

31-98 California Legal Forms--Transaction Guide § 98.204

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.204 Power of Attorney Empowering Counsel to Appear for Military Person in Adoption Proceedings

[1] Comment

[a] Use of Form

This form is an instrument commissioning and empowering counsel to appear in court in adoption proceedings for a member of the military or the American Red Cross. A military power of attorney is exempt from any requirement of form, substance, formality, or recording provided for powers of attorney under state law and must be given the same effect as a power of attorney prepared and executed in accordance with state law [*10 U.S.C. § 1044b*].

Ordinarily, a person wishing to adopt a child must appear before the court. However, if at the appointed time for the court appearance it is established by satisfactory evidence that (1) the adoptive parent is commissioned or enlisted in the military service or an auxiliary of the military service of the United States or of any of its allies, or in the American Red Cross (or any other recognized charitable or religious organization), and (2) the adoptive parent's service-related absence from California or other service-related circumstances makes it impossible or impracticable for him or her to appear in person, the appearance may be made by counsel commissioned and empowered in writing to act in this capacity [*Fam. Code § 8613(a)*]. Counsel acting as a commissioned and empowered attorney in fact for this purpose may execute and acknowledge the adoption agreement for the adoptive parent. Alternately, the adoption agreement may be acknowledged by the adoptive parent before a notary public or a person authorized to take acknowledgments under *Civ. Code §§ 1183 and 1183.5* [*Fam. Code § 8613(b)*].

The power of attorney may be, but is not required to be, incorporated in the petition for adoption [*Fam. Code § 8613(a)*]. This form is intended to be used when a separate power of attorney is presented to the court. However, it may also be incorporated in the petition for adoption.

[b] Appearance by Spouse Also Residing With Adoptive Parent in Military Service

If the spouse of an adoptive parent who is in the military service or in the American Red Cross resides with that adoptive parent outside of California, the spouse may also make an appearance in the adoption proceedings through his or her counsel, commissioned and empowered in writing to so act [*Fam. Code § 8613(e)*]. Alternative language is provided in this form for use by a spouse in this situation.

[c] Use of Acknowledgment

Because the power of attorney must be filed in the office of the clerk of the court [*see Fam. Code § 8613(d)*], and to provide the court with assurance of the power's validity, it should be acknowledged whether it is incorporated in the petition for adoption [*see Fam. Code § 8613(a)*] or is executed as a separate instrument (this form).

Two forms of acknowledgment are presented for use with this form. The first is the form prescribed by statute for use by military notaries. Any officer on active duty or performing inactive duty training in the armed forces with the general powers of a notary public under applicable federal law [*see 10 U.S.C. § 1044a*] may perform all notarial acts for any person serving in the armed forces of the United States, or for any spouse of a person serving in the armed forces, wherever they may be. A military notary may also perform all notarial acts for any person eligible for legal assistance under laws and regulations of the United States, wherever he or she may be; for any person serving with, employed by, or accompanying the armed forces of the United States outside the United States and outside the Canal Zone, Puerto Rico, Guam, and the Virgin Islands; and for any person subject to the Uniform Code of Military Justice outside of the United States [*Civ. Code § 1183.5*]. Instruments acknowledged by and oaths and affirmations made before authorized officers may not be rendered invalid by the failure to state the place of execution or acknowledgment. No seal or authentication of the officer's certificate of acknowledgment or of any jurat signed by him or her may be required. However, the officer must endorse or attach a certificate of acknowledgment in a form authorized by the laws of California or in substantially the form set forth in *Civ. Code § 1183.5* (first example shown here).

The second acknowledgment shown here is the general form of acknowledgment prescribed by *Civil Code § 1189*. This form should be used if the notary is not an officer on active duty in the armed forces with the general powers of a notary public under applicable federal law [*Civ. Code § 1188; see 10 U.S.C. § 1044a* (authority to act as notary in military)].

[2] FORM

Power of Attorney Empowering Counsel to Appear for Military Person in Adoption Proceedings

POWER OF ATTORNEY FOR ADOPTION PROCEEDINGS

I, _____ [name], hereby appoint _____ [name of counsel] to appear in court for me pursuant to the provisions of Family Code Section 8613 in _____ [any adoption proceedings in which I am the petitioning party or Action No. _____ now pending before the Superior Court of _____ County, California]. I am [commissioned or enlisted] as [identify rank or position, e.g., a captain] in the _____ [identify military service, auxiliary, or Red Cross, e.g., United States Army or American Red Cross]. It is impracticable for me to appear in court in California because [specify reasons, e.g., of my military duties].

[Add optional provision if spouse of adoptive parent is also to empower counsel to act for spouse:]

I, _____ [name], am the [husband or wife] of _____ [name of adoptive parent] and reside with [him or her] outside California. I hereby appoint _____ [name of counsel] to appear in court for me pursuant to the provisions of *Family Code Section 8613* in _____ [any adoption proceedings in which my _____ (husband or wife) is the petitioning party or Action No. _____ now pending before the Superior Court of _____ County, California]. It is impracticable for me to appear in court in California because _____ [specify reasons, e.g., of my

_____ (husband's or wife's) military duties].

Subscribed and sworn to before me on _____ [date].

_____ [signature of person in military service]

[typed name]

_____ [serial number, rank, branch of service, and capacity in which signed]

[If power of attorney is also executed by adoptive spouse, add additional signature line:]

_____ [signature of spouse]

[typed name]

[Add one of following forms of acknowledgment:]

ACKNOWLEDGMENT BY MILITARY NOTARY

On this the _____ day of _____, [year], before me _____ [name], the undersigned officer, personally appeared [name of person signing instrument] [known to me or satisfactorily proven to me] to be [serving in the armed forces of the United States or a spouse of a person serving in the armed forces of the United States or a person serving with, employed by, or accompanying the armed forces of the United States outside the United States and outside the Canal Zone, Puerto Rico, Guam, and the Virgin Islands], and to be the person whose name is subscribed to the within instrument, and acknowledged that _____ [he or she] executed the same. And the undersigned does further certify that _____ [he or she] is at the date of this certificate a commissioned officer of the armed forces of the United States having the general powers of a notary public under the provisions of Title 10, Section 936 or 1044a of the United States Code (Public Law 90-632 and 101-510).

_____ [signature of officer]

_____ [rank, branch of service, and capacity in which signed]

[OR:]

ACKNOWLEDGMENT

[Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):]

State of California

County of _____

On _____ [date], before me, _____ [name and title of officer taking acknowledgment], personally appeared [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence] to be the person[s] whose name[s] [is or are] subscribed to the within instrument and acknowledged to me that _____ [he or she or they] executed the same in _____ [his or her or their] authorized _____ [capacity or capacities], and that by _____ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

WITNESS my hand and official seal.

Signature [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Family Law Adoption General Overview Military & Veterans Law General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 98 POWERS OF ATTORNEY

PART IV. FORMS

A. Complete Powers of Attorney

31-98 California Legal Forms--Transaction Guide § 98.205

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.205 Power to Petition for and Receive Legacy or Inheritance

[1] Comment

[a] Use of Form

This form is a power of attorney to collect an inheritance. It empowers the attorney in fact to act on behalf of the principal to apply for and collect money or other property due to the principal out of the named estate. The attorney in fact may be paid a flat fee or a percentage of the amount recovered.

[b] Court Scrutiny of Power of Attorney Containing Assignment of Heir's Interest

If the power of attorney contains an assignment of all or part of the heir's interest, the probate court may inquire into it on the motion of an interested party or on its own motion to ascertain whether the fee or consideration paid or agreed to be paid by the heir is reasonable and whether it was obtained by duress, fraud, or undue influence. The court may make such judgment as it deems just and equitable [*Prob. Code § 11604*]. In one case, for example, a \$122,000 distribution to an heir hunter was held to be not grossly unreasonable even though the probate court had authorized a \$5,000 fee to a different heir hunter. The heir hunter who actually located the heir spent approximately 150 hours searching data bases and interviewing leads and had spent two days searching for the heir [*Estate of Wright (2001) 90 Cal. App. 4th 228, 239, 108 Cal. Rptr. 2d 572*] .

[c] Validity of Assignment of Heir's Interest

An inheritance or interest in an estate is assignable whether the claim arises because of the provisions of a will or because of intestacy [*Estate of Clark (1928) 94 Cal. App. 453, 460, 271 P. 542*] . An assignment of a claim of inheritance, in whole or in part, in return for genealogical services is particularly proper [*Estate of Cohen (1944) 66 Cal. App. 2d 450, 456-459, 152 P.2d 485*] . If the assignment is made, however, as part of, or in conjunction with, a power of attorney whereby the attorney in fact is empowered to procure and pay for legal services on behalf of the

principal in return for a percentage of the principal's interest in the estate so that the attorney in fact has the entire management of litigation, the arrangement is against public policy as constituting the practice of law without a license (if the attorney in fact is not an attorney) and because it amounts to a commercial exploitation of the legal profession [*Estate of Collins* (1968) 268 Cal. App. 2d 86, 90-92, 73 Cal. Rptr. 599] . In such a situation, the principal may disclaim the contract and appoint another person as his or her attorney in fact to act in the matter of the collection of the inheritance [*Estate of Butler* (1947) 29 Cal. 2d 644, 646, 649-652, 177 P.2d 16] . The distinguishing feature that makes a contract void as against public policy is the inclusion of a power permitting the attorney in fact to engage an attorney to act for the principal when the attorney in fact is an heir-hunter in the business of acting as middleman between the heir and the person who will present the case in court [see *Estate of Butler* (1947) 29 Cal. 2d 644, 649-650, 177 P.2d 16] . However, when an heir revoked a general power of attorney in favor of an attorney procured by the heir hunter and employed independent counsel, the heir's assignment of her interest in the estate to the heir hunter did not require invalidation [*Estate of Wright* (2001) 90 Cal. App. 4th 228, 236, 108 Cal. Rptr. 2d 572] .

[2] FORM

Power to Petition for and Receive Legacy or Inheritance

POWER OF ATTORNEY TO COLLECT INHERITANCE

I, _____ [name of principal], hereby appoint _____ [name of attorney in fact] to act as my attorney in fact to collect any and all moneys or property that may be due to me by way of will, intestacy, or otherwise from, out of, or on account of the Estate of _____ [name of decedent].
 _____ [Name of attorney in fact] may do anything necessary, proper, or convenient to establish my claim to and interest in the above-described estate, including procuring and presenting all genealogical material such as birth and death certificates and the like. _____ [He or She] is not empowered, however, to hire or pay any attorneys on my behalf. I reserve this right and activity entirely to myself.

I agree to pay _____ [name of attorney in fact] _____ [specify amount, e.g., 30 percent of the amount I recover on account of my claim to or interest in the above-described estate] for _____ [his or her] services in this matter. This sum will include any and all costs incurred by _____ [name of attorney in fact] in establishing my claim and interest and collecting the money and property due me.

Dated _____ at _____ [city], _____ [state or country].

 [signature of principal]
 [typed name]

ACKNOWLEDGMENT

[Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):]

State of California
 County of _____

On _____ [date], before me, _____ [name and title of officer taking acknowledgment], personally appeared [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument and acknowledged to me that

_____ [he or she or they] executed the same in _____ [his or her or their] authorized
_____ [capacity or capacities], and that by _____ [his or her or their] signature[s] on
the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

WITNESS my hand and official seal.

Signature [Seal]

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Wills Beneficiaries General
Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 98 POWERS OF ATTORNEY

PART IV. FORMS

A. Complete Powers of Attorney

31-98 California Legal Forms--Transaction Guide § 98.206

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.206 Power to Represent Creditor in Bankruptcy Proceedings

[1] Comment

[a] Use of Form

This form is a power of attorney to act on behalf of a creditor in bankruptcy matters. It may be used to appoint an attorney or a layperson to perform specified actions relating to a bankruptcy, such as voting on questions submitted to the creditors, on behalf of a creditor [see 11 U.S.C. § 101(10) ("creditor" defined for purposes of federal bankruptcy law)]. The first alternative is a general power of attorney. The second is a special power of attorney. For a discussion of general and special powers of attorney, see § 98.32[4], [5]. For discussion of creditors' agreements, see Ch. 78, *Creditors' Agreements: Nonbankruptcy Alternatives*. For discussion of bankruptcy proceedings, see California Forms of Pleading and Practice, Ch. 94, *Bankruptcy* (Matthew Bender).

The alternative forms presented here are adapted from Official Forms 11a and 11b, which are used by the Supreme Court in bankruptcy proceedings.

[b] Need for Written and Acknowledged Authorization

A creditor may act in a bankruptcy proceeding through an agent, attorney in fact, or proxy. The agent, attorney in fact, or proxy may not, however, appear in judicial proceedings or perform other acts constituting the practice of law unless he or she is also an attorney at law [*Bankruptcy Rules, Rule 9010(a)*].

The authority of an agent, attorney in fact, or proxy to represent a creditor for any purpose other than the execution and filing of a proof or claim or the acceptance or rejection of a plan must be evidenced by an executed and acknowledged power of attorney form substantially similar to Official Form 11a or 11b of the Bankruptcy Rules. The acknowledgment must be taken by a justice or judge of the United States, a court clerk or a clerk's deputy, or any person authorized to administer oaths in the state where the acknowledgment is taken [*Bankruptcy Rules, Rule 9010(c)*; 28 U.S.C. §§ 459,

953]. In California, this includes notary publics, certified shorthand reporters and, if certain requirements are met, former justices and judges [*Code Civ. Proc.* § 2093]. The form for acknowledgments taken in California is specified by statute [*Civ. Code* §§ 1188, 1189].

[2] FORM

Power to Represent Creditor in Bankruptcy Proceedings

[insert case caption here]

GENERAL POWER OF ATTORNEY

To _____ [name or names] of _____ [complete mailing address]

The undersigned claimant hereby authorizes you [, or any one of you], as attorney in fact for the undersigned and with full power of substitution, to vote on any question that may be lawfully submitted to creditors of the debtor in the above-titled case; to vote for a trustee of the estate of the debtor and for a committee of creditors; to receive dividends; and in general to perform any act not constituting the practice of law for the undersigned in all matters arising in this case.

_____ Dated:

[name of creditor]

By _____ [signature]

[typed name]

as _____

Address: _____

ACKNOWLEDGMENT

[Acknowledgments taken in California must be in the following form (*Civ. Code* § 1189(a)):]

State of California

County of _____

On _____ [date], before me, _____ [name and title of officer taking acknowledgment], personally appeared [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument and acknowledged to me that _____ [he or she or they] executed the same in _____ [his or her or their] authorized _____ [capacity or capacities], and that by _____ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

WITNESS my hand and official seal.

Signature [Seal]

[OR:]

[insert case caption here]

SPECIAL POWER OF ATTORNEY

To _____ [name or names] of _____ [complete mailing address]

The undersigned claimant hereby authorizes you [, or any one of you], as attorney in fact for the undersigned [*if desired, add: and with full power of substitution,*] to attend the meeting of creditors of the debtor or any adjournment thereof, and to vote in my behalf on any question that may be lawfully submitted to creditors at such meeting or adjourned meeting, and for a trustee or trustees of the estate of the debtor.

_____ Dated:

[name of creditor]

By _____ [signature]

[typed name]

as _____

Address: _____

ACKNOWLEDGMENT

[Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):]

State of California

County of _____

On _____ [date], before me, _____ [name and title of officer taking acknowledgment], personally appeared [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument and acknowledged to me that _____ [he or she or they] executed the same in _____ [his or her or their] authorized _____ [capacity or capacities], and that by _____ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

WITNESS my hand and official seal.

Signature [Seal]

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law Claims General Overview Contracts Law Debtor & Creditor Relations Estate, Gift & Trust Law Powers of Attorney General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 98 POWERS OF ATTORNEY

PART IV. FORMS

A. Complete Powers of Attorney

31-98 California Legal Forms--Transaction Guide § 98.207

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.207 Special Power to Represent Principal Before Internal Revenue Service [IRS Form 2848]

[1] Comment--Use of Form

This form [IRS Form 2848] is a power of attorney that a taxpayer uses to empower an agent to represent him or her before the Internal Revenue Service (IRS) with respect to specified tax matters [*see Treas. Reg. § 601.504(a)* (situations in which power of attorney is required)]. Only a person recognized to practice before the IRS may be designated. Form 2848, and instructions for completing and filing it, may be obtained from the IRS, and are available online at the official IRS website. The IRS will accept a power of attorney other than IRS Form 2848 only if the power of attorney meets certain requirements detailed by regulation [*see Treas. Reg. § 601.503*]. The form is reproduced here along with the official IRS instructions.

A taxpayer's representative must execute a written declaration and attach it to the taxpayer's power of attorney [*Treas. Reg. § 601.502(c)*]. Part II of this form, properly completed, satisfies the requirement of the representative's declaration [*see Treas. Reg. § 601.503(b)(1)*].

This form allows the attorney in fact to perform virtually all of the acts the taxpayer (principal) could perform.

If the taxpayer does not want to appoint a representative, but does wish to authorize another individual or an entity to inspect and/or receive confidential tax information relating to the taxpayer, the taxpayer should use IRS Form 8821 [*see § 98.208*].

[2] FORM

Special Power to Represent Principal Before Internal Revenue Service [IRS Form 2848]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust Law Powers of Attorney General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 98 POWERS OF ATTORNEY

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A. Complete Powers of Attorney

31-98 California Legal Forms--Transaction Guide § 98.208

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.208 Taxpayer's Authorization for Disclosure of Tax Information To Another Person or Entity [IRS Form 8821]

[1] Comment

[a] Use of Form

This form [IRS Form 8821], referred to in the regulations and tax parlance as a "tax information authorization," is used by a taxpayer to authorize another individual or entity to inspect and/or receive confidential information relating to the taxpayer [see *I.R.C. § 6103*; *Treas. Reg. §§ 301.6103(c)-1, 601.501(b)(15)*]. The authorization will apply to the type of tax and the years or periods specified in the form. The form is only a disclosure authorization and cannot be used to appoint a representative. If the taxpayer wishes to authorize an individual to represent the taxpayer's interests before the Internal Revenue Service (IRS), the taxpayer must complete IRS Form 2848 [see § 98.207; see also *Treas. Reg. § 601.504(a)*]. Form 8821, and instructions for completing and filing it, may be obtained from the IRS.

A taxpayer may file a tax information authorization without using this form. However, the authorization must contain all of the information required on this form [see General Instructions to IRS Form 8821].

[b] Written Requests for or Consent to Disclosure of Tax Returns

A written request for or consent to disclosure of tax returns or return information must be in the form of a separate written document pertaining solely to the authorized disclosure. It must be signed [see *Treas. Reg. § 301.6103(c)-1(e)(1)*; see also *Treas. Reg. § 301.6061-1(b)* (methods of signing)] and dated by the taxpayer who filed the return or to whom the return information relates [*Treas. Reg. § 301.6103(c)-1(b)(1)*]. At the time it is signed and dated by the taxpayer, the written document also must specify all of the following [*Treas. Reg. § 301.6103(c)-1(b)(1)(i)-(iv)*]:

- The taxpayer's name, mailing address, and taxpayer identifying number [see *I.R.C. § 6103(b)(6)*].

- The identity of the person or persons to whom the disclosure is to be made.
- The type of return (or specified portion of the return) or return information (and the particular data) that is to be disclosed; and
- The taxable year or years covered by the return or return information.

In order to qualify as a "separate written document," the request must meet one of the following requirements [*Treas. Reg. § 301.6103(c)-1(e)(1)*]:

- Text appearing on one or more sheets of 8 1/2-inch by 11-inch or larger paper, each of which pertains solely to the authorized disclosure, so long as the sheet or sheets, taken together, contain all the elements described above;
- Text appearing on one or more computer screens, each of which pertains solely to the authorized disclosure, as long as the screen or screens, taken together, (1) contain all the elements described above; (2) can be signed [*see Treas. Reg. § 301.6103(c)-1(e)(1)*; *see also Treas. Reg. § 301.6061-1(b)* (methods of signing)] and dated by the taxpayer; and (3) can be reproduced, if necessary; or
- The consent is a consent on the record in an administrative or judicial proceeding, or a transcript of such a proceeding recording such consent, containing the information required above.

[c] Requests for Information or Assistance

If a taxpayer makes a written or nonwritten request, either directly to another person, or to the IRS, that the other person (such as a member of Congress, friend, or relative of the taxpayer) provide information or assistance relating to the taxpayer's return or to a transaction or other contact between the taxpayer and the IRS, the IRS may disclose returns or return information (in written or nonwritten form) to the other person under specified circumstances [*Treas. Reg. § 301.6103(c)-1(c)*]. If the request is written, it may be in the form of a letter or other written document, which must be signed [*see Treas. Reg. § 301.6103(c)-1(e)(1)*; *see also Treas. Reg. § 301.6061-1(b)* (methods of signing)] and dated by the taxpayer and include [*Treas. Reg. § 301.6103(c)-1(c)(1)(i)*]:

- The taxpayer's name, mailing address, and taxpayer identifying number [*see I.R.C. § 6103(b)(6)*].
- The identity of the person or persons to whom the disclosure is to be made.
- Sufficient facts underlying the request for information or assistance to enable the IRS to determine the nature and extent of the information or assistance requested and the returns or return information to be disclosed in order to comply with the taxpayer's request.

A person who receives a copy of a taxpayer's written request for information or assistance but who is not the addressee of the request, such as a member of Congress who is provided with a courtesy copy of a taxpayer's letter to another member of Congress or to the IRS, cannot receive returns or return information [*Treas. Reg. § 301.6103(c)-1(c)(1)(ii)*].

[d] Nonwritten Requests for Disclosure

Requests for information also may be nonwritten [*see Treas. Reg. § 301.6103(c)-1(c)(2)(ii)*]. Examples of disclosures pursuant to nonwritten requests for information or assistance include disclosures to a friend, relative, or other person whom the taxpayer brings to an interview or meeting with IRS officials, and disclosures to a person whom the taxpayer

wishes to involve in a telephone conversation with IRS officials [*Treas. Reg. § 301.6103(c)-1(c)(2)(ii)*]. The IRS may disclose returns and return information to the extent of the taxpayer's written request only after the IRS has done all of the following [*Treas. Reg. § 301.6103(c)-1(c)(2)(i)*]:

- Obtained from the taxpayer sufficient facts underlying the request for information or assistance to enable the IRS to determine the nature and extent of the information or assistance requested and the return or return information to be disclosed in order to comply with the taxpayer's request.
- Confirmed the identity of the taxpayer and the designee.
- Confirmed the date, the nature, and the extent of the information or assistance requested.

As long as the preceding requirements have been met, the taxpayer does not need to be present, either in person or as part of a telephone conversation, for disclosures of returns and return information to be made to the other person [*Treas. Reg. § 301.6103(c)-1(c)(2)(iii)*].

[e] Filing

The taxpayer must file the form with each IRS office in which the taxpayer wants the appointee to inspect and/or receive confidential tax information on the taxpayer's behalf. The taxpayer may file the authorization by fax, provided the appropriate IRS office is equipped to accept such a transmission. If the authorization is filed for a matter currently pending before an IRS office, the taxpayer must file the authorization with that office. Otherwise, the taxpayer should file the authorization with the service center where the related return was, or will be, filed. The IRS must receive this form within 60 days of the date it was signed and dated by the taxpayer [*see Treas. Reg. § 301.6103(c)-1(b)(2)*; General Instructions to IRS Form 8821].

[f] Revocation of Previous Authorizations

As indicated in Paragraph 6 of this form, the filing of a tax information authorization automatically revokes all previously filed tax information authorizations covering the same tax matters and time periods covered by the newly filed form. However, the taxpayer may prevent such a revocation from occurring by checking the appropriate box in Paragraph 6.

[2] FORM

Tax Information Authorization [IRS Form 8821]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Tax Law Federal Tax Administration & Procedure Audits & Investigations Disclosure of Information (IRC secs. 6103-6104, 6108-6110, 6713, 7213, 7216, 7431, 7435)



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31-98 California Legal Forms--Transaction Guide §§ 98.209-98.219

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

[Reserved]

§§ 98.209[Reserved]



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B. Specific Power Provisions

31-98 California Legal Forms--Transaction Guide § 98.220

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.220 Power to Collect Debts and Compromise Claims

[1] Comment--Use of Form

This form is a grant of a general power of attorney to collect debts and to compromise claims and give receipts and releases on behalf of the principal. While this form illustrates the possible breadth of this type of power, the attorney can and should limit the scope of the power to a specified transaction or series of transactions wherever possible. For a complete power of attorney into which this particular power may be inserted, see § 98.202

[2] FORM

Power to Collect Debts and Compromise Claims

To ask, demand, sue for, collect, and receive all sums of money, debts, or other obligations of whatever kind that are now or may later become due, owing, or payable, or otherwise belong to me, to settle and compromise any such debts or obligations that may be due me and to endorse in my name any check or note payable to me or my order given in payment of any debt or obligation and to take such other steps in connection with any such debt or obligation that _____ [he or she] may deem necessary and proper and in my name to execute and deliver any receipts, releases, or discharges of any debt or obligation with the same effect as if those receipts, releases, or discharges were executed by me personally.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Debtor & Creditor Relations Estate, Gift & Trust Law Powers of Attorney General Overview



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B. Specific Power Provisions

31-98 California Legal Forms--Transaction Guide § 98.221

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.221 Power to Sell and Convey Real Property

[1] Comment--Use of Form

This form is a specific power to sell and convey a particular piece of real property that belongs to the principal. If more than one piece of real property is to be covered by the power, additional descriptions may be included, or the form can be adapted by the use of general language to cover all real property owned by the principal. The power should not, however, be expressed in any broader or more general terms than necessary to accomplish the intended purpose. For a complete power of attorney into which this particular power may be inserted, see § 98.202.

[2] FORM

Power to Sell and Convey Real Property

To grant, bargain, sell, and convey my real property or any part of it, located at _____ [street address or location], City of _____, County of _____, State of California, more particularly described as [insert legal description], for a price and on terms and conditions that _____ [he or she] deems proper, with or without the taking back of a purchase money mortgage or deed of trust, and to collect and receive the proceeds from any sale.

To enter into any contract or contracts for the sale of the premises, or any part of them, with the persons and on the terms that _____ [he or she] in _____ [his or her] discretion elects, and to execute, acknowledge, and deliver in my name any deeds or conveyances, with any covenants or conditions that _____ [he or she] may deem proper, that may be required for the transfer of said property or any part thereof or of any interest therein.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Real Property Law Ownership & Transfer Powers of Attorney Real Property Law Purchase & Sale General Overview



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B. Specific Power Provisions

31-98 California Legal Forms--Transaction Guide § 98.222

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.222 Power to Execute a Mortgage on Real Property

[1] Comment

[a] Use of Form

This form is a specific power giving an attorney in fact the power to execute a mortgage on a specified parcel of real property belonging to the principal. This type of power may be useful when the attorney in fact is borrowing money for the principal and is authorized to secure the loan by a deed of trust or mortgage on the principal's property. For a complete form of power of attorney into which this particular power may be inserted, see *Section 98.202*.

[b] Requirement That the Power Be in Writing and Recorded

A power of attorney to execute a mortgage must be in writing and subscribed, acknowledged, or proved, certified, and recorded in the same manner as powers of attorney for grants of real property [*Civ. Code* § 2933].

[c] Necessity for Specific Power

Because a power to sell and convey real estate does not authorize the attorney in fact to mortgage it [*Golinsky v. Allison* (1896) 114 Cal. 458, 460, 46 P. 295] , it may be necessary to include a special provision authorizing the attorney in fact to mortgage the property if this is the intention, even though he may have been empowered to sell and convey the property.

[2] FORM

Power to Execute a Mortgage on Real Property

To execute a mortgage or deed of trust on my real property located at _____[street address or location

], City of _____, County of _____, State of California, and more particularly described as [*insert legal description*], in an amount and on the terms and conditions that _____[he or she] may deem necessary and proper, not to exceed the amount of \$ _____, and to sign, execute, and deliver, in my name or otherwise, the instruments that may be required in connection with obtaining the mortgage or deed of trust, and to do the other acts that I might or could do in obtaining the mortgage or deed of trust on the property.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Real Property Law Financing Mortgages & Other Security Instruments General Overview Real Property Law Ownership & Transfer Powers of Attorney



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B. Specific Power Provisions

31-98 California Legal Forms--Transaction Guide § 98.223

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.223 Power to Exchange Real Property

[1] Comment--Use of Form

This form is a specific power giving an attorney in fact the power to consummate an exchange of all or part of the principal's specified parcel of real property for other real property as the attorney in fact deems appropriate. The attorney in fact is further authorized to execute any instruments necessary in conjunction with the exchange. The form may be used alone as a limitation on the agent's available methods of disposing of the property where, for tax or other reasons, the principal desires to exchange rather than sell the property, or the power may enlarge the agent's alternatives by being used in addition to a sale or mortgage power. The power of attorney should be acknowledged and recorded [*see §§ 98.11 [1], 98.18*]. For a complete form of power of attorney into which this power may be inserted, see *Section 98.202*.

[2] FORM

Power to Exchange Real Property

To exchange my real property located at _____ [*street address or location*], City of _____, County of _____, State of California, in whole or in part, for any other property, encumbered or unencumbered, as _____ [*he or she*], in _____ [*his or her*] discretion, chooses, and on the terms and conditions that _____ [*he or she*] deems fit and proper, and to sign, execute, and deliver any contracts for the purchase of the other property so exchanged or for the sale and conveyance of my property or of any part of it, and to execute, acknowledge, and deliver any deeds or other instruments of conveyance that may be required to consummate the exchange, and to make any adjustments and any other acts or things that I myself might do in making the exchange and effecting the sale of my property and purchase of the other property.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Real Property Law Financing Mortgages & Other Security Instruments General Overview Real Property Law Ownership & Transfer Powers of Attorney



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B. Specific Power Provisions

31-98 California Legal Forms--Transaction Guide § 98.224

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.224 Power to Collect Rents

[1] Comment--Use of Form

This form is a specific power giving a broad power to collect rents, whether past, present, or future, from a given parcel of real property. This type of power is most useful when the attorney in fact will be acting under the power for an extended period of time. For a complete form of power of attorney into which this power may be inserted, see *Section 98.202*.

[2] FORM

Power to Collect Rents

To demand, sue for, collect, and receive all rents now due or that may later become due to me from past, present, or future tenants or occupants of the lands, buildings, or other structures, or any parts thereof located at *[describe location]*, and on payment, to give receipts in my name and discharges in full satisfaction of those rents.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Real Property Law Landlord & Tenant General Overview Real Property Law Ownership & Transfer Powers of Attorney



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B. Specific Power Provisions

31-98 California Legal Forms--Transaction Guide § 98.225

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.225 Power to Sell Personal Property

[1] Comment--Use of Form

This form is a specific power giving an attorney in fact the power to sell and to enter into contracts for the sale of personal property. The form may be adapted to include all of the personal property of the principal, or may be limited to specific items of personal property. This form is to be used in conjunction with the complete power of attorney *form in Section 98.202*.

[2] FORM

Power to Sell Personal Property

To sell and to enter into a contract or contracts for the sale of [*specify, e.g., all or any part of my personal property, effects, and belongings of every kind and nature wherever situated or my 1995 Ford automobile, California license number 3ABC123*], with full power to deliver possession of that [personal property *or specify item, e.g., automobile*] and to execute in my name any documents necessary to transfer title to that [personal property *or specify item, e.g., automobile*], including bills of sale or other documents of title, and to take any security interest for any unpaid balance that my attorney in fact, in _____ [his or her] discretion, deems necessary and proper.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPowers of AttorneyGeneral Overview



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B. Specific Power Provisions

31-98 California Legal Forms--Transaction Guide § 98.226

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.226 Power to Borrow Money and to Execute Promissory Note and Security Agreement

[1] Comment--Use of Form

This form is a specific power giving an attorney in fact the power to borrow money on behalf of the principal; it is primarily useful when broad authority is necessary. Whenever possible, the power should be limited in scope both as to the source of funds and to the type of security that may be given. A limitation on the terms on which the funds are borrowed, such as number and amount of payments and rate of interest, may also be desirable. If it is anticipated that the loan will be secured by real property, also use the form presented in Section 98.222. For a complete form of power of attorney into which this power may be inserted, see *Section 98.202*.

[2] FORM

Power to Borrow Money and to Execute Promissory Note and Security Agreement

To borrow money from the sources and on the terms that my attorney deems fit and proper, to an amount not to exceed \$ _____, and to execute in conjunction with any loan of money a security agreement covering any of my real or personal property and to execute, sign, acknowledge, and deliver in a form that may be required any promissory note or any other instrument that may be required in conjunction with the transaction.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Real Property Law Financing General Overview



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B. Specific Power Provisions

31-98 California Legal Forms--Transaction Guide § 98.227

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.227 Power to Manage Business

[1] Comment--Use of Form

This form is a specific power authorizing an attorney in fact to take over the business of a principal. It may be used when the principal will be unable, because of absence or other reason, to carry on the affairs of the business. Because of the broad policy-making powers granted, the attorney in fact should possess sound business judgment in addition to being a trusted person. For a complete form of power of attorney into which this power may be inserted, see *Section 98.202*.

[2] FORM

Power to Manage Business

To manage, control, and take charge of my business of [*specify nature of business*], known as _____ [*business name*] located at _____ [*street address*], City of _____, County of _____, State of California, and to do everything necessary to carry on and continue the affairs of the business, including the purchase of materials and supplies, the hiring and firing of personnel, the acceptance of orders for and delivery of merchandise and goods produced, either in cash or for credit, the acceptance of checks, notes, or documents of title in connection with the operation of the business and the making, signing, issuance, and endorsing of any checks, notes, or documents of title that may be necessary in the judgment of the attorney in fact.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Corporations General Overview Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of

Attorney Limited Powers



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B. Specific Power Provisions

31-98 California Legal Forms--Transaction Guide § 98.228

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.228 Power to Execute Negotiable Instruments

[1] Comment--Use of Form

This form is a specific power that may be used to authorize an agent to make his or her principal liable on a negotiable instrument by executing the instrument as a maker, drawer, or endorser. For general coverage of the signature requirements for negotiable instruments, and the liability of an agent who signs commercial paper on the principal's behalf, see Volume 10A, Chapter 55, *Negotiable Instruments*. For a complete form of power of attorney into which this power may be inserted, see *section 98.202*.

[2] FORM

Power to Execute Negotiable Instruments

- (a) To endorse [and deliver for deposit with, or collection by, _____ (*name of bank*)] any and all checks, drafts, promissory notes, certificates of deposit, or other orders or instruments for the payment of money.
- (b) To sign and deliver checks or drafts on any bank, whether against funds actually standing to my credit at the time or against or in anticipation of deposits to be made or funds to be placed to my credit thereafter, and to settle and adjust my accounts with those banks.
- (c) To accept any and all drafts or bills of exchange or other orders for payment of money at any time drawn on my account [, making them payable at the _____ (*name of bank*) or otherwise directing payment of them by that bank].
- (d) To sell [to the _____ (*name of bank*) for my account] any and all promissory notes, drafts, or other orders for the payment of money at any time drawn and endorsed payable to my order or

generally, and to endorse them for the purpose of sale.

(e) To borrow in my name [from _____ (*name of lender*)] whatever sum or sums of money my attorney in fact deems proper, and as security for repayment of any loan or loans, to make and deliver one or more promissory note or notes, drafts, or other order or orders for the payment of money, and to pledge or hypothecate as collateral security therefor any and all negotiable instruments, bonds, stocks, certificates of deposit, or securities held by me or by that attorney in fact, and to execute and deliver any and all endorsements or instruments of assignment or transfer that may be necessary, expedient, or customary in similar cases to effectively transfer the securities pledged to the lender.

(f) To make and deliver [to _____ (*name of other party*)] on my behalf any agreements or contracts [orally or] in writing as my attorney in fact deems proper.

The following is a specimen of the handwriting and signature to be used by the attorney in fact authorized in this instrument:

_____ [*name of principal*]
_____ [*signature of attorney in fact*]
Attorney in Fact

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsGeneral OverviewEstate, Gift & Trust LawPowers of AttorneyGeneral Overview



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31-98 California Legal Forms--Transaction Guide §§ 98.229-98.239

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

[Reserved]

§§ 98.229[Reserved]



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C. Revocation and Substitution

31-98 California Legal Forms--Transaction Guide § 98.240

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.240 Notice of Revocation of Power of Attorney

[1] Comment

[a] Use of Form

This form is a general form for the of revocation of a power of attorney. It is in the form of a notice of the revocation and may be sent directly to the attorney in fact and to any third persons with whom he or she has dealt or is dealing. For a form for use in revoking a power of attorney affecting real property, particularly when the power of attorney has been recorded, see *Section 98.241*.

[b] Revocability of Power of Attorney

The Power of Attorney Law provides that a power of attorney may be revoked (1) in accordance with its terms or (2) by a writing [*Prob. Code § 4151(a)*]. In addition, an attorney in fact's authority under a power of attorney may be revoked (1) in accordance with its terms, (2) by the principal's informing the attorney in fact of the revocation, or (3) in writing from the principal's legal representative, with court approval [*Prob. Code § 4153(a)*]. The general law of agency provides that the power of an agent is terminated by (1) revocation by the principal, (2) death of the principal, or (3) incapacity of the principal to contract [*Civ. Code § 2356(a)*]. For further discussion of revocability, see *Section 98.18[1]*.

[c] Effect of Revocation

In order to make a revocation effective, it is essential, as a practical matter, that not only the attorney in fact, but all third persons who might deal with the attorney in fact in reliance on the power of attorney, be given notice of the revocation. This is because an attorney in fact or third person who does not have notice of the revocation is protected from liability [*Prob. Code § 4151(b)*; see *Prob. Code § 4300 et seq.*]. In addition, although a revocation of the power of attorney will terminate the authority of the agent to act under it, any bona fide transaction entered into with the agent by

any person acting without actual knowledge of the revocation will be binding on the principal and the principal's successors [*Civ. Code* § 2356(b)]. It is important to note that "actual knowledge" of the revocation is required, so that mere constructive notice which may follow from the recordation of the revocation appears to be insufficient.

Once a power of attorney has been formally revoked by a written instrument, it may not be revived and reinstated by a mere oral declaration; a new written instrument is required [*see People v. Tufts* (1914) 167 Cal. 266, 268, 139 P. 78] .

[d] Effect of Provision Making Power Irrevocable

Before a valid revocation of a power of attorney can be made, it is necessary to determine whether the power of attorney is revocable. A recitation in the power of attorney itself that it is revocable or irrevocable will not be dispositive since the power may in fact be irrevocable or revocable despite a contrary statement on its face [*see Frink v. Roe* (1886) 70 Cal. 296, 309, 11 P. 820 ; *see Boehm v. Spreckels* (1920) 183 Cal. 239, 248, 191 P. 5] . While such a provision in the power of attorney will not be conclusive, it will, however, be some evidence of the intention and understanding of the parties [*see Norton v. Whitehead* (1890) 84 Cal. 263, 270, 24 P. 154] .

A power of attorney terminates if it is revoked by the principal, unless the attorney in fact has an interest in the subject of the power [*Civ. Code* § 2356(a)(1)]. If the power of attorney is coupled with an interest, is given for a valuable consideration, or is part of a security for the payment of money or the performance of some other lawful act, it will be irrevocable whether so expressed on its face or not [*Frink v. Roe* (1886) 70 Cal. 296, 309, 11 P. 820 ; *see Boehm v. Spreckels* (1920) 183 Cal. 239, 248, 191 P. 5] . If it is not coupled with an interest or given as security for the payment of money or for the performance of an act deemed of value, it can be revoked by the principal even though made irrevocable by its terms [*Todd v. Superior Court* (1919) 181 Cal. 406, 417, 184 P. 684] .

To constitute a power coupled with an interest, making the power irrevocable, the power of attorney must: (1) be held for the benefit of the attorney in fact rather than the principal; (2) be created to secure the performance of a duty to the attorney in fact or to protect a title in the attorney in fact; and (3) be created either simultaneously with the duty or title or for consideration [*Becket v. Welton Becket & Associates* (1974) 39 Cal. App. 3d 815, 820, 114 Cal. Rptr. 531] . There must be a specific, present, and coexisting interest in the subject of the power or agency; the agent must have an interest or estate in the subject matter of the agency independent of the power conferred, rather than merely an interest or estate which accrues by or after the exercise of the power conferred [*Jay v. Dollarhide* (1970) 3 Cal. App. 3d 1001, 1023, 84 Cal. Rptr. 538 , *overruled o.g.*, *Morris v. Thogmartin* (1973) 29 Cal. App. 3d 922, 930, 105 Cal. Rptr. 919] .

If the power of attorney is coupled with an interest (that is, if the attorney in fact acquires an interest in the thing or estate to be disposed of or managed under the power), the power will be irrevocable, provided that the attorney in fact has such a beneficial interest in the subject matter itself, apart from its proceeds, that if the power were revoked he or she would be deprived of a substantial right [*O'Connell v. Superior Court* (1935) 2 Cal. 2d 418, 423, 41 P.2d 334] .

For further discussion of irrevocability, see *Section 98.18* [5].

[2] FORM

Notice of Revocation of Power of Attorney

NOTICE OF REVOCATION OF POWER OF ATTORNEY

I, _____[*name of principal*], of _____[*street address*], City of _____, County of _____, State of California, give notice that I have revoked, and do revoke, by this notice, the power of attorney dated _____[*date*] given to _____[*name of attorney in fact*] empowering [him or her] to act as my true and lawful attorney in fact to [*briefly specify nature of powers granted*], and I declare that all power and authority granted under that power of attorney is revoked and

withdrawn.

Dated: _____

_____ [signature]

[typed name]

ACKNOWLEDGMENT

[Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):]

State of California

County of _____

On _____ [date], before me, _____ [name and title of officer taking acknowledgment], personally appeared [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument and acknowledged to me that _____ [he or she or they] executed the same in _____ [his or her or their] authorized _____ [capacity or capacities], and that by _____ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

WITNESS my hand and official seal.

Signature [Seal]

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Revocation & Termination



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 98 POWERS OF ATTORNEY

PART IV. FORMS

C. Revocation and Substitution

31-98 California Legal Forms--Transaction Guide § 98.241

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.241 Revocation of Power of Attorney Affecting Interest in Real Property

[1] Comment

[a] Use of Form

This form is a revocation of a power of attorney affecting real property. For discussion of the revocation of powers of attorney, see § 98.240[1].

[b] Recordation Requirement

To revoke a power to convey or execute instruments affecting real property that has been recorded, it is necessary to execute a written revocation and have it acknowledged or proved, certified, and recorded in the same office in which the power of attorney was recorded [*Civ. Code § 1216*]. However, an unrecorded instrument is valid as between the parties to the instrument and those who have notice of it [*Civ. Code § 1217*]. If the power being revoked affects real property but has not been recorded, it is still advisable to record the revocation in the county where the real property is situated in case the power of attorney is subsequently recorded. Revocations of powers of attorney that do not affect real property need not be recorded.

[2] FORM

Revocation of Power of Attorney Affecting Interest in Real Property

REVOCATION OF POWER OF ATTORNEY AFFECTING REAL PROPERTY

I, _____ [name of principal], of _____ [street address], City of _____, County of _____, State of California, executed a power of attorney dated _____ [date] appointing _____ [name of attorney in fact] of _____

street address], City of _____, County of _____, State of California, my true and lawful attorney with full power to act for me and in my name, and this power of attorney was duly recorded on _____ [*date of recordation*] in Book _____, at Page _____, of the Official Records, County of _____, State of California.

I hereby revoke and withdraw the power of attorney granted to _____ [*name of attorney in fact*], described above. Dated _____ at _____ [*city*], _____ [*state or country*]

_____ [*signature of principal*]
[*typed name*]

ACKNOWLEDGMENT

[*Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):*]

State of California
County of _____

On _____ [*date*], before me, _____ [*name and title of officer taking acknowledgment*], personally appeared [*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [*is or are*] subscribed to the within instrument and acknowledged to me that _____ [*he or she or t hey*] executed the same in _____ [*his or her or their*] authorized _____ [*capacity or capacities*], and that by _____ [*his or her or their*] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

WITNESS my hand and official seal.

Signature [*Seal*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Revocation & Termination Real Property Law Ownership & Transfer Powers of Attorney



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 98 POWERS OF ATTORNEY

PART IV. FORMS

C. Revocation and Substitution

31-98 California Legal Forms--Transaction Guide § 98.242

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.242 Substitution of Attorney in Fact

[1] Comment

[a] Use of Form

This form is a substitute power of attorney. It is to be used by an attorney in fact to appoint a substitute attorney in fact to exercise some or all of the powers granted to the attorney in fact under his or her power of attorney. The attorney in fact who executes this document may be the original attorney in fact appointed by the principal, or a substitute attorney appointed pursuant to a document such as this one [*see* § 98.35[3]].

PRACTICE TIP:

If the principal wishes to appoint a different attorney in fact, he or she should terminate the existing power of attorney and execute a new one, rather than using a form of substitution. For revocation forms, see §§ 98.240 and 98.241.

[b] Power of Substitution

Before an attorney in fact can execute a valid substitute power of attorney, he or she must have the authority to do so. An agent, unless specially forbidden by the principal to do so, can delegate his or her powers to another person in any of the following cases, and in no others [Civ. Code § 2349]:

- When the act to be done is purely mechanical;
- When it is such as the agent cannot himself or herself, and the sub-agent can lawfully perform;
- When it is the usage of the place to delegate such powers; or

- When the delegation is specially authorized by the principal.

The Power of Attorney Act specifically allows the delegation of authority by an attorney in fact to perform purely mechanical acts [*Prob. Code* § 4205], but does not address the other cases covered by the general law of agency. Therefore, delegation of authority in those circumstances would still be allowed [*see Prob. Code* § 4051].

The primary way in which a principal authorizes his or her attorney in fact to execute a substitute power of attorney is by the use of the phrase "with full power of substitution" in the grant of power under the power of attorney. The use of this phrase in the power of attorney and in successive substitute powers of attorney will create a continuing power of substitution whereby each succeeding attorney in fact will be able to choose a successor to carry out the powers granted to him or her [*see Rosenberg v. C. W. Clarke Co. (1962) 200 Cal. App. 2d 178, 182-186, 19 Cal. Rptr. 191*].

[c] Requirements for Valid Substitute Power of Attorney

Because an attorney in fact cannot confer on a substitute attorney in fact greater or different powers than the attorney in fact possesses under his or her power of attorney, the powers enumerated in the substitute power of attorney should either be identical to, or fall within the scope of, the powers granted under the original power of attorney [*see Rosenberg v. C.W. Clarke Co. (1962) 200 Cal. App. 2d 178, 184, 19 Cal. Rptr. 191*]. Any change or alteration in the powers after the execution of the document will extinguish all executory obligations of the instrument against parties who did not consent to the act [*Rosenberg v. C.W. Clarke Co. (1962) 200 Cal. App. 2d 178, 184, 19 Cal. Rptr. 191*].

Furthermore, since the naming of a substitute attorney in fact creates a personal agency relationship with the principal, the original or substitute attorney in fact may not execute a substitute power of attorney in blank, to be filled out by the bearer at some future date. The appointment must be the personal act of the attorney in fact, so the name of the substitute attorney in fact must be filled in at the time of the execution of the instrument [*Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1020, 84 Cal. Rptr. 538*, overruled o.g., *Morris v. Thogmartin (1973) 29 Cal. App. 3d 922, 930, 105 Cal. Rptr. 919*]. If the substitute power of attorney includes the power to convey land, the description of the land must also be included in the substitute power of attorney; it may not be inserted afterward [*Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1020, 84 Cal. Rptr. 538*, overruled o.g., *Morris v. Thogmartin (1973) 29 Cal. App. 3d 922, 930, 105 Cal. Rptr. 919*].

[2] FORM

Substitution of Attorney in Fact

SUBSTITUTE POWER OF ATTORNEY

I, _____[*name*], attorney in fact for _____[*name of principal*] under a power of attorney dated _____[*specify date; if the power of attorney has been recorded, add: and recorded in Book _____, at Page _____, of the Official Records, County of _____, State of California*], which empowers me to [*set forth powers contained in the power of attorney*], with full power of substitution, do hereby appoint _____[*name of substitute attorney in fact*] as my substitute attorney in fact. In acting in this capacity, _____[*name of substitute attorney in fact*] will have full power and authority to perform every act necessary to carry out any or all of the powers described herein, as fully as I could do if personally present, with full power of substitution. I hereby ratify and confirm all that _____[*name of substitute attorney in fact*] may lawfully do or cause to be done under this Substitute Power of Attorney.

[*If substitute power of attorney is to be irrevocable, include the following provision:*]

For value received, receipt of which is hereby acknowledged, this substitute power of attorney is made and declared to

be irrevocable by me or otherwise.

Dated: _____

_____ [signature]

[typed name]

ACKNOWLEDGMENT

[Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):]

State of California

County of _____

On _____ [date], before me, _____ [name and title of officer taking acknowledgment], personally appeared [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument and acknowledged to me that _____ [he or she or t hey] executed the same in _____ [his or her or their] authorized _____ [capacity or capacities], and that by _____ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

WITNESS my hand and official seal.

Signature [Seal]

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 98 POWERS OF ATTORNEY

PART IV. FORMS

C. Revocation and Substitution

31-98 California Legal Forms--Transaction Guide § 98.243

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.243 Affidavit of Authority

[1] Comment--Use of Form

This form is an affidavit by the attorney in fact stating that he or she has no knowledge of the revocation or termination of his or her authority [*see* § 98.18]. This affidavit may be presented to third parties who may question whether the attorney in fact still possess the power he or she seeks to exercise. If the power sought to be exercised involves the execution of a document to be recorded, this affidavit should be recorded and, therefore, must be acknowledged. However, if the execution of a recordable document is not the power sought to be exercised, the acknowledgment may be omitted [*see Prob. Code* § 4305].

[2] FORM

Affidavit of Authority

When Recorded Mail To: _____ (For Recorder's Use Only)

AFFIDAVIT

I, _____ [*name of attorney in fact*], attorney in fact for _____ [*name of principal*],
declare:

1. I am attorney in fact for _____ [*name of principal*] under a power of attorney dated
_____ [*specify date; if the power of attorney has been recorded, add: and recorded in Book*
_____, at Page _____, of the Official Records, County of _____, State of California],
which empowers me to [*set forth powers contained in the power of attorney*].

2. On _____ [date on which act is or was performed], I will [perform or have performed] the following act(s) as attorney in fact for _____ [name of principal] pursuant to the authority granted by the power of attorney:

[describe act or acts performed or to be performed].

3. At the time of the performance of the above described act(s) I had no actual knowledge of the termination of the power of attorney, of the termination of my authority by revocation, or of the death or incapacity of the principal.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ [date] at _____ [city and state].

_____ [signature of attorney in fact]

ACKNOWLEDGMENT

[Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):]

State of California

County of _____

On _____ [date], before me, _____ [name and title of officer taking acknowledgment], personally appeared [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument and acknowledged to me that _____ [he or she or they] executed the same in _____ [his or her or their] authorized _____ [capacity or capacities], and that by _____ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

WITNESS my hand and official seal.

Signature [Seal]

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview



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C. Revocation and Substitution

31-98 California Legal Forms--Transaction Guide § 98.244

AUTHOR: Reviewed by the Honorable Walter L. Blackwell III

§ 98.244 Certification of Copy of Power of Attorney

[1] Comment--Use of Form

This form is a certification of a copy of a power of attorney. A certified copy of a power of attorney may be used with the same force and effect as the original [*Prob. Code § 4307(a)*]. The copy may be certified by an attorney authorized to practice law in California, a California notary public, or any public official authorized to make certifications [*Prob. Code § 4307(b)*].

This form may be used to certify a copy of a power of attorney by affixing it to the copy.

[2] FORM

Certification of Copy of Power of Attorney

I, _____ [*name of person executing certification*], declare:

1. I am _____ [an attorney authorized to practice law in the State of California *or* a notary public in the State of California *or* an official of the State of California or a political subdivision thereof who is authorized to make certifications].

2. I have examined the original power of attorney and the copy thereof to which this certification is affixed and the copy is a true and correct copy of the original power of attorney.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ [date] at _____ [city and state].

_____ *[signature of person making certification]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

Chapter 99 [Reserved]

31-99 California Legal Forms--Transaction Guide Chapter 99

[Reserved]

Chapter 99[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 100 CONTROL, CUSTODY, AND SUPPORT OF MINORS

31-100 California Legal Forms--Transaction Guide 100.syn

§ 100.syn Synopsis to Chapter 100: CONTROL, CUSTODY, AND SUPPORT OF MINORS

§ 100.01 California Statutes

§§ 100.02-100.04 [Reserved]

§ 100.05 Law Reviews and Periodicals

§ 100.06 Annotations

§ 100.07 Text References

§§ 100.08-100.09 [Reserved]

§ 100.10 Definitions

[1] Parent-Child Relationship

[2] Minor

§ 100.11 Establishing Parentage

[1] Uniform Parentage Act

[a] Purpose and Scope of Act

[b] Application of Act's Father-Child Provisions to Mother-Child Determinations

[2] "Conclusive" Presumptions Regarding Father

[a] Presumption That Mother's Husband is Father

[b] Presumption Arising From Declaration of Paternity

[3] Rebuttable Presumptions Regarding Father

[a] Statutory Presumptions

[b] Rebuttal of Statutory Presumptions

[c] Presumption Based on Constitutional Rights

[4] Effect of Artificial Insemination

[5] Surrogate Parenting Arrangements

[6] Vacating Paternity Judgment on Basis of Genetic Testing

§ 100.12 Rights and Obligations Arising From Parent-Child Relationship

§§ 100.13-100.19 [Reserved]

§ 100.20 Parental Right to Custody

§ 100.21 Parental Control of Child

[1] State's Power to Restrict Parental Control

[2] Child's Name

[3] Child's Residence

[4] Child's Property

[5] Child's Earnings

[6] Child's Marriage

§ 100.22 Termination of Parental Control

[1] Termination for Abuse of Parental Authority

[2] Termination to Facilitate Adoption

[3] Protective Orders Under Domestic Violence Prevention Act

§§ 100.23-100.29 [Reserved]

§ 100.30 Parental Obligation to Support Child

§ 100.31 Enforcement of Support Obligation

§ 100.32 Agreements for Support

§ 100.33 Liability of Stepparent for Support

§ 100.34 Liability of Deceased Parent's Estate

§ 100.35 Rights of Persons Supplying Necessaries

§§ 100.36-100.49 [Reserved]

§ 100.50 Emancipation Defined

§ 100.51 Methods of Emancipation

[1] Emancipation by Operation of Law

[2] Relinquishment of Parental Control

[3] Judicial Declaration of Emancipation

§ 100.52 Effect of Emancipation

§§ 100.53-100.99 [Reserved]

§ 100.100 Facts for Parent-Child Relationship in General

Scope

§ 100.101 Facts for Agreement Concerning Custody, Control, and Support

Scope

§ 100.102 Facts for Declaration of Emancipation

Scope

§ 100.103 Facts for Agreement for Artificial Insemination

Scope

§ 100.104 Documents

Scope

§§ 100.105-100.109 [Reserved]

§ 100.110 Agreement Concerning Custody, Control, and Support

Scope

§ 100.111 Emancipation of Minor Child

Scope

§ 100.112 Surrogate Parenting Services

Scope

§§ 100.113-100.119 [Reserved]

§ 100.120 Agreement Concerning Custody, Control, and Support

Scope

§ 100.121 Artificial Insemination Arrangement

Scope

§ 100.122 Surrogate Parenting Services

Scope

§§ 100.123-100.129 [Reserved]

§ 100.130 Agreement for Support of Minor Child

Scope

§ 100.131 Stepparent's Agreement for Support of Minor Child

Scope

§ 100.132 Notice of Change in Minor's Residence

Scope

§ 100.133 Agreement Relinquishing Parental Rights

Scope

§ 100.134 Agreement for Artificial Insemination

Scope

§ 100.135 Agreement for Surrogate Parenting Services

Scope

§§ 100.136-100.149 [Reserved]

§ 100.150 Amending Agreement

Scope

§ 100.151 Enforcing Agreement

Scope

§§ 100.152-100.199 [Reserved]

§ 100.200 Agreement for Compensation for Support of Child

[1] Comment

[a] Use of Form

[b] Parents' Duty of Support

[c] Power of Attorney

[2] FORM

Agreement for Compensation for Support of Child

§ 100.201 Stepparent's Agreement for Support of Minor Child

[1] Comment

[a] Use of Form

[b] Need for Agreement

[c] Liability of Stepparent's Property for Support of Child

[d] Effect of Stepparent's Assumption of Parental Obligations

[e] Intestate Succession

[f] Consideration for Agreement

[g] Enforcement of Agreement

[2] FORM

Stepparent's Agreement for Support of Minor Child

§ 100.202 Notice of Change of Minor's Residence

[1] Comment

[a] Use of Form

[b] Establishment of Residence Generally

[c] Determination by Parent

[d] Determination by Guardian

[e] Determination by Child

[2] FORM

Notice of Change of Minor's Residence

§§ 100.203-100.209 [Reserved]

§ 100.210 Relinquishment of Parental Rights to Control Minor and to Receive Minor's Earnings

[1] Comment

[a] Use of Form

[b] Parents' Right to Custody and Control of Unemancipated Minor

[c] Authorization for Relinquishment of Parental Control

[d] Manner of Relinquishment

[e] Effect of Minor Child

[f] Effect on Parents' Duty of Support

[g] Execution of Agreement

[h] Acknowledgement of Receipt by Child

[2] FORM

Relinquishment of Parental Rights to Control Minor and to Receive Minor's Earnings

§ 100.211 Relinquishment of Parental Right to Minor's Earnings

[1] Comment

[a] Use of Form

[b] Parents' Right to Earnings

[c] Relinquishment of Parental Right to Earnings

[d] Declaration of Relinquishment

[2] FORM

Relinquishment of Parental Right to Minor's Earnings

§§ 100.213-100.219 [Reserved]

§ 100.220 Agreement for Artificial Insemination

[1] Comment

- [a] Use of Form
- [b] Statutory Requirements
- [c] Insemination Procedure and Paternity Rights
- [d] Medical Screening
- [e] Confidentiality of Agreement
- [f] Consideration
- [g] Standard Contractual Provisions
- [h] Separate Counsel
- [i] Attorneys' Fees

[2] FORM

Agreement for Artificial Insemination

§ 100.221 Agreement for Surrogate Parenting Services

[1] Comment

- [a] Use of Form
- [b] Enforceability of Traditional Surrogacy Contracts
- [c] Application of Artificial Insemination Statutes to Surrogacy Arrangements
- [d] Suggested Procedures for Adoption
- [e] Potential Practical Problems
- [f] Purpose of Agreement
- [g] Termination of Surrogate's Rights
- [h] Death of Father
- [i] Medical and Psychological Testing
- [j] Artificial Insemination
- [k] Surrogate's Conduct During Pregnancy
- [l] Amniocentesis

[m] Abortion

[n] Miscarriage

[o] Delivery

[p] Determining Paternity

[q] Surrender of Custody and Adoption

[r] Consideration

[s] Escrow

[t] Insurance

[u] Assumption of Risks

[v] Cancellation of Contract

[w] Surrogate's Decision to Keep Child

[x] Attorneys' Fees

[y] Standard Contractual Provisions

[z] Separate Counsel

[aa] Provisions for Confidentiality

[2] FORM

Agreement for Surrogate Parenting Services



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DIVISION VII: PERSONAL TRANSACTIONS CHAPTER 100 CONTROL, CUSTODY, AND SUPPORT OF MINORS

31-100 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers the control, custody, and support aspects of the parent-child relationship. The Legal Background discusses the nature and extent of that relationship and its concomitant rights and duties. It also examines the practical and legal issues involved in artificial insemination and surrogate parenting. The Transaction Guide sets forth the facts, documents, determinations, and procedures used in drafting custody and support agreements, as well as contracts for artificial insemination and surrogate parenting services. The forms include examples and discussions of contracts for child custody, child support, artificial insemination, and surrogate parenting arrangements.

This chapter does not cover agreements regarding child custody and support made pursuant to dissolution of marriage or separation. For a discussion of agreements made in those contexts, see Chs. 120- 125. For a discussion of contract formation generally, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

The personal affairs of minors, including consent to medical and dental care by minors, marriage of minors, and tort claims by and against minors, are discussed in Ch. 100A, *Personal Affairs of Minors* . The business affairs of minors, including contracts by minors, and minors' work permits and entitlement to earnings, are covered in Ch. 100B, *Contracts and Employment of Minors* . For a discussion of birth and death records, see Ch. 101, *Vital Records* . Inheritance issues regarding minors are discussed in Ch. 60, *Estate Planning* . The Uniform Transfers to Minors Act [Prob. Code § 3900 et seq.] is covered in Ch. 60A, *Gifts* . For a discussion of guardianships for minors, see Ch. 66, *Guardianships* ; see also California Forms of Pleading and Practice, Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , et seq. (Matthew Bender). Adoptions are covered in California Forms of Pleading and Practice, Ch. 12, *Adoptions: Nature and Effect* , et seq. (Matthew Bender).



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 100 CONTROL, CUSTODY, AND SUPPORT OF MINORS
PART I. RESEARCH GUIDE
A. Primary Sources

31-100 California Legal Forms--Transaction Guide § 100.01

§ 100.01 California Statutes

Capacity of minors to consent to and consummate marriage. *Fam. Code §§ 302-304.*

Parents' duty to support minor. *Fam. Code § 3900.*

Right of third party to supply necessities to child. *Fam. Code § 3950.*

Definition of "minor." *Fam. Code § 6500.*

Definition of "adult." *Fam. Code § 6501.*

Civil liability of minor. *Fam. Code § 6600.*

Enforcement of minor's rights by civil proceeding. *Fam. Code § 6601.*

Minor's contract for attorneys' Fees. *Fam. Code § 6602.*

Minor's capacity to contract. *Fam. Code § 6700-6753.*

Medical treatment for minors.

Consent by persons having care of minor or by court. *Fam. Code §§ 6910, 6911.*

Consent by minor. *Fam. Code §§ 6920-6929.*

Emancipation of Minors Law. *Fam. Code §§ 7000 et seq.*

Right of mother and father to services and earnings of child. *Fam. Code § 7500(a)*.

Right of custodial parent to change child's residence. *Fam. Code § 7501*.

Absence of parental right to control child's property. *Fam. Code § 7502*.

Payment of minor's earnings to minor absent notice to employer by parent or guardian. *Fam. Code § 7503*.

Parent's relinquishment of right to receive child's earnings. *Fam. Code § 7504*.

Presumptions concerning child of marriage. *Fam. Code §§ 7540, 7541*.

Uniform Act on Blood Tests to Determine Paternity. *Fam. Code §§ 7550-7558*.

Uniform Parentage Act. *Fam. Code §§ 7600-7730*.

Criminal acts of parents regarding children.

Selling or paying for custody of human being. *Penal Code § 181*.

Child neglect. *Penal Code § 270*.

Abandonment of child under 14 years of age. *Penal Code § 271*.

Failure to provide for minor under 14 years of age. *Penal Code § 271a*.

Contributing to delinquency of minor. *Penal Code § 272*.

Payment to parent for adoption of child. *Penal Code § 273*.

Abusing or endangering health of child. *Penal Code § 273a*.

Willful infliction of corporal injury on child. *Penal Code § 273d*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Family Protection & Welfare Children General Overview Family Law Marriage Capacity to Marry



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31-100 California Legal Forms--Transaction Guide § 100.05

§ 100.05 Law Reviews and Periodicals

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Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor*, 6 *S. Cal. Rev. L. & Women's Stud.* 173 (Fall 1996).

Evelyn Posamentier & Sue Welsh, *The Commerce of Surrogate Motherhood: A Selected Interdisciplinary Bibliography*, 26 *Pac. L.J.* 147 (January 1995).

Jeffrey M. Place, *Gestational Surrogacy and the Meaning of "Mother": Johnson v. Calvert*, 851 *P.2d* 776 (Cal. 1993), 17 *Harv. J.L. & Pub. Pol'y* 907 (Summer 1994).

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Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 *S. Cal. L. Rev.* 623 (1991).

Turk, *If Baby M Were a Californian ...*, 7 *Calif. Lawyer* 78 (No. 8)(August 1987).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareChildrenGeneral OverviewFamily LawPaternity &
SurrogacySurrogacyGeneral OverviewFamily LawPaternity & SurrogacySurrogacyDisposition of Eggs, Preembryos &
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31-100 California Legal Forms--Transaction Guide § 100.06

§ 100.06 Annotations

Annot., Determination of Status as Legal or Natural Parents in Contested Surrogacy Births, 77 A.L.R.5th 567 (2000) .

Annot., Rights and Obligations Resulting From Human Artificial Insemination, 83 A.L.R.4th 295 (1991) .

Annot., Postmajority Disability as Reviving Parental Duty to Support Child, 48 A.L.R.4th 919 (1986) .

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Legal Topics:

For related research and practice materials, see the following legal topics:

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31-100 California Legal Forms--Transaction Guide § 100.07

§ 100.07 Text References

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Ch. 60, *Estate Planning*.

Ch. 60A, *Gifts*.

Ch. 66, *Guardianships*.

Ch. 100A, *Personal Affairs of Minors*.

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Ch. 30, *The Parent-Child Relationship*.

Ch. 31, *Establishing Parentage*.

Ch. 40, *Duty to Support Children and Jurisdiction to Order Support*.

Ch. 171, *Termination of Parental Rights*.

Ch. 172, *Adoption of Unmarried Minors.*

California Forms of Pleading and Practice(Matthew Bender).

Ch. 12, *Adoptions: Nature and Effect.*

Ch. 12A, *Adoptions: Termination of Parental Rights.*

Ch. 12B, *Adoptions: Unmarried Minors.*

Ch. 245, *Emancipation of Minors.*

Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians.*

Ch. 282, *Guardianship and Conservatorship: Temporary Guardians and Conservators.*

Ch. 283, *Guardianship and Conservatorship: Bonds.*

Ch. 284, *Guardianship and Conservatorship: Notice.*

Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee.*

Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal.*

Ch. 287, *Guardianship and Conservatorship: General Management Powers.*

Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers.*

Ch. 289, *Guardianship and Conservatorship: Management of Community Property.*

Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee.*

Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment.*

Ch. 290B, *Guardianship and Conservatorship: Substituted Judgment.*

Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims.*

Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardians, Conservators, and Sureties.*

Ch. 290E, *Guardianship and Conservatorship: Accounts.*

Ch. 290F, *Guardianship and Conservatorship: Compensation of Guardian or Conservator.*

Ch. 290G, *Guardianship and Conservatorship: Removal or Resignation of Guardians and Conservators.*

Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and*

Conservatorships.

Ch. 291, *Guardians Ad Litem.*

Ch. 364, *Minors.*

California Points and Authorities (Matthew Bender), Ch. 171, *Paternity* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarriageGeneral OverviewFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacySurrogacyGeneral Overview



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PART II. LEGAL BACKGROUND
A. Parent-Child Relationship

31-100 California Legal Forms--Transaction Guide § 100.10

§ 100.10 Definitions

[1] Parent-Child Relationship

A parent-child relationship is the legal relationship existing between a child and his or her natural or adoptive parents, by which the law confers or imposes rights, privileges, duties, and obligations. It includes both the mother-child relationship and the father-child relationship [*Fam. Code § 7601*]. For most purposes, the legal considerations involved in the parent-child relationship apply only when the child is an unmarried minor child [*see [2], below; but see Fam. Code § 3910(a)*] (parental duty to support incapacitated, needy child of any age)].

The parent-child relationship may be established between a child and any of the following:

- The natural mother, by proof that the woman gave birth to the child;
- The biological father, under a series of presumptions [*see Fam. Code § 7611; see also § 100.11[2], [3]*]; or
- An adoptive parent, by proof of adoption [*Fam. Code § 7610; see California Forms of Pleading and Practice, Ch. 12, Adoptions: Nature and Effect* (Matthew Bender)].

A parentage action under the Uniform Parentage Act [*see Fam. Code §§ 7600-7730*] is used to establish the parentage of a mother or father [*see § 100.11[1]*].

The parent-child relationship extends equally to every child and every parent, regardless of the parent's marital status [*Fam. Code § 7602*]. A determination by a court as to the existence or nonexistence of a parent-child relationship is determinative for all purposes except for criminal proceedings brought for child neglect [*Fam. Code § 7636; see Penal Code § 270*].

The Legislature and courts have recognized the value of having two parents, rather than one, as a source of both

emotional and financial support for a child [see *Kristine M. v. David P.* (2006) 135 Cal. App. 4th 783, 786, 788-791, 37 Cal. Rptr. 3d 748 (once paternity is established under Uniform Parentage Act, public policy prevents court from terminating father's parental rights pursuant to parents' post-birth stipulation made as matter of convenience to end father's contact with, and obligation to support, child); *Librers v. Black* (2005) 129 Cal. App. 4th 114, 123, 28 Cal. Rptr. 3d 188 ("whenever possible, a child should have the benefit of two parents to support and nurture him or her"); see also Fam. Code § 7570(a)]. However, there is no reason that the parents of a child cannot both be women [*Elisa B. v. Superior Court* (2005) 37 Cal. 4th 108, 117-119, 33 Cal. Rptr. 3d 46, 117 P.3d 660 (explaining that *Johnson v. Calvert* (1993) 5 Cal. 4th 84, 92, 19 Cal. Rptr. 2d 494, 851 P.2d 776, which said child can have "only one natural mother," must be read in context as rejecting argument that child can have one father plus two mothers); see *Sharon S. v. Superior Court* (2003) 31 Cal. 4th 417, 427 n.6, 2 Cal. Rptr. 3d 699, 73 P.3d 554 (mother could consent to "second parent" adoption by her lesbian partner)]. For example, if two women are registered domestic partners, their rights and obligations with respect to a child of either of them are the same as those of spouses [Fam. Code § 297.5(d)]. For discussion of domestic partner registration, see Ch. 110, *Nonmarital Cohabitation Agreements and Related Transactions*.

In some instances, the parent-child relationship may exist between a child and a person, such as a stepparent, who stands *in loco parentis* to the child [see *Trudell v. Leatherby* (1931) 212 Cal. 678, 681-682, 300 P. 7, *overruled on other grounds*, *Gibson v. Gibson* (1971) 3 Cal. 3d 914, 923, 92 Cal. Rptr. 288, 479 P.2d 648]. The term "*in loco parentis*" refers to a person who has put himself or herself in the position of a parent by assuming the obligations incidental to the parental relationship, without formally establishing that relationship through adoption [*Estate of Teddy* (1963) 214 Cal. App. 2d 113, 119, 29 Cal. Rptr. 402; see § 100.201[1][d]].

[2] Minor

A minor is any individual who is under 18 years of age [Fam. Code § 6500]. The period of minority is calculated from the first minute of the day on which the individual is born to the same minute of the corresponding day completing the period of minority [Fam. Code § 6500]. Any individual who is age 18 or older is an adult [Fam. Code § 6501].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareChildrenGeneral OverviewFamily LawMarriageGeneral OverviewFamily LawPaternity & SurrogacyGeneral Overview



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A. Parent-Child Relationship

31-100 California Legal Forms--Transaction Guide § 100.11

§ 100.11 Establishing Parentage

[1] Uniform Parentage Act

[a] Purpose and Scope of Act

Effective January 1, 1976, California abolished the concept of illegitimacy by enacting its version of the Uniform Parentage Act (UPA) [*Fam. Code § 7600 et seq.*; see *Lozano v. Scalier* (1996) 51 Cal. App. 4th 843, 846, 59 Cal. Rptr. 2d 346]. The UPA established a procedure to determine the existence or nonexistence of the parent-child relationship [see *Fam. Code § 7630(e)*, 7650], and abolished most distinctions between children of married and unmarried parents [see *Fam. Code § 7602*].

An action under the UPA is often used by one parent to establish a parent-child relationship as a basis for obtaining support from the other parent [see *Fam. Code § 3900* (parents' duty of support); see also §§ 100.30, 100.31]. However, a parentage action may be brought for other reasons, such as obtaining custody or visitation rights [see *Fam. Code §§ 7604, 7637* (custody and visitation orders allowed under UPA)] or determining inheritance rights [see *Prob. Code § 6450* (determining parent-child relationship for purposes of intestate succession)].

In a paternity action under the UPA, a series of presumptions applies [see *Fam. Code § 7611*; see also [2], [3], below]. These presumptions are relevant not only in determining paternity, but also in establishing a man's standing to file a paternity action. An action to declare the existence of the father-child relationship based on a presumption that arises from the parents' marriage or attempted marriage [see *Fam. Code § 7611(a)-(c)*] may be brought at any time by the child, the child's natural mother, the presumed father, an adoption agency to which the child has been relinquished, or a prospective adoptive parent of the child [*Fam. Code § 7630(a)(1)*; see *Lisa I. v. Superior Court* (2005) 133 Cal. App. 4th 605, 614-621, 34 Cal. Rptr. 3d 927 (application of statutory presumptions and standing rules to bar biological father's and paternity suit does not violate biological father's constitutional rights where biological father has no existing relationship with child); see also *Fam. Code § 7630(e)* (party to assisted reproduction agreement, as defined in *Fam. Code § 7606*, may bring action to establish parent-child relationship consistent with intent expressed in that agreement)]. Those same parties may also bring an action to declare the nonexistence of the father-child relationship based on those presumptions, but only within a reasonable time after obtaining knowledge of the relevant facts. If the

presumption is rebutted, paternity of the child by another man may be determined in the same action if the other man has been made a party [*Fam. Code* § 7630(a)(2)]. Any interested party may bring an action for the purpose of determining the existence or nonexistence of the father-child relationship based on a man's receipt of the child into his home and his openly holding out the child as his natural child [*Fam. Code* § 7630(b); *see Fam. Code* § 7611(d)]. To have standing to pursue such an action, a man seeking to prove the existence of paternity must allege that he is an interested party who can also prove he is a presumed father based on his receiving the child into his home and openly holding out the child as his own [*Said v. Jegan* (2007) 146 Cal. App. 4th 1375, 1383, 53 Cal. Rptr. 3d 661 ; *Librers v. Black* (2005) 129 Cal. App. 4th 114, 124-126, 28 Cal. Rptr. 3d 188] . However, if the man seeks to prove he is not the child's father, he need only allege facts showing that he *might* qualify as a presumed father [*Said v. Jegan* (2007) 146 Cal. App. 4th 1375, 1383-1384, 53 Cal. Rptr. 3d 661 (plaintiff was interested party because he was listed as father on child's birth certificate)].

Any interested party also may bring an action at any time for the purpose of determining the existence or nonexistence of the father-child relationship that is presumed when a child is conceived using a decedent's genetic material [*Fam. Code* § 7630(b); *see Fam. Code* § 7611(f); *Prob. Code* § 249.5]. For detailed discussion of the statutory presumptions, see [2], [3] *below*.

To determine a mother-child relationship, any interested party may bring an action under the UPA [*see Fam. Code* § 7650; *Robert B. v. Susan B.* (2003) 109 Cal. App. 4th 1109, 1114-1117, 135 Cal. Rptr. 2d 785 ("interested" person does not include woman who has no genetic or gestational relationship to child and no status as presumed mother, at least when another woman asserts cognizable claim to motherhood)]. Proof of the mother-child relationship may be established by proof of her having given birth to the child, or as otherwise permitted by the UPA [*Fam. Code* § 7610(a); *see Johnson v. Calvert* (1993) 5 Cal. 4th 84, 91-92, 19 Cal. Rptr. 2d 494, 851 P.2d 776 (blood test evidence to prove maternity)].

Regardless of its terms, an agreement between the parties, or between an alleged or presumed parent and the child, does not bar an action under the UPA [*Fam. Code* § 7632; *K.M. v. E.G.* (2005) 37 Cal. 4th 130, 144, 33 Cal. Rptr. 3d 61, 117 P.3d 673 (waiver form signed by ovum donor relinquishing and waiving all claims to legal parentage does not affect's court's determination of parentage)].

An action under the UPA to determine parentage may be brought before the birth of the child [*Fam. Code* § 7633]. If an order or judgment is entered before the birth of the child, enforcement of the order or judgment will be stayed until the birth of the child [*Fam. Code* § 7633].

A judgment establishing parentage under the UPA may be set aside under certain circumstances [*see Fam. Code* § 7645 *et seq.*; *see, e.g.*, [2][b], [6], *below*]. However, a party who has stipulated to the entry of a judgment establishing parentage, and who has enjoyed the benefits of that judgment, will be estopped from challenging the validity of the judgment [*Kristine H. v. Lisa R.* (2005) 37 Cal. 4th 156, 162-166, 33 Cal. Rptr. 3d 81, 117 P.3d 690 (stipulated judgment established that lesbian partners were both parents of child; "[g]iven that the court had subject matter jurisdiction to determine the parentage of the unborn child, and that Kristine invoked that jurisdiction, stipulated to the issuance of a judgment, and enjoyed the benefits of that judgment for nearly two years, it would be unfair both to Lisa and the child to permit Kristine to challenge the validity of that judgment")].

If a party invokes the jurisdiction of the superior court to determine parentage under the UPA, and that party then stipulates to the entry of a judgment declaring that both parties to the action are legal parents of the child, the party will be estopped from claiming ends with the entry of a stipulated judgment establishing parentage,

For a detailed discussion of actions under the UPA, and forms for use in such actions, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, Ch. 31, *Establishing Parentage* (2d ed. Matthew Bender).

[b] Application of Act's Father-Child Provisions to Mother-Child Determinations

Most of the UPA is cast in terms of proceedings to determine paternity [see *Fam. Code* §§ 7611-7649.5]. However, the UPA also expressly provides that insofar as practicable, its provisions applicable to the father-child relationship also apply in an action to determine the existence or nonexistence of a mother-child relationship [*Fam. Code* § 7650(a)]. For example, the UPA expressly provides that a man who receives a child into his home and openly holds out the child as his natural child is presumed to be the child's natural father, even in the absence of a biological relationship [*Fam. Code* § 7611(d); see [3][a], *below*]. This presumption may also apply, therefore, to a woman who, although not biologically related to a child, receives the child into her home and openly holds out the child as her natural child. The presumption that the woman is the child's natural mother may be rebutted by clear and convincing evidence, but only in an "appropriate" case [*Fam. Code* § 7612(a)]. A case in which rebuttal of the presumption would leave the child motherless (such as when there is no competing claim to be the child's mother) is not an appropriate case for rebuttal, even if the presumed mother admits she is not the biological mother [*In re Karen C. (2002) 101 Cal. App. 4th 932 937-940, 124 Cal. Rptr. 2d 677*]. However, if the child's biological father and biological mother have identified themselves and come forward to assert their legal parentage, it is not appropriate to invoke a gender-neutral reading of the paternity presumptions to find that another woman is the child's mother [*Amy G. v. M.W. (2006) 142 Cal. App. 4th 1, 12-14, 16, 47 Cal. Rptr. 3d 297* (when birth mother promptly comes forward to assert her legal maternity, and child's father is undisputed and present in action, father's spouse cannot be child's presumed mother under *Fam. Code* § 7611(a),(d))].

A biological mother whose parental rights have been terminated in a dependency proceeding [see *Welf. & Inst. Code* § 366.26] may not seek presumed mother status under the UPA [*In re Cody B. (2007) 153 Cal. App. 4th 1004, 1009-1013, 63 Cal. Rptr. 3d 652* (no exception to *Fam. Code* § 7648.4's reimbursement bar for declared father who filed motion to set aside paternity decree before that statute's enactment)].

The foregoing principles also apply in determining the parental rights and obligations of a woman with regard to a child born to her partner in a lesbian relationship. For example, the Supreme Court has held that a woman who agreed to raise children with her lesbian partner, supported her partner's artificial insemination using an anonymous donor, and received the resulting children into her home and held them out as her own was presumed to be the children's natural parent and had an obligation to support them [*Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 119-125, 33 Cal. Rptr. 3d 46, 117 P.3d 660* ; see *Fam. Code* §§ 7611(d), 7650(a); see also *Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301, 308, 44 Cal. Rptr. 3d 332* (whether biological mother opposes presumed-parent status for former lesbian partner should not affect determination of that status under *Fam. Code* §§ 7611(d), 7650(a) and *Elisa B. v. Superior Court*)]. The Court found that the case was not an appropriate one in which to rebut the presumption of natural parenthood with proof that the woman was not the children's biological mother, because she actively participated in causing the children to be conceived with the understanding that she would raise them as her own together with the birth mother, she voluntarily accepted the rights and obligations of parenthood after the children were born, and there were no competing claims to her being the children's second natural parent [*Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 122-125, 33 Cal. Rptr. 3d 46, 117 P.3d 660*]. The Supreme Court's holding that a child could have two natural parents, both of whom are women, was not precluded by the Court's statement in an earlier case that a child can have "only one natural mother" [see *Johnson v. Calvert (1993) 5 Cal. 4th 84, 92, 19 Cal. Rptr. 2d 494, 851 P.2d 776*]. That earlier statement had been made in a case in which the child had an undisputed father and it was necessary for the court to decide between the competing claims of the father's wife, who supplied the ovum, and a surrogate, who gave birth to the child. In that context, the Court's "only one natural mother" language was no more than a rejection of an argument that a child could have *three* parents [*Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 117-119, 33 Cal. Rptr. 3d 46, 117 P.3d 660* ; see *Scott v. Superior Court (2009) 171 Cal. App. 4th 540, 544-545, 89 Cal. Rptr. 3d 843* ("In a same sex domestic partner relationship, a child may have two natural mothers (i.e., a biological mother and a mother meeting the presumed parent criteria in [*Fam. Code*] section 7611); but in a heterosexual relationship, there can be only one mother.")].

For detailed discussion of rebuttable presumptions of parentage under the UPA, see [3][a], [b], *below*.

Another section of the UPA provides that a man who donates semen to a licensed physician and surgeon or to a licensed sperm bank for use in artificial insemination or in vitro fertilization of a woman other than the donor's wife is treated in law as if he were not the natural father of any resulting child [*Fam. Code* § 7613(b); see [4], *below*]. Whether this section also applies to a woman who provides ova used to impregnate another woman is an open question [see *K.M. v. E.G. (2005) 37 Cal. 4th 130, 139, 33 Cal. Rptr. 3d 61, 117 P.3d 673* ("Even if we assume that the provisions of section 7613(b) apply to women who donate ova, the statute does not apply under the circumstances of the present case")]. However, the Supreme Court has held that, even if an ovum donor is to be treated the same as a sperm donor, this section would not apply in a case of gestational surrogacy in which the ovum donor intends to raise the resulting child as her own [*Johnson v. Calvert (1993) 5 Cal. 4th 84, 100, 19 Cal. Rptr. 2d 494, 851 P.2d 776*]. Similarly, the section does not apply to a woman who supplies her ova to impregnate her lesbian partner (using an anonymous sperm donor) in order to produce children who would be raised in their joint home; in such a case, therefore, the genetic relationship between the ovum donor and the children would establish a mother-child relationship [*K.M. v. E.G. (2005) 37 Cal. 4th 130, 139-143, 33 Cal. Rptr. 3d 61, 117 P.3d 673* (if sperm donor is anonymous, child's two parents may both be women)].

For detailed discussion of the effect of artificial insemination on paternity, see [4], *below*. For discussion of surrogacy arrangements, see [5], *below*.

[2] "Conclusive" Presumptions Regarding Father

[a] Presumption That Mother's Husband is Father

A child born to a married woman cohabiting with her husband who is not impotent or sterile is "conclusively" presumed to be the child of the husband [*Fam. Code* § 7540]. The presumption was once truly conclusive for all purposes, and as such, it was a substantive rule of law rather than an evidentiary presumption [*Vincent B. v. Joan R. (1981) 126 Cal. App. 3d 619, 623, 179 Cal. Rptr. 9*]. However, the presumption is now subject to a limited right of rebuttal by blood test evidence or other genetic test evidence only, on a motion brought only by particular persons authorized by statute, including the husband, the mother (but only with the cooperation of an alleged biological father), and the child (through a guardian ad litem) [see *Fam. Code* §§ 7541, 7551; *Rodney F. v. Karen M. (1998) 61 Cal. App. 4th 233, 240, 71 Cal. Rptr. 2d 399* (court-ordered blood test that was not authorized by statute could not rebut presumption); see also *Brian C. v. Ginger K. (2000) 77 Cal. App. 4th 1198, 1216-1219, 92 Cal. Rptr. 2d 294* (application of presumption under *Fam. Code* § 7540 improper where mother had left husband and was cohabiting with another man, who assumed parental responsibilities)].

Blood tests or other genetic tests cannot be used to rebut the presumption of paternity in any case (1) in which the wife was artificially inseminated under the supervision of a licensed physician and with the consent of her husband [see *Fam. Code* § 7613; see also [4], *below*], (2) in which the wife conceived by means of a surgical procedure with the consent of her husband, or (3) in which a final judgment regarding paternity was reached on or before September 30, 1980 [*Fam. Code* § 7541(e)].

The United States Supreme Court, in a case without a majority opinion, has upheld the constitutionality of the "conclusive" presumption of paternity against due process and equal protection challenges [see *Michael H. v. Gerald D. (1989) 491 U.S. 110, 119-130, 133-136, 109 S. Ct. 2333, 105 L. Ed. 2d 91* (alleged biological father and guardian ad litem for child sought determination of paternity over opposition of mother and husband, who were still married and living together and with child in family unit)]. However, five justices refused to foreclose the possibility that a biological father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to and cohabiting with another man at the time of the child's conception and birth [see *Michael H. v. Gerald D. (1989) 491 U.S. 110, 133-136, 156-163, 109 S. Ct. 2333, 105 L. Ed. 2d 91* (Stevens, J., concurring in judgment;

Brennan, J., joined by Blackmun, J., and Marshall, J., dissenting; and White, J., dissenting); *see also Michael M. v. Giovanna F.* (1992) 5 Cal. App. 4th 1272, 1284-1285 n.8, 7 Cal. Rptr. 2d 460 (plurality opinion of Scalia, J., in *Michael H. v. Gerald D.* was not majority opinion and thus not controlling on question of scope of constitutionally protected interest in parent-child relationship)].

The California Supreme Court has found the "conclusive" presumption unconstitutional as applied to some facts [*see Michelle W. v. Ronald W.* (1985) 39 Cal. 3d 354, 358-359, 216 Cal. Rptr. 748, 703 P.2d 88 (putative father did not claim paternity at birth or for four years, during which time mother remained married and continued to live with husband, who fulfilled all parenting obligations)]. Courts are increasingly reluctant to apply the statutory presumption conclusively if there is no intact family interest to protect [*see, e.g., County of Orange v. Leslie B.* (1993) 14 Cal. App. 4th 976, 17 Cal. Rptr. 2d 797; *In re Melissa G.* (1989) 213 Cal. App. 3d 1082, 1089, 261 Cal. Rptr. 894] .

A biological father lacks standing to seek an order for blood tests to overcome the conclusive presumption that the mother's husband is the father, unless the biological father is able to allege facts that would make him a "presumed father" within two years of the child's birth [*see Fam. Code § 7541(b)*]; *see also Fam. Code §§ 7611, 7612* ("presumed father" status)]. Thus, the mother and her husband can prevent the biological father from ever establishing any parental rights over the child, by preventing him from developing a relationship with the child. However, if they permit the biological father to receive the child into his home and hold the child out as his own, the biological father will attain "presumed father" status [*see Fam. Code § 7611(d)*] and will have standing to seek an order for blood tests [*Craig L. v. Sandy S.* (2004) 125 Cal. App. 4th 36, 49-52, 22 Cal. Rptr. 3d 606] .

[b] Presumption Arising From Declaration of Paternity

In a nonmarital situation, there is a presumption of paternity that can be created by the voluntary execution of a declaration of paternity by the mother and the man who alleges (and is alleged) to be the father of the child [*see Fam. Code §§ 7573, 7576*]. For declarations executed on or before December 31, 1996, this presumption is deemed "conclusive" and has the same force and effect as the presumption applicable to the mother's cohabiting husband [*see Fam. Code § 7540*; *see also* [a], *above*]. However, it may be rebutted by any person, but only by blood test or genetic test evidence. A notice of motion for blood tests, supported by a declaration of the moving party stating the factual basis for placing the issue of paternity before the court, must be made within three years from the date the declaration of paternity was executed by either the attesting father or the attesting mother, whichever signature is later [*Fam. Code § 7576(a), (d)*]. This presumption does not override the presumption that the mother's husband is the father [*see Fam. Code § 7540*; *see also* [a], *above*] or the presumption arising from genetic test evidence [*see Fam. Code § 7555*; *see also* [3][b], *below*]. It does, however, override all other statutory presumptions [*Fam. Code § 7576(e)*].

For voluntary declarations of paternity executed on or after January 1, 1997, the governing statutes do not characterize the declaration in terms of creating any particular type of presumption. Instead, they provide that a completed voluntary declaration of paternity that has been filed with the State Department of Child Support Services "shall establish the paternity of the child and shall have the same force and effect as a judgment of paternity issued by a court of competent jurisdiction" [*Fam. Code § 7573*; *see Kevin Q. v. Lauren W.* (2009) 175 Cal. App. 4th 1119, 1136-1139, 95 Cal. Rptr. 3d 477 (declaration of paternity under *Fam. Code § 7573* rebuts any presumption of paternity arising under *Fam. Code § 7611*)]. The voluntary declaration must be recognized as a basis for the establishment of an order for child custody, visitation, or child support, with certain statutory exceptions [*Fam. Code § 7573*]. These exceptions, which include the rules for declarations executed on or before December 31, 1996 (discussed immediately above), also include a special rule applicable to parents who are minors [*see Fam. Code § 7577*], and provisions for rescinding or setting aside the declaration [*see Fam. Code §§ 7573, 7575-7577*].

Although California law requires a voluntary declaration of paternity to be executed on a form developed by the California Department of Child Support Services [*see Fam. Code § 7574(a)*], a substantially similar declaration executed in another state may not be denied effect in California simply because it was not executed on a California form

[*In re Mary G.* (2007) 151 Cal. App. 4th 184, 198-202, 59 Cal. Rptr. 3d 703 (applying Fam. Code §§ 7611 and 7570 *et seq.* to deny presumed-father status solely because voluntary acknowledgment of paternity was made outside California would violate constitutional equal protection and full faith and credit principles)].

Either parent may rescind a post-1996 voluntary declaration within 60 days of the execution of the declaration by the attesting father or attesting mother, whichever signature is later, unless a court order for custody, visitation, or child support has been entered in an action in which the signatory was a party [Fam. Code § 7575(a)].

The set-aside provisions for post-1996 declarations permit a motion for genetic tests to be filed no later than two years from the date of the child's birth by (1) a local child support agency, (2) the mother, or (3) the man who signed the voluntary declaration as the child's father [Fam. Code § 7575(b)(3)(A); *see, e.g., County of Orange v. Superior Court* (2007) 155 Cal. App. 4th 1253, 1262, 66 Cal. Rptr. 3d 689 (trial court erred in granting request for genetic testing filed more than five years after child's birth)]. A motion for genetic tests may also be filed by any participant in any action to determine the existence or nonexistence of the father and child relationship [see Fam. Code § 7630], or in any action to establish an order for child custody, visitation, or child support based on the voluntary declaration [Fam. Code § 7575(b)(3)(A); *Solano County Health & Soc. Servs. Dep't v. Adrian L. (In re J.L.)* (2008) 159 Cal. App. 4th 1010, 1020-1021, 72 Cal. Rptr. 3d 27]. A local child support agency's authority to seek genetic tests is limited to circumstances in which there is a conflict between a voluntary acknowledgment of paternity and a judgment of paternity, or a conflict between two or more voluntary acknowledgments of paternity. [Fam. Code § 7575(b)(3)(B)]. If the court finds that the conclusions of all the experts based on the results of the genetic tests are that the man who signed the voluntary declaration is not the father of the child, the court may set aside the voluntary paternity declaration, unless the court determines that denial of the action to set aside the voluntary declaration of paternity is in the best interest of the child [Fam. Code § 7575(b)(1); *see Fam. Code § 7575(b)(2)* (if action is denied, court must state on record basis for denial of action and any supporting facts)]. In determining the best interest of the child, the court must consider all of the following factors [Fam. Code § 7575(b)(1)]:

- The age of the child.
- The length of time since the execution of the voluntary declaration of paternity by the man who signed the voluntary declaration.
- The nature, duration, and quality of any relationship between the man who signed the voluntary declaration and the child, including the duration and frequency of any time periods during which the child and the man who signed the voluntary declaration resided in the same household or enjoyed a parent-child relationship.
- The request of the man who signed the voluntary declaration that the parent-child relationship continue.
- Notice by the biological father of the child that he does not oppose preservation of the relationship between the man who signed the voluntary declaration and the child.
- The benefit or detriment to the child in establishing the biological parentage of the child.
- Whether the conduct of the man who signed the voluntary declaration has impaired the ability to ascertain the identity of, or get support from, the biological father.
- Additional factors deemed by the court to be relevant to its determination of the best interest of the child.

The above provisions do not preclude either parent, or a local child-support agency, from seeking set-aside relief under the general provisions for relief from judgments [see *Code Civ. Proc.* § 473; *County of Los Angeles v. Sheldon P.* (2002) 102 Cal. App. 4th 1337, 1343-1346, 126 Cal. Rptr. 2d 350 (county maintaining local child support agency has standing to bring *Code Civ. Proc.* § 473 motion to set aside voluntary declaration of paternity, but voluntary declarant must be made party to set-aside proceeding)]. If the court sets aside a post-1996 declaration, it must order that the mother, child, and alleged father submit to genetic tests and proceed as in the case of a motion for genetic tests, as described immediately above [see *Fam. Code* § 7575(c)]. In addition, the Uniform Parentage Act provides detailed procedures for setting aside a judgment of paternity [*Fam. Code* § 7645 *et seq.*; see *County of Fresno v. Sanchez* (2005) 135 Cal. App. 4th 15, 19-20, 37 Cal. Rptr. 3d 192 (enactment of comprehensive statutory scheme for setting aside paternity judgments under *Fam. Code* § 7645 *et seq.*, which took effect Jan. 1, 2005, vitiates *County of Los Angeles v. Navarro* (2004) 120 Cal. App. 4th 246, 248-250, 14 Cal. Rptr. 3d 905, which had relied on equitable considerations in granting relief from factually wrong paternity judgment after expiration of time for relief under *Code Civ. Proc.* § 473)]. For discussion, see [6], *below*.

For further discussion of voluntary paternity declarations, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, Ch. 31, *Establishing Parentage* (2d ed. Matthew Bender).

[3] Rebuttable Presumptions Regarding Father

[a] Statutory Presumptions

In addition to the "conclusive" presumptions arising from the mother's marriage and a declaration of paternity [see [2], *above*], there are four rebuttable presumptions that a man is the biological father of a child:

- First, a man is presumed to be the father if (1) he and the child's natural mother are or have been married to each other; and (2) the child is born either during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, divorce, or decree of separation [*Fam. Code* § 7611(a)].
- Second, a presumption of paternity arises if before the child's birth, the man and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law (although the attempted marriage is or could be declared invalid); and the child is born during the attempted marriage or either (1) within 300 days of its termination by death, annulment, declaration of invalidity, or divorce, if the attempted marriage could be declared invalid only by a court; or (2) within 300 days after the termination of cohabitation if the attempted marriage is invalid without a court order [*Fam. Code* § 7611(b)].
- Third, a man is the presumed father if, after the child's birth, he and the child's natural mother have married or attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either (1) with his consent, the man is named as the child's father on the birth certificate; or (2) he is obligated to support the child under a written voluntary promise or by court order [*Fam. Code* § 7611(c)].
- Fourth, a presumption of fatherhood applies if a man receives the child into his home and openly holds out the child as his natural child [*Fam. Code* § 7611(d); see *Elisa B. v. Superior Court* (2005) 37 Cal. 4th 108, 119-125, 33 Cal. Rptr. 3d 46, 117 P.3d 660 (presumption of motherhood applies to woman who agreed to raise children with her lesbian partner, supported her partner's artificial insemination using anonymous donor, and received resulting children into her home and held them out as her own); see, e.g., *In re A.A.* (2003) 114 Cal. App. 4th 771, 784, 7 Cal. Rptr. 3d 755 (dependency case)]. The receipt of the child into the home must be sufficiently unambiguous as to constitute a clear declaration regarding the

nature of the relationship, but it need not continue for any specific duration [*Charisma R. v. Kristina S.* (2009) 175 Cal. App. 4th 361, 374, 96 Cal. Rptr. 3d 26 (parties cohabited and shared parental responsibilities for first thirteen weeks of child's life; although cohabitation for an extended duration may strengthen a claim for presumed parent status, *Fam. Code § 7611(d)* does not require that cohabitation or coparenting continue for any particular period of time)]. But the receipt of the child into the home must be actual; there is no doctrine of "constructive receipt," by which the presumption would be established without actual receipt if the father is prevented from receiving the child into his home by the mother's acts, such as placing the child for adoption [*Adoption of Kelsey S.* (1992) 1 Cal. 4th 816, 825-830, 823 P.2d 1216]. However, a father in this situation may have certain constitutional protections [see [b], below]. "Openly" holding out a child as one's own does not necessarily entail a public declaration of parenthood, and it is not necessarily negated by admitting to school officials, social workers, or police that there is no biological relationship. With an older child (over age two), the child's long-held belief that a parent-child relationship exists may be the most compelling evidence that the child was held out to the community as the person's own [see *Kern County Dep't of Human Servs. v. Monica G. (In re Salvador M.)* (2003) 111 Cal. App. 4th 1353, 1357-1359, 4 Cal. Rptr. 3d 705 (applying "presumed father" principles to woman seeking "presumed mother" status)].

A fifth statutory rebuttable presumption became inoperative on January 1, 1997. Under that provision, a man was presumed to be the father of a child who was born and resided in a nation with which the United States engaged in an Orderly Departure Program (a program under the aegis of the United Nations, designed to establish the paternity of Amerasian children in Vietnam), if the father acknowledged paternity in a declaration under penalty of perjury [*Fam. Code § 7611(e)*; see *Code Civ. Proc. § 2015.5* (declaration requirements)].

A sixth statutory rebuttable presumption applies to a child (other than a clone) who is conceived, using a man's genetic material, after the man's death. This presumption, which applies only if statutory conditions are met, is relevant only for determining rights to property to be distributed on the death of the presumed father [*Fam. Code § 7611(f)*; *Prob. Code § 249.5*].

If two or more of these presumptions arise and conflict with each other, or with a claim or presumption in favor of the child's natural or adoptive parent [see *Fam. Code § 7610*], the presumption that, on the facts, is founded on the weightier considerations of policy and logic will control [*Fam. Code § 7612(b)*; see *In re A.A.* (2003) 114 Cal. App. 4th 771, 781, 788, 7 Cal. Rptr. 3d 755 (in dependency case involving two competing claims of presumed-father status under *Fam. Code § 7611(d)*, only one man attained that status and trial court did not need to engage in weighing process under *Fam. Code § 7612(b)*)].

If none of the presumptions described above is applicable, then a man may not be presumed to be the biological father of a child if either of the following is true [*Fam. Code § 7611.5*]:

- The child was conceived as a result of rape [see *Penal Code § 261*] and the father was convicted of that crime.
- The child was conceived as a result of unlawful sexual intercourse [see *Penal Code § 261.5*], the father was convicted of that crime, and the mother was under age 15 and the father was age 21 or older at the time of conception.

Apart from the statutory presumptions described above, under the doctrine of "parentage by estoppel," a man who receives a child into his home and holds the child out as his own may be obligated to pay child support, even if it is established that the man was not the child's biological father. In one case, for example, a man had held himself out to be a child's natural father for over 12 years, and the child never was informed he had any other father. Under the circumstances, the court of appeal found that there was substantial evidence to estop the man from denying paternity,

whether or not the statutory presumption of paternity could be rebutted [*In re Marriage of Pedregon* (2003) 107 Cal. App. 4th 1284, 1287-1291, 132 Cal. Rptr. 2d 861] . At least one court of appeal, however, has declined to apply the doctrine of parentage by estoppel to a man who acted without knowledge that he was not truly the child's biological parent. That court reasoned that it would be unfair to apply the equitable doctrine of estoppel to impose a support obligation on an individual whose conduct in receiving the child into his home and holding the child out as his own was based on his *mistaken* belief that he actually was the child's natural father [*County of San Diego v. Arzaga* (2007) 152 Cal. App. 4th 1336, 1347-1348, 62 Cal. Rptr. 3d 329] .

[b] Rebuttal of Statutory Presumptions

Any of the presumptions described above is a rebuttable presumption affecting the burden of proof and may be rebutted only by clear and convincing evidence and only in an appropriate case [*Fam. Code* § 7612(a); see *In re A.A.* (2003) 114 Cal. App. 4th 771, 788, 7 Cal. Rptr. 3d 755 (in dependency case in which presumed father under *Fam. Code* § 7611(d) established family with minor child, as matter of law, presumption not rebutted by clear and convincing evidence that another party was biological father); *In re Kiana A.* (2001) 93 Cal. App. 4th 1109, 1118-1121, 113 Cal. Rptr. 2d 669 (though results of genetic testing constitute clear and convincing evidence, it does not follow that evidence will rebut presumption in every case; but only in appropriate case)].

With respect to the presumption arising when a man receives a child into his home and openly holds the child out as his own [see *Fam. Code* § 7611(d)], the California Supreme Court has held that the presumption is not necessarily rebutted when a presumed father seeks parental rights but admits that he is not the child's biological father. In particular, the statutory rebuttal provision [*Fam. Code* § 7612(a)] was not intended to apply when no other man claims parental rights and the child would be rendered fatherless by rebuttal of the presumption. Those circumstances are not "an appropriate action" in which to apply the rebuttal provision. Instead, the Supreme Court has suggested, the Legislature intended for the rebuttal provision to apply in an action in which "another candidate is vying for parental rights and seeks to rebut a presumption (under *Fam. Code* § 7611(d)) in order to perfect his claim, or in which a court decides that the legal rights and obligations of parenthood should devolve upon an unwilling candidate" [*In re Nicholas H.* (2002) 28 Cal. 4th 56, 62-70, 120 Cal. Rptr. 2d 146, 46 P.3d 932 (man does not lose status as presumed father by admitting he is not biological father); see *In re Raphael P.* (2002) 97 Cal. App. 4th 716, 734, 118 Cal. Rptr. 2d 610 (when there is only one man seeking to establish paternity based on having received child into his home under *Fam. Code* § 7611(d), genetic evidence that man is not child's biological father will not necessarily rebut presumption); *In re Kiana A.* (2001) 93 Cal. App. 4th 1109, 1118-1121, 113 Cal. Rptr. 2d 669 (in applying paternity presumptions, extant father-child relationship is to be preserved at cost of biological ties)]. The California Supreme Court applied similar reasoning in a case in which a woman had agreed to raise children with her lesbian partner, had supported her partner's artificial insemination using an anonymous donor, and had received the resulting children into her home and held them out as her own [*Elisa B. v. Superior Court* (2005) 37 Cal. 4th 108, 119-125, 33 Cal. Rptr. 3d 46, 117 P.3d 660 ; see *Fam. Code* §§ 7611(d), 7650(a)]. The Court found that the case was not an appropriate one in which to rebut the presumption of natural parenthood with proof that the woman was not the children's biological mother, because she had actively participated in causing the children to be conceived with the understanding that she would raise them as her own together with the birth mother, she had voluntarily accepted the rights and obligations of parenthood after the children were born, and there were no competing claims to her being the children's second natural parent [*Elisa B. v. Superior Court* (2005) 37 Cal. 4th 108, 122-125, 33 Cal. Rptr. 3d 46, 117 P.3d 660] .

When two men claim fatherhood and both are presumed fathers under *Fam. Code* § 7611, the biological paternity of one presumed father does not necessarily rebut the other man's presumption of paternity. A court must instead consider whether rebuttal of the presumption would be appropriate in the circumstances of the case, and it is within the court's discretion to find that the presumption in favor of the nonbiological father controls [*In re Jesusa V.* (2004) 32 Cal. 4th 588, 603-612, 10 Cal. Rptr. 3d 205, 85 P.3d 2 (failing to accord determinative weight to biological relationship with child does not violate due process rights of man with biological paternity); see *Craig L. v. Sandy S.* (2004) 125 Cal. App. 4th 36, 49-52, 22 Cal. Rptr. 3d 606 (state's interest in preserving stability of marriages will not necessarily

outweigh interests of man and child with whom he has established paternal relationship under *Fam. Code* § 7611(d)]. However, if the mother and the biological father have signed and filed a valid declaration of paternity under *Fam. Code* § 7573 (see 100.11[2][b], above), that declaration has the same force as a judgment of paternity and rebuts any presumption arising under *Fam. Code* § 7611 [Kevin Q. v. Lauren W. (2009) 175 Cal. App. 4th 1119, 1136-1139, 95 Cal. Rptr. 3d 477].

The rebuttable presumptions also are rebutted by a court decree establishing paternity of the child by another man [*Fam. Code* § 7612(c)]. Paternity may be established for purposes of *Fam. Code* § 7612(c) by, for example, a stipulated judgment of paternity in favor of another man entered in another case [see, e.g., *Barkaloff v. Woodward* (1996) 47 Cal. App. 4th 393, 399, 55 Cal. Rptr. 2d 167]. A mere determination made in the same case, however, that another man is the biological father, is insufficient for this purpose [*In re A.A.* (2003) 114 Cal. App. 4th 771, 789, 7 Cal. Rptr. 3d 755 (trial court improperly used determination of paternity made in same case to find rebuttal, although "judgment" on determination did not exist until that case was concluded)].

[c] Presumption Based on Constitutional Rights

In addition to the statutory presumptions discussed in [a], above, federal constitutional guarantees of equal protection and due process for unwed fathers require that a presumption of paternity also apply in situations in which the man has promptly come forward and demonstrated as full a commitment to his parental responsibilities as the biological mother allowed and the circumstances permitted, within a short time after he knew or should have known of the existence of the child or the pregnancy [*Adoption of Michael H.* (1995) 10 Cal. 4th 1043, 1060, 43 Cal. Rptr. 2d 445, 898 P.2d 891 ; *Adoption of Kelsey S.* (1992) 1 Cal. 4th 816, 849, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]. Thus, an alleged father who acts promptly, and who is prevented by the mother's conduct from meeting the statutory requirements for presumed-father status, must be permitted standing to bring an action to establish his paternity (and to rebut the mother's husband's competing presumption of paternity) if the child was conceived or born while the mother was not married to her husband [*Gabriel P. v. Suedi D.* (2006) 141 Cal. App. 4th 850, 859-861, 46 Cal. Rptr. 3d 437]. Similarly, an alleged father's delay in asserting his constitutional paternity rights will not forfeit those rights if the delay is the result of violent coercion by the presumed father [*Solano County Health & Soc. Servs. Dep't v. Adrian L. (In re J.L.)* (2008) 159 Cal. App. 4th 1010, 1022-1025, 72 Cal. Rptr. 3d 27]. This constitutional protection is not available, however, to a father who fails to promptly come forward to offer support, but rather attempts to assume his parental responsibilities many months after learning of the pregnancy [*Adoption of Michael H.* (1995) 10 Cal. 4th 1043, 1060, 43 Cal. Rptr. 2d 445, 898 P.2d 891 ; *In re Jason J.* (2009) 175 Cal. App. 4th 922, 932-933, 96 Cal. Rptr. 3d 625 (biological father did not qualify as father under *Adoption of Kelsey S.* (1992) 1 Cal. 4th 816, 849, 4 Cal. Rptr. 2d 615, 823 P.2d 1216, because "he points to no evidence he promptly stepped forward to assume any parental responsibilities, let alone full parental responsibilities"); *Adoption of Arthur M.* (2007) 149 Cal. App. 4th 704, 719-721, 57 Cal. Rptr. 3d 259]. Similarly, this constitutional protection is unavailable to a natural father who abandons his parental responsibilities and formally waives his parental rights when a guardianship is established for the child [*In re Charlotte D.*, (2009) 45 Cal. 4th 1140, 1147-1151, 90 Cal. Rptr. 3d 724, 202 P.3d 1109]. And the constitutional protection will not be afforded to a biological father whose involvement in criminal activities, resulting in incarceration, is the primary factor preventing him from assuming full parental responsibilities [*Adoption of O.M.*, (2008) 169 Cal. App. 4th 672, 680-681, 87 Cal. Rptr. 3d 135 (although mother broke off relationship with child's biological father, father's ability to demonstrate commitment to parental responsibilities was impeded to far greater extent by predictable consequences of his own criminal activity)].

An alleged father does not have a constitutionally protected interest in establishing a relationship with his biological child if the child was born to a woman who was married to another man at the time of the child's conception and birth. In such a case, the fact that the alleged father is effectively prevented from establishing a relationship with the child by the child's mother will not change this result, if he otherwise has no recognized basis for asserting paternity [*Dawn D. v. Superior Court* (1998) 17 Cal. 4th 932, 939-944, 72 Cal. Rptr. 2d 871, 952 P.2d 1139 ; *Gabriel P. v. Suedi D.* (2006) 141 Cal. App. 4th 850, 860-861, 46 Cal. Rptr. 3d 437]. For further discussion of the constitutional ramifications

of the presumptions of paternity, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, Ch. 171, *Termination of Parental Rights* (2d ed. Matthew Bender).

[4] Effect of Artificial Insemination

A husband is treated as if he were the biological father of a child conceived by his wife through artificial insemination with semen donated by another man, if (1) the insemination is performed under the supervision of a licensed physician, and (2) the husband has given his consent to the procedure [*Fam. Code § 7613(a)*]. The objective of this statutory provision is to establish two legal parents for the child [*Alexandria S. v. Pacific Fertility Medical Center, Inc.* (1997) 55 Cal. App. 4th 110, 126, 64 Cal. Rptr. 2d 23 ; cf. *Dunkin v. Boskey* (2000) 82 Cal. App. 4th 171, 196-198, 98 Cal. Rptr. 2d 44 (written agreement between unmarried parties to grant paternity rights to male party regarding child conceived by artificial insemination is enforceable to avoid unjust enrichment of mother, by awarding male party reimbursement of amounts he expended in performance of agreement)].

The husband's consent to artificial insemination must be in writing and signed by both husband and wife. The physician must certify their signatures and the date of the insemination, and the physician must retain the husband's consent as part of the medical record, which must be kept confidential and in a sealed file. However, the physician's failure to take these actions will not affect the father-child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only on an order of the court for good cause shown [*Fam. Code § 7613(a)*].

The donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in artificial insemination or in vitro fertilization of a woman other than the donor's wife is treated by statute as if he were not the biological father of the child conceived pursuant to the artificial insemination [*Fam. Code § 7613(b)*]; see *Robert B. v. Susan B.* (2003) 109 Cal. App. 4th 1109, 1113-1114, 135 Cal. Rptr. 2d 785 (*Fam. Code § 7613(b)* does not apply to man who provides semen solely for purpose of inseminating his own wife, even if resulting embryo is erroneously implanted in another woman)]. This provision does not apply, however, to a man who supplies sperm for use in a surrogacy arrangement to produce a child whom he and his wife will raise in their joint home [*Johnson v. Calvert* (1993) 5 Cal. 4th 84, 100, 19 Cal. Rptr. 2d 494, 851 P.2d 776 ; see *K.M. v. E.G.* (2005) 37 Cal. 4th 130, 139-141, 33 Cal. Rptr. 3d 61, 117 P.3d 673 ("there is nothing to indicate that [*Fam. Code § 7613(b)*] would apply if a man provided semen to be used to impregnate his unmarried partner in order to produce a child that would be raised in their joint home"); but see *Steven S. v. Deborah D.* (2005) 127 Cal. App. 4th 319, 326, 25 Cal. Rptr. 3d 482 (*Fam. Code § 7613(b)* applies even if semen donor was known to impregnated woman and they had had sexual relationship; parties did not live together or plan to raise child in semen donor's home)].

Under the statutory procedure, the insemination (including the donation of semen) must be performed under the supervision of a licensed physician [*Fam. Code § 7613(a)*]. If the semen is provided and the woman inseminated privately, the statutory presumption does not operate and the donor may establish his paternity of the child [*Jhordan C. v. Mary K.* (1986) 179 Cal. App. 3d 386, 391-396, 224 Cal. Rptr. 530 (rejecting constitutional challenge to physician requirement)]. For further discussion of issues concerning artificial insemination, see § 100.220[1][b].

Pre-conception agreements establishing parentage in the context of artificial insemination or other means of reproductive assistance are to be distinguished from *post-birth* agreements regarding parenthood in the context of normal sexual reproduction. A pre-conception agreement generally involves a situation in which the child would not have been born without the deliberative, acted-on intention of the couple who sought reproductive assistance [*Johnson v. Calvert* (1993) 5 Cal. 4th 84, 93, 19 Cal. Rptr. 2d 494, 851 P.2d 776 (honoring pre-conception surrogacy agreement)]. In contrast, when a child is born as the result of procreation through normal sexual reproduction, public policy generally prevents a court from terminating the father's parental rights pursuant to the parents' post-birth stipulation made as a matter of convenience to end father's contact with, and obligation to support, the child [*Kristine M. v. David P.* (2006) 135 Cal. App. 4th 783, 786, 788-791, 37 Cal. Rptr. 3d 748 (public policies favoring creation of

father-child relationship as source of emotional and financial support, and declaring preeminence of parent's obligation to support his or her minor child, trump any policy that would favor private ordering of parenthood after child's birth)].

[5] Surrogate Parenting Arrangements

Some couples who desire but are unable to bear children have turned to the use of surrogates, often paying substantial sums of money in exchange for the gestation of a child. Under a typical arrangement, the surrogate mother agrees to provide the gestation function and to renounce any parental rights that she might otherwise be entitled to, in exchange for monetary consideration. Two basic types of surrogate arrangements have come before the California courts.

Under the first type of surrogate arrangement, which involves in-vitro fertilization, fertilization of a human egg occurs in a laboratory. Under this process, an egg can be removed from one woman, fertilized with the intended father's sperm in a petri dish, and then implanted into the uterus of a different woman, who carries the fetus and gives birth to the child [see, e.g., *Johnson v. Calvert* (1993) 5 Cal. 4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776]. This arrangement has been called "gestational" surrogacy [see *In re Marriage of Moschetta* (1994) 25 Cal. App. 4th 1218, 1222, 30 Cal. Rptr. 2d 893]. If a woman who wants a child is unable to carry the fetus, her fertilized egg may be implanted in the uterus of a gestational surrogate. Conversely, the woman desiring a child might be unable to ovulate; in that case, the fertilized egg of the surrogate could be implanted in her uterus. Another variation of gestational surrogacy involves implantation into a surrogate of fertilized ovum in which both sperm and egg come from anonymous donors [see *In re Marriage of Buzzanca* (1998) 61 Cal. App. 4th 1410, 1421, 1428, 72 Cal. Rptr. 2d 280].

Under the second type of surrogacy arrangement, a child is produced from the egg of the surrogate mother and the sperm of the intended father. This arrangement has been called "traditional surrogacy" [see *In re Marriage of Moschetta* (1994) 25 Cal. App. 4th 1218, 1221-1222, 30 Cal. Rptr. 2d 893]. In traditional surrogacy, the surrogate is unquestionably the biological mother of the child. The typical surrogate agreement in such a case requires the surrogate to acknowledge the sperm donor's paternity and to surrender the child to the donor and, if he is married, to his wife [see, e.g., *Adoption of Matthew B.* (1991) 232 Cal. App. 3d 1239, 1252, 284 Cal. Rptr. 18, cert. denied sub nom. *Nancy B. v. Charlotte M.* (1992) 503 U.S. 991]. In this type of surrogacy arrangement, the donor's wife must adopt the child to establish her parent-child relationship with the child. In addition, because of the possible application of statutory law against the sperm donor as father [see *Fam. Code* § 7613(b); see also § 100.221[1][c]], both the sperm donor and his wife may be required to adopt the child by independent adoption (rather than just the wife by stepparent adoption) [see *Sherwyn v. Department of Social Services* (1985) 173 Cal. App. 3d 52, 56-57, 218 Cal. Rptr. 778].

Under either type of surrogacy arrangement, if the surrogate changes her mind and refuses to fulfill her obligations under the contract, the court must first determine the rights of the parties under existing statutory law. Then the court must consider the effect of the contract on those rights [see *Johnson v. Calvert* (1993) 5 Cal. 4th 84, 89, 19 Cal. Rptr. 2d 494, 851 P.2d 776].

In a case involving in vitro fertilization and gestational surrogacy, the California Supreme Court has ruled that a child borne by a surrogate but produced by the egg and sperm of a married couple is the child of the woman who was intended to be the mother by the parties. In the case before the Court, the claim of the surrogate that she was the "mother of the child" because she gave birth to the child was rejected by the Court, which determined that the wife of the couple (whose egg was used in the process) was the intended mother of the child under their surrogacy arrangement [*Johnson v. Calvert* (1993) 5 Cal. 4th 84, 93, 19 Cal. Rptr. 2d 494, 851 P.2d 776]. In that case (which did not require adoption of the child), the Court upheld the basic validity and enforcement of surrogacy contracts against the argument that they are in violation of public policy [*Johnson v. Calvert* (1993) 5 Cal. 4th 84, 95, 19 Cal. Rptr. 2d 494, 851 P.2d 776]. In another case, a woman supplied ova to impregnate her lesbian partner in order to produce children who would be raised in their joint home (they were registered domestic partners [see *Fam. Code* § 297.5 et seq.]). Since a child's two parents may both be women, and there was no possible third parent (the sperm donor was anonymous), the Supreme Court found that both partners were mothers of the resulting children--one because she provided the ova, and

the other because she gave birth. Under the circumstances, it was unnecessary to examine the partners' intentions about maternity, since there was no need to choose between the two possible parents [*K.M. v. E.G. (2005)* 37 Cal. 4th 130, 142-143, 33 Cal. Rptr. 3d 61, 117 P.3d 673] .

A variation on the in-vitro procedure involves implantation into a surrogate of fertilized ovum in which both sperm and egg come from anonymous donors. In such a case, although neither the couple contracting for the child nor the surrogate mother is genetically related to the child, the couple will be deemed the child's parents [*In re Marriage of Buzzanca (1998)* 61 Cal. App. 4th 1410, 1421, 1428, 72 Cal. Rptr. 2d 280] .

One appellate court has refused to find a contractual exception to the consent requirements of adoption law in the case of "traditional" surrogacy. If a surrogate who is the child's true biological mother subsequently changes her mind and refuses to consent to the adoption of the child by the father's wife, the adoption may not proceed absent some other ground for terminating the surrogate's parental rights [*In re Marriage of Moschetta (1994)* 25 Cal. App. 4th 1218, 1228-1231, 30 Cal. Rptr. 2d 893] .

For a surrogacy agreement and a summary of legal issues involved in their enforcement and the determination of paternity and maternity, see § 100.221.

Pre-conception agreements establishing parentage in the context of surrogacy arrangements or other means of reproductive assistance are to be distinguished from *post-birth* agreements regarding parenthood in the context of normal sexual reproduction. A pre-conception agreement generally involves a situation in which the child would not have been born without the deliberative, acted-on intention of the couple who sought reproductive assistance [*Johnson v. Calvert (1993)* 5 Cal. 4th 84, 93, 19 Cal. Rptr. 2d 494, 851 P.2d 776 (honoring pre-conception surrogacy agreement)]. In contrast, when a child is born as the result of procreation through normal sexual reproduction, public policy generally prevents a court from terminating the father's parental rights pursuant to the parents' post-birth stipulation made as a matter of convenience to end father's contact with, and obligation to support, the child [*Kristine M. v. David P. (2006)* 135 Cal. App. 4th 783, 786, 788-791, 37 Cal. Rptr. 3d 748 (public policies favoring creation of father-child relationship as source of emotional and financial support, and declaring preeminence of parent's obligation to support his or her minor child, trump any policy that would favor private ordering of parenthood after child's birth)].

[6] Vacating Paternity Judgment on Basis of Genetic Testing

In addition to any other procedures available to set aside a paternity judgment [Fam. Code § 7649; see [2][b], above], a judgment establishing paternity may be set aside or vacated on motion by the person identified in the judgment as the mother (the "previously established mother"), the person identified in the judgment as the father (the "previously established father"), the child, or the legal representative of any of those persons, if genetic testing indicates that the previously established father is not the biological father of the child [Fam. Code § 7646(a); see Fam. Code §§ 7645(c), (d) (definitions), 7647, 7647.5, 7647.7 (procedure on motion)]. In the absence of actual genetic testing, the court lacks authority to vacate the paternity judgment; thus, if genetic test results are not available because of the mother's noncompliance with a testing order or for any other reason, the paternity judgment cannot be vacated [*San Mateo County Dep't of Child Support Servs. v. Clark, (2008)* 168 Cal. App. 4th 834, 841-843, 85 Cal. Rptr. 3d 763] .

For purposes of this remedy, a paternity "judgment" includes any judgment, order, or decree entered in a California court that establishes paternity, including a determination of paternity made pursuant to a petition filed under Welf. & Inst. Code §§ 300, 601, or 602, or a voluntary declaration of paternity. However, a judgment in any action for marital dissolution, legal separation, or nullity is not considered a "judgment" for purposes of these set-aside provisions [Fam. Code § 7645(b)]. Furthermore, a court may not set aside or vacate (1) any judgment made by a tribunal of another state, or (2) a California judgment, if genetic tests conducted prior to the judgment did not exclude the previously established father as the biological father [Fam. Code § 7648.3].

A motion to set aside or vacate a judgment under these provisions must be filed within one of the following time periods [*Fam. Code § 7646(a)*]:

- If paternity was established by a voluntary declaration of paternity, a two-year period beginning on the date of the child's birth. The court may, however, consider an untimely motion if the declaration of paternity was procured by extrinsic fraud, such as when the movant has been fraudulently kept ignorant or otherwise prevented from denying paternity [*see County of Orange v. Superior Court (2007) 155 Cal. App. 4th 1253, 1261, 66 Cal. Rptr. 3d 689* (extrinsic fraud not established by allegations that movant and child's mother were not "mutually exclusive" while they were in a relationship, and that movant had heard from unnamed individuals that child did not look like him)].
- If the paternity judgment was entered before January 1, 2005, on the default of the established father, the two-year period from January 1, 2005, to December 31, 2006, inclusive [*Fam. Code § 7646(a)(3)*]. Formerly, this time period was expressed as "a two-year period commencing with the enactment of" the relevant statute [*see former Fam. Code § 7646(a)(3)*]. Under a strict interpretation of this former provision, a motion to set aside a paternity judgment was untimely if filed more than two years after the September 28, 2004, *enactment* of the former statute, even if filed within two years of the January 1, 2005, *effective date* of the statute [*see, e.g., County of Sacramento v. Llanes (2008) 168 Cal. App. 4th 1165, 1174-1176, 86 Cal. Rptr. 3d 158*]. The statute was amended, effective January 1, 2009, to express the relevant time period as "a two-year period from January 1, 2005, to December 31, 2006, inclusive" [*Fam. Code § 7646(a)(3)*, as amended by Stats. 2008, ch. 58, § 1]. The amendment also provides that a court may reconsider a motion to set aside a paternity judgment if (1) the motion was filed between September 24, 2006, and December 31, 2006, inclusive; (2) the motion was denied solely on the basis that it was untimely; and (3) the request for reconsideration is filed on or before December 31, 2009 [*Fam. Code § 7646(c)*].
- In all other cases, a two-year period beginning on the date on which the previously established father knew or should have known of the judgment, or when he knew or should have known of the existence of an action to adjudicate the issue of paternity, whichever is first.

If the court finds that the conclusions of all of the experts, based on the results of genetic tests [*see Fam. Code § 7550 et seq.*], indicate that the previously established father is not the biological father of the child, the court may, nevertheless, deny the motion if it determines that denial of the motion is in the best interest of the child, after considering the following factors [*Fam. Code § 7648; see Fam. Code § 7648.1* (basis for denial and supporting facts to be stated on record)]:

- The age of the child.
- The length of time since the entry of the judgment establishing paternity.
- The nature, duration, and quality of any relationship between the previously established father and the child, including the duration and frequency of any periods during which the child and the previously established father resided in the same household or enjoyed a parent-child relationship.
- The request of the previously established father that the parent-child relationship continue.
- Notice by the biological father of the child that he does not oppose preservation of the relationship between the previously established father and the child.

- The benefit or detriment to the child in establishing the biological parentage of the child.
- Whether the conduct of the previously established father has impaired the ability to ascertain the identity of, or get support from, the biological father.
- Additional factors deemed by the court to be relevant to its determination of the best interest of the child.

If the court grants the motion, it must also vacate any order for child support and arrearages issued in the basis of the vacated judgment. However, the previously established father has no right of reimbursement for any support paid prior to the granting of the motion [*Fam. Code § 7648.4*; see *County of Los Angeles v. James (2007) 152 Cal. App. 4th 253, 256-257, 60 Cal. Rptr. 3d 880* (no exception to *Fam. Code § 7648.4*'s reimbursement bar for declared father who filed motion to set aside paternity decree before that statute's enactment)].

These procedures to set aside or vacate paternity judgments do not establish a basis for the termination of any adoption, and they do not affect any obligation of an adoptive parent to an adoptive child [*Fam. Code § 7648.8*]. Similarly, these procedures do not establish a basis for setting aside or vacating a judgment establishing paternity with regard to a child conceived by artificial insemination [see *Fam. Code § 7613*] or a child conceived pursuant to a surrogacy agreement [*Fam. Code § 7648.9*]. Finally, a distribution from the estate of a decedent, or a payment made by a trustee, insurance company, pension fund, or any other person or entity that was made in good-faith reliance on a final paternity judgment may not be set aside or subject to direct or collateral attack because of the entry of an order setting aside or vacating the paternity judgment under these provisions. The person or entity that has made such a distribution or payment does not incur any liability because of the distribution or payment or because of the entry of an order setting aside or vacating the paternity judgment [*Fam. Code § 7649.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act



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DIVISION VII: PERSONAL TRANSACTIONS
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31-100 California Legal Forms--Transaction Guide § 100.12

§ 100.12 Rights and Obligations Arising From Parent-Child Relationship

The mother or father in a parent-child relationship has various rights, privileges, duties, and obligations imposed by law [see *Fam. Code § 7601*], including the right to custody [see *Fam. Code § 3010*; see also § 100.20 et seq.] and the duty of support [see *Fam. Code § 3900*; see also § 100.30 et seq.]. However, the parent's control over a child is limited to some extent by the state [see § 100.21[1]] and may even be partially or completely terminated by the emancipation of the minor [see *Fam. Code § 7000 et seq.*; see also § 100.50 et seq.] or under court procedures based on the parents' failure to perform their duties [see *Fam. Code § 7507*; *Welf. & Inst. Code § 300 et seq.*; see also § 100.22[1]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsEmancipation of Minors



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31-100 California Legal Forms--Transaction Guide §§ 100.13-100.19

[Reserved]

§§ 100.13[Reserved]



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31-100 California Legal Forms--Transaction Guide § 100.20

§ 100.20 Parental Right to Custody

A parent's most basic right with respect to a child is the right to custody [see *Odell v. Lutz* (1947) 78 Cal. App. 2d 104, 106, 177 P.2d 628]. The mother and presumed father [see *Fam. Code* § 7611; see also § 100.11[2], [3]] are equally entitled to custody of their unmarried child [*Fam. Code* § 3010(a)]. If either parent is deceased, is unable or unwilling to take custody, or has abandoned the family, the other is entitled to custody [*Fam. Code* § 3010(b)]. The concept of custody includes a variety of parental rights [see § 100.21].

Parents who are married to each other are jointly entitled to custody [see *Fam. Code* § 3010(a)]. While they live together, this jointly held right usually does not create problems. However, when they live separately from each other and disagree regarding the custody of their child, the superior court has jurisdiction to make a custody order either as part of a dissolution proceeding [see *Fam. Code* § 3022] or without such a proceeding [*Fam. Code* § 3120; *Cal. Rules of Ct.*, Rule 5.22]. For discussion of contested custody proceedings, whether in the context of a proceeding for dissolution of marriage or within some other proceeding [see *Fam. Code* § 3021 (proceedings to which custody provisions of Family Code apply)], see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, Chs. 32- 35 (2d ed. Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyGeneral OverviewFamily LawParental Duties & RightsGeneral Overview



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31-100 California Legal Forms--Transaction Guide § 100.21

§ 100.21 Parental Control of Child

[1] State's Power to Restrict Parental Control

Generally, fit parents have a liberty interest in the care, custody, and control of their children derived from the *Fourteenth Amendment of the United States Constitution* [*Troxel v. Granville* (2000) 530 U.S. 57, 65-69, 120 S. Ct. 2054, 147 L. Ed. 2d 49] . Thus, for example, a fit parent's decisions regarding nonparental visitation with his or her child are presumed to be in the child's best interests and ordinarily will not be subject to state interference [see *Zasueta v. Zasueta* (2002) 102 Cal. App. 4th 1242, 1252-1255, 126 Cal. Rptr. 2d 245 (Fam. Code § 3102, which authorizes court to order relatives' visitation with child after parent's death without considering surviving parent's wishes, is unconstitutional as applied to fit parent); *Herbst v. Swan* (2002) 102 Cal. App. 4th 813, 816-820, 125 Cal. Rptr. 2d 836 (same)]. However, the presumption that a fit parent is acting in the child's best interests only means that the parent's decisions must be accorded "special weight"; the presumption does not insulate a fit parent's decisions from *all* judicial review [*Fenn v. Sherriff* (2003) 109 Cal. App. 4th 1466, 1478-1487, 1 Cal. Rptr. 3d 185 (court may constitutionally order grandparent visitation over objection of fit parent under Fam. Code § 3102, so long as court accords special weight to fit parent's objection); see also *In re Marriage of W.* (2003) 114 Cal. App. 4th 68, 73-75, 7 Cal. Rptr. 3d 461 (Fam. Code § 3101, allowing stepparent visitation, is not facially unconstitutional, but was unconstitutionally applied because court failed to accord special weight to parents' position)].

The court's power to override a parent's decision was illustrated by a California Supreme Court decision applying *Fam. Code § 3104*. After a judgment has been entered dissolving a marriage and awarding sole custody to one parent, *Fam. Code § 3104* authorizes a court to grant reasonable visitation rights to a grandparent. In such a case, if the parent with sole custody objects to visitation by the grandparent, the statute creates a rebuttable presumption, affecting the burden of proof, that grandparent visitation is not in the child's best interest [Fam. Code § 3104(f)]. However, an objection by the parent with sole custody will not prevent grandparent visitation in every case. The California Supreme Court held that *Fam. Code § 3104* may constitutionally be applied to grant visitation to paternal grandparents with the approval of the father but over the objection of the mother, who had been awarded sole custody of the child, so long as the trial court considers the statute's rebuttable presumption that grandparent visitation is not in the child's best interest [*In re Marriage of Harris* (2004) 34 Cal. 4th 210, 223-230, 17 Cal. Rptr. 3d 842, 96 P.3d 141] .

Moreover, despite parents' wide discretion in the control they exercise over their children, the state's interest in the well-being of children justifies some state intervention in the parent-child relationship [see *Prince v. Massachusetts* (1944) 321 U.S. 158, 166-167, 64 S. Ct. 438, 88 L. Ed. 645]. For example, the state may limit a parent's control over his or her child with regard to education [see *Educ. Code* §§ 48200-48232 (type and duration of instruction required), 48293 (penalties against parents)], employment [see, e.g., *Lab. Code* § 1294 (prohibited occupations for minors; see also Ch. 100B, *Contracts and Employment of Minors*), discipline [see *Penal Code* § 273d (willful infliction of cruel or inhuman punishment on child resulting in traumatic condition is felony)], and medical care [see *Penal Code* § 270 (willful failure to provide medical care is a misdemeanor); see also Ch. 100A, *Personal Affairs of Minors*].

[2] Child's Name

The parents' right to custody also gives them the authority to decide whether their child may change his or her birth name. A minor generally does not have the right to change his or her own name; a petition for a minor's change of name ordinarily must be signed by a parent or guardian, or if both parents are dead and there is no guardian, then by some near relative or friend of the minor [Code Civ. Proc. § 1276(a); but see Code Civ. Proc. § 1276(d) (if minor age 12 or older has been relinquished to adoption agency and has not been legally adopted, petition to change name may be made jointly by minor and adoption agency); see generally California Forms of Pleading and Practice, Ch. 377, *Name, Change of* (Matthew Bender)]. A change-of-name petition may be filed in conjunction with an action to establish a parent-child relationship [see *Fam. Code* § 7638].

[3] Child's Residence

The parental right to custody includes the right to determine the minor child's residence, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child [*Fam. Code* § 7501(a); see *Fam. Code* § 7501(b) (reaffirming *In re Marriage of Burgess* (1996) 13 Cal. 4th 25, 37, 51 Cal. Rptr. 2d 444, 913 P.2d 473, which held that when judicial custody order is in place, custodial parent seeking to relocate bears no burden of establishing that it is necessary to do so); see also § 100.202[1][c]]. Generally, the residence of a minor is the residence of the parent or parents with whom the child maintains his place of abode, or the residence of any individual who has been given legal custody of the minor by court order [see *Welf. & Inst. Code* § 17.1(a); *Gov. Code* § 244(d)]. The residence of an unmarried minor who has a living parent cannot be changed by the minor's own act [*Gov. Code* § 244(e)].

The right to control a child's residence includes the right to place the child with another person for the purpose of establishing a guardianship over the child [*Guardianship of Donaldson* (1986) 178 Cal. App. 3d 477, 486, 223 Cal. Rptr. 707 (custodial mother placed children with grandparents in Illinois); see Ch. 66, *Guardianships*].

[4] Child's Property

A parent, as such, has no control over the property of his or her child [*Fam. Code* § 7502]. It is well settled in California that minors are entitled to hold their own property, both real and personal [*In re Scott K.* (1979) 24 Cal. 3d 395, 405, 155 Cal. Rptr. 671, 595 P.2d 105, cert. denied, 444 U.S. 973 (parent may not consent to warrantless search of tool box owned by minor child); *In re Guardianship of Yano* (1922) 188 Cal. 645, 649, 206 P. 995]. For further discussion, see Ch. 100A, *Personal Affairs of Minors*. However, a court may direct that an allowance be made to a parent from a child's property for the child's support, when that action would be for the child's benefit [*Fam. Code* § 3902].

For discussion of a child's receipt of property by inheritance or gift, see Chs. 60A, *Gifts*, and 100A, *Personal Affairs of Minors*.

[5] Child's Earnings

Generally, a child's earnings are not considered to be his or her property. Parents having custody of an unmarried minor generally are entitled to the child's earnings [*Fam. Code* § 7500; *see Fam. Code* § 771(a)]. The father's right to the child's earnings is equal to the mother's right, if he is presumed to be the father [*see Fam. Code* § 7500(a)]. An employer must pay a minor employee's earnings directly to the minor, until such a time as the parent or guardian gives notice that he or she claims them [*Fam. Code* § 7503; *Lab. Code* § 3605; *see Ch. 100B, Contracts and Employment of Minors*].

An exception to the general rule applies to a child's earnings from an entertainment, artistic, or professional sports contract [*see Fam. Code* §§ 771(b), 6750 *et seq.*]. Fifteen percent of the minor's gross earnings under such a contract, whether or not it has been approved by a court, must be set aside by the employer in trust for the benefit of the minor (a "Coogan Trust Account") [*Fam. Code* §§ 6752(b)-(i), 6753; *see Fam. Code* § 6750(c) (minor's "gross earnings" defined)]. For further discussion, *see Ch. 100B, Contracts and Employment of Minors* .

[6] Child's Marriage

An unmarried minor may marry only with the written consent of one or both parents and a court order [*Fam. Code* § 302; *see California Forms of Pleading and Practice*, Ch. 359, *Marriage* (Matthew Bender)]. The purpose of this statutory requirement is to permit parents to exercise over their children the control and discipline to which they are entitled by virtue of their right to custody [*Turner v. Turner* (1959) 167 Cal. App. 2d 636, 642, 334 P.2d 1011] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawParental Duties & RightsGeneral OverviewFamily LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of ChildrenGovernmentsState & Territorial GovernmentsGeneral Overview



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§ 100.22 Termination of Parental Control

[1] Termination for Abuse of Parental Authority

A child, a relative within the third degree of the child, or the supervisors of the county where the child resides, may bring a civil action to establish abuse of parental authority, in order to free the child from the control of the parent and enforce the duty of support and education [see *Fam. Code § 7507*]. However, this form of action is infrequently used, because the protection of a child from an abusive parent ordinarily is accomplished through a dependency proceeding in juvenile court [see *Welf. & Inst. Code § 300 et seq.*; see also *California Forms of Pleading and Practice*, Ch. 328, *Juvenile Courts: Dependency Proceedings* (Matthew Bender)].

[2] Termination to Facilitate Adoption

The Family Code prescribes a procedure, sometimes called a "Section 7800 proceeding," by which a minor child may be judicially declared free from the custody and control of either or both parents [see *Fam. Code § 7800 et seq.*]. The purpose of the procedure is to serve the welfare and best interest of the child by providing the stability and security of an adoptive home if those conditions are otherwise missing from the child's life [*Fam. Code § 7800*].

A declaration of freedom from parental custody and control issued in a Section 7800 proceeding terminates all parental rights and responsibilities with regard to the child [*Fam. Code § 7803*]. Thus, although the term "freedom from parental custody and control" is still used in the statutes [see *Fam. Code § 7803*], the proceeding is essentially one for the "termination of parental rights," which is now the commonly used terminology.

Grounds for the termination of parental rights in a Section 7800 proceeding include (1) abandonment; (2) conviction of a felony; (3) developmental disability or mental illness of the parents; and (4) inadequate parental relationship [see *Fam. Code §§ 7822, 7825, 7826, 7827, 7828*]. A judgment terminating parental rights on one of these grounds must be supported by a judicial determination of the child's best interests, based on clear and convincing evidence; the judgment is voidable if entered by the court solely on the basis of the parents' stipulation [*Fam. Code §§ 7800, 7801, 7821*; *In re Marriage of Jackson* (2006) 136 Cal. App. 4th 980, 990-994, 39 Cal. Rptr. 3d 365] .

Several other grounds for Section 7800 proceedings are listed in the Family Code [*see Fam. Code §§ 7823 (cruelty or neglect), 7824 (alcoholism, drug-related disability, or moral depravity), 7829 (determination that parent is not entitled to reunification with a dependent of juvenile court)*]. These other grounds require that the child first have been adjudicated a dependent child of the juvenile court under *Welfare & Institutions Code § 300 et seq.* [*see Fam. Code §§ 7823(a), 7824(b), 7829(a)*]. However, since January 1, 1999, the Welfare and Institutions Code has provided the exclusive procedures for terminating parental rights of children who are dependents of the juvenile court [*Welf. & Inst. Code § 366.26(a)*; *see Fam. Code §§ 7660-7670, 8604-8606*]. Therefore, Section 7800 proceedings are no longer available for the grounds listed in the Family Code that require the child to be a dependent child of the juvenile court. For further discussion, see California Forms of Pleading and Practice, Ch. 12A, *Adoptions: Termination of Parental Rights*, and Ch. 328, *Juvenile Courts: Dependency Proceedings* (Matthew Bender)].

Section 7800 proceedings often are initiated concurrently with adoption proceedings, because the effect of declaring a child free of the custody and control of a parent is that the parent's consent to an adoption is not required [*see Fam. Code § 8606(a)*; *but cf. Sharon S. v. Superior Court* (2003) 31 Cal. 4th 417, 426-427, 2 Cal. Rptr. 3d 699, 73 P.3d 554 (stepparent adoption may occur without termination of birth parent's rights)]. If a parent has agreed for the child to be in the physical custody of another person or persons for adoption and has not signed an adoption placement agreement [*see Fam. Code § 8801.3*], a consent to adoption [*see Fam. Code § 8814*], or a relinquishment to a licensed adoption agency [*see Fam. Code § 8700*], evidence of the adoptive placement does not in itself preclude the court from finding an intent on the part of the parent to abandon the child [*Fam. Code § 7822(d)*]. Similarly, if the parent did place the child for adoption [*see Fam. Code § 8801.3*], consent to adoption [*see Fam. Code § 8814*], or relinquish the child to a licensed adoption agency [*see Fam. Code § 8700*], and then revoked the consent or rescinded the relinquishment but has not taken reasonable action to obtain custody of the child, evidence of the adoptive placement does not in itself preclude the court from finding an intent on the part of the parent to abandon the child [*Fam. Code § 7822(d)*].

If the parent of an Indian child has transferred physical care, custody, and control of the child to an Indian custodian, that action will not be deemed to constitute abandonment of the child unless the parent manifests the intent to abandon the child by either (1) failing to resume physical care, custody, and control on the request of the Indian custodian, or (2) failing to substantially comply with any obligations assumed by the parent in his or her agreement with the Indian custodian despite the Indian custodian's objection to the noncompliance. Also, intent to abandon may be evidenced by the Indian custodian's inability to request that the parent resume physical care, custody, and control of the child, if that inability results from the parent's failure to keep the Indian custodian apprised of his or her whereabouts, and the Indian custodian has made reasonable but unsuccessful efforts to find the parent [*Fam. Code § 7822(e)*].

Probate Code Section 1516.5 authorizes Section 7800 proceedings to facilitate adoption by a child's probate guardian if one or both parents do not have legal custody of the child, the guardianship has continued for at least two years, and the court finds that adoption by the guardian would be in the child's best interest [*Prob. Code § 1516.5(a)*]. If those conditions are met, the court need not make any finding of present parental unfitness before terminating parental rights [*see Prob. Code § 1516.5(a)*]. The California Supreme Court has held that Section 1516.5 is not unconstitutional on its face for failing to require a finding of present parental unfitness. The Court concluded that Section 1516.5 does not on its face violate parents' due-process rights, since the termination of parental rights and adoption can occur under the statute only after a parent has surrendered custody to a guardian and has exercised no parental care or control for at least two years [*Guardianship of Ann S.* (2009) 45 Cal. 4th 1110, 1126-1136, 90 Cal. Rptr. 3d 701, 202 P.3d 1089] . The Court noted, however, that Section 1516.5 is open to constitutional challenge as applied to particular parents, for example, if a fully responsible parent were to find it necessary to place a child in a guardianship despite maintaining a parental commitment as full as the circumstances permit [*Guardianship of Ann S.*, (2009) 45 Cal. 4th 1110, 1132, 90 Cal. Rptr. 3d 701, 202 P.3d 1089 ; *see In re Charlotte D.*, (2009) 45 Cal. 4th 1140, 1143, 90 Cal. Rptr. 3d 724, 202 P.3d 1109] . But the Court rejected an as-applied challenge by a natural father who had abandoned his parental responsibilities and formally waived his parental rights when the guardianship was established, circumstances that precluded him from establishing a full commitment to parental responsibility [*In re Charlotte D.*, (2009) 45 Cal. 4th 1140, 1147-1151, 90 Cal. Rptr. 3d 724, 202 P.3d 1109] .

For further discussion of the termination of parental rights proceedings, and for the forms used in those proceedings, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, Ch. 171, *Termination of Parental Rights* (2d ed. Matthew Bender).

[3] Protective Orders Under Domestic Violence Prevention Act

The Domestic Violence Prevention Act [*Fam. Code* § 6200 *et seq.*] is intended to prevent the recurrence of acts of domestic violence and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable them to seek a resolution of the causes of the violence [*Fam. Code* § 6220]. Under the Act, protective orders may be obtained to protect alleged victims, including minor children [*Fam. Code* §§ 6221-6226]. A court issuing a protective order may also make an ex parte order regarding temporary custody and visitation of a minor child at the request of a party who establishes a parent-child relationship with the child and shows immediate harm to the child or an immediate risk that the child will be removed from California [*Fam. Code* §§ 3064, 6323(a)(1)]. After notice and hearing, a temporary custody order may be extended by the court if the adverse party fails to establish a parent-child relationship with the child [*Fam. Code* §§ 6340(a), 6345(a); *Gonzalez v. Munoz* (2007) 156 Cal. App. 4th 413, 421-423, 67 Cal. Rptr. 3d 317].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawParental Duties & RightsGeneral OverviewFamily LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of ChildrenFamily LawParental Duties & RightsTermination of RightsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Custody and Control of Minor Child

31-100 California Legal Forms--Transaction Guide §§ 100.23-100.29

[Reserved]

§§ 100.23[Reserved]



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31-100 California Legal Forms--Transaction Guide § 100.30

§ 100.30 Parental Obligation to Support Child

The father and mother of a minor child generally have an equal responsibility to support their child in the manner suitable to the child's circumstances [*Fam. Code § 3900*]. If a parent owing a duty of support is present in or a resident of California, his or her duty of support exists under California law, regardless of the presence or residence of the child to whom the duty of support is owed [*Fam. Code § 3550(b)*]. The willful failure of a parent to support his or her child is a misdemeanor [*see Penal Code § 270*].

The duty of support generally terminates when the child reaches age 18 [*see Fam. Code § 6500*] or is emancipated [*see Fam. Code § 7050(a)*]. However, the duty will continue to exist as to any unmarried child who has attained the age of 18, is a full-time high school student, and who is not self-supporting, until the child completes the twelfth grade or attains age 19, whichever occurs first [*Fam. Code § 3901*]. To the extent they are able, parents must also support their child, of whatever age, if he or she is incapacitated from earning a living and without sufficient means [*Fam. Code § 3910*].

A parent's duty to support his or her minor child does not extend to any child of the minor [*Fam. Code § 3930*]. For comprehensive discussion of the duty of child support, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, Ch. 40, *Duty to Support Children and Jurisdiction to Order Support* (2d ed. Matthew Bender). For discussion of the appropriate amount of child support under California's statewide uniform child support guideline [*see Fam. Code § 4050 et seq.*], see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, Ch. 41, *Child Support Orders* (2d ed. Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawParental Duties & RightsGeneral OverviewFamily LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsDutiesSupport of Children



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31-100 California Legal Forms--Transaction Guide § 100.31

§ 100.31 Enforcement of Support Obligation

Child support issues often arise in conjunction with proceedings for dissolution of marriage [*see Fam. Code § 2010(c)*]. For discussion and forms for use in marital settlement agreements, see Ch. 123, *Spousal and Child Support Provisions*. If the parents of a minor child are unmarried, child support may be ordered in a proceeding under the Uniform Parentage Act [*see Fam. Code § 7637; see also § 100.11[1]*]. For comprehensive discussion of proceedings under the Uniform Parentage Act, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, Ch. 31, *Establishing Parentage* (2d ed. Matthew Bender).

Duties of child support are also commonly enforced by a county through its local child-support agency [*see Fam. Code § 17400 et seq.*]. For discussion of enforcement of support by local authorities, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, Ch. 141, *Special Remedies for Enforcement of Support* (2d ed. Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Parental Duties & Rights Duties General Overview Family Law Parental Duties & Rights Duties Support of Children



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31-100 California Legal Forms--Transaction Guide § 100.32

§ 100.32 Agreements for Support

A husband and wife may agree in writing to a separation, and they may provide in that agreement for the support of either of them and of their children during the separation or on the dissolution of their marriage. The mutual consent of the parties is sufficient consideration for the agreement [*Fam. Code § 3580*]. The provisions of an agreement between the parents for child support are deemed to be separate and severable from all other provisions of the agreement relating to property and support of the wife or husband. An order for child support based on the agreement is treated as a law-imposed order made under the court's power to order child support [*Fam. Code § 3585*].

A promise in writing to furnish support for a child, growing out of a presumed or alleged father-child relationship does not require consideration and is enforceable according to its terms [*Fam. Code § 7614(a)*]. If it is in the best interest of the child or the mother, a court may, and on the promisor's request must, order the promise to be kept in confidence and designate a person or agency to receive and disburse on behalf of the child all amounts paid in performance of the promise [*Fam. Code § 7614(b)*]. Notwithstanding the terms of any agreement between an alleged or presumed father and the mother or child, the agreement does not bar an action to determine the existence or nonexistence of a parent-child relationship [*Fam. Code § 7632*].

Parents may agree to provide additional support for a child over and above what is required by law [*see Fam. Code § 3901(b)*; *see § 100.30* (legal duty of support)]. Without an agreement for compensation, a parent is not bound to compensate the other parent or any relative for the voluntary support of the parent's child [*Fam. Code § 3951(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawParental Duties & RightsDutiesGeneral Overview



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31-100 California Legal Forms--Transaction Guide § 100.33

§ 100.33 Liability of Stepparent for Support

The separate property of a married person is not liable for any debts incurred by his or her spouse before or during the marriage [*Fam. Code § 913(b)(1)*]. A child support obligation that does not arise from that marriage is treated as a debt incurred before marriage, regardless of whether or when a court order for support is made or modified [*Fam. Code § 915(a)*].

The community property of a stepparent and natural parent generally is liable for a child support obligation of the natural parent that arose prior to the marriage [*Fam. Code § 910(a)*]. However, the stepparent's community earnings are not liable for the support obligation, to the extent that they are (1) held in a deposit account in which the natural parent has no right of withdrawal; and (2) not commingled with other community property, other than property that is insignificant in amount [*Fam. Code § 911(a)*].

If community property of a marriage is applied to the satisfaction of a prior child support obligation of one spouse (the natural parent), when nonexempt separate income of the natural parent is available but not applied, the community is entitled to reimbursement from the natural parent up to the amount of the separate income [*Fam. Code § 915(b)*] (reimbursement not to exceed amount of community property applied to pay natural parent's child support obligation).

For an agreement by a stepparent to support the stepchild, see § 100.201.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsDutiesSupport of Children



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§ 100.34 Liability of Deceased Parent's Estate

If a parent obligated to support a child dies and leaves an estate sufficient to support the child, and the child is left chargeable to the county or confined in a state institution to be cared for in whole or in part by the state, the county supervisors or the director of the relevant state department may bring a civil action against the parent's estate for child support. For that purpose, the board or director has the same remedies as any creditor against the estate and against the parent's heirs, devisees, and next of kin [*Fam. Code* § 3952].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawEstate AdministrationGeneral OverviewFamily LawChild

SupportObligationsEnforcementGeneral OverviewFamily LawParental Duties & RightsDutiesSupport of Children



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31-100 California Legal Forms--Transaction Guide § 100.35

§ 100.35 Rights of Persons Supplying Necessaries

If a parent neglects to provide articles necessary for a child under his or her charge, according to his or her circumstances, a nonrelative may in good faith supply those necessities and ordinarily recover their reasonable value from the parent [*Fam. Code § 3950*]. "Necessaries" in this context include food, clothing, habitation, and medical treatment [*see Nielsen v. Richards (1925) 75 Cal. App. 680, 686, 243 P. 697 ; see also Penal Code § 270 (criminal liability for parent's willful failure to furnish necessities)*].

A parent is not bound to compensate the other parent or any relative for the voluntary support of his or her child, without an agreement for compensation [*Fam. Code § 3951(a)*]. Similarly, a parent is not bound to compensate a stranger for the support of a child who has abandoned the parent without just cause [*Fam. Code § 3951(b)*]. "Abandonment" is a child's permanent relinquishment of submission to parental control. Determination of abandonment is a factual issue [*see County of Fresno v. Walker (1981) 115 Cal. App. 3d 814, 824-825, 171 Cal. Rptr. 572*]. These exceptions to the parent's general duty to compensate third parties do not relieve the parent of the obligation to support a child during any period in which the state, county, or other governmental entity furnishes support for the child [*Fam. Code § 3951(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Parental Duties & Rights General Overview Family Law Parental Duties & Rights Duties General Overview



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31-100 California Legal Forms--Transaction Guide §§ 100.36-100.49

[Reserved]

§§ 100.36[Reserved]



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31-100 California Legal Forms--Transaction Guide § 100.50

§ 100.50 Emancipation Defined

Emancipation of a minor child is the termination of the parents' control and authority over the minor, thereby allowing the minor to act as an adult for some or all purposes [*see Fam. Code § 7050*]. A minor may become emancipated by operation of law, by relinquishment of the parental right of control over the minor, or by judicial declaration under the Emancipation of Minors Law [*Fam. Code §§ 7122, 7504; see § 100.51*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family Law Parental Duties & Rights Emancipation of Minors



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31-100 California Legal Forms--Transaction Guide § 100.51

§ 100.51 Methods of Emancipation

[1] Emancipation by Operation of Law

A person under age 18 is an emancipated minor if any of the following conditions is satisfied:

- The person has entered into a valid marriage (whether or not the marriage has been dissolved) [*Fam. Code § 7002(a)*];
- The person is on active duty with the armed forces of the United States [*Fam. Code § 7002(b)*]; or
- The person has received a declaration of emancipation under the Emancipation of Minors Law [*Fam. Code § 7002(c)*; see [3], below].

[2] Relinquishment of Parental Control

Emancipation may be accomplished by a parent's relinquishment of the right to control his or her child and the right to receive the child's earnings [see § 100.21[5]], whether the parent is solvent or insolvent [*Fam. Code § 7504*]. Relinquishment of control may result in complete or partial emancipation [*Perkins v. Robertson* (1956) 140 Cal. App. 2d 536, 540, 295 P.2d 972] , and it may be effective for specific purposes only [see, e.g., *Jolicoeur v. Mihaly* (1971) 5 Cal. 3d 565, 580, 96 Cal. Rptr. 697, 488 P.2d 1 (emancipation for residential and voting purposes); see also § 100.210[1][c]].

Relinquishment may occur under an express agreement of the parents and child [see, e.g., *Slater v. California State Auto. Asso.* (1962) 200 Cal. App. 2d 375, 377, 19 Cal. Rptr. 290 (relinquishment of son's military earnings)] or by implication from the conduct of the minor child and his or her parents [see, e.g., *Martinez v. Southern Pacific Co.* (1955) 45 Cal. 2d 244, 253, 288 P.2d 868 (minor controlled her own finances and contributed to family budget as adult)]. Relinquishment is presumed if a parent has abandoned his or her child [*Fam. Code § 7504*; see *Guardianship of Brazeal* (1953) 117 Cal. App. 2d 59, 61, 254 P.2d 886 (relinquishment of all rights and duties toward child constitutes abandonment)].

[3] Judicial Declaration of Emancipation

An unemancipated minor may petition the court for a declaration of emancipation, if all of the following conditions are satisfied [*Fam. Code § 7120*]:

- The minor is at least 14 years of age;
- The minor willingly lives separate and apart from his or her parents or legal guardian, with their consent or acquiescence;
- The minor manages his or her own financial affairs; and
- The source of the minor's income is not derived from any activity declared to be a crime under federal or California law.

Before the petition may be heard, any notice that the court deems reasonable must be given to the minor's parents, guardian, or other person entitled to the minor's custody, or proof must be supplied to the court that their addresses are unknown or that for other reasons the notice cannot be given [*Fam. Code § 7121*]. The court will issue a declaration of emancipation if it finds that the minor meets the requisites for filing the petition and that emancipation would not be contrary to the minor's best interest [*Fam. Code § 7122(a)*]. The declaration is conclusive evidence that the minor is emancipated [*Fam. Code § 7122(c)*].

A judicial declaration of emancipation confers full capacity on the minor; partial emancipation is not possible under the statutory procedure [see *West Shield Investigations & Sec. Consultants v. Superior Court* (2000) 82 Cal. App. 4th 935, 949, 98 Cal. Rptr. 2d 612 (when issuing declaration of emancipation under *Fam. Code § 7122*, court has no power to modify or limit consequences of emancipation as set forth in *Fam. Code § 7050*)].

For further discussion of the procedure required to obtain a declaration of emancipation, and the forms used for that procedure, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, Ch. 30, *The Parent-Child Relationship* (2d ed. Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawGuardiansGeneral OverviewFamily LawParental Duties & RightsGeneral OverviewFamily LawParental Duties & RightsEmancipation of Minors



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31-100 California Legal Forms--Transaction Guide § 100.52

§ 100.52 Effect of Emancipation

Unless emancipated through a partial relinquishment of parental control [*see, e.g., Jolicoeur v. Mihaly (1971) 5 Cal. 3d 565, 580, 96 Cal. Rptr. 697, 488 P.2d 1* (emancipation for residential and voting purposes); *see also § 100.51[2]*], an emancipated minor is considered to be an adult for the following purposes [*see Fam. Code § 7050*]:

- The right to support from the minor's parents [*see § 100.30*].
- The right of the minor's parents or guardian to control the minor and to receive the minor's earnings [*see § 100.21*].
- Establishing the minor's residence [*see § 100.21*].
- Being outside the jurisdiction of the juvenile court with respect to wardship [*see Welf. & Inst. Code § 601*] or dependency proceedings [*see Welf. & Inst. Code § 300; but see Welf. & Inst. Code § 602* (emancipated minor subject to juvenile court for purposes of criminal activity)].
- Capacity to apply for a work permit [*see Educ. Code § 49110*] without the request of the minor's parents or guardian [*see Ch. 100B, Contracts and Employment of Minors*].
- Ending all vicarious liability of the minor's parents or guardian for the minor's torts, excluding liability imposed by the Vehicle Code or arising from an agency relationship [*see Ch. 100A, Personal Affairs of Minors*].
- Capacity to enroll in any school or college.
- Consenting to medical, dental, or psychiatric care, without parental consent, knowledge, or liability [*see Ch. 100A, Personal Affairs of Minors*].

- Capacity to enter into a binding contract [see Ch. 100B, *Contracts and Employment of Minors*], including an insurance contract [see *Fam. Code* § 7051], or to give a delegation of power [see Ch. 98, *Powers of Attorney*].
- Capacity to buy, sell, lease, encumber, exchange, or transfer any interest in real or personal property, including shares of stock in a domestic or foreign corporation or a membership in a nonprofit corporation [see Ch. 100B, *Contracts and Employment of Minors*]. With respect to any shares of stock in a domestic or foreign corporation, any membership in a nonprofit corporation, or any other property held by the minor, an emancipated minor has the capacity to (1) vote in person, and to give proxies to exercise any voting rights, with respect to those shares, memberships, or property; (2) waive notice of any meeting or giving consent to the holding of any meeting; and (3) authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners [*Fam. Code* § 7052].
- Capacity to sue or be sued in his or her own name.
- Capacity to compromise, settle, arbitrate, or otherwise adjust a claim, action, or proceeding by or against the minor.
- Capacity to make or revoke a will.
- Capacity to make a gift, outright or in trust.
- Capacity to convey or release contingent or expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy, and consent to a transfer, encumbrance, or gift of marital property.
- Capacity to exercise or release his or her powers as donee of a power of appointment, unless the creating instrument provides otherwise.
- Capacity to create a revocable or irrevocable trust for his or her own benefit, or for the benefit of others.
- Capacity to revoke a revocable trust.
- Capacity to elect to take under or against a will.
- Capacity to renounce or disclaim any interest acquired by testate or intestate succession, or by inter vivos transfer, including exercising the right to surrender the right to revoke a revocable trust.
- Capacity to make an election, or election and agreement, regarding a surviving spouse's right to community or quasi-community property [see *Prob. Code* §§ 13502, 13503].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawParental Duties & RightsGeneral OverviewFamily LawParental Duties & RightsEmancipation of Minors



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31-100 California Legal Forms--Transaction Guide §§ 100.53-100.99

[Reserved]

§§ 100.53[Reserved]



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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

31-100 California Legal Forms--Transaction Guide § 100.100

§ 100.100 Facts for Parent-Child Relationship in General

1. For each party:
 - a. Name.
 - b. Address.
 - c. Telephone number.
 - d. Marital status.
2. Parties' relationship to each other and to any child affected by agreement.
3. For any child that will be affected by agreement:
 - a. Name.
 - b. Sex.
 - c. Date and place of birth.
 - d. Identity of natural parents, if applicable.
 - e. Address.
4. What parties intend to accomplish, such as:

a. Affecting control, custody, or support of minor child in one of following ways:

(1) Compensating other parent or relative for supporting minor child [*Fam. Code* § 3951; *see* § 100.200].

NOTE:

In the absence of such an agreement, a parent is not bound to compensate the other parent or a relative for the voluntary support of the child [*Fam. Code* § 3951].

(2) Having stepparent agree to support spouse's child by former marriage [*see* § 100.201].

NOTE:

In the absence of such an agreement, a stepparent generally is not obligated to support his or her spouse's child [*see Fam. Code* §§ 911(a), 913(b)(1); *see* §§ 100.33, 100.201[1][c], [d]].

(3) Providing notification of change in minor's residence [*Fam. Code* § 7501; *see* § 100.202].

NOTE:

A parent entitled to the custody of a child, or the child's guardian, has the right to determine the child's residence [*Fam. Code* § 7501; *Prob. Code* § 2352].

b. Relinquishing parental rights regarding either or both of following [*see Fam. Code* § 7504]:

NOTE:

Express relinquishment is a form of emancipation. For discussion and forms relating to the judicial procedure by which a minor may obtain a declaration of emancipation [*Fam. Code* § 7120], *see* California Forms of Pleading and Practice, Ch. 245, **Emancipation of Minors** (Matthew Bender).

(1) Control of minor [*see* § 100.210].

(2) Right to minor's earnings [*see* § 100.211].

c. Obtaining services of third party with respect to either:

NOTE:

These procedures generally are used to circumvent the sterility of a husband or wife, but they have also been used for single or gay or lesbian persons who wish to have children [*see* Holly J. Harlow, **Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor**, 6 S. Cal. Rev. L. & Women's Stud. 173 (Fall 1996); Annas, **Fathers Anonymous: Beyond the Best Interests of the Sperm Donor**, 14 Family L.Q. 1, 5 (1980)].

(1) Artificial insemination [*Fam. Code* § 7613; *see* § 100.220].

(2) Surrogate parenting [*Fam. Code* § 7613; *see* § 100.221].

Legal Topics:

For related research and practice materials, *see* the following legal topics:

Family Law Parental Duties & Rights General Overview Family Law Parental Duties & Rights Duties General Overview



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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

31-100 California Legal Forms--Transaction Guide § 100.101

§ 100.101 Facts for Agreement Concerning Custody, Control, and Support

1. Extent of client's custody and control of child, for example, whether:

a. Client has sole custody, pursuant to:

(1) Death of other parent.

(2) Court order.

(3) Custody agreement.

b. Client has joint custody with other parent.

c. Client has no legal custody or control over child, such as when client is stepparent.

d. Client no longer has legal custody or control over child, as result of one of following circumstances:

NOTE:

A parent, whether natural or adoptive, does not retain custody and control of the child--and therefore may not make any agreement regarding that custody and control--under the circumstances listed below.

(1) Court has appointed guardian for child [*see Fam. Code § 7505*].

NOTE:

The appointment of a guardian terminates a parent's authority over his or her child [*see Fam. Code § 7505*]. For discussion of guardianship proceedings, see Ch. 66, ***Guardianships***.

(2) Child has attained age 18 [*Fam. Code § 6501; see Fam. Code § 7505*].

NOTE:

Attainment of the age of majority [*see Fam. Code § 6501*] emancipates a minor by operation of law [*see Fam. Code § 7505(c)*].

(3) Minor child has been emancipated from parental control by any of following [*Fam. Code § 7002*]:

NOTE:

An emancipated minor is no longer subject to the custody and control of his or her parents [*Fam. Code §§ 7050(b)*].

(a) Marriage [*see Fam. Code § 7505(b)*].

(b) Current active duty with United States armed forces.

(c) Judicial declaration of emancipation [*see Fam. Code § 7120*].

(d) Express relinquishment of parental right to control [*see Fam. Code § 7504*].

(4) Child has been declared free from parental custody and control pursuant to any of following proceedings:

NOTE:

The parent-child relationship, with its accompanying rights and duties, may be terminated by a court in any of the following ways:

(a) Abandonment proceedings [*Fam. Code §§ 7800-7895; see § 100.22[2]*].

NOTE:

For discussion and forms used in this type of proceeding, see California Forms of Pleading and Practice, Ch. 12A, **Adoptions: Termination of Parental Rights** (Matthew Bender).

(b) Dependency proceeding in juvenile court [*see Welf. & Inst. Code § 300 et seq.*]X; *see also* California Forms of Pleading and Practice, Ch. 328, *Juvenile Courts: Dependency Proceedings* (Matthew Bender).

(c) Proceedings for abuse of parental authority [*Fam. Code § 7507*].

NOTE:

There remains in the Family Code a civil action for abuse of parental authority, which may be brought by the child, by the child's relative within the third degree, or the supervisors of the county in which the child resides. If the abuse is established, the child may be freed from the parent's dominion, and the duty of support and education may be enforced [*Fam. Code § 7507*]. This action is seldom, if ever, brought today because parental abuse is addressed under juvenile court dependency jurisdiction [*see Welf. & Inst. Code § 300 et seq.*].

2. Parent's reason for changing support or custody obligations.

NOTE:

If, for example, a parent intends to have a friend or relative provide support to the child because the parent is absent from the country or state, he or she may wish to have financial and other affairs handled by that person pursuant to a power of attorney [*see Prob. Code § 4000 et seq.*; *see also* Ch. 98, **Powers of Attorney**].

3. If client is stepparent, whether he or she has attempted to adopt stepchild.

NOTE:

A stepparent may acquire a legal parental relationship with his or her spouse's child by means of a stepparent adoption [*see Fam. Code §§ 9000-9007*; *see also* California Forms of Pleading and Practice, Ch. 12B, **Adoptions: Unmarried Minors** (Matthew Bender)]. A stepparent adoption severs the parent-child relationship between the child and the noncustodial parent [*see Fam. Code § 8617*], and it creates a new parent-child relationship between the child and the adoptive parent [*see Fam. Code § 8617*]. However, a stepparent may be prevented from adopting a stepchild by the noncustodial parent, because a noncustodial parent who has not "abandoned" his or her child must give consent to the adoption of that child [*Fam. Code §§ 8604-8606, 9003*; *see § 100.201[1][b]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of ChildrenFamily LawParental Duties & RightsDutiesSupport of Children



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31-100 California Legal Forms--Transaction Guide § 100.102

§ 100.102 Facts for Declaration of Emancipation

1. Whether minor child has already been emancipated.
2. Why parents wish to emancipate their child.
3. What rights parents wish to relinquish, such as [*see Fam. Code § 7504*]:
 - a. All control over child, including right to earnings.
 - b. Right to child's earnings only.

NOTE:

This type of emancipation is partial only [*Slater v. California State Auto. Asso. (1962)* 200 Cal. App. 2d 375, 377, 19 Cal. Rptr. 290 ; **see** §§ 100.51[2], 100.211[1][c]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawParental Duties & RightsDutiesCare & Control of ChildrenFamily LawParental Duties & RightsEmancipation of Minors



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31-100 California Legal Forms--Transaction Guide § 100.103

§ 100.103 Facts for Agreement for Artificial Insemination

1. Following information about semen donor:

NOTE:

An attorney who has been retained to draft an artificial insemination agreement should probably inquire into the following matters, even though they are outside the strict legal aspects of the agreement, in order to determine whether the parties are likely to perform their obligations under the agreement, and to counsel the client on the potential problems that could arise.

a. Whether donor is willing to undergo medical screening.

NOTE:

Sperm banks generally screen donors for venereal disease. However, when a private arrangement is made with a known donor, the recipient should ensure that the donor is disease-free for her own protection and the protection of the child. For that reason, the agreement should include a provision requiring medical screening [*see § 100.220[2]*].

b. Whether donor has any other children.

NOTE:

A man with no other children may be more likely to attempt to establish paternity and thereby acquire custody or visitation rights.

c. Whether donor has his own attorney.

NOTE:

Because the parties have conflicting interests with respect to the child to be conceived, the donor should have his own attorney to advise him of the legal consequences of the artificial insemination agreement.

2. How long parties wish to attempt conception.

NOTE:

The agreement should specify a finite period of time during which conception will be attempted [*see* § 100.220[1][c], [2]].

3. Whether contemplated arrangement is one in which parties will acknowledge donor's paternity.

4. Parties' intentions regarding:

- a. Child custody.
- b. Visitation rights.
- c. Child support.

5. Whether parties want to keep fact of artificial insemination private.

6. Whether parties want child to be informed of parentage on attainment of age of majority or otherwise.

7. Whether parties intend for donor to receive compensation in addition to medical expenses.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract InterpretationGeneral OverviewFamily LawPaternity & SurrogacySurrogacyDisposition of Eggs, Preembryos & Sperm



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31-100 California Legal Forms--Transaction Guide § 100.104

§ 100.104 Documents

1. Any documents regarding custody and control of minor child.

NOTE:

For example, divorced parents may have executed a marital settlement agreement regarding custody of their child [*see* Ch. 120, ***Complete Marital Settlement Agreements*** ; and Ch. 124, ***Provisions for Child Custody and Visitation***].

2. Any final court orders for either of following regarding minor child:

- a. Adoption.

- b. Guardianship.

3. Any other related or ancillary documents that should be obtained to effectuate agreement.

NOTE:

For example, in a surrogate parenting arrangement, the standard attorney-client agreement may be altered to include an understanding about the uncertain legality and enforceability of these types of agreements, and adoption petitions and consents should be drafted [*see* § 100.122].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsDutiesSupport of Children



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31-100 California Legal Forms--Transaction Guide §§ 100.105-100.109

[Reserved]

§§ 100.105[Reserved]



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31-100 California Legal Forms--Transaction Guide § 100.110

§ 100.110 Agreement Concerning Custody, Control, and Support

1. Determine whether client has parent-child relationship with child who will be subject to agreement.

NOTE:

Control of a child, with its accompanying rights and duties, results from a parent or guardian's lawful custody of a child [*see* §§ 100.20, 100.21].

a. Determine whether client has mother-child relationship with child as result of any of following:

(1) Having given birth to child [*see Fam. Code* § 7610(a)].

(2) Adoption proceedings [*see Fam. Code* § 7610(c)].

(3) In vitro fertilization of surrogate [*see Johnson v. Calvert* (1993) 5 Cal. 4th 84, 93, 19 Cal. Rptr. 2d 494, 851 P.2d 776] .

(4) Status as presumed mother [*see Fam. Code* §§ 7611, 7650; *In re Karen C.* (2002) 101 Cal. App. 4th 932, 937-940, 124 Cal. Rptr. 2d 677 (insofar as practicable, Uniform Parentage Act's presumptions applicable to father-child relationship also apply to mother-child relationship)].

NOTE:

If the child's biological father and biological mother have identified themselves and come forward to assert their legal parentage, it is not appropriate to invoke a gender-neutral reading of the paternity presumptions to find that another woman is the child's mother [*Amy G. v. M.W.* (2006) 142 Cal. App. 4th 1, 12-14, 16, 47 Cal. Rptr. 3d 297 (when birth

mother promptly comes forward to assert her legal maternity, and child's father is undisputed and present in action, father's spouse cannot be child's presumed mother under *Fam. Code § 7611(a),(d)*].

b. Determine whether client has father-child relationship with child, pursuant to either of following:

(1) Status as presumed father [*see Fam. Code § 7540, 7611; see also § 100.11[1]-[3]*].

(2) Adoption proceedings [*see Fam. Code § 7610(c)*].

c. Determine whether client has informal relationship with child, such as that of stepparent.

NOTE:

A stepparent has no legal right of custody or control over his or her stepchild unless the relationship is formalized through adoption, or unless the stepparent stands *in loco parentis* to the child [*see Fam. Code §§ 9000-9007; Trudell v. Leatherby (1931) 212 Cal. 678, 681, 682, overruled on other grounds, Gibson v. Gibson (1971) 3 Cal. 3d 914, 923, 92 Cal. Rptr. 288, 479 P.2d 648; see also §§ 100.10[1], 100.201[1][d]*].

2. Determine whether client has present right to make agreement regarding child's custody and control.

NOTE:

A person who does not retain a present right to custody and control of the child may not make any agreement regarding that child's custody and control. For a list of facts that should be used to determine the status of the client's right to custody and control, see § 100.101.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation General Overview Family Law Child Custody General Overview Family Law Child Support Obligations General Overview Family Law Parental Duties & Rights Duties Support of Children



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31-100 California Legal Forms--Transaction Guide § 100.111

§ 100.111 Emancipation of Minor Child

1. Determine whether express relinquishment of control is preferable method of emancipating minor.

NOTE:

A minor may obtain a judicial declaration of emancipation instead [*see Fam. Code § 7120; see also § 100.51[3]*]. For the procedure and forms used to obtain such a declaration, see California Forms of Pleading and Practice, Ch. 245, ***Emancipation of Minors*** (Matthew Bender). Neither method will emancipate the minor for all purposes. However, an express parental relinquishment may be used when the parties wish to emancipate the minor for certain purposes only [*see § 100.211*], or when the minor wishes to continue living with his or her parents [*see Fam. Code § 7120(b)(2)* (judicial declaration of emancipation requires that minor live separate and apart)]. A judicial declaration of emancipation will entitle the minor to extensive statutory rights [*see Fam. Code § 7050; § 100.52*].

2. Determine whether express relinquishment should be in writing.

NOTE:

Although no particular form of relinquishment is required [*see Fam. Code § 7504*], a writing will serve as a record of that act.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Family Law Parental Duties & Rights Emancipation of Minors



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31-100 California Legal Forms--Transaction Guide § 100.112

§ 100.112 Surrogate Parenting Services

NOTE:

An attorney who has been retained to draft a surrogate parenting agreement should make the following determinations, some of which may be somewhat outside the usual scope of inquiry regarding parties' intentions regarding a contract, in order to ascertain whether the parties are likely to perform their obligations under the agreement. Careful planning and evaluation of the parties' intentions regarding the surrogate arrangement may eliminate some problems that could arise later. For example, careful examination of the prospective surrogate [*see* P 3, *below*] may reveal her ambivalence about relinquishing a child, allowing the childless couple to avoid choosing a woman who would subsequently refuse to perform the contract [*see, e.g., In re Baby M* (1988) 109 N.J. 396, 537 A.2d 1227 (surrogate refused to relinquish child); *see also* § 100.221[1][b]].

1. Determine whether contract will be enforceable if surrogate refuses to perform.

NOTE:

For a discussion of some of the major issues involved in the interpretation and enforcement of surrogate agreements, *see* § 100.221[1][b].

2. Determine whether attorney-client agreement for preparation of surrogate agreement should reflect legal uncertainties inherent in arrangement [*see* P 1, *above*; *see also* § 100.122].
3. In selecting surrogate mother consider all of following:

NOTE:

Surrogate broker or provider services generally screen potential surrogate mothers, and provide childless couples with that information [*see* Graham, "Surrogate Gestation and the

Protection of Choice," 22 *Santa Clara L. Rev.* 291, 293 (1982)]. However, when a private arrangement is made with a prospective surrogate, the potential father and his wife, and their attorney, should make the following determinations.

- a. Whether woman is physically and emotionally healthy.
- b. Genetic compatibility of woman with biological father.

NOTE:

A complete medical examination of the prospective biological parents can be used to detect any potential genetic problems.

- c. Woman's motives in bearing child for someone else to raise.
- d. Whether surrogate is married.

NOTE:

Some surrogate organizations use only widowed, divorced, or single women as surrogates, to avoid the conclusive statutory presumption that the woman's husband is the father of the child [*see Fam. Code § 7540*].

- e. If surrogate is married, whether her husband agrees with her decision to act as surrogate.

NOTE:

The husband's cooperation is needed to consent to adoption of the child, since he will be the presumed father [*see Fam. Code §§ 7540, 8604; Civ. Code § 224* (consent of both parents required)].

- f. Whether woman already has other children.

NOTE:

Women who have already had children are probably better able to determine how they will feel about parting with their newborn babies [*see Bird, Surrogate Motherhood: Hers? Yours? Ours?*, 2 *Calif. Lawyer* 20, 21 (Feb. 1982)].

- g. Whether surrogate is likely to maintain appropriate lifestyle during pregnancy?

NOTE:

Most surrogate agreements require the surrogate to refrain from the use of cigarettes, alcohol, nonprescription drugs, and other activities harmful to the fetus during pregnancy. Potential parents should ascertain whether the surrogate is likely to maintain that lifestyle, since they probably cannot obtain specific performance of such a contract provision [*see Civ. Code § 3390(1)* (obligations to render personal services or employ another for personal service cannot be specifically enforced); *see also* Ch. 92, **Service Contracts**].

- 4. Ascertain that surrogate has her own attorney.

NOTE:

Due to the potential for conflicts between the parties to a surrogate agreement, both before and after the birth of the child, each party should be represented by independent counsel [*see § 100.221[1][z]*].

5. Determine amount of fee that should be offered for surrogate services.

NOTE:

Surrogate arrangements generally involve payment by the couple of a lump sum fee to the mother, as well as maternity expenses, and all Attorneys' Fees [*see Turk, If Baby M Were a Californian ...* , 7 *Calif. Lawyer* 78 (No. 8)(August 1987)].

6. Determine whether surrogate has medical insurance covering pregnancy and birth.

NOTE:

If she is not covered, the father should expect to cover all medical costs.

7. Verify that parties agree regarding potential abortion of abnormal child.

NOTE:

The parties may add a provision in their agreement regarding the action to be taken if amniocentesis or other medical tests reveal an abnormal fetus. However, because any decision regarding abortion remains solely with the mother [*see Roe v. Wade (1973) 410 U.S. 113, 153, 93 S. Ct. 705, 35 L. Ed. 2d 147*] , the parties should be in accord on this point [*see § 100.221[1][m]*].

8. Determine whether childless couple is prepared for possibility that they may:

NOTE:

The parties to a surrogate arrangement must be fully aware of the legal uncertainties regarding the arrangement.

- a. Be required to pay child support or medical expenses throughout child's lifetime.
- b. Never receive custody of child or visitation rights.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacySurrogacyGeneral Overview



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31-100 California Legal Forms--Transaction Guide §§ 100.113-100.119

[Reserved]

§§ 100.113[Reserved]



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31-100 California Legal Forms--Transaction Guide § 100.120

§ 100.120 Agreement Concerning Custody, Control, and Support

1. Draft contract [see §§ 100.130-100.133].
2. Have parties do the following:
 - a. Read written contract.
 - b. Execute contract, indicating date and place of execution.
3. Prepare duplicate copy of contract for each party.
4. If required by agreement, ensure that parties open bank, trust, or escrow account, as appropriate.

NOTE:

For example, an agreement for the support of a minor child [see § 100.200] may require the absent parent to make child support payments to the custodian, which may be arranged through deposit to such an account.

5. If required by agreement, draft and have parties execute appropriate power of attorney form.

NOTE:

For example, an agreement for the support of a minor child [see § 100.200] may require the absent parent to execute a power of attorney, in order for the custodian to handle the child's day-to-day affairs and medical consents. For discussion and examples of forms for powers of attorney, see Ch. 98, **Powers of Attorney**.

6. If agreement provides for making of trust or will provisions [see, e.g., § 100.201[2], P 5], draft or amend applicable

instrument.

7. If agreement provides for payment of consideration [*see, e.g., § 100.201*[2], P 2], ensure that parties comply with consideration provisions.

8. If agreement includes notice of change of address of minor child [*see § 100.202*], ensure that it is delivered to appropriate person or organization.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawFormationGeneral OverviewFamily LawChild SupportGeneral Overview



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31-100 California Legal Forms--Transaction Guide § 100.121

§ 100.121 Artificial Insemination Arrangement

1. Draft contract [see § 100.134].
2. Have parties do the following:
 - a. Read written contract.
 - b. Execute contract, indicating date and place of execution.
3. Prepare duplicate copy of contract for each party.
4. Ensure that parties comply with any medical or psychological screening required by agreement.
5. Ensure that donor receives any compensation or payment for expenses required by agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Paternity & Surrogacy Surrogacy Agreements Healthcare Law Treatment Reproductive Technology Artificial Insemination



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31-100 California Legal Forms--Transaction Guide § 100.122

§ 100.122 Surrogate Parenting Services

NOTE:

For the most part, the procedures outlined below apply to a surrogate arrangement that involves adoption, which is the type of arrangement covered by the surrogacy agreement presented in this chapter in § 100.221. That form is an agreement between two married couples; the "surrogate" (the biological mother) and her husband on the one hand, and the biological father and his wife on the other hand. Under such an arrangement, which is referred to in this chapter as "traditional" surrogacy, adoption of the child is necessary.

A different type of surrogate arrangement is referred to as "gestational" surrogacy, which involves the in vitro fertilization of the egg of one woman for implantation in the womb of another [*see In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218, 1222, 30 Cal. Rptr. 2d 893 ; see also § 100.11[5]*].

Gestational surrogacy does not require an adoption; only a determination of whether the egg donor or the child bearer is the legal mother of the child. For more detailed discussion of the two general types of surrogacy arrangements, see §§ 100.11[5] and 100.221[1][a], [b].

1. Consider adding following provisions to standard attorney-client agreement [*see, e.g., Ch. 86, Agreements for Professional Services*]:

NOTE:

The following is based on the assumption that the attorney will be representing the childless couple. Generally, a childless couple seeks the advice of an attorney in finding a surrogate and in making the entire arrangement.

a. Each client's acknowledgment that attorney cannot guarantee that:

- (1) Surrogate will conceive.
- (2) Surrogate will comply with agreement.
- (3) Any resulting child will be free from defects.

b. Each client's understanding that some issues involved in surrogacy contracts have not been adjudicated and that client faces several risks if surrogate refuses to comply with terms of contract, for example:

- (1) Biological father's name may not be entered on birth certificate as father.
- (2) Surrogate may be granted exclusive custody of child (or lesser custodial rights) as mother of child.
- (3) Biological father may be denied custody or visitation rights.
- (4) Biological father may be ordered to pay lifetime medical expenses or support for child who may never be in his custody.

c. Attorney's agreement to:

- (1) Report to biological father on progress of insemination and pregnancy.
- (2) Oversee surrogate's compliance with agreement, by reviewing surrogate's monthly medical reports.

d. Warning that surrogate agreement involving adoption may be unenforceable under following laws:

NOTE:

Because the law governing surrogate agreements that involve adoption is uncertain, the attorney drafting the surrogate contract should inform his or her clients of the specific laws that may pose problems [*see* § 100.221[1][b]; *see also* California Forms of Pleading and Practice, Ch. 12, **Adoptions: Nature and Effect** (Matthew Bender)].

- (1) *Penal Code* § 273(a), making payment, offer of payment, or receipt, of money or anything of value for consent regarding subsequent adoption of child punishable as misdemeanor.
- (2) *Penal Code* § 181, making sale or attempted sale of custody of human being punishable as felony [*see Penal Code* § 17(a) ("felony" defined)].
- (3) *Fam. Code* § 8609, making advertisement for supplying or accepting of children for adoption by person or organization other than licensed agency punishable as misdemeanor.

e. Warning that certain statutes may preclude client who is semen donor from being considered child's father, for example [*see* § 100.221[1][b], [c]]:

(1) *Fam. Code § 7613(b)*, which specifically denies any parental rights to man who donated semen to licensed physician and surgeon or to licensed sperm bank for use in artificial insemination or in vitro fertilization of woman other than his wife.

(2) *Fam. Code § 7540*, which provides conclusive presumption of paternity by husband of surrogate when couple cohabits, if husband is not impotent or sterile.

f. Statement specifying whether attorney will be required to represent childless couple in event of litigation with surrogate.

2. Draft surrogate contract [*see § 100.135*].

3. Have parties do the following:

a. Read written contract.

b. Execute contract, indicating date and place of execution.

4. Prepare duplicate copy of contract for each party.

5. Prepare documents required for adoption of child at birth [*see Fam. Code §§ 8800-8823*].

NOTE:

Because *Fam. Code § 7613(b)* treats a sperm donor as though he were not the biological father of the child, the California State Department of Social Services has taken the position that the biological father must therefore complete an "independent" adoption, as if he were a complete stranger to the child [*see Sherwyn v. Department of Social Services* (1985) 173 Cal. App. 3d 52, 55, 218 Cal. Rptr. 778 ; *see also* Emley, ***Something Borrowed, Something Blue: Surrogate Parenting and California Laws***, San Francisco Attorney, August/September 1987, p. 10]. For the forms and procedures used to accomplish an independent adoption, see California Forms of Pleading and Practice, Ch. 12B, ***Adoptions: Unmarried Minors*** (Matthew Bender)].

6. If desired, submit following to court for approval:

NOTE:

In the uncertain legal climate in which surrogate arrangements involving adoption operate, court approval of these documents may increase the likelihood that they will be treated as enforceable should litigation later arise [Turk, ***If Baby M Were a Californian ...***, 7 Calif. Lawyer 78, 82 (No. 8)(August 1987)]. Procedurally, approval might be obtained pursuant to a court action brought by a guardian ad litem for the unborn child. A guardian ad litem is a special guardian appointed by the court to prosecute or defend on behalf of an infant party [*see Code Civ. Proc. §§ 373, 373.5* (procedure for appointment); *see also* California Forms of Pleading and Practice, Ch. 291, ***Guardians ad Litem*** (Matthew Bender)]. However, use of such a procedure assumes that the surrogate agreement does not violate *Penal Code § 273*, regarding payment for the right to adopt a child, and that the surrogate mother will not change her mind regarding relinquishment of the child.

a. Surrogate parenting agreement.

b. Adoption documents [*see P 5, above*].

7. Draft any of following documents required by surrogate agreement to provide for support of child:
 - a. Will [*see* Ch. 61, *Will Drafting and Complete Will Forms* ; Ch. 63, *Will Provisions*].
 - b. Codicil [*see* Ch. 62, *Codicils*].
 - c. Trust [*see* Ch. 70, *Complete Revocable Trust Forms* ; Ch. 71, *Marital Deduction Trust Provisions*].
 - d. Private annuity [*see* Ch. 97, *Private Loans and Annuities*].
8. Verify that appropriate party obtains any of following insurance policies required by surrogate agreement:
 - a. Medical insurance for surrogate.
 - b. Life insurance for surrogate.
 - c. Life insurance for childless couple, to benefit child on their deaths.
9. Ensure that childless couple opens escrow account for deposit of surrogate fees.
10. Ensure that parties comply with appropriate medical or psychological screening required by agreement.
11. After birth of child:
 - a. Confirm paternity of child.

NOTE:

Blood tests are generally considered accurate to determine paternity [*see, e.g., Fam. Code* §§ 7550-7557]. For practical reasons, the parties to the agreement need to verify that the man contracting with the surrogate is in fact the biological father; if he is not, the parties should cancel the contract. By statute, blood test evidence cannot be used to rebut the presumption that a woman's husband is the father, if she has either: (1) borne a child conceived by means of a surgical procedure, with the consent of her husband; or (2) borne a child through artificial insemination and the insemination was under the supervision of a licensed physician and with the consent of her husband [*Fam. Code* §§ 7541(e)(3), 7613; *see* § 100.11[2][a]]. Whether the courts would apply this statutory rule in a surrogate arrangement involving adoption is uncertain [*see Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1272-1273, 284 Cal. Rptr. 18, cert. denied sub nom. Nancy B. v. Charlotte M. (1992) 503 U.S. 991 ; Sherwyn v. Department of Social Services (1985) 173 Cal. App. 3d 52, 59, 218 Cal. Rptr. 778 ; see also* § 100.221[1][c]].

- b. Follow procedures for adoption by childless couple [*see Civ. Code* §§ 224.21-224.95; *see Fam. Code* §§ 8800-8823; *see also* P 5, *above*].

NOTE:

For a detailed discussion of adoptions, see *California Forms of Pleading and Practice*, Ch. 12B, ***Adoptions: Unmarried Minors*** (Matthew Bender).

- c. Ensure that surrogate receives payment for services from escrow account [*see* P 9, *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawPaternity & SurrogacySurrogacyGeneral OverviewFamily LawPaternity & SurrogacySurrogacyAgreements



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§§ 100.123[Reserved]



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31-100 California Legal Forms--Transaction Guide § 100.130

§ 100.130 Agreement for Support of Minor Child

NOTE:

For an example and discussion of a compensation agreement, see § 100.200. For a general guide to drafting contracts, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions***.

1. State names of each of following:
 - a. Parent.
 - b. Adult ("custodian") assuming support duties.
 - c. Child.
2. Specify purpose of agreement.
3. Indicate basis of parent's right to determine child's residence, either:
 - a. Parent is sole surviving parent.
 - b. Parent has sole custody.
4. If custodian is not related to child, state that minor has not abandoned parent.

NOTE:

A parent is not obligated to compensate a stranger for the support of a child who has abandoned the parent without just cause [*Fam. Code* § 3951(b)].

5. Include agreement by custodian to assume sole support of child.
6. Provide for parent's compensation of custodian for support of child.
7. Add any of following standard contractual provisions, if desired:

- a. Statement that contract contains entire agreement of parties ("integration clause").

NOTE:

For a discussion of this type of provision in contracts generally, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

- b. Statement that California law will govern agreement.

NOTE:

For a discussion of choice of law provisions in contracts generally, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

- c. Statement regarding modification or amendment of agreement.

NOTE:

Modification is usually only permitted with the written consent of both parties.

- d. Provision that agreement will be severable in event of partial invalidity.

NOTE:

For a discussion of severability provisions in contracts generally, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

8. Include signatures of all parties to agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation General Overview Family Law Child Support General Overview Family Law Parental Duties & Rights Duties Support of Children



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31-100 California Legal Forms--Transaction Guide § 100.131

§ 100.131 Stepparent's Agreement for Support of Minor Child

NOTE:

For an example and discussion of a stepparent's support agreement, see § 100.201. For a general guide to drafting contracts, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions***.

1. State stepparent's agreement to provide support to specified minor children of spouse.
2. If required, state consideration for agreement.

NOTE:

If the agreement is executed as a prenuptial agreement, no consideration is required [*see Fam. Code § 1611*].

3. Specify period for which stepparent agrees to support children, either:
 - a. Until specified date.
 - b. Until child reaches age of majority or is emancipated.
4. Describe effect of following on support obligation:
 - a. Dissolution or termination of marriage between stepparent and spouse.
 - b. Legal separation of stepparent and spouse.
5. If desired by parties, include provisions regarding support upon death of stepparent.

NOTE:

For example, the stepparent may agree to make a will provision for his or her stepchildren [**see** § 100.201[2]].

6. Add any appropriate standard contractual provisions [*see* § 100.130 P 7].

7. Include signature of each party.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation General Overview Family Law Child Support Obligations General Overview Family Law Parental Duties & Rights Duties Support of Children



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31-100 California Legal Forms--Transaction Guide § 100.132

§ 100.132 Notice of Change in Minor's Residence

NOTE:

For a form for this notice, see § 100.202.

1. State name and address of person or organization to which notice is directed.
2. Identify person giving notice, stating:

a. Name(s).

b. Status as either:

(1) Parent(s).

NOTE:

If one parent is giving the notice, his or her status as the only living parent or as the parent with sole custody should be included.

(2) Guardian.

NOTE:

If a guardian is giving the notice, information regarding his or her appointment as guardian should be included.

3. State that minor's address will change, specifying:

a. Old address.

b. New address.

c. Effective date of change.

4. Include signature(s).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawParental Duties & RightsGeneral OverviewFamily LawParental Duties & RightsDutiesGeneral Overview



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31-100 California Legal Forms--Transaction Guide § 100.133

§ 100.133 Agreement Relinquishing Parental Rights

NOTE:

This chapter includes only the forms for an express written relinquishment by parents of their right to control their minor child or to receive his or her earnings [*Fam. Code § 7504*; **see** §§ 100.210, 100.211]. For forms and discussion of the judicial procedure by which a minor may obtain a declaration of emancipation [*Fam. Code § 7120*], see California Forms of Pleading and Practice, Ch. 245, ***Emancipation of Minors*** (Matthew Bender). For forms and discussion relating to transactions that an emancipated minor may make, see Chs. 100A, ***Personal Affairs of Minors***, and 100B, ***Contracts and Employment of Minors***. For a general guide to drafting contracts, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions***.

1. State names of the following persons:

- a. Parent(s) relinquishing control.
- b. Minor child.

2. If desired, describe reasons for relinquishment of control.

3. State either:

- a. Specific rights regarding control of child that parents are relinquishing [*see § 100.211* (right to child's earnings only)]; or
- b. That parents are relinquishing all control over child [*see § 100.210*].

4. If desired, state that parents will continue to support child upon request.

NOTE:

Emancipation pursuant to relinquishment of control does not automatically terminate the parents' duty of support and other obligations to the child [*Lehrer v. Lehrer* (1976) 63 Cal. App. 3d 276, 280, 133 Cal. Rptr. 709] . Otherwise, parents could agree to relinquish their right of control merely to evade their parental duties [**see** § 100.210[1][f]].

5. If desired, state parents' intent to continue general responsibility for minor child.

6. Add any appropriate standard contractual provisions [*see* § 100.130 P 7].

7. Include signature of each party.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation General Overview Family Law Parental Duties & Rights Termination of Rights General Overview



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31-100 California Legal Forms--Transaction Guide § 100.134

§ 100.134 Agreement for Artificial Insemination

NOTE:

For an example and discussion of an agreement for artificial insemination, see § 100.220. For a general guide to drafting contracts, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions***.

1. Set forth each of following:

- a. Parties to agreement.
- b. Purpose of agreement [*see* § 100.220[2], P 1].

2. Include provisions governing each of following:

- a. Medical screening of donor [*see* § 100.220[2], P 2].

NOTE:

The donor should be determined to be free of venereal disease before insemination takes place [*see* § 100.103]. The prospective mother may also want the donor to have a genetic evaluation.

b. Procedure for insemination [*see* § 100.220[2], P 3], specifying:

- (1) Finite period of time or timetable under which insemination will be performed.
- (2) How procedure will be performed, either:
 - (a) Under supervision of licensed physician.

(b) Privately.

NOTE:

Before any parties contemplate a private procedure (that is, one outside the supervision of a licensed physician), they must be advised that the resulting paternity of a child may not be that intended by the parties [*see Fam. Code § 7613; see also § 100.220[1][b]*].

c. Recognition or nonrecognition of donor's paternity [*see § 100.220[2], P 4*].

NOTE:

The form set forth in this chapter [*see § 100.220*] is designed for insemination of a married woman, under the supervision of a licensed physician and with the consent of her husband. It provides that (1) the donor's paternity will not be recognized, and (2) he will not be entitled to the rights and duties inherent in the parent-child relationship [*see P d, below*]. However, the parties may provide for recognition of paternity by including the donor's name on the birth certificate [*see Health & Safety Code § 102425(a)* (entry of father's name on birth certificate)].

d. Any parental rights and obligations of donor [*see § 100.220[2], PP 4-7*], such as:

NOTE:

If the donor's paternity will not be recognized [*see P c, above*], he will not have any enforceable obligations or rights regarding the child. However, if the parties recognize the donor's paternity, they may wish to provide for visitation or support.

(1) Child custody.

(2) Visitation.

(3) Child support.

e. Confidentiality of arrangement, if desired [*see § 100.220[2], P 7*].

NOTE:

If the parties want to keep the artificial insemination arrangement private, the agreement should include a provision to that effect.

f. Consideration [*see § 100.220[2], P 8*].

NOTE:

Even if the parties do not intend for the donor to receive any compensation, the woman to be inseminated should cover the cost of the donor's medical screening.

g. Attorneys' fees [*see § 100.220[2], P 9*].

NOTE:

For discussion of a provision for attorneys' fees [*see Code Civ. Proc. § 1021*], see § 100.220[1][i].

h. Cancellation of agreement [*see Civ. Code § 1699; § 100.220[2], P 10*], on occurrence of specified events, such as:

NOTE:

The parties may specify the manner in which they may cancel the agreement, such as notification by the cancelling party's attorney to the other party. A cancellation generally involves the abrogation of only those provisions that have not yet been performed [*see Mamula v. McCulloch* (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571] .

(1) Medical determination that donor has venereal disease or transmissible genetic defect.

(2) Woman's failure to conceive within specified period of time or specified number of attempts.

i. Representation by separate counsel.

NOTE:

The competing interests between the parties with respect to the child necessitates separate legal representation for the childless couple and the semen donor.

3. Include appropriate standard contractual provisions [*see* § 100.220[2], PP 11-14; *see also* § 100.130 P 7].

NOTE:

Because the agreement is being drafted with the intent that California law apply, and because the agreement may not be given effect in the manner the parties intend under the laws of other states, it is especially important that a choice of law provision stating that California law will govern the agreement be included [*see* Ch. 75, **Formation of Contracts and Standard Contractual Provisions**]. Other standard contract provisions may be added when applicable.

4. Include signatures of all parties.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation General Overview Family Law Paternity & Surrogacy Surrogacy Disposition of Eggs, Preembryos & Sperm



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31-100 California Legal Forms--Transaction Guide § 100.135

§ 100.135 Agreement for Surrogate Parenting Services

NOTE:

This section is intended as a checklist of provisions that should be considered for inclusion in a surrogacy arrangement of the type illustrated in § 100.221. That form is an agreement between two married couples; the "surrogate" (the biological mother) and her husband on the one hand, and the biological father and his wife on the other hand. Under such an arrangement, which is referred to in this chapter as "traditional" surrogacy, adoption of the child is necessary.

A different type of surrogate arrangement is referred to as "gestational" surrogacy, which involves the in vitro fertilization of the egg of one woman for implantation in the womb of another [*see In re Marriage of Moschetta* (1994) 25 Cal. App. 4th 1218, 1222, 30 Cal. Rptr. 2d 893 ; *see also* § 100.11[5]].

Gestational surrogacy does not require an adoption; only a determination of whether the egg donor or the child bearer is the legal mother of the child. For more detailed discussion of this distinction and the enforceability of both types of surrogate parenting contracts, see [*see* § 100.221[1][b]].

In either case, appropriate modifications will be necessary to take into account different relationships among the principal parties; for example, if the surrogate is unmarried, provisions relating to her husband obviously will be unnecessary.

For coverage of attorney-client agreements that cover drafting a surrogate parenting contract, see § 100.122. For a general guide to drafting contracts, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions*** .

1. Set forth each of following:

a. Parties to agreement.

NOTE:

The wife of the biological father may be included as a party, although she has no actual duties under the contract. However, because of the possibility that a court might hold that the paternity provisions of *Fam. Code* §§ 7540 and 7613 (stating that the husband of the inseminated woman, rather than the biological father, will be deemed to be the father for all purposes) do not apply to surrogate arrangements [*see Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1272-1273, 284 Cal. Rptr. 18, cert. denied sub nom. Nancy B. v. Charlotte M. (1992) 503 U.S. 991; Sherwyn v. Department of Social Services (1985) 173 Cal. App. 3d 52, 59, 218 Cal. Rptr. 778; see also § 100.221[1][c]*], some practitioners recommend that the wife of the biological father should not sign the agreement, in order to avoid possible criminal repercussions. *Penal Code* § 273 makes it a misdemeanor to pay money for the adoption of a child. The biological father would not commit a misdemeanor under that statute, because a man cannot purchase his own child; his wife could circumvent that statute by not becoming a party to the agreement [*see Turk, If Baby M Were a Californian ..., 7 Calif. Lawyer 78, 80 (No. 8)(August 1987)*].

b. Purpose of agreement [*see § 100.221[2], P 1*].

NOTE:

The parties may also wish to include a summary of the procedure that will be used to effectuate the purpose.

2. Include provisions regarding following:

a. Biological father's emotional investment in surrogate arrangement [*see § 100.221[2], P 3*].

NOTE:

An express acknowledgment of the emotional investment of the biological father and his wife may later help establish the basis for a cause of action for intentional infliction of emotional distress if the surrogate breaches the contract by keeping the child after birth [*see Bird, Surrogate Motherhood: Hers? Yours? Ours?, 2 Calif. Lawyer 20, 24 (No. 2)(Feb. 1982); see also § 100.221[1][g]*].

b. Termination of parental rights [*see § 100.221[2], P 3*].

NOTE:

The surrogate and her husband should agree to completely terminate parental rights to the child, and not attempt to establish any relationship with the child.

c. Death of biological father [*see § 100.221[2], P 4*].

NOTE:

The parties should determine the custody and support of the child if the biological father, or both the biological father and his wife, die before the surrogate has relinquished the child [*see § 100.221[1][h]*].

d. Medical and psychological evaluations [*see § 100.221[2], PP 5, 6*].

NOTE:

Most surrogate agreements require the surrogate to undergo extensive tests, since her physical and emotional health are the most important factors for suitability as a surrogate [

see § 100.221[1][i]. Psychological counseling may identify and eliminate potential problems [*see Turk, If Baby M Were a Californian ...*, 7 Calif. Lawyer 78 (No. 8)(August 1987)].

e. Review of medical records [*see § 100.221[2]*, P 7].

NOTE:

The adopting parents may want to examine the medical records of the surrogate's existing children, to determine any genetic problems.

f. Artificial insemination [*see § 100.221[2]*, P 8].

NOTE:

The contract may designate a doctor to perform the procedure, and it may contain the husband's agreement to give his consent [*see § 100.221[1][j]*].

g. Conduct during pregnancy [*see § 100.221[2]*, P 9].

NOTE:

The contract should specify all activities, such as smoking and drinking, that the surrogate agrees to forgo in the best interests of the fetus [*see § 100.221[1][k]*].

h. Amniocentesis [*see § 100.221[2]*, P 10].

NOTE:

This procedure, used to detect genetic defects in a fetus, may be required on the advice of a physician, or on the request of the biological father. The parties should agree on the action to be taken if the test results show an abnormal fetus [*see § 100.221[1][l]*].

i. Abortion [*see § 100.221[2]*, P 11].

NOTE:

The parties should attempt to agree on whether an abortion should be performed if the fetus is abnormal or the surrogate's health is threatened. However, the surrogate has the sole right to decide whether to seek an abortion, to the exclusion of the biological father [*see Roe v. Wade (1973) 410 U.S. 113, 153, 35 L. Ed. 147, 93 S. Ct. 705 ; see also § 100.221[1][m]*].

j. Miscarriage [*see § 100.221[2]*, P 12].

NOTE:

The parties should agree on whether miscarriage will cancel the agreement or whether additional attempts at pregnancy will be required [*see § 100.221[1][n]*].

k. Delivery [*see § 100.221[2]*, P 13].

NOTE:

If the adoptive parents wish to be present during the delivery of the child, the parties should include a provision to that effect. They may want to require that the delivery take place in a hospital, to ensure optimum medical attention for the child [*see § 100.221[1][o]*].

l. Determination of paternity [see § 100.221[2], P 14].

NOTE:

A surrogate contract should include the agreement of the surrogate's husband (if any) to be tested for paternity, since the purpose of the agreement would not be accomplished if the child born to the surrogate was biologically her husband's [see § 100.221[1][p]]. The contract may require the child's birth certificate to state the biological father's surname if the blood test confirms that he is the biological father.

m. Surrender of custody [see § 100.221[2], P 15].

NOTE:

The parties should specify whether the child will be released to the adoptive parents from the hospital after birth, or within a certain time after going home with the surrogate and her husband. The surrogate and her husband should agree to sign all releases incident to transfer of custody and adoption [see § 100.221[1][q]].

n. Consideration [see § 100.221[2], P 16].

NOTE:

The parties should specify all fees and expenses to be paid by the biological father, including medical and insurance expenses [see P p, **below**], as well as other agreed-upon costs [see § 100.221[1][r]].

o. Escrow [see § 100.221[2], P 17].

NOTE:

Many surrogate arrangements require the biological father to deposit the surrogate's flat fee into escrow, to be paid to her upon relinquishment of the child [see § 100.221[1][s]]. This arrangement overcomes to some extent the potential unenforceability of the agreement. If the surrogate refuses to relinquish the child, at least the biological father's out-of-pocket loss is minimized [see Andrews, *The Stork Market: The Law of the New Reproductive Technologies*, 70 A.B.A. J. 50, 56 (Aug. 1984)].

p. Insurance [see § 100.221[2], P 18].

NOTE:

The biological father may purchase medical insurance for the surrogate if she is not already covered, and may agree to purchase a life insurance policy to insure against her death resulting from the pregnancy or childbirth [see § 100.221[1][t]].

q. Assumption of pregnancy risks [see § 100.221[2], P 19].

NOTE:

The surrogate and her husband should acknowledge and accept the risks inherent in pregnancy and childbirth, including death [see § 100.221[1][u]].

r. Assumption of risk of abnormal child [see § 100.221[2], P 20].

NOTE:

The biological father should acknowledge that the baby may be abnormal, and should agree to accept the child, whatever the child's condition [*see* § 100.221[1][u]].

- s. Cancellation of agreement [*see* § 100.221[2], P 21].

NOTE:

The parties should state what circumstances, such as failure to conceive or miscarriage, permit cancellation of the contract [*see* *Civ. Code* § 1699; *see also* § 100.221[1][v]].

- t. Procedure in event of surrogate's decision to keep child [*see* § 100.221[2], P 22].

NOTE:

The parties to a surrogate agreement may agree to permit the surrogate to change her mind regarding relinquishment of the child during a certain period of time, such as the first trimester of pregnancy, and require her to notify the father immediately on making such a decision. If the surrogate makes that decision, the contract should provide for reimbursement of expenses to the father. It should also provide for the custody, visitation, and support of the child in the event the surrogate keeps the child, whether in accordance with or in breach of the agreement [*see* § 100.221[1][w]].

- u. Representation by separate counsel [*see* § 100.221[2], P 25].

NOTE:

Because of the great potential for conflict between the parties, both before and after execution of the agreement, they should have separate counsel. This fact should be stated in the agreement [*see* § 100.221[1][z]].

- v. Provision for attorneys' fees [*see* § 100.221[2], P 23].

NOTE:

For discussion of a provision for attorneys' fees [*see* *Code Civ. Proc.* § 1021], *see* § 100.221[1][x].

- w. Confidentiality of arrangement, if desired [*see* § 100.221[2], P 28].

NOTE:

Some, if not most, parties may wish to keep the fact of surrogate parenting secret, for their own or the child's sake [*see* § 100.221[1][aa]].

3. Add standard contractual provisions [*see* §§ 100.130, P 7; 100.221[2], PP 24, 26, 27].

NOTE:

Because the agreement is being drafted with the intent that California law apply, and because the agreement may not be given effect in the manner the parties intend under the laws of other states, it is especially important that a choice of law provision stating that California law will govern the agreement be included [*see* Ch. 75, **Formation of Contracts and Standard Contractual Provisions**]. Other standard contract provisions may be added when applicable.

4. Set forth space for signatures of all parties to agreement.

5. If desired, include following:

NOTE:

These statements may be added to increase the likelihood that a court would find the agreement enforceable [*see* California Family Law Monthly, vol. 3, No. 10 (May 1987), p. 398 (Matthew Bender)]. For further discussion, see § 100.221[1][i], [z]].

a. With respect to surrogate's attorney:

(1) Statement that he or she:

(a) Has explained agreement to surrogate and her husband.

(b) Believes that they fully understand their rights and obligations under agreement.

(2) Signature.

b. With respect to mental health expert:

(1) Statement that he or she:

(a) Has examined surrogate and her husband.

(b) Believes they are psychologically sound and fully competent to enter into agreement.

(c) Believes they understand consequences of their act.

(2) Signature.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation General Overview Family Law Paternity & Surrogacy Surrogacy General Overview Family Law Paternity & Surrogacy Surrogacy Agreements Family Law Paternity & Surrogacy Surrogacy Disposition of Eggs, Preembryos & Sperm



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[Reserved]

§§ 100.136[Reserved]



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31-100 California Legal Forms--Transaction Guide § 100.150

§ 100.150 Amending Agreement

1. Draft modified written agreement [*see Civ. Code § 1698*].

NOTE:

If the original contract specifies a particular method of modification, the amended agreement should conform to those requirements. If the modifications desired are so extensive that they would require a complete redrafting of the agreement, the original agreement should be terminated and a new one drafted. For further discussion and forms for modifying contracts generally, see Ch. 77, ***Discharge of Obligations***.

2. Obtain signatures of all parties.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract ModificationsGeneral OverviewFamily LawPaternity & SurrogacyGeneral Overview



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31-100 California Legal Forms--Transaction Guide § 100.151

§ 100.151 Enforcing Agreement

1. If dispute between parties arises before breach of agreement, advise parties to seek declaratory relief [see *Code Civ. Proc. § 1060*].

NOTE:

A person interested under a contract may bring an action for a declaration of his or her rights and duties with respect to another person, as long as an actual controversy exists [Code Civ. Proc. § 1060]. For a general discussion of declaratory relief as a remedy, see California Forms of Pleading and Practice, Ch. 182, **Declaratory Relief** (Matthew Bender).

2. If either party breaches contract, advise parties to seek relief in same manner as other contracts [see California Forms of Pleading and Practice, Chs. 140, *Contracts* ; 490, *Rescission and Restitution* ; and 528, *Specific Performance* (Matthew Bender)].

NOTE:

For a discussion of potential problems in enforcing a surrogacy agreement, see § 100.221[1][b].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceGeneral OverviewFamily LawPaternity & SurrogacyGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 100 CONTROL, CUSTODY, AND SUPPORT OF MINORS
PART III. TRANSACTION GUIDE
E. Related and Subsequent Procedures

31-100 California Legal Forms--Transaction Guide §§ 100.152-100.199

[Reserved]

§§ 100.152[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 100 CONTROL, CUSTODY, AND SUPPORT OF MINORS
PART IV. FORMS
A. Custody, Control, and Support of Child

31-100 California Legal Forms--Transaction Guide § 100.200

§ 100.200 Agreement for Compensation for Support of Child

[1] Comment

[a] Use of Form

This form is a contract between a parent and a third party, in which the parent agrees to compensate the third party for the support of his or her minor child. It may be used in circumstances in which a parent with sole custody agrees to have his or her child live with a friend or relative, if, for example, the parent will be absent from the state or country for an extended period of time. If the child's parents have joint custody, appropriate modifications should be made. This form is not intended to be used as a custody and support agreement between spouses.

Like all other types of contracts, an agreement for the support of a child must include (1) the consent of parties capable of contracting [*see Civ. Code §§ 1556-1559* (parties), *1565-1590* (consent)]; (2) a lawful object [*see Civ. Code §§ 1595-1599*]; and (3) a sufficient cause or consideration [*Civ. Code § 1550; see Civ. Code §§ 1605-1615* (consideration); *see also* [2], P 2, *below*]. For a detailed discussion of these essential contract elements, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

[b] Parents' Duty of Support

Parents have an equal responsibility to support and educate their child in a manner suitable to the child's circumstances, taking into consideration their respective earnings or earning capacities [*see Fam. Code § 3900*]. As a general rule, the parental duty of support continues as to an unmarried child who has attained the age of 18 years, is a full-time high school student, and who is not self-supporting, until the time the child completes the 12th grade or attains the age of 19 years, whichever occurs first [*Fam. Code § 3901(a)*]. For emancipated minors, the duty of support ends at the time of emancipation [*see Fam. Code §§ 7002, 7050(a)*].

A parent is not bound to compensate the other parent or a relative for the voluntary support of his or her child, unless the parent has made an agreement for compensation [*Fam. Code § 3951(a)*]. However, this rule does not relieve the parent of the obligation to support a child during any period in which the state, county, or other governmental entity

furnishes support for the child [*Fam. Code* § 3951(c)]. Similarly, a parent is not required to compensate a "stranger" for the support of a child who has abandoned the parent without just cause [*Fam. Code* § 3951(b)]. "Abandonment" is a child's permanent relinquishment of submission to parental control [see *County of Fresno v. Walker* (1981) 115 Cal. App. 3d 814, 824, 171 Cal. Rptr. 572 ; see also § 100.35].

[c] Power of Attorney

If a parent intends to have a third party support his or her child during the parent's extended absence for a reason such as employment abroad, he or she may want to appoint an agent to carry out his or her support and other obligations. This may be accomplished through a power of attorney. For example, a statutory short form power of attorney states that the appointed attorney in fact can provide for the support and welfare of the person's spouse, children, and dependents, and perform a variety of other actions, unless the power of attorney specifically limits the permissible actions [see *Prob. Code* § 4000 et seq.; see also Ch. 98, *Powers of Attorney*]. For discussion and a power of attorney form authorizing the custodian to act as the parents' agent with respect to a child, see Ch. 98, *Powers of Attorney* .

[2] FORM

Agreement for Compensation for Support of Child

AGREEMENT FOR COMPENSATION FOR SUPPORT OF CHILD

This Agreement is made between _____ [name of parent] ("Parent"), the _____ [father or mother] of _____ [name of child] ("Minor"), and _____ [name of other adult] ("Custodian") [add as appropriate; the _____ (describe relationship, e.g., Minor's uncle)].

Purpose of Agreement

1. Because [state reason for arrangement, e.g., Parent will be living abroad for two years for employment purposes], Parent agrees that Minor shall live with Custodian [add as applicable: until _____ (date, or event such as parent's return or minor's 18th birthday)].

Parent's Right of Custody and Control

2. Parent is entitled to determine Child's residence under *Family Code Section 7501*, as _____ [he or she] [has sole custody or is the only living parent] of Child.

[Add when the custodian is not a relative:]

Acknowledgment of Nonabandonment

3. Parent acknowledges that Minor has not abandoned Parent, but instead is under the care of Custodian with Parent's full approval and consent.

[Continue with the following:]

Promise to Provide Care

4. Custodian agrees to assume the sole support of Minor; to have Minor live at Custodian's residence or to otherwise provide for Minor's lodging; to feed, clothe, and otherwise provide for Minor according to Custodian's circumstances; to provide medical care; and to provide for Minor's education, for the term of this Agreement.

Promise to Compensate for Support

5. In consideration of the support of Minor to be provided by Custodian, Parent agrees to [pay to Custodian the amount of \$_____ per _____ (state period of time, e.g., month) or promptly reimburse Custodian upon receipt of invoices itemizing expenditures arising from Custodian's support of Minor].

[Add when appropriate:]

Additional Compensation

6. Parent further agrees to pay to Custodian the sum of \$_____ on [specify time, e.g., the date on which Minor takes up residence with Custodian].

[Continue with the following:]

Dated: _____

PARENT

_____ [signature of parent]

[typed name]

CUSTODIAN

_____ [signature of custodian]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation General Overview Family Law Child Support Obligations General Overview Family Law Parental Duties & Rights Duties Support of Children



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DIVISION VII: PERSONAL TRANSACTIONS
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PART IV. FORMS
A. Custody, Control, and Support of Child

31-100 California Legal Forms--Transaction Guide § 100.201

§ 100.201 Stepparent's Agreement for Support of Minor Child

[1] Comment

[a] Use of Form

This form is an agreement by a stepparent to support stepchildren who reside with the stepparent and the stepchildren's birth parent but who have not been adopted by the stepparent. It is intended for use in situations in which the birth parent (the stepparent's spouse) has sole custody of his or her children. If the birth parents have joint custody, appropriate modifications should be made to this form in accordance with the custody and support order.

This agreement may be executed prior or subsequent to the marriage of the stepparent and the birth parent. For discussion and examples of prenuptial agreements generally, see Ch. 111, *Prenuptial Agreements*. Contract formation generally is covered in Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

[b] Need for Agreement

A stepparent may acquire a legal parental relationship with respect to his or her spouse's child by means of a stepparent adoption [see *Fam. Code* §§ 9000-9007; see also California Forms of Pleading and Practice, Ch. 12B, *Adoptions: Unmarried Minors* (Matthew Bender)]. A stepparent adoption severs the parent-child relationship between the child and the noncustodial birth parent and creates a new parent-child relationship between the child and the adoptive parent [see *Fam. Code* §§ 8616, 8617].

A stepparent may be either unwilling or legally unable to formalize his or her relationship with stepchildren through adoption. For example, the stepparent and natural parent may be unable to obtain the noncustodial birth parent's consent to the adoption. This consent is usually, but not always, required [see *Fam. Code* §§ 8604-8607]. At the time request for consent is sought from a birth parent, the birth parent must be advised that if he or she lived at any time with the child as parent and child, the adoption of the child by a stepparent does not affect the child's right to inherit the birth parent's property or the property of blood relatives of the birth parent [see *Fam. Code* § 9004]. In addition, the consent of the child, if over the age of 12 years, is necessary to his or her adoption [*Fam. Code* § 8602].

There is no intermediate status between an informal stepparent-child relationship and a legal stepparent adoption, and no support obligation in an informal stepparent-child relationship [see [c], [d], *below*]. This form creates a legal obligation on the part of a nonadoptive stepparent to treat the stepchild as his or her legal child.

[c] Liability of Stepparent's Property for Support of Child

The separate property of a stepparent who has not adopted his or her stepchild is not liable for the support of that child [see Fam. Code § 813(b)(1)]. The community property of the stepparent and the child's birth parent generally is liable for a child support obligation that arose prior to the marriage [Fam. Code §§ 910, 915]. However, the stepparent's community earnings are not liable for such a support obligation to the extent that they are (1) held in a deposit account in which the stepparent's spouse has no right of withdrawal, and (2) uncommingled with other community property other than property that is insignificant in amount [Fam. Code § 911(a)]; see Com. Code § 9102(a)(29) (defining "deposit account")].

If community property of a marriage is applied to the satisfaction of a prior child support obligation of one spouse (the natural parent), when nonexempt separate income of the natural parent is available but not applied, the community is entitled to reimbursement from the natural parent up to the amount of the separate income [Fam. Code § 915(b) (reimbursement not to exceed amount of community property applied to pay natural parent's child support obligation)].

[d] Effect of Stepparent's Assumption of Parental Obligations

The parent-child relationship with its concomitant rights and duties extends to persons, including stepparents, standing *in loco parentis* to a child. The term "*in loco parentis*" refers to any person who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formalities necessary to establish the legal relationship of parent and child [*Estate of Teddy* (1963) 214 Cal. App. 2d 113, 119, 29 Cal. Rptr. 402] . A stepparent does not, merely by virtue of marrying a child's birth parent, stand *in loco parentis* to his or her stepchild [*Trudell v. Leatherby* (1931) 212 Cal. 678, 681 , *overruled on other grounds*, *Gibson v. Gibson* (1971) 3 Cal. 3d 914, 923, 92 Cal. Rptr. 288, 479 P.2d 648] . However, to the extent that a stepparent receives the child into his or her own family and treats the child as a member of the family, the stepparent stands in the place of a natural parent. In that situation, the reciprocal rights, duties, and obligations of parent and child continue as long as the relationship continues [*Trudell v. Leatherby* (1931) 212 Cal. 678, 681, 682 , *overruled on other grounds*, *Gibson v. Gibson* (1971) 3 Cal. 3d 914, 923, 92 Cal. Rptr. 288, 479 P.2d 648] . Just as a natural parent cannot recover for the support and maintenance of his or her child, and is not liable for the services of that child, a person *in loco parentis* is subject to the same rule, in the absence of an express contract [*Trudell v. Leatherby* (1931) 212 Cal. 678, 681, 682 , *overruled on other grounds*, *Gibson v. Gibson* (1971) 3 Cal. 3d 914, 923, 92 Cal. Rptr. 288, 479 P.2d 648] .

The rights and duties arising out of a relationship *in loco parentis* last only as long as the relationship with the child continues, and they may be abandoned [see *Clevenger v. Clevenger* (1961) 189 Cal. App. 2d 658, 665-666, 11 Cal. Rptr. 707 ; see also [2], P 3, *below*]. In contrast, the duties and obligations of legal parents may not be abandoned by the parent, even if parental rights and obligations have been assumed by a person standing *in loco parentis* to a child [see Fam. Code §§ 3901, 4000; see also § 100.30].

[e] Intestate Succession

For purposes of determining intestate succession [see Prob. Code §§ 6400-6455], a parent-child relationship generally exists between a child and his or her birth or adoptive parents [see Prob. Code § 6450; but see Prob. Code §§ 6451-6453 (exceptions to general rule)]. If an adoption has not occurred, a parent-child relationship between a child and his or her stepparent generally exists only if [Prob. Code § 6454; see [b], *above*]:

- The relationship began during the child's minority and continued throughout the parties' joint lifetimes; and
- It is established by clear and convincing evidence that the stepparent would have adopted the child but for a legal barrier.

Also, a child born out of wedlock can establish that he or she is the natural child of an intestate decedent by producing clear and convincing evidence that the decedent openly held the child out as the decedent's own [*Estate of Chambers* (2009) 175 Cal. App. 4th 891, 896, 96 Cal. Rptr. 3d 651 ; see Fam. Code § 7630(c); Prob. Code § 6453(b)].

However, even if the foregoing requirements are not met, the judicial doctrine of equitable adoption may be applied to establish the right of a child (or the child's issue) to share in a deceased stepparent's intestate estate [Prob. Code § 6455]. To establish an equitable adoption, the child (or the child's issue) must show by clear and convincing evidence (1) some direct expression by the decedent of an intent to adopt the child, and (2) that the decedent acted consistently with that intent by forming a close and enduring familial relationship with the child [*Estate of Ford* (2004) 32 Cal. 4th 160, 171-173, 8 Cal. Rptr. 3d 541, 82 P.3d 747 (intent to adopt may be shown by proof of unperformed express agreement or promise to adopt, or by proof of other acts or statements directly and unequivocally showing that decedent intended child to be, or to be treated as, legally adopted child)].

[f] Consideration for Agreement

Generally, every contract requires a sufficient cause or consideration [Civ. Code § 1550(4); see Civ. Code §§ 1605-1615]. However, if this agreement is executed as a premarital agreement, it does not require consideration to be enforceable [Fam. Code § 1611; see [2], P 2, below].

[g] Enforcement of Agreement

If this agreement is made as a premarital agreement, its enforceability is governed by Uniform Premarital Agreement Act [Fam. Code §§ 1600-1617; see Ch. 111, *Premarital Agreements*]. For a discussion of the enforcement of postnuptial agreements, see Ch. 112, *Postnuptial Agreements* .

[2] FORM

Stepparent's Agreement for Support of Minor Child

AGREEMENT FOR SUPPORT OF STEPCHILD[REN]

Promise to Support

1. _____ [name of stepparent] ("Promisor") promises to _____ [name of natural parent spouse] ("Promisee") that [, from the time of marriage and thereafter,] _____ [he or she] will accept into _____ [his or her] home, treat as a member of the family, and provide reasonable support for the care, maintenance, and education of, the following minor child[ren] of Promisee:

_____ [name of child] born _____ [date]

_____ [name of child] born _____ [date]

_____ [name of child] born _____ [date]

_____ [name of child] born _____ [date]

Consideration

2. This promise is made in consideration of [*describe consideration, e.g., the transfer of the separate property of Promisee, set forth as Exhibit A attached to this Agreement, to community property*].

Period of Support

3. Except as provided in Paragraph 4, Promisor shall provide the support referred to in Paragraph 1 with respect to [the or each] child until [the or each] child reaches the age of majority, or until [the or each] child becomes emancipated, whichever occurs first [or until _____ (date)].

Effect of Dissolution [or Separation]

4. Notwithstanding the period of support specified in Paragraph 3, above, Promisor's promise to support is intended to be binding only for the duration of _____ [his or her] marriage to Promisee, and therefore shall terminate upon dissolution of their marriage [or upon their legal separation].

[Optional:]

Provisions in Will

5. Promisor shall provide in _____ [his or her] will, on the condition that he or she dies while married to Promisee, for the payment to the guardian of each child listed above who at the time of Promisor's death is under the age of majority and unemancipated, of an amount equal to \$_____ per month for each such child until that child reaches the age of majority or is emancipated, to be used exclusively for the purposes specified in Paragraph 1, above. Promisor shall have the option to arrange for payment of this sum in any manner, including lump sum payment; purchase of a commercial annuity for each child; creation of a trust fund, the income of which shall be applied for the benefit of each child; or purchase of life insurance, the principal amount of which shall be used to purchase a commercial annuity for each child upon the death of Promisor.

[Continue with the following:]

Effect on Natural Children

6. Nothing in this Agreement shall be construed as absolving either party of his or her statutory duty to support any minor children of the marriage.

Dated: _____

PROMISOR

_____ [signature of stepparent]

[*typed name*]

PROMISEE

_____ [*signature of natural parent*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation General Overview Family Law Child Support Obligations General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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PART IV. FORMS

A. Custody, Control, and Support of Child

31-100 California Legal Forms--Transaction Guide § 100.202

§ 100.202 Notice of Change of Minor's Residence

[1] Comment

[a] Use of Form

This form is a notice of a minor's change of residence. It is intended to be used by a parent or guardian when the residency of the minor child is at issue, such as when the child changes school districts.

The right to determine a child's residence is based on the right to custody [*Fam. Code § 7501*; see § 100.21[3]; see also [c], *below*]. For a discussion of other rights inherent in the right to custody, see §§ 100.20 and 100.21.

[b] Establishment of Residence Generally

A minor's residence ordinarily is the same as either (1) the residence of the parent or parents with whom the child maintains his or her place of abode; or (2) the residence of any individual who has been given legal custody of the minor by court order [*Gov. Code § 244(d), (e)*; *Welf. & Inst. Code § 17.1*].

[c] Determination by Parent

A parent entitled to the custody of a child [see § 100.20] has the right to change the child's residence, subject to the power of the proper court to restrain a removal that would prejudice the rights or welfare of the child [*Fam. Code § 7501*]. For example, a child's welfare would be prejudiced if his or her mother removed the child from the state in order to frustrate or destroy the father's visitation rights [see *In re Marriage of Ciganovich* (1976) 61 Cal. App. 3d 289, 293, 132 Cal. Rptr. 261]. The right to determine the child's residence includes the right to place the child with another person for the purpose of establishing a guardianship over the child [*Guardianship of Donaldson* (1986) 178 Cal. App. 3d 477, 486, 223 Cal. Rptr. 707].

[d] Determination by Guardian

A child's guardian or conservator may fix the residence of the child at any place in California without the permission of the court [Prob. Code § 2352(a),(b)]. However, he or she must select the least restrictive appropriate setting that is both (1) available and necessary to meet the needs of the child, and (2) in the best interests of the child [Prob. Code § 2352(a),(b); *see* Ch. 66, *Guardianships*]. A child's guardian or conservator may also fix the residence of the child at any place outside of California, if he or she obtains permission of the court first [Prob. Code § 2352(c)]. The guardian or conservator must file a notice of change of residence with the court within 30 days of the date of the change [Prob. Code § 2352(e)(1) Judicial Council to develop forms of notice]. The guardian or conservator ordinarily must mail a copy of the notice to any persons who would be entitled to notice of a hearing to appoint a guardian or conservator [see prob. Code §§ 1511(b), 1822(b)], and must file a proof of service, unless the court waives the mailing requirement in order to prevent harm to the child [Prob. Code § 2352(e)(2)]. For additional discussion of guardians and conservators, see Ch. 66, *Guardianships* .

[e] Determination by Child

The residence of an unmarried minor who has a living parent cannot be changed by the minor's own act [Gov. Code § 244(e)]. However, an emancipated minor [see §§ 100.50-100.52] is considered to be an adult [see Fam. Code § 6501] for the purpose of establishing his or her own residence [Fam. Code § 7050(e)(15)].

[2] FORM

Notice of Change of Minor's Residence

NOTICE OF CHANGE OF MINOR'S RESIDENCE

To: _____ [name of person to be notified]
 _____ [address of person to be notified]

YOU ARE HEREBY NOTIFIED THAT:

[If notice is given by parent(s):]

_____ [name(s) of parent(s)], the _____ [mother or father or parents] of
 _____ [name of minor]

[Or, if guardian gives notice:]

_____ [name of guardian], appointed by _____ [name of court] on
 _____ [date] as the guardian of _____ [name of minor],

[Continue with the following:]

_____ [is or are] changing the residence of _____ [name of child]. Beginning on
 _____ [date], _____ [name of child] will no longer reside at
 _____ [old address]. Instead, _____ [he or she] will reside at
 _____ [new address] until further notice.

Dated: _____

_____ [signature(s) of parent(s) or guardian]
[typed name(s)]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyGeneral OverviewFamily LawFamily Protection & WelfareChildrenGeneral Overview



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31-100 California Legal Forms--Transaction Guide §§ 100.203-100.209

[Reserved]

§§ 100.203[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 100 CONTROL, CUSTODY, AND SUPPORT OF MINORS
PART IV. FORMS
B. Emancipation of Minor

31-100 California Legal Forms--Transaction Guide § 100.210

§ 100.210 Relinquishment of Parental Rights to Control Minor and to Receive Minor's Earnings

[1] Comment

[a] Use of Form

This form is a relinquishment by parents of the right to control and receive the earnings of their minor child. This type of declaration can be used to create an express emancipation of the minor child [*Fam. Code § 7504*; see [d], below]. For a relinquishment of the right to a child's earnings only, see § 100.211.

For forms and discussion of the judicial procedure by which a minor may receive a declaration of emancipation, see California Forms of Pleading and Practice, Ch. 245, *Emancipation of Minors* (Matthew Bender).

[b] Parents' Right to Custody and Control of Unemancipated Minor

The mother of an unemancipated minor child, and the father, if presumed to be the father [*see Fam. Code § 7611*], are equally entitled to the services and earnings of the child [*Fam. Code § 7500(a)*]. If one parent is dead, is unable, or refuses to take custody, or has abandoned the child, the other parent is entitled to the services and earnings of the child [*Fam. Code § 7500(b)*]. A parent's statutory rights to a child's earnings, however, do not include earnings from professional, sports, or related contracts of a kind described in *Fam. Code § 6750 et seq.* [*Fam. Code § 7500(c)*]. Included within the concept of custody are various rights of control over the child [*see § 100.21*]. Emancipation of a minor child terminates the parents' right of custody and control [*see Fam. Code § 7050(b)*; see also § 100.52].

[c] Authorization for Relinquishment of Parental Control

The parents of a minor child, whether solvent or insolvent, may emancipate their child by relinquishing their rights to control the minor and receive his or her earnings [*Fam. Code § 7504*]. Emancipation may also occur by operation of law [*see Fam. Code § 7002*] or by judicial declaration [*see Fam. Code § 7120*].

[d] Manner of Relinquishment

Emancipation pursuant to parental relinquishment of control may be express or implied, complete or partial, conditional or absolute [*Perkins v. Robertson* (1956) 140 Cal. App. 2d 536, 540, 295 P.2d 972] . Whether a child has been emancipated by his or her parents presents a question of fact, as the alleged emancipation is not based on a simple and determinable event such as a marriage ceremony or a birthday, but rather on the totality of circumstances and a variety of acts and attitudes [*Lehrer v. Lehrer* (1976) 63 Cal. App. 3d 276, 280, 133 Cal. Rptr. 709] .

This form is an express written relinquishment of parental control. It may also constitute evidence of parental consent if the minor wishes to obtain a judicial declaration of emancipation [see *Fam. Code* § 7120; see also *California Forms of Pleading and Practice*, Ch. 245, *Emancipation of Minors* (Matthew Bender)]. However, relinquishment may also be implied from parental conduct [see, e.g., *Martinez v. Southern Pacific Co.* (1955) 45 Cal. 2d 244, 253, 288 P.2d 868 (minor controlled her own finances and contributed to family budget as adult)], and will be presumed if the parents have abandoned the minor child [*Fam. Code* § 7504; see *Guardianship of Brazeal* (1953) 117 Cal. App. 2d 59, 61, 254 P.2d 886 (relinquishment of all rights and duties toward child constitutes abandonment)].

[e] Effect of Minor Child

Emancipation by relinquishment of parental authority may be effective for specific purposes only [see *Jolicoeur v. Mihaly* (1971) 5 Cal. 3d 565, 580, 96 Cal. Rptr. 697, 488 P.2d 1 (emancipation for residential and voting purposes)]. In contrast, emancipation by operation of law is effective for all purposes [see *Fam. Code* § 7505], and emancipation pursuant to the Emancipation of Minors Law is complete for most purposes [see *Fam. Code* § 7050; see also §§ 100.51[3], 100.52]. To the extent that the child has been emancipated, he or she becomes *sui juris*, with the same independence as though he or she had attained majority [*Lev v. College of Marin* (1971) 22 Cal. App. 3d 488, 491, 99 Cal. Rptr. 476] .

This parental relinquishment form is designed to provide for complete emancipation of the minor child. For an example of a relinquishment resulting in partial emancipation, see § 100.211.

[f] Effect on Parents' Duty of Support

When emancipation occurs under the Emancipation of Minors Law [*Fam. Code* §§ 7000-7143], the parent's duty of support is terminated [*Fam. Code* § 7050(a); but see *Fam. Code* § 7130(b) (declaration of emancipation of indigent minor with no means of support is subject to rescission)]. However, emancipation pursuant to relinquishment of control does not automatically terminate the parents' duty of support and other obligations to the child [*Lehrer v. Lehrer* (1976) 63 Cal. App. 3d 276, 280, 133 Cal. Rptr. 709] . Otherwise, parents could agree to relinquish their right of control merely to evade their parental duties. Whether emancipation is total or partial, a parent may continue the obligation to support a child by agreement [see *Fam. Code* § 3901(b)]. This form provides for the continuation of support [see [2], P 3, below]. Even if a child has been emancipated, his or her parents are always obligated to support the child to the extent of their ability, if the child is incapacitated from earning a living and without sufficient means [*Fam. Code* § 3910(a)].

[g] Execution of Agreement

If the parents have joint custody, each must sign the declaration of relinquishment, since they are equally entitled to their child's custody, services, and earnings [see *Fam. Code* § 7500(a)]. This form assumes execution by two parents. It may be modified for use by a surviving parent or a parent with court-awarded sole custody [see *Fam. Code* § 7500(b)].

[h] Acknowledgement of Receipt by Child

Although a relinquishment is not a contract made with the minor, but a declaration by the parents, this form includes an acknowledgment by the minor that he or she is aware of the parents' express relinquishment of control.

[2] FORM**Relinquishment of Parental Rights to Control Minor and to Receive Minor's Earnings**

DECLARATION OF RELINQUISHMENT OF RIGHTS TO CONTROL CHILD AND _____
 [HIS or HER] EARNINGS

_____[*name of mother*] and _____[*name of father*] ("Parents"), the parents of
 _____[*name of child*] ("Child"), declare as follows:

Qualification of Child

1. _____[*name of child*], age _____, has demonstrated to the satisfaction of
 _____[his or her] Parents that _____[he or she] is capable of self-management in all
 aspects of life and no longer requires parental regulation. [*If desired, describe reasons for decision, e.g., This decision is
 based on the fact that _____ (he or she) has managed _____ (his or her) personal and
 financial affairs, independent of parental control, for over a year.*]

Relinquishment of Parental Rights

2. As a consequence of Parents' trust in Child's abilities, as set forth in Paragraph 1, Parents fully and completely
 relinquish the right of controlling [him or her] and the right to _____[his or her] earnings, pursuant to
Family Code § 7504. By this relinquishment, Parents intend that _____[*name of child*] be entirely
 emancipated from parental control, and that, among other things, _____[he or she] may reside at any
 location, engage in any occupation, and make any other decisions regarding _____[his or her] life, that
 _____[he or she] sees fit.

Affirmation of Parental Duty of Support

3. Parents do not deny or abdicate in any way their legal or moral obligation to support Child. If
 _____[he or she] chooses to remain living at Parents' residence, they will continue to furnish all
 reasonable room, board, and general expenses consistent with their normal manner of caring for their minor children. If
 _____[he or she] resides at any other location, they will be willing to support [him or her] in a manner
 comparable with what they would have provided had Child remained at their residence, if _____[he or
 she] requires or so requests.

Retention of General Parental Responsibility

4. Parents expressly retain any and all parental responsibility for Child imposed by law.

Dated: _____

FATHER

_____ [*signature of father*]

[*typed name*]

MOTHER

_____ [*signature of mother*]

[*typed name*]

Acknowledged and accepted on _____ [*date*] by:

CHILD

_____ [*signature of child*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsEmancipation of Minors



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 100 CONTROL, CUSTODY, AND SUPPORT OF MINORS
PART IV. FORMS
B. Emancipation of Minor

31-100 California Legal Forms--Transaction Guide § 100.211

§ 100.211 Relinquishment of Parental Right to Minor's Earnings

[1] Comment

[a] Use of Form

This form is a declaration by the parents of a minor child relinquishing their right to control the child's earnings. The use of this form constitutes a partial emancipation of the minor child [see *Slater v. California State Auto. Asso.* (1962) 200 Cal. App. 2d 375, 377, 19 Cal. Rptr. 290 ; see also [c], below]. For a form relinquishing both the right to earnings and the right of control over the child, intended to constitute a complete emancipation, see § 100.210.

[b] Parents' Right to Earnings

It is generally established that minors are entitled to hold their own property, both real and personal [*In re Scott K.* (1979) 24 Cal. 3d 395, 405, 155 Cal. Rptr. 671, 595 P.2d 105 , cert. denied, 444 U.S. 973, 100 S. Ct. 468, 62 L. Ed. 2d 388 ; see § 100.21[4]]. However, a minor child's earnings are not considered to be his or her own property, and parents having custody and control of an unmarried minor are entitled to his or her earnings [see *Fam. Code* § 7500]. For further discussion of the parents' right to their child's earnings, see § 100.21[5].

[c] Relinquishment of Parental Right to Earnings

A parent, whether solvent or insolvent, may relinquish to the child the rights of controlling the child and receiving the child's earnings. Such a relinquishment is a form of emancipation [see *Fam. Code* § 7504], and it may be either complete or partial [*Perkins v. Robertson* (1956) 140 Cal. App. 2d 536, 540, 295 P.2d 972 ; see also § 100.210[1][d]]. The relinquishment illustrated in § 100.210 is intended to be a relinquishment of all parental rights of control, resulting in complete emancipation. In contrast, relinquishment only of parents' rights to their child's earnings ordinarily constitutes a partial emancipation [see *Slater v. California State Auto. Asso.* (1962) 200 Cal. App. 2d 375, 377, 19 Cal. Rptr. 290] . This form is intended to emancipate the minor child only for purposes of his or her earnings.

[d] Declaration of Relinquishment

Although no particular form of voluntary relinquishment is required by statute [*see Fam. Code § 7504*], a writing will serve as a record of that relinquishment. This declaration is designed for execution by both parents. It may be modified for use by a surviving parent or a parent with court-awarded custody [*see Fam. Code § 7500(b)*].

In addition to a written declaration, relinquishment may be implied from the actions of the parents and child, and it will be presumed when the parents have abandoned the child [*see Fam. Code § 7504; see also §§ 100.51[2], 100.210[1][d]*].

[2] FORM

Relinquishment of Parental Right to Minor's Earnings

DECLARATION OF RELINQUISHMENT OF RIGHTS TO CHILD'S EARNINGS

[*name of mother*] and _____ [*name of father*] ("Parents"), the parents of

[*name of child*] ("Child"), declare as follows:

Qualification of Child

1. _____ [*name of child*], age _____, has demonstrated to the satisfaction of

[his or her] Parents that _____ [he or she] is capable of managing

[his or her] earnings and income and no longer requires parental regulation of

[his or her] financial affairs more than any other adult. [*If desired, describe reasons for decision,*
e.g., This decision is based on the fact that _____ (he or she) has managed _____
(his or her) financial affairs independent of parental control for over a year.]

Relinquishment of Parental Right to Earnings

2. As a consequence of Parents' trust in Child's abilities, as expressed in Paragraph 1, Parents fully and completely relinquish to Child the right to _____ [his or her] earnings, pursuant to *Family Code Section 7504*. By this relinquishment, they intend that _____ [*name of child*] be entirely emancipated from parental control, as to _____ [his or her] right or ability to receive, handle, manage, invest, or spend any funds, including those produced by Child's efforts, or generated in Child's name or to _____ [his or her] account, as well as to buy, hold in any manner, mortgage, lease, sell, or otherwise dispose of any personal property in Child's name or under _____ [his or her] ownership.

Affirmation of Remaining Parental Rights and Duties

3. Parents do not deny or abdicate in any way their right of custody and control of _____ [*name of child*], and they expressly retain their right to make a final determination on any position of employment to be taken, school to be attended, or residence to be maintained by Child. By this Declaration, Parents do not deny or abdicate in any way their parental duties toward Child, including their duty to support [him or her].

Retention of General Parental Responsibility

4. Parents expressly retain any and all parental responsibility for Child imposed by law.

Dated: _____

FATHER

_____ [*signature of father*]

[*typed name*]

MOTHER

_____ [*signature of mother*]

[*typed name*]

Acknowledged and accepted on _____ [*date*] by:

CHILD

_____ [*signature of child*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Parental Duties & Rights Duties General Overview Family Law Parental Duties & Rights Emancipation of Minors



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31-100 California Legal Forms--Transaction Guide §§ 100.213-100.219

[Reserved]

§§ 100.213[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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C. Artificial Insemination and Surrogate Parenting

31-100 California Legal Forms--Transaction Guide § 100.220

§ 100.220 Agreement for Artificial Insemination

[1] Comment

[a] Use of Form

This form is an agreement among a married woman who wishes to become pregnant through artificial insemination, her husband, and a man who agrees to be the semen donor. It is intended for use under circumstances in which the donor is known to the married couple (rather than anonymous) and in which the insemination will be performed under the supervision of a physician [*see* [b], *below*].

This form does not address or cover any issues that are involved in other types of artificial insemination arrangements, such as a relationship between a single woman who will be inseminated and her woman companion who plan to jointly raise a child or children conceived by artificial insemination [*see, e.g., Nancy S. v. Michele G. (1991) 228 Cal. App. 3d 831, 279 Cal. Rptr. 212 ; Curiale v. Reagan (1990) 222 Cal. App. 3d 1597, 272 Cal. Rptr. 520*].

For an agreement for surrogate parenting, *see* § 100.221.

[b] Statutory Requirements

When donor artificial insemination is performed under the supervision of a physician with the consent of a woman's husband, the husband is treated as if he were the biological father of the child conceived by his wife. The husband's consent to the procedure must be in writing and signed by both husband and wife. The physician must certify their signatures and the date of the insemination. The physician must retain the husband's consent as part of the medical record, which must be kept confidential and in a sealed file [*Fam. Code § 7613(a)*]. The physician's failure to take these actions, however, will not affect the father-child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only on an order of the court for good cause [*Fam. Code § 7613(a)*].

This form requires the husband and wife to execute a separate written instrument of consent to the artificial

insemination procedure and present the instrument to the physician for certification of the spouses' signatures [see [2], P 3, *below*]. The parties should be aware that a physician may require the use of his or her own consent form for this purpose.

The requirements that semen be donated to, and the insemination be under, the supervision of a licensed physician must be satisfied for the statutory presumptions regarding paternity to apply. If the semen is provided and the woman inseminated privately, the presumption does not operate and the donor may establish his paternity of the child [*Jhordan C. v. Mary K. (1986) 179 Cal. App. 3d 386, 391-396, 224 Cal. Rptr. 530* (rejecting constitutional challenge to physician requirement)].

The donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in artificial insemination or in vitro fertilization of a woman other than the donor's wife is treated by law as if he were not the biological father of the child conceived pursuant to the artificial insemination [*Fam. Code § 7613(b)*]. This provision provides unmarried as well as married women a statutory method of obtaining semen for artificial insemination without fear that the donor may claim paternity. Similarly, it provides men with a statutory method for donating semen to married or unmarried women without fear of liability for child support [see *Jhordan C. v. Mary K. (1986) 179 Cal. App. 3d 386, 392, 224 Cal. Rptr. 530*]. If the woman is married, her husband is presumed to be the father [see *Fam. Code § 7540*]; neither spouse can use blood tests to rebut that presumption [see *Fam. Code § 7541(e)(2)*; see also § 100.11[2][a], [4]].

[c] Insemination Procedure and Paternity Rights

Paragraph 3 of this form requires the artificial insemination procedure to be conducted by a designated, licensed physician. It also provides for the husband to be listed as "father" on the child's birth certificate. The semen donor acknowledges and agrees that he has no paternity rights and further agrees that he will make no claim to those rights. Paragraph 5 denies the donor any rights of custody or visitation. In Paragraph 6, the wife waives any rights to seek support from the donor.

The husband and wife agree that they both consent to the procedure and that they will execute a separate written consent instrument for presentation to the supervising physician. For further discussion of these issues and the applicable legal presumptions, see [b], *above*. This agreement [see [2], P 3, *below*] requires the wife to cancel the agreement if she has not become pregnant within a specified time. A corresponding right could be given to the donor if the parties so agree.

[d] Medical Screening

The parties to an artificial insemination agreement should consider requiring the donor to undergo a physical and genetic evaluation, including testing for venereal disease or other conditions that might be detrimental to a fetus [see [2], P 2, *below*]. This agreement permits the husband and wife to cancel the agreement if the evaluation discloses certain abnormalities.

[e] Confidentiality of Agreement

If confidentiality of the artificial insemination arrangement is desired by the parties, the express obligations of each party and the specific scope of those obligations must be specified in the agreement [see, e.g., [2], P 7, *below*]. Otherwise, the parties are under no obligation to maintain confidentiality regarding the arrangement. Both sides to the agreement, the husband and wife on one hand, and the donor on the other, may desire this confidentiality.

[f] Consideration

This agreement requires that the husband and wife bear all medical costs for the physical evaluation and screening of the donor and for the insemination procedure. Additional consideration, if any, to be paid to the donor should be clearly

stated in the agreement [see [2], P 8, *below*].

[g] Standard Contractual Provisions

The agreement should include a choice-of-law provision stating that California law will govern the agreement [see [2], P 11, *below*; see also Ch. 75, *Formation of Contracts and Standard Contractual Provisions*], and it may include other general provisions used in most contracts, such as a provision regarding partial invalidity of the contract [see [2], P 13, *below*; see also Ch. 75, *Formation of Contracts and Standard Contractual Provisions*]. For other standard provisions, see § 100.130.

[h] Separate Counsel

The fact that the donor is relinquishing all parental rights to any child necessitates separate legal representation for both the donor and for the prospective mother. This form states that the parties had separate legal counsel, who explained the consequences of the agreement to them [see [2], P 12, *below*].

[i] Attorneys' Fees

A litigant is not entitled to attorneys' fees unless they are agreed to by the parties or specifically provided for by statute [Code Civ. Proc. § 1021; see *Annette F. v. Sharon S. (In re Adoption of Joshua S.)* (2008) 42 Cal. 4th 945, 949, 954-958, 70 Cal. Rptr. 3d 372, 174 P.3d 192 ("private attorney general" statute, Code Civ. Proc. § 1021.5, did not authorize fee award in case that established validity of second-parent adoption by same-sex partner of child's birth mother, because statute does not authorize award of fees against individual who has done nothing to adversely affect rights of public or substantial class of people other than to raise issue in course of private litigation that could establish legal precedent adverse to portion of public); see also [2], P 9, *below*]. In any action on a contract, if the contract provides that attorneys' fees and costs incurred to enforce the contract are to be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, regardless of whether he or she is the party named in the contract, is entitled to reasonable attorneys' fees in addition to other costs [Civ. Code § 1717(a)].

For further discussion and examples of attorneys' fees provisions, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[2] FORM

Agreement for Artificial Insemination

AGREEMENT FOR ARTIFICIAL INSEMINATION

_____[name of prospective mother] ("Recipient"), _____[name of recipient's husband] ("Husband"), and _____[name of semen donor] ("Donor"), hereby agree as follows:

Purpose

1. The sole purpose of this Agreement is to enable Recipient and her Husband to have a child by means of artificial insemination with semen donated by Donor. As used in this Agreement, "Child" shall include all children born simultaneously pursuant to insemination performed under this Agreement.

Medical Screening

2. Donor agrees that, prior to any artificial insemination performed pursuant to Paragraph 3, he shall undergo a physical and genetic evaluation by Dr. _____[*name of supervising physician*], a licensed physician. This examination shall include testing for venereal diseases. Donor shall provide a copy of the medical report to Recipient before any insemination is attempted. Recipient may cancel this Agreement pursuant to Paragraph 10 if the medical report indicates the presence of any such diseases or transmissible genetic abnormalities.

Procedure

3. The procedure for the artificial insemination of Recipient shall be performed under the supervision of Dr. _____[*name of supervising physician*]. Husband expressly agrees to the artificial insemination of his wife, Recipient, as provided for in this agreement. Husband and Wife shall each execute a separate written memorandum of consent for delivery to Dr. _____[*name of supervising physician*], who shall certify their signatures. Donor agrees to provide Dr. _____[*name of supervising physician*] with semen for the artificial insemination of Recipient, according to a schedule to be determined by Dr. _____[*name of same physician*]. The parties agree that conception shall be attempted [*describe period of time or number of attempts, e.g., over a period of three months*]. Recipient shall cancel this Agreement pursuant to Paragraph 10 if she does not conceive [*specify period of time or number of attempts, e.g., during those three months*].

Paternity

4. Donor fully understands that by participating in the artificial insemination procedure described in this Agreement, he shall have no rights as father, or otherwise, to any Child conceived by means of the procedure. Donor knowingly and voluntarily agrees that he shall have no rights as father or otherwise to the child and expressly waives any right to contest the fact of Husband's paternity of any child conceived. Donor agrees that Recipient shall enter her Husband's name as the father on the birth certificate of any Child born to her. He further agrees that in the best interests of the Child, he will not attempt to assert his paternity to the Child, by means of a paternity action or otherwise, or attempt to form a parent-child relationship with the Child.

Custody and Visitation

5. Recipient and her Husband shall retain sole custody of the Child, and Donor shall not be entitled to custody or visitation of the Child, in accordance with Paragraph 4 of this Agreement.

Support

6. Recipient shall not attempt to obtain child support from Donor and shall not accept any gifts or money from Donor on behalf of the Child.

Confidentiality

7. Donor acknowledges that it is in the best interests of the Child that the details surrounding the Child's birth should remain private, and that disclosure of the fact of artificial insemination should be left to the discretion of Recipient and her Husband. Therefore, Donor agrees to respect this privacy and refrain from discussing this Agreement and related topics with persons other than the parties and their attorneys, physicians, or other professionals involved in the artificial

insemination arrangement.

Consideration

8. Recipient and her Husband shall pay for Donor's physical and genetic evaluation required by Paragraph 2 and all other costs related to the artificial insemination procedure referred to in Paragraph 3. *[If appropriate, specify any other consideration, e.g., In addition, they shall pay Donor a flat fee of \$_____.]*

Attorneys' Fees

9. If any legal action, including an action for declaratory relief, is brought to enforce the provisions of this agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees from the other party. These fees, which may be set by the court in the same action or in a separate action brought for that purpose, are in addition to any other relief to which the prevailing party may be entitled. This provision applies to this entire agreement.

Cancellation

10. Recipient shall cancel this Agreement on receipt of a medical determination that Donor has venereal disease or transmissible genetic defects, or on the failure of Recipient to conceive after the attempts specified in Paragraph 3. Notice of cancellation shall be given by Recipient's attorney to Donor.

Governing Law

11. The validity of this Agreement and of any of its terms or provisions, as well as the rights and duties of the parties under this Agreement, shall be construed pursuant to and in accordance with the laws of the state of California.

Representation by Separate Counsel

12. The parties acknowledge that they have been represented by separate counsel in the negotiations of this Agreement; that their respective counsel were of their own choosing; that they have read this Agreement; that their counsel have explained its meaning and legal consequences to them; and that they are signing it freely and voluntarily.

Partial Invalidity

13. If any term of this Agreement is held by a court of competent jurisdiction to be void or unenforceable, the remainder of the contract terms shall remain in full force and effect and shall not be affected.

Original and Copies

14. On execution of this Agreement, the original shall be retained by the attorney for *[specify party, e.g., Recipient]*, and a copy shall be given to Donor.

Dated: _____

RECIPIENT

_____ [*signature of prospective mother*]

[*typed name*]

HUSBAND

_____ [*signature of recipient's husband*]

[*typed name*]

DONOR

_____ [*signature of donor*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawPaternity & SurrogacySurrogacyAgreementsFamily
LawPaternity & SurrogacySurrogacyDisposition of Eggs, Preembryos & Sperm



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C. Artificial Insemination and Surrogate Parenting

31-100 California Legal Forms--Transaction Guide § 100.221

§ 100.221 Agreement for Surrogate Parenting Services

[1] Comment

[a] Use of Form

This form is an agreement by a woman to be artificially inseminated under the supervision of a doctor and to carry, bear, and relinquish the resulting child to the biological father (that is, the sperm donor) and his wife for a stepparent adoption. Although such a woman is the biological mother of the baby, she is commonly referred to as the "surrogate mother." This form of surrogacy has been denominated "traditional" surrogacy, as opposed to "gestational" surrogacy, the latter involving the in vitro fertilization of the egg of one woman for implantation in the womb of another [see *In re Marriage of Moschetta* (1994) 25 Cal. App. 4th 1218, 1222, 30 Cal. Rptr. 2d 893 ; see also § 100.11[5]].

Despite basic questions of legality and enforceability [see [b], *below*], surrogate parenting contracts have been used by infertile couples as an alternative to agency adoption. Not only do surrogate arrangements usually provide a child sooner than the lengthy agency adoption process, but they also ensure that the child will be biologically related to at least one parent, and under gestational surrogacy, to both parents. The arrangement also gives a couple some choice regarding the woman who will bear the child. Although a surrogate parenting arrangement may also be used in other situations, this agreement contemplates that the prospective parents will be a married couple.

An attorney who prepares this type of agreement should first enter into a written contract with his or her client. For the attorney's protection, it is recommended that the attorney-client agreement contain language disclosing to the client the state of the law with respect to the legality and enforceability of surrogate parent arrangements. For a list of recommended provisions that may be included in the attorney-client agreement to draft a surrogate parenting agreement, see § 100.122.

Despite questions of legality and enforceability [see [b], *below*], most surrogate parenting agreements contain detailed provisions, so that the parties to the arrangement understand all aspects regarding conception, pregnancy, birth, and surrender of the child before those events actually occur [see Bird, *Surrogate Motherhood: Hers? Yours? Ours?*, 2 Calif. Lawyer 20, 23 (No. 2)(Feb. 1982)].

[b] Enforceability of Traditional Surrogacy Contracts

Although the California Supreme Court has held that surrogacy contracts, in general, do not necessarily violate public policy [see *Johnson v. Calvert* (1993) 5 Cal. 4th 84, 95-97, 19 Cal. Rptr. 2d 494, 851 P.2d 776 (upholding gestational surrogacy)], traditional surrogacy contracts do not override the otherwise-applicable provisions of California adoption law [*In re Marriage of Moschetta* (1994) 25 Cal. App. 4th 1218, 1228-1231, 30 Cal. Rptr. 2d 893] . Thus, one California court of appeal has held that a traditional surrogacy arrangement is unenforceable against a surrogate mother who refuses to consent to the adoption of the child by the biological father's wife [see *In re Marriage of Moschetta* (1994) 25 Cal. App. 4th 1218, 1228-1231, 30 Cal. Rptr. 2d 893] .

Under either type of surrogacy arrangement, if the surrogate changes her mind and refuses to fulfill her obligations under the contract, the courts must first determine the rights of the parties under existing statutory law. Then the court must consider the effect of the contract on those rights [*Johnson v. Calvert* (1993) 5 Cal. 4th 84, 89, 19 Cal. Rptr. 2d 494, 851 P.2d 776] . Gestational surrogacy does not require an adoption; only a determination of whether the egg donor or the child bearer is the legal mother of the child. California parentage law supports both positions. The egg donor may rely on blood tests to establish her genetic link to the child [see *Fam. Code* § 7555], while the Uniform Parentage Act expressly provides that a mother-child relationship may be established by proof of having given birth to the child [see *Fam. Code* § 7610(a)]. Therefore, to break the "tie," the court may look to the intent of the parties as expressed in their contract [*Johnson v. Calvert* (1993) 5 Cal. 4th 84, 93, 19 Cal. Rptr. 2d 494, 851 P. 2d 776 ; but see *K.M. v. E.G.* (2005) 37 Cal. 4th 130, 142-143, 33 Cal. Rptr. 3d 61, 117 P.3d 673 (if ovum donor and child bearer are lesbian partners who will raise child in their joint home, and sperm donor is anonymous, each partner is mother of child, court need not examine partners' intentions about maternity)].

In contrast, under traditional surrogacy, although the husband is the true biological father of the child, the wife may attain parental rights only through a stepparent adoption [see *Fam. Code* § 9000 *et seq.*]. As exemplified by this form, the surrogate must acknowledge the husband's paternity, surrender the child to the couple, and consent to a stepparent adoption by the wife [see *Fam. Code* § 7613(b); see also [c], below].

Under California law, a stepparent adoption first requires the filing of a petition [see *Fam. Code* § 9000(a)], and then the signing of parental consent before a notary public, court clerk, probation officer, qualified court investigator, or county welfare department staff member, who must immediately file the consent with the clerk of the court where the petition is filed [*Fam. Code* § 9003(a)]. A natural parent's consent is considered to be a jurisdictional prerequisite to an adoption, regardless of the child's best interests [see *Adoption of Matthew B.* (1991) 232 Cal. App. 3d 1239, 1259 n.9, 284 Cal. Rptr. 18 , cert. denied sub nom. *Nancy B. v. Charlotte M.* (1992) 503 U.S. 991] . If the surrogate gives her consent after the birth of the child and then attempts to withdraw it, the question may be resolved according to the best interests of the child under the adoption statutes [*Adoption of Matthew B.* (1991) 232 Cal. App. 3d 1239, 1255-1259, 284 Cal. Rptr. 18 , cert. denied sub nom. *Nancy B. v. Charlotte M.* (1992) 503 U.S. 991 ; see *Fam. Code* § 9005 (petition to withdraw consent to stepparent adoption)]. However, if the surrogate refuses to give her consent at all, there is no judicial remedy. The California Supreme Court's opinion in *Johnson v. Calvert* might support, by implication, the position that a nonstatutory exception to the consent requirement arises from the parties' contract [see *Johnson v. Calvert* (1993) 5 Cal. 4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776] . However, the first court to confront the issue after *Johnson v. Calvert* refused to find any such exception, holding that a traditional surrogacy contract is unenforceable if the surrogate refuses to give the required consent [*In re Marriage of Moschetta* (1994) 25 Cal. App. 4th 1218, 1228-1231, 30 Cal. Rptr. 2d 893] . Therefore, counsel should assume that the provisions of this form requiring the surrogate to consent to an adoption cannot be specifically enforced, and the clients must be advised accordingly.

[c] Application of Artificial Insemination Statutes to Surrogacy Arrangements

Parental rights are denied to a man who donates semen that has been used by a physician to artificially inseminate a woman other than the donor's wife [*Fam. Code* § 7613(b); see Bird, *Surrogate Motherhood: Hers? Yours? Ours?*, 2

Calif. Lawyer 20, 22 (No. 2)(Feb. 1982)]. Thus, there is a "conclusive" presumption that the husband of a woman is the father of any child born to that woman, unless the husband is impotent or sterile [*Fam. Code* § 7540; see § 100.11[2][a]]. If a married woman conceives by artificial insemination under the supervision of a physician, or with semen obtained from a physician, or by means of a surgical procedure with the consent of her husband, no party can challenge the paternity of the child based on blood tests that would otherwise be permissible [*Fam. Code* § 7541(a), (e)].

However, the rule that the donor is not the father of a child born as a result of artificial insemination has no application to a surrogacy situation in which the purpose of the donation is to produce a child who will be raised in the donor's home [*Johnson v. Calvert* (1993) 5 Cal. 4th 84, 100, 19 Cal. Rptr. 2d 494, 851 P.2d 776 (husband and wife did not intend to "donate" sperm and ova to surrogate mother, but rather "to procreate a child genetically related to them by the only available means"); see *K.M. v. E.G.* (2005) 37 Cal. 4th 130, 139-141, 33 Cal. Rptr. 3d 61, 117 P.3d 673 (even if *Fam. Code* § 7613(b) applies to women who donate ova, it does not apply when purpose of donation is to produce child who will be raised in donor's home; also, "there is nothing to indicate that [*Fam. Code* § 7613(b)] would apply if a man provided semen to be used to impregnate his unmarried partner in order to produce a child that would be raised in their joint home")].

[d] Suggested Procedures for Adoption

Because it is unlikely that a surrogacy agreement can be specifically enforced to compel the surrogate to consent to an adoption [see [b], above], the prospective parents should take advantage of all statutory procedures to accelerate the adoption process. In this regard, the parents may wish to attempt to jointly adopt the child using the procedures for an independent adoption, arguing that a joint adoption is necessary because, as a sperm donor, the husband is not treated as the biological father of the child [see *Fam. Code* § 7613(b); see also [c], above]. However, the parents should be made aware of the possibility that a court might rule that a joint adoption is not required, pursuant to the rule that one cannot adopt one's own child [see *Marshall v. Marshall* (1925) 196 Cal. 761, 765-767, 239 P. 36] .

Independent adoption procedures, applicable since January 1, 1995, allow the surrogate and the adopting parents to sign an adoption placement agreement at the time when the child is released from the hospital and given over to the adopting parents [see *Fam. Code* § 8801.3]. This agreement would include the surrogate's consent to the adoption [see *Fam. Code* § 8801.3(c)(5)], which would be absolutely revocable for 30 days [see *Fam. Code* § 8814.5(a)(1)]. However, once the child is born, the surrogate may waive the right to revoke [see *Fam. Code* § 8814.5(a)(2)].

There are no similar procedures for a stepparent adoption because the statutes assume that stepparent adoptions do not involve newborn children [see *Fam. Code* § 9000 *et seq.*]. The surrogate's consent to a stepparent adoption must be signed in the presence of a notary public, court clerk, probation officer, qualified court investigator, or county welfare department staff member [see *Fam. Code* § 9003(a)], which is unlikely to be accomplished at the time the child is released to the prospective parents. While there is no absolute right of revocation within a certain number of days, there is a right to petition to withdraw consent, which may be made anytime before the adoption is granted [see *Fam. Code* § 9005; *Adoption of Matthew B.* (1991) 232 Cal. App. 3d 1239, 284 Cal. Rptr. 18, cert. denied sub nom. *Nancy B. v. Charlotte M.* (1992) 503 U.S. 991] .

Whether an independent adoption or a stepparent adoption is attempted, the petition should be filed immediately on the child's birth. Prenatal filing would appear to be prohibited because in both kinds of adoptions, the petition must set forth the child's gender, date of birth, and name before adoption [see *Fam. Code* §§ 8802(c), 9000(c)]. Immediate filing allows a copy of the petition to be served on the public or private adoption agency that will be asked to take either the surrogate's waiver of the right to revoke consent in an independent adoption [see *Fam. Code* § 8814.5(a)(2)] or the surrogate's consent to a stepparent adoption [see *Fam. Code* § 9003(a)].

[e] Potential Practical Problems

An attorney drafting a surrogate parenting agreement must consider various practical problems that might arise. For example, the most obvious thing that could go wrong would be the surrogate's decision to keep the baby [see [b], *above*]. The surrogate might also violate her contractual agreement not to smoke, drink, or take drugs, or she might refuse to keep prenatal medical appointments or follow medical advice. On the other hand, the adoptive parents might separate or divorce before the birth of the baby [see, e.g., *In re Marriage of Moschetta* (1994) 25 Cal. App. 4th 1218, 30 Cal. Rptr. 2d 893], refuse to accept a deformed or retarded child, or refuse to pay the surrogate's medical expenses or flat fee. The surrogate could die or become incapacitated in childbirth, or the biological father could die before receiving the child, leaving no means of support.

These possibilities should be covered in the contract, so that the parties understand the problems inherent in the arrangement, as well as their agreed-to solutions, before performance. However, if one of the parties seeks court intervention regarding performance of the contract, a court might reach its own decision regardless of the contract provisions [see Bird, *Surrogate Motherhood: Hers? Yours? Ours?*, 2 Calif. Lawyer 20, 24 (No. 2)(Feb. 1982)]. The attorney should warn the parties of that possibility.

[f] Purpose of Agreement

A surrogacy contract should state that its sole purpose is to obtain the services of the surrogate mother in carrying and delivering a child for the biological father [see [2], P 1, *below*]. It may disclaim that it is an attempt to pay for the adoption or sale of a baby [see [b], *above*].

[g] Termination of Surrogate's Rights

This form contains a provision in which the surrogate and her husband acknowledge the emotional investment of the biological father and his wife in the surrogate arrangement and agree to terminate completely their parent-child relationship on surrender of the child [see [2], P 3, *below*].

[h] Death of Father

In order to cover all possibilities, a surrogacy contract should specify what provisions the biological father must make for the support and custody of the child, if he should die before receiving custody of the baby. It should also include provisions for the child on the death of both adoptive parents. This form requires the biological father to provide for the child by will or life insurance, and it specifies that custody of the child will remain with his wife if he should die, or with the surrogate mother and her husband if both the father and his wife should die before the child has been legally adopted [see [2], P 4, *below*]. The contract should also provide for the possibility of the death of the surrogate mother during pregnancy or during delivery [see [2], P 18, *below*].

[i] Medical and Psychological Testing

Because a woman's physical and mental health are extremely important factors in her suitability as a surrogate mother, the contract should require her to undergo extensive medical and psychological testing at the expense of the biological father-to-be [see [2], PP 5, 6, *below*]. Provisions may be added to continue psychological testing during the beginning of pregnancy, to determine whether the physical changes have also effected psychological changes regarding her willingness to relinquish the child. Some attorneys recommend that the surrogate's attorney and a mental health expert sign the agreement, attesting to the fact that the woman has been advised of her rights, is psychologically healthy, and understands the consequences of her act [Turk, *If Baby M Were a Californian ...*, 7 Calif. Lawyer 78, 82 (No. 8)(August 1987)].

This form also permits the biological father and his wife to examine the medical records of the surrogate's children, to determine any medical characteristics that might be relevant to the child to be conceived [see [2], P 7, *below*].

The biological father should also undergo medical testing to determine his health and the presence of any diseases or genetic factors that could contribute to problems in the child to be conceived [see [2], P 5, *below*].

[j] Artificial Insemination

The surrogacy contract should describe the insemination procedure and require the surrogate's husband, if any, to consent in writing to the procedure [see [2], P 8, *below*]. For further discussion of the legal aspects of artificial insemination, see § 100.220[1][b].

[k] Surrogate's Conduct During Pregnancy

Generally, pregnant women are advised to refrain from certain activities during pregnancy for the health of the fetus. The contract should itemize all such activities, including smoking and consumption of alcohol and nonprescription drugs. It may also require the surrogate to comply with additional restrictions or procedures required by her physician [see [2], P 9, *below*].

[l] Amniocentesis

The process of amniocentesis, used to detect the presence of genetic or congenital abnormalities, may be required, or may be required on the request of the biological father or the surrogate's physician [see [2], P 10, *below*]. The contract should also specify the action to be taken if the result of the amniocentesis indicates an abnormal fetus [see [m], *below*].

[m] Abortion

This form allows the surrogate to have an abortion if the surrogate's physician recommends that procedure for the surrogate's health. It provides that the agreement will terminate if the surrogate has an abortion for any other reason [see [2], P 11, *below*]. The parties may also agree to abortion if tests reveal fetal abnormalities. However, a provision that attempts to restrict a woman's right to an abortion may be unconstitutional [see Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 Harv. L. Rev. 1936 (1986)]. In a New Jersey case, the court held that a clause in a surrogacy contract prohibiting abortion except as allowed by the biological father was void and unenforceable [see *In the Matter of Baby M* (1988) 109 N.J. 396, 537 A.2d 1227]. The New Jersey court stated that after conception, only the surrogate, to the exclusion of the semen donor, will have the right to decide whether to abort the fetus, citing *Roe v. Wade* [(1973) 410 U.S. 113, 153, 35 L. Ed. 147, 93 S. Ct. 705].

In an *in vitro* (gestational) surrogacy case, the California Supreme Court declined to determine the validity of a surrogacy contract purporting to deprive the surrogate of her freedom to terminate the pregnancy [see *Johnson v. Calvert* (1993) 5 Cal. 4th 84, 97, 19 Cal. Rptr. 2d 494, 851 P.2d 776]. As noted by the court, the contract involved in that case at one point purported to give the biological parents the sole right to determine whether to abort the pregnancy, but at another point acknowledged that a pregnant woman has the absolute right to abort or not abort any fetus she is carrying [see *Johnson v. Calvert* (1993) 5 Cal. 4th 84, 96-97, 19 Cal. Rptr. 2d 494, 851 P. 2d 776].

[n] Miscarriage

The possibility of miscarriage should be addressed. This form provides that miscarriage will terminate the agreement, and it does not require additional attempts at conception [see [2], P 12, *below*]. However, this provision may be amended to require performance of additional insemination within a stated period of time after a miscarriage if the parties so agree.

[o] Delivery

The contract should specify whether the biological father and his wife will be permitted to attend the delivery of the child. The father may wish to require delivery to take place in a hospital, to ensure optimum medical care for the child [see [2], P 13, *below*].

[p] Determining Paternity

The parties must verify that the man who has contracted with the surrogate is, and the surrogate's husband (if any) is not, the biological father of the child born to the surrogate. Blood tests generally are used to determine paternity [see *Fam. Code § 7550 et seq.*], and if a child is born to a married woman, a motion may be brought by the husband for blood tests to prove that he is not the biological father of the child [*Fam. Code § 7541(b)*]. This form requires the surrogate's husband to take all actions, including blood testing, required to establish his nonpaternity [see [2], P 14, *below*]. If tests reveal that the surrogate's husband is the biological father, the contract is rescinded, and the surrogate must reimburse the prospective parents for all expenses paid under the agreement [see [2], P 21, *below*].

[q] Surrender of Custody and Adoption

This form contains the agreement of the surrogate and her husband to deliver custody to the biological father on a physician's determination that the child may leave the hospital, and their agreement to sign all adoption consents [see [2], P 15, *below*]. Whether the child must be adopted by both the biological father and his wife through an independent adoption, or by only the biological father's wife through a stepparent adoption, is discussed in [d], *above*. For coverage of both types of adoptions, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, Ch. 172, *Adoption of Unmarried Minors* (2d ed. Matthew Bender).

[r] Consideration

The surrogacy contract should specifically describe all fees and expenses to be paid by the biological father. These typically include the following [see [2], P 16, *below*]:

- A flat fee that is deposited into escrow and paid on delivery of the child to the father.
- The costs of initial medical and psychological testing;
- The insemination fee.
- All medical and related expenses incurred by the surrogate during pregnancy and delivery that are not covered or allowed by the surrogate's or her husband's insurance.
- Life insurance for the surrogate.
- Transportation expenses.
- Maternity clothing.
- Paternity testing.
- The surrogate's attorney fees.
- All court costs, filing fees, and copying fees for the establishment of paternity and adoption of the child.

The contract should emphasize that the consideration under the contract is for services, rather than the buying and selling of a child or a payment for adoption, which are illegal [see *Penal Code* §§ 181, 273; see also [2], P 16, *below*].

[s] Escrow

Most surrogacy contracts provide that the flat fee to be paid to the surrogate mother, as distinguished from the reimbursement for expenses incurred throughout pregnancy, will be deposited in an escrow account on conception and paid to the surrogate on relinquishment of custody to the biological father and his wife [see Bird, *Surrogate Motherhood: Hers? Yours? Ours?* 2 *Calif. Lawyer* 20, 24 (No. 2)(Feb. 1982); see also [2], P 17, *below*]. Such a provision assures the biological father that if the surrogate breaches the contract and keeps the child, the economic loss is minimized [see Andrews, *The Stork Market: The Law of the New Reproductive Technologies*, 70 *A.B.A. J.* 50, 56 (Aug. 1984)]. For a general discussion of the nature and purpose of escrow, see Ch. 26, *Real Property Escrows*.

[t] Insurance

Most surrogate parenting contracts provide that the biological father will, in addition to furnishing other consideration, take out a life insurance policy on the life of the surrogate mother, to insure against her increased risk of death due to pregnancy or birth of the child [see [2], P 18, *below*].

[u] Assumption of Risks

This agreement provides that the surrogate's physician has advised her about the risks of pregnancy and childbirth, and that she accepts those risks [see [2], P 19, *below*]. It also provides that the biological father understands that there is no guarantee that the child to be born will be normal, and that he accepts such a risk and will accept the baby, whatever its condition [see [2], P 20, *below*].

[v] Cancellation of Contract

A surrogate agreement should state the events that will allow the parties to cancel their rights and duties. Cancellation [see *Civ. Code* § 1699] generally involves the abrogation of only those provisions that have not yet been performed [see *Mamula v. McCulloch* (1969) 275 *Cal. App. 2d* 184, 197, 79 *Cal. Rptr.* 571 ; see also Ch. 77, *Discharge of Obligations*]. For example, the parties may cancel their obligations if conception does not occur, if the surrogate suffers a miscarriage, or if paternity testing after birth reveals that the surrogate's husband is the biological father [see [2], P 21, *below*].

[w] Surrogate's Decision to Keep Child

Because the greatest possibility for failure of the surrogate arrangement involves the surrogate's decision to keep the child, the surrogate agreement should provide for that eventuality. It may require the surrogate to return some or all of the money received pursuant to the agreement, and it may require her to execute a written agreement for joint custody [see [2], P 22, *below*; see also Ch. 124, *Provisions for Child Custody and Visitation*].

Some agreements specify a period during which the mother may change her mind, such as the first trimester of pregnancy, and provide that if she changes her mind after that period, the father will receive sole custody and she will have visitation rights only. However, while custody agreements between parents are legal and encouraged, they are not binding on a court, which may make any custody order that it deems to be in the best interests of the child [see *Fam. Code* § 3020; *Adoption of Matthew B.* (1991) 232 *Cal. App. 3d* 1239, 1258-1259, 284 *Cal. Rptr.* 18 , *cert. denied sub nom. Nancy B. v. Charlotte M.* (1992) 503 *U.S.* 991] . Regardless of the type of provision that the drafting attorney includes in the agreement, he or she must prepare all parties for the possibility that, if they do not perform their contractual obligations, they may have to share the child in some manner for the rest of their lives [see Turk, *If Baby M Were a Californian ...*, 7 *Calif. Law.* 78, 82 (No. 8)(August 1987)].

[x] Attorneys' Fees

This form provides that the prevailing party in litigation arising under the contract will be entitled to recover reasonable attorneys' fees [see [2], P 23, *below*; see also *Civ. Code* § 1717]. For further discussion of attorneys' fee provisions, see § 100.220[1][i].

[y] Standard Contractual Provisions

Because the agreement is being drafted with the intent that California law apply, and because the agreement may not be given effect in the manner the parties intend under the laws of other states, it is especially important that a choice of law provision stating that California law will govern the agreement be included [see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*]. If desired by the parties, the contract also may include other standard provisions such as a provision regarding partial invalidity of the contract [see [2], P 26, *below*; see also Ch. 75, *Formation of Contracts and Standard Contractual Provisions*]. For other standard provisions, see § 100.130.

[z] Separate Counsel

The strong possibility of conflict between the parties both before and after the baby is born makes separate legal representation for the surrogate and adopting parents highly advisable [see *Fam. Code* § 8800 (legislative policy concerning separate counsel for adopting parents and birth parents in independent adoptions)]. For example, while issues of the biological mother's lifestyle and compliance with medical procedures [see [2], P 9, *below*] may arise during the pregnancy, the most extreme potential for conflict involves the decision of the biological mother to keep the baby [see [w], *above*]. This form states that the parties had separate legal counsel, who explained the consequences of the agreement to them [see [2], P 25, *below*].

[aa] Provisions for Confidentiality

If the parties to the agreement want to maintain confidentiality regarding the surrogate arrangement, the agreement should state that no party will discuss the agreement or the surrogate arrangement with persons other than those directly involved, such as attorneys and doctors [see [2], P 28, *below*].

[2] FORM**Agreement for Surrogate Parenting Services****SURROGATE PARENTING AGREEMENT**

This agreement is made among _____ [name of surrogate mother] ("Surrogate"),
_____ [name of surrogate's husband], her husband, ("Husband"), and _____ [name of
biological father] ("Father").

Purpose

1. The sole purpose of this Agreement is to enable _____ [name of biological father], Father, and his wife, _____ [name], to have a child who is biologically related to _____ [name of biological father], by means of the artificial insemination, conception, and delivery of such a child by _____ [name of surrogate]. This is not intended to be an agreement for the purchase of Surrogate's Child, or for Surrogate's consent to surrender the Child for adoption, as prohibited under *Penal Code* §§ 181 and 273. As used in this Agreement, "Child" shall include all children born simultaneously pursuant to insemination performed pursuant to Paragraph 8 of this Agreement.

General Procedure

2. The parties agree that Surrogate shall be artificially inseminated with the semen of Father by a licensed physician, pursuant to Paragraph 8 of this Agreement. Upon conception, Surrogate shall carry the Child until delivery. At the time set forth in Paragraph 15, Surrogate and Husband shall surrender custody of the Child to Father and his wife, and shall take all necessary actions required for the adoption of the Child by Father and his wife, pursuant to Paragraph 15 of this Agreement.

Termination of Parental Rights

3. Surrogate and Husband acknowledge that Father and his wife have an emotional investment in the surrogate arrangement, and that it is in the best interests of the Child that Father and his wife shall act as the Child's only parents. Therefore, they agree that immediately after birth, they will surrender all rights to the Child, including the right of custody and the right to name him or her, and will not attempt to form a parent-child relationship with him or her.

Death of Father

4. If Father should die after execution of this Agreement, prior to relinquishment of custody of the Child to Father pursuant to Paragraph 15 of this Agreement, Surrogate and Husband agree that relinquishment of custody shall be made instead to _____[*name of biological father's wife*], the wife of Father. If both Father and _____[*name of wife*], his wife, should die after execution of this Agreement and prior to relinquishment of custody to them, custody of the Child shall [*state custody provision, e.g., remain with Surrogate and Husband*]. Father agrees that he shall provide for the support of the Child in the event of his death [*specify method, e.g., by will or by purchase of a life insurance policy*].

Medical Evaluations

5. Prior to artificial insemination performed pursuant to Paragraph 8, Surrogate and Father shall undergo a complete physical and genetic evaluation by a licensed physician. This evaluation shall be used to determine the physical health of each party, including the presence of any sexually transmitted diseases, including [*specify, e.g., AIDS*], and to determine the presence of any transmissible genetic condition or abnormality, including [*identify any specific conditions*]. Surrogate and Father agree to sign a release, before the evaluation, permitting review of each other's evaluation report.

Psychological Evaluation

6. Prior to artificial insemination performed pursuant to Paragraph 8, Surrogate and Husband shall undergo a psychological evaluation by _____[*name of doctor, if known or a licensed psychologist or psychiatrist they shall select*]. Surrogate and Husband agree to sign a release, prior to the evaluation, permitting review of the evaluation report by Father and his wife.

Review of Children's Medical Records

7. Surrogate and Husband agree to allow Father, his wife, and their physician to review the medical records of any existing children of Surrogate and Husband. They agree to sign any consent forms required for such a review.

Artificial Insemination Procedure

8. Surrogate agrees to be artificially inseminated with Father's sperm, according to the times and procedures determined by _____[*name of physician*]. Husband agrees that he shall not sign any written consent to the insemination procedure under *Family Code Section 7613*, or do any other act that might result in his treatment as the biological father of the Child. Surrogate agrees to refrain from sexual intercourse with Husband during the period of time in which she attempts to conceive pursuant to artificial insemination. Surrogate and Husband agree to notify Father upon confirmation of pregnancy by her physician.

Conduct During Pregnancy

9. Surrogate agrees to obtain prenatal examinations at least [*specify, e.g., once per month*] during pregnancy, and any other physical examinations and medical tests specified in Paragraph 10 as necessary, and shall follow all medical instructions given to her by her obstetrician. She further agrees that during pregnancy, she shall not smoke, drink alcohol, use any drugs, prescription or otherwise, or [*specify any additional restrictions, e.g., engage in strenuous exercise*] without the written consent of her physician. Surrogate agrees to inform Father and his wife of the progress of the pregnancy, and to sign any release forms required to allow their review of the medical records pertaining to her pregnancy.

Amniocentesis

10. Surrogate agrees that, on the request of her obstetrician or Father, she will undergo amniocentesis or other related tests including [*specify desired medical tests*] to determine whether any genetic or congenital defects are present in the Child. The parties agree that Surrogate may undergo these tests of her own accord, if her obstetrician and Father do not require them.

Abortion

11. Surrogate agrees that she will not abort the fetus unless, in the professional medical opinion of her physician, abortion is necessary for her health [*add if desired*; or unless amniocentesis reveals the presence in the fetus of genetic or congenital defects]. If Surrogate obtains an abortion under any other circumstances, this Agreement shall terminate, and Surrogate shall reimburse Father and his wife for all payments, other than medical expenses, received to that date.

Miscarriage

12. If miscarriage occurs during any month of pregnancy, Surrogate shall be entitled to the compensation already received pursuant to Paragraph 16, but shall not receive further compensation. All medical expenses shall be covered as provided in Paragraph 16. Surrogate shall cancel this Agreement upon miscarriage pursuant to Paragraph 21, and no party shall be further obligated under this Agreement; however, the parties may make a new agreement regarding subsequent attempts at conception.

Delivery of Child

13. Surrogate and Husband agree that they will notify Father and his wife at the onset of labor [*add if desired*: and that Father and his wife may be present during delivery of the Child. Surrogate and Husband shall sign any consent forms necessary to facilitate this result]. Surrogate agrees to deliver the Child in a hospital, under medical supervision.

Determination of Paternity

14. Husband agrees that, after the birth of the Child, he shall comply with all actions required to determine the paternity of the Child, including blood testing.

Surrender of Custody Upon Birth

15. Surrogate and Husband agree to surrender custody of the Child to Father and his wife _____ [*specify time after birth, e.g., as soon as a physician determines that the Child is physically ready to leave the hospital*]. They agree to sign any documents required for the hospital's relinquishment of the Child, and all adoption consents required for Father and his wife to adopt the Child.

Consideration for Services

16. The parties agree that the consideration paid pursuant to this Agreement constitutes payment for services to be provided by Surrogate and expenses related to those services, not payment for Surrogate's Child or for Surrogate's consent to surrender the Child for adoption in violation of *Penal Code* §§ 181 and 273. In consideration for her services, Father agrees to pay to Surrogate all of the following:

(a) \$ _____, on surrender of custody of Child to Father. This sum shall be placed in escrow on notification of conception, pursuant to Paragraph 17 of this Agreement.

(b) The costs of initial medical and psychological testing to determine suitability as a surrogate mother, pursuant to Paragraphs 5 and 6 of this Agreement.

(c) The insemination fee incurred pursuant to Paragraph 8.

(d) All medical, pharmacy, hospital, and laboratory expenses incurred by Surrogate during insemination, pregnancy, and delivery that are not covered or allowed by Surrogate's or Husband's insurance. However, medical and related expenses occurring _____ [*length of time, e.g., eight weeks or more*] after the birth of the child shall not be included. Furthermore, Father shall not reimburse Surrogate or Husband for lost wages.

(e) Transportation expenses, if it is necessary for Surrogate to travel in order to meet the obligations set forth in this Agreement.

(f) The cost of Maternity clothing, up to a total of \$ _____.

(g) The cost of Paternity testing of the Child pursuant to Paragraph 14 of this Agreement.

(h) Surrogate's attorneys' fees for independent legal advice regarding the meaning and consequences of this Agreement, but not for any legal advice regarding breach or enforcement of this Agreement.

- (i) All court costs, filing fees, and copying fees for the establishment of paternity and adoption of the Child.
- (j) The cost of a life insurance policy on Surrogate's life, pursuant to Paragraph 18.
- (k) _____ [*Specify any other agreed-upon consideration*].

Escrow Agreement

17. On notification by Surrogate or Husband of conception, Father shall deposit into escrow the fee set forth in Paragraph 16(a). The escrow agent shall place this sum into an interest-bearing account in a financial institution. Upon notification by Father of the relinquishment of custody of the Child to him, the escrow agent shall pay the deposited sum, plus interest, to Surrogate.

Insurance

18. Due to the risks of pregnancy and childbirth as set forth in Paragraph 19, Father shall purchase a term life insurance policy on Surrogate's life, payable to a beneficiary selected by Surrogate, of at least \$_____, and shall ensure that the policy remains in effect for at least [*specify period, e.g., 6 weeks*] after the birth of the Child.

Assumption of Pregnancy Risks

19. Surrogate and her Husband have had the medical risks associated with pregnancy and childbirth explained to them by _____ [*name of physician*], and they understand and agree to assume all of those risks, including the risk of death.

Assumption of Risks of Abnormal Child

20. _____ [*Name of physician*] has explained to Father the risk that pregnancy may result in an abnormal Child, and that genetic and congenital abnormalities may not be detected by amniocentesis or other related tests described in Paragraph 10. Father understands that risk, and agrees to accept any Child born as a result of this Agreement who possesses genetic or congenital abnormalities, including birth defects or mental retardation.

Cancellation of Agreement

21. The parties shall cancel this Agreement if Surrogate fails to conceive pursuant to Paragraph 8, if she miscarries, or if paternity testing performed after the Child's birth pursuant to Paragraph 14 reveals that Surrogate's Husband is the biological father of the Child. Notice of termination shall be given by one party's attorney to the attorney for the other party.

Surrogate's Decision to Keep Child

22. If at any time prior to conception, during pregnancy, or after delivery, Surrogate decides that she will not relinquish the Child to Father and his wife, she shall immediately notify Father regarding that decision. This Agreement shall

terminate, and Surrogate shall reimburse Father for [*describe consideration to be returned, e.g., all amounts received from Father pursuant to this Agreement*]. Surrogate agrees that it is in the best interest of the Child in such a situation that Surrogate and Father share joint custody, and agrees to execute an agreement to that effect. The parties understand that Father shall be required to provide support to the Child whether or not he receives custody of the Child.

Attorneys' Fees

23. If any legal action, including an action for declaratory relief, is brought to enforce the provisions of this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees from the other party. These fees, which may be set by the court in the same action or in a separate action brought for that purpose, are in addition to any other relief to which the prevailing party may be entitled. This provision applies to the entire Agreement.

Governing Law

24. The validity of this Agreement and of any of its terms or provisions, as well as the rights and duties of the parties under this Agreement, shall be construed pursuant to and in accordance with the laws of the state of California.

Representation by Separate Counsel

25. The parties acknowledge that they have been represented by separate counsel in the negotiations of this agreement, that their respective counsel were of their own choosing, that they have read this Agreement, that their counsel have explained its meaning and legal consequences to them, and that they are signing it freely and voluntarily.

Partial Invalidity

26. If any term of this agreement is held by a court of competent jurisdiction to be void or unenforceable, the remainder of the contract terms shall remain in full force and effect and shall not be affected.

Original and Copies

27. On execution of this Agreement, the original shall be retained by the attorney for _____ [*specify party, e.g., Father*], and copies shall be given to Surrogate and Father.

[*Optional:*]

Confidentiality

28. Surrogate and Husband acknowledge that it is in the best interests of the Child that the details surrounding his or her birth should remain private, and that disclosure of the surrogate parenting arrangement should be left to the discretion of Father and his wife. Therefore, Surrogate and Husband agree to respect this privacy and refrain from discussing this Agreement and related topics with persons other than the parties and their attorneys, physicians, or other professionals involved in the surrogate arrangement.

Dated: _____

SURROGATE

_____ [signature of surrogate]

[typed name]

HUSBAND

_____ [signature of surrogate's husband]

[typed name]

FATHER

_____ [signature of biological father]

[typed name]

[Optional:]

Declaration by Surrogate's Attorney

I, _____ [name of attorney], an attorney at law representing _____ [name of surrogate], the Surrogate, and _____ [name of surrogate's husband], her Husband, acknowledge that I have explained this Surrogate Parenting Agreement to Surrogate and her Husband, and that I believe they fully understand their rights and obligations under this Agreement.

_____ Dated:

_____ [signature of attorney]

[typed name]

Declaration by Mental Health Expert

I, _____ [name of mental health expert], a [occupation, e.g., psychiatrist], acknowledge that I have examined _____ [name of surrogate], the Surrogate, and _____ [name of surrogate's husband], her Husband, and that I believe they are psychologically sound, are fully competent to enter into this Agreement, and understand the consequences of their act.

_____ Dated:

_____ [signature of mental health expert]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawPaternity & SurrogacySurrogacyGeneral OverviewFamily LawPaternity & SurrogacyAgreements



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 100A PERSONAL AFFAIRS OF MINORS

31-100A California Legal Forms--Transaction Guide 100A.syn

§ 100A.syn Synopsis to Chapter 100A: PERSONAL AFFAIRS OF MINORS

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§§ 100A.02-100A.04 [Reserved]

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§ 100A.10 Rights and Duties of Parents

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[2] Parents as Trustees of Minor's Small Estate

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[b] Claims of Unborn Persons

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§§ 100A.102-100A.109 [Reserved]

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§ 100A.111 Money and Property of Minors

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§ 100A.112 Tort Claims

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§§ 100A.113-100A.119 [Reserved]

§ 100A.120 Medical or Dental Care

[1] Minor's Consent

Scope

[2] Parental Consent

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[3] Parental Authorization for Other Adult to Give Consent

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§ 100A.122 Tort Claims

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§§ 100A.123-100A.199 [Reserved]

§ 100A.200 Consent by Parent or Guardian to Medical, Dental, or Hospital Care for Minor

[1] Comment

[a] Use of Form

[b] Payment for Medical Care; Parent as Contracting Party

[c] Guardian as Contracting Party

[2] FORM

Consent by Parent or Guardian Medical, Dental, or Hospital Care for Minor

§ 100A.201 Consent by Caregiver to Medical, Dental, or Hospital Care for Minor

[1] Comment--Use of Form

[2] FORM

Consent by Caregiver Medical, Dental, or Hospital Care for Minor

§ 100A.202 Authorization by Parent, Guardian, or Caregiver for Another Adult to Consent to Medical or Dental Care for Minor

[1] Comment

[a] Use of Form

[b] Authorization for Caregiver to Give Consent

[c] Custody of Minor Following Treatment

[2] FORM

Authorization by Parent, Guardian, or Caregiver for Another Adult to Consent to Medical or Dental Care for Minor

§ 100A.203 Authorization by Caregiver for School Enrollment and Medical Care

[1] Comment

[a] Use of Form

[b] Caregiver Not Defined

[c] Parental Consent Not Required

[d] Third-Party Liability

[2] FORM

Authorization by Caregiver School Enrollment and Medical Care [Fam. Code § 6552]

§§ 100A.204-100A.209 [Reserved]

§ 100A.210 Consent by Emancipated Minor to Medical, Dental, or Psychiatric Care

[1] Comment--Use of Form

[2] FORM

Consent by Emancipated Minor Medical, Dental, or Psychiatric Care

§ 100A.211 Consent by Minor for Medical Care for Sexual Assault

[1] Comment--Use of Form

[2] FORM

Consent by Minor Medical Care for Sexual Assault

§ 100A.212 Consent by Minor and Parent or Guardian to Medical Care Related to Prevention or Treatment of Pregnancy

[1] Comment

[a] Use of Form

[b] Minor's Consent for Abortion or Sterilization

[2] FORM

Consent by Minor and Parent or Guardian Medical Care Related to Prevention or Treatment of Pregnancy

§ 100A.213 Consent by Minor Aged 15 or Older and Living Apart From Parents to Medical, Dental, or Hospital Care

[1] Comment--Use of Form

[2] FORM

Consent by Minor Aged 15 or Older and Living Apart From Parents Medical, Dental, or Hospital Care

§ 100A.214 Consent by Minor Aged 12 or Older to Outpatient Mental Health Treatment or Counseling

[1] Comment--Use of Form

[2] FORM

Consent by Minor Aged 12 or Older Outpatient Mental Health Treatment or Counseling

§ 100A.215 Consent by Minor Aged 12 or Older to Provision of Residential Shelter Services

[1] Comment--Use of Form

[2] FORM

Consent by Minor Aged 12 or Older Provision of Residential Shelter Services

§ 100A.216 Consent by Minor Aged 12 or Older to Treatment for Infectious or Communicable Disease

[1] Comment--Use of Form

[2] FORM

Consent by Minor Aged 12 or Older Treatment for Infectious or Communicable Disease

§ 100A.217 Consent by Minor Aged 12 or Older to Medical Care for Rape

[1] Comment--Use of Form

[2] FORM

Consent by Minor Aged 12 or Older Medical Care for Rape

§ 100A.218 Consent by Minor Aged 12 or Older to Medical Care and Counseling for Drug or Alcohol Problem

[1] Comment--Use of Form

[2] FORM

Consent by Minor Aged 12 or Older Medical Care and Counseling for Drug or Alcohol Problem

§§ 100A.219-100A.229 [Reserved]

§ 100A.230 Parent's Receipt and Declaration for Total Estate of Minor Not Exceeding \$5,000

[1] Comment--Use of Form

[2] FORM

Parent's Receipt and Declaration Total Estate of Minor Not Exceeding \$5,000

§§ 100A.231-100A.239 [Reserved]

§ 100A.240 Release of Minor's Claim by Parent or Guardian

[1] Comment

[a] Use of Form

[b] Capacity of Minor to Release Claim

[c] Limited Power of Parent or Guardian

[d] Court Approval of Settlements

[e] Disposition of Settlement Proceeds

[f] Release of Unknown Claims

[2] FORM

Release of Minor's Claim by Parent or Guardian

§ 100A.241 Emancipated Minor's Release of Claim

[1] Comment--Use of Form

[2] FORM

Emancipated Minor's Release of Claim

§§ 100A.242-100A.249 [Reserved]

§ 100A.250 Release of Claim Against Minor

[1] Comment--Use of Form

[2] FORM

Release of Claim Against Minor

§ 100A.251 Release of Claims Against Minor and Minor's Parent, Guardian, or Conservator

[1] Comment

[a] Use of Form

[b] Limited Liability of Parent or Guardian for Minor's Tort

[c] Vicarious Liability of Parent or Guardian in General

[d] Willful Misconduct

[e] Discharge of Firearm

[f] Certain Acts of Petty Theft

[g] Willful Injury or Damage to School Personnel or Property

[h] Malicious Damage to Library or Exhibit Materials

[2] FORM

Release of Claims Against Minor and Minor's Parent, Guardian, or Conservator



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Scope

This chapter covers three topics pertaining to the nonbusiness affairs of minors:

- Medical care for minors, including the rights and duties of parents with respect to medical care for their minor children, and circumstances in which a minor may consent to and contract for medical care.
- Receipt of money or property belonging to minors, including the different legal rules that apply to "property" and "earnings" of minors as well as the respective rights of a minor and the parents to control a minor's property and earnings.
- Release of a tort claim by or against a minor, including legal rules governing the settlement of tort claims against minors and their parents.

Other chapters cover additional nonbusiness affairs of minors. For inheritance issues relating to minors, see Ch. 60, *Estate Planning* . For discussion of the California Uniform Transfers to Minors Act, see Ch. 60A, *Gifts* . For guardianships of minors and their estates, see Ch. 66, *Guardianships* . The control, custody, and support of a child are covered in Ch. 100, *Control, Custody, and Support of Minors* . The California Child Day Care Facilities Act is discussed in Ch. 100C, *Child Care Facilities* . Birth and death records are covered in Ch. 101, *Vital Records* . Health Care issues in general are discussed in Ch. 104, *Health Care Transactions, Consents, and Directives* .

Business affairs of minors, including contracts by minors, minors' work permits, and the rights of minors to their earnings, are covered in Ch. 100B, *Contracts and Employment of Minors* .

Marriages of minors, judicial proceedings relating to minors' contracts, claims and property of minors, court consents to medical care, and the emancipation of minors are also covered in California Forms of Pleading and Practice, Ch. 359, *Marriage* , Ch. 364, *Minors: Claims and Property of Minors*, through Ch. 367A, *Minors: Tort Actions*, and Ch. 245, *Emancipation of Minors* (Matthew Bender).



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§ 100A.01 California Statutes

[1] Minors in General

Minor's capacity to marry. *Fam. Code §§ 302-304.*

Parents' duty to support minor child. *Fam. Code § 3900.*

Right of person to supply necessities to minor. *Fam. Code § 3950.*

Definition of "minor." *Fam. Code § 6500.*

Definition of "adult." *Fam. Code § 6501.*

Minor's capacity to contract. *Fam. Code § 6700 et seq.*

Emancipation of Minors Law. *Fam. Code § 7000 et seq.*

[2] Medical Treatment for Minors

Consent by persons having care of minor or by court. *Fam. Code §§ 6910, 6911.*

Consent by minor. *Fam. Code § 6920 et seq.*

California Adolescent Family Life Act. *Health & Safety Code § 124175 et seq.*

Children's Civil Commitment and Mental Health Treatment Act. *Welf. & Inst. Code § 5585 et seq.*

Minor's right to have review of admission to mental facility. *Welf. & Inst. Code § 6002.10 et seq.*

[3] Money and Property of Minors

Right of parents to claim services and earnings of child. *Fam. Code § 7500(a).*

Right of custodial parent to change child's residence. *Fam. Code § 7501.*

Negation of parental right to control child's property. *Fam. Code § 7502.*

Payment of minor's earnings to minor in absence of notice to employer by parent or guardian. *Fam. Code § 7503.*

Parent's relinquishment of right to control child and right to receive child's earnings. *Fam. Code § 7504.*

Payment to parent of minor's money or property if minor's total estate does not exceed \$5,000. *Prob. Code § 3400 et seq.*

Money or property paid or delivered pursuant to compromise of minor's claim. *Prob. Code § 3600 et seq.*

California Uniform Transfers to Minors Act. *Prob. Code § 3900 et seq.*

[4] Tort Claims of Minors

No claims against parent for "wrongful life." *Civ. Code § 43.6(a).*

Guardian, conservator of estate, or guardian ad litem must represent minor in civil action. *Code Civ. Proc. § 372.*

Appointment of guardian ad litem. *Code Civ. Proc. § 373.*

Guardian ad litem for unborn or unascertained persons. *Code Civ. Proc. § 373.5.*

Enforcement of minor's rights by civil proceeding. *Fam. Code § 6601.*

Authority of guardians and conservators to compromise claims of minors. *Prob. Code § 2500 et seq.*

Authority of parents to compromise minor's disputed claim. *Prob. Code § 3500.*

[5] Tort Claims Against Minors

Responsibility of each person for own willful acts and negligence. *Civ. Code § 1714(a).*

Liability of parent or guardian for willful misconduct of minor that results in injury or death to another person or injury to property of another. *Civ. Code § 1714.1(a).*

Liability of parent or guardian having custody and control for willful misconduct of minor that results in defacement of property of another. *Civ. Code § 1714.1(b).*

Liability of parent or guardian for injury to person or property caused by discharge of firearm by minor. *Civ. Code §*

1714.3.

Liability of minor and parent or guardian for cutting, tearing, or injuring work of art, mechanics, or literature. *Educ. Code § 19910.*

Liability of minor and parent or guardian for willful detention of library book. *Educ. Code § 19911.*

Liability of parent or guardian for willful misconduct that results in damage to school property or injury to pupil or school employee. *Educ. Code § 48904.*

Civil liability of minor. *Fam. Code § 6600.*

Minor's contract for attorneys' fees. *Fam. Code § 6602.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsDutiesSupport of Children



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31-100A California Legal Forms--Transaction Guide §§ 100A.02-100A.04

[Reserved]

§§ 100A.02[Reserved]



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B. Secondary Sources

31-100A California Legal Forms--Transaction Guide § 100A.05

§ 100A.05 Law Reviews and Periodicals

Smith, *The Medical Emancipation of Minors: A California History*, 11 *J. Contemp. Legal Issues* 637 (2000).

Kelly, *The Rightful Position in "Wrongful Life" Actions*, 42 *Hastings L.J.* 505 (January 1991).

Comment, *Aborting the Rights of Minors? Questioning the Constitutionality of California's Parental Consent Statute*, 19 *Pacific L.J.* 1519 (1988).

Comment, *Relief for the Neglected Child: Court-Ordered Medical Treatment in Non-Emergency Situations*, 22 *Santa Clara L. Rev.* 471 (1982).

Note, *California's Emancipation of Minors Act: The Costs and Benefits of Freedom From Parental Control*, 18 *Calif. Western L. Rev.* 482 (1982).

Barnett & Spradlin, *Enslavement in the Twentieth Century: The Right of Parents to Retain Their Children's Earnings*, 5 *Pepperdine L. Rev.* 685 (1978).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law
Parental Duties & Rights
Duties
Support of Children
Family Law
Parental Duties & Rights
Emancipation of Minors



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§ 100A.06 Annotations

Annot., What Voluntary Acts of Child, Other Than Marriage or Entry Into Military Service, Terminate Parent's Obligation to Support, 57 A.L.R.5th 557 (1998) .

Annot., Infant's Liability for Medical, Dental, or Hospital Services, 53 A.L.R.4th 1249 (1987) .

Annot., Infant's Misrepresentation as to His Age as Estopping Him From Disaffirming His Voidable Transaction, 29 A.L.R.3d 1270 (1970) .

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsEmancipation of Minors



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31-100A California Legal Forms--Transaction Guide § 100A.07

§ 100A.07 Text References

California Forms of Pleading and Practice (Matthew Bender).

Ch. 364, *Minors: Claims and Property of Minors*.

Ch. 365, *Minors: Contract Actions*.

Ch. 366, *Minors: Court Consent for Medical Care or Enlistment*.

Ch. 367, *Minors: Disaffirmation of Judgments*.

Ch. 367A, *Minors: Tort Actions*.

Ch. 520, *Settlement and Release*.

California Legal Forms (Matthew Bender).

Ch. 60, *Estate Planning*.

Ch. 60A, *Gifts*.

Ch. 66, *Guardianships*.

Ch. 66A, *Conservatorships*.

Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

Ch. 100, *Control, Custody, and Support of Minors*.

Ch. 100B, *Contracts and Employment of Minors*.

Ch. 101, *Vital Records*.

Ch. 104, *Health Care Transactions, Consents, and Directives*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Parental Duties & Rights Duties General Overview Family Law Parental Duties & Rights Emancipation of Minors



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31-100A California Legal Forms--Transaction Guide § 100A.10

§ 100A.10 Rights and Duties of Parents

Parents have both the authority and the duty to provide for medical care for their minor children [*Simoneau v. Pacific Electric Ry. Co.* (1911) 159 Cal. 494, 506, 115 P. 320 ; *County of Alameda v. Kaiser* (1965) 238 Cal. App. 2d 815, 817-818, 48 Cal. Rptr. 343 ; *Slaughter v. Zimman* (1951) 105 Cal. App. 2d 623, 625, 234 P.2d 94 ; 57 Ops. Cal. Atty. Gen. 28, 29 (1974) ; see Fam. Code § 3900; see also Fam. Code § 6500 (definition of "minor"); Ch. 100B, *Contracts and Employment of Minors*]. A parent's authority with respect to his or her minor child includes the right to direct the minor's activities and to make decisions regarding the minor's care, control, education, health, and religion [*Burge v. City & County of San Francisco* (1953) 41 Cal. 2d 608, 617, 262 P.2d 6] . The obligation to provide medical and other support for a minor child falls equally on the child's mother and father [Fam. Code § 3900] and may be enforced by civil suit on behalf of the child [Fam. Code §§ 4000-4002].

If a parent fails to provide articles necessary for a child who is under the parent's charge, any person may in good faith supply the necessary articles and recover their reasonable value from the parent [Fam. Code § 3950]. A parent who willfully fails to provide necessary medical attendance or other remedial care for his or her minor child is guilty of a crime [Penal Code § 270]. Although financial inability may excuse a failure to provide necessary medical care [*People v. Arnold* (1967) 66 Cal. 2d 438, 451, 58 Cal. Rptr. 115, 426 P.2d 515 ; *People v. Smith* (1918) 38 Cal. App. 175, 177, 175 P. 696] , providing unorthodox treatment (such as home remedies or faith healing) might not discharge the parent's duty [*People v. Arnold* (1967) 66 Cal. 2d 438, 451-452, 58 Cal. Rptr. 115, 426 P.2d 515] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of Children



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§ 100A.11 Contracts of Parents

Parents ordinarily must contract and pay for medical care for their minor children [*see Ballard v. Anderson (1971) 4 Cal. 3d 873, 878, 95 Cal. Rptr. 1, 484 P.2d 1345 ; Doyle v. Giuliani (1965) 62 Cal. 2d 606, 610, 43 Cal. Rptr. 697, 401 P.2d 1*], since unemancipated minors, with some exceptions [*see § 100A.12[3]*], can disaffirm their own contracts to pay for medical services [*Ballard v. Anderson (1971) 4 Cal. 3d 873, 878, 95 Cal. Rptr. 1, 484 P.2d 1345 ; Doyle v. Giuliani (1965) 62 Cal. 2d 606, 610, 43 Cal. Rptr. 697, 401 P.2d 1 ; see Fam. Code §§ 6700, 6701, 6710*]. The right of minors to disaffirm contracts is conferred by law to protect them against their own improvidence in assuming contractual obligations [*Ballard v. Anderson (1971) 4 Cal. 3d 873, 878-879, 95 Cal. Rptr. 1, 484 P.2d 1345 ; see generally Ch. 100B, Contracts and Employment of Minors*]. Since the power of disaffirmance does not apply to contracts between adults, a parent's contract to pay for medical care rendered to his or her minor child is not subject to disaffirmance [*see Doyle v. Giuliani (1965) 62 Cal. 2d 606, 609, 43 Cal. Rptr. 697, 401 P.2d 1*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties Age Family Law Parental Duties & Rights Duties General Overview



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31-100A California Legal Forms--Transaction Guide § 100A.12

§ 100A.12 Minor's Consent to Medical Care

[1] Need for Consent

Consent is primarily important in determining whether a health care provider [*see Bus. & Prof. Code § 6146(c)(2)* (definition of "health care provider"); *Civ. Code §§ 3333.1(c)(1), 3333.2(c)(1); Code Civ. Proc. §§ 340.5(1), 667.7(e)(3), 1295(g)(1); see also California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners* (Matthew Bender)] may be held liable for battery or negligence arising out of treatment of a patient (whether the patient is a minor or an adult). The legal concept of consent derives from the general proposition that every person has a fundamental right to give or withhold consent for health care treatment [*see Turpin v. Sortini (1982) 31 Cal. 3d 220, 233, 182 Cal. Rptr. 337, 643 P.2d 954; see, e.g., Prob. Code § 4701* (statutory health care directive)]. Since a battery is any harmful or offensive touching of the person, a health care provider who renders medical or surgical treatment to which the patient has not consented may be liable for battery [*Cobbs v. Grant (1972) 8 Cal. 3d 229, 240, 104 Cal. Rptr. 505, 502 P.2d 1*]. Consent, however, is a complete legal defense to an action for battery [*Carr v. Dickey (1958) 163 Cal. App. 2d 416, 423, 329 P.2d 539; see California Torts, Ch. 41, Assault and Battery* (Matthew Bender)].

Because minors generally are not legally capable of consenting to medical treatment or hospital care, except as permitted by statute [*see Fam. Code § 6920 et seq.*], their parents have the right and duty to give or withhold consent for their medical treatment or hospital care [*Cobbs v. Grant (1972) 8 Cal. 3d 229, 244, 104 Cal. Rptr. 505, 502 P.2d 1; Ballard v. Anderson (1971) 4 Cal. 3d 873, 883, 95 Cal. Rptr. 1, 484 P.2d 1345*].

[2] Emancipated Minor

Emancipated minors are generally free from the legal disabilities to which other minors are subject. Under the Emancipation of Minors Law [*Fam. Code § 7000 et seq.*], emancipated minors are considered as being over the age of majority for many purposes, including consenting to medical, dental, or psychiatric care without parental consent, knowledge, or liability and entering into binding contracts [*see Fam. Code § 7050(e)(1), (2); see also § 100A.210*].

A minor may be emancipated by any of the following [*Fam. Code § 7002*]:

- Entering into a valid marriage, whether or not the marriage is later terminated by dissolution;
- Assuming active duty with any of the armed forces of the United States; or
- Receiving a judicial declaration of emancipation.

A petition for a judicial declaration of emancipation must specify all of the following [*Fam. Code § 7120*]:

- The minor is at least 14 years of age.
- The minor is willingly living separate and apart from his or her parents or guardian.
- The minor is managing his or her own financial affairs.
- The minor's income is not derived from any activity declared to be a crime under the laws of California or of the United States.

For a discussion of judicial proceedings for emancipation, together with necessary forms, see *California Forms of Pleading and Practice*, Ch. 245, *Emancipation of Minors* (Matthew Bender).

[3] Unemancipated Minor

Although generally lacking the authority to consent to medical care and treatment, an unemancipated minor does have the power to give consent under various circumstances specified by statute [*see Fam. Code § 6920 et seq.*]. The consent of the parents or guardian of a minor who contracts for medical care or treatment in any of the circumstances specified in the statutes is not necessary to that care or treatment, and a minor who contracts under the specified circumstances may not disaffirm his or her contract because of minority [*see Fam. Code §§ 6920, 6921*].

An unemancipated minor who is alleged to have been sexually assaulted [*see § 100A.211*] or needs medical or surgical care related to the prevention or treatment of pregnancy [*see § 100A.212*] may consent to medical care with regard to his or her condition, regardless of his or her age [*Fam. Code §§ 6925, 6928*].

At or after age 15, an unemancipated minor who is living separate and apart from his or her parents or guardian and is managing his or her own financial affairs may consent to any type of medical or dental care [*Fam. Code § 6922; see § 100A.213*].

A minor who is at least 12 years of age may obtain mental health treatment or counseling on an outpatient basis [*see § 100A.214*] or may consent to residential shelter services [*see § 100A.215*] if, in the opinion of the attending professional, the minor is mature enough to participate intelligently in the outpatient services or residential shelter services and either has been the victim of incest or child abuse or would present a danger of serious physical or mental harm to himself or herself or others without the treatment or counseling [*Fam. Code § 6924(b)*]. At or after age 12, a minor may consent to medical care or treatment for a communicable disease [*Fam. Code § 6926; see § 100A.216*], or the effects of having been raped [*Fam. Code § 6927; see § 100A.217*], or a drug or alcohol problem [*Fam. Code § 6929; see § 100A.218*].

Even though some statutes authorizing minors to give consent for their own medical care or treatment do not specify a minimum age below which minors are incapable of consenting, case law establishes that no minor who lacks the maturity to give an informed consent to any treatment or procedure may consent to or contract for that treatment or procedure. Thus, regardless of any applicable statutory age limit, a minor who is unable to convince competent medical authorities that he or she has the requisite understanding and maturity to give an informed consent for any medical

treatment must be denied the treatment without the consent of either a parent or a guardian [*Ballard v. Anderson* (1971) 8 Cal. 3d 873, 883, 95 Cal. Rptr. 1, 484 P.2d 1345] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawParental Duties & RightsConsentGeneral OverviewFamily LawParental Duties & RightsDutiesGeneral OverviewHealthcare LawTreatmentGeneral Overview



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§ 100A.13 Court Consent

If a minor 16 years of age or older and residing in California needs the consent of a parent or guardian in order to receive hospital or medical care but has no parent or guardian available to give the consent, the superior court, on application by the minor, may summarily provide the consent [*Fam. Code § 6911*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family Law Parental Duties & Rights Consent General Overview



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31-100A California Legal Forms--Transaction Guide § 100A.14

§ 100A.14 Minor's Agreement to Pay for Medical Care

In general, if a minor agrees to pay for medical care or treatment, the minor's contract may be disaffirmed (before the minor reaches majority or within a reasonable time thereafter) unless the contract is one the minor may validly make by express statutory authority [see *Fam. Code* §§ 6710, 6711]. For example, a minor's contract to pay the reasonable value of things necessary for the minor's support is not subject to disaffirmance if made by the minor when not under the care of a parent or guardian able to provide those things for the minor, as long as the things have actually been furnished to the minor [*Fam. Code* § 6712]. In addition, a minor cannot disaffirm an otherwise valid obligation assumed by the minor under the express authority or direction of a statute [see *Fam. Code* § 6711; see also Ch. 100B, *Contracts and Employment of Minors*].

Statutory law describes particular circumstances in which a minor may consent to the furnishing of medical care and treatment for various purposes [see *Fam. Code* § 6920 *et seq.*]. Those provisions state that consent given in the circumstances described is not subject to disaffirmance because of minority [*Fam. Code* § 6921]. Courts have stressed that statutes permitting minors to enter into certain types of contracts and to give consent for medical care or treatment in specified circumstances were enacted to permit the minors to obtain those services [see *Ballard v. Anderson* (1971) 4 Cal. 3d 873, 880, 95 Cal. Rptr. 1, 484 P.2d 1345 ; *Burnand v. Irigoyen* (1947) 30 Cal. 2d 861, 866, 186 P.2d 417] . They represent the legislative determination that the public interest in encouraging minors to obtain the specified services outweighs the public policy designed to protect minors from their own improvidence [*Ballard v. Anderson* (1971) 4 Cal. 3d 873, 880, 95 Cal. Rptr. 1, 484 P.2d 1345] .

Although no reported cases have held that the statutory provisions that permit a minor to give consent for certain medical care and treatment [see *Fam. Code* § 6920 *et seq.*] also apply to agreements to pay for health care, the Attorney General has expressed that opinion. In a decision interpreting former *Civ. Code* § 34.5 [now see *Fam. Code* § 6925], authorizing a minor to give consent for medical and surgical care related to the prevention or treatment of pregnancy [see § 100A.212], the Attorney General opined that a minor who consents to care related to the prevention or treatment of pregnancy is not relieved of responsibility for payment for the pregnancy-related care [57 Ops. Cal. Atty. Gen. 28, 29 (1974)] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawParental Duties & RightsDutiesGeneral
OverviewHealthcare LawTreatmentGeneral Overview



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A. Medical and Dental Care

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[Reserved]

§§ 100A.15[Reserved]



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31-100A California Legal Forms--Transaction Guide § 100A.20

§ 100A.20 Ownership of Property

In California, it is settled that minors are entitled to acquire and hold property, both real and personal [*Estate of Tetsubumi Yano* (1922) 188 Cal. 645, 649, 206 P. 995 ; see *In re Scott K.* (1979) 24 Cal. 3d 395, 405, 155 Cal. Rptr. 671, 595 P.2d 105 , cert. denied, 444 U.S. 973 (parent may not consent to warrantless search of tool box owned by minor child)]. The courts have repeatedly held that the property of a minor belongs to the minor and not to the minor's parents [*Emery v. Emery* (1955) 45 Cal. 2d 421, 432, 289 P.2d 218 ; see *In re Scott K.* (1979) 24 Cal. 3d 395, 405, 155 Cal. Rptr. 671, 595 P.2d 105 , cert. denied, 444 U.S. 973 ; *Watkins v. Clemmer* (1933) 129 Cal. 567, 574, 19 P.2d 303] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of ChildrenReal Property LawOwnership & TransferGeneral Overview



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31-100A California Legal Forms--Transaction Guide § 100A.21

§ 100A.21 Parental Control of Minor's Property

[1] General Lack of Parental Authority over Minor's Property

By statute, a minor's parents, as parents, have no rights in or to the minor's property [*see Fam. Code § 7502*], except for earnings [*see Fam. Code § 7500*; § 100A.22]. This rule appears to be absolute [*see Barnett & Spradlin, Enslavement in the Twentieth Century: The Right of Parents to Retain Their Children's Earnings*, 5 *Pepperdine L. Rev.* 685 (1978)]. It makes no difference if the child acquires the property while supported by the parent, or even as the beneficiary of property paid for by the parent [*see Estate of Tetsubumi Yano* (1922) 188 *Cal.* 645, 650, 206 *P.* 995 ; *see also* Barnett & Spradlin, *Enslavement in the Twentieth Century: The Right of Parents to Retain Their Children's Earnings*, 5 *Pepperdine L. Rev.* 685 (1978)].

Although the right of minors to own property is well-established in California [*see § 100A.20*], the right of minors to contract with respect to their property is subject to severe statutory restrictions. For example, a minor may not make any contract relating to real property or relating to any personal property not in the immediate possession or control of the minor [*Fam. Code § 6701*]. Contracts made contrary to these restrictions are void and require no act of disaffirmance [*Burnand v. Irigoyen* (1947) 30 *Cal. 2d* 861, 865, 186 *P.2d* 417 ; *Hakes Investment Co. v. Lyons* (1913) 166 *Cal.* 557, 559-561, 137 *P.* 911] . For this reason, if a minor owns any substantial property, it is usually necessary to entrust control of the property to some person other than the minor. Further, because the parents of a minor, as parents, have no control over the property of the minor [*see Fam. Code § 7502*], the person entrusted with control of the minor's property may not generally be a parent unless the parent is acting in some other legally recognized capacity, such as trustee [*see* Ch. 64A, *Testamentary Trusts: Trustee Provisions* ; Ch. 72, *Irrevocable Trusts*] or guardian of the minor's estate [*see Prob. Code § 2100 et seq.*; *see also* Ch. 66, *Guardianships*], or custodian under the California Uniform Transfers to Minors Act [*see Prob. Code § 3900 et seq.*; *see also* Ch. 60A, *Gifts*].

Although a minor child's property generally may not be used by the parents for the support of the child [*see generally* Ch. 100, *Control, Custody, and Support of Minors*], the court may direct an allowance to be made to the parent of a child for whom support may be ordered, out of the children's property, for the child's past or future support if for the child's benefit. Any order directing such an allowance may be made on any conditions the court deems proper [*Fam. Code §*

3902].

[2] Parents as Trustees of Minor's Small Estate

The total estate of a minor may be paid to a parent of the minor entitled to the minor's custody, to be held in trust for the minor [*Prob. Code* § 3401(a), (b)], if the parent gives the person making the payment or delivery written assurance, verified by the parent's oath, that the total estate does not exceed \$5,000 [*Prob. Code* § 3401(c)(2)]. The written receipt of the parent [*see* § 100A.230] acquits the person making the payment or delivery to the parent [*Prob. Code* § 3402].

For this purpose, the total estate of the minor includes all money and other property belonging to the minor or to the minor's guardianship estate, if any [*Prob. Code* § 3400(a)]. It does not include custodial property held for the minor pursuant to the California Uniform Transfers to Minors Act [*see Prob. Code* § 3900 *et seq.*], nor does it include the proceeds of a compromise of the minor's claim or a judgment in favor of the minor [*Prob. Code* § 3400(b); *see Prob. Code* §§ 3602(c), 3610 *et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law
Parental Duties & Rights
Duties
Care & Control of Children
Real Property Law
Ownership & Transfer
General Overview



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31-100A California Legal Forms--Transaction Guide § 100A.22

§ 100A.22 Parental Right to Minor's Earnings

With limited exception, parents who have custody of an unmarried minor are entitled to the minor's earnings [*see Fam. Code § 7500*]. The earnings and accumulations of a minor child while living with or in the custody of a separated parent are the separate (and not the community) property of that parent [*Fam. Code § 771*]. However, a minor's wages must be paid directly to the minor until the parent or guardian entitled to the wages gives the employer notice that he or she claims the wages [*Fam. Code § 7503*]. In addition, a minor's earnings from an artistic, entertainment, or sports contract are subject to special rules. Fifteen percent of the minor's gross earnings under such a contract, whether or not it has been approved by a court, must be set aside by the employer in trust for the benefit of the minor (a "Coogan Trust Account") [*Fam. Code §§ 6752(b)-(i), 6753; see Fam. Code § 6750(c)* (minor's "gross earnings" defined); *see generally* Ch. 100B, *Contracts and Employment of Minors*].

When parents have the right to a child's earnings, they may use the earnings as they see fit [*Macchi v. La Rocca* (1921) 54 Cal. App. 98, 100-101, 201 P. 143] , and they have no duty to return them to the minor when he or she reaches the age of majority [*Smith v. Smith* (1918) 38 Cal. App. 388, 397, 176 P. 382] . However, a parent may waive or relinquish the right to receive the earnings of a minor child [*see Fam. Code § 7504; see also Osterberg v. Osterberg* (1945) 68 Cal. App. 2d 254, 260, 156 P.2d 46 (waiver); *Taylor v. Hill* (1896) 115 Cal. 143, 151, 44 P. 336 (relinquishment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawParental Duties & RightsGeneral Overview



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[Reserved]

§§ 100A.23[Reserved]



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31-100A California Legal Forms--Transaction Guide § 100A.30

§ 100A.30 Minors' Tort Claims

[1] Right to Recover for Injury

Minors generally have the same right as adults to recover for injuries caused by the torts of others. However, in any action to recover damages for injuries, a minor must be represented by a guardian, unless the minor is emancipated [*Code Civ. Proc.* § 372; *Fam. Code* § 6601; *see Fam. Code* § 7000 *et seq.* (Emancipation of Minors Law)]. If a minor does not already have a guardian, the minor must appear by a guardian ad litem [*Code Civ. Proc.* § 372; *see Code Civ. Proc.* §§ 373, 373.5 (appointment of guardian ad litem generally; appointment for unborn or unascertained person)]. Even if a minor claimant has a guardian of his or her estate, the court may appoint a guardian ad litem to represent the minor in judicial proceedings when the court deems the appointment to be expedient [*Code Civ. Proc.* § 372].

A minor at least 12 years of age may appear without a guardian, counsel, or guardian ad litem for the purpose of requesting or opposing a request for a protective or restraining order against harassment, workplace violence, or domestic violence [*Code Civ. Proc.* § 372(b)(1)]. A minor under age 12 may seek or oppose such orders without the assistance of counsel, but the minor must appear by a guardian ad litem [*Code Civ. Proc.* § 374; *see Cal. Rules of Ct., Rule 3.1153*]. For further discussion, see California Forms of Pleading and Practice, Ch. 293, *Harassment and Domestic Violence* (Matthew Bender).

[2] Prenatal Injury

A child conceived but not yet born is considered an existing person for purposes of recovery for injuries suffered before birth [*Civ. Code* § 43.1; *Scott v. McPheeters* (133 Cal. App. 2d 629, 631, 939) P.2d 678, 93 P.2d 562]. However, recovery is permitted only if the child is actually born [*see Code Civ. Proc.* § 340.4] and only if the unborn child suffered some actual injury. A child may not recover for a doctor's failure to perform an abortion on the child's mother, since birth itself is not a compensable injury [*Stills v. Gratton* (1976) 55 Cal. App. 3d 698, 705-706, 127 Cal. Rptr. 652].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Relationships & TortsTort LiabilityChild TortsFamily LawParental Duties & RightsDutiesCare &
Control of ChildrenFamily LawParental Duties & RightsDutiesLiability for Minor's ActionsTortsVicarious
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31-100A California Legal Forms--Transaction Guide § 100A.31

§ 100A.31 Settlement of Minors' Tort Claims

[1] Capacity of Minors to Settle Claims

Settlements of tort claims (and releases and covenants not to sue executed as part of settlements) are contracts [*see Pellett v. Sonotone Corp.* (1945) 26 Cal. 2d 705, 711, 160 P.2d 783 ; *Setzer v. Moore* (1927) 202 Cal. 333, 338, 260 P. 550] . Since minors generally lack the capacity to contract for themselves or with respect to their own property [*see Fam. Code § 6701*], they generally lack the capacity to settle tort claims, whether those claims are in their favor or against them.

An emancipated minor is considered to be an adult for the purpose of entering into binding contracts [*Fam. Code § 7050(e)(2)*] and compromising, settling, arbitrating, or otherwise adjusting a claim, action, or proceeding by or against the minor [*Fam. Code § 7050(e)(5)*; *see § 100A.241*].

[2] Power to Settle Claims

[a] Parents and Guardians

Guardians ad litem and guardians of the estates of minors have power to settle tort claims in favor of their wards, provided certain requirements are met [*see Code Civ. Proc. § 372* (compromise by guardian ad litem or guardian of estate); *Prob. Code § 2500* (power of guardians to settle claims in favor of or against wards)].

Generally parents have no power release a minor's claims in the absence of specific statutory authority [*Burge v. City & County of San Francisco* (1953) 41 Cal. 2d 608, 613, 262 P.2d 6] . Parents who are guardians of the estates of their minor children, and parents who have been appointed as guardians ad litem for the purpose of representing their children in judicial proceedings [*see Code Civ. Proc. §§ 373, 373.5*], may settle tort claims of their children [*see Code Civ. Proc. § 372*; *Prob. Code § 2500*]. Further, parents who have custody of their children have statutory authority to settle tort claims in favor of their minor children when the settlements are approved by the court [*Prob. Code § 3500(b)*; *see [3], below*]. If the parents are living together, either parent may exercise this right to settle; if the parents are living separate and apart, the parent who has the care, custody, or control of the minor may exercise the right [*Prob. Code §*

3500(a)].

A judgment rendered against a minor who is not represented by a general guardian or a guardian ad litem is subject to disaffirmance by the minor [*Gouanillou v. Industrial Acc. Com.* (1920) 184 Cal. 418, 420, 193 P. 937 ; *Keane v. Penha* (1946) 76 Cal. App. 2d 693, 696, 173 P.2d 835] . However, the right to disaffirm will be lost if the minor fails to inform the trial court that he or she is not an adult or if, after attaining majority, the minor continues to participate in the proceedings without objecting to the earlier proceedings [*Childs v. Lanterman* (1894) 103 Cal. 387, 391-392, 37 P. 842 ; *Hughes v. Quackenbush* (1934) 1 Cal. App. 2d 349, 363, 37 P.2d 991] .

[b] Claims of Unborn Persons

A tort claim in favor of an unborn person may be compromised by a guardian ad litem appointed to act on behalf of the unborn person, subject to court approval. A judgment, order, or decree rendered pursuant to such a compromise is conclusive on the unborn person. The guardian ad litem of an unborn person has the same power to release or discharge a claim on behalf of the unborn person as a guardian or parent of a living minor; and the court has the same power to order the proceeds of any settlement on behalf of an unborn person to be held and invested for the unborn person [Code Civ. Proc. § 373.5; see Code Civ. Proc. § 372; Prob. Code §§ 3500, 3602, 3610, 3611].

[3] Requirement of Court Approval

Settlements by parents, acting as parents and not in some other legal capacity, require court approval [see Prob. Code § 3500(b)]. Settlements by guardians also require court approval, except in limited circumstances. Court approval is required when a tort claim of a minor is settled by a guardian ad litem or by a guardian of the minor's estate who has appeared for the minor in judicial proceedings to which the minor is a party [Code Civ. Proc. § 372]. If a settlement is made by a guardian of the minor's estate who has not appeared for the minor in a judicial proceeding, the general rule is that court approval is not required if the settlement is to the advantage of the estate [Prob. Code § 2501(a)(1)]. However, court approval is required in the following cases:

- When the settlement involves title to, an interest in, a lien or encumbrance on, or an option to purchase, real property or an interest in real property [Prob. Code § 2501(a); see Prob. Code § 2501(b), (c) (special rules regarding certain leases)].
- When the settlement requires the transfer or encumbrance of property of the minor's estate or the creation of an unsecured liability of the estate, or both, in an amount or value in excess of \$25,000 [Prob. Code § 2502].
- When the claim is in favor of the minor and against the guardian or against the attorney for the guardian (whether or not the claim arises out of the administration of the minor's estate) [Prob. Code § 2503(a)].
- When the claim is for the support, maintenance, or education of the minor or a person whom the minor is legally obligated to support, maintain, or educate [Prob. Code § 2504(a)].
- When the minor's claim is for wrongful death [Prob. Code § 2504(b)].
- When the claim is for physical or nonphysical harm to the minor's person [Prob. Code § 2504(c)].

Whether or not court approval is required, guardians, at their option, may seek court approval of any settlement in favor of a minor [Prob. Code § 2500(b); see Prob. Code § 2503; see also Prob. Code § 2403]. When a settlement is approved by the court, any proceeds must be held and invested pursuant to court order [Code Civ. Proc. § 372; Prob. Code §

3500(c); see *Prob. Code* §§ 3500(d), 3610, 3611; see also [5], below].

[4] Execution of Releases

A guardian or parent who has the power to compromise a minor's claim also has the power to execute a full release and satisfaction of the claim or, if appropriate, a covenant not to sue or not to enforce judgment on the claim [*Prob. Code* § 3500(d)].

A person who releases a claim abandons or relinquishes the claim and any right to demand that it be paid or enforced [*Civ. Code* § 1541; *Pellett v. Sonotone Corp.* (1945) 26 Cal. 2d 705, 711, 160 P.2d 783]. Under the former rule that the release of one joint tortfeasor had the effect of releasing all [see *Kincheloe v. Retail Credit Co., Inc.* (1935) 4 Cal. 2d 21, 23, 46 P.2d 971], covenants not to sue were at one time used instead of releases when tort claimants settled with fewer than all of the tortfeasors claimed to be liable for the same tort. Under *Code Civil Proc.* § 877, however, a release given in good faith to one or more of a number of tortfeasors claimed to be liable for the same tort does not discharge any other tortfeasor from liability unless the terms of the release so provide (although it does reduce the claims against the others in the amount stipulated by the release, or in the amount of the consideration paid for it, whichever is greater).

If the court orders that all or any part of the proceeds of the compromise be deposited in a financial institution [see [5], below], a parent's release and satisfaction is not effective for any purpose until the money has been deposited as ordered [*Prob. Code* § 3500(d)].

[5] Disposition of Proceeds

When settlement of a minor's claim is approved by a court, the court that approves the settlement has authority to make orders respecting disposition of the money or property payable to the minor [*Code Civ. Proc.* § 372; *Prob. Code* §§ 3500(c), 3600; see California Forms of Pleading and Practice, Ch. 367A, *Minors: Tort Actions* (Matthew Bender)].

If there is a guardian of the minor's estate, the balance due to the minor after payment of all expenses, costs, and fees approved by the court [see *Prob. Code* § 3601] ordinarily must be paid or delivered to the guardian [*Prob. Code* § 3602(b)]. However, on application of the guardian, the court may order all or part of the money to be deposited in an insured account in a California financial institution, or deposited with a trust company, as a part of the guardianship estate, but subject to withdrawal only on court authorization [*Prob. Code* §§ 2456(a), 3602(b)]. On the ex parte motion of the guardian or any person interested in the guardianship estate, the court may instead order that the remaining balance not become part of the guardianship estate but be either [*Prob. Code* § 3602(c)]:

- Deposited in an insured account in a California financial institution or in a single-premium deferred annuity;
- Transferred to a custodian for the benefit of the minor under the California Uniform Transfers to Minors Act [see *Prob. Code* § 3900 et seq.]; or
- Transferred to the trustee of a trust that is created or approved in the order or judgment and is revocable by the minor at the age of 18 years.

As still another alternative, the guardian or any person interested in the guardianship estate may petition the court for an order that all or part of the remaining balance not become a part of the guardianship estate but instead be paid to a special needs trust for the benefit of the minor [*Prob. Code* § 3602(d), (f); see *Prob. Code* § 3604 et seq. (requirements for special needs trust)].

If there is no guardian of the estate of the minor, the court must, on application of the minor's attorney, order one or

more of the following [*Prob. Code §§ 3602(a), 3610*]:

- A guardian of the estate must be appointed, and the remaining balance of the money or property must be paid to that person [*Prob. Code § 3611(a)*].
- The remaining balance of any property other than money must be held on any conditions that the court determines to be in the best interest of the minor, and the remaining balance of any money must be deposited with the county treasurer (subject to statutory restrictions) or in an insured account in a financial institution in California or in a single premium deferred annuity, subject to withdrawal only on the authorization of the court [*Prob. Code § 3611(b),(h)*].
- After a hearing by the court, the remaining balance of any money must be paid to a special needs trust for the benefit of the minor [*Prob. Code § 3611(c)*; see *Prob. Code §§ 3604, 3605* (requirements for special-needs trust)].
- If the remaining balance of the money does not exceed \$20,000, all or part of that balance will be held as the court determines to be in the best interest of the minor [*Prob. Code § 3611(d)*].
- If the remaining balance of the money and other property does not exceed \$5,000 in value, all or part will be paid or delivered to the parent of the minor, without bond, to be held for the benefit of the minor according to statutory requirements [*Prob. Code § 3611(e)*; see *Prob. Code § 3400 et seq.*].
- The remaining money or property to be delivered for the benefit of the minor will be transferred to a custodian and held pursuant to the California Uniform Transfers to Minors Act [*Prob. Code § 3611(f)*; see *Prob. Code § 3900 et seq.*].
- The remaining balance of the money or other property must be paid or delivered to the trustee of a trust that is created or approved in the order or judgment [see *Prob. Code § 3600*] and is revocable by the minor on becoming 18 [*Prob. Code § 3611(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Family Relationships & Torts Tort Liability Child Torts Family Law Parental Duties & Rights Duties Care & Control of Children Family Law Parental Duties & Rights Duties Liability for Minor's Actions Torts Procedure Settlements General Overview Torts Vicarious Liability Family Members Children & Parents



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31-100A California Legal Forms--Transaction Guide § 100A.32

§ 100A.32 Claims Based on Minors' Torts

[1] Claims Against Minors

Minors are liable for their tortious conduct [*Fam. Code § 6600*; see *Civ. Code § 1714(a)* (everyone responsible for own willful acts and negligence)]. This is so even when they lack the mental capacity to recognize the wrongfulness of their conduct, provided they are mature enough to have the state of mind necessary for commission of the particular tort with which they are charged [*Ellis v. D'Angelo* (1953) 116 Cal. App. 2d 310, 315, 253 P.2d 675] . Thus, a minor who inflicts injury on another will be liable even if he or she did not intend to inflict the injury, provided he or she intended to do the act that resulted in the injury [see *Singer v. Marx* (1956) 144 Cal. App. 2d 637, 641, 301 P.2d 440 (minor throwing rock was liable for battery); *Ellis v. D'Angelo* (1953) 116 Cal. App. 2d 310, 317, 253 P.2d 675] . However, a minor cannot be held liable for punitive or exemplary damages [see *Civ. Code § 3294*] unless, at the time of the wrongful act, the minor was capable of knowing that the act was wrongful [*Fam. Code § 6600*].

Whether a minor will be liable for negligence depends on whether the minor exercised the degree of care ordinarily exercised by persons of like age, mental capacity, and experience [*Christian v. Goodwin* (1961) 188 Cal. App. 2d 650, 652, 10 Cal. Rptr. 507 ; *Ellis v. D'Angelo* (1953) 116 Cal. App. 2d 310, 315, 253 P.2d 675] . When, however, a minor engages in an activity that is ordinarily undertaken by adults and for which adult qualifications are required (for example, driving an automobile), the minor will be required to meet the standard of care established for adults [*Pritchard v. Veterans Cab Co.* (1965) 63 Cal. 2d 727, 732, 48 Cal. Rptr. 904, 408 P.2d 360] . Similarly, minority will not insulate a person from the Vehicle Code provisions imputing liability to the owner of an automobile [see *Veh. Code §§ 17150-17153*]. If a minor permits another to drive an automobile that the minor owns, the minor may be liable for the negligence of the driver [see *Ridley v. Young* (1944) 64 Cal. App. 2d 503, 513-514, 149 P.2d 76] . Whether a particular act of a minor constitutes negligence is usually a question of fact to be determined by the trier of fact [*Singer v. Marx* (1956) 144 Cal. App. 2d 637, 642-643, 301 P.2d 440] .

[2] Claims Against Parents of Minors

Since the purpose of holding minors liable for their torts is to compensate the injured parties and not to punish the minors [*Ellis v. D'Angelo* (1953) 116 Cal. App. 2d 310, 314-315, 253 P.2d 675] , recovery for a minor's torts is

usually limited to the minor's own assets and does not extend to the assets of the parents. The general rule is that parents are not liable for injuries caused by their children unless the parents' own negligence contributed to the injuries. If, however, a parent's failure to exercise reasonable control over a child that the parent had a right and duty to control results in injuries to a third party, the parent will be liable for the injuries [*Poncher v. Brackett* (1966) 246 Cal. App. 2d 769, 771-772, 55 Cal. Rptr. 59] . In such a case, the parent's liability is founded on the right and duty to control the child [*Poncher v. Brackett* (1966) 246 Cal. App. 2d 769, 772, 55 Cal. Rptr. 59] . If a parent's negligence made it possible for a child to injure another, the parent will be liable for the injury if the parent had the duty to control the child and it was probable that an injury would result from failure to control the child [*Buelke v. Levenstadt* (1923) 190 Cal. 684, 689, 214 P. 42 ; *Ellis v. D'Angelo* (1953) 116 Cal. App. 2d 310, 317, 253 P.2d 675] .

Parents may also be liable for the torts of their children under an agency theory. If a child commits a tort while acting as an agent of the parent and within the authority of the agency, the parent may be liable [see *Van Den Eikhof v. Hocker* (1978) 87 Cal. App. 3d 900, 904-905, 151 Cal. Rptr. 456 ; *Johnson v. Peterson* (1974) 38 Cal. App. 3d 619, 622-624, 113 Cal. Rptr. 445] .

Under circumstances specified by statute, parents may be liable for their children's torts even when the parents have not been negligent and there was no agency relationship between the child and the parent. Statutes impose liability on parents, regardless of the parents' personal lack of culpability, for the following [see § 100A.251[1][c]]:

- Willful misconduct of the minor child if it results in an injury to the person or property of another [Civ. Code § 1714.1; see Cal. Rules of Ct., Appen. B (liability limit, as adjusted by Judicial Council to reflect cost-of-living increases)].
- Injury to person or property caused by the discharge of a firearm, if the parent permitted the minor to have the firearm or left the firearm in a place accessible to the minor [Civ. Code § 1714.3].
- Petty theft involving merchandise taken from a store or a book or other library materials taken from a library [Penal Code § 490.5(b)].
- Willful misconduct that results in injury to or death of a pupil or any person employed by a school district or private school, or for willful defacement of school property [Educ. Code § 48904(a)].
- Malicious damage to or detention of library or exhibit materials [Educ. Code § 19910].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Relationships & TortsTort LiabilityChild TortsFamily LawParental Duties & RightsDutiesCare & Control of ChildrenFamily LawParental Duties & RightsDutiesLiability for Minor's ActionsTortsVicarious LiabilityFamily MembersGeneral OverviewTortsVicarious LiabilityFamily MembersChildren & Parents



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DIVISION VII: PERSONAL TRANSACTIONS
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PART II. LEGAL BACKGROUND
C. Tort Claims

31-100A California Legal Forms--Transaction Guide §§ 100A.33-100A.99

[Reserved]

§§ 100A.33[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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PART III. TRANSACTION GUIDE
A. Client Interview Facts and Documents

31-100A California Legal Forms--Transaction Guide § 100A.100

§ 100A.100 Facts

1. Personal information.

a. For minor:

- (1) Name, address, and telephone number.
- (2) Age and date of birth.
- (3) Name, address, and telephone number of parent or guardian.

b. For client other than minor:

- (1) Name, address, and telephone number of client.
- (2) Name, address, and telephone number of minor.
- (3) Relationship between client and minor, such as:
 - (a) Natural parent and child.
 - (b) Adoptive parent and child.
 - (c) Grandparent and grandchild.
 - (d) Guardian and ward.
 - (e) Potential provider of medical care to child

2. Legal status of minor, either:

- a. Unemancipated.
- b. Emancipated by reason of any of following [*Fam. Code § 7002*]:

- (1) Valid marriage.
- (2) Active duty with the United States armed forces.
- (3) Judicial declaration of emancipation [*see Fam. Code § 7120*].

3. Whether marriage of minor's parents has been dissolved and, if so, which parent was awarded custody.

4. Whether parents are living together or apart (without dissolution of marriage) and, if apart, parent with whom child is living.

5. If medical care or treatment of minor is involved:

- a. Nature of care or treatment.
- b. Whether minor's desire for treatment is known to parents or guardian.
- c. If need for treatment is not known by parents or guardian, whether minor wishes treatment to remain confidential.
- d. Who will pay for care or treatment.

6. If property of minor is involved:

- a. Type of property.
- b. Source of property, such as inheritance or gift.
- c. Identity of person from whom property was received.
- d. Approximate value of property.
- e. How property is or will be held, if known, such as:
 - (1) By minor or another party outright.
 - (2) In trust for minor.
 - (3) By guardian of minor's estate.
 - (4) By custodian under California Uniform Transfers to Minors Act [*see Prob. Code § 3900 et seq.*].

f. Characteristics of property, such as following:

- (1) Whether property is likely to require management.
- (2) Whether property is subject of any contracts or ancillary agreements.
- (3) Whether property needs to be sold, conveyed, transferred, or exchanged before minor becomes emancipated or attains age of majority.

g. Total value of minor's estate, including this property.

7. If tort claim is involved:

a. Whether claim is in favor of or against minor.

b. Basic facts and circumstances of claim.

c. Names, addresses, and telephone numbers of:

- (1) Other parties to claim.
- (2) Attorneys for other parties.
- (3) Insurance carriers for:
 - (a) Minor.
 - (b) Minor's parents or guardian.
 - (c) Other parties to claim.

d. Whether suit has been filed.

e. Whether guardian ad litem has been appointed for minor.

f. Whether settlement offer has been made and, if so:

- (1) Amount and terms.
- (2) Whether settlement is acceptable to minor.
- (3) Whether settlement is acceptable to parent or guardian.
- (4) Whether any other parties to claim have already settled.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Family Protection & Welfare Children General Overview Family Law Parental Duties & Rights Duties Care & Control of Children



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31-100A California Legal Forms--Transaction Guide § 100A.101

§ 100A.101 Documents

1. If marriage of minor's parents has been dissolved, copy of custody order.
2. If minor was adopted, copy of adoption decree.
3. If guardian has been appointed for minor, copy of order of appointment.
4. If minor is married, copy of marriage license or certificate.
5. If minor was emancipated by court order, copy of order.
6. Any papers relating to subject matter of transaction, such as:
 - a. Documents relating to ownership, title, or value of property held or to be held by minor.
 - b. Documents relating to tort claim by or against minor.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareChildrenGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of Children



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DIVISION VII: PERSONAL TRANSACTIONS
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A. Client Interview Facts and Documents

31-100A California Legal Forms--Transaction Guide §§ 100A.102-100A.109

[Reserved]

§§ 100A.102[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Preliminary Determinations

31-100A California Legal Forms--Transaction Guide § 100A.110

§ 100A.110 Medical and Dental Care for Minors

1. Determine whether minor is legally capable of consenting to medical, dental, hospital, or surgical care by virtue of meeting any of following statutory criteria:

- a. Minor has been lawfully married [*see Fam. Code § 7002(a)*].
- b. Minor is on active duty with armed forces [*see Fam. Code §§ 6950, 7002(b)*].
- c. Minor is at least 14 years of age and received judicial declaration of emancipation [*see Fam. Code § 7002(c)*; *see also Fam. Code § 7120*].
- d. Minor is at least 15 years of age, living apart from parents or guardian, and managing own financial affairs [*see Fam. Code § 6922*].

NOTE:

While the consent of parents or a guardian is not necessary in such a case, a treating physician, surgeon, or dentist may (with or without the minor's consent) advise the parents or guardian of the treatment given or needed if, on the basis of information given by the minor, the physician, surgeon, or dentist has reason to know their whereabouts [*Fam. Code § 6922(c)*; **see § 100A.213[1]**].

e. Minor is at least 12 years of age and, in opinion of attending professional, in need of outpatient mental health treatment or counseling because both:

- (1) Minor is mature enough to participate intelligently in the outpatient services.
- (2) Minor is alleged victim of incest or child abuse or would present danger of serious

physical or mental harm to self or others without treatment or counseling [*Fam. Code* § 6924(b); *see* § 100A.214[1]].

f. Minor is at least 12 years of age and in need of diagnosis or treatment for infectious, contagious, or communicable disease that either [*see Fam. Code* § 6926; *see also* § 100A.216[1]]:

(1) Is required by law or regulation to be reported to the local health officer.

(2) Is related sexually transmitted disease, as determined by State Director of Health Services.

g. Minor is victim of rape or sexual assault [*see Fam. Code* §§ 6927, 6928].

NOTE:

The statute that permits a minor to give consent for treatment for an alleged rape applies only to minors age 12 and older [*see Fam. Code* § 6927]. A separate statute, which permits minors who have been sexually assaulted to give consent for treatment, has no specific minimum age for the minor and requires the treating medical professional to contact the minor's parents or guardian (unless the professional reasonably believes that the parent or guardian committed the assault) [*see Fam. Code* § 6928].

h. Minor is at least 12 years of age and in need of diagnosis of, or treatment for, drug or alcohol problem [*see Fam. Code* § 6929(b); *see also* § 100A.218[1]].

i. Minor is in need of hospital, medical, or surgical care related to prevention or treatment of pregnancy [*see Fam. Code* § 6925; *Health & Safety Code* § 123450; *but see American Academy of Pediatrics v. Lungren* (1997) 16 Cal. 4th 307, 314, 356-357, 66 Cal. Rptr. 2d 210, 940 P.2d 797 (parental consent and judicial bypass procedure for minors' abortions was unconstitutional); *see also* § 100A.212[1][b]].

2. Determine whether minor is mature enough to make decisions about his or her own medical care.

NOTE:

A minor must be sufficiently mature to give an informed consent for any treatment or procedure, even when a statute authorizes the minor to give consent for the treatment. A minor who cannot convince competent medical authorities that he or she has the requisite understanding and maturity to give an informed consent may be denied the treatment without the consent of either a parent or guardian [*see Ballard v. Anderson* (1971) 4 Cal. 3d 873, 883, 95 Cal. Rptr. 1, 484 P.2d 1345].

3. Determine whether person other than minor must consent to and contract for minor's medical, dental, hospital, or surgical care, such as:

a. Either parent.

NOTE:

Unless the minor comes within a special statute entitling the minor to give consent for his or her own medical care or treatment, the right (and duty) to make health care decisions for the minor ordinarily is vested in the parents [*see* § 100A.10]. Ordinarily, if either parent is unable or unwilling to take custody, the other is entitled to make health care decisions for the minor [*see Fam. Code* § 3010(b)]. Adoptive parents have the same right to give consent for medical care for their adopted children that natural parents have for their natural children [*see Fam. Code* § 8616 (status of adopted child)].

b. Custodial parent.

NOTE:

When custody has been awarded to one parent on dissolution of marriage, that parent has the right to make health care decisions for the minor [*Lerner v. Superior Court (1952) 38 Cal. 2d 676, 681, 242 P.2d 321*] .

c. Guardian.

NOTE:

The guardian of a minor generally has the same rights as a parent to make health care decisions for the minor [*Prob. Code §§ 2252(b)(1), 2353(a)*]. However, no surgery (except emergency surgery) may be performed on a minor ward 14 years of age or older without either (1) the consent of both the guardian and the ward, or (2) a court order specifically authorizing the surgery [*Prob. Code § 2353(b)*].

d. Other person authorized by parent or guardian to consent [*see Fam. Code § 6910; see also § 100A.202*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareChildrenGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of Children



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CHAPTER 100A PERSONAL AFFAIRS OF MINORS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

31-100A California Legal Forms--Transaction Guide § 100A.111

§ 100A.111 Money and Property of Minors

1. Determine whether minor is emancipated, and therefore legally capable of holding and dealing with property, as result of either:

NOTE:

An unemancipated minor may not make any contract relating to real property, or any contract relating to personal property unless the personal property is in the minor's immediate possession or control [*Fam. Code § 6701*]. Such a contract is void and requires no act of disaffirmance [*Burnand v. Irigoyen* (1947) 30 Cal. 2d 861, 865, 186 P.2d 417 ; *Hakes Investment Co. v. Lyons* (1913) 166 Cal. 557, 559-561, 136 P. 911] . For this reason, it is usually necessary to entrust control of a minor's property to some person other than the minor.

- a. Having been lawfully married [*see Fam. Code § 7002(a)*].
- b. Being on active duty with armed forces [*see Fam. Code §§ 6950, 7002(b)*].
- c. Being at least 14 years of age and receiving judicial declaration of emancipation [*see Fam. Code § 7002(c)*; *see also Fam. Code § 7120*].

2. Determine whether parent or other adult should hold minor's property, considering following:

- a. Nonparent adult is legally capable of holding property for minor as any of following:
(1) Trustee [*see Prob. Code § 15000 et seq.*; *see also Ch. 64A, Testamentary Trusts: Trustee Provisions* ; Ch. 72, *Irrevocable Trusts*].

(2) Guardian of minor's estate [*see Prob. Code § 2401(a)*; *see also* Ch. 66, *Guardianships*].

(3) Custodian under California Uniform Transfers to Minors Act [*see Prob. Code § 3900 et seq.*; *see also* Ch. 60A, *Gifts*].

NOTE:

The California Uniform Transfers to Minors Act [*Prob. Code § 3900 et seq.*] provides a nonexclusive method for giving property to minors without the creation of a guardianship or trust [*see Prob. Code § 3925*]. Any type of property may be transferred to and held by a custodian under the Act.

b. Parent is legally capable of holding property for minor as any of following:

NOTE:

A minor's parents, acting as parents and not in some other legal capacity, have no control over the minor's property [*Fam. Code § 7502*; *see § 100A.21[1]*]. (For this purpose, however, the minor's earnings must be excluded from the definition of the minor's property [*Fam. Code § 7500*].) A parent who acts in some other capacity, such as trustee, guardian, or custodian under the California Uniform Transfers to Minors Act, may, however, hold and manage the minor's property.

(1) Trustee.

(2) Guardian of minor's estate.

(3) Custodian under California Uniform Transfers to Minors Act [*see Prob. Code § 3900 et seq.*].

(4) Parent-trustee, if total value of minor's estate is \$5,000 or less [*Prob. Code § 3401*; *see §§ 100A.21[2]*, *100A.230[1]*].

NOTE:

Property held for the minor under the California Uniform Transfers to Minors Act and the proceeds of a compromise of or judgment on a minor's claim [*see Prob. Code § 3610 et seq.*; *see also* California Forms of Pleading and Practice, Ch. 364, **Minors: Claims and Property of Minors** (Matthew Bender)] may be excluded for purposes of the \$5,000 limit on the value of the minor's estate [*Prob. Code § 3400*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawParental Duties & RightsGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of ChildrenFamily LawParental Duties & RightsEmancipation of Minors



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31-100A California Legal Forms--Transaction Guide § 100A.112

§ 100A.112 Tort Claims

1. Determine whether minor is emancipated, and therefore legally capable of settling tort claim, as result of any of following:

NOTE:

Minors generally lack the capacity to settle tort claims, whether those claims are in their favor or against them, because minors generally lack the capacity to contract for themselves or with respect to their own property [*see Fam. Code §§ 6701, 6710; see also § 100A.31[1]*]. Also, in any civil action or other proceeding in which a minor seeks to enforce his or her rights, a guardian must conduct the action or proceeding [*Fam. Code § 6601*].

- a. Having been lawfully married [*see Fam. Code § 7002(a)*].
- b. Being on active duty with armed forces [*see Fam. Code §§ 6950, 7002(b)*].
- c. Being at least 14 years of age and receiving judicial declaration of emancipation [*see Fam. Code § 7002(c); see also Fam. Code § 7120*].

2. Determine whether parent or other adult is legally capable of settling tort claim, either as:

- a. Guardian or guardian ad litem.

NOTE:

A tort claim against a minor may be compromised and settled by a guardian of the minor's estate or by a guardian ad litem appointed to represent the minor in litigation [

Code Civ. Proc. § 372; Prob. Code § 2500(a)(1)].

b. Custodial parent.

NOTE:

Parents who have custody of their minor children have statutory authority to settle tort claims in favor of the children, provided the settlements are approved by the court. If the parents are living together, either may settle [*Prob. Code § 3500(a)(1)*]. If the parents are living separate and apart, the parent having care, custody, or control of the minor has the right to settle [*Prob. Code § 3500(a)(2)*].

3. Determine whether settlement of minor's claim will require court approval because either:

a. Settlement is being made by guardian ad litem or by guardian of estate who has appeared for minor in a judicial proceeding [*Code Civ. Proc. § 372*].

b. Settlement is being made by guardian who has not appeared for minor, but either [*see Prob. Code § 2500(a)*]:

(1) Settlement involves title to, interest in, lien or encumbrance on, or option to purchase, real property or a real property interest [*Prob. Code § 2501*].

(2) Settlement requires transfer or encumbrance of property of minor's estate in amount or value in excess of \$25,000 [*Prob. Code § 2502*].

(3) Claim is in favor of minor and against guardian or attorney for guardian, whether or not claim arises out of administration of minor's estate [*Prob. Code § 2503*].

(4) Claim is for support, maintenance, or education of minor or person whom minor is legally obligated to support, maintain, or educate [*Prob. Code § 2504(a)*].

(5) Claim is minor's claim for wrongful death [*Prob. Code § 2504(b)*].

(6) Claim is for physical or nonphysical harm to minor's person [*Prob. Code § 2504(c)*].

c. Claim is being settled by parent having custody of minor [*Prob. Code § 3500*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Family Relationships & Torts Tort Liability Child Torts Family Law Parental Duties & Rights Duties Care & Control of Children Family Law Parental Duties & Rights Duties Liability for Minor's Actions Family Law Parental Duties & Rights Emancipation of Minors Torts Vicarious Liability Family Members Children & Parents



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31-100A California Legal Forms--Transaction Guide §§ 100A.113-100A.119

[Reserved]

§§ 100A.113[Reserved]



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31-100A California Legal Forms--Transaction Guide § 100A.120

§ 100A.120 Medical or Dental Care

[1] Minor's Consent

1. Select appropriate form of consent based on relevant facts:

a. For emancipated minor, use *form in § 100A.210*.

b. Minor of any age:

(1) For care or treatment for alleged sexual assault [*see Fam. Code § 6928*], use *form in § 100A.211*.

NOTE:

A minor of any age may give consent for treatment for an alleged sexual assault [*Fam. Code § 6928(a), (b)*]. However, the treating professional must attempt to contact a parent or guardian of the minor [*Fam. Code § 6928(c)*].

(2) For hospital, medical, or surgical care related to prevention or treatment of pregnancy [*see Fam. Code § 6925*], use *form in § 100A.212*.

c. For minor at least 15 years of age, living separate and apart from parents or guardian, and managing his or her own financial affairs [*see Fam. Code § 6922*], use *form in § 100A.213*.

d. Minor at least 12 years of age:

(1) For outpatient mental health treatment or counseling [*see Fam. Code § 6924*], use *form in § 100A.214* if minor either:

(a) Is alleged victim of incest or child abuse; or

(b) Would present danger of serious physical or mental harm to self or others without treatment or counseling.

(2) For residential shelter services [*see Fam. Code § 6924*], use *form in § 100A.215*.

(3) For diagnosis or treatment for infectious, contagious, or communicable disease [*see Fam. Code § 6926*], use *form in § 100A.216*.

NOTE:

The disease must be either a disease required by law or regulation to be reported to the local health officer [*see Health & Safety Code § 120130; 17 Cal. Code Reg. § 2500 et seq.; see also Health & Safety Code § 120250* (duty of physicians, nurses, and others to report)] or a related sexually transmitted disease, as determined by the State Director of Health Services [*Fam. Code § 6926*].

(4) For treatment or care because of alleged rape [*see Fam. Code § 6927*], use *form in § 100A.217*.

(5) For medical care or counseling related to diagnosis and treatment of drug or alcohol problem [*see Fam. Code § 6929*], use *form in § 100A.218*.

2. Draft consent.

3. Obtain minor's signature.

4. Deliver signed consent to health care provider.

[2] Parental Consent

1. If minor is not legally capable of consenting for medical, dental, hospital, or surgical care, select appropriate consent form for execution by parent, guardian, or other adult:

a. For consent by parent or guardian, use *form in § 100A.200*.

b. For consent by other adult with authorization [*see Fam. Code § 6910; see also [3], below*], use *form in § 100A.201*.

2. Draft consent.

3. Obtain signature of parent, guardian, or other adult.

4. Deliver signed consent to health care provider.

[3] Parental Authorization for Other Adult to Give Consent

1. If person other than parent or guardian will be authorized to give consent for medical, dental, hospital,

or surgical care, select appropriate authorization form:

- a. For general or specific authorization [*see Fam. Code § 6910*], use *form in § 100A.202*.
 - b. For authorization by caregiver for school enrollment and medical care [*see Fam. Code § 6552*], use *form in § 100A.203*.
2. Draft authorization.
 3. Obtain signature of parent or guardian.
 4. Deliver signed authorization to intended recipient.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareChildrenGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of ChildrenFamily LawParental Duties & RightsEmancipation of Minors



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31-100A California Legal Forms--Transaction Guide § 100A.121

§ 100A.121 Money or Property

[1] Parent's Receipt for Property

1. If minor's "total estate" does not exceed \$5,000, and parent is willing to hold and manage property for minor [*see Prob. Code § 3401(c)(2)*], draft parent's receipt and declaration that total estate of minor does not exceed \$5,000 [*see § 100A.230*].
2. Implement payment or delivery of funds to parent.
3. Obtain parent's signature on receipt.
4. Advise parent of duty to account to minor for all funds paid or delivered when minor reaches majority [*Prob. Code § 3300*].

[2] Fiduciary Arrangements

1. If property should be transferred to minor under California Uniform Transfers to Minors Act [*see Prob. Code § 3900 et seq.*], ensure that procedures mandated by Act are followed [*see Ch. 60A, Gifts*].
2. If property should be held for minor by guardian of minor's estate and minor does not already have guardian, secure appointment of guardian [*see Ch. 66, Guardianships* ; for detailed coverage of guardianship procedures, see California Forms of Pleading and Practice, Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* (Matthew Bender)].
3. If property should be held for minor by trustee, draft and implement appropriate trust form [*see Ch.*

72, Irrevocable Trusts].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law
Conservators & Guardians
Guardians for Minors
Family Law
Parental Duties & Rights
Duties
Care & Control of Children
Real Property Law
Ownership & Transfer
Agents & Fiduciaries



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31-100A California Legal Forms--Transaction Guide § 100A.122

§ 100A.122 Tort Claims

NOTE:

This section assumes that counsel for the tortfeasor will draft the release. For a general consideration of releases, see Ch. 77, ***Discharge of Obligations*** .

[1] Claim by Minor

1. If minor is not legally capable of settling claim [*see § 100A.112*]:
 - a. Draft release [*see § 100A.240*].
 - b. Obtain court approval of settlement, if required [*see § 100A.112*; *see also § 100A.240[1][d]*].
 - c. On receipt of release signed by parent or guardian, pay consideration for release to counsel for parent or guardian.
2. If minor is legally capable of settling tort claim [*see § 100A.112*]:
 - a. Draft release [*see § 100A.241*].
 - b. On receipt of release signed by minor, pay consideration for release to counsel for minor.

[2] Claim Against Minor

1. If claim is against minor alone:

- a. Draft release [*see* § 100A.250].
- b. On receipt of release signed by claimant, pay consideration for release to counsel for claimant.

2. If claim is against minor and parent or guardian:

- a. Draft release [*see* § 100A.251].
- b. On receipt of release signed by claimant, pay consideration for release to counsel for claimant.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Parental Duties & Rights Duties Care & Control of Children Torts Procedure General Overview



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31-100A California Legal Forms--Transaction Guide §§ 100A.123-100A.199

[Reserved]

§§ 100A.123[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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A. Medical and Dental Care
1. Parental Consent or Authorization

31-100A California Legal Forms--Transaction Guide § 100A.200

§ 100A.200 Consent by Parent or Guardian to Medical, Dental, or Hospital Care for Minor

[1] Comment

[a] Use of Form

This form may be used by a health care provider [*see Bus. & Prof. Code § 6146(c)(2)* (definition of health care provider); *Civ. Code §§ 3333.1(c)(1), 3333.2(c)(1)*; *Code Civ. Proc. §§ 340.5(1), 667.7(e)(3), 1295(g)(1)*] to obtain the consent of the parent or guardian of an unemancipated minor to medical, surgical, or hospital care or treatment for the minor. The form optionally provides that the parent is to be responsible for payment of charges for the care or treatment. For consents by minors to their medical, surgical, or hospital care or treatment, see § 100A.210 et seq.

[b] Payment for Medical Care; Parent as Contracting Party

Minors are not generally capable of contracting to pay for medical care or treatment [*Cobbs v. Grant* (1972) 8 Cal. 3d 229, 244, 104 Cal. Rptr. 505, 502 P.2d 1], and the contracts of minors are generally subject to disaffirmance [*Fam. Code § 6710*; see *Ballard v. Anderson* (1971) 4 Cal. 3d 873, 878, 95 Cal. Rptr. 1, 484 P.2d 1345 ; see also § 100A.14]. A minor's parents have the authority (and, when medical care is necessary, the duty) to contract and pay for the minor's medical care [*Rainer v. Community Memorial Hosp.* (1971) 18 Cal. App. 3d 240, 251 n.14, 95 Cal. Rptr. 901 ; see § 100A.10].

The right to make decisions about a minor's medical care is one of the rights embraced within the general concept of custody of the minor [*Burge v. City & County of San Francisco* (1953) 41 Cal. 2d 608, 617, 262 P.2d 6]. Normally custodial rights are exercised by both parents [*Fam. Code §§ 3010(a), 3900*; see *Burge v. City & County of San Francisco* (1953) 41 Cal. 2d 608, 617, 262 P.2d 6]. When custody has been awarded to one parent on dissolution of marriage, that parent has the right to make basic decisions regarding the child's care and control, including health care decisions [*Lerner v. Superior Court* (1952) 38 Cal. 2d 676, 681, 242 P.2d 321]. If either parent is unable or unwilling to take custody, or has abandoned the child, the other is entitled to exercise those rights [*see Fam. Code § 3010(b)*].

If the minor has been adopted, the adoptive parents have the same right and duty to make health care decisions for the minor as would the natural parents [see *Fam. Code* § 8616 (status of adopted child)]. Although stepparents as such do not have any custodial rights in their minor stepchildren, stepparents who have received children into their family and thereafter treat the children as members of their family stand *in loco parentis* and have the rights and are subject to the duties of natural parents [*Trudell v. Leatherby* (1931) 212 Cal. 678, 681-682, 300 P. 7, *overruled on other grounds*, *Gibson v. Gibson* (1971) 3 Cal. 3d 914, 923, 92 Cal. Rptr. 288, 479 P.2d 648] .

[c] Guardian as Contracting Party

The guardian of the person of a minor generally has the same rights as a parent to make health care decisions for the minor [*Prob. Code* §§ 2252(b)(1), 2353(a)]. However, no surgery (except emergency surgery) may be performed on a minor ward 14 years of age or older without (1) the consent of both the guardian and the ward, or (2) a court order specifically authorizing the surgery [*Prob. Code* § 2353(b); see *Prob. Code* § 2357 (procedure for obtaining court order)]. The guardian has the power to give consent for surgery for the ward in any case in which the guardian determines in good faith, based on medical advice, that the case is an emergency in which the ward faces loss of life or serious bodily injury if the surgery is not performed [*Prob. Code* § 2353(c)]. In such an emergency, the consent of the guardian alone is sufficient [*Prob. Code* § 2353(c)]. For petitions for court orders authorizing medical treatment of minors subject to guardianship, see California Forms of Pleading and Practice, Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee* (Matthew Bender).

[2] FORM

Consent by Parent or Guardian Medical, Dental, or Hospital Care for Minor

CONSENT TO CARE OR TREATMENT

I, _____ [name], am the _____ [mother or father or guardian] of _____ [name of minor], who was born on _____ [date].

I consent to [describe care or treatment] to be rendered to _____ [name of minor] by _____ [name of health care provider]. [If parent is to be responsible for payment of charges for care or treatment, add: I further agree to pay all charges for that care or treatment.]

As _____ [mother or father or guardian] of _____ [name of minor], I am responsible for the health care decisions of _____ [name of minor] and am authorized to give consent for the services to be rendered. I represent that my consent is legally sufficient and that no consent from any other person is required by law.

Dated: _____

_____ [signature of parent or guardian]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Parental Duties & Rights Consent General Overview Family Law Parental Duties & Rights Duties Care & Control of Children Healthcare Law Treatment General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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31-100A California Legal Forms--Transaction Guide § 100A.201

§ 100A.201 Consent by Caregiver to Medical, Dental, or Hospital Care for Minor**[1] Comment--Use of Form**

This form may be used by a health care provider to obtain consent for a minor's medical or dental care from an adult to whom the minor has been entrusted but who is not the minor's parent or guardian. The form optionally provides that the consenting adult agrees to be responsible for payment of charges for that care [*see* § 100A.200[1][b]].

A minor's parent or guardian, or a caregiver who is a relative of the minor (and who is permitted by *Fam. Code* § 6550 to authorize medical and dental care), may authorize another adult, to whom the minor has been entrusted, to give consent for medical or dental care [*see Fam. Code* §§ 6901, 6902 (definitions)] for the minor [*Fam. Code* § 6910].

For a form that may be used by a parent, guardian, or caregiver who is a relative to authorize another adult to give consent for a minor's medical or dental care, see § 100A.202. The form illustrated in § 100A.200 may be used for consent by a parent or guardian for a minor's medical or dental treatment. For forms for consent by a minor for medical, dental, or hospital care, see § 100A.210 et seq.

[2] FORM**Consent by Caregiver Medical, Dental, or Hospital Care for Minor**

CONSENT FOR MEDICAL OR DENTAL TREATMENT OR HOSPITAL CARE

I, _____[*name*], am an adult person. _____[*name of minor*], a minor, who was born on _____[*date*], has been entrusted to me by _____[*name*], _____[*indicate relationship, e.g., her father*], who authorized me in writing to give consent for medical, surgical, dental, and hospital diagnosis, care, treatment, and surgery for _____[*name of minor*].

I give consent for *[describe care or treatment]* to be rendered to _____ *[name of minor]* by
_____ *[name of health care provider]*. *[If adult is to be responsible for payment of charges for care or treatment, add: I agree to pay all charges for that care or treatment.]*

I understand and represent that my consent for the care, services, and treatment to be rendered to
_____ *[name of minor]* is sufficient and that no consent from any other person is required by law.

Dated: _____

_____ *[signature]*
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law
Conservators & Guardians
Guardians for Minors
Family Law
Guardians Duties & Rights
Family Law
Parental Duties & Rights
Consent
General Overview
Family Law
Parental Duties & Rights
Duties
Care & Control of
Children
Healthcare Law
Treatment
General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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31-100A California Legal Forms--Transaction Guide § 100A.202

§ 100A.202 Authorization by Parent, Guardian, or Caregiver for Another Adult to Consent to Medical or Dental Care for Minor

[1] Comment

[a] Use of Form

This form may be used by the parent or guardian of a minor to authorize an adult who is neither a parent nor a guardian to give consent for medical, dental, or hospital care or treatment for the minor. This form also may be used by a qualifying caregiver of the minor to authorize another adult to give consent for the minor's medical or dental care or treatment. The caregiver must be a relative of the minor and must be permitted by *Fam. Code § 6550* to authorize medical and dental care for the minor [*Fam. Code § 6910*]. The form optionally provides that the authorized person (1) agrees to pay for the care or treatment [*see § 100A.200[1][b]*] and (2) will receive physical custody of the minor following completion of the care or treatment [*see [c], below*].

For a special form for a caregiver's authorization for medical care, see *§ 100A.203 [see Fam. Code § 6552]*.

[b] Authorization for Caregiver to Give Consent

The parent or guardian of a minor, or a caregiver who is a relative of the minor and who may authorize medical and dental care under *Fam. Code § 6550*, may authorize another adult, to whom the minor has been entrusted, to give consent for medical or dental care [*see Fam. Code §§ 6901, 6902* (definitions)] for the minor. The authorization must be in writing [*Fam. Code § 6910*].

[c] Custody of Minor Following Treatment

A health facility [*see Health & Safety Code § 1250*] may not surrender the physical custody of a minor under 16 years of age to any person unless the surrender is authorized in writing by the minor's parent, the person having legal custody of the minor, or the caregiver who is a relative of the minor and who may authorize medical and dental care under *Fam.*

Code § 6550 [Health & Safety Code § 1283(a)].

[2] FORM

Authorization by Parent, Guardian, or Caregiver for Another Adult to Consent to Medical or Dental Care for Minor

AUTHORIZATION

I, _____ [name], am the [parent or parent having legal custody or guardian or caregiver and a relative] of _____ [name of minor], who was born on _____ [date]. Under *Family Code Section 6550*, I may authorize medical and dental care for _____ [name of minor].

I authorize _____ [name], to whom _____ [name of minor] has been entrusted, to give consent [and agree to pay] for [describe treatment, e.g., emergency medical or dental treatment or care] for _____ [name of minor], under *Family Code Section 6910*.

This authorization includes the authority to give consent [and agree to pay] for any [describe specific treatment, e.g., emergency oral surgery or orthodontic care] to be rendered to _____ [name of minor] under the general or special supervision of a qualified physician, surgeon, or dentist.

_____[If authorized adult is to receive physical custody of minor following completion of treatment, add: I further authorize _____ (name) to receive physical custody of _____ (name of minor) under *Health and Safety Code Section 1283(a)* on completion of any treatment, and I specifically instruct any treating health facility to surrender the physical custody of _____ (name of minor) to _____ (name).]

Dated: _____

_____[signature of parent or guardian]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law
Conservators & Guardians
Guardians for Minors
Family Law
Guardians Duties & Rights
Family Law
Parental Duties & Rights
Consent
General Overview
Family Law
Parental Duties & Rights
Duties
Care & Control of Children
Healthcare Law
Treatment
General Overview



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31-100A California Legal Forms--Transaction Guide § 100A.203

§ 100A.203 Authorization by Caregiver for School Enrollment and Medical Care

[1] Comment

[a] Use of Form

This form is a caregiver's authorization affidavit, which must be in substantially the form prescribed by statute [*Fam. Code § 6552*]. If this form is validly executed by the caregiver as required by statute, it authorizes a caregiver who is 18 years of age or older to enroll a child in school and give consent for school-related medical care [*see Fam. Code § 6550(h)(3)* (definition)] for the minor [*see Fam. Code § 6550(a)*]. If the caregiver is a qualified relative [*see Fam. Code § 6550(h)(2)*], proper execution gives the caregiver the same rights to authorize medical care, including mental health treatment, and dental care for the minor that are given to a legally appointed guardian of the person of a minor [*Fam. Code § 6550(a)*; *see Prob. Code § 2353* (guardian's right to authorize medical treatment for ward); *see also Prob. Code § 2356* (limitations on mental health treatment for ward)].

A caregiver's authorization affidavit is invalid unless it substantially contains, in not less than 10-point boldface type or a reasonable equivalent and enclosed in a box with 3-point rule lines, a warning to the effect that if any of the statements in the affidavit are incorrect, the affiant will be committing a crime punishable by a fine, imprisonment, or both [*Fam. Code § 6550(g)*; *see Fam. Code § 6552*].

[b] Caregiver Not Defined

"Caregiver" is not expressly defined in the statutes [*see Fam. Code § 6550(h)* *Fam. Code § 6550(i)*(definitions)]. However, it is clear from the statutes and from the statutory text of the affidavit that the minor must live with the caregiver [*see Fam. Code §§ 6550(f)*, 6552 (introductory statement that "minor named below lives in my home")]. If the minor stops living with the caregiver, the caregiver must notify any school, health care provider, or health care service plan that has been given the affidavit [*Fam. Code § 6550(f)*]. The affidavit becomes invalid when the school, health care provider, or health care service plan receives notice that the minor is no longer living with the caregiver [*Fam. Code § 6550(f)*].

[c] Parental Consent Not Required

No parental signature is required [see *Fam. Code* §§ 6550, 6552]. However, the text of the affidavit requires the caregiver to state either or both of the following: (1) that he or she has advised the parent or parents or other person having legal custody of the minor of the caregiver's intent to authorize medical care, and has received no objection; or (2) that he or she is unable to contact the parent or parents or other person having legal custody of the minor to give notice of the intended authorization. Both statements may be necessary if notice has been given to one parent and the other cannot be contacted [see *Fam. Code* § 6552]. The decision of a caregiver to give or withhold consent for medical or dental care for a minor is superseded by any contravening decision of the parent or other person having legal custody of the minor, provided the decision of that parent or person does not jeopardize the life, health, or safety of the minor [*Fam. Code* § 6550(b)].

[d] Third-Party Liability

No person [see *Fam. Code* § 6550(h)(1)] who acts in good faith reliance on a caregiver's authorization affidavit to provide medical or dental care, without actual knowledge of facts contrary to those stated on the affidavit, is subject to criminal liability or to civil liability to any person, or is subject to professional disciplinary action, for the reliance if the applicable portions of the affidavit are completed. This immunity applies even if medical or dental care is provided to a minor against the wishes of the parent or other person having legal custody of the minor, as long as the person providing the medical or dental care has no actual knowledge of the wishes of that parent or person [*Fam. Code* § 6550(c)]. A person who relies on the affidavit has no obligation to make any further inquiry or investigation [*Fam. Code* § 6550(d)]. However, these provisions do not relieve an individual from liability for violations of other provisions of law [*Fam. Code* § 6550(e)].

[2] FORM**Authorization by Caregiver School Enrollment and Medical Care [Fam. Code § 6552]****CAREGIVER'S AUTHORIZATION AFFIDAVIT**

Use of this affidavit is authorized by Part 1.5 (commencing with *Section 6550*) of *Division 11 of the California Family Code*.

Instructions:

Completion of items 1-4 and the signing of the affidavit is sufficient to authorize enrollment of a minor in school and authorize school-related medical care. Completion of items 5-8 is additionally required to authorize any other medical care. Print clearly.

The minor named below lives in my home and I am 18 years of age or older.

1. Name of minor: _____.

2. Minor's birth date: _____.

3. My name (adult giving authorization): _____.

4. My home address: _____.

5. [] I am a grandparent, aunt, uncle, or other qualified relative of the minor (see back of this form for a definition of "qualified relative").

6. Check one or both (for example, if one parent was advised and the other cannot be located):

☐ I have advised the parent(s) or other person(s) having legal custody of the minor of my intent to authorize medical care, and have received no objection.

☐ I am unable to contact the parent(s) or other person(s) having legal custody of the minor at this time, to notify them of my intended authorization.

7. My date of birth: _____.

8. My California driver's license or identification card number: _____.

Warning: Do not sign this form if any of the statements above are incorrect, or you will be committing a crime punishable by a fine, imprisonment, or both.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

Signed: _____

[Information below could appear on reverse side of form.]

Notices:

1. This declaration does not affect the rights of the minor's parents or guardian regarding the care, custody, and control of the minor, and does not mean that the caregiver has legal custody of the minor.

2. A person who relies on this affidavit has no obligation to make any further inquiry or investigation.

Additional Information:

TO CAREGIVERS:

1. "Qualified relative," for purposes of item 5, means a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half brother, half sister, uncle, aunt, niece, nephew, first cousin, or any person denoted by the prefix "grand" or "great," or the spouse of any of the persons specified in this definition, even after the marriage has been terminated by death or dissolution.

2. The law may require you, if you are not a relative or a currently licensed foster parent, to obtain a foster home license in order to care for a minor. If you have any questions, please contact your local department of social services.

3. If the minor stops living with you, you are required to notify any school, health care provider, or health care service plan to which you have given this affidavit. The affidavit is invalid after the school, health care provider, or health care service plan receives notice that the minor no longer lives with you.

4. If you do not have the information requested in item 8 (California driver's license or I.D.), provide another form of

identification such as your social security number or Medi-Cal number.

TO SCHOOL OFFICIALS:

1. *Section 48204 of the Education Code* provides that this affidavit constitutes a sufficient basis for a determination of residency of the minor, without the requirement of a guardianship or other custody order, unless the school district determines from actual facts that the minor is not living with the caregiver.

2. The school district may require additional reasonable evidence that the caregiver lives at the address provided in item 4.

TO HEALTH CARE PROVIDERS AND HEALTH CARE SERVICE PLANS:

1. A person who acts in good faith reliance upon a caregiver's authorization affidavit to provide medical or dental care, without actual knowledge of facts contrary to those stated on the affidavit, is not subject to criminal liability or to civil liability to any person, and is not subject to professional disciplinary action, for that reliance if the applicable portions of the form are completed.

2. This affidavit does not confer dependency for health care coverage purposes.

Legal Topics:

For related research and practice materials, see the following legal topics:

Education LawStudentsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansDuties & RightsFamily LawParental Duties & RightsConsentGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of Children



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DIVISION VII: PERSONAL TRANSACTIONS
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31-100A California Legal Forms--Transaction Guide §§ 100A.204-100A.209

[Reserved]

§§ 100A.204[Reserved]



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31-100A California Legal Forms--Transaction Guide § 100A.210

§ 100A.210 Consent by Emancipated Minor to Medical, Dental, or Psychiatric Care

[1] Comment--Use of Form

This form may be used by a health care provider to obtain the consent of an emancipated minor for medical, dental, or psychiatric care or treatment [*see § 100A.12[2]*]. The form also provides that the minor agrees to pay for the care or treatment [*see § 100A.14*]. For a form for consent by the parent or guardian of a minor to medical, dental, or hospital care for the minor, see § 100A.200.

Emancipated minors are treated as adults for most legal purposes, including the right to give or withhold consent for medical, dental, or psychiatric care [*Fam. Code § 7050(e)(1)*] and to make binding contracts [*Fam. Code § 7050(e)(2)*]. The parents of an emancipated minor are not liable for the minor's medical care and are not obligated to support the minor [*see Fam. Code § 7050(a)*].

Under the Emancipation of Minors Law [*Fam. Code § 7000 et seq.*], a person under age 18 who comes within any of the following descriptions is an emancipated minor [*Fam. Code § 7002*]:

- The person has entered into a valid marriage, whether or not the marriage has been dissolved;
- The person is on active duty with any of the armed forces of the United States; or
- The person has received a judicial declaration of emancipation [*see Fam. Code § 7122; see also California Forms of Pleading and Practice, Ch. 245, Emancipation of Minors* (Matthew Bender)].

The Emancipation of Minors Law recognizes that minors may attain emancipation under facts other than those specified [*see Fam. Code § 7001* (no effect on status of minors emancipated under prior case law)]. Thus, a minor also may become emancipated by virtue of the parents' relinquishment of control [*see Jolicoeur v. Mihaly* (1971) 5 Cal. 3d 565, 580, 96 Cal. Rptr. 697, 488 P.2d 1 ; *see also* Ch. 100, *Control, Custody, and Support of Minors*].

[2] FORM**Consent by Emancipated Minor Medical, Dental, or Psychiatric Care****CONSENT AND AGREEMENT TO PAY FOR MEDICAL SERVICES**

I, _____ [name], was born on _____ [date] and am an emancipated minor under the Emancipation of Minors Law inasmuch as _____ [specify facts constituting emancipation, e.g., on _____ (date) I received a declaration of emancipation from the Superior Court of the State of California for the County of _____]. Under the Emancipation of Minors Law, I am capable of giving consent for medical, dental, or psychiatric care.

I give consent for [describe medical, dental, or psychiatric care or treatment] to be rendered to me by _____ [name of provider]. I agree to pay all charges for that care or treatment.

I understand and represent that my consent is sufficient and that no consent from any other person is required by law. Neither my consent nor my agreement to pay is subject to disaffirmance because of minority.

Dated: _____

_____ [signature of minor]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Parental Duties & Rights Consent General Overview Family Law Parental Duties & Rights Emancipation of Minors Healthcare Law Treatment General Overview



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31-100A California Legal Forms--Transaction Guide § 100A.211

§ 100A.211 Consent by Minor for Medical Care for Sexual Assault

[1] Comment--Use of Form

This form may be used by a health care provider to obtain the consent of a minor who is alleged to have been sexually assaulted, for hospital, medical, or surgical care related to the diagnosis or treatment of the minor's condition. The form optionally provides that the minor is to be responsible for payment of charges for the care [*see* § 100A.14]. For a form for consent by an emancipated minor, see § 100A.210. For a form of consent by a parent or guardian for medical, dental, or hospital care for a minor, see § 100A.200.

A minor who is alleged to have been sexually assaulted may give consent for hospital, medical, and surgical care related to the diagnosis and treatment of his or her condition and for the collection of medical evidence with regard to the alleged sexual assault [*Fam. Code* § 6928(b)]. For this purpose, sexual assault includes (but is not limited to) conduct coming within the provisions of *Penal Code* §§ 261, 286, and 288a (rape, sodomy, and oral copulation) [*Fam. Code* § 6928(a)]. However, the minor must be of sufficient maturity to give an informed consent for any treatment or procedure [*see Ballard v. Anderson (1971) 4 Cal. 3d 873, 883, 95 Cal. Rptr. 1, 484 P.2d 1345* (construing former *Civ. Code* § 34.9, predecessor to *Fam. Code* § 6928)].

The person rendering medical treatment to the minor pursuant to the consent given in this form must attempt to contact the minor's parent or guardian and note in the minor's treatment record the date and time he or she attempted to contact the parent or guardian and whether the attempt was successful or unsuccessful. However, the treating professional is relieved of this duty if he or she reasonably believes that the parent or guardian committed the sexual assault on the minor [*Fam. Code* § 6928(c)].

For a form for consent by a minor aged 12 years or older who may have come into contact with an infectious disease, see § 100A.216. For a form of consent by a minor aged 12 years or older who is alleged to have been raped, see § 100A.217.

[2] FORM

Consent by Minor Medical Care for Sexual Assault

CONSENT [AND AGREEMENT TO PAY] FOR MEDICAL SERVICES

I, _____[*name*], was born on _____[*date*] and am a minor. Under *Family Code Section 6928*, I am capable of giving consent for hospital, medical, and surgical care related to the diagnosis or treatment of a condition resulting from an alleged sexual assault.

I give consent for [*describe hospital, medical, or surgical care or treatment*] to be rendered to me by _____[*name of provider*]. I understand and represent that my consent is sufficient and that no consent from any other person is required by law. My consent is not subject to disaffirmance because of minority.

[*If minor is to be responsible for payment of charges, add: I agree to pay all charges for that care or treatment. My agreement to pay is not subject to disaffirmance because of minority.*]

Dated: _____

_____ [*signature of minor*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentPatient ConsentGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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2. Minor's Consent

31-100A California Legal Forms--Transaction Guide § 100A.212

§ 100A.212 Consent by Minor and Parent or Guardian to Medical Care Related to Prevention or Treatment of Pregnancy

[1] Comment

[a] Use of Form

This form is an unemancipated minor's consent to medical care related to the prevention or treatment of pregnancy. The form optionally provides that the minor is to be responsible for payment of charges for the care [*see* § 100A.14]. For a form for consent by an emancipated minor, see § 100A.210.

By statute, a minor generally may consent to medical care related to the prevention or treatment of pregnancy [*Fam. Code* § 6925], and that consent is not subject to disaffirmance because of minority [*see Fam. Code* §§ 6920, 6921]. For example, such treatment might involve furnishing birth control devices or prenatal care to a pregnant minor. However, an unemancipated minor may not be sterilized without a parent's or guardian's consent [*Fam. Code* § 6925(b)(1); *see* [b], *below*]. For a form for consent by a parent or guardian for medical, dental, or hospital care for a minor, see § 100A.200.

[b] Minor's Consent for Abortion or Sterilization

Statutory law that permits a minor to give consent for medical care related to the prevention or treatment of pregnancy expressly does not authorize a minor to be sterilized without the consent of the minor's parent or guardian or to receive an abortion without the consent of a parent or guardian except as provided in *Health & Safety Code* § 123450 (prohibiting abortion except pursuant to parental consent or judicial order or in medical emergency) [*Fam. Code* § 6925(b)]. However, the statutory requirement of parental consent or a judicial order for an abortion is unconstitutional [*American Academy of Pediatrics v. Lungren* (1997) 16 Cal. 4th 307, 314, 356-357, 66 Cal. Rptr. 2d 210, 940 P.2d 797]. It thus appears that only the prohibition on sterilization of an unemancipated minor without consent of a parent or guardian [*see Fam. Code* § 6925(b)(1)] remains in effect with respect to the prevention and treatment of pregnancy.

[2] FORM**Consent by Minor and Parent or Guardian Medical Care Related to Prevention or Treatment of Pregnancy****CONSENT [AND AGREEMENT TO PAY] FOR MEDICAL SERVICES**

I, _____[*name*], was born on _____[*date*] and am an unemancipated minor. Under *Family Code Section 6925*, I am capable of giving my consent for medical care relating to the treatment and prevention of pregnancy except for any care that involves sterilization.

I give consent for [*describe specific medical care or treatment*] to be rendered to me by _____[*name of provider*]. I understand and represent that my consent is sufficient and that no consent from any other person is required by law. My consent is not subject to disaffirmance because of minority.

[*If minor is to be responsible for payment of charges, add: I agree to pay all charges for that care or treatment. My agreement to pay is not subject to disaffirmance because of minority.*]

Dated: _____

_____ [*signature of minor*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Guardians Duties & Rights Family Law Parental Duties & Rights Consent General Overview Family Law Parental Duties & Rights Duties Care & Control of Children Healthcare Law Treatment Patient Consent General Overview Healthcare Law Treatment Patient Consent Consent by Guardians & Parents



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DIVISION VII: PERSONAL TRANSACTIONS
 CHAPTER 100A PERSONAL AFFAIRS OF MINORS
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 A. Medical and Dental Care
 2. Minor's Consent

31-100A California Legal Forms--Transaction Guide § 100A.213

§ 100A.213 Consent by Minor Aged 15 or Older and Living Apart From Parents to Medical, Dental, or Hospital Care

[1] Comment--Use of Form

This form may be used by a health care provider to obtain the consent of an unemancipated minor aged 15 years or older who is living apart from his or her parents or guardian and managing his or her own financial affairs to the minor's own medical, dental, or hospital care. The form provides that the minor is to be responsible for payment of charges for the care [*see § 100A.14*]. For a form for consent by an emancipated minor, see § 100A.210.

A minor 15 years of age or older may give consent and contract for medical, dental, or hospital care if living separate and apart from his or her parents or guardian (with or without their consent) and managing his or her own financial affairs [*Fam. Code § 6922(a)*]. The length of time that the minor has been living separate does not affect the minor's capacity to consent, nor does the source of the minor's income [*see Fam. Code § 6922(a)(2), (3)*]. A minor who meets these qualifications is empowered to give consent for hospital care or any X-ray examination, anesthetic, or medical or surgical diagnosis or treatment rendered by a licensed physician, surgeon, or dentist [*Fam. Code § 6922(a)*; *see Fam. Code §§ 6901, 6902*]. The minor's consent is not subject to disaffirmance because of minority [*Fam. Code § 6921*].

The consent of a parent or guardian is not necessary, and there is no liability on the part of the parents or guardian for any care rendered pursuant to the minor's consent [*Fam. Code § 6922(b)*]. However, a treating physician, surgeon, or dentist may (with or without the consent of the minor) advise the parents or guardian as to the treatment given or needed, if the physician, surgeon, or dentist has reason to know their whereabouts based on information given by the minor [*Fam. Code § 6922(c)*].

[2] FORM

Consent by Minor Aged 15 or Older and Living Apart From Parents Medical, Dental, or Hospital Care

CONSENT AND AGREEMENT TO PAY FOR MEDICAL SERVICES

I, _____[*name*], was born on _____[*date*] and am a minor.

I am living separate and apart from my [parents or guardian] and am managing my own financial affairs. Under *Family Code Section 6922*, I am capable of giving consent and contracting for hospital, medical, dental, and surgical care.

I give consent for [*describe hospital, medical, dental, or surgical care or treatment*] to be rendered to me by _____[*name of provider*]. I understand and represent that my consent is sufficient and that no consent from any other person is required by law. I agree to pay all charges for that care or treatment. Neither my consent nor my agreement to pay is subject to disaffirmance because of minority.

Dated: _____

_____ [*signature of minor*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentPatient ConsentGeneral Overview



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31-100A California Legal Forms--Transaction Guide § 100A.214

§ 100A.214 Consent by Minor Aged 12 or Older to Outpatient Mental Health Treatment or Counseling

[1] Comment--Use of Form

This form may be used by a health care provider to obtain the consent of an unemancipated minor 12 years of age or older to mental health treatment or counseling on an outpatient basis. The form optionally provides that the minor is to be responsible for payment of charges for the treatment or counseling [*see § 100A.14*]. For a form for consent by a minor 12 years of age or older for medical care and counseling relating to the diagnosis and treatment of a drug or alcohol problem, see § 100A.218. For a form for consent by an emancipated minor, see § 100A.210.

A minor who is 12 years of age or older may consent to mental health treatment or counseling on an outpatient basis if *both* of the following requirements are satisfied [*Fam. Code § 6924(b)*]:

- The minor, in the opinion of the attending professional person [*see Fam. Code § 6924(a)(2)* (definition)], is mature enough to participate intelligently in the outpatient services.
- The minor would present a danger of serious physical or mental harm to himself or herself or to others without the mental health treatment or counseling or the minor is the alleged victim of incest or child abuse.

Mental health treatment or counseling services on an outpatient basis encompasses such services by a governmental agency, a person or agency that contracts with a governmental agency to provide the services, an agency that receives funding from community united funds, a runaway house or crisis resolution center, or a professional person [*Fam. Code § 6924(a)(1)*]. The term does not include, and the statutory authorization for consent by minors 12 years of age and older specifically does not authorize, a minor to receive, convulsive therapy or psychosurgery [*see Welf. & Inst. Code § 5325(f), (g)*], or psychotropic drugs without the consent of the minor's parent or guardian [*Fam. Code § 6924(f)*]. For a form for consent by a parent or guardian for medical, dental, or hospital care for a minor, see § 100A.200.

The mental health treatment or counseling of a minor authorized by statute must include the involvement of the minor's parents or guardian unless, in the opinion of the professional who is treating or counseling the minor, such involvement would be inappropriate. The professional must state in the client record whether and when he or she attempted to contact the parents or guardian and whether the attempt was successful or unsuccessful, or the reason why, in the professional's opinion, contact would be inappropriate [*Fam. Code § 6924(d)*]. The minor's parents or guardian are not liable for payment for mental health treatment or counseling services provided pursuant to the minor's consent unless the parents or guardian participated in the mental health treatment or counseling, and then only for services rendered with the participation of the parents or guardian [*Fam. Code § 6924(e)*].

[2] FORM

Consent by Minor Aged 12 or Older Outpatient Mental Health Treatment or Counseling

CONSENT [AND AGREEMENT TO PAY] FOR MENTAL HEALTH TREATMENT OR COUNSELING

I, _____ [name], was born on _____ [date] and am a minor. Under *Family Code Section 6924*, I am capable of giving consent for mental health treatment or counseling on an outpatient basis.

I give consent for [describe treatment or counseling] by _____ [name of health care provider]. I understand and represent that my consent is sufficient and that no consent from any other person is required by law. My consent is not subject to disaffirmance because of minority.

[If minor is to be responsible for payment of charges, add: I agree to pay all charges for that treatment or counseling. My agreement to pay is not subject to disaffirmance because of minority.]

I understand that the treatment or counseling will include the involvement of my parents or guardian unless, in the opinion of the professional person who treats me, that involvement would be inappropriate. I further understand that my consent does not include authorization for convulsive therapy or psychosurgery as defined in *Welfare and Institutions Code Section 5325* and does not include authorization for psychotropic drugs without the consent of my parent or guardian.

Dated: _____

_____ [signature of minor]
[typed name]

Certificate of Mental Health Professional

I, _____ [name], certify:

1. I am a _____ [professional title, e.g., psychiatrist] and a mental health professional within the meaning of *Family Code Section 6924*.
2. It is my opinion that _____ [name of minor], a minor, is mature enough to participate intelligently in mental health treatment or counseling on an outpatient basis.

[Add one of the following alternatives:]

3. It is also my opinion that _____ [name of minor] would present a danger of serious

physical or mental harm to _____ [himself or herself] or others without such mental health treatment or counseling.

[OR]

3. _____ [name of minor] has been the victim of alleged _____ [incest or child abuse].

[Add one of the following alternatives:]

4. On _____ [date(s)] I _____ [attempted, without success, to contact or contacted] the _____ [parent or guardian] of _____ [name of minor].

[OR]

4. In my opinion, it would be inappropriate to attempt to contact the _____ [parent or guardian] of _____ [name of minor] for the following reasons: _____ [specify].

[Continue with the following:]

I certify that the foregoing is true and correct according to the best of my knowledge.

Dated: _____

_____ [signature of mental health professional]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Treatment Patient Consent General Overview Public Health & Welfare Law Healthcare Mental Health Services General Overview Public Health & Welfare Law Social Services General Overview



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31-100A California Legal Forms--Transaction Guide § 100A.215

§ 100A.215 Consent by Minor Aged 12 or Older to Provision of Residential Shelter Services

[1] Comment--Use of Form

This form may be used by a provider of residential shelter services [*see Fam. Code § 6924(a)(3)* (definition)] to obtain the consent of an unemancipated minor 12 years of age or older for residential shelter services. The form optionally provides that the minor will be required to pay for these services [*see § 100A.14*]. For a form for consent by an emancipated minor, see *§ 100A.210*.

An unemancipated minor who has attained the age of 12 years may consent to the provision of residential shelter services if, in the opinion of the attending professional person [*see Fam. Code § 6924(a)(2)* (definition)], the minor is mature enough to participate intelligently in a decision to give consent for residential shelter services and either allegedly has been the victim of incest or child abuse or presents a danger of serious physical or mental harm to himself or herself or to others without the residential shelter services [*Fam. Code § 6924(b)*].

The consent of the parent(s) or guardian of the minor is not necessary to authorize the provision of these services, and the minor's consent to the services is not subject to disaffirmance because of minority [*Fam. Code § 6921*]. However, the professional person who offers the residential shelter services, whether as an individual or as a representative of an entity [*see Fam. Code § 6921(a)(3)*], must make his or her best efforts to notify the minor's parents or guardian that the services are being provided [*Fam. Code § 6924(c)*].

The parents or guardian of the minor are not liable for payment of the cost of any residential shelter services rendered to the minor unless they consented to the provision of the services [*Fam. Code § 6924(e)*].

[2] FORM

Consent by Minor Aged 12 or Older Provision of Residential Shelter Services

CONSENT [AND AGREEMENT TO PAY] FOR RESIDENTIAL SHELTER SERVICES

I, _____ [name of minor], was born on _____ [date] and am a minor.

I have requested residential shelter services from _____ [name of provider], and I understand that I may request and receive these services without the consent of my parents, guardian, or any other person. *[If minor is required to pay for services, add: I agree to pay the cost of all services provided to me. I understand that my parent, guardian, or any other person is not responsible for paying these charges on my behalf.]*

I understand that _____ [name of provider] is required by law to use best efforts to notify my parents or guardian that I am being provided with residential shelter services.

Dated: _____

_____ [signature of minor]

[typed name]

STATEMENT OF PROVIDER

_____ [name of minor], a minor aged _____ years, entered
 _____ [name of facility providing services] to receive residential shelter services on
 _____ [date]. It is my opinion, as a professional person offering residential shelter services, that the minor is mature enough to participate intelligently in the decision to give consent for residential shelter services.

[Add one of the following alternatives:]

It is also my opinion that the minor presents a danger of serious physical or mental harm to [himself or herself] or others if _____ [he or she] does not receive residential shelter services at this time.

[OR]

The minor has informed me that _____ [he or she] is a victim of _____ [child abuse or incest].

[Continue with the following:]

Dated: _____

_____ [name of facility providing services]

_____ [signature of professional person]

[typed name]

Record of Attempt to Contact Parents or Guardian

Notification of the parents or guardian of _____ [name of minor] that _____ [he or she] is being provided with residential shelter services was made or attempted as follows: *[describe all contacts or attempted contacts, including dates, persons from facility who made or attempted contact, methods of attempted contact]*

(phone, letter, or other), names of persons with whom contact was made or attempted, and brief description of any successful contact].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareChildrenGeneral OverviewFamily LawFamily Protection &
WelfareChildrenServicesPublic Health & Welfare LawGeneral Overview



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31-100A California Legal Forms--Transaction Guide § 100A.216

§ 100A.216 Consent by Minor Aged 12 or Older to Treatment for Infectious or Communicable Disease

[1] Comment--Use of Form

This form may be used by a health care provider to obtain the consent of an unemancipated minor aged 12 years or older for medical treatment for an infectious, contagious, or communicable disease. The form optionally provides that the minor is to be responsible for payment of charges for the treatment [*see § 100A.14*]. For a form for consent by an emancipated minor, see § 100A.210.

A minor who is at least 12 years of age and who may have come into contact with an infectious, contagious, or communicable disease may give consent, under certain circumstances, for hospital, medical, and surgical care related to the diagnosis or treatment of the disease. The disease must be either a disease required by law or regulation to be reported to the local health officer [see *Health & Safety Code § 120130*; *17 Cal. Code Reg. § 2500 et seq.*; see also *Health & Safety Code § 120250* (duty of physicians, nurses, and others to report)] or a related sexually transmitted disease, as determined by the State Director of Health Services [*Fam. Code § 6926*].

The consent of the parents or guardian of the minor is not necessary to authorize the care, and the parents or guardian are not liable for payment for any care rendered [*Fam. Code § 6226*]. The minor's consent to the treatment authorized by statute [*Fam. Code § 6926*] is not subject to disaffirmance because of minority [*Fam. Code § 6921*].

For a form for consent by a minor of any age who is alleged to have been sexually assaulted, see § 100A.211. For a form for consent by a minor aged 12 years or older who is alleged to have been raped, see § 100A.217.

[2] FORM

Consent by Minor Aged 12 or Older Treatment for Infectious or Communicable Disease

CONSENT [AND AGREEMENT TO PAY] FOR MEDICAL SERVICES

I, _____[*name*], was born on _____[*date*] and am a minor. Under *Family Code Section 6926*, I am capable of giving consent for hospital, medical, and surgical care related to the diagnosis or treatment of infectious, contagious, or communicable diseases.

I give consent for [*describe hospital, medical dental, or surgical care or treatment*] to be rendered to me by _____[*name of provider*]. I understand and represent that my consent is sufficient and that no consent from any other person is required by law. My consent is not subject to disaffirmance because of minority.

[*If minor is to be responsible for payment of charges, add: I agree to pay all charges for that care or treatment. My agreement to pay is not subject to disaffirmance because of minority.*]

Dated: _____

_____ [*signature of minor*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentPatient ConsentGeneral Overview



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31-100A California Legal Forms--Transaction Guide § 100A.217

§ 100A.217 Consent by Minor Aged 12 or Older to Medical Care for Rape

[1] Comment--Use of Form

This form may be used by a health care provider to obtain the consent of an unemancipated minor aged 12 years or older for hospital, medical, or surgical care related to the diagnosis or treatment of rape. The form optionally provides that the minor is to be responsible for payment of charges for the diagnosis or treatment [*see § 100A.14*]. For a form for consent by an emancipated minor, see § 100A.210.

An unemancipated minor who is 12 years of age or older and is alleged to have been raped may give consent for hospital, medical, and surgical care related to the diagnosis or treatment of his or her condition and for the collection of medical evidence with regard to that condition or to the alleged rape [*Fam. Code § 6927*]. The minor's consent is not subject to disaffirmance because of minority [*Fam. Code § 6921*].

For a form for consent by an unemancipated minor of any age for medical treatment necessitated by sexual assault, see § 100A.211. For a form for consent by an unemancipated minor aged 12 years or older who may have come into contact with an infectious disease, see § 100A.216.

[2] FORM

Consent by Minor Aged 12 or Older Medical Care for Rape

CONSENT [AND AGREEMENT TO PAY] FOR MEDICAL SERVICES

I, _____[*name*], was born on _____[*date*] and am a minor. Under *Family Code Section 6927*, I am capable of giving consent for hospital, medical, and surgical care related to the diagnosis or treatment of a condition resulting from an alleged rape.

I give consent for [*describe hospital, medical, or surgical care or treatment*] to be rendered to me by

_____[*name of provider*]. I understand and represent that my consent is sufficient and that no consent from any other person is required by law. My consent is not subject to disaffirmance because of minority.

[*If minor is to be responsible for payment of charges, add:* I agree to pay all charges for that care or treatment. My agreement to pay is not subject to disaffirmance because of minority.]

Dated: _____

_____[*signature of minor*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultRapeGeneral OverviewHealthcare
LawTreatmentPatient ConsentGeneral Overview



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31-100A California Legal Forms--Transaction Guide § 100A.218

§ 100A.218 Consent by Minor Aged 12 or Older to Medical Care and Counseling for Drug or Alcohol Problem

[1] Comment--Use of Form

This form may be used by a physician, surgeon, registered nurse, psychologist, clinical social worker, or marriage and family therapist (or an appropriately employed and supervised marriage and family therapist registered intern, psychological assistant, or associate clinical social worker) [see *Fam. Code § 6929(a)(4)*] to obtain the consent of an unemancipated minor 12 years of age or older for medical care and counseling related to the diagnosis and treatment of a drug or alcohol problem [see *Fam. Code § 6929(a)(1), (2)* (definitions)]. The form optionally provides that the minor is to be responsible for payment of charges for the care and counseling [see *§ 100A.14*]. For a form for consent by an emancipated minor, see *§ 100A.210*.

A minor 12 years of age or older may give consent for medical care and counseling related to the diagnosis and treatment of a drug or alcohol problem [*Fam. Code § 6929(b)*], and the consent of the minor is not subject to disaffirmance because of minority [*Fam. Code § 6921*]. However, the minor may not receive replacement narcotic abuse treatment without the consent of the minor's parent or guardian [*Fam. Code § 6929(e)*]. For a form for consent by a parent or guardian for medical, dental, or hospital care for a minor, see *§ 100A.200*.

The treatment plan must include the involvement of the minor's parent or guardian if that involvement is determined to be appropriate by the professional person or treatment facility treating the minor. If the treating person determines that it is appropriate to contact the parents or guardian, he or she is required to state in the minor's treatment record whether and when he or she attempted to make contact and whether the attempt was successful or unsuccessful. If the treating person determines that contact would be inappropriate, he or she must state in the treatment record why, in his or her opinion, it would be inappropriate [*Fam. Code § 6929(c)*]. In any event, the parent or guardian will not be liable for services rendered to the minor unless the parent or guardian has participated in the program [*Fam. Code § 6929(d)*].

The statutory authorization for the minor's consent does not restrict the right of a parent or guardian to seek medical care and counseling for a drug or alcohol problem of a minor when the minor does not give consent for treatment [*Fam.*

Code § 6929(f)]. In addition, when the parent or guardian has sought such treatment, the provider must disclose (and will incur no liability for disclosing) medical information to the parent or guardian even if the minor child does not give consent for the disclosure [*Fam. Code § 6929(g)*].

[2] FORM

Consent by Minor Aged 12 or Older Medical Care and Counseling for Drug or Alcohol Problem

CONSENT [AND AGREEMENT TO PAY] FOR MEDICAL SERVICES

I, _____[*name*], was born on _____[*date*] and am a minor. Under *Family Code Section 6929*, I am capable of giving consent for medical care and counseling related to the diagnosis and treatment of a drug or alcohol problem.

I give consent for [*describe care or treatment*] to be rendered to me by _____[*name of provider*]. I understand and represent that my consent is sufficient and that no consent from any other person is required by law. My consent is not subject to disaffirmance because of minority.

[*If minor is to be responsible for payment of charges, add: I agree to pay all charges for that care or treatment. My agreement to pay is not subject to disaffirmance because of minority.*]

Dated: _____

_____ [*signature of minor*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareChildrenGeneral OverviewFamily LawFamily Protection & WelfareChildrenServicesHealthcare LawTreatmentPatient ConsentGeneral Overview



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31-100A California Legal Forms--Transaction Guide §§ 100A.219-100A.229

[Reserved]

§§ 100A.219[Reserved]



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B. Money or Property

31-100A California Legal Forms--Transaction Guide § 100A.230

§ 100A.230 Parent's Receipt and Declaration for Total Estate of Minor Not Exceeding \$5,000

[1] Comment--Use of Form

This form may be used by the parent of a minor to acknowledge receipt of money or other property belonging to the minor when the minor's total estate does not exceed \$5,000. Use of this form obligates the parent to hold the minor's total estate in an informal trust. For a transfer of a minor's money or other property to a custodian under the California Uniform Transfers to Minors Act [*see Prob. Code § 3900 et seq.*], see Ch. 60A, *Gifts* .

Although the parents of a minor generally have no right to control the minor's property [*see Fam. Code § 7502; § 100A.21[1]*], the minor's property may be paid to and held by a parent (or both parents) when the minor's total estate does not exceed \$5,000 in value [*Prob. Code § 3401(c)(2); see § 100A.21[2]*]. The parent or parents must be entitled to custody of the minor [*Prob. Code § 3401(a), (b)*] and must give the person making the payment or delivery written assurance, verified by oath (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]), that the minor's total estate (including the property being paid or delivered) does not exceed \$5,000 [*Prob. Code § 3401(c)(2)*].

In computing the \$5,000 limit, all money and other property belonging to the minor or to the minor's guardianship estate, if any, must be included in the total estate [*Prob. Code § 3400(a)*]. However, property held for the minor under the California Uniform Transfers to Minors Act [*see Prob. Code § 3900 et seq.*] and the proceeds of a compromise of or judgment on a minor's claim [*see Prob. Code §§ 3602(c), 3610 et seq.*] must be excluded [*Prob. Code § 3400(b)*].

The written receipt of the parent or parents acquits the person making the payment or delivery [*Prob. Code § 3402*]. A parent who receives any money or property belonging to a minor pursuant to these provisions must account to the minor for the money or property when the minor reaches the age of majority [*Prob. Code § 3300*].

[2] FORM

Parent's Receipt and Declaration Total Estate of Minor Not Exceeding \$5,000

RECEIPT AND DECLARATION OF PARENT

I, _____ [name], am the _____ [mother or father] of _____ [name of minor], who was born on _____ [date], and I am entitled to _____ [his or her] custody.

I acknowledge receipt from _____ [name] of the following [money or property or money and property] belonging to _____ [name of minor]: [specify].

I acknowledge receipt of this [money or property or money and property] under *Probate Code Section 3401*. The total estate of _____ [name of minor], including the [money or property or money and property] described above, does not exceed \$5,000 in value, excluding any money held for _____ [name of minor] under the California Uniform Transfers to Minors Act and any proceeds of any compromise or judgment held for _____ [name of minor] under *Probate Code Section 3602* or Section 3610 et seq.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Executed _____ [date] at [place].

_____ [signature of parent]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Conservators & Guardians Guardians for Minors Estate, Gift & Trust Law Personal Gifts Gifts to Minors Uniform Acts



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31-100A California Legal Forms--Transaction Guide §§ 100A.231-100A.239

[Reserved]

§§ 100A.231[Reserved]



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C. Tort Claims
1. Claims by Minor

31-100A California Legal Forms--Transaction Guide § 100A.240

§ 100A.240 Release of Minor's Claim by Parent or Guardian

[1] Comment

[a] Use of Form

This form is a release that may be used by a guardian of the estate, guardian ad litem, or custodial parent of a minor to release a tort claim in favor of the minor [*see generally* Ch. 77, *Discharge of Obligations*]. For an emancipated minor's release, see § 100A.241. For release of a tort claim against a minor, see § 100A.250. For release of a tort claim against a minor and the minor's parent or guardian, see § 100A.251. For detailed coverage of settlement and release of litigation in general, see California Forms of Pleading and Practice, Ch. 520, *Settlement and Release* (Matthew Bender).

[B] Capacity of Minor to Release Claim

A release of a tort claim is a contract that settles and extinguishes the claim [*Civ. Code* § 1541; *Pellett v. Sonotone Corp.* (1945) 28 Cal. 2d 705, 711, 160 P.2d 783] . Since minors generally lack the capacity to make contracts [*see Fam. Code* §§ 6700, 6701, 6710], they generally lack the capacity to release persons against whom they have claims [*see* § 100A.31[1]]. Furthermore, a minor's civil action to enforce the minor's rights must be conducted by a guardian [*Fam. Code* § 6601].

[c] Limited Power of Parent or Guardian

Guardians ad litem and guardians of the estates of minors have the power to settle tort claims in favor of their wards, provided certain requirements are met [*see Code Civ. Proc.* § 372 (compromise by guardian ad litem or guardian of estate); *Prob. Code* § 2500 (power of guardians to settle claims in favor of or against wards)]. Generally, parents have no power release a minor's claims in the absence of specific statutory authority [*Burge v. City & County of San Francisco* (1953) 41 Cal. 2d 608, 613, 262 P.2d 6] . Parents who are guardians of the estates of their minor children, and parents who have been appointed as guardians ad litem for the purpose of representing their children in judicial

proceedings [see *Code Civ. Proc.* §§ 373, 373.5], may settle tort claims of their children [see *Code Civ. Proc.* § 372 ; *Prob. Code* § 2500]. Further, parents who have custody of their children have statutory authority to settle tort claims in favor of their minor children when the settlements are approved by the court [*Prob. Code* § 3500(b); see [d], *below*]. If the parents are living together, either parent may exercise this right to settle; if the parents are living separate and apart, the parent who has the care, custody, or control of the minor may exercise the right [*Prob. Code* § 3500(a)]. For additional discussion, see § 100A.31[2][a].

[d] Court Approval of Settlements

Except when a statute specifically provides otherwise, settlement of a disputed minor's claim is not binding on the minor unless the claim is approved by the court [see *Everett v. Everett* (1976) 57 Cal. App. 3d 65, 69, 129 Cal. Rptr. 8 ; *Berry v. Chaplin* (1946) 74 Cal. App. 2d 652, 657, 169 P.2d 442] . Statutes specifically require court approval for settlement of a claim in favor of a minor when the claim is settled by the parents [*Prob. Code* § 3500(b)], a guardian ad litem [*Code Civ. Proc.* § 372], or a guardians of the estate who has appeared for the minor in judicial proceedings [*Code Civ. Proc.* § 372].

The general rule is that a settlement of a claim in favor of a minor by a guardian who has not appeared for the minor in a judicial proceeding does not require court approval [*Prob. Code* § 2500(a)]. However, court approval is required by statute in many circumstances [see *Prob. Code* §§ 2501-2504; § 100A.31[3]]. For practice rules relating to compromises of minor's claims, see California Civil Actions Pleading and Practice, Ch. 48, *Compromising and Settling Case* (Matthew Bender).

A guardian or parent who has the power to compromise a minor's claim also has the power to execute a full release (or, if appropriate, a covenant not to sue or not to enforce judgment on the claim) with court approval [see *Code Civ. Proc.* § 372; *Prob. Code* § 3500(d)].

[e] Disposition of Settlement Proceeds

On approving the settlement of a minor's claim, the court has authority to make orders respecting disposition of the proceeds of the settlement [*Code Civ. Proc.* § 372; *Prob. Code* § 3500(c)]. It may order that reasonable medical and other expenses, attorneys' fees, and costs be deducted from the proceeds [*Prob. Code* § 3601(a)] and that the balance be paid to the guardian of the minor's estate, if there is one [*Prob. Code* § 3602(b); see *Prob. Code* § 3611(a) (court may order appointment of guardian of estate)], or otherwise disposed of according to numerous statutory alternatives [*Prob. Code* §§ 3602(a), 3610, 3611]. If the remaining balance of the money or other property to be paid or delivered does not exceed \$5,000 in value, it may be paid or delivered to a parent of the minor under *Probate Code* § 3401 [see § 100A.230]. For additional discussion of the disposition of settlement proceeds, see § 100A.31[5].

If the court orders that all or any part of the proceeds of the settlement of a minor's claim be deposited in an insured financial institution in California or in a single-premium deferred annuity [see § 100A.31[5]], a parent's release and satisfaction is not effective for any purpose until the money has been deposited as ordered [*Prob. Code* § 3500(d)].

[f] Release of Unknown Claims

This release contains a provision concerning unknown claims. In the absence of such a provision, a release generally does not extend to claims that the claimant does not know or suspect to exist and that would have materially affected the settlement [*Civ. Code* § 1542; see Ch. 77, *Discharge of Obligations*].

[2] FORM

Release of Minor's Claim by Parent or Guardian

GENERAL RELEASE

I, _____ [name], am the _____ [capacity, e.g., parent or parent currently having the sole custody or guardian of the estate or guardian ad litem] of _____ [name of minor], who was born on _____ [date] and is a minor. [If executed by guardian or guardian ad litem, add: On _____ (date) I was appointed as the _____ (guardian of the estate or guardian ad litem) of _____ (name of minor) by _____ (name of court), in proceeding number _____. I have been acting in that capacity since my appointment and am so acting at this time.]

1. Extent of Release. For the consideration described below, for the benefit of _____ [name of minor], I fully and forever release, discharge, and acquit _____ [names of released parties] and _____ [his or her or their] heirs, executors, administrators, and assigns, from any and all rights, claims, actions, demands, costs, and expenses that _____ [name of minor] may have or have a right to assert, arising out of _____ [briefly state facts, including dates and locations, giving rise to claim], thereby causing damages to _____ [name of minor].

2. Capacity. I make this release for and on behalf of _____ [name of minor] in my capacity as the _____ [specify, e.g., parent or parent presently having the sole custody or guardian of the estate or guardian ad litem] of _____ [name of minor].

3. Consideration. The total consideration for this release is \$_____, to be paid and delivered as follows: [describe amounts, times, and terms of agreed payments].

4. Unknown Claims. I agree that this release shall apply to all unknown and unanticipated claims, injuries, causes of actions, and damages as well as to those now disclosed, and I waive the provisions of *Civil Code Section 1542*, which provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

5. Release Not an Admission. This settlement is of a disputed claim and does not constitute an admission of liability by _____ [names of released parties].

6. Free and Voluntary Execution. I execute this release freely and voluntarily and after investigating all relevant information and facts relating to the matters and events referred to above, and satisfying myself that the settlement is fair and equitable to _____ [name of minor].

[If court approval is required, add one of the following alternatives:]

7. Court Approval. This release is subject to and conditioned on the approval of the _____ [name of court], and until and unless so approved shall not be effective for any purpose.

[OR]

7. Court Approval. This release is made pursuant to order of the _____ [name of court] in proceeding number _____, dated _____, by which the settlement of the claims of _____ [name of minor] on the terms and conditions set forth in this release was duly approved.

[Continue with the following:]

Dated: _____

_____ [*signature of parent or guardian*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Releases From Liability General Overview Estate, Gift & Trust Law Conservators &
Guardians Guardians for Minors Family Law Parental Duties & Rights Duties Care & Control of
Children Torts Procedure Settlements Releases General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
 CHAPTER 100A PERSONAL AFFAIRS OF MINORS
 PART IV. FORMS
 C. Tort Claims
 1. Claims by Minor

31-100A California Legal Forms--Transaction Guide § 100A.241

§ 100A.241 Emancipated Minor's Release of Claim**[1] Comment--Use of Form**

This form may be used by an emancipated minor to release a tort claim [*see generally* Ch. 77, *Discharge of Obligations*]. An emancipated minor is treated as an adult for, among other things, the purpose of entering into binding contracts [*Fam. Code § 7050(c)(2)*] and compromising, settling, arbitrating, or otherwise adjusting a claim, action, or proceeding by or against the minor [*Fam. Code § 7050(e)(5)*; *see § 100A.31[1]*].

For detailed coverage of settlement and release of litigation in general, see California Forms of Pleading and Practice, Ch. 520, *Settlement and Release* (Matthew Bender).

[2] FORM**Emancipated Minor's Release of Claim**

GENERAL RELEASE

I, _____ [*name*], was born on _____ [*date*] and am an emancipated minor under the Emancipation of Minors Law inasmuch as _____ [*specify facts showing emancipation, e.g., on _____ [*date*], I received a declaration of emancipation from the Superior Court of the State of California for the County of _____*]. Under the Emancipation of Minors Law, I am capable of entering into a binding contract and compromising, settling, arbitrating, or otherwise adjusting a claim, action, or proceeding.

1. Extent of Release. In consideration of the payment to me described below, I fully and forever release, discharge, and acquit _____ [*names of released parties*] and _____ [*his or her or their*] heirs, executors, administrators, and assigns, from any and all rights, claims, actions, demands, costs, and expenses that I may have or have a right to assert, arising out of _____ [*briefly state facts, including dates and locations, giving rise to claim*], thereby causing damages to me.

2. Consideration. The total consideration for this release is \$_____, to be paid and delivered as follows: *[describe amounts, times, and terms of agreed payments]*.

3. Unknown Claims. I agree that this release shall apply to all unknown and unanticipated claims, injuries, causes of actions, and damages as well as to those now disclosed, and I waive the provisions of *Civil Code Section 1542*, which provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

4. Release Not an Admission. This settlement is of a disputed claim and does not constitute an admission of liability by _____ *[names of released parties]*.

5. Free and Voluntary Execution. I execute this release freely and voluntarily, and after investigating all relevant information and facts relating to the matters and events referred to above, and satisfying myself that the settlement is fair and equitable.

Dated: _____

_____ *[signature of minor]*

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements General Overview Civil Procedure Settlements Releases From Liability General Overview Civil Procedure Settlements Releases From Liability General Releases Family Law Parental Duties & Rights Emancipation of Minors Torts Procedure Settlements Releases General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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31-100A California Legal Forms--Transaction Guide §§ 100A.242-100A.249

[Reserved]

§§ 100A.242[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 100A PERSONAL AFFAIRS OF MINORS
PART IV. FORMS
C. Tort Claims
2. Claims Against Minor

31-100A California Legal Forms--Transaction Guide § 100A.250

§ 100A.250 Release of Claim Against Minor

[1] Comment--Use of Form

This form may be used to release a minor from tort liability. For release of a claim against a minor and the minor's parent or guardian, see § 100A.251.

A minor is generally liable for his or her own torts, but a minor is not liable for exemplary damages unless at the time of the act he or she was capable of knowing that the act was wrongful [*Fam. Code § 6600; see § 100A.32[1]*]. However, since minors generally lack the capacity to make enforceable contracts [*see Fam. Code §§ 6700, 6701, 6710*], they generally lack the capacity to settle tort claims against them [*see § 100A.31[1]*].

Although parents have statutory authority to settle tort claims *in favor of* their minor children (provided the settlements are approved by the court) [*see Prob. Code § 3500; see also § 100A.31[2][a]*], parents have no authority to settle tort claims *against* their minor children unless acting as guardian of the estate or guardian ad litem. Statutes broadly empower guardians to settle claims against wards [*see Code Civ. Proc. § 372; Prob. Code § 2500(a)*].

The court must approve the settlement of a tort claim against a minor if it is made by a guardian ad litem or by a guardian of the estate who has appeared for the minor in a proceeding to which the minor is a party [*Code Civ. Proc. § 372*]. The general rule is that court approval is not required if the settlement is by a guardian who has not appeared for the minor in a judicial proceeding [*Prob. Code § 2500(a)*]. However, the general rule is vitiated by statutory provisions requiring court approval in particular circumstances [*see, e.g., Prob. Code § 2502* (court approval required for settlement in excess of \$25,000); *see also § 100A.31[3]*].

For detailed coverage of settlement and release of litigation in general, see California Forms of Pleading and Practice, Ch. 520, *Settlement and Release* (Matthew Bender).

[2] FORM

Release of Claim Against Minor

GENERAL RELEASE

On the conditions and terms set forth below, I, _____[*name*], for myself, my heirs, executors, administrators, and assigns, hereby fully and forever release, discharge, and acquit _____[*name of minor*] and _____[*his or her*] heirs, executors, administrators, and assigns, from any and all rights, claims, actions, demands, costs, and expenses that I have or may have a right to assert, arising out of _____[*briefly state facts, including dates and locations, giving rise to claim*], thereby causing damages to me.

1. Consideration. The total consideration for this release is \$_____, to be paid and delivered as follows: [*describe amounts, times, and terms of agreed payments*].

2. Unknown Claims. I agree that this release shall apply to all unknown and unanticipated claims, injuries, causes of actions, and damages as well as to those now disclosed, and I waive the provisions of *Civil Code Section 1542*, which provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

3. Release Not an Admission. This settlement is of a disputed claim and does not constitute an admission of liability by _____[*name of minor*].

4. Free and Voluntary Execution. I execute this release freely and voluntarily and after investigating all relevant information and facts relating to the matters and events referred to above, and satisfying myself that the settlement is fair and equitable in all respects.

[*If court approval is required, add one of the following alternatives:*]

5. Court Approval. This release is subject to and conditioned on the approval of the _____[*name of court*], and until and unless so approved shall not be effective for any purpose.

[OR]

5. Court Approval. This release is made pursuant to order of the _____[*name of court*] in proceeding number _____, dated _____, by which the settlement of the claims of _____[*name of minor*] on the terms and conditions set forth in this release was duly approved.

[*Continue with the following:*]

Dated: _____

_____ [*signature*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Releases From Liability General Overview Family Law Family Relationships & Torts Tort

LiabilityGeneral OverviewFamily LawFamily Relationships & TortsTort LiabilityChild TortsFamily LawParental
Duties & RightsDutiesCare & Control of ChildrenTortsProcedureSettlementsReleasesGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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C. Tort Claims
2. Claims Against Minor

31-100A California Legal Forms--Transaction Guide § 100A.251

§ 100A.251 Release of Claims Against Minor and Minor's Parent, Guardian, or Conservator

[1] Comment

[a] Use of Form

This form may be used to release a minor and the minor's parent or guardian from tort liability [*see generally* Ch. 77, *Discharge of Obligations*], either when the parent or guardian is vicariously liable for the torts of the minor or when the parent or guardian is independently liable. The form includes alternative provisions for use if court approval is required for the settlement of the claim. For discussion of requirements for court approval, see § 100A.31[3]. For detailed coverage of settlement and release of litigation in general, see *California Forms of Pleading and Practice*, Ch. 520, *Settlement and Release* (Matthew Bender).

[b] Limited Liability of Parent or Guardian for Minor's Tort

A minor is civilly liable for his or her own wrongs, but he or she is not liable for exemplary damages unless at the time of the act the minor was capable of knowing that the act was wrongful [*Fam. Code* § 6600].

The parent or guardian of a minor generally is not liable for the minor's torts unless the negligence of the parent or guardian contributed to the injuries. If, however, the negligence of a parent or guardian makes it possible for a minor to cause an injury, and the parent or guardian had the duty to control the minor, the parent or guardian will be liable for the injury [*Buelke v. Levenstadt* (1923) 190 Cal. 684, 689, 214 P. 42 ; *Poncher v. Brackett* (1966) 246 Cal. App. 2d 769, 771-772, 55 Cal. Rptr. 59 ; *Ellis v. D'Angelo* (1953) 116 Cal. App. 2d 310, 317, 253 P.2d 675] . In such a case, the liability of the parent or guardian is founded first on the duty to control the minor and second on the failure to discharge that duty with reasonable care [*Poncher v. Brackett* (1966) 246 Cal. App. 2d 769, 772, 55 Cal. Rptr. 59] .

The duty to control a minor is imposed by law on the custodial parents [*Ellis v. D'Angelo* (1953) 116 Cal. App. 2d 310, 317, 253 P.2d 675] . Similar duties may be imposed on others. For example, in appropriate circumstances, guardians have the duty to control their wards [*see Prob. Code* § 2351(a) (guardian has care, custody, and control of

ward)). Even a grandparent may be liable for failure to reasonably control a minor if the grandparent has assumed custody and control of the minor and does not exercise reasonable control [*Poncher v. Brackett* (1966) 246 Cal. App. 2d 769, 773, 55 Cal. Rptr. 59] .

[c] Vicarious Liability of Parent or Guardian in General

The liability of a minor may be imputed to a parent or guardian under various theories. For example, if a minor commits a tort while acting as an agent of a parent, and if the tort was committed in the scope and purpose of the agency, the parent will be liable for the tort [see *Van Den Eikhof v. Hocker* (1978) 87 Cal. App. 3d 900, 904-905, 151 Cal. Rptr. 456 ; *Johnson v. Peterson* (1974) 38 Cal. App. 3d 619, 622-624, 113 Cal. Rptr. 445] . Most commonly, parents and guardians are liable for the torts of minors under various statutory provisions that impose liability in specific fact situations [see [d]-[h], below].

[d] Willful Misconduct

Any act of willful misconduct by a minor that results in injury or death to another person or in any injury to the property of another is imputed to the parent or guardian having custody and control of the minor for all purposes of civil damages [Civ. Code § 1714.1(a)]. Willful misconduct by a minor that results in defacement of the property of another with paint or a similar substance is also imputed to the parent or guardian having custody and control of the minor for all purposes of civil damages, including court costs and attorneys' fees [Civ. Code § 1714.1(b)]. For this purpose, the parent or guardian having custody and control of the minor is jointly and severally liable with the minor for any damages resulting from the willful misconduct [Civ. Code § 1714.1(a)].

This rule does not impute liability to persons other than the parents or guardians of the minor. Neither foster parents nor governmental entities exercising control over minors, such as juvenile courts, are liable for a minor's willful misconduct unless otherwise provided by law [59 Ops. Atty. Gen. 142, 143 (1976)].

There is a statutory limit of liability imputed to parents and guardians under this rule for each tort of the minor [see Civ. Code § 1714.1(a), (b)]. The limit is to be adjusted every two years by the Judicial Council to reflect any increases in the cost of living [Civ. Code § 1714.1(c); see Cal. Rules of Ct., Appen. B (effective Jan. 1, 2007, limit is \$34,700)]. In the case of injury to a person, vicarious liability is further limited to medical, dental, and hospital expenses incurred by the injured person [Civ. Code § 1714.1(a)]. Insurer liability is limited to \$10,000 [Civ. Code § 1714.1(e)].

Vicarious liability for personal injury is in addition to any other liability imposed on the parent or guardian [Civ. Code § 1714.1(a)]. Thus, a parent could be vicariously liable under the statute and also liable for the parent's own negligence in failing to exercise reasonable control over the minor.

[e] Discharge of Firearm

Civil liability for any injury to the person or property of another proximately caused by the discharge of a firearm by a minor is imputed to a parent or guardian having custody or control of the minor, if the parent or guardian either permitted the minor to have the firearm or left the firearm in a place accessible to the minor [Civ. Code § 1714.3]. The liability of a parent under this rule is joint and several with that of the minor [Civ. Code § 1714.3].

The liability imposed by this rule is in addition to any other liability imposed on the parent or guardian by law [Civ. Code § 1714.3]. Liability is limited to \$30,000 for injury or death of one person as a result of any one occurrence and \$60,000 for injury to or death of all persons as a result of any one occurrence [Civ. Code § 1714.3].

[f] Certain Acts of Petty Theft

When an unemancipated minor's willful conduct would constitute petty theft [see Penal Code §§ 487, 488] involving

merchandise taken from a merchant's premises or a book or other library materials taken from a library facility, any merchant or library facility injured by such conduct may bring a civil action against the parent or guardian having control and custody of the minor [*Penal Code § 490.5(b)*]. For the purpose of such an action, the misconduct of the minor will be imputed to the parent or guardian, who will be jointly and severally liable with the minor [*Penal Code § 490.5(b)*]. Liability under this rule is limited to the retail value of the merchandise taken (unless recovered in merchantable condition), plus not less than \$50 nor more than \$500 [*Penal Code § 490.5(b)*]. Recovery of damages under this rule is in addition to any other liability imposed by law on parents and guardians for the tortious conduct of minors [*Penal Code § 490.5(b)*].

An action to recover damages under this rule may be brought in small claims court if the total damages do not exceed the jurisdictional limits of the small claims court [*see Code Civ. Proc. §§ 116.220, 116.221, 116.231(a)*] or in any other appropriate court. However, total damages, including the value of the merchandise or book or other library materials taken, cannot exceed \$500 for each action brought [*Penal Code § 490.5(b)*].

[g] Willful Injury or Damage to School Personnel or Property

The parent or guardian of any minor whose willful misconduct results in injury or death to any pupil or any person employed by or performing volunteer services for a school district or private school, or who willfully cuts, defaces, or otherwise injures any property belonging to a school district, private school, or school employee, is liable for damages caused by the minor [*Educ. Code 48904(a)*]. In addition, the parent or guardian is liable to a school district or private school for all property belonging to the school district or private school lent to the minor and not returned on demand of an employee of the district or private school authorized to make the demand [*Educ. Code § 48904(a)*].

Liability under this rule cannot exceed \$10,000, plus a maximum of \$10,000 for any reward paid by a local agency for information leading to the apprehension of a person who willfully caused personal injury or property damage [*Educ. Code § 48904(a)(1)*; *see Gov. Code § 53069.5* (authority of local agency to offer reward)]. However, the liability limits are subject to adjustments for inflation by the State Superintendent of Public Instruction [*Educ. Code § 48904(a)(2)*].

[h] Malicious Damage to Library or Exhibit Materials

The parent or guardian of a minor who willfully and maliciously cuts, tears, defaces, breaks, or injures any book, map, chart, picture, engraving, statue, coin, model, apparatus, other work of literature, art, mechanics, or object of curiosity, deposited in any public library, gallery, museum, collection, fair, or exhibition, is liable for all damages caused by the minor [*Educ. Code § 19910*].

[2] FORM

Release of Claims Against Minor and Minor's Parent, Guardian, or Conservator

GENERAL RELEASE

On the conditions and terms set forth below, I, _____ [name], for myself, my heirs, administrators, and assigns, hereby fully and forever release, discharge, and acquit _____ [names of released parties] and their heirs, executors, administrators, and assigns, both individually and in any representative or fiduciary capacity in which they may be acting, from any and all rights, claims, actions, demands, costs, and expenses, arising out of _____ [briefly state facts, including dates and locations, giving rise to claim], thereby causing damages to me.

1. Consideration. The total consideration for this release is \$ _____, to be paid and delivered as follows: _____ [describe amounts, times, and terms of agreed payments].

2. Unknown Claims. I agree that this release shall apply to all unknown and unanticipated claims, injuries, causes of actions, and damages as well as to those now disclosed, and I waive the provisions of *Civil Code Section 1542*, which provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

3. Release Not an Admission. This settlement is of a disputed claim and does not constitute an admission of liability by _____ [names of released parties].

4. Free and Voluntary Execution. I execute this release freely and voluntarily and after investigating all relevant information and facts relating to the matters and events referred to above, and satisfying myself that the settlement is fair and equitable in all respects.

[If court approval is required, add one of the following alternatives:]

5. Court Approval. This release is subject to and conditioned on the approval of the _____ [name of court], and until and unless so approved shall not be effective for any purpose.

[OR]

5. Court Approval. This release is made pursuant to order of the _____ [name of court] in proceeding number _____, dated _____, by which the settlement of the claims of _____ [name of minor] on the terms and conditions set forth in this release was duly approved.

[Continue with the following:]

Dated: _____

_____ [signature]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Releases From Liability General Overview Family Law Family Relationships & Torts Tort Liability Child Torts Family Law Parental Duties & Rights Duties Care & Control of Children Family Law Parental Duties & Rights Duties Liability for Minor's Actions Torts Procedure Settlements Releases General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 100B CONTRACTS AND EMPLOYMENT OF MINORS

31-100B California Legal Forms--Transaction Guide 100B.syn

§ 100B.syn Synopsis to Chapter 100B: CONTRACTS AND EMPLOYMENT OF MINORS

§ 100B.01 California Sources

[1] Statutes

[2] Regulations

§ 100B.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 100B.03-100B.04 [Reserved]

§ 100B.05 Law Reviews and Periodicals

§ 100B.06 Annotations

§ 100B.07 Text References

§§ 100B.08-100B.09 [Reserved]

§ 100B.10 "Minor" Defined

§ 100B.11 Emancipation of Minors

[1] Methods and Effect of Emancipation in General

[2] Relinquishment of Parental Rights

§§ 100B.12-100B.19 [Reserved]

§ 100B.20 General Capacity to Make Contracts

§ 100B.21 Areas in Which Minors Lack Contractual Capacity

§ 100B.22 Disaffirmance of Contracts

[1] Contracts Subject to Disaffirmance

[2] Contracts Not Subject to Disaffirmance

[3] Defenses to Disaffirmance

§ 100B.23 Ratification of Contracts On Reaching Majority

§§ 100B.24-100B.29 [Reserved]

§ 100B.30 General Regulation of Minors' Employment

[1] Governing Law

[2] Violations by Employers

[a] Criminal Penalties

[b] Civil Penalties

[3] Effect of Compulsory Education Laws

[4] Wage and Hour Restrictions

[5] Parental Entitlement to Wages

§ 100B.31 Prohibited Occupations

[1] Federal Regulation

[2] California Regulation

§ 100B.32 Special Requirements for Employment of Minors

[1] Permits to Employ Minors

[2] Work Permits

[3] Registration of Persons Hiring or Transporting Minors Engaged in Door-to-Door Sales

§ 100B.33 Professional Entertainment and Sports Contracts Involving Minors

[1] Court Approval Requirement

[2] Trust Account for Minor's Earnings

§§ 100B.34-100B.99 [Reserved]

§ 100B.100 Facts

Scope

§ 100B.101 Documents

Scope

§§ 100B.102-100B.109 [Reserved]

§ 100B.110 Contracts Involving Minors

[1] Capacity to Contract

Scope

[2] Power of Disaffirmance

Scope

[3] Preventing Disaffirmance

Scope

[4] Release of Contract Claims by or Against Minor

Scope

§ 100B.111 Employment of Minors

[1] Prohibited Occupations

[a] Occupations Prohibited Under Federal Law

Scope

[b] Occupations Prohibited Under California Law

Scope

[2] Hours of Employment

Scope

[3] Work Permits

Scope

[4] Permits to Employ

Scope

[5] Additional Determinations for Entertainment Industry Employment

Scope

[6] Registration of Persons Hiring or Transporting Minors Engaged in Door-to-Door Sales

Scope

§§ 100B.112-100B.119 [Reserved]

§ 100B.120 Procedural Guide to Contracts Involving Minors

[1] Contracts for Necessities

Scope

[2] Ratification of Contracts

Scope

[3] Notices of Nullity

Scope

[4] Disaffirmance of Contracts

Scope

[5] Release of Contract Claims by or Against Minor

Scope

§ 100B.121 Procedural Guide to Employment of Minors

[1] Obtaining Work Permits and Permits to Employ

Scope

[2] Obtaining Pupil Leave of Absence for Temporary Employment

Scope

[3] Drafting, Executing, and Reviewing Employment Agreements

Scope

[4] Drafting, Executing, and Reviewing Entertainment Industry Employment Agreements

Scope

[5] Registration of Persons Hiring or Transporting Minors Engaged in Door-to-Door Sales

Scope

§§ 100B.122-100B.129 [Reserved]

§ 100B.130 Modification of Minors' Contracts

Scope

§ 100B.131 Renewal of Work Permits and Permits to Employ

Scope

§ 100B.132 Renewal of Registration of Persons Hiring or Transporting Minors Engaged in Door-to-Door Sales

Scope

§§ 100B.133-10B.199 [Reserved]

§ 100B.200 Contract for Necessities Provided to Minor or Minor's Family

[1] Comment

[a] Use of Form

[b] Disaffirmance Not Permitted

[c] Parental Duty of Support

[d] Necessities

[2] FORM

MINOR'S CONTRACT FOR NECESSITIES

§ 100B.201 Contract for Employment of Minor as Photographic Model

[1] Comment

[a] Use of Form

[b] Work Permit Requirements

[c] Hours of Employment

[d] Compulsory Schooling Requirements

[e] Court Approval of Contract

[f] Termination of Contract

[g] Parental Consent

[h] Sexual Exploitation of Children

[2] FORM

CONTRACT FOR EMPLOYMENT OF MINOR AS PHOTOGRAPHIC MODEL

§ 100B.202 Clause in Minor's Employment Contract Regarding Studio Teacher

[1] Comment

[a] Use of Form

[b] Attendance Requirements

[c] Studio Teacher's Credentials and Responsibilities

[d] Employer's Responsibilities

[2] FORM

Studio Teacher Arrangements

§ 100B.203 Clause in Minor's Employment Contract Conditioning Employment on Court Approval of Contract

[1] Comment

[a] Use of Form

[b] Obtaining Court Approval of Contract

[c] Disaffirmance by Minor

[2] FORM

Court Approval of Contract

§ 100B.204 Trustee's Statement Identifying Account Established for Minor's Earnings

[1] Comment--Use of Form

[2] FORM

TRUSTEE'S STATEMENT IDENTIFYING ACCOUNT ESTABLISHED FOR MINOR'S EARNINGS

§§ 100B.205-100B.209 [Reserved]

§ 100B.210 Guaranty by Third Party to Assume Minor's Obligations if Minor Disaffirms Contract

[1] Comment

[a] Use of Form

[b] Qualifications of Guarantor

[c] Nature of Underlying Obligation

[2] FORM

GUARANTY OF CONTRACT MADE BY MINOR

§ 100B.211 Ratification of Contract Made During Minority

[1] Comment--Use of Form

[2] FORM

RATIFICATION OF CONTRACT MADE DURING MINORITY

§ 100B.212 Agreement to Pay Debt Contracted During Minority

[1] Comment

[a] Use of Form

[b] Credit Sales and Prohibitions Against Usury

[2] FORM

AGREEMENT TO PAY DEBT CONTRACTED DURING MINORITY

§ 100B.213 Notice of Nullity of Minor's Conveyance of Real Property

[1] Comment

[a] Use of Form

[b] Real Property Conveyances by Minors

[c] Recording the Notice

[2] FORM

Notice of Nullity of Minor's Conveyance of Real Property

§ 100B.214 Notice of Disaffirmance of Contract

[1] Comment

[a] Use of Form

[b] Effect of Disaffirmance

[c] Time of Disaffirmance

[d] Contracts That Cannot Be Disaffirmed

[2] FORM

NOTICE OF DISAFFIRMANCE OF CONTRACT

§ 100B.215 Notice of Disaffirmance of Promissory Note

[1] Comment--Use of Form

[2] FORM

NOTICE OF DISAFFIRMANCE OF PROMISSORY NOTE

§ 100B.216 Notice of Disaffirmance of Contract by Deceased Minor's Heirs or Personal Representatives

[1] Comment

[a] Use of Form

[b] Nondisaffirmable Obligations of Deceased

[c] Persons Authorized to Give Notice

[d] Desirability of Court Approval

[e] Methods for Obtaining Court Approval or Authorization

[f] Trustees and Trust Beneficiaries

[2] FORM

NOTICE OF DISAFFIRMANCE OF CONTRACT BY MINOR'S HEIRS OR PERSONAL REPRESENTATIVES

§§ 100B.217-100B.229 [Reserved]

§ 100B.230 Release of Minor's Disputed Contract Claim Against Third Person

[1] Comment

[a] Use of Form

[b] Nature of Release

[c] Court Approval of Compromise Prior to Filing of Action

[d] Court Approval of Compromise After Action Is Filed

[e] Receiving the Minor's Property

[2] FORM

RELEASE OF MINOR'S CONTRACT CLAIM

§ 100B.231 Release of Minor From Liability for Breach of Contract

[1] Comment

[a] Use of Form

[b] Consideration for Release

[c] Effect of Right to Disaffirm Obligations on Minors' Liability for Breach

[d] Contracts That Minor May Not Disaffirm

[2] FORM

RELEASE OF MINOR'S LIABILITY FOR BREACH OF CONTRACT

§§ 100B.232-100B.239 [Reserved]

§ 100B.240 Statement of Intent to Employ Minor and Request for Work Permit (Department of Education Form B-1)

[1] Comment

[a] Use of Form

[b] Persons for Whom Work Permits Are Not Required

[c] Permits to Employ

[d] Effect of Compulsory School Attendance on Minors' Hours of Work

[e] Procedures for Obtaining Work Permit and Permit to Employ

[f] Full-Time Work Permits

[g] Cancellation of Work Permits

[2] FORM

Statement of Intent to Employ Minor and Request for Work Permit

§ 100B.241 Application for Permission to Work in the Entertainment Industry (Form DLSE 277)

[1] Comment

- [a] Use of Form
- [b] Entertainment Industry Occupations
- [c] Persons Subject to Work Permit Requirements
- [d] Schooling Requirements
- [e] Procedure for Obtaining Entertainment Industry Work Permit

[2] FORM

Application for Permission to Work in Entertainment Industry

§ 100B.242 Application for Permission to Employ Minors in the Entertainment Industry (Form DLSE 281)

[1] Comment

- [a] Use of Form
- [b] Nature of Entertainment Industry Permit to Employ
- [c] Issuance, Suspension, and Revocation of Permit
- [d] Blanket Permits to Employ Minors

[2] FORM

Application for Permission to Employ Minors in the Entertainment Industry

§ 100B.243 Agreement for Pupil Leave of Absence From School

[1] Comment

- [a] Use of Form
- [b] Statutory Requirements for Leave
- [c] Type of Work Involved
- [d] Contents of Agreement

[2] FORM

AGREEMENT FOR PUPIL LEAVE OF ABSENCE

§§ 100B.244-100B.249 [Reserved]

§ 100B.250 Notice to Employer of Parent or Guardian's Claim to Minor's Wages or Workers' Compensation Payments

[1] Comment

[a] Use of Form

[b] Parents' Entitlement to Child's Earnings

[c] Inapplicability to Emancipated Minors

[d] Earnings Held in Coogan Trust Account

[e] Taxation of Minors' Earnings

[2] FORM

NOTICE TO EMPLOYER OF PARENT OR GUARDIAN'S CLAIM TO MINOR'S WAGES OR WORKERS' COMPENSATION PAYMENTS

§ 100B.251 Consent of Parent or Guardian to Assignment of Minor's Wages

[1] Comment

[a] Use of Form

[b] Limitations on the Assignment of Wages

[c] Requirements for Assignment of Wages

[2] FORM

CONSENT OF PARENT OR GUARDIAN TO MINOR'S WAGE ASSIGNMENT



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31-100B California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers contracts and employment agreements involving minor parties. The coverage of contracts focuses on the capacity of minors to enter into, disaffirm, and ratify various types of contracts. The forms in this chapter include a minor's contract for necessities, statements of ratification and disaffirmance, and releases of claims by and against minors. For general contract forms and a discussion of basic contract principles (which, subject to the special considerations discussed in this chapter, are applicable to contracts involving minors), see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , and Ch. 77, *Discharge of Obligations* .

The coverage of employment agreements in this chapter deals with the special considerations involved in hiring minors, including work permit requirements, permissible occupations and hours of work under state and federal law, and parental entitlement to minor children's earnings. The employment forms include applications for work permits and permits to employ, special applications and contract clauses relating to the employment of minors in the entertainment industry, a complete contract for the employment of a minor as a photographic model, and notices regarding parental claims to minors' wages. For forms and discussion relating to employment contracts generally, see Ch. 85, *Employment Agreements* .

The emancipation of minors is discussed briefly in this chapter insofar as it relates to the capacity of minors to contract and to control their earnings. For a more detailed discussion of the emancipation procedure, and of the rights and responsibilities arising out of the parent-child relationship, see Ch. 100, *Control, Custody, and Support of Minors* . For forms relating to the judicial emancipation procedure, see California Forms of Pleading and Practice, Ch. 245, *Emancipation of Minors* (Matthew Bender).

Nonbusiness concerns of minors, such as medical care, marriage, and tort claims, are discussed in Ch. 100A, *Personal Affairs of Minors* .



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A. Primary Sources

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§ 100B.01 California Sources

[1] Statutes

Guardian's power to compromise claims. *Code Civ. Proc. § 372.*

Minor's inability to disaffirm medical arbitration contract signed by minor's parent or guardian. *Code Civ. Proc. § 1295(d).*

Compulsory education of minors. *Educ. Code § 48200.*

Exceptions to compulsory education requirements. *Educ. Code §§ 48220-48232.*

Employment of minors.

Part-time work permits. *Educ. Code §§ 49110-49119.*

Full-time work permits. *Educ. Code §§ 49130-49135.*

Exceptions to work permit requirements. *Educ. Code §§ 49140-49141.*

Permits to employ and duties of employer. *Educ. Code §§ 49160-49165.*

Violations of work permit and child labor laws. *Educ. Code §§ 49180-49183; Lab. Code §§ 1287-1289, 1303, 1308.*

"Minor" defined. *Fam. Code § 6500.*

"Adult" defined. *Fam. Code § 6501.*

Contract for attorneys' fees for litigation services made by or on behalf of minor. *Fam. Code § 6602.*

Contractual capacity of minor. *Fam. Code §§ 6700, 6701.*

Minor's right to disaffirm contracts. *Fam. Code §§ 6710, 6711.*

Minor's contract for necessities. *Fam. Code § 6712.*

Protection of innocent purchaser who purchases goods from minor. *Fam. Code § 6713.*

Contracts in art, entertainment, and professional sports made by minors. *Fam. Code §§ 6750-6753.*

Consent for medical treatment rendered to minors. *Fam. Code §§ 6900-6929.*

Enlistment by minor in armed forces. *Fam. Code § 6950.*

Emancipation of Minors Law. *Fam. Code §§ 7000-7143.*

Entitlement of parents to services and earnings of child. *Fam. Code § 7500.*

Payment by employer of minor's earnings. *Fam. Code § 7503.*

Parent's relinquishment of right to control child and right to receive child's earnings. *Fam. Code § 7504.*

Occupations prohibited to minors. *Lab. Code §§ 1290-1298.*

Prohibition against employment of minors under age six in door-to-door or street sales. *Lab. Code § 1308.1(a).*

Prohibition against employment of minors under age 16 in door-to-door sales more than 50 miles from minor's place of residence. *Lab. Code § 1308.1(b).*

Registration of persons hiring or transporting minors engaged in door-to-door sales. *Lab. Code §§ 1308.2-1308.4.*

Hours of work for minors. *Lab. Code §§ 1391-1394.*

Compromise of claims on behalf of minors. *Prob. Code §§ 2500-2507, 3500 et seq.*

[2] Regulations

Prohibited occupations for minors. *8 Cal. Code Reg. §§ 11701-11707.*

Entertainment industry employment. *8 Cal. Code Reg. §§ 11750-11765.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of ChildrenLabor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawWage & Hour LawsChild Labor



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31-100B California Legal Forms--Transaction Guide § 100B.02

§ 100B.02 Federal Sources

[1] Statutes

Fair Labor Standards Act. 29 U.S.C. §§ 203, 212, 213, 218.

[2] Regulations

Child labor regulations. 29 C.F.R. § 570.1 *et seq.*

Waiver of child labor laws for agricultural employment. 29 C.F.R. §§ 575.1-575.9.

Penalties for violations of child labor laws. 29 C.F.R. §§ 579.1-580.18.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of
ChildrenLabor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawWage &
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§§ 100B.03[Reserved]



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B. Secondary Sources

31-100B California Legal Forms--Transaction Guide § 100B.05

§ 100B.05 Law Reviews and Periodicals

Peter M. Christiano, *Saving Shirley Temple: An Attempt to Secure Financial Futures for Child Performers*, 31 *McGeorge L. Rev.* 201 (2000).

Note, *When Parental Interference Goes Too Far: The Need for Adequate Protection of Child Entertainers and Athletes*, 18 *Cardozo Arts & Ent. L.J.* 427 (2000).

Note, *The Regulation of Minors' Entertainment Contracts: Effective California Law or Hollywood Grandeur?*, 19 *J. Juv. L.* 376 (1998).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Parental Duties & Rights General Overview Family Law Parental Duties & Rights Duties Care & Control of Children



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§ 100B.06 Annotations

Annot., What Voluntary Acts of Child, Other Than Marriage or Entry Into Military Service, Terminate Parent's Obligation to Support, 55 A.L.R.5th 557 (1998) .

Annot., Infant's Liability for Medical, Dental, or Hospital Services, 53 A.L.R.4th 1249 (1987) .

Annot., Infant's Misrepresentation as to His Age as Estopping Him From Disaffirming His Voidable Transaction, 29 A.L.R.3d 1270 (1970) .

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawParental Duties & RightsGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of ChildrenLabor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawWage & Hour LawsChild Labor



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B. Secondary Sources

31-100B California Legal Forms--Transaction Guide § 100B.07

§ 100B.07 Text References

Wilcox, California Employment Law (Matthew Bender).

Ch. 1, *Overview of Wage and Hour Laws*.

Ch. 6, *Child Labor Laws*.

Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure (2d ed.), Ch. 30, *The Parent-Child Relationship* (Matthew Bender).

California Forms of Pleading and Practice (Matthew Bender).

Ch. 245, *Emancipation of Minors*.

Ch. 364, *Minors: Contract Actions*.

California Legal Forms (Matthew Bender).

Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

Ch. 77, *Discharge of Obligations* .

Ch. 87, *Entertainment Contracts* .

Ch. 100, *Control, Custody, and Support of Minors* .

Ch. 100A, *Personal Affairs of Minors* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Parental Duties & Rights Duties Care & Control of Children Labor & Employment Law Wage & Hour
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[Reserved]

§§ 100B.08[Reserved]



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A. Minority Status

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§ 100B.10 "Minor" Defined

Minors are all persons under 18 years of age [*Fam. Code § 6500*]. All other persons are adults [*Fam. Code § 6501*]. However, for purposes of California law prohibitions against the employment of minors [*see § 100B.31[2]*], a person is considered a "minor" if he or she is either of the following [*Lab. Code § 1286(c)*; *see 8 Cal. Code Reg. § 11705*]:

- Under age 18 and either (1) required to attend school under relevant provisions of the Education Code [*see Educ. Code §§ 48200 et seq., 48400 et seq.*], or (2) not required to attend school under those provisions solely because he or she is a nonresident of California; or
- Under age six.

For a more detailed discussion of the determination of minority and majority, see Ch. 100, *Control, Custody, and Support of Minors*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawParental Duties & RightsGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of Children



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31-100B California Legal Forms--Transaction Guide § 100B.11

§ 100B.11 Emancipation of Minors

[1] Methods and Effect of Emancipation in General

A minor may become emancipated through marriage, the assumption of military active duty, or the statutory declaration of emancipation procedure [*Fam. Code § 7002; see Ch. 100, Control, Custody, and Support of Minors*]. A minor also may become emancipated if his or her parents relinquish the right to control the minor and receive his or her earnings [*see Fam. Code § 7504; see also [2], below*].

Once emancipated, a minor has the capacity to contract as an adult, including the capacity to contract involving real property interests [*Fam. Code § 7050(e)(2), (3)*]. The minor will have no right to disaffirm contracts entered into after his or her emancipation on the basis of minority [*see Fam. Code § 7050(e)*]. However, the minor may rescind or otherwise avoid contractual obligations on grounds generally available to adult contracting parties [*see Civ. Code § 1688 et seq.; see also Ch. 77, Discharge of Obligations*]. The minor will acquire the right to sue and be sued, and to compromise or otherwise settle claims in his or her own name [*Fam. Code § 7050(e)(4), (5)*]. A judicial declaration of emancipation confers full capacity on the minor; partial emancipation is not possible under the statutory procedure [*see West Shield Investigations & Sec. Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 949, 98 Cal. Rptr. 2d 612*] (when issuing declaration of emancipation under *Fam. Code § 7122*, court has no power to modify or limit consequences of emancipation as set forth in *Fam. Code § 7050*).

Emancipated minors are not exempt from the working hour and occupation provisions of the Education Code and the Labor Code [*see Fam. Code § 7050* (effect of emancipation does not specifically include exemption from hour and occupation limitations); *Educ. Code §§ 49111, 49112; Lab. Code § 1290; see also § 100B.30[4]*].

The parents or guardians of an emancipated minor lose their right to receive and control the minor's earnings [*Fam. Code § 7050(b); see § 100B.30[5]*], and the minor can to apply for a work permit without a parental request [*Fam. Code § 7050(e)(16); see § 100B.32[2]*]. For a discussion of the effect of emancipation on the parent and child relationship generally, see Ch. 100, *Control, Custody, and Support of Minors*.

[2] Relinquishment of Parental Rights

Emancipation may occur through the express or implied relinquishment by a minor's parents of the right to control the minor and receive his or her earnings [see *Fam. Code § 7504*; see also Ch. 100, *Control, Custody, and Support of Minors*]. Abandonment by the parent is presumptive evidence of that relinquishment [*Fam. Code § 7504*]. Whether emancipation through relinquishment has occurred, and if so, the extent of the emancipation, are determined by reference to the totality of circumstances in the particular case [*Lehrer v. Lehrer* (1976) 63 Cal. App. 3d 276, 280, 133 Cal. Rptr. 709] .

Partial emancipation, for particular purposes but not for others, is possible through a partial relinquishment of parental rights [*Perkins v. Robertson* (1956) 140 Cal. App. 2d 536, 540, 295 P.2d 972] . For instance, a minor may be emancipated for the purpose of establishing his or her own residence, but not for purposes of entering into contracts or controlling his or her own earnings [*Jolicoeur v. Mihaly* (1971) 5 Cal. 3d 565, 580, 96 Cal. Rptr. 697, 488 P.2d 1] . For these reasons, a minor who wishes to assume control over his or her business affairs to the full extent permitted by the law, or to enter into a contractual or employment relationship on the basis of his or her emancipated status, should obtain a judicial declaration of emancipation [see *Fam. Code § 7122*; see also California Forms of Pleading and Practice, Ch. 245, *Emancipation of Minors* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawParental Duties & RightsGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of ChildrenFamily LawParental Duties & RightsEmancipation of Minors



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31-100B California Legal Forms--Transaction Guide §§ 100B.12-100B.19

[Reserved]

§§ 100B.12[Reserved]



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31-100B California Legal Forms--Transaction Guide § 100B.20

§ 100B.20 General Capacity to Make Contracts

With specific exceptions designated by statute [*see § 100B.21*], a minor may make a contract in the same manner as an adult [*see Fam. Code § 6700*]. However, this general power is limited by the minor's right to disaffirm certain contracts [*Fam. Code §§ 6710-6713; see § 100B.22[1]*] and by statutory restrictions on a minor's right to marry [*see Fam. Code §§ 300-310*].

There are three general categories of contracts involving minor parties:

- Contracts that are void because the minor lacked capacity to contract regarding the subject matter [*see § 100B.21*].
- Contracts that are valid but may be disaffirmed by the minor [*see § 100B.22[1]*].
- Contracts that are valid and may not be disaffirmed by the minor [*see § 100B.22[2]*].

The largest category consists of contracts that are valid but subject to disaffirmance by the minor [*see Fam. Code § 6700*]. Minors may enter into most types of contracts in the same manner as adults, and they retain the power to disaffirm most of their contracts [*see Fam. Code §§ 6700, 6710*]. This power of disaffirmance reflects a public policy of protecting minors from their own lack of judgment and from "machinations of other people," by discouraging adults from contracting with minors [*Niemann v. Deverich* (1950) 98 Cal. App. 2d 787, 793, 221 P.2d 178 ; *see Goldberg v. Superior Court* (1994) 23 Cal. App. 4th 1378, 1383, 28 Cal. Rptr. 2d 613 (one who provides minor with goods and services proceeds at his or her own risk)].

A minor's capacity to contract will often depend on whether the subject matter of the contract is within the minor's immediate possession and control. It has been held that a minor news carrier, who received newspapers from a distributor and folded and delivered them, was in immediate possession of the papers and therefore was entitled to contract with the distributor regarding their sale [*Taylor v. Industrial Acci. Com.* (1963) 216 Cal. App. 2d 466, 473-474, 30 Cal. Rptr. 877] .

Minors who become emancipated through marriage, the assumption of military active duty, or the statutory declaration of emancipation procedure [see *Fam. Code* §§ 7000-7143] acquire the status of adults for various purposes and may enter into binding contracts [*Fam. Code* §§ 7050-7052]. For a discussion of the effect of emancipation on a minor's contractual and employment relationships, see § 100B.11[1]. For a discussion of the emancipation of minors generally, see Ch. 100, *Control, Custody, and Support of Minors* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties Age Contracts Law Types of Contracts General Overview Family Law Parental Duties & Rights Emancipation of Minors



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§ 100B.21 Areas in Which Minors Lack Contractual Capacity

A minor cannot make any contract that relates to real property or any interest in real property, and cannot make any contract relating to any personal property that is not in the immediate possession or control of the minor [*Fam. Code § 6701*]. A minor also may not give any delegation of a power [*Fam. Code § 6701(a)*]. A minor without a valid driver's license cannot contract to lease, purchase, accept, or otherwise obtain any vehicle subject to registration [*Veh. Code § 15500*]. Contracts entered into by minors in these areas are void as a matter of law; no act of disaffirmance is necessary to render them ineffective [*see Fam. Code § 6701; see also Burnand v. Irigoyen (1947) 30 Cal. 2d 861, 865, 186 P.2d 417*].

The prohibition against minors' contracts regarding real property does not extend to *holding* real property. There is no statutory prohibition against minors owning real property or interests in the property [*see Oyama v. California (1948) 332 U.S. 633, 640, 68 S. Ct. 68, 92 L. Ed. 249; In re Scott K. (1979) 24 Cal. 3d 395, 405, 155 Cal. Rptr. 671, 595 P.2d 105*].

The main purpose of the prohibition against a minor's delegation of power is to prevent minors from circumventing their inability to contract by appointing an agent to act for them [*Hakes Inv. Co. v. Lyons (1913) 166 Cal. 557, 560, 137 P. 911*].

A contract for attorneys' fees for services in litigation, made by or on behalf of a minor, is void unless it is approved by the court. If the agreement has not been approved, the court that renders the judgment in the underlying matter must set reasonable attorneys' fees [*Fam. Code § 6602*]. For further discussion and related forms, see California Forms of Pleading and Practice, Ch. 291, *Guardians ad Litem* (Matthew Bender).

A minor who wishes to ratify an obligation that he or she assumed under a void contract must execute a new contract after reaching the age of majority. The original contract cannot be ratified, since it was void at the time it was executed [*Hakes Inv. Co. v. Lyons (1913) 166 Cal. 557, 561, 137 P. 911*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties Age Family Law Parental Duties & Rights Duties Care & Control of Children



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§ 100B.22 Disaffirmance of Contracts

[1] Contracts Subject to Disaffirmance

Except as otherwise specified by statute, contracts entered into by minors may be disaffirmed by them before, or within a reasonable time after, reaching the age of majority (18). If a minor dies after executing a contract that is valid but subject to disaffirmance, the minor's heirs or personal representative can disaffirm the contract [*Fam. Code § 6710*]. In most cases, a disaffirmance will rescind the contract even if it has been fully executed [*Warner Bros. Pictures v. Brodel* (1948) 31 Cal. 2d 766, 771, 192 P.2d 949] . A minor can disaffirm a contract regardless of whether the other party had notice of the minor's age when the contract was entered into [*Niemann v. Deverich* (1950) 98 Cal. App. 2d 787, 792-793, 221 P.2d 178 ; but see [3], below].

The circumstances of the particular case must be considered to determine whether a person seeking to disaffirm a contract has acted within a reasonable time after reaching the age of majority [*Hakes Inv. Co. v. Lyons* (1913) 166 Cal. 557, 559, 137 P. 911] . If, upon reaching majority, the minor is aware of his or her right to disaffirm, the statute of limitations for an action on the contract may serve as a guide to determining a reasonable time [*Hurley v. Southern California Edison Co.* (9th Cir. 1950) 183 F.2d 125, 132 ; see *Code Civ. Proc. §§ 337* (four-year limitation for actions on written contracts), 339 (two-year limitation for actions on oral contracts)].

A contract must be disaffirmed as a whole if it is disaffirmed at all. One who made a contract as a minor cannot retain the benefits of the contract while disaffirming the burdens [*Peers v. McLaughlin* (1891) 88 Cal. 294, 299, 26 P. 119] . If goods transferred by a minor are sold to an innocent purchaser before disaffirmance of the contract, the goods cannot be recovered from that purchaser on disaffirmance [*Fam. Code § 6713*].

Disaffirmance may be accomplished by any act or declaration disclosing an unequivocal intent to repudiate the contract [*Berg v. Traylor* (2007) 148 Cal App. 4th 809, 820, 56 Cal. Rptr. 3d 140 ("No specific language is required to communicate an intent to disaffirm.")].

[2] Contracts Not Subject to Disaffirmance

A minor cannot disaffirm an obligation that is otherwise valid and that was entered into by the minor under the express authority or direction of a statute [*Fam. Code § 6711*]. There are three general categories of minor's contracts that, by statute, are not subject to disaffirmance:

- Contracts for necessities [*Fam. Code § 6712*].
- Certain employment contracts that have been approved by the superior court [*Fam. Code §§ 6750, 6751*; see §§ 100B.33, 100B.203].
- Consents to various medical treatments [*Fam. Code § 6921*; see Ch. 100A, *Personal Affairs of Minors*].

A minor who is not under the care of a parent or guardian able to provide support cannot disaffirm a contract to pay the reasonable value of things actually received that are necessary to support the minor or the minor's family [*Fam. Code § 6712*]. A contract for necessities may be inferred from the furnishing of necessities as requested by the minor [*Burnand v. Irigoyen* (1947) 30 Cal. 2d 861, 867, 186 P.2d 417] . Lodging [*Burnand v. Irigoyen* (1947) 30 Cal. 2d 861, 868, 186 P.2d 417] , emergency medical care [*Bauman v. San Francisco* (1940) 42 Cal. App. 2d 144, 161, 108 P.2d 989] , and legal services under some circumstances [*Leonard v. Alexander* (1942) 50 Cal. App. 2d 385, 389, 122 P.2d 984] have been held to be "necessities" for this purpose. A contract to secure personal-management services to advance a minor's acting career is not a contract for "necessities" [*Berg v. Traylor* (2007) 148 Cal App. 4th 809, 820, 56 Cal. Rptr. 3d 140] .

Parents are liable for the support of their minor children [*Fam. Code §§ 3900, 3901*], and one who has provided necessities to a minor can recover from the minor's parents [*Fam. Code § 3950*]. Adoptive parents assume all the duties of parenthood toward an adopted child, including the duty to provide support during the child's minority [*Fam. Code § 8616*]. At the time of adoption, the child's birth parents are relieved of all responsibility for the child, and they are no longer liable for necessities provided to the child by others [*Fam. Code § 8617*]. Parents are not liable for the value of necessities provided to any child of their child [*Fam. Code § 3930*]. For a discussion of parental obligations in general, see Ch. 100, *Control, Custody, and Support of Minors* .

Subject to specific statutory limitations, a minor may consent to certain types of medical and dental care, and the consent of the minor's parent or guardian is not necessary [*Fam. Code § 6920*; see *Fam. Code §§ 6922-6929*]. In these permitted situations, a consent by the minor is not subject to disaffirmance because of his or her minority [*Fam. Code § 6921*; see, e.g., *Michaelis v. Schori* (1993) 20 Cal. App. 4th 133, 137-139, 24 Cal. Rptr. 2d 380 (minor who consents to provision of medical care relating to pregnancy pursuant to statutory authority [see *Fam. Code § 6925*] is barred from disaffirming that consent); see also *Code Civ. Proc. § 1295(d)* (minor may not disaffirm medical services contract containing arbitration provision, if contract was signed by minor's parent or legal guardian)]. For a more detailed discussion of minors' consents to medical care and treatment, see Ch. 100A, *Personal Affairs of Minors* .

Minors who receive workers' compensation payments may not disaffirm the payments after reaching the age of majority. Workers' compensation payments received by a minor operate as a full release of the employer and the insurance carrier for the amount paid [*Lab. Code § 3605*].

Minors who have been emancipated through marriage, the assumption of military active duty, or the statutory declaration of emancipation procedure [see *Fam. Code § 7002*; see also § 100B.11[1]] may not disaffirm their contractual obligations on the basis of minority [*Fam. Code § 7050(e)(2)*]. For a discussion of the emancipation of minors generally, see Ch. 100, *Control, Custody, and Support of Minors*].

Contracts that cannot be disaffirmed by reason of minority may nevertheless be void, subject to rescission, or unenforceable for other reasons. For a discussion of the requirements for valid contracts generally, see Ch. 75,

Formation of Contracts and Standard Contractual Provisions . For a discussion of excuses for nonperformance of contractual duties, see Ch. 77, *Discharge of Obligations* .

[3] Defenses to Disaffirmance

There are very few effective defenses to a minor's disaffirmance of a contract. The purpose of the law providing for disaffirmance is to discourage adults from contracting with minors, and this purpose is effectuated by allowing the minor to disaffirm even in circumstances in which an adult would be estopped from doing so [*Niemann v. Deverich* (1950) 98 Cal. App. 2d 787, 792-793, 221 P.2d 178 ; see *Goldberg v. Superior Court* (1994) 23 Cal. App. 4th 1378, 1383, 28 Cal. Rptr. 2d 613 (one who provides minor with goods and services proceeds at his or her own risk)]. However, the right of disaffirmance was not intended to affect contracts entered into by adults on behalf of their children, at least when those contracts do not impose affirmative obligations on the children. Thus, when a parent signs a liability release relating to his or her child's participation in a school program, the child may not disaffirm the release based on his or her minority [*Hohe v. San Diego Unified Sch. Dist.* (1990) 224 Cal App. 3d 1559, 1564-1565, 274 Cal. Rptr. 647 ; see also *Code Civ. Proc.* § 1295(d) (minor may not disaffirm arbitration provision in medical-services contract signed by parent or legal guardian)]. On the other hand, a minor may disaffirm a contract made by his or her parent that imposes significant affirmative responsibilities on the minor, such as a contract that obligates a child actor to pay commissions to a personal manager [*Berg v. Traylor* (2007) 148 Cal App. 4th 809, 818-819, 56 Cal. Rptr. 3d 140 ("There is no public policy barring a minor from disaffirming a contract [made by the minor's parent] that imposes significant affirmative responsibilities on [the minor].")].

The doctrine of estoppel is not applicable to minors [*Lackman v. Wood* (1864) 25 Cal. 147, 153 ; *Morgan v. Morgan* (1963) 220 Cal. App. 2d 665, 675, 34 Cal. Rptr. 82] . Thus, a contract made by a minor may be disaffirmed even if the minor made misrepresentations concerning his or her age at the time the contract was entered into [*Williams v. Leon T. Shettler Co.* (1929) 98 Cal. App. 282, 283, 276 P. 1065] . The doctrine of estoppel does apply, however, to acts done after the minor reaches the age of majority [*Burnand v. Irigoyen* (1947) 30 Cal. 2d 861, 867, 186 P.2d 417] . Thus, a person who makes a contract at age 16, and expressly ratifies the contract or continues to perform his or her duties under the contract after reaching age 18, may be estopped from disaffirming it [see *Burnand v. Irigoyen* (1947) 30 Cal. 2d 861, 867, 186 P.2d 417] . Likewise, a person who takes no action to disaffirm a contract entered into during minority within a reasonable time after reaching majority may be estopped from disaffirming the contract [see *Fam. Code* § 6710; see also *Hurley v. Southern California Edison Co.* (9th Cir. 1950) 183 F.2d 125, 132] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of Children



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31-100B California Legal Forms--Transaction Guide § 100B.23

§ 100B.23 Ratification of Contracts On Reaching Majority

Upon reaching majority, a minor can ratify contracts entered into during his or her minority [see §§ 100B.211, 100B.212]. No special form is required to show ratification, and oral ratifications are valid. A ratification may be inferred from actions consistent with the contract or from a failure to disaffirm the contract within a reasonable period after reaching the age of majority [see *Fam. Code* § 6710; see also *Hastings v. Dollarhide* (1864) 24 Cal. 195, 210] .

An effective ratification will preclude a later disaffirmance [*Hakes Inv. Co. v. Lyons* (1913) 166 Cal. 557, 561, 137 P. 911] . However, a ratification made during minority is not binding on the minor and does not preclude a later disaffirmance [*Niemann v. Deverich* (1950) 98 Cal. App. 2d 787, 793, 221 P.2d 178] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawFormationCapacity of PartiesAgeContracts LawRemediesRatification



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[Reserved]

§§ 100B.24[Reserved]



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31-100B California Legal Forms--Transaction Guide § 100B.30

§ 100B.30 General Regulation of Minors' Employment

[1] Governing Law

The employment of minors is regulated by the Division of Labor Standards Enforcement (DLSE) of the Department of Industrial Relations, the Department of Education, and local school districts. Statutes relating to the employment of minors are found in the Education Code and the Labor Code, and implementing regulations are contained in the California Code of Regulations. To the extent that an employer located in California is engaged in interstate commerce, or in the production, manufacture, or delivery of goods for shipment in interstate commerce, the employer is also subject to the provisions of the Fair Labor Standards Act and related federal regulations that deal with child labor [29 U.S.C. §§ 203(l), 212; *see* § 100B.31[1]]. The various laws and regulations are not always consistent with one another, and the practices of the regulatory authorities involved in enforcing the statutory requirements differ considerably according to region. When state and federal laws differ, higher standards set by the state are controlling [29 U.S.C. § 218].

Violations of child labor laws carry civil and criminal penalties under both state and federal law [*see, e.g., Educ. Code* § 49182; *Lab. Code* §§ 1288, 1303; 29 U.S.C. § 216(a), (e); *see* [2], *below*; *see also* § 100B.31].

[2] Violations by Employers

[a] Criminal Penalties

Both the Education Code and the Labor Code treat violations of statutory duties imposed on employers as criminal offenses [*see Educ. Code* § 49182; *Lab. Code* § 1303]. The penalty for each offense is a fine of at least \$1,000, or up to six months' imprisonment, or both, with a penalty of up to \$10,000, or up to six months imprisonment, or both, for each willful violation [*Lab. Code* § 1303 (imprisonment not to be imposed except for second or subsequent conviction)]. Other sections of the Labor Code provide criminal penalties for violations of specific prohibitions. For example, *Lab. Code* § 1391 makes it a misdemeanor, punishable by a fine of \$1,000 to \$5,000, imprisonment for up to 60 days, or both, to violate the restrictions on the hours minors may work, with a penalty of up to \$10,000, or imprisonment for up to six months, or both, for willful violations [*Lab. Code* § 1391(c) (imprisonment not to be imposed except for second

or subsequent conviction); see [4], *below*. *Lab. Code § 1308* provides for a fine of \$1,000 to \$5,000, or imprisonment for up to six months, or both, for violation of its provisions prohibiting parents or other persons with custody of a minor from allowing the minor to engage in certain specified occupations (imprisonment not to be imposed except for second or subsequent conviction).

Violations of the federal laws relating to child labor carry criminal penalties of up to \$10,000 or six months imprisonment, or both [29 U.S.C. § 216(a)].

[b] Civil Penalties

The Labor Code imposes civil penalties for violations of child labor laws [see *Lab. Code § 1288*]. Class "A" violations are those involving the employment of minors in certain occupations or environments in violation of specified provisions of the Labor Code [see *Lab. Code §§ 1290, 1292, 1293, 1293.1, 1294, 1294.1, 1294.5, 1308, 1308.1, 1392*] and any other violation that the Director of Industrial Relations determines presents an imminent danger to minors or a substantial probability of death or serious physical injury to minors [*Lab. Code § 1288(a)*]. The violation of *Lab. Code § 1391* (permissible hours of employing minors) for a third or subsequent time is also a class "A" violation [*Lab. Code § 1288(a)*]. The penalty for class "A" violations is an amount not less than \$5000, nor more than \$10,000, for each violation, with a penalty of up to \$10,000 for willful or repeated violations [*Lab. Code § 1288(a)*].

Class "B" violations are (1) violations of *Lab. Code §§ 1299 or 1308.5* (pertaining to work permits); (2) a violation of *Lab. Code § 1391* for the first or second time; and (3) any other violation that the Director of Industrial Relations determines to have a direct and immediate relationship to the health, safety, or security of minor employees, and that does not fall into class "A" [*Lab. Code § 1288(b)*]. The penalty for class "B" violations is an amount not less than \$500, nor more than \$1,000, for each violation; the penalty for a second violation of *Lab. Code § 1391* is \$1,000 [*Lab. Code § 1288(b)*].

The Director of Industrial Relations is authorized to issue citations to employers [*Lab. Code § 1287*] and to define additional class "A" and class "B" violations [see *Lab. Code § 1288*]. The Labor Commissioner is authorized to investigate complaints made by employees, provide hearings, and recover civil penalties [*Lab. Code §§ 98, 1289(a), (c)*]. An employer who has been cited must either request a hearing by the Labor Commissioner or pay the amount specified for the violation within 15 business days after service of the citation [*Lab. Code § 1289(a), (b)*; see *Code Civ. Proc. § 1013* (methods of service of citation)]. If a hearing is requested, the Labor Commissioner must hold the hearing within 30 days. At the conclusion of the hearing, the citation or proposed civil penalty must be affirmed, modified, or dismissed by the Commissioner [*Lab. Code § 1289(a)*]. A writ of mandate may be taken from a finding to the appropriate superior court, as long as party agrees to pay any judgment and costs ultimately rendered [*Lab. Code § 1289(a)*].

A violation of federal child-labor laws generally carries a civil penalty of up to \$11,000 for each affected employee. If a violation results in serious injury or death of any employee under age 18, the penalty may be as much as \$50,000, and that amount may be doubled in a case of a repeated or willful violation [29 U.S.C. § 216(e)].

[3] Effect of Compulsory Education Laws

Children between the ages of six and 18 must attend school full time [*Educ. Code § 48200*]. Exempt from this requirement are (1) students who receive private tutoring at least three hours a day, between the hours of 8:00 A.M. and 4:00 P.M., from persons holding valid California credentials [*Educ. Code § 48224*]; and (2) students enrolled in continuation education classes [*Educ. Code § 48200*; see *Educ. Code §§ 48400, 48430-48438*]. Children holding full-time work permits may also be exempt from full-time classes, but they must attend classes part time [*Educ. Code § 48230*; see also 8 Cal. Code Reg. § 11760].

The governing board of a school district may adopt a written policy authorizing pupil leaves of absence [*Educ. Code* § 48232(a)]. If this type of policy has been adopted, a child who attends school within the district and who is at least 15 years old may be granted a leave of absence for up to one semester, for the purpose of supervised travel, study, training, or work not available under another education option [*Educ. Code* § 48232(b)]. For a discussion of the conditions that must be satisfied in order for a pupil to obtain a leave of absence, see § 100B.243[1][b]. For coverage of the procedures for obtaining work permits and exemption from full-time education requirements, see §§ 100B.32[2] and 100B.240-100B.243.

[4] Wage and Hour Restrictions

Minors age 16 or 17 generally are not allowed to work more than eight hours in any one day or more than 48 hours in any one week. They may not work or before 5 A.M., or after 10 P.M. on any day preceding a school day. However, a minor 16 or 17 years of age may work during any evening preceding a non-school day until 12:30 A.M. [*Lab. Code* § 1391(a)(3); see *Lab. Code* § 1391(b) ("school day" defined)]. In addition, while school is in session, a minor who is 16 or 17 years old may not work more than four hours in any school day, unless the minor (1) is employed in personal attendant occupations such as babysitting [see 8 *Cal. Code Reg.* § 11150], school-approved work experience, or cooperative vocational education programs; or (2) has been issued a permit to work pursuant to *Educ. Code* § 49112 and is employed in accordance with the provisions of that permit [*Lab. Code* § 1391(a)(4); see also § 100B.32[2]]. A minor 16 or 17 years of age may work in an agricultural packing plant for no more than 10 hours on any day during peak harvest season that school is not in session, if the Labor Commissioner has issued an exemption to the minor's employer [*Lab. Code* § 1393(a)].

More restrictive provisions with respect to maximum hours and permitted work times apply to minor age 15 or younger [see *Lab. Code* § 1391(a)(1), (2)]. The general rule is that a minor 15 years of age or younger cannot work more than eight hours a day or more than 40 hours in one week, or before 7 A.M. or after 7 P.M., except that from June 1 through Labor Day, a minor 15 years of age or younger may work until 9 P.M. [*Lab. Code* § 1391(a)(1)]. In addition, while school is in session, a minor 14 or 15 years of age cannot work more than three hours in any school day, more than 18 hours in any week, or during school hours [*Lab. Code* § 1391(a)(2)]. However, a minor 14 or 15 years of age who is enrolled in and employed under a school-supervised and school-administered work experience and career exploration program may be employed up to 23 hours, any portion of which may be during school hours [*Lab. Code* § 1391(a)(2)].

These provisions do not apply to any minor employed to deliver newspapers to consumers [*Lab. Code* § 1391(d)]. Minors who (1) are involved in work experience education programs [*Lab. Code* § 1391.1], or (2) have obtained a high school degree or its equivalent [*Lab. Code* § 1391.2] also are exempt from these limitations. However, emancipated minors are not exempt from the hour and occupation provisions of the Education Code and the Labor Code [see *Fam. Code* § 7050 (effect of emancipation does not specifically include exemption from hour and occupation limitations); *Educ. Code* §§ 49111, 49112; *Lab. Code* § 1290; see also § 100B.11[1]].

Minors 14 and 15 years of age who are employed in permitted occupations involved in interstate commerce may work a maximum of 8 hours per day and 40 hours per week. When school is in session, such minors may work a maximum of 3 hours on any school day and 18 hours in any week. They may work only between the hours of 7:00 A.M. and 7:00 P.M. except between June 1 and Labor Day, when they may work until 10:00 P.M. [29 *C.F.R.* § 570.35; see 29 *C.F.R.* §§ 570.33, 570.34 (prohibited and permitted occupations for minors age 14 and 15)].

The California and federal minimum wage standards apply to minors [*Lab. Code* § 1197; 29 *U.S.C.* § 206]. Failure to comply with California's minimum wage statute is a crime [*Lab. Code* §§ 1197-1199] and also carries civil penalties [see *Lab. Code* § 1197.1]. A minor receiving less than the minimum wage is entitled to recover the unpaid balance of the full amount owed, including interest, plus reasonable attorney's fees and costs of suit [*Lab. Code* § 1194(a)]. Punitive damages are not available, however [see *Brewer v. Premier Golf Props.* (2008) 168 *Cal. App. 4th* 1243, 1252,

86 Cal. Rptr. 3d 225 ("[P]unitive damages are not recoverable when liability is premised solely on the employer's violation of the Labor Code statutes that regulate meal and rest breaks, pay stubs, and minimum wage laws.")). For a detailed analysis of the federal and California minimum wage laws, see California Employment Law, Ch. 2, *Minimum Wages* (Matthew Bender).

[5] Parental Entitlement to Wages

The mother of an unemancipated minor child, and the father, if presumed to be the father [*see Fam. Code § 7611*], are equally entitled to the services and earnings of the child [*Fam. Code § 7500(a)*]. If one parent is dead, is unable or refuses to take custody, or has abandoned the child, the other parent is entitled to the services and earnings of the child [*Fam. Code § 7500(b)*]. Special rules, however, pertain to the receipt of a child's professional earnings [*see Fam. Code §§ 6750 et seq., 7500(c)*; *see also § 100B.33*]. In addition, a parent may relinquish to the child the right to control the child and to receive the child's earnings. Abandonment by the parent is presumptive evidence of that relinquishment [*Fam. Code § 7504*].

An employer must pay a minor employee's earnings directly to the minor, until such a time as the parent or guardian gives notice that he or she claims them [*Fam. Code § 7503*; *Lab. Code § 3605* (Workers' Compensation); *see § 100B.250*].

These statutory provisions apply only to the *earnings* of minors, not to the *property* of minors. Parents do not, by virtue of their status as parents, have the right to control the property of their minor children generally [*Fam. Code § 7502*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Parental Duties & Rights Duties Care & Control of Children Labor & Employment Law Wage & Hour Laws Child Labor



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31-100B California Legal Forms--Transaction Guide § 100B.31

§ 100B.31 Prohibited Occupations

[1] Federal Regulation

Generally, businesses that engage in interstate commerce are prohibited from employing minors under age 16 in any capacity, and minors between the ages of 16 and 18 in occupations that have been determined to be hazardous to minors [29 U.S.C. §§ 203(l), 212]. This rule does not apply to agricultural and entertainment occupations (within certain age and hour limitations) [29 U.S.C. § 213(c)], to newspaper carriers or home workers engaged in the making of ornamental wreaths [29 U.S.C. § 213(d)], or to the employment of minors by their parents or guardians in occupations other than mining, manufacturing, and occupations found to be particularly hazardous or detrimental to the health and well-being [29 U.S.C. § 203(l)].

The Department of Labor has created several exceptions to the general rule that employment of children under the age of 16 constitutes oppressive child labor. Children age 14 or older may work in retail, clerical, and food service jobs, and in certain service station jobs [see 29 C.F.R. § 570.34; see also 29 C.F.R. § 570.33 (prohibited occupations for minors age 14 and 15)]. They may also be employed in school-sponsored work experience and career exploration programs meeting certain requirements [see 29 C.F.R. § 570.35a]. The Department has defined particular occupations and working conditions that are prohibited under the terms of the Fair Labor Standards Act, imposing civil penalties of up to \$11,000 for each violation of these regulations [29 C.F.R. §§ 570.50-570.72, 579.5; see 41 U.S.C. § 35(c) (employment of minors under public contracts in excess of \$10,000 prohibited); see also § 100B.111[1]].

[2] California Regulation

The Labor Code contains numerous specific restrictions on the occupations that may be engaged in by minors under age 16. Minors age 14 and 15, however, may be employed in any occupations not prohibited by these provisions [see *Lab. Code* § 1294.3 (giving examples of nonprohibited occupations)].

Minors under the age of 16 are prohibited from working in occupations that are dangerous or injurious to their lives, limbs, health, or morals [*Lab. Code* § 1294(h)]. They may not work on any railroad, vessel, or aircraft, or operate an automobile on the job [8 *Cal. Code Reg.* § 11707; *Lab. Code* § 1294(a), (b), (g)]. They may not work in places where

dangerous acids, dyes, gases, or other dangerous chemicals are used, or in processes involving the manufacture of tobacco [*Lab. Code* § 1294(c), (d), (f)]. The operation of various tools and machines by minors under age 16 is also prohibited, as is any work in proximity to moving machinery [8 *Cal. Code Reg.* § 11701; *Lab. Code* §§ 1292, 1293]. Work in certain physically dangerous occupations, including the building, construction, and mining trades, and in any occupation involving the manufacture, sale, or transfer of explosives, is prohibited [8 *Cal. Code Reg.* §§ 11701, 11703; see *Lab. Code* § 1294(e)]. Although minors age 14 and 15 may work in gas service stations, they may only perform specific tasks listed in *Lab. Code* § 1294.3 [*Lab. Code* § 1294.5(c)].

Minors under age 16 are also prohibited from working (1) in occupations declared hazardous for minors under age 16 in federal regulations dealing with agricultural activities [*Lab. Code* § 1294.1(a)(1); see 29 C.F.R. § 570.71]; (2) in any occupation excluded from the application of federal regulations permitting the employment of minors 14 or 15 years of age under certain conditions [*Lab. Code* § 1294.1(a)(2); see 29 C.F.R. §§ 570.31 *et seq.*, 570.33, 570.34(b)]; or (3) in occupations declared in federal regulations to be particularly hazardous to, or detrimental to the health of, minors between age 16 and 18 [*Lab. Code* § 1294.1(b); see 29 C.F.R. § 570.50 *et seq.*]. However, none of these restrictions prohibits those minors engaged in processing and delivering newspapers from entering areas of a newspaper plant, other than areas where printing presses are located, for purposes related to their work [*Lab. Code* § 1294.1(c)]. Moreover, these restrictions do not apply to student-learners in a bona fide vocational agricultural program meeting certain criteria [see *Lab. Code* § 1295(b)(1)], or minors 14 or 15 years of age holding certificates of completion of tractor operation or machine operation programs meeting specified criteria who are working in the occupations for which they have been trained [see *Lab. Code* § 1295(b)(2), (3)].

Minors under age 16 may not work as messengers (except for the delivery of newspapers to consumers) except in cities with a population of 15,000 or less; older minors are restricted as to the hours they may work in this occupation [see *Lab. Code* § 1297]. Minors under age 16 are generally prohibited from making deliveries from moving vehicles, and their employment as door-to-door sales agents is severely restricted [see 8 *Cal. Code Reg.* §§ 11701, 11706]. However, they are permitted to deliver newspapers from an automobile driven by a person at least 16 years of age, as well as by foot, bicycle, or public transportation [*Lab. Code* § 1294.4]. Minors under age 16 are also prohibited from engaging in door-to-door selling of newspaper or magazine subscriptions, candy, cookies, flowers, or other merchandise or commodities more than 50 miles from their place of residence [*Lab. Code* § 1308.1(b); see also § 100B.32[3]]. The DLSE is empowered to determine additional occupations or tasks that are unsuitable for performance by minors [see *Lab. Code* § 1296].

Generally, no business that sells or serves alcoholic beverages for consumption on the premises may employ any person under age 21 for the purpose of preparing or selling alcoholic beverages [*Bus. & Prof. Code* § 25663(a) (employer violating this provision is guilty of misdemeanor)]. A person between age 18 and age 21 who is employed in a bona fide eating place [see *Bus. & Prof. Code* §§ 23038, 23038.1] that is licensed for the sale of alcoholic beverages may serve alcoholic beverages to consumers only if (1) that service occurs only in an area primarily designed and used for the sale and service of food for consumption on the premises; and (2) the primary duty of the employee is to serve food, with the service of alcoholic beverages being incidental to that duty [*Bus. & Prof. Code* § 25663(c) ("service" of alcoholic beverage includes delivery, presentation, opening, or pouring of beverage)]. A person under age 18 may be employed at an establishment that sells alcoholic beverages for consumption off the premises only if the employee is under the continuous supervision of a person age 21 or older [*Bus. & Prof. Code* § 25663(b)]. An employer who violates these sections is guilty of a misdemeanor and may be fined up to \$1,000, or sentenced to six months imprisonment, or both [*Bus. & Prof. Code* §§ 25663, 25617]. Minors age 16 and 17 may not perform work in gas service stations that involves the use of pits, racks, or lifting apparatus, or work that involves the inflation of any tire mounted on a rim equipped with a removable retaining ring [see *Lab. Code* § 1294.5(b)].

Minors under the age of 12 may not work in agricultural zones of danger or accompany their parents to work in such places. The presence of moving machinery, unprotected chemicals, or unprotected water hazards creates an agricultural zone of danger [*Lab. Code* § 1293.1(a)]. With one exception, minors under age 12 may not work or accompany their

parents to work in any agriculture-related occupations declared hazardous for minors under 16 under federal regulations [*Lab. Code § 1293.1(b)*; *see also 29 C.F.R. § 570.71*]. The exception to this rule applies to agricultural, horticultural, viticultural, or domestic labor performed while school is not in session, for or under the control of the minor's parent, on premises owned or controlled by the parent [*Lab. Code § 1394(a)*]. Minors under age 12 may not work at selling or distributing newspapers, magazines, periodicals, or circulars [*Lab. Code § 1298(a)*].

Minors under age 6 are not permitted to engage in door-to-door sales or street sales of candy, cookies, flowers, or any other merchandise or commodities [*Lab. Code § 1308.1(a)*; *see Lab. Code § 1286(e)* ("door-to-door sales" has same meaning as "home solicitation contract or offer," as defined in *Civ. Code § 1689.5(a)*, but without reference to that provision's minimum price limitation)]. Minors under age 16 who are regularly employed as news carriers are not prohibited from door-to-door selling of, or solicitation of subscriptions to, the newspaper that they usually deliver [*8 Cal. Code Reg. § 11706.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Parental Duties & Rights Duties Care & Control of Children Labor & Employment Law Wage & Hour Laws Child Labor



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DIVISION VII: PERSONAL TRANSACTIONS
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31-100B California Legal Forms--Transaction Guide § 100B.32

§ 100B.32 Special Requirements for Employment of Minors

[1] Permits to Employ Minors

A firm or corporation that wishes to employ a minor must obtain a permit to employ minors [*Educ. Code § 49160; see §§ 100B.240-100B.242*]. There are exceptions to this rule for the employment of minors in dramatic performances, when the consent of the Labor Commissioner has been obtained [*Lab. Code § 1308.5*], and situations in which minors are working under the supervision of their parents or guardians [*Educ. Code § 49141*].

The Superintendent of Public Instruction prepares the appropriate forms and procedures, which are administered by the local school districts [*Educ. Code § 49117; see § 100B.240*]. The district superintendent (or chief executive officer or equivalent of a charter school attended by the minor), or persons who are designated by the superintendent (or chief executive officer or equivalent of the charter school) and certified to provide specialized pupil personnel services or work experience education, may issue permits to employ [*Educ. Code § 49110(b)(1)-(3)*]. Also authorized to issue permits are the county superintendent of schools (or a person authorized by the county superintendent) if the minor does not reside within a school district or attend a charter school, and the principal (or administrator designated by the principal) of the public or private school that the minor attends [*Educ. Code §§ 49110(b)(4),(5)*].

Once a permit to employ has been issued, it must be kept on file by the employer during the minor's term of employment [*Educ. Code § 49161; Lab. Code § 1299*]. Various education and labor officials may inspect the premises from time to time, and the permit will be subject to cancellation if the inspections reveal any violations of the laws relating to the employment of minors [*Educ. Code § 49164; see Lab. Code § 1300*].

If a minor is not required by law to attend school, but is otherwise required to hold a work permit, a certificate of age will serve as the employer's permit to employ [*Educ. Code § 49114; see [2], below; see also § 100B.240[1]*].

The employment of minors in the entertainment industry requires special consents, forms, and procedures. The DLSE is authorized to issue permits for the employment of minors to entertainment industry employers [*8 Cal. Code Reg. § 11753; see Lab. Code § 1308.5*]. "Blanket Permits" may also be issued, subject to certain conditions and limitations, for

the employment of groups or organizations of minors [8 *Cal. Code Reg. § 11754*; see § 100B.242[1][d]]. In addition to satisfying employment permit requirements, employers in the entertainment industry must provide studio teachers to instruct and supervise minor employees. Studio teachers are certified for this purpose by the Labor Commissioner [8 *Cal. Code Reg. § 11755*]. For coverage of the procedures to obtain permits to employ minors in the entertainment industry, see *Sections 100B.121[1] and 100B.242[1]*.

Anyone who makes a false statement on a permit to employ is guilty of a misdemeanor and will be punished by a fine of not more than \$100, imprisoned for not more than 30 days, or both [*Educ. Code § 49183*].

[2] Work Permits

Work permits may be issued to persons between the ages of 12 and 18 [*Educ. Code § 49111*]. A minor is permitted to work only if he or she holds a valid work permit or is exempt from the work permit requirements by the provisions of the Education Code [*Lab. Code § 1290*]. Regular work permits may be issued by the district superintendent (or chief executive officer or equivalent of a charter school attended by the minor); certified work experience instructors; the county superintendent of schools (or a person authorized by the county superintendent) if the minor does not reside within a school district or attend a charter school; or the principal (or administrator designated by the principal) of the public or private school that the minor attends [*Educ. Code § 49110(b)*]. Permits to work in the entertainment field and related fields are issued by the DLSE [8 *Cal. Code Reg. § 11752*; see *Lab. Code § 1308.5*]. The authority that issued the permit may revoke it at any time if it determines that the work is interfering with the minor's health or education [*Educ. Code § 49116(c)*].

A minor's parent, guardian, foster parent, caregiver with whom the child resides, or residential shelter services provider must file a written request with the proper issuing authority before a work permit can be issued [*Educ. Code § 49110(c)*; see *Fam. Code § 7050(e)(16)*]. To obtain a certificate of age (used by minors who are not required to attend school full-time but are otherwise required to hold work permits), or permission for a minor under the age of 16 to work full-time, the parent or guardian must appear in person before the issuing authority [*Educ. Code §§ 49114, 49132*].

In order to obtain a permit to work on school days, a minor ordinarily must be at least 14 years old and must have completed the equivalent of the seventh grade [*Educ. Code § 49112(a)*; see *Educ. Code § 49112(d)* (permit requirement not applicable to minors employed to deliver newspapers to consumers)]. Maximum hours that may be worked under the permit on a school day depend on the age of the minor [*Educ. Code § 49112(a)*; see *Educ. Code § 49112(c)* (extended hours permitted on school day preceding nonschool day for minors age 16 or older)]. Permits to work in a school-sponsored employment program may also be issued to a minor 13 years old who has completed the sixth grade but who has been identified by a school district as exhibiting the potential to drop out of school [*Educ. Code § 49112(b)*].

A permit to work full-time during the school year may be issued to a minor between the ages of 14 and 16 only on a showing that he or she has successfully completed an elementary school course and has no other sufficient source of support [*Educ. Code § 49130*]. If a parent or guardian is available and able to support the minor, this type of permit will not be issued. Minors over age 16 may obtain full-time work permits without meeting the education and necessity requirements applicable to those between 14 and 16 years of age [*Educ. Code § 49131*].

Minors who are employed by their parents or guardians are not required to have work permits [*Educ. Code § 49141*]. In practice, work permits are not required for minors engaged in employments such as babysitting, newspaper routes, and yard work [18 *Ops. Cal. Atty. Gen. 114 (1951)*; see *Educ. Code § 49112(d)* (specific exemption for newspaper deliveries)].

[3] Registration of Persons Hiring or Transporting Minors Engaged in Door-to-Door Sales

Any individual, association, corporation, or other entity that employs or uses, indirectly through third persons or directly, minors under age 16 in door-to-door sales at any location more than 10 miles from the minor's residence, must register annually with the Labor Commissioner [*Lab. Code § 1308.3(a)*]. Registration requires the execution under penalty of perjury of a written application (including a copy of any written contract or agreement offered to the minor or used in the sales), an investigation into whether the applicant has previously violated the California child labor laws and whether the minors will be exposed to hazardous or unsafe working conditions, and payment of a fee [*Lab. Code § 1308.3(b)*]. Registrants must make all of their payroll records available for inspection by the Labor Commissioner [*Lab. Code § 1308.3(c)*]. These registration requirements do not apply to a trustee or charitable corporation [*see Gov. Code §§ 12582, 12582.1*] or to an entity described in *Gov. Code § 12583*, which generally includes governmental units and agencies, certain religious organizations or charities operated as religious organizations, educational institutions, hospitals, or licensed health care plans [*Lab. Code § 1308.3(g)*].

Similar registration requirements apply to anyone age 18 or older who transports, or provides direction or supervision during transportation of, a minor under age 16 to any location more than 10 miles from the minor's residence, or who directs or supervises the minor, for the purpose of facilitating the minor's participation in door-to-door sales of any merchandise or commodity [*Lab. Code § 1308.2(a)*]. Registration requires the execution under penalty of perjury of a written application; an investigation of the applicant's character, competency, and responsibility; and payment of a fee [*Lab. Code § 1308.2(b)*]. These registration requirements do not apply to the minor's parents or guardians, to anyone solely providing transportation for hire, or to anyone acting on behalf of a trustee or charitable corporation [*see Gov. Code §§ 12582, 12582.1*] or an entity described in *Gov. Code § 12583* [*Lab. Code § 1308.2(f)*].

The Labor Commissioner may revoke, suspend, or refuse to renew a registration in any of the following circumstances:

- The registrant or an agent of the registrant has violated or failed to comply with the provisions governing registration [*Lab. Code § 1308.4(a)*; *see Lab. Code §§ 1308.2, 1308.3*];
- The registrant has made any misrepresentation or false statement in the application for registration [*Lab. Code § 1308.4(b)*];
- The registrant has operated in a manner substantially different from the conditions of operation stated in the application for registration [*Lab. Code § 1308.4(c)*];
- The Labor Commissioner or a court of law has found that the registrant or an agent of the registrant has violated, or willfully aided or abetted the violation of, any California law regulating the employment of minors [*Lab. Code § 1308.4(d)*]; or
- The Secretary of Labor or a court of law has found that the registrant has violated the child labor provisions of the Fair Labor Standards Act [*Lab. Code § 1308.4(e)*; *see also 29 U.S.C. § 212* (FLSA child labor provisions)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Parental Duties & Rights Duties Care & Control of Children Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Child Labor



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31-100B California Legal Forms--Transaction Guide § 100B.33

§ 100B.33 Professional Entertainment and Sports Contracts Involving Minors

[1] Court Approval Requirement

An employment contract under which a minor agrees to perform as an artist or athlete, or to render other artistic or creative services, either directly or through a third party, may be submitted for approval to the superior court [*Fam. Code § 6751(a)*]. Once approved by the court, the contract will not be subject to disaffirmance on the basis of minority [*Fam. Code § 6751(a)*].

Artistic services subject to this provision include, but are not limited to, acting, dancing, writing, composing, directing, producing, designing, song writing, arranging, producing music, or performing as a musician, comedian, singer, stunt-person, or other entertainer [*Fam. Code § 6750(a)(1)*]. Athletic services covered include any in which the minor is "employed or agrees to render services as a participant or player in a sport" [*Fam. Code § 6750(a)(3)*].

This rule also applies to any contract by which a minor agrees to purchase, sell, lease, license, or otherwise dispose of any tangible or intangible rights in literary, musical, or dramatic properties, or the use of a person's likeness, voice recording, performance, or story of or incidents in his or her life--either tangible or intangible--for any use in the entertainment field, including motion pictures, television, the production of sound recordings in any format, or the legitimate or living stage [*Fam. Code § 6750(a)(2)*].

A contract to secure personal-management services to advance a minor's acting career is not a contract in which the minor agrees to perform artistic services; such a contract, therefore, is not strictly within the scope of this rule [*see Fam. Code § 6750(a)*]. As a practical matter, however, parties to agreements for personal-management services in the entertainment industry routinely seek court approval, for the protection of all involved [*Berg v. Traylor (2007) 148 Cal App. 4th 809, 819 n.4, 56 Cal. Rptr. 3d 140*] .

[2] Trust Account for Minor's Earnings

Notwithstanding the general rule regarding parental entitlement to a minor's wages [*see § 100B.30(5)*], at least 15 percent of a minor's gross earnings must be set aside by the minor's employer and placed in a trust account in a bank,

savings and loan, or similar financial institution, as prescribed by statute [*Fam. Code* §§ 6752(b), (d), 6753(a)]. At least one parent or legal guardian of the minor who is entitled to the minor's physical care, custody, and control, must serve as a trustee of the account, and the trustee, or trustees, as the case may be, are responsible for monitoring and accounting for the funds on deposit [*Fam. Code* § 6752(b)(2), (d)(1)]. Each trustee is subject to the law of trusts and occupies a fiduciary position with respect to the minor [*Fam. Code* § 6752(e)].

The set-aside rule for earnings applies whether or not a court has approved the underlying contract [*Fam. Code* § 6752(b), (d)]. If the court has approved the contract, the court retains jurisdiction over the trust [*Fam. Code* § 6752(b)(7)].

With limited exceptions (for example, to pay taxes on the minor's earnings), the funds may not be removed from the trust account, except on court order, until the minor reaches age 18, at which time he or she can withdraw the funds [*Fam. Code* §§ 6752(e), 6753(b), (e)(3)]. Terms and conditions for establishing the trust account and its management are set forth in *Fam. Code* §§ 6752 and 6753. For forms relating to court approval of minors' employment contracts, see California Forms of Pleading and Practice, Ch. 365, *Minors: Contract Actions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of Children



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31-100B California Legal Forms--Transaction Guide §§ 100B.34-100B.99

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§§ 100B.34[Reserved]



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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

31-100B California Legal Forms--Transaction Guide § 100B.100

§ 100B.100 Facts

1. For minor:

- a. Full name.
- b. Date of birth.
- c. Address and telephone number.
- d. Social security number.
- e. Date of death, if applicable.

2. For each parent of minor:

- a. Full name.
- b. Address and telephone number.
- c. Extent of custody and control over minor.

3. For each other person having legal or physical custody of minor:

- a. Full name.
- b. Address and telephone number.

- c. Relationship to minor.
- 4. Minor's actual living arrangements and main source of support.
- 5. Minor's military status.
- 6. Minor's marital status.
 - a. Date and place married.
 - b. Date marriage dissolved or annulled.
 - c. Full name, age, address and telephone number of spouse.
- 7. For each of minor's children:
 - a. Full name.
 - b. Date and place of birth.
 - c. Name, age, address, and telephone number of other parent.
 - d. Existing court orders for custody and support.
 - e. Actual care, custody, and support arrangements.
- 8. Minor's emancipation status.
 - a. Date of judicial declaration of emancipation [*see Fam. Code § 7122*].
 - b. Circumstances indicative of emancipation by relinquishment of parental control [*see Fam. Code §§ 7120, 7504*], for example:
 - (1) Living away from family home.
 - (2) Controlling own earnings and finances.
 - (3) Not supported by parents.
- 9. For contracts:
 - a. Name, address, and telephone number of each party.
 - b. Terms of agreement:
 - (1) Subject matter.
 - (2) Consideration.
 - (3) Conditions.

(4) Guaranty for minor's performance.

c. For existing contract, date executed.

d. For disaffirmance:

(1) Benefits already received by minor.

(2) Whether minor is able to return benefits already received.

(3) Consideration already given by minor.

(4) Whether court order approving contract was obtained.

10. For employment:

a. Name, address, and telephone number of prospective employer.

b. For entertainment industry employment, name, address, and telephone number of studio teacher, if known [*see 8 Cal. Code Reg. § 11755*].

c. Nature of employment.

d. Equipment or machinery minor will handle or come in contact with.

e. Wages or other compensation.

f. Days and hours of employment.

g. Highest grade level completed by minor.

h. Name and address of school attended by minor.

i. Names and telephone numbers of school principal and work experience coordinator.

j. Type of program in which minor is currently enrolled, such as:

(1) Regular, full-time classes in public or private school.

(2) Continuation classes to accommodate full-time work schedule.

(3) Special education [*see Educ. Code § 56031* (definition)].

(4) Vocational or work experience program.

(5) Studio-teacher arrangements [*see 8 Cal. Code Reg. § 11755*].

k. Regular school schedule, including:

(1) Hours of school.

(2) Dates of school vacations.

l. Projected date of high school graduation or completion of equivalency course.

m. Reasons minor is not attending school full time.

n. Whether parents wish to receive minor's earnings [*see Fam. Code §§ 7500, 7503*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of Children



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31-100B California Legal Forms--Transaction Guide § 100B.101

§ 100B.101 Documents

1. Reliable record of minor's age [*see Educ. Code § 49133(b)*], such as:
 - a. Birth certificate.
 - b. School enrollment record.
 - c. Baptism certificate.
 - d. Passport.
2. Court orders regarding any of following:
 - a. Legal and physical custody of minor.
 - b. Legal and physical custody of minor's children.
 - c. Guardianship of person or estate of minor [*see Prob. Code § 1514*].
 - d. Judicial declaration of emancipation [*see Fam. Code § 7122*].
 - e. Rescission or voiding of judicial declaration of emancipation [*Fam. Code §§ 7130-7135*].
 - f. Release of claim by or against minor [*see Prob. Code §§ 2501-2504, 3500*].

g. Approval of minor's employment contract and plan for preservation of earnings [*Fam. Code* §§ 6750-6753].

3. Contracts to which minor is party.
4. Notices of ratification, disaffirmance, or nullity of contracts executed by minor.
5. Draft of compromise and settlement agreement for contract claim by or against minor.
6. Current and expired work permits.
7. If minor is performing artist, copies of other employment contracts to which minor is party.
8. If minor is engaged in door-to-door sales, copy of registration of employer or person transporting minor [*see Lab. Code* §§ 1308.2-1308.4].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of Children



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[Reserved]

§§ 100B.102[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Preliminary Determinations

31-100B California Legal Forms--Transaction Guide § 100B.110

§ 100B.110 Contracts Involving Minors

[1] Capacity to Contract

1. Determine whether minor is emancipated--and therefore has capacity to contract--by reason of any of following circumstances [*Fam. Code § 7002*]:

a. Minor is or has been legally married.

NOTE:

A minor who has entered into a legal marriage will not lose his or her emancipated status on dissolution of the marriage [*Fam. Code § 7002(a)*].

b. Minor is currently on active military duty.

c. Minor has obtained declaration of emancipation [*see Fam. Code § 7122*].

NOTE:

For a discussion of the judicial declaration of emancipation procedure, see Ch. 100, **Control, Custody, and Support of Minors**, and California Forms of Pleading and Practice, Ch. 245, **Emancipation of Minors** (Matthew Bender).

2. Confirm that contract does not concern subject matter for which minors may not contract, such as:

a. Lease, purchase, or other contract to obtain vehicle subject to registration by minor without valid driver's license [*Veh. Code § 15500*].

b. Delegation of power [*Fam. Code § 6701(a)*].

NOTE:

The prohibition against delegations of power by minors does not apply to the petition of a minor of at least 12 years of age for the appointment of a guardian [*Prob. Code* § 1510(a)].

- c. Real property or any interest in real property [*Fam. Code* § 6701(b)].

NOTE:

There is no prohibition, however, against minors **owning** real property or interests in real property [*see Oyama v. California* (1948) 332 U.S. 633, 640, 92 L. Ed. 249, 68 S. Ct. 68] . If a minor is to receive property from an estate, but does not have a legal guardian or other person authorized to receive the property, it may be liquidated and placed in an account held by the county treasurer for the minor [*Prob. Code* § 11850(c)].

- d. Personal property not within minor's immediate possession or control [*Fam. Code* § 6701(c)].

NOTE:

Minors may execute a valid assignment of their wages, provided the written consent of a parent or guardian is attached to the assignment [*see Lab. Code* § 300(b)(3)]. For a form for parental consent to a minor's wage assignment, see § 100B.251.

- e. Contract for attorneys' fees for litigation services that has not been approved by court [*Fam. Code* § 6602].

[2] Power of Disaffirmance

1. Determine whether contract is one that minor *cannot* disaffirm, such as [*Fam. Code* § 6711]:

NOTE:

Minors may disaffirm their contracts, before reaching the age of majority or within a reasonable time thereafter, except for contracts entered into under the express authority or direction of a statute [*Fam. Code* §§ 6710, 6711].

- a. Contract to pay reasonable value of necessities [*see* § 100B.200], to extent that all of following circumstances exist [*Fam. Code* § 6712]:

NOTE:

A contract may be inferred from the furnishing of necessities as requested by the minor [*see Leonard v. Alexander* (1942) 50 Cal. App. 2d 385, 122 P.2d 984] , or in circumstances in which the minor would have requested them if he or she had been able to do so [*see Burnand v. Irigoyen* (1947) 30 Cal. 2d 861, 186 P.2d 417] . For a discussion of items that may be considered "necessities," see § 100B.22[2].

- (1) Minor is not under care of parent or guardian able to provide those necessities.

- (2) Items are actually necessary to support of minor or minor's family.

(3) Items are actually provided to minor or minor's family.

b. Contract that has been approved by superior court and involves:

NOTE:

Minors are not prohibited from entering into contracts in these areas without the approval of the court. However, contracts that have not been approved will be subject to the minor's disaffirmance [*see Fam. Code §§ 6750, 6751*]. Although a contract to secure personal-management services to advance a minor's acting career is not listed in the governing statute [*see Fam. Code § 6750(a)*], parties to agreements for personal-management services in the entertainment industry routinely seek court approval, for the protection of all involved [*Berg v. Traylor (2007) 148 Cal App. 4th 809, 819 n.4, 56 Cal. Rptr. 3d 140*] .

(1) Minor's employment in entertainment industry, as [*Fam. Code § 6750(a)(1)*]:

(a) Actor or actress.

(b) Dancer.

(c) Musician.

(d) Comedian.

(e) Singer.

(f) Writer.

(g) Director.

(h) Producer.

(i) Production executive.

(j) Choreographer.

(k) Composer.

(l) Conductor.

(m) Designer.

(n) Stunt-person.

(o) Voice-over artist.

(p) Songwriter.

(q) Musical producer.

(r) Musical arranger.

(s) Other type of performer or entertainment industry employee.

(2) Minor's agreement to purchase, sell, lease, license, or otherwise dispose of tangible or intangible rights in literary, musical, or dramatic properties for use in entertainment industry [*Fam. Code* § 6750(a)(2)].

(3) Minor's employment as participant or player in sport [*Fam. Code* § 6750(a)(3)].

(4) Minor's agreement with talent agency [*Lab. Code* § 1700.37].

c. Minor's consent to medical treatment, in certain circumstances [*Fam. Code* §§ 6900-6929; see Ch. 100A, *Personal Affairs of Minors*].

NOTE:

For a discussion of a minor's obligation to pay for medical treatment obtained pursuant to his or her nondisaffirmable consent, see § 100B.22[2].

d. Minor's written relinquishment to licensed adoption agency, or consent to adoption, of his or her child [*Fam. Code* §§ 8606(b)-(e), 8700(b); but see *Fam. Code* § 8700(e) (relinquishment may be withdrawn at any time before certified copy of it is filed with State Department of Social Services)].

e. Contract entered into by minor in capacity as public officer or candidate for public office [*Gov. Code* § 275.2].

f. Premarital or marital property agreement made by emancipated minor or minor otherwise capable of contracting marriage [*Fam. Code* § 1501].

g. Minor veteran's contract for purchase of farm or home from Department of Veterans Affairs, or other related contract [*Mil. & Vet. Code* § 986.10].

h. Certain contracts of minors for life insurance, disability insurance, or annuities [see *Fam. Code* § 7051].

2. Determine whether contract is void [see [1], above].

NOTE:

If a contract is void, the minor does not need to perform any acts of disaffirmance or return any consideration received under the contract [see *Burnand v. Irigoyen* (1947) 30 Cal. 2d 861, 865, 186 P.2d 417; *Sparks v. Sparks* (1951) 101 Cal. App. 2d 129, 137, 225 P.2d 238] .

3. Ascertain that disaffirmance will be in minor's best interest.

a. Determine whether minor will be able to return consideration received without hardship [see *Civ. Code* § 1691].

NOTE:

It is uncertain whether a minor is required to return any consideration received upon disaffirmance of a contract [see *Fam. Code* § 6710].

b. Determine whether performing obligations under contract will be more burdensome to minor than

giving up benefits of contract.

NOTE:

A contract cannot be partially disaffirmed. A minor who disaffirms his or her obligations under a contract must also give up the expectation of receiving future benefits under the contract [*Peers v. McLaughlin* (1891) 88 Cal. 294, 26 P. 119] .

4. Ascertain that none of following has occurred to render otherwise disaffirmable contract binding on minor:

a. Minor has ratified contract after reaching age of majority (18), either:

(1) By express oral or written ratification [see *Hakes Inv. Co. v. Lyons* (1913) 166 Cal. 557, 561, 137 P. 911] .

(2) By continuing to perform obligations under contract [see *Burnand v. Irigoyen* (1947) 30 Cal. 2d 861, 186 P.2d 417 ; *Hurley v. Southern California Edison Co.* (9th Cir. 1950) 183 F.2d 125, 132] .

NOTE:

Ratifications made during minority are not binding on the minor making them, and do not preclude a later disaffirmance [*Niemann v. Deverich* (1950) 98 Cal. App. 2d 787, 221 P.2d 178] .

b. Minor has failed to perform any acts indicating disaffirmance within reasonable time after reaching age 18 [*Fam. Code* § 6710].

NOTE:

The circumstances of the particular case must be considered to determine whether the person seeking to disaffirm the contract has acted within a reasonable time after reaching the age of majority [*Hakes Inv. Co. v. Lyons* (1913) 166 Cal. 557, 137 P. 911] . If upon reaching majority the minor is aware of his or her right to disaffirm, the statute of limitations for an action on the contract may serve as a guide to determining a reasonable time [*Hurley v. Southern California Edison Co.* (9th Cir. 1950) 183 F.2d 125, 132 ; see *Code Civ. Proc* §§ 337 (four-year limitation for actions on written contracts), 339 (two-year limitation for actions on oral contracts)].

c. Contract has been approved by superior court [*Fam. Code* §§ 6750, 6751; see §§ 100B.33, 100B.203[1][b]].

5. Determine who should execute disaffirmance:

a. Minor, if living [*Fam. Code* § 6710].

b. If minor is deceased, minor's heir or personal representative, either [*Fam. Code* § 6710]:

(1) Administrator of estate, if estate has been administered under court supervision [see *Prob. Code* § 8461 (persons entitled to administer estate of intestate decedent)].

(2) Beneficiaries under minor's will, if minor executed will after reaching age 18 or becoming emancipated.

(3) Heirs under laws of intestate succession [see *Prob. Code* §§ 6400-6455].

[3] Preventing Disaffirmance

1. Determine whether third party guarantor for minor's performance is desirable [*see* § 100B.210].

NOTE:

A guaranty is not necessary if the minor's contract is not disaffirmable, and will have no effect if the contract is void. See Paragraph 1 in [2], **above**, for a list of nondisaffirmable and void contracts of minors.

- a. Ascertain that obligation is not binding on minor.
- b. Ascertain that contract is not void.
- c. Ascertain that one of following applies:
 - (1) Minor's only obligation under contract is to pay money.
 - (2) Minor's only obligation under contract is simple task not requiring minor's personal skill or knowledge.
 - (3) Oblige will accept payment of money in lieu of minor's performance of personal services or delivery of unique items.
- d. Ascertain whether proposed guarantor is:
 - (1) Over age 18.

NOTE:

The use of a minor guarantor would defeat the purpose of the guaranty clause, since the guarantor, like the primary obligor, would be able to disaffirm the obligation [*see Fam. Code* § 6710].

- (2) Within jurisdiction of court in which obligee would, if necessary, sue to enforce obligation.
- (3) In position to influence minor to honor contract.

2. Determine whether validity of contract should be conditioned on superior court approval [*see* § 100B.203].

- a. Ascertain that contract is subject to court approval procedure [*Fam. Code* § 6750; *Lab. Code* § 1700.37; *see* § 100B.203].
- b. Determine whether risk of minor's disaffirmance and hardship resulting from disaffirmance justify time and expense required to obtain court approval of contract.

NOTE:

For a procedural guide to obtaining court approval of a minor's contract, see California Forms of Pleading and Practice, Ch. 364, **Minors: Contract Actions** (Matthew Bender).

c. Ascertain that minor's parent or guardian will consent to court's plan to preserve minor's earnings under contract [*see Fam. Code § 6752*].

NOTE:

The court must order that 15 percent of a minor's earnings under an entertainment industry or professional sports employment contract be set aside and preserved for the minor's future use. The individual (at least one custodial parent or guardian) who serves as trustee must provide the minor's employer with a copy of a statement that identifies the trust account into which the earnings will be placed and must render an annual accounting for the trust funds [*Fam. Code §§ 6752, 6753; see § 100B.204*].

[4] Release of Contract Claims by or Against Minor

NOTE:

The following determinations address only those aspects of settlement and release that are unique to minors' contract claims. For a general guide to settlement and release of claims, see Ch. 77, ***Discharge of Obligations***. For coverage of tort claims by or against minors, see Ch. 100A, ***Personal Affairs of Minors***.

1. If claim involves minor's contract breach, determine whether minor can avoid liability by disaffirming contract.

NOTE:

A minor can disaffirm most types of contractual obligations without incurring liability for breach [*Fam. Code §§ 6710, 6711*]. For a list of contracts that cannot be disaffirmed, and a list of acts by the minor that may extinguish the right of disaffirmance, see Paragraph 1 in [2], ***above***.

2. Ascertain that claim does not involve any of following acts, for which release of liability through contract is prohibited [*Civ. Code § 1668*]:

- a. Fraud.
- b. Willful injury to persons or property.
- c. Violations of law.

3. Determine extent of release, considering following [*see Civ. Code §§ 1541-1543*]:

- a. General release is appropriate if parties wish to cancel contract.
- b. Special release is appropriate if claim involves litigation or dispute over single breach or aspect of contract, and parties wish to continue contractual relationship.
- c. Release of later-discovered claims is generally appropriate only if likelihood of later-discovered claims is very low.

4. Determine who may properly execute release, either:

- a. Guardian of minor's estate [*Prob. Code § 2500(a)(1)*].
 - b. If minor has no guardian of estate, one of following [*Prob. Code § 3500(a)*]:
 - (1) Custodial parent [*Prob. Code § 3500(a)(2)*].
 - (2) Either parent, if parents are living together [*Prob. Code § 3500(a)(1)*].
 - c. Minor, if emancipated [*Fam. Code § 7050(e)(5)*].
 - d. Only guardian of estate or guardian ad litem, if action or proceeding on claim has been filed [*Code Civ. Proc. § 372*].
5. Determine whether one of following circumstances exists, requiring prior court approval of compromise and release:

NOTE:

For forms and discussion relating to court approval of the compromise and release of a minor's claim, see California Forms of Pleading and Practice, Ch. 364, **Minors: Claims and Property of Minors** (Matthew Bender).

- a. Compromise requires transfer or encumbrance of property belonging to minor's estate, or creation of unsecured liability of estate, in amount or value exceeding \$25,000 [*Prob. Code § 2502*].
- b. Compromise involves claim by minor against guardian or guardian's attorney, whether or not arising out of administration of minor's estate [*Prob. Code § 2503*].
- c. Compromise involves minor's claim for support, maintenance, or education of self or children, or for wrongful death [*Prob. Code § 2504(a), (b)*].
- d. Compromise involves real property interests, other than extension, renewal, or modification of lease in situation in which either of following applies [*Prob. Code § 2501(b)*]:

NOTE:

Because minors lack the capacity to contract regarding interests in real property [*Fam. Code § 6701*], a minor would rarely have occasion to enter into a compromise of a contract claim involving real property.

- (1) Under lease as extended, renewed, or modified, rental does not exceed \$5,000 per month and term does not exceed two years.
- (2) Lease is from month to month, regardless of amount of rent.
- e. Compromise is executed by minor's parent or parents [*Prob. Code § 3500(b)*].
- f. Action or proceeding on claim has been filed [*Code Civ. Proc. § 372*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties Age Contracts Law Types of Contracts General Overview



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 100B CONTRACTS AND EMPLOYMENT OF MINORS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

31-100B California Legal Forms--Transaction Guide § 100B.111

§ 100B.111 Employment of Minors

[1] Prohibited Occupations

[a] Occupations Prohibited Under Federal Law

NOTE:

Many occupations are subject to both federal and state laws and regulations [*see* [b], *below*]. If so, the statute or regulation that provides the more protective standard will govern [29 C.F.R. § 570.50(a)].

1. If proposed employment is in agricultural occupation, determine that none of following is involved:

NOTE:

"Agricultural occupations" include, for these purposes, farming in all its branches, including but not limited to the cultivation and tilling of soil, dairying, and the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities; the raising of livestock, bees, fur-bearing animals, or poultry; and any practices performed by a farmer or on a farm as an incident to or in conjunction with farming operations [*see* 29 C.F.R. § 570.70(c)(1)]. Exemptions from the prohibition against minors' employment in these occupations may be made for student-learners, children who have completed special Federal Extension Service training programs, and vocational agriculture students [*see* 29 C.F.R. § 570.72].

- a. Employment of minor under age 14, unless one of following applies [*see* 29 U.S.C. § 213(c)(1)]:

- (1) Minor is employed by parent or person standing in place of parent, on farm owned or

operated by that person.

(2) Minor is employed with permission of parent or person standing in place of parent on farm where none of employees is required to be paid at rate prescribed by 29 U.S.C. § 206(a)(4).

(3) Minor is at least age 12, and either:

(a) Employment is at same place as that of parent or person standing in place of parent;
or

(b) Employment is with permission of parent or person standing in place of parent.

(4) Minor is at least age 10, and both of following apply:

(a) Minor's employment will be limited to hand-harvest of short-season crops.

(b) Employer holds valid waiver for employment of minors ages 10 to 12 for hand-harvest of short-season crops [see 29 U.S.C. § 213(c)(4)].

b. Employment of minor under age 16 in any of following occupations, unless parent or person standing in place of parent is employer and owns or operates farm [29 C.F.R. § 570.71; see 29 U.S.C. § 213(c)(2)]:

(1) Operating or connecting or disconnecting implements or parts to or from tractors of over 20 PTO horsepower.

(2) Operating or assisting to operate:

(a) Corn or cotton picker, grain combine, hay mower, forage harvester, hay baler, potato digger, or mobile pea viner.

(b) Feed grinder, crop dryer, forage blower, auger conveyor, or unloading mechanism of non-gravity-type self-unloading wagon or trailer.

(c) Power post-hole digger, power post driver, or non-walking-type rotary tiller.

(d) Trencher or earthmoving equipment.

(e) Fork lift.

(f) Potato combine.

(g) Power-driven circular, band, or chain saw.

(3) Working on farm or in yard, pen, or stall occupied by:

(a) Bull, boar, or stud horse maintained for breeding purposes.

(b) Sow with suckling pigs.

(c) Cow with newborn calf (with umbilical cord present).

- (4) Felling, bucking, skidding, loading, or unloading timber with butt diameter of more than six inches.
- (5) Working from ladder or scaffold at height of over 20 feet.
- (6) Driving bus, truck, or automobile when transporting passengers, or riding on tractor as passenger or helper.
- (7) Working inside:
 - (a) Fruit, forage, or grain storage designed to retain oxygen-deficient or toxic atmosphere.
 - (b) Upright silo within two weeks after silage has been added or when top unloading device is in operating position.
 - (c) Manure pit.
 - (d) Horizontal silo while operating tractor for packing purposes.
- (8) Handling or applying specified agricultural chemicals [*see 29 C.F.R. § 570.71(a)(9); 7 U.S.C. § 135*].
- (9) Handling or using blasting agents, including but not limited to:
 - (a) Dynamite.
 - (b) Black powder.
 - (c) Sensitized ammonium nitrate.
 - (d) Blasting caps.
 - (e) Primer cord.
- (10) Transporting, transferring, or applying anhydrous ammonia.

2. If minor is under age 16 and proposed employment is in commerce [*see 29 U.S.C. § 203(b)* (definition)], production of goods for commerce, or any enterprise engaged in commerce or production of goods for commerce [*see 29 U.S.C. § 203(s)* (definition)], determine that employment is in one of following occupations open to minors:

NOTE:

Except as specifically provided otherwise by statute or regulation, the employment of minors under the age of 16 in commerce, the productions of goods for commerce, or any enterprise engaged in commerce or production of goods for commerce is considered oppressive child labor and is prohibited [*29 U.S.C. § 203(l)*]. "Commerce" for this purpose means interstate commerce [*29 U.S.C. § 203(b)*] and, while the scope of activities covered is quite broad, it does not include all of the activities subject to the constitutional power of Congress over commerce [*Mitchell v. Welcome Wagon, Inc. (D.C. Tenn. 1954)* 139 F. Supp. 674, 678 , **aff'd**, 232 F.2d 892 (6th Cir. 1956)] .

a. Any occupation in which minor is employed by parent or person standing in parent's place, except for [29 U.S.C. § 203(l)]:

(1) Mining.

(2) Manufacturing.

(3) Other occupations determined by Secretary of Labor to be particularly hazardous to minors.

b. Actor or performer in motion pictures, theatrical productions, or radio or television productions [29 U.S.C. § 213(c)(1)(C)].

c. Newspaper carrier [29 U.S.C. § 213(d)].

d. Homeworker engaged in making of ornamental wreaths [29 U.S.C. § 213(d)].

e. Occupations in foreign countries or certain territories under United States jurisdiction [29 U.S.C. § 213(f)].

f. For minors over age 14 [29 C.F.R. § 570.34(a)]:

(1) Office and clerical occupations.

(2) Following retail occupations:

(a) Cashiering.

(b) Selling.

(c) Price marking and tagging.

(d) Assembling orders.

(e) Packing and shelving.

(f) Bagging and carrying customers' orders.

NOTE:

Minors may not load or unload goods to or from trucks, railroad cars, or conveyors [29 C.F.R. § 570.34(b)(8)].

(3) Producing artwork.

(4) Advertising occupations.

(5) Trimming windows.

(6) Comparative shopping.

(7) Modeling.

(8) Making deliveries and running errands by foot, bicycle, or public transportation.

(9) Cleaning or ground maintenance not involving use of power-driven mowers or cutters.

NOTE:

Outside window washing that involves working from window sills, and all work requiring the use of ladders, scaffolds, or their substitutes, is prohibited to minors under the age of 16 [29 C.F.R. § 570.34(b)(4)].

(10) Kitchen work and other work involved in preparing and serving food and beverages, including operating machines and devices used in performing such work.

NOTE:

Baking and cooking are prohibited except (1) with electric or gas grilles that do not involve cooking over an open flame, and (2) with a deep fryer that is equipped with and utilizes a device that automatically lowers a basket into the hot oil or grease and automatically raises the basket from the hot oil or grease [29 C.F.R. § 570.34(b)(5)]. Also prohibited are occupations that involve operating, setting up, adjusting, cleaning, oiling, or repairing power-driven food slicers and grinders, food choppers, and cutters, and bakery-type mixers [29 C.F.R. § 570.34(b)(6)].

(11) Cleaning vegetables and fruits, and wrapping, sealing, labeling, weighing, pricing, and stocking foodstuffs.

NOTE:

The preparation of meats for sale, other than wrapping, sealing, labeling, weighing, pricing, and stocking, is prohibited to minors under the age of 16 [29 C.F.R. § 570.34(b)(7)].

(12) Dispensing gasoline and oil to cars and trucks, courtesy service, and car cleaning, washing, and polishing.

NOTE:

Jobs involving the use of pits, racks, lifting apparatus, the inflation of any tire mounted on a rim equipped with a removable retaining ring, or the operation of motor vehicles or service as helpers on motor vehicles are prohibited to minors [29 C.F.R. §§ 570.33(c), 570.34(a)(8)].

3. If minor is under age 16 and proposed employment is in commerce, production of goods for commerce, or any enterprise engaged in commerce or production of goods for commerce [see 29 U.S.C. § 203(b), (s) (definitions)], and occupation is permitted to minors [see P 2, *above*], ascertain that following prohibited conditions of employment are not present:

a. Goods are manufactured, mined, or otherwise processed in workroom or workplace of minor [29 C.F.R. § 570.33(a)].

b. Job involves operation or tending of hoisting apparatus or power-driven machinery other than office machines, or maintenance or repair of machines or equipment [29 C.F.R. §§ 570.33(b), 570.34(b)(3)].

c. Employer is public messenger service [29 C.F.R. § 570.33(d)].

d. Job is connected with transportation of persons or property by rail, highway, air, water, pipeline, or

other means [29 C.F.R. § 570.33(f)(1)].

e. Job is connected with warehousing and storage, communications and public utilities, or construction, or involves maintenance or repair of the workplace establishment [29 C.F.R. §§ 570.33(f)(2)-(4), 570.34(b)(3)].

f. Work is performed in or about boiler or engine rooms [29 C.F.R. § 570.34(b)(2)].

4. If minor is over age 16 and proposed employment is in commerce, production of goods for commerce, or any enterprise engaged in commerce or production of goods for commerce [see 29 U.S.C. § 203(b), (s) (definitions); see also P [2], above], ascertain that employment is not in any of following prohibited occupations [29 U.S.C. § 203(l); see 29 C.F.R. §§ 570.41-570.49]:

a. Occupations in or about plants or establishments that manufacture or store explosives or articles containing explosive components [see 29 U.S.C. § 570.51(b)(2) (definition)], except for [29 C.F.R. § 570.51(a)(1)]:

(1) Occupations in retail establishments.

(2) Occupations performed in "nonexplosives area" of establishment [see 29 C.F.R. § 570.51(b)(3) (definition)].

b. Following occupations in or about plants or establishments that manufacture or store small-arms ammunition not exceeding .60 caliber size, shotgun shells, or blasting caps when manufactured or stored in conjunction with manufacture of small-arms ammunition [29 C.F.R. § 570.51(a)(2)]:

(1) Occupations involving manufacture, mixing, transport, or handling of explosive compounds used in small-arms ammunition, or performance of other duties in area in which explosive compounds are manufactured or mixed.

(2) Occupations involving manufacture, transport, or handling of primers or performance of other duties in building in which primers are manufactured.

(3) Occupations involving priming of cartridges or performance of other duties in same workroom in which rim-fire cartridges are primed.

(4) Occupations involving plate loading of cartridges or operation of automatic loading machines.

(5) Occupations involving loading, inspection, packing, shipping, and storage of blasting caps.

c. Occupation of motor vehicle driver or outside helper on public roads or highways, or in or about mines, logging, or sawmill operations, or excavations [see 29 C.F.R. § 570.68(a)], except for occasional operation of car or truck not exceeding 6,000 pounds gross vehicle weight, during daylight hours, if certain other requirements are also met [see 29 U.S.C. § 570.52(b)].

d. Occupations in or about coal mines, except for [29 C.F.R. § 570.53]:

(1) Occupation of slate or other refuse picker at picking table or chute in tippie or

breaker.

(2) Occupations performed entirely in offices or in repair or maintenance shops located in surface part of plant.

e. Logging occupations, and occupations involving operation of sawmills, lath mills, shingle mills, and cooperage-stock mills [see 29 C.F.R. § 570.54(b) (definitions)], except for:

NOTE:

The exceptions relating to work in mills do not apply to work that involves entering the sawmill building, or to any portable sawmill the lumberyard of which is used only for the temporary storage of green lumber and that does not ordinarily maintain an office or repair or maintenance shop [29 C.F.R. § 570.54(a)(2)].

(1) Work in offices or repair or maintenance shops.

(2) Construction, operation, repair, or maintenance of logging camp administrative or living quarters.

(3) Forest protection work and work in timber cruising, surveying, or logging-engineering parties that does not involve felling or bucking of timber, collection or transport of logs, operation of power-driven machinery, handling of explosives, or work on trestles.

(4) Peeling of fence posts and similar products.

NOTE:

This work may not be done in conjunction with or at the same time and place as any logging operations prohibited to minors [29 C.F.R. § 570.54(a)(1)(iv)].

(5) Feeding and caring for animals.

(6) Straightening, marking, or tallying lumber on dry chain or dry drop sorter.

(7) Pulling lumber from dry chain.

(8) Lumberyard cleanup.

(9) Piling, handling, or shipping cooperage stock in yards or storage sheds other than operating or assisting in operating power-driven equipment.

(10) Clerical work in yards or shipping sheds.

(11) Clean-up work outside shake and shingle mills, except when mill is operating.

(12) Splitting shakes manually from precut and split blocks with froe and mallet, and packing shakes into bundles in conjunction with this work, except inside mill building or cover.

(13) Manually loading bundles of shingles or shakes into trucks or railroad cars.

NOTE:

The employer must maintain on file a statement from a licensed doctor of medicine or osteopathy certifying that the minor is capable of performing this work without injury [29 C.F.R. § 570.54(a)(2)(x)].

f. Following occupations involving operation of power-driven woodworking machines [29 C.F.R. § 570.55], unless minor employed as apprentice or student-learner under specified conditions [see 29 C.F.R. § 570.50(b), (c)]:

(1) Operating, supervising, or controlling operation of, or feeding material or helping operator feed material into machines.

NOTE:

Minors between the ages of 16 and 18 are not prohibited from placing material on moving chains or in hoppers or slides for automatic feeding of woodworking machines [29 C.F.R. § 570.55(a)(1)].

(2) Setting up, adjusting, repairing, oiling, or cleaning machines.

(3) Off-bearing from circular saws and from guillotine-action veneer clippers.

g. Following occupations involving exposure to radioactive substances and ionizing radiations [29 C.F.R. § 570.57; see 29 C.F.R. § 570.57(b) (definitions)]:

(1) Occupations pursued in workrooms where radium is stored or used in manufacture of self-luminous compound; self-luminous compound is made, processed, packaged, stored, used, or worked on; incandescent mantels are made from fabric and solutions containing thorium salts, or are processed or packaged; or other radioactive substances are present in air in average concentrations exceeding 10 percent of maximum permissible concentrations [see 29 C.F.R. § 570.57(a)(1)].

(2) Occupations involving exposure to ionizing radiations in excess of 0.5 rem per year.

h. Following occupations involving operation of power-driven hoisting apparatus [29 C.F.R. § 570.58]:

(1) Operation of elevators, cranes, derricks, hoists, or high-lift trucks.

NOTE:

Minors between the ages of 16 and 18 are not prohibited from operating unattended automatic operation passenger elevators or electric or air-operated hoists not exceeding one-ton capacity [29 C.F.R. § 570.58(a)(1)], nor automatic elevators and signal operation elevators under certain circumstances [see 29 C.F.R. § 570.58(c)].

(2) Occupations involving riding on manlifts or on freight elevators not operated by assigned operators.

(3) Assisting in operation of cranes, derricks, or hoists performed by crane hookers, crane chasers, hookers-on, riggers, rigger helpers, and like occupations.

i. Operating, setting up, adjusting, repairing, oiling, cleaning, or helping place materials into or remove materials from following power-driven metal-forming, punching, and shearing machines, unless minor employed as apprentice or student-learner under specified conditions [29 C.F.R. § 570.59; see 29 C.F.R. § 570.50(b), (c)]:

NOTE:

Specific examples of the following types of machines are listed under 29 C.F.R. § 570.59(a)(1)(i)-(v).

(1) Rolling machines.

(2) Pressing or punching machines, except for punch presses with fully automatic feed and ejection, and fixed barrier guard.

(3) Bending machines.

(4) Hammering machines.

(5) Shearing machines.

j. Occupations in connection with mining, other than coal mining, except for [29 C.F.R. § 570.60].

(1) Work in offices, warehouses or supply houses, change houses, laboratories, or repair or maintenance shops not located underground.

(2) Operation or maintenance of living quarters.

(3) Surveying, repairing, and maintaining roads, and general cleanup not done inside mine.

(4) Track crew work involving building and maintaining sections of railroad track in areas of open-cut metal mines where mining and haulage activities are not conducted at same time and place.

(5) Work in or about surface placer mining operations, other than placer dredging operations and hydraulic placer mining operations.

(6) Operation of jigs, sludge, tables, flotation cells or drier-filters, hand-sorting at picking tables or belts, or general clean-up work in metal mills other than mercury-recovery mills or mills using cyanide process.

k. Following occupations in or about slaughtering and meat-packing establishments, rendering plants, or wholesale, retail, or service establishments [29 C.F.R. § 570.61], unless minor is employed as apprentice or student-learner under specified conditions [see 29 C.F.R. § 570.50(b), (c)]:

NOTE:

Minors over the age of 16 are not prohibited from occupations involving the killing and processing of poultry, rabbits, or small game in areas physically separated from the killing floor [29 C.F.R. § 570.61(c)(1)].

(1) All occupations on killing floor, in curing cellars, and in hide cellars (except work of messengers, runners, and similar persons who enter these areas infrequently and for short periods of time).

(2) Occupations involving recovery of lard and oils, except packaging and shipping and operation of lard-roll machines.

(3) Occupations involving tankage or rendering of animal products into stock feeds, tallow, inedible greases, fertilizer ingredients, and similar products.

(4) Occupations involving operating or feeding certain power-driven meat processing machines [see 29 C.F.R. § 570.61(a)(4)].

(5) Boning occupations.

(6) Occupations involving pushing or dropping any suspended carcass, half carcass, or quarter carcass.

(7) Occupations involving hand lifting or hand carrying any carcass or half carcass of beef, pork, or horse, or any quarter carcass of beef or horse.

l. Occupations involving operating, assisting to operate, setting up, adjusting, repairing, oiling, or cleaning following bakery machines [29 C.F.R. § 570.62]:

(1) Horizontal or vertical dough mixer.

(2) Batter mixer.

(3) Bread dividing, rounding, or molding machine.

(4) Dough brake.

(5) Dough sheeter.

(6) Combination bread slicing and wrapping machine.

(7) Cake cutting band saw.

(8) Cookie or cracker machine.

NOTE:

The prohibition regarding cookie and cracker machines applies only to setting up and adjusting them [29 C.F.R. § 570.62(a)(2)].

m. Occupations involving operating or assisting to operate following power driven paper-products machines [29 C.F.R. § 570.63], and setting up, adjusting, repairing, oiling, or cleaning them, unless minor employed as apprentice or student-learner under specified conditions [see 29 C.F.R. § 570.50(b), (c)]:

(1) Arm-type wire stitcher or stapler.

(2) Circular or band saw.

(3) Corner cutter or mitering machine.

(4) Corrugating and single- or double-facing machine.

(5) Envelope or platen die cutting press.

(6) Guillotine paper cutter or shear.

(7) Horizontal bar scorer.

(8) Laminating or combining machine.

(9) Scrap paper baler or paper box compactor [*but see 29 C.F.R. § 570.63(c)* (minors age 16 and 17 may load materials into, but not operate or unload, certain scrap paper balers and paper box compactors that cannot be operated while being loaded)].

(10) Vertical slotter.

(11) Platen printing press.

(12) Punch press that involves hand feeding of machine.

(13) Sheeting machine.

n. Occupations in or about establishments in which clay construction products are manufactured, except for [29 C.F.R. § 570.64(a)(1)]:

(1) Work in storage and shipping.

(2) Work in offices, laboratories, and storerooms.

(3) Work in drying departments of plants manufacturing sewer pipe.

o. Occupations in or about establishments in which silica brick or other silica refractories are manufactured, except for work in offices [29 C.F.R. § 560.64(a)(2)].

p. Setting up, adjusting, repairing, oiling, or cleaning following power-driven machines, and operating or helping to operate machines not equipped with fully automatic feed and ejection [29 C.F.R. § 570.65], unless minor employed as apprentice or student-learner under specified conditions [*see 29 C.F.R. § 570.50(b), (c)*]:

(1) Circular saws.

(2) Band saws.

(3) Guillotine shears.

q. Occupations in wrecking, demolition, and shipbreaking operations [29 C.F.R. § 570.66].

r. Occupations in roofing operations and occupations on or about a roof [29 C.F.R. § 570.67], unless minor is employed as apprentice or student-learner under specified conditions [*see 29 C.F.R. § 570.50(b), (c)*].

NOTE:

"Roofing operations" means all work performed in connection with the installation of roofs, including related metal work such as flashing, and applying weatherproofing materials and substances (such as waterproof membranes, tar, slag or pitch, asphalt prepared paper, tile, composite roofing materials, slate, metal, translucent materials, and shingles of asbestos, asphalt, wood or other materials) to roofs of buildings or other structures. The term also includes all jobs on the ground related to roofing operations such as roofing laborer, roofing helper, materials handler and tending a tar heater [29 C.F.R. § 570.67(b)]

]. "On or about a roof" includes all work performed on or in close proximity to a roof, including carpentry and metal work, alterations, additions, maintenance and repair, including painting and coating of existing roofs; the construction of the sheathing or base of roofs (wood or metal), including roof trusses or joists; gutter and downspout work; the installation and servicing of television and communication equipment such as cable and satellite dishes; the installation and servicing of heating, ventilation and air conditioning equipment or similar appliances attached to roofs; and any similar work that is required to be performed on or about roofs [29 C.F.R. § 570.67(b)].

s. Following occupations in excavating operations [29 C.F.R. § 570.68], unless minor is employed as apprentice or student-learner under specified conditions [see 29 C.F.R. § 570.50(b), (c)]:

- (1) Excavating, working in, or backfilling trenches.

NOTE:

This prohibition does not apply to working in or manually excavating or backfilling trenches that do not exceed four feet in depth at any point [29 C.F.R. § 570.68(a)(1)].

- (2) Excavating for buildings or other structures or working in those excavations.

NOTE:

This prohibition does not apply to manually excavating to, or working in, depths not exceeding four feet below any ground surface adjoining the excavation, nor to working in an excavation where the side walls are shored or sloped to the angle of repose [29 C.F.R. § 570.68(a)(2)].

- (3) Working within tunnels before completion of all driving and shoring operations.

- (4) Working within shafts before completion of all sinking and shoring operations.

[b] Occupations Prohibited Under California Law

NOTE:

For purposes of the prohibitions discussed below, a person is considered a "minor" if he or she is (1) under the age of 18 and either (a) required to attend school under relevant provisions of the Education Code [see *Educ. Code* §§ 48200 *et seq.*, 48400 *et seq.*], or (b) not required to attend school under those provisions solely because he or she is a nonresident of California; or (2) under the age of six [*Lab. Code* § 1286(c); see 8 *Cal. Code Reg.* § 11705]. Many occupations are subject to both federal and state laws and regulations [see [a], *above*]. If so, the statute or regulation that provides the more protective standard will govern [29 C.F.R. § 570.50(a)].

1. If minor is under age 16, determine that employment does not involve any of following:

NOTE:

Minors who are involved in vocational or institutional training, apprenticeship programs, or work experience education programs meeting certain criteria are exempt from the prohibitions established by *Lab. Code* §§ 1292, 1293, 1294, and 1294.5 [*Lab. Code* § 1295(a); see PP b, c, d--l, q, *below*]. Minors who are involved in agricultural vocational programs, or who hold certificates of completion of certain agriculture-related programs,

in compliance with federal regulations, are exempt from the prohibitions established by *Lab. Code § 1294.1* [*Lab. Code § 1295(b)*]; *see* PP t--v, **below**].

a. Working in or in connection with manufacturing establishments [*Lab. Code § 1290*].

NOTE:

For this purpose, manufacturing work includes work done at any place on the work of a manufacturing establishment, or on any of the materials entering into the products of a manufacturing establishment, whether under contract or by arrangement with any person in charge of or connected with a manufacturing establishment directly or indirectly through contractors or third persons [*Lab. Code § 1291*].

b. Adjusting belts to machinery; sewing or lacing machine belts in workshops or factories; or oiling, wiping, or cleaning, or assisting to clean machinery [*Lab. Code § 1292*].

c. Working in close proximity to moving machinery [*8 Cal. Code Reg. § 11701(a)*], functioning parts of unguarded and dangerous moving equipment [*8 Cal. Code Reg. § 11707*], or hazardous or unguarded belts or gearing [*Lab. Code § 1293(f)*], including but not limited to operating or assisting to operate following machines [*Lab. Code § 1293*]:

(1) Circular or band saws; wood shapers; wood jointers; planers; sandpaper or wood-polishing machines; wood-turning or boring machines.

(2) Picker machines or machines used in picking wool, cotton, hair, or other material; carding machines; leather-burnishing machines; laundry machines.

(3) Printing presses; boring or drill presses; stamping machines used in sheet metal, tinware, paper and leather manufacturing, or washer and nut factories; metal or paper cutting machines; paper-lace machines.

(4) Corner-staying machines in paper box factories; corrugating rolls of type used in corrugated paper, roofing, or washboard factories.

(5) Dough brakes and cracker machines.

(6) Wire or iron straightening or drawing machines; rolling mill machines; power punches or shears; washing, grinding, or mixing machines; calendar rolls in paper and rubber manufacturing; steam boilers.

d. Working on railroads [*Lab. Code § 1294(a)*].

e. Working on vessels or boats engaged in navigation or commerce within jurisdiction of California [*Lab. Code § 1294(b)*].

f. Working in, about, or in connection with processes in which soldering or dangerous or poisonous acids are used [*Lab. Code § 1294(c)*].

g. Manufacturing or packing paints, colors, or white or red lead [*Lab. Code § 1294(c)*].

- h. Working in occupations causing dust in injurious quantities [*Lab. Code § 1294(d)*].
- i. Manufacturing or using dangerous or poisonous dyes, or compositions of lye, in quantities injurious to health, or manufacturing or preparing compositions with dangerous or poisonous gases [*Lab. Code § 1294(d)*].
- j. Building and construction work [*8 Cal. Code Reg. § 11701(b)*]; working on scaffolding; working in tunnels or excavations, or in, about, or in connection with mines, coal breakers, coke ovens, or quarries [*Lab. Code § 1294(e)*].
- k. Working in assorting, manufacturing, or packing tobacco [*Lab. Code § 1294(f)*].
- l. Operating automobiles, motor cars, or trucks [*Lab. Code § 1294(g)*]; delivering goods, merchandise, commodities, papers, or packages from motor vehicles [*8 Cal. Code Reg. § 11701(c)*].
- m. Working as messenger for telegraph, telephone, or messenger companies, or federal government agencies, in cities of more than 15,000 inhabitants [*Lab. Code § 1297*].
- n. Working in or about plants manufacturing explosives or articles containing explosive components [*8 Cal. Code Reg. § 11703*].
- o. Transporting or selling explosives or articles containing explosive components [*8 Cal. Code Reg. § 11703*].
- p. Door-to-door selling, unless following conditions are met [*8 Cal. Code Reg. § 11706(a)*]:

NOTE:

"Door-to-door sales" has the same meaning as "home solicitation contract or offer," as defined in *Civ. Code § 1689.5(a)*, but without that provision's minimum monetary limitation [*Lab. Code § 1286(e)*]. Minors under age 16 who are regularly employed as news carriers are not prohibited from door-to-door selling of, or solicitation of subscriptions to, the newspaper that they usually deliver [*8 Cal. Code Reg. § 11706.2*].

- (1) Work is done in pairs, on same or opposite side of street.
 - (2) Minors are supervised by one adult for every 10 minors, and are within sight or sound of adult at least once every 15 minutes.
 - (3) Minors are returned to homes or places of rendezvous daily after work.
 - (4) Work is done within 50 miles of minors' place of residence [*Lab. Code § 1308.1(b)*].
- q. Working in gas service stations, other than in those activities specifically permitted [*Lab. Code § 1294.5(c)*; *see also Lab. Code § 1294.3* (permitted activities)].
 - r. Selling merchandise (including newspapers) to passing motorists from fixed location on public roadway [*8 Cal. Code Reg. § 11706(b)*].
 - s. Working in close proximity to explosives, functioning parts of aircraft or vessels, or functioning

blades or propellers [8 Cal. Code Reg. § 11707].

t. Working in any agriculture-related occupation declared particularly hazardous by federal regulations [Lab. Code § 1294.1(a)(1); 29 C.F.R. § 570.71].

u. Working in any employment excluded from federal regulations permitting employment of minors 14 or 15 years of age [Lab. Code § 1294.1(a)(2); 29 C.F.R. §§ 570.33, 570.34(b)].

v. Working in any occupation declared particularly hazardous for, or detrimental to health or well-being of, minors between 16 and 18 years of age by federal regulations [Lab. Code § 1294.1(b); 29 C.F.R. § 570.50 et seq.].

NOTE:

None of the restrictions described in Paragraphs t, u, and v, **above**, prohibits a minor employed to process and deliver newspapers from entering areas of a newspaper plant, other than areas where printing presses are located, for purposes related to the minor's employment [Lab. Code § 1294.1(c)].

2. If minor is 14 or 15 years of age, determine that employment is not one of occupations prohibited by Labor Code [see P 1, *above*], and that employment is in permissible occupation, such as following [Lab. Code § 1294.3]:

NOTE:

Occupations in which a minor age 14 or 15 may be employed include, but are not limited to, the following [Lab. Code § 1294.3].

a. Office and clerical occupations.

b. Following retail occupations:

(1) Cashiering.

(2) Selling.

(3) Price marking and tagging.

(4) Assembling orders.

(5) Packing and shelving.

(6) Bagging and carrying customers' orders.

c. Producing artwork.

d. Advertising occupations.

e. Trimming windows.

f. Comparative shopping.

- g. Modeling.
- h. Making deliveries and running errands by foot, bicycle, or public transportation.
- i. Cleaning or ground maintenance not involving use of power-driven mowers or cutters.
- j. Kitchen work, including preparing and serving food and beverages.
- k. Following activities, if performed in areas physically separate from areas where meat is prepared and outside freezers and coolers:
 - (1) Cleaning vegetables and fruits.
 - (2) Sealing, labeling, weighing, pricing, and stocking goods.

3. If minor is under age 12, determine that employment does not involve working in:

- a. Agriculture-related occupations declared hazardous for employment of minors under 16 by federal regulations [*Lab. Code § 1293.1*; 29 C.F.R. § 570.71];
- b. Agricultural zones of danger [*Lab. Code § 1293.1*], which are any of the following:
 - (1) On or about moving equipment.
 - (2) In or about unprotected chemicals.
 - (3) In or about unprotected water hazards.
- c. Selling or distributing newspapers, magazines, periodicals, or circulars [*Lab. Code § 1298(a)*].

[2] Hours of Employment

1. Determine whether minor is exempt from Education Code and Labor Code restrictions on hours of employment for one of following reasons [Educ. Code § 49101, Lab. Code § 1391.2; *see* P 2, *below*]:

NOTE:

The fact that a minor is exempt from restrictions on hours worked under California law does not also exempt the minor from the restrictions imposed by the Code of Federal Regulations for occupations in or relating to interstate commerce [*see* P 2c, *below*].

- a. Minor has graduated from four-year high school course.
 - b. Minor has completed equal amount of education in private school or by private tuition.
 - c. Minor has received certificate of proficiency [*see Educ. Code § 48412*].
2. Confirm that proposed hours of employment are within following legal limits.

NOTE:

Unless otherwise specified, minors may not be employed during school hours [29 C.F.R. § 570.35(a); *see Educ. Code § 49112*].

- a. For occupations not subject to specific regulations [*Lab. Code § 1391*]:

NOTE:

The following restrictions do not apply to any minor employed to deliver newspapers to consumers [*Educ. Code §§ 49112(d), 49116(d); Lab. Code § 1391(d)*].

- (1) Starting and ending work times:

(a) If minor is 15 years of age or younger, no earlier than 7:00 A.M. and no later than 7:00 P.M. (or 9:00 P.M. from June 1 through Labor Day) [*Lab. Code § 1391(a)(1)*].

(b) If minor is 16 or 17 years of age, no earlier than 5:00 A.M. and no later than 10:00 P.M. on any day preceding school day (or 12:30 A.M. on any evening preceding nonschool day) [*Lab. Code § 1391(a)(3)*].

NOTE:

Minors over the age of 16 may work until 12:30 A.M. on days preceding school days if they are enrolled in work experience or cooperative vocational education programs, have the permission of their parent and their work experience coordinator, and the work is not detrimental to the their health, education, or welfare [*Lab. Code § 1391.1*].

- (2) Maximum hours per week:

(a) For minor 15 years of age or younger, 40 hours per week [*Lab. Code § 1391(a)(1)*].

(b) For minor 16 or 17 years of age, 48 hours per week [*Lab. Code § 1391(a)(3)*].

- (3) For any nonschool day, maximum hours worked per day may not exceed eight [*Lab. Code § 1391(a)(3)*].

- (4) Maximum hours of work permitted per school day:

(a) For minor 16 or 17 years of age, maximum of four hours, except in cases when either [*Educ. Code § 49116(b); Lab. Code § 1391(a)(4)*]:

(i) Minor is employed in personnel attendance occupation, such as babysitting [*see 8 Cal. Code Reg. § 11150(2)(J)*], or in school-approved work experience program, or in cooperative vocational education program.

(ii) Minor has been issued permit to work for up to 8 hours on school days preceding nonschool days [*Educ. Code § 49112(c)*].

(b) For minor 14 or 15 years of age, maximum of three hours [*Educ. Code § 49116(a); Lab. Code § 1391(a)(2)*].

NOTE:

Minors in this age group may work up to a maximum of 23 hours per week, rather than the regular maximum of 18, if they are enrolled in and employed pursuant to a school-supervised and school-administered work experience and career exploration program [*Educ. Code § 49116(a)*]. To obtain a work permit, minors in this group also must have completed the equivalent of the seventh grade in a public school course [*Educ. Code § 49112(a)*].

(c) For minor 13 years of age who has completed sixth grade and who has been issued special work permit, maximum of two hours per day but not over four hours per week [*Educ. Code § 49112(b)*].

NOTE:

A work permit may be issued to a 13-year-old minor who has completed the sixth grade if he or she has been identified by the school district as having the potential to drop out of school and he or she participates in an employment program, sponsored by a school district and conducted on school premises, that is intended to foster pupils' appreciation of the importance of education in preparing them for future education and employment. These permits are issued at the discretion of the school district [*Educ. Code § 49112(b)*].

b. Generally, if minor is 15 years of age or younger, maximum of 3 hours may be worked on any school day, not to exceed 18 hours per week [*Educ. Code § 49116(a)*] and maximum of 8 hours may be worked on nonschool days, not to exceed 40 hours per week [*Lab. Code § 1391*].

NOTE:

This rule is subject to the same exceptions described in P a(4)(b), **above** [*see Educ. Code § 49116(a)*; *Lab. Code § 1391(a)*].

c. For minors ages 14 to 16 employed in commerce, production of goods for commerce, or any enterprise engaged in commerce or production of goods for commerce [29 C.F.R. § 570.35(a); *see* 29 U.S.C. § 203(b), (s) (definitions); *see also* [1][a], **above**]:

(1) No earlier than 7:00 A.M., and no later than:

(a) 7:00 P.M. from day after Labor Day through May 31.

(b) 9:00 P.M. from June 1 through Labor Day.

(2) No more than 40 hours per week when school is not in session.

(3) No more than 18 hours per week when school is in session.

(4) Up to 23 hours per week when school is in session, for minors enrolled in work experience programs meeting certain requirements [*see* 29 C.F.R. § 570.35a(b)(3)].

(5) No more than eight hours per nonschool day.

(6) No more than three hours per school day.

d. For minors engaged in messenger occupations, no earlier than 6:00 A.M. and no later than 9:00 P.M. [*Lab. Code § 1297*].

NOTE:

This restriction does not apply to any minor employed to deliver newspapers to consumers [*Lab. Code* § 1297].

e. For minors employed in entertainment industry [*Lab. Code* § 1308.7(a); see 8 *Cal. Code Reg. §* 11760; see also [5], below]:

- (1) No more than eight hours in one day of 24 hours.
- (2) No more than 48 hours in one week.
- (3) No earlier than 5:00 A.M., and no later than 10:00 P.M. on any day preceding a school day.

NOTE:

During any evening preceding a nonschool day, a minor may work until 12:30 A.M. of the nonschool day [*Lab. Code* § 1308.7(a)].

f. For minors ages 16 and 17 employed by agricultural packing plant issued exemption by Labor Commissioner, no more than 10 hours on any day during peak harvest season that school is not in session [*Lab. Code* § 1393(a)].

3. If proposed hours of employment conflict with school hours, determine whether either of following is appropriate:

a. Full-time work permit, which is available when either [*Educ. Code* § 49130]:

NOTE:

Minors holding full-time work permits are required to attend part-time continuation classes [*Educ. Code* § 49135], and their parents or guardians may be held criminally liable for failure to compel their attendance [*Educ. Code* §§ 48450, 48454].

(1) Minor is between ages of 14 and 16 and has graduated from elementary school course, and any of following apply:

- (a) Parent or guardian is incapacitated for labor due to illness or injury.
- (b) Minor's family is in need of minor's earnings due to death or desertion of father or mother and unavailability of sufficient aid from other sources.
- (c) Minor is unable to reside with family and minor's earnings are necessary for minor's support.
- (d) Minor is in foster care and purpose of employment is enabling minor to gain work skills and habits.

(2) Minor is over 16 years old [*Educ. Code* § 49131].

b. Leave of absence from school, which is available when [*Educ. Code* § 48232; see §§ 100B.121[2], 100B.243]:

- (1) Minor will be at least 15 years old when leave of absence begins.
- (2) Minor's school district has written policy authorizing pupil leaves of absence.

(3) Job is not available under another education option.

NOTE:

In practice, school officials generally require not only that the job be unavailable under other education options, but also that it be sufficiently educational, prestigious, or unusual to justify the suspension of formal schooling.

[3] Work Permits

1. Determine whether minor is exempt from work permit requirements because of existence of one of following circumstances:

NOTE:

Minors are permitted to work only if they hold a valid work permit or are exempt from the work permit requirements by the provisions of the Education Code [*Lab. Code § 1290*].

a. Minor is under 12 years of age and is not seeking employment in entertainment industry [*see Educ. Code § 49111, 8 Cal. Code Reg. § 11753(a)*].

NOTE:

Regular work permits are not issued to minors under the age of 12 [*see Educ. Code § 49111*].

b. Minor is employed by parent or guardian in entertainment industry or other industry not subject to special work permit requirements [*Educ. Code § 49141*].

c. Minor is employed in babysitting, newspaper delivery, yard work, or similar occupation [*18 Ops. Cal. Atty. Gen. 114 (1951) ; see Educ. Code § 49112(d)*].

d. Minor's employment will be confined to participation in horseback riding exhibitions, contests, or certain other related events [*Educ. Code § 49119; see Lab. Code § 1308(b)(3)*].

e. Minor's employment consists of appearance or participation in one of following events [*Lab. Code § 1310*]:

(1) Single radio or television broadcast lasting no more than one hour, if minor receives no compensation and no admission fee is charged.

(2) Entertainment event produced by church, school, or community.

(3) Entertainment event for charity or children for which no admission fee is charged.

(4) Any one event during calendar year, occurring on day on which school attendance is not required or on day preceding such a day, lasting four hours or less, if minor's parent or guardian is present and minor is not compensated.

f. Minor has done one of following [*Educ. Code § 49101*]:

- (1) Graduated from high school maintaining four-year course above eighth grade.
- (2) Received equal amount of private education.
- (3) Obtained certificate of proficiency [*see Educ. Code § 48412*].

NOTE:

Any person who is 16 or older, or has completed one year of enrollment in the tenth grade, may take the proficiency examination [*Educ. Code § 48412(a)*]. A copy of the California High School Proficiency Examination booklet and other information regarding the examination may be obtained from the local public school administrative office.

2. Determine type of work permit required.

a. Regular work permit, if [*see § 100B.240*]:

- (1) Minor is over 12 and plans to work only during school vacations or other periods of exemption from compulsory school attendance [*Educ. Code § 49111*].
- (2) Minor is 14 or 15 and [*Educ. Code § 49112(a)*]:
 - (a) Has completed equivalent of seventh grade in public school course.
 - (b) Plans to work outside of school hours for no more than three hours per school day.
- (3) Minor is at least 16 and plans to work [*Educ. Code § 49112(a), (c)*]:
 - (a) Outside of school hours.
 - (b) No more than eight hours on school days preceding nonschool days.
 - (c) No more than four hours on other school days.
- (4) Minor is over 14 and plans to work part-time in work experience education course [*Educ. Code § 49113*].

NOTE:

Requirements for work experience education courses are set forth under *Educ. Code §§ 51760-51769*.

(5) Minor is 13 years old and has done all of following [*Educ. Code § 49112(b)*]:**NOTE:**

Work permits for 13-year-old minors are issued at the discretion of the school district in which the minor is enrolled and must limit the minor's hours of employment to two hours per day and four hours per week [*Educ. Code § 49112(b)*].

- (a) Completed sixth grade.
- (b) Been identified by school district as having potential to drop out of school.

(c) Enrolled in employment program sponsored by school district and intended to foster pupils' appreciation of importance of education in preparing them for future education and employment.

b. Full-time work permit, if either [*Educ. Code* § 49130]:

(1) Minor is between ages of 14 and 16 and has graduated from elementary school course, and any of following apply:

(a) Parent or guardian is incapacitated for labor due to illness or injury.

(b) Minor's family is in need of minor's earnings due to death or desertion of father or mother and unavailability of sufficient aid from other sources.

(c) Minor is unable to reside with family and minor's earnings are necessary for minor's support.

(d) Minor is in foster care and purpose of employment is enabling minor to gain work skills and habits.

(2) Minor is over 16 years old [*Educ. Code* § 49131].

c. Certificate of age if both [*Educ. Code* § 49114]:

(1) Minor is not required to attend school.

(2) Minor is not exempt from work permit requirements [*see* P 1, *above*].

d. Entertainment industry work permit [*8 Cal. Code Reg. § 11753(a); see § 100B.241*], if:

(1) Minor is over 15 days old [*see 8 Cal. Code Reg. § 11760*].

NOTE:

Entertainment industry work permits are not issued to infants who are less than 15 days old [*see 8 Cal. Code Reg. § 11760*].

(2) Minor will work in [*Lab. Code* § 1308.5; *8 Cal. Code Reg. § 11751*]:

(a) Television.

(b) Radio broadcasting.

(c) Motion pictures.

(d) Photography.

(e) Recording.

(f) Modeling.

- (g) Theatrical productions.
- (h) Publicity.
- (i) Rodeos.
- (j) Circuses.
- (k) Musical performances.
- (l) Any other performances by minors to entertain the public.

[4] Permits to Employ

NOTE:

Unless otherwise exempted by statute, every person, firm, or corporation that employs a minor must have a permit to employ that minor [*Educ. Code § 49160*].

1. Determine whether employer is exempt from permit requirements because of existence of one of following circumstances:

- a. Employer is minor's parent or guardian, and employment is not in entertainment industry or other industry with special permit requirements [*Educ. Code § 49141*].
- b. Minor has received high school diploma or equivalent [*Educ. Code § 49101*].
- c. Employer is private person and employs minor as babysitter, gardener, or in similar occupation [*18 Ops. Cal. Atty. Gen. 114 (1951)*].

2. Determine type of permit required.

- a. Regular permit to employ [*see § 100B.240*], for non-entertainment industry employer of minor who is required to attend school.

NOTE:

The California State Department of Education issues a single permit form that serves as both the minor's permit to work and the employer's permit to employ the minor [*see § 100B.240* (permit application)].

- b. Certificate of age, for employment of minor exempt from compulsory schooling for reasons other than having obtained high school degree or its equivalent [*Educ. Code § 49114*].
- c. Permit to employ minors in entertainment industry [*8 Cal. Code Reg. § 11751(b)*; *see § 100B.22*].
- d. Blanket permit to employ minors in entertainment industry, for employment of group or organization of minors in single production by employer that does not ordinarily employ or provide suitable working conditions for minors [*8 Cal. Code Reg. § 11754*; *see § 100B.242[1][d]*].

[5] Additional Determinations for Entertainment Industry Employment

1. Ascertain that proposed contract does not violate any existing contract for minor's exclusive services.
2. Ascertain that employer has arranged for required adult supervision of minor employees:
 - a. By studio teacher:

NOTE:

Studio teachers are certified teachers who hold valid California Elementary and Secondary teaching credentials and have been certified on examination by the Labor Commissioner [8 Cal. Code Reg. § 11755]. They are responsible for the education of all minors employed in the entertainment industry, and for the general supervision of those under age 16 [8 Cal. Code Reg. § 11755.2]. For a more detailed discussion of the role of studio teachers in the entertainment industry employment of minors, see § 100B.202[1][c], [d].

(1) For infants age 15 days to 6 weeks, one studio teacher per every three or fewer infants [8 Cal. Code Reg. § 11760(a)(2)].

(2) For infants age 6 weeks to 6 months, one studio teacher per every 10 or fewer infants [8 Cal. Code Reg. § 11760(a)(2)].

(3) For minors age 15 days to 16 years [8 Cal. Code Reg. § 11755.2]:

- a. One studio teacher per every 10 or fewer minors on school days.

- b. One studio teacher per every 20 or fewer minors on nonschool days.

(4) For minors age 16 or over, one studio teacher per every 10 or fewer minors on school days only and for educational purposes only (general supervision not required).

(5) For groups of 100 or more minors employed pursuant to blanket permit to employ, as specified by Labor Commissioner on employer's request for special arrangements [8 Cal. Code Reg. § 11754(c)].

b. By nurse [8 Cal. Code Reg. § 11760(a)(2)]:

(1) For infants age 15 days to 6 weeks, one nurse per every three or fewer infants.

(2) For infants age 6 weeks to 6 months, one nurse per every 10 or fewer infants.

c. By parent or guardian [8 Cal. Code Reg. § 11757]:

(1) For minors under age 16, parent or guardian must be within sight or sound of minor at all times.

(2) Parent or guardian not required to be present for minors age 16 or over.

(3) For minors working for employers holding blanket permits to employ, one parent or guardian for

every 20 or fewer minors [8 Cal. Code Reg. § 11754(e)].

[6] Registration of Persons Hiring or Transporting Minors Engaged in Door-to-Door Sales

1. Determine whether registration with Labor Commissioner is required because client is individual, association, corporation, or other entity that employs or uses, directly or indirectly through third persons, minors under 16 years of age in door-to-door sales anywhere more than 10 miles from minor's residence [Lab. Code § 1308.3(a)].

NOTE:

This requirement does not apply to trustees, charitable corporations, or certain other entities [Lab. Code § 1308.3(g)].

2. Determine whether registration with Labor Commissioner is required because client is person over 18 years of age who transports, or provides direction or supervision during transportation of, minor under 16 years of age to location more than 10 miles from minor's residence, or directs or supervises minor, for purpose of facilitating minor's participation in door-to-door sales of any commodity [Lab. Code § 1308.2(a)].

NOTE:

This requirement does not apply to any minor's parents or guardians, anyone solely providing transportation for hire who is not otherwise subject to registration, or anyone acting on behalf of trustees, charitable corporations, or certain other entities [Lab. Code § 1308.2(f)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties Age Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Wage & Hour Laws Child Labor



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CHAPTER 100B CONTRACTS AND EMPLOYMENT OF MINORS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 100B CONTRACTS AND EMPLOYMENT OF MINORS
PART III. TRANSACTION GUIDE
C. Procedural Guide

31-100B California Legal Forms--Transaction Guide § 100B.120

§ 100B.120 Procedural Guide to Contracts Involving Minors

[1] Contracts for Necessities

1. Draft contract to include following [*see § 100B.200*]:

NOTE:

For general guides to contract drafting and standard contractual provisions, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions*** . For contracts governing sales of goods under the Uniform Commercial Code, see Ch. 52, ***Sales of Goods Under the Uniform Commercial Code*** .

a. Preliminary matters, including:

(1) Name of each party.

(2) Acknowledgment of minor's age.

(3) Minor's statement that goods or services to be provided are necessary to support minor or minor's family [*see Fam. Code § 6712(a)*].

(4) Minor's statement that parent or guardian is absent or unable to provide subject goods or services [*see Fam. Code § 6712(c)*].

b. Terms of contract, including:

(1) Description of goods or services to be provided.

(2) Price and payment terms.

(3) Required disclosure statements, if contract provides for interest or installment payments [*see 15 U.S.C. § 1606 et seq.; Civ. Code § 1801 et seq.; see also Ch. 45, Consumer Installment Loans and Credit Sales*].

(4) Guarantor or security arrangements, if any.

c. General provisions, including:

(1) Entire agreement clause.

(2) Choice of law clause.

(3) Attorneys' fees clause.

2. Review draft with client.

a. Explain that minor cannot disaffirm contract [*Fam. Code § 6712; see §§ 100B.22[2], 100B.200[1][b]*].

b. Ascertain that minor fully understands credit terms, if any.

c. Inform provider of necessities that he or she can also recover reasonable value of necessities actually provided to minor from minor's parent or guardian, to extent parent or guardian is able to pay [*Fam. Code § 3950*].

3. Obtain signatures of all parties.

4. Indicate date and place of agreement.

5. Provide each party with signed copy of contract, and keep copy for attorney's records.

[2] Ratification of Contracts

NOTE:

In order for the ratification of a minor's contract to be valid and binding, it must be executed after the minor reaches age 18. Ratifications executed by a minor are not binding [*see Fam. Code § 6700, 6710; Niemann v. Deverich (1950) 221 P.2d 178*]. For a guaranty that a minor will ratify a contract on reaching the age of majority, see § 100B.210.

1. Negotiate consideration, if any, to be paid to client (former minor) in exchange for ratification.

2. Draft ratification to include [*see § 100B.211*]:

a. Adequate description of contract or obligation to be ratified, including:

(1) Date contract was made.

(2) Parties.

(3) Client's obligations.

(4) Other important terms.

NOTE:

If the contract is written, a copy of it should be attached to the ratification for reference.

b. Statement of client's date of birth, age at time contract was made, and present age.

c. Client's acknowledgment of right to disaffirm contract.

d. Clear and unambiguous statement of ratification.

e. Acknowledgment of any consideration received in exchange for ratification.

3. If ratification is in form of promise to pay debt incurred during minority [*see § 100B.212*], include additional requirements for negotiable instruments [*Com. Code § 3104; see Ch. 55, Negotiable Instruments*]:

a. Unconditional promise to pay specified amount.

b. Statement that amount is payable either:

(1) On demand.

(2) At definite time.

c. Statement that debt is payable either:

(1) To order.

(2) To bearer.

4. Review draft with client.

a. Make sure client understands legal right to disaffirm obligation, and full extent of duties assumed by ratifying contract.

b. Instruct client to verify date of birth as stated and execute ratification.

5. Indicate date and place of execution.

6. Provide executed copies of ratification to each party to original contract, and keep copy for attorney's records.

[3] Notices of Nullity

NOTE:

Minors' contracts regarding real property interests are void and are not subject to ratification once the minor reaches the age of majority [*Fam. Code § 6701(b); Hakes Inv. Co. v. Lyons (1913) 166 Cal. 557, 561, 137 P. 911 ; see § 100B.213[1][b]*]. A minor who has executed a purported conveyance of real property should execute and record a notice that the conveyance is void, to put others who deal with the property on notice that there is a cloud on the title.

1. Draft notice to include [*see § 100B.213*]:

- a. Names of grantor, grantee, and other parties to transaction.
- b. Legal description of property affected.
- c. Statement of minor's age at time of conveyance.
- d. Place where original instrument was recorded.

2. Review notice with minor and obtain minor's signature.

3. Indicate date and place executed.

4. Have notice notarized.

NOTE:

The form for acknowledgment by a notary is specified by *Civ. Code § 1189*.

5. Record notice in each county in which original conveyance was recorded [*see Civ. Code § 1213*].

NOTE:

A minor's notice that his or her conveyance of real property is void is entitled to recording as an instrument that purports to affect title to real property [*see Gov. Code § 27280*].

6. Deliver copies of executed, notarized notice to all parties to original conveyance, and keep copy for attorney's records.

[4] Disaffirmance of Contracts

NOTE:

Except as otherwise specified by statute, contracts entered into by minors may be disaffirmed by them before, or within a reasonable time after, they reach the age of majority (18) [*Fam. Code §§ 6710, 6711*]. A disaffirmance may be written, made orally, or made through actions indicating an intent to repudiate the contract [*Pereira v. Toscano (1927) 84 Cal. App. 526, 258 P. 429*] . However, a written disaffirmance will prevent disputes regarding whether, when, and in what manner the disaffirmance was actually made.

1. Draft written disaffirmance, including the following provisions [*see §§ 100B.214 (disaffirmance of contract), 100B.215 (disaffirmance of promissory note)*]:

NOTE:

A disaffirmance may also be made orally, or through actions indicating an intent to repudiate the contract [*Pereira v. Toscano* (1927) 84 Cal. App. 526, 258 P. 429] . However, a written disaffirmance will prevent disputes regarding whether, when, and in what manner the disaffirmance actually was made.

a. Adequate description of contract or obligation disaffirmed, including:

(1) Date contract was made.

(2) Parties.

(3) Subject matter.

(4) Material terms.

NOTE:

If the contract is written, a copy of it should be attached to the notice of disaffirmance.

b. Clear and unambiguous statement of disaffirmance.

c. Statement that minor is returning consideration already received under contract.

NOTE:

It is unclear whether a minor who disaffirms an obligation is required to return benefits received under the contract prior to the disaffirmance [*see Fam. Code § 6710; see also Civ. Code § 1691*]. The minor should return the benefits, if he or she can do so without undue hardship, since a refusal to do so may encourage the other party to contest the validity of the disaffirmance.

d. Demand for return of any consideration advanced by minor, or acknowledgment of receipt if consideration has already been returned.

NOTE:

If, prior to the minor's disaffirmance, the goods sold by the minor pursuant to the contract are transferred to another purchaser, for value and without notice of the transferor's defect of title, the minor may not recover the goods from that innocent purchaser [*Fam. Code § 6713*].

e. If disaffirmance will be executed by heir or personal representative of deceased minor [*see § 100B.216*], include:

NOTE:

Upon the death of a minor, the heirs or personal representatives may disaffirm the minor's contracts that could have been disaffirmed by the minor during his or her lifetime [*Fam. Code § 6710*]. To determine who should execute the disaffirmance, see §§ 100B.110[2] and 100B.216[1][c].

(1) Statement that minor is deceased, specifying date of death.

(2) Statement of signatory's capacity, either:

(a) Personal representative (executor or administrator) of minor's estate; or

NOTE:

Because unemancipated minors generally lack the capacity to dispose of property by will [*Prob. Code § 6100*], the personal representative of a deceased minor's estate ordinarily would be a court-appointed administrator rather than an executor or an administrator with the will annexed [*see Prob. Code § 8460(a)* (appointment of administrator as personal representative for estate of intestate decedent)]. For the same reason, in the usual case there would be no beneficiaries under a will who might give a notice of disaffirmation; only heirs at law [*see (b), below*]. However, if a minor became emancipated or reached the age of majority, thereafter made a will, and death occurred soon after, an executor or administrator with the will annexed appointed under such a will might conceivably disaffirm a contract or contracts made by the decedent before the decedent had become emancipated or reached the age of majority. Similarly, there might be beneficiaries under such a will who could disaffirm in this situation.

(b) Heir of minor or beneficiary under will of minor.

(3) Probate number and court in which probate is pending, if applicable.

2. Review draft with minor, or minor's heir or personal representative, and obtain signature.

3. Indicate date and place of agreement.

4. File petition for court approval of disaffirmance only if:

NOTE:

Heirs or personal representatives are not required by statute to obtain court approval before giving notice of disaffirmance of a deceased minor's contract [*see Fam. Code § 6710*]. However, it may be advisable to seek court approval if there are questions concerning the validity of the disaffirmance. For further discussion of this issue, see § 100B.216[1][d][i].

a. Minor is deceased and disaffirmance is executed by minor's heir or personal representative.

b. Either of following applies:

(1) Uncertainty exists as to whether contract is:

(a) Void [*see Fam. Code § 6701*].

NOTE:

Disaffirmance is not necessary to extinguish a minor's obligation under a void contract [*Fam. Code § 6701; see Burnand v. Irigoyen (1947) 30 Cal. 2d 861, 865, 186 P.2d 417*].

(b) Subject to disaffirmance [*see Fam. Code §§ 6700, 6710, 6711; see also § 100B.110[2]*].

(2) Personal representative is public administrator or creditor of minor, or other potential conflict of interest exists.

5. Deliver copies of disaffirmance to:

a. All parties to contract.

b. All other persons who may be affected by disaffirmance.

6. Keep copy of disaffirmance for attorney's records.

[5] Release of Contract Claims by or Against Minor

1. Negotiate settlement agreement.

NOTE:

For a guide to settlement of disputed claims, see Ch. 77, *Discharge of Obligations*. For a discussion of the release of minors' tort claims, see Ch. 100A, *Personal Affairs of Minors*.

2. Draft release to include [see §§ 100B.230 (release of minor's claim), 100B.231 (release of claim against minor)]:

a. Identification of parties to release.

(1) Minor's name and statement of minority.

(2) Name of person executing release on minor's behalf, and statement of relationship to minor.

(3) Other parties to release.

b. Identification of contract out of which claim arose.

NOTE:

If the contract is written, a copy should be attached to the release for reference.

c. Extent of release, either:

(1) Release of specific claim or cause of action only.

(2) General release.

(3) General release including later-discovered claims.

d. Acknowledgment of consideration given for release.

NOTE:

Consideration is not necessary to support a written release. Oral releases require consideration [Civ. Code § 1541].

e. Statement that either:

(1) Contract is canceled; or

(2) Release does not discharge duty of future performance under contract.

f. Statement conditioning validity of release on superior court approval, if required by law [see § 100B.110[4]] or desired by parties.

3. Review release with parties.

4. Obtain court approval of release, if required [see § 100B.110[4]; see also California Forms of Pleading and Practice, Ch. 364, *Minors: Claims and Property of Actions*, and Ch. 365, *Minors: Contract Actions* (Matthew Bender)].

5. Collect payment for release, if payment is owed by minor party.

NOTE:

Property due the minor should be collected by the person specified by the court order approving the settlement and release [see *Prob. Code* §§ 3600-3612]. If the settlement and release have been executed without court approval, the guardian of the minor's estate should collect the property [see *Prob. Code* § 2500]. A minor's parent cannot execute a release until payment has been delivered and deposited pursuant to the court order, if any [*Prob. Code* § 3500(d)].

6. Instruct client to execute release.

7. Indicate date and place of execution.

8. Provide executed copies of release to each party and retain copy for attorney's records.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawFormationGeneral OverviewContracts LawFormationCapacity of PartiesAgeContracts LawTypes of ContractsGeneral Overview



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31-100B California Legal Forms--Transaction Guide § 100B.121

§ 100B.121 Procedural Guide to Employment of Minors

[1] Obtaining Work Permits and Permits to Employ

NOTE:

See § 100B.111[3] to determine what type of work permit, if any, will be required.

1. For regular work permit and permit to employ, or certificate of age:

a. Instruct minor to obtain Statement of Intent to Employ Minor and Request for Work Permit [see § 100B.240] from school, local school district administrative office, or Department of Education.

NOTE:

The same form is used to request regular work permits, permits to employ, and certificates of age.

b. Instruct prospective employer to fill out lower portion of application and sign application.

c. Instruct minor or minor's parent or guardian to fill in upper portion of application.

d. Obtain signature of parent or guardian.

e. Instruct minor to present application and proof of age, in person, to local school superintendent or other officer authorized to issue work permit.

NOTE:

If the job placement officer at the minor's school is unable to direct the minor to the appropriate person and place to which the application should be delivered, the local school district administrative office can provide this information.

f. Advise parent, guardian, or employer to accompany minor when presenting application if any of following applies:

- (1) Occupation or working conditions are particularly unusual for minors.
- (2) Minor is claiming special exceptions to hour and occupation restrictions, or schooling requirements.

2. For full-time work permit and permit to employ:

- a. Complete application in same manner as for regular work permit [*see* PP 1a--d, *above*].
- b. Instruct minor, and parent or guardian if minor is under age 16 [*see Educ. Code § 49132*], to present application in person before local school superintendent or other officer authorized to issue work permits.
- c. Instruct minor to provide following documents to superintendent at time application is submitted [*Educ. Code § 49133*]:

- (1) School record signed by teacher or principal and stating:
 - (a) Minor's age.

- (b) Minor's grade.

- (c) Minor's attendance record for current term.

- (2) Evidence of birth, such as:

- (a) Birth certificate.

- (b) Baptism certificate duly attested.

- (c) School record of enrollment.

- (d) Passport.

- (e) Affidavit of parent or guardian.

- (3) Written statement of proposed employer acknowledging that work is waiting for minor and describing nature of work.

NOTE:

The work permit request form includes spaces for this information and for the employer's signature [*see § 100B.240*]. However, some school districts may require a separate, additional writing to satisfy this requirement.

(4) If minor is under age 16, certificate of physician appointed by school board or other public medical officer stating that minor is physically fit to pursue specified occupation.

NOTE:

No charge may be made to the minor for this certificate [*Educ. Code § 49133*].

3. For entertainment industry work permit:

a. Instruct minor to:

(1) Obtain Application for Permission to Work in the Entertainment Industry [*see § 100B.241*] from local office of Division of Labor Standards Enforcement.

(2) Ask official from whom application is obtained whether medical examination will be required for type of employment sought.

b. Instruct minor or minor's parent or guardian to complete front side of form.

c. Obtain signature of parent or guardian.

d. Instruct minor to ask principal or other school official designated by principal to complete School Record section of form.

e. If physical examination is required, instruct minor to have examining physician complete appropriate portion of form and sign form.

f. Mail completed form or deliver in person to local office of Division of Labor Standards Enforcement.

4. For permit to employ minors in entertainment industry:

NOTE:

Entertainment industry employers apply for permits to indicate that their place and type of business are suitable for the employment of minors generally, rather than applying for permission to employ a specific minor [*see 8 Cal. Code Reg. §§ 11751(b), 11752*].

a. Instruct employer to obtain and complete Application for Permission to Employ Minors in the Entertainment Industry [*see § 100B.242*] from, and mail completed Application to, local office of Division of Labor Standards Enforcement.

b. Inform employer that Division of Labor Standards Enforcement may investigate employer's premises before issuing permit [*see 8 Cal. Code Reg. § 11752*].

c. Instruct employer to note expiration date of permit, and to keep permit current [*see § 100B.131*].

5. For blanket permit to employ minors in entertainment industry:

a. Instruct employer to request permit in writing from local office of Division of Labor Standards Enforcement.

b. Inform employer that request must include evidence of employer's arrangements for following [*8 Cal. Code Reg. § 11754*]:

(1) Studio-teachers [see § 100B.202[1]].

(2) Workers' compensation insurance for minor employees.

(3) Supervision of minor employees by at least one parent or other qualified person per every 20 minors or part thereof.

6. For emergency permits to employ minors before 5:00 A.M. or after 10:00 P.M.:

a. Instruct employer to submit written request for permit at least 48 hours in advance [8 Cal. Code Reg. § 11760(g)].

b. Advise employer that request should contain following:

(1) Explanation of emergency situation.

NOTE:

Emergency situations that may justify the issuance of a temporary permit to employ minors at hours not normally permitted include live productions presented during those hours, and early morning or late night exteriors shot as exteriors [8 Cal. Code Reg. § 11760(g)].

(2) Copy of employer's regular permit to employ minors.

(3) Explanation of any special measures to be taken to ensure safety and well-being of minors employed pursuant to emergency permit.

[2] Obtaining Pupil Leave of Absence for Temporary Employment

NOTE:

Pupil leaves of absence are only permitted by law if the governing board of the local school district has adopted a written policy authorizing them, and are subject to the conditions set forth by *Educ. Code* § 48232. Although some schools or school districts handle extended absences on a more informal basis, the pupil and his or her parent or guardian should attempt to comply with the statutory requirements in order to avoid problems that may arise later concerning classroom attendance requirements. A pupil must be at least 15 years old in order to take a leave of absence [*Educ. Code* § 48232].

1. Contact local school district administrative offices to obtain official forms, if any, used by district.

2. If official forms are provided, review for required contents, including [*Educ. Code* § 48232(c)]:

a. Purpose of leave.

NOTE:

Pupil leaves of absence may be granted for the purposes of supervised travel, study, training, or work not available to the pupil under another education option [*Educ. Code* § 48232(b)].

- b. Length of leave.
 - c. Provisions for child to contact or meet with appropriate school official at least monthly during leave.
 - d. Statement that activity to be pursued during leave is not available under other education option.
3. If official forms are not provided, draft agreement to include [*see § 100B.243*]:
- a. Name of child.
 - b. Name of school.
 - c. Statement that leave is taken pursuant to *Educ. Code § 48232* and any local policy promulgated under its authority.
 - d. Purpose of leave [*Educ. Code § 48232(c)(1)*].
 - e. Statement that activity to be pursued during leave is not available under other education option [*Educ. Code § 48232(c)(4)*].
 - f. Length of time child will be on leave [*Educ. Code § 48232(c)(2)*].

NOTE:

A leave of absence may be granted for a period not to exceed one regular school semester, and may be extended for up to one additional semester on the written approval of the local attendance review board [*Educ. Code § 48232(e)*]. A leave of absence cannot be continued past the end of the school year in which it is taken [*Educ. Code § 48232(f)*].

- g. Provisions for child to contact or meet with appropriate school official at least monthly during leave [*Educ. Code § 48232(c)(3)*], including:
 - (1) Official's name, address, and telephone number.
 - (2) Time, place, and nature of contacts or meetings.
 - (3) Statement that leave will be terminated if pupil fails to perform contact or meeting obligation.
- h. Statement that leave may be terminated at any time and by any party, by written notice to pupil.
- i. Statement of child's right to do any of the following [*Educ. Code § 48232(d)*]:
 - (1) Return to school at any time.
 - (2) Receive makeup sessions for classes missed during leave, if reenrollment occurs at beginning of semester.
 - (3) Complete any academic requirements within time period equal to that of classmates, plus period of time equal to leave of absence, without penalty.

4. Review draft with client and school principal or school administrative officer.
5. Obtain signatures from minor and other required parties [*Educ. Code § 48232(c)*]:
 - a. Minor's parent or guardian.
 - b. School principal or administrative officer.
 - c. Classroom teacher familiar with child's academic progress, chosen by child.
 - d. District supervisor of child welfare and attendance.
6. Provide copies of executed agreement for:
 - a. Each party to agreement.
 - b. Child's school record.
 - c. Attorney's records.
7. Instruct child to do following:
 - a. Contact or meet with school official as required by contract, and keep record of contacts or meetings.
 - b. Upon return to school, request that written acknowledgment of date of return be placed in child's record.
 - c. Obtain written approval of all parties to original agreement and local school attendance review board prior to extending leave [*Educ. Code § 48232*].

[3] Drafting, Executing, and Reviewing Employment Agreements

NOTE:

The procedure provided here is a simple one, appropriate for the usual summer and after-school work arrangements of minors. For discussion and examples of more detailed employment agreements, see Ch. 85, ***Employment Agreements***, and Ch. 87, ***Entertainment Contracts***. The procedure for a minor's simple entertainment industry employment agreement is set forth in [4], ***below***.

1. Draft employment contract to include:
 - a. Preliminary matters, such as:
 - (1) Name and address of each party.
 - (2) Nature of employer's business.
 - (3) Statement that employee is a minor.

b. Terms of contract, such as:

(1) Term of employment, indicating either:

(a) Employment is at will.

(b) Specified beginning and ending dates.

(c) Conditions under which contract may be terminated before or extended beyond specified dates.

(2) Employee's title.

(3) Name and title of employee's immediate supervisor.

NOTE:

Because of the age and inexperience of minor employees, and the fact that they often work during evening or weekend hours when the regular supervising staff is not present, it is especially important that the employer identify the person to whom the minor should look for immediate supervision. This person should be someone familiar with the hour and occupation restrictions imposed on minor employees by law.

(4) Duties of employee.

(5) Limitations on employee's duties pursuant to child labor laws.

NOTE:

Tasks or occupations that are performed in the course of the employer's business but are prohibited to minors should be specifically identified in the employment contract, to put both parties on notice of the restrictions applicable to the minor employee. For a list of prohibited occupations and conditions of employment, see § 100B.111[1].

(6) Hours of employment [see § 100B.111[2].

(7) Rules of employer, such as:

(a) Uniform requirements or dress code.

(b) Restrictions on serving friends or family members (for retail and restaurant jobs).

(c) Absentee policy.

(d) Grievance procedure.

(e) Grounds for termination.

(8) Manner of giving notice to terminate employment.

NOTE:

A contract clause requiring the employee to give notice a particular number of days before terminating

the employment relationship will not affect a minor employee's right to disaffirm the contract obligation at will [*Fam. Code § 6710*]. However, it may be useful to encourage voluntary compliance with the employer's wishes.

(9) Compensation, including as appropriate:

- (a) Hourly wages.
- (b) Salary.
- (c) Holiday and overtime pay.
- (d) Commissions.
- (e) Provisions for wage increases.
- (f) Statement of who is to receive minor's earnings.

NOTE:

A minor's wages must be paid directly to the minor until the minor's parent or guardian notifies the employer that he or she claims the wages [*Fam. Code § 7503; Lab. Code § 3605; see § 100B.250*]. A minor may also assign his or her wages with the consent of his or her parent or guardian [*Lab. Code § 300(b)(3); see § 100B.251; see also Ch. 76, *Assignment of Rights and Obligations**].

(10) Benefits, including as appropriate:

- (a) Workers' compensation insurance.
- (b) Health insurance.
- (c) Employee discount.
- (d) Vacations and sick time.

c. General provisions, such as [*see Ch. 75, *Formation of Contracts and Standard Contractual Provisions**]:

- (1) Entire agreement clause.
- (2) Choice of law clause.

2. Review draft with client.

a. Explain minor's right to disaffirm contract if not submitted to superior court for approval [*Fam. Code § 6710; see § 100B.22*].

b. Explain employer's potential civil and criminal liability for violation of child labor laws.

NOTE:

In addition to civil and criminal penalties, an employer who violates any law respecting

the employment of minors may have its permit to employ minors revoked [*Lab. Code § 1300; Educ. Code § 49164; 8 Cal. Code Reg. § 11758*].

(1) Criminal penalties of \$1,000 to \$5,000, up to 6 months imprisonment, or both, for each violation of California child labor laws, with a penalty of up to \$10,000, or up to 6 months imprisonment, or both, for willful violation [*Lab. Code § 1303; see also Lab. Code §§ 1308(a), 1391(c)*].

(2) Civil penalties of \$5,000 to \$10,000 for each class "A" violation [*Lab. Code § 1288(a)*]:

NOTE:

Civil citations for child labor law violations are issued by the Division of Labor Standards Enforcement (DLSE), under the authority of the Director of Industrial Relations [*Lab. Code § 1287; 8 Cal. Code Reg. § 11775*]. Class "A" violations are generally those that present an imminent danger or a substantial probability of death or serious physical harm to a minor [*see 8 Cal. Code Reg. § 11780; Lab. Code § 1288(a)*].

(a) Employment of minor in violation of *Lab. Code §§ 1290, 1292-1294.1, 1294.5* [*see § 100B.111[1][b]*].

(b) Use of minor in obscene, indecent, or immoral purposes, exhibitions, or practices [*see Lab. Code § 1308(a)(3); see also Lab. Code § 1309*].

(c) Employment of minor under age 16 in mendicant or wandering business [*see Lab. Code § 1308(a)(4)*].

(d) Employment of minor under age 16 in vocation, occupation, service, or purpose of singing, playing on musical instruments, rope or wire walking, dancing, begging, or peddling, or as gymnast, acrobat, contortionist, or rider, in any place whatsoever [*see Lab. Code § 1308(a)(2)*].

(e) Violations of *Lab. Code § 1392*, and third and subsequent violations of *Lab. Code § 1391* (limiting minors' hours of employment) [*see § 100B.111[2]*].

(f) Prohibited employment of minors under age 12 in agricultural zones of danger or in agriculture-related occupations declared hazardous for employment of minors under 16 by federal regulations [*see Lab. Code § 1293.1; see also 29 C.F.R. § 570.71*].

(g) Employment of minor under age 16 in any business, exhibition, or vocation injurious to minor's health or dangerous to minor's life or limbs [*Lab. Code § 1308(a)(1)*].

(h) Other violations determined by Director of Industrial Relations to present imminent danger to minor employees or substantial probability of death or serious physical harm [*Lab. Code § 1288(a)*].

(3) Civil penalties of \$500 to \$1000 for each class "B" violation [*Lab. Code § 1288(b)*].

NOTE:

Class "B" violations are generally less serious than class "A" violations, but have a direct or immediate relationship to the health, safety, or security of minor employees [8 Cal. Code Reg. § 11782].

(a) Failure to keep all permits and certificates to work or employ on file [Lab. Code § 1299].

(b) Employment of minors in entertainment industry without proper permits [Lab. Code § 1308.5].

(c) First and second violations of Lab. Code § 1391 (limiting minors' hours of employment) [see § 100B.111[2]].

NOTE:

The penalty for a second violation of Lab. Code § 1391 is \$1,000 [Lab. Code § 1288(b)].

(4) Criminal penalties of up to \$10,000 or six months imprisonment, or both, for each violation of federal child labor laws [29 U.S.C. § 216(a)].

3. Review work permit and permit to employ with client.

a. Note expiration date of permit, and advise employer of need to keep current permits on file [Educ. Code § 49161; see § 100B.131].

b. Instruct employer to keep permit on file during entire term of minor's employment [see Educ. Code § 49161].

c. Advise employer that following public officials may enter premises to inspect permits and working conditions of minors [Educ. Code § 49164]:

(1) Supervisor of attendance.

(2) Probation officers.

(3) Labor Commissioner or designee.

(4) Officers of Superintendent of Public Instruction.

d. Advise minor's parent or guardian to retain copy of permit [see Educ. Code § 48450].

4. Execute contract.

a. Obtain signatures of all parties.

b. Indicate date and place contract was signed.

5. Provide following parties with copies of executed contract, and keep copy for attorney's records:

- a. Minor employee.
- b. Parent or guardian of minor.

NOTE:

If the parent or guardian intends to collect the minor's wages, a copy of the contract will be useful to prove that the employer has been given notice of this intention.

- c. Employer.
- d. Third party guarantor of minor's performance, if any [*see § 100B.210*].

6. If minor will be employed full-time, instruct minor to enroll in continuation classes.

NOTE:

Continuation classes, which are organized by local school districts to meet the particular needs of minors within each district, provide minors with opportunities to complete academic course requirements for high school graduation, to participate in independent study, work-study programs, and regional occupation programs, and to receive career counseling and job placement services [*Educ. Code § 48430*]. If information regarding the local continuation program cannot be obtained from the work experience office at the minor's school, the minor or the minor's parents should contact the local public school administrative office for information.

[4] Drafting, Executing, and Reviewing Entertainment Industry Employment Agreements**NOTE:**

The following procedures apply when a small independent employer hires a minor for a single production. Major motion picture contracts, recording contracts, and other arrangements by which large corporations employ minors for extended periods are beyond the scope of this chapter, and usually would not involve the drafting of an employment agreement by the minor's attorney. For additional forms and discussion regarding entertainment industry employment, see Ch. 87, ***Entertainment Contracts***.

1. Draft employment contract to include [*see § 100B.201* (minor's modeling contract)]:

- a. Preliminary matters, such as:

- (1) Name of each party.
- (2) Statement of employee's minority.

- b. Terms of contract, such as:

- (1) Nature of services to be performed by minor.
- (2) Title and description of production.
- (3) Location of production or other place where minor will perform services.
- (4) Duration of contract.

(5) Conditions under which contract may be terminated earlier, or extended.

(6) Hours of employment or, if hours will be irregular, statement that minor will not be required to work in excess of limits imposed by law for his or her age [*see* § 100B.111[2]].

(7) Compensation, specifying as appropriate:

(a) Hourly wage.

(b) Salary.

(c) Flat fee.

(d) Royalties.

(e) Percentage of box office receipts.

(f) Other compensation.

(8) When minor will be paid.

(9) Statement conditioning contract on court approval, if desired by parties [*see* § 100B.203].

NOTE:

A minor's contract with a talent agency, agreement to perform as a professional athlete, or agreement to perform artistic or creative services in the entertainment field may be submitted for approval to the superior court. If the contract is approved by the court, the minor may not later disaffirm the obligation [*Lab. Code* § 1700.37; *see Fam. Code* § 6751]. For further discussion of this procedure, see § 100B.203[1][b].

(10) Acknowledgment of court order for preservation of minor's earnings, and statement that parties will comply with order.

(11) Statement of who will provide items incidental or necessary to minor's performance, and appropriate specifications for each, such as:

(a) Wardrobe.

(b) Transportation.

(c) Meals.

(d) Lodging.

(e) Other incidental items.

(12) Arrangements for required adult supervision of minor by [*see* § 100B.111[5]]:

(a) Studio-teacher [*8 Cal. Code Reg. §§ 11755.1, 11760(a)(2); see* § 100B.202].

(b) Nurse [8 Cal. Code Reg. § 11760(a)(2)].

(c) Parent or guardian [8 Cal. Code Reg. § 11757].

(13) Provisions regarding use of minor's name, such as:

(a) Name to be used, if different from legal name.

(b) Title, if any.

(c) Type size in which name will appear.

(d) Employer's right to use name in advertising or merchandising connected with product or production.

(14) Exclusivity clause, if desired by parties.

(15) Grounds for termination of contract by either party.

2. If contract involves use of minor's name, voice, signature, photograph, or likeness for advertising purposes, draft and execute parental consent form [see § 100B.201[2]].

3. Instruct employer to arrange for studio teacher by contacting county superintendent or other local school district personnel [see Educ. Code § 48225].

4. File petition for superior court approval of contract, if desired by parties.

NOTE:

For a discussion of the procedure used to obtain court approval of a minor's contract, see California Forms of Pleading and Practice, Ch. 365, **Minors: Contract Actions** (Matthew Bender).

5. Review following documents with client:

a. Employment contract.

b. Parental consent [see P 2, above].

c. Minor's work permit [see § 100B.121[1]].

(1) Note expiration date and advise client of need to keep permit current [see Educ. Code §§ 49118, 49161].

NOTE:

An employment industry work permit will not be valid for a period exceeding six months [8 Cal. Code Reg. § 11753].

(2) Make sure that permitted hours of employment are consistent with hours set forth in contract.

d. Employer's permit to employ minors [*see* § 100B.121[1]].

NOTE:

A parent or guardian should never allow a minor to work for an entertainment industry employer who does not have a valid permit to employ minors. If the parent or guardian is not sure that the employer's permit is valid or that the premises are safe for the minor, he or she should contact the local office of the Division of Labor Standards Enforcement.

(1) Instruct employer to keep permit valid and on file as long as minors are employed.

(2) Advise employer that various public officials may enter premises to inspect permits and working conditions of minors [*Educ. Code* § 49164].

e. Court order approving contract and setting forth plan for preservation of minor's earnings.

f. Parental consent to court order for preservation of minor's earnings [*see* § 100B.204].

NOTE:

The court must order that 15 percent of a minor's earnings under an entertainment industry or professional sports employment contract be set aside and preserved for the minor's future use, and the individual (at least one custodial parent or guardian) who serves as trustee must provide the minor's employer with a copy of a statement that identifies the trust account into which the earnings will be placed and must render an annual accounting for the trust funds [*Fam. Code* §§ 6752, 6753; *see* § 100B.204].

6. Execute contract.

a. Obtain signatures of all parties.

b. Indicate date and place signed.

7. Provide executed copies for each party, and keep copy for attorney's records.

[5] Registration of Persons Hiring or Transporting Minors Engaged in Door-to-Door Sales

1. If client is individual, association, corporation, or other entity that employs or uses, directly or indirectly through third persons, any minor under 16 years of age in door-to-door sales anywhere more than 10 miles from minor's residence [*Lab. Code* § 1308.3(a)]:

a. Obtain required application form from Division of Labor Standards Enforcement's Licensing and Registration Unit, and execute application, including all of following [*Lab. Code* § 1308.3(b)]:

NOTE:

Items (1) through (4), **below**, must be provided under penalty of perjury [*Lab. Code* § 1308.3(b)(1)(A)-(C)].

(1) Client's name, address, and employer identification number.

(2) Names, addresses, and social security numbers of all adults employed to supervise, accompany, or transport minors engaged in door-to-door sales.

(3) Statement of all facts required by Labor Commissioner regarding nature of merchandise to be sold.

(4) Plan detailing level and nature of adult supervision to be provided to minors.

(5) Copy of any written contract or other written agreement to be offered by client to minors or used by applicant in door-to-door sales.

b. Ascertain from Division of Labor Standards Enforcement amount of fee necessary to accompany application [*Lab. Code § 1308.3(b)(3)*].

c. Advise client that Labor Commissioner, before issuing registration, will conduct investigation to determine that client has not previously violated California child labor laws and does not propose to expose minors to hazardous or unsafe working conditions [*Lab. Code § 1308.3(b)(2)*].

d. Advise client that client must make payroll records for any period available for inspection by Labor Commissioner [*Lab. Code § 1308.3(c)*].

e. Advise client that client, or anyone acting on client's behalf, must have proof of registration in his or her immediate possession at all times when engaged in activities for which registration is required [*Lab. Code § 1308.3(d)*].

f. Advise client that Labor Commissioner may revoke, suspend, or refuse to renew registration for any of following reasons [*Lab. Code § 1308.4*]:

(1) Violating or failing to comply with registration requirements and procedure.

(2) Making misrepresentations or false statements in registration application.

(3) Operating in manner substantially different from conditions of operation stated in registration application.

(4) Violating or willfully aiding and abetting in violation of California or federal child labor laws.

g. Advise client that whenever application for registration or renewal is made but application processing has not been completed, Labor Commissioner may, at his or her discretion, issue temporary or provisional registration valid for no longer than 90 days and subject to summary revocation by Commissioner [*Lab. Code § 1308.3(e)*].

2. If client is person over 18 years of age who transports, or provides direction or supervision during transportation of, minor under 16 years of age to location more than 10 miles from minor's residence, or directs or supervises minor, for purpose of facilitating minor's participation in door-to-door sales of any commodity [*Lab. Code § 1308.2(a)*]:

a. Obtain required application form from Division of Labor Standards Enforcement's Licensing and Registration Unit, and execute application, including all of the following [*Lab. Code § 1308.2(b)*]:

- (1) Name, address, social security number, and California driver's license number of client.
- (2) Name, address, and employer identification number of organization from which merchandise to be sold is purchased.
- (3) Statement of all facts required by Labor Commissioner regarding client's character, competency, and responsibility.
- (4) Statement of all facts required by Labor Commissioner regarding how client proposes to transport minors, number of minors to be transported, methods and levels of adult supervision to be provided, nature of merchandise sold, content of any promotional statement to be delivered by minors, and how merchandise will be represented to public.

b. Ascertain from Division of Labor Standards Enforcement amount of fee necessary to accompany application [*Lab. Code § 1308.2(b)(3)*].

c. Advise client that Labor Commissioner, before issuing registration, will conduct investigation of client's character, competency, and responsibility [*Lab. Code § 1308.2(b)(2)*].

d. Advise client that proof of registration must be in client's immediate possession at all times when client is engaged in activities for which registration is required [*Lab. Code § 1308.2(c)*].

e. Advise client that Labor Commissioner may revoke, suspend, or refuse to renew registration for any of following reasons [*Lab. Code § 1308.4*]:

- (1) Violating or failing to comply with registration requirements and procedure.
- (2) Making misrepresentations or false statements in registration application.
- (3) Operating in manner substantially different from conditions of operation stated in registration application.
- (4) Violating California or federal child labor laws.

NOTE:

Registration is not required if client is a trustee, charitable corporation, or one of certain other entities, a minor's parent or guardian, anyone solely providing transportation for hire who is not otherwise subject to registration, or anyone acting on behalf of trustees, charitable corporations, or certain other entities [*Lab. Code §§ 1308.2(f), 1308.3(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Wage & Hour Laws Child Labor



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DIVISION VII: PERSONAL TRANSACTIONS
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PART III. TRANSACTION GUIDE
C. Procedural Guide

31-100B California Legal Forms--Transaction Guide §§ 100B.122-100B.129

[Reserved]

§§ 100B.122[Reserved]



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31-100B California Legal Forms--Transaction Guide § 100B.130

§ 100B.130 Modification of Minors' Contracts

NOTE:

This coverage is limited to considerations that are unique to minors' contracts. For a guide to performance, modification, and cancellation of contracts generally, see Ch. 77, ***Discharge of Obligations***.

1. Prior to modifying contract, determine that contract is valid [*see Fam. Code §§ 6700, 6701; see also § 100B.110[1]*].

2. For employment contracts, ascertain that proposed modification will not result in violation of:

- a. Hour or occupation restrictions on employment of minors [*see § 100B.111[1], [2]*].
- b. Provisions of work permit and permit to employ.

NOTE:

If new permits are needed, the minor and the minor's employer should apply for the permits in the same manner used to obtain the original permits [*see § 100B.121[1]*].

3. Consider submitting modified contract to superior court for approval, if either:

NOTE:

Obtaining court approval of certain contracts will prevent the minor from disaffirming the contract [*Fam. Code § 6751; Lab. Code § 1700.37; see § 100B.22*]. Statutory provisions governing those contracts do not address the issue of whether modifications to the contract must also be approved by the court [*see Fam. Code § 6751; Lab. Code § 1700.37*]. Therefore, it is possible that the minor would be

permitted to disaffirm the modified contract even if the original version had been approved by the court. For this reason, it is advisable to seek approval for any modifications. For discussion of the approval process, see § 100B.203[1][b], and California Forms of Pleading and Practice, Ch. 365, **Minors: Contract Actions** (Matthew Bender).

a. Original contract was approved by court.

b. Contract as modified will be of type for which approval procedure is provided [see *Fam. Code* § 6751; *Lab. Code* § 1700.37].

4. For contracts involving minor's purchase of necessities [see § 100B.200], ascertain that contract as modified will satisfy requirements for nondisaffirmable contracts [*Fam. Code* § 6712; see § 100B.110[2]].

NOTE:

A minor's contract for non-necessities, or for necessities not provided under the conditions outlined by statute [see *Fam. Code* § 6712], may be disaffirmed by the minor [*Fam. Code* §§ 6710, 6711].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Modifications General Overview Contracts Law Formation Capacity of Parties Age



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31-100B California Legal Forms--Transaction Guide § 100B.131

§ 100B.131 Renewal of Work Permits and Permits to Employ

1. Advise minor and employer that renewal of permits will not be required if either:
 - a. Minor will turn 18 before permit expires.
 - b. Employment will end before permit expires.
2. If renewal is required, advise minor and employer to apply for renewal before expiration date of permit, using same procedure as for original permit [see § 100B.121[1]].

NOTE:

Regular work permits and permits to employ issued during the school year expire no later than the fifth day of the next school year [*Educ. Code § 49118*]. Entertainment industry work permits are not valid for a period exceeding six months [*8 Cal. Code Reg. § 11753*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Wage & Hour Laws Child Labor



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31-100B California Legal Forms--Transaction Guide § 100B.132

§ 100B.132 Renewal of Registration of Persons Hiring or Transporting Minors Engaged in Door-to-Door Sales

1. Advise client that registration is renewable annually [*Lab. Code §§ 1308.2(a), 1308.3(a)*].
2. If renewal is desired, advise client to apply, using same procedure as for original permit [*see 100B.121[5]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawWage & Hour
LawsChild Labor



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31-100B California Legal Forms--Transaction Guide §§ 100B.133-10B.199

[Reserved]

§§ 100B.133[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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PART IV. FORMS
A. Contracts Involving Minors

31-100B California Legal Forms--Transaction Guide § 100B.200

§ 100B.200 Contract for Necessities Provided to Minor or Minor's Family

[1] Comment

[a] Use of Form

This form is a complete contract between a minor and a supplier of necessities to the minor or the minor's family. It can be used for goods or services, and it contains language for both single transactions and ongoing contractual relationships.

No particular form is required for an agreement to create an obligation on the part of a minor to pay the reasonable value of necessities actually furnished to him or her. A contract will be implied if the necessities are furnished at the request of the minor [*Leonard v. Alexander (1942) 50 Cal. App. 2d 385, 388, 122 P.2d 984*]. Furthermore, a quasi-contractual obligation will arise when things are provided that the minor would have requested had he or she been capable of doing so (such as emergency medical treatment) [*Burnand v. Irigoyen (1947) 30 Cal. 2d 861, 867, 186 P.2d 417*]

If a contract involves the extension of consumer credit, the appropriate Truth in Lending and Unruh Act disclosure provisions must be included [15 U.S.C. § 1601 *et seq.*; Civ. Code § 1801 *et seq.*; see Ch. 45, *Consumer Installment Loans and Credit Sales*]. Special requirements also apply to contracts for the sale or lease of an automobile [see Ch. 47, *Automotive Financing and Vehicle Leasing* ; see also Veh. Code § 15500 (minors without valid driver's licenses prohibited from contracting to buy or lease automobiles)].

[b] Disaffirmance Not Permitted

A minor's contract to pay the reasonable value of necessities actually provided to the minor, or the minor's family, while he or she is not under the care of a parent or guardian who is able to provide them cannot be disaffirmed on the basis of minority [Fam. Code § 6712]. A minor who is under the care of a parent or guardian able to provide support may enter into a contract for necessities, but the minor retains the power to disaffirm the contract [Fam. Code §§ 6710-6712; see also *Aubel v. Sosso (1925) 72 Cal. App. 57, 60, 236 P. 319*]. This form contains specific representations by the minor

that he or she is not under the care of a parent or guardian able to provide the things contracted for, and that those things are necessary for the support of the minor or the minor's family [see P 1 of form].

A clause relating to the reasonableness of the price charged for the necessities is also included [see P 3 of form]. It is unlikely that such a statement would be given much weight by a court if the price was in fact unreasonable, but the statement nevertheless may be useful to alert the parties to the importance of the reasonableness requirement. Minors are obligated to pay only the reasonable value of necessities furnished to them pursuant to a contract [*Fam. Code* § 6712(a)].

[c] Parental Duty of Support

Parents have a duty to support their minor children according to their circumstances [*Fam. Code* § 3900]. One who provides necessities to a minor who is under the care of a parent or guardian can recover the reasonable value of the things provided from the parent or guardian, to the extent that the parent or guardian is able to pay for them [*Fam. Code* § 3950]. A parent does not have the duty to support a child of the parent's child (whether or not the parent's child is a minor) [*Fam. Code* § 3930].

[d] Necessities

The courts have not set forth any uniform standard for determining what may be considered necessary for the care and support of a minor or a minor's family. Food and lodging [*Burnand v. Irigoyen* (1947) 30 Cal. 2d 861, 867, 186 P.2d 417] ; the services of an attorney in civil actions, when rendered for the benefit of the minor [*Leonard v. Alexander* (1942) 50 Cal. App. 2d 385, 389, 122 P.2d 984 ; see *Estate of Ott* (1979) 99 Cal. App. 3d 605, 615-616, 160 Cal. Rptr. 402 (legal services are not "necessaries of life" if not rendered expressly for benefit of minor)]; and emergency medical treatment [*Bauman v. San Francisco* (1940) 42 Cal. App. 2d 144, 162, 108 P.2d 989] have been held to be necessities within the meaning of applicable statutory provisions [see *Fam. Code* § 6712(a); (cited cases decided under predecessor statute, former *Civ. Code* § 36(a)(1))].

[2] FORM

MINOR'S CONTRACT FOR NECESSITIES

MINOR'S CONTRACT FOR NECESSITIES

Recitals

1. _____ [name of minor], herein referred to as "Minor," and _____ [name of seller], herein referred to as "Seller," enter into this contract on the basis of the following representations by Minor:

(a) Minor represents that _____ [he or she] was born on _____ [date], and is _____ years old on the date of signing this Agreement.

(b) Minor represents that _____ [he or she] is not living with a parent or guardian who is able to provide Minor [or Minor's family] with the necessities described in Paragraph 2 of this Agreement.

(c) Minor represents that the _____ [goods or services] described in Paragraph 2 of this Agreement are necessities required for the care and support of Minor [or Minor's family].

Minor and Seller therefore agree as follows:

Goods or Services to Be Furnished

2. Seller will provide to Minor the following [goods or services]: [*generally describe or enumerate*] [on an as-needed basis from _____ (date), through _____ (date)]. [These _____ (goods or services) will be delivered to Minor at _____ (specify place of delivery), on _____ (date).]

Payment

3. Minor will pay to Seller, upon receipt of the [goods or services] described in Paragraph 2 of this Agreement [*or specify other payment arrangements*], \$[*specify if this is per-unit price, or if additional charges will apply, e.g., plus \$5 if the goods are delivered to Minor's home*]. Minor and Seller agree that this sum is the reasonable value of the [goods or services] described and acknowledge that Minor cannot be held liable for an amount in excess of the reasonable value of the [goods or s ervices].

[CAUTION: If interest or installment payments are provided for, this contract must comply with the disclosure requirements set forth under the federal Truth in Lending Act (15 U.S.C. § 1601 et seq.) and the California Unruh Act (Civ. Code § 1801 et seq.). For discussion and forms for these disclosures, see Ch. 45, Consumer Installment Loans and Credit Sales.]

Assignability

4. Neither this Agreement nor any interest under it may be assigned by either party without the prior written consent of the other party.

Entire Agreement

5. This Agreement contains the entire agreement of the parties with respect to the matters covered herein. No other agreement, statement, or promise by the parties that is not contained in this Agreement shall be binding or valid.

Choice of Law

6. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

Attorneys' Fees

7. If any legal action is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision shall apply to this entire contract.

Executed at _____ [city], _____ [state], on _____ [date].

MINOR

_____ [signature of minor]

[*typed name*]

SELLER

_____ [*signature of seller*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties Age Contracts Law Types of Contracts General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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A. Contracts Involving Minors

31-100B California Legal Forms--Transaction Guide § 100B.201

§ 100B.201 Contract for Employment of Minor as Photographic Model

[1] Comment

[a] Use of Form

This form is a complete contract between a minor and a person or organization employing the minor as a photographic model. In addition to standard modeling contract provisions, this form includes an express statement of the employee's minority and an optional clause conditioning the contract's validity on the superior court's approval of the agreement [see P 9; see also [e], below].

[b] Work Permit Requirements

Modeling is considered to be an entertainment industry job, and the written consent of the Labor Commissioner is required for the employment of a minor under the age of 16 as a model [*Lab. Code § 1308.5(a)(7)*; *8 Cal. Code Reg. § 11751*]. The written consent of the Labor Commissioner is given in the form of an entertainment industry work permit, which will not be issued unless the Labor Commissioner has determined that the work environment is proper for the minor and that the employment will not be harmful to the minor's health or education [*Lab. Code § 1308.6*]. The permit may be revoked by the Commissioner at any time if the minor's continued employment would violate any law or regulation or be detrimental to the minor [*Lab. Code § 1300*]. For the application used to request a modeling work permit, see § 100B.241. For the application used to request a regular work permit for non-entertainment industry employment, see § 100B.240.

[c] Hours of Employment

The maximum number of hours per day and per week for which a minor may be employed in the entertainment industry is regulated by statute [*Lab. Code § 1308.7(a)*]. The precise number of hours that minors employed in the entertainment industry can work per day is determined by the age of the minor [*8 Cal. Code Reg. § 11760*]:

- Infants younger than six months of age but older than 15 days may work for only 20 minutes per

day, and may be kept at the place of employment for a maximum of two hours per day.

- Children between the ages of six months and two years may work two hours per day, and may be kept at the place of employment for up to four hours per day.
- Between the ages of two and six, three hours of actual work and up to six hours spent at the place of employment are allowed.
- From age six to age nine, four hours of work on school days and six hours on nonschool days is allowed, with a maximum of eight hours to be spent at the workplace.
- Children between nine and 16 years of age may work for five hours on school days and seven hours on nonschool days, and may be kept at the place of employment for up to nine hours per day.
- Minors over the age of 16 may work for six hours on school days and eight hours on nonschool days, and remain at the place of employment for up to 10 hours per day.

Work time includes time spent in wardrobe or makeup, whether at the minor's home or at the place of employment [8 *Cal. Code Reg. § 11763*]. Paragraph 3 of this form should be filled in to reflect the permissible hours of work for the minor, in accordance with the above regulations.

[d] Compulsory Schooling Requirements

Minors working in the entertainment industry must be supervised by studio teachers, and must, if they are between the ages of six and 18, be engaged in schoolwork for at least three of the hours spent at work during each full work day [see [c], *above*] that is also a regular school day [*Educ. Code § 48224*; 8 *Cal. Code Reg. § 11760*]. The hours of instruction must be between 8:00 A.M. and 4:00 P.M. [*Educ. Code § 48224*]. For a more detailed discussion of the responsibilities of the teachers who work with minors in the entertainment industry, see § 100B.202[1][c]. For an example of a provision regarding a studio teacher, which should be included as Paragraph 5 of this form, see § 100B.202[2].

[e] Court Approval of Contract

Minors' employment contracts do not require court approval in order to be valid [see *Fam. Code § 6700, 6701*]. However, obtaining court approval will prevent the minor from later disaffirming a sports or entertainment industry employment contract on the basis of his or her minority [see *Fam. Code §§ 6750, 6751*]. This statutory rule [*Fam. Code § 6751(a)* (former *Civ. Code § 36(a)*)] applies generally to "artistic and creative services" rendered by minors in the entertainment industry. The regulations relating to the employment of minors include modeling as an entertainment industry occupation [8 *Cal. Code Reg. § 11751*; see also *Faloona v. Hustler Magazine, Inc. (N.D. Tex. 1985) 607 F. Supp. 1341, 1355, aff'd, 799 F.2d 1000 (5th Cir. 1986)* (stating that modeling contracts are covered by former *Civ. Code § 36*, predecessor of *Fam. Code § 6751*)].

The court approving the contract must order that 15 percent of the minor's gross earnings be set aside by the employer in trust, in an account or other savings plan, and preserved for the benefit of the minor (a "Coogan Trust Account") [*Fam. Code § 6752(b)(1)*; see *Fam. Code §§ 6750(c)* (minor's "gross income" defined), 6753 (standards for operation of trust); see also § 100B.204[1]].

Obtaining court approval may be a wise precaution for the employer's protection if an ongoing contractual relationship is contemplated. If the agreement involves a single show or photo session, however, the benefit of extinguishing the minor's right to disaffirm may not justify the time and expense involved in obtaining approval.

Paragraph 9 of this form is an optional clause stating that the contract will be submitted for court approval and that the employer may cancel the contract if the court does not approve it. Cancellation has the effect of abrogating all unperformed duties under the contract [see *Civ. Code* § 1699; *Mamula v. McCulloch* (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571]. It is distinguished from rescission, which restores the parties to their pre-contract positions [see *Civ. Code* § 1688; *Mamula v. McCulloch* (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571]. For further discussion of rescission and cancellation, see Ch. 77, *Discharge of Obligations*.

For further discussion of court approval of minors' contracts, see § 100B.203[1][b]. For another example of a clause conditioning a contract on court approval, see § 100B.203[2]. For a petition for approval of a minor's employment contract, see California Forms of Pleading and Practice, Ch. 365, *Minors: Contract Actions* (Matthew Bender).

[f] Termination of Contract

Contract provisions that give one party an option to terminate the contract under specified conditions are valid [*R.J. Cardinal Co. v. Ritchie* (1963) 218 Cal. App. 2d 124, 143, 32 Cal. Rptr. 545]. However, if an employer terminates an employment agreement in bad faith, he or she may be liable for wrongful discharge or breach of the implied covenant of good faith and fair dealing [*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 176, 164 Cal. Rptr. 839, 610 P.2d 1330; *Cleary v. American Airlines, Inc.* (1980) 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722 (overruled in part by *Guz v. Bechtel National, Inc.* (2000) 24 Cal. 4th 317, 351, 100 Cal Rptr. 2d 352, 8 P.3d 1089)]. Paragraph 2 of this form sets forth the beginning and ending dates of the job, and specifies that the employer may terminate the contract before the stated ending date if he or she is dissatisfied with the minor's performance, or for other good cause. There is also an optional provision allowing the employer to terminate the contract on a good-faith determination that the minor's services are no longer needed.

For additional discussion of termination of employment contracts by the employer, see Ch. 85, *Employment Agreements*.

[g] Parental Consent

Before a minor's name, voice, signature, photograph, or likeness can be used for advertising purposes, the consent of the minor's parent or legal guardian must be obtained [*Civ. Code* § 3344(a)]. If proper consent has not been obtained, the person who provided the minor's likeness (but not the owners or employees of the medium used for the advertisement) will be liable to the minor in an amount equal to \$750 or the actual damages suffered by the minor, whichever is greater [*Civ. Code* § 3344(a), (f)]. Punitive damages and attorneys' fees may also be available to the minor, along with any profits from the unauthorized use that are not collected in the form of actual damages [*Civ. Code* § 3344(a)].

This form includes a parental consent form that can be tailored to the specific uses for which the photographs are released [see Exhibit "A"]. *Civ. Code* § 3344 does not specify that the consent must be in writing, but a writing is advisable for both parties, as proof of the fact and extent of the consent given.

[h] Sexual Exploitation of Children

It is a crime to knowingly develop, duplicate, print, or exchange any representation of information, data, or image, including any film, photograph, videotape, negative, or slide depicting a child under the age of 18 engaged in sexual conduct [*Penal Code* § 311.3(a)]. Violators may be fined up to \$2,000, or imprisoned in the county jail for up to one year, or both. Repeat offenders may be imprisoned in the state prison [*Penal Code* § 311.3(d)].

[2] FORM

CONTRACT FOR EMPLOYMENT OF MINOR AS PHOTOGRAPHIC MODEL

CONTRACT FOR EMPLOYMENT OF MINOR AS PHOTOGRAPHIC MODEL

This Agreement is entered into by _____ [*name of minor*], a minor born on _____ [*date*], and herein referred to as "Minor," and _____ [*name of employer*], herein referred to as "Employer," for the employment of Minor as a photographic model.

Purpose of Agreement

1. Employer will employ Minor as a photographic model for [*describe assignment, e.g., the 13th edition of the XYZ Clothing Catalog*].

Term of Employment

2. Minor will commence work under this Agreement on _____ [*date*], at [*specify location*], and will continue to work until _____ [*date*], [unless Employer makes a good-faith determination, prior to that date, that minor's services are no longer needed. In that case, Employer may terminate this Agreement upon _____ days written notice to minor. Employer may terminate this agreement at any time if Employer is dissatisfied with Minor's performance, or for other good cause].

Hours of Employment

3. Employer will require Minor to work no more than [hours or minutes] on any [*add if minor is of school age: nonschool*] day, [*add if minor is of school age: no more than _____ hours on any school day,*] and no more than 48 hours in any week. Minor will not be required to remain on the set [*or specify other place of employment*] for more than _____ hours per day. Minor will be required to work only between the hours of 5:00 A.M. and 10:00 P.M., or 5:00 A.M. and 12:00 A.M. if a special permit is issued.

Compensation

4. Employer will pay Minor [*or _____ (name of person to receive minor's earnings), Minor's (parent or legal guardian)*] the sum of \$[per hour] for the term of employment described in Paragraph 2 of this Agreement. Payment will be made [in the manner set forth by the attached court order,] as follows: [*specify payment arrangements*].

Studio Teacher Arrangements

5. [*For a provision regarding studio teacher arrangements, if necessary, see § 100B.202*].

Wardrobe

6. Employer will furnish all Minor's wearing apparel for use in connection with the assignment described in Paragraph 1 of this Agreement [with the exception of _____ (*specify, e.g., shoes and undergarments*)]. All items furnished by Employer will remain the property of Employer.

[OR]

6. Minor will supply _____ [his or her] own wearing apparel for use in connection with the assignment described in Paragraph 1 of this Agreement, as follows: *[describe appropriate apparel]*.

[Add if minor will need to travel to shooting location:]

Transportation

7. Employer will arrange and pay for Minor's transportation [and that of one parent or other adult designated by Minor's parent] between _____ [city], _____ [state], and _____ [city], _____ [state] by *[describe mode of travel, e.g., first class air travel]*, and Minor's food and lodging [and that of one parent or other adult designated by Minor's parent] on location in _____ [city], _____ [state].

[Continue with the following:]

Parental Consent

8. The validity of this Agreement is conditioned on the written consent of _____ *[name of parent or guardian]*, the [parent or guardian] of Minor, which is attached to this Agreement and designated as Exhibit A, to the release for commercial purposes of any photographs, slides, films, videotapes, or negatives produced under the terms of this Agreement.

[Optional provision:]

Court Approval

9. This contract will be submitted for approval to the Superior Court of _____ County, State of California, within _____ days after its execution. If it is not approved by that court within _____ days after its submission, Employer may, at its option, cancel this Agreement. Employer's liability to Minor upon cancellation will be limited to making pro rata compensation to Minor under the terms of Paragraph 4 of this Agreement for any services rendered before cancellation.

[Continue with the following:]

Executed at _____ [city], _____ [state], on _____ [date].

MINOR

_____ *[signature of minor]*

[typed name]

EMPLOYER

_____ *[signature of employer]*

[*typed name*]

EXHIBIT A

Release

The undersigned hereby declares that _____ [he or she] is the [parent or legal guardian] of _____ [name of minor], a minor born _____ [date]. The undersigned consents to the use of the [specify appropriate photographic format, e.g., slides] of the minor, taken on _____ [date], at [place], by _____ [name of photographer] and _____ [his or her or its] successors and assigns, subject only to the following restrictions: [specify, e.g., use of the photographs in connection with any advertisement for tobacco products or liquor is prohibited]. [The undersigned waives any right to inspect or approve the _____ (specify appropriate photographic format, e.g., slides) prior to their use.]

Executed at _____ [city], _____ [state], on _____ [date].

_____ [signature of parent or guardian]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties Age Contracts Law Types of Contracts General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 100B CONTRACTS AND EMPLOYMENT OF MINORS
PART IV. FORMS
A. Contracts Involving Minors

31-100B California Legal Forms--Transaction Guide § 100B.202

§ 100B.202 Clause in Minor's Employment Contract Regarding Studio Teacher

[1] Comment

[a] Use of Form

This form is a clause for use in a minor's entertainment industry employment contract, stating that the employer will provide a studio teacher for the minor as required by California law [*see 8 Cal. Code Reg. § 11751*]. Entertainment industry employers include organizations and individuals that use the services of minors in motion pictures, theatrical productions, photography, modeling, recording, rodeos, circuses, and other entertainment performances [*8 Cal. Code Reg. § 11751*]. This form is designed for use by small independent companies or individuals employing minors. Major studios and other large entertainment industry employers will generally have their own form contracts, with provisions for studio teachers that reflect the terms of a collective bargaining agreement.

This clause can be added to a regular entertainment industry contract that is being tailored for use with a minor employee. For examples of entertainment industry contracts, see Ch. 87, *Entertainment Contracts*. Other clauses that may be desirable when a minor employee is involved include a declaration or acknowledgment of the fact of minority, a clause conditioning the contract on the approval of the superior court, and a clause specifying that the minor's wages are to be distributed in compliance with the court's order. For examples of these clauses, see §§ 100B.201 and 100B.203.

[b] Attendance Requirements

Minors between the ages of six and 18 who have not been exempted from compulsory schooling requirements [*see Educ. Code §§ 48220-48232*] must receive at least three hours of instruction per school day while working in the entertainment industry [*Educ. Code §§ 48200, 48224; see also 8 Cal. Code Reg. § 11760*]. The instruction must be in English and must cover the same topics covered by regular public education for the child's age or grade level [*Educ. Code § 48224*].

[c] Studio Teacher's Credentials and Responsibilities

Studio teachers must be certified schoolteachers and must hold both elementary and secondary California teaching credentials [8 Cal. Code Reg. § 11755]. Since they will be responsible not only for the education of minor employees, but also for their health, safety, and morals on the job, they must be certified by the Labor Commissioner to ensure that they are knowledgeable concerning California child labor laws [8 Cal. Code Reg. § 11755].

The studio teacher is responsible for the education and supervision of minors on the set or other location of employment [8 Cal. Code Reg. § 11755]. Generally, it is his or her job to ensure that the child labor laws are complied with during the course of the minor's employment. The studio teacher has the authority to prohibit the minor's engagement on a set or location, or to remove the minor from a location, if he or she determines that the minor's health, safety, or morals are being endangered. The employer may appeal the studio teacher's decision to the Labor Commissioner, who will make the final determination [8 Cal. Code Reg. § 11755.2]. The studio teacher must also report to the Board of Education any unusual occurrences or circumstances on the job that affect the employment of minors [8 Cal. Code Reg. § 11758]. If an employer discriminates against a studio teacher for removing a minor from an improper employment situation or making reports to the Board of Education regarding the working conditions for minors at the place of employment, the employer's permit to employ minors may be denied, suspended, or revoked by the Division of Labor Standards Enforcement [8 Cal. Code Reg. § 11758.1].

[d] Employer's Responsibilities

An entertainment industry employer must provide studio teachers for the benefit of all minor employees between the ages of 15 days and 16 years, and for those between the ages of 16 and 18 who are required to attend school [8 Cal. Code Reg. § 11755.2]. The employer must pay the teachers [8 Cal. Code Reg. § 11755.4]. Generally, the employer must provide one teacher for every 10 students. During weekends, holidays, and school vacations, the employer must provide one teacher for every 20 students between the ages of 15 days and 16 years. A larger teacher-to-student ratio, and the employment of nurses in addition to studio teachers, are required for infants and very young children [see 8 Cal. Code Reg. § 11760].

Employers may obtain lists of qualified and available studio teachers from the county superintendent, or other local school district personnel [see Educ. Code § 48225]. Placement services for teachers and employers may also be provided by the local school districts, particularly in the Los Angeles area.

[2] FORM

Studio Teacher Arrangements

Studio Teacher Arrangements

In compliance with *Title 8, Section 11755.2 of the California Code of Regulations*, Employer [or other designation used in contract] shall provide, at Employer's expense, a certified studio teacher to tutor and supervise the activities of Minor [or Employee or other designation used in contract] while Minor is employed under the terms of this Agreement. Employer's obligation under this Paragraph shall cease when Minor attains age eighteen.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawFormationCapacity of PartiesAgeContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview



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A. Contracts Involving Minors

31-100B California Legal Forms--Transaction Guide § 100B.203

§ 100B.203 Clause in Minor's Employment Contract Conditioning Employment on Court Approval of Contract

[1] Comment

[a] Use of Form

This form is a clause for use in an entertainment industry employment contract. It states that the employee is a minor and that the employer may cancel the contract if it is not approved by the superior court [*see Fam. Code § 6751*]. The clause may be added to a regular entertainment industry contract that is being tailored for use with a minor employee. For examples of entertainment industry contracts, see Ch. 87, *Entertainment Contracts*. Other clauses that may be desirable when a minor employee is involved include a clause relating to the employer's obligation to provide a studio teacher to tutor and supervise minor employees [*see § 100B.202*], and a clause specifying that the minor's wages are to be paid to a parent or guardian in compliance with the court order [*see § 100B.201*].

[b] Obtaining Court Approval of Contract

Certain contracts of minors may be submitted for approval to the superior court of the county in which the minor lives or works, and, if approved by the court, cannot be subsequently disaffirmed on the basis of minority. Contracts that may be submitted to the court for approval include those under which a minor agrees to render artistic or creative services in the entertainment field; to buy, sell, lease, or otherwise dispose of literary, musical, or dramatic properties; to employ a talent agency; or to perform professional athletic services [*Fam. Code §§ 6750, 6751; Lab. Code § 1700.37*].

Any party to the contract may petition the court for approval of the contract [*Fam. Code § 6751(b)*]. The court approving the contract must order 15 percent of the minor's gross earnings set aside and preserved for the minor's future benefit, and the individual (at least one custodial parent or guardian) who serves as trustee must provide the minor's employer with a copy of a statement that identifies the trust account into which the earnings will be placed and must render an annual accounting for the trust funds [*Fam. Code §§ 6752, 6753; see § 100B.204* (trustee's statement)]. For a form used to petition the superior court for approval of a minor's contract, see California Forms of Pleading and Practice, Ch. 364, *Minors: Contract Actions* (Matthew Bender).

If the minor neither lives nor works in California, the contract may be approved by the superior court in the county where any party has its principal place of business in the state [*Fam. Code § 6751(a)*].

[c] Disaffirmance by Minor

Court approval is not required to make a minor's employment contract valid [*see Fam. Code § 6700*]. However, employers who do not avail themselves of the approval procedure will have no defense to the minor's right to disaffirm the contract at will. A minor may generally disaffirm his or her contractual obligations during minority or within a reasonable time after reaching the age of majority, even if the minor made misrepresentations concerning his or her age, or the other party had no notice of the minor's age, when the contract was entered into [*Fam. Code § 6710; see Niemann v. Deverich (1950) 98 Cal. App. 2d 787, 793, 221 P.2d 178 ; see also Williams v. Leon T. Shettler Co. (1929) 98 Cal. App. 282, 283, 276 P. 1065*]. The disaffirming minor will be entitled to receive payment for any services that he or she has already performed under the contract [*Civ. Code § 1691(b); see Abdullah v. Abdullah (1920) 50 Cal. App. 115, 119, 194 P. 511*]. The acknowledgment of the employee's minority that appears at the beginning of this form is designed to place the employer on notice of the possibility that the employee may disaffirm the contract unless court approval is obtained.

For further discussion of the right of minors to disaffirm their contractual obligations, see § 100B.22[1].

[2] FORM

Court Approval of Contract

Court Approval of Contract

Minor [*or Employee or other designation used in contract*] warrants that _____ [he or she], at the time of the execution of this Agreement, is a minor under the provisions of *California Family Code Section 6500*. Pursuant to the provisions of *California Family Code Section 6751*, this Agreement shall be submitted for approval to the Superior Court of _____ County, State of California, within _____ days after its execution. If it is not approved by the court within _____ days after its submission, Employer [*or other designation used in contract*] may, at its option, cancel this Agreement. Employer's liability to Minor upon cancellation shall be limited to making pro rata compensation to Minor under the terms of this Agreement for any services rendered prior to cancellation.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawFormationCapacity of PartiesAgeLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview



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31-100B California Legal Forms--Transaction Guide § 100B.204

§ 100B.204 Trustee's Statement Identifying Account Established for Minor's Earnings**[1] Comment--Use of Form**

This form is a written statement for use by a trustee or trustees to identify the trust account that has been established for the benefit of a minor who has entered into a professional entertainment or sports contract. A photocopy of the trustee's statement must be provided to the employer within 10 days after the minor and the employer (and any "loan-out company" through which the minor's service are provided) sign the contract [*Fam. Code* §§ 6752(b)(3), (d)(2), 6753(c)]. The copy of the statement must be accompanied by any information received from the financial institution confirming the creation of the account, such as an account agreement, account terms, or passbook [*Fam. Code* § 6753(c)].

When a minor's sports or entertainment industry employment contract is submitted to the superior court for approval [*Fam. Code* § 6751; *see* § 100B.203; *see also* California Forms of Pleading and Practice, Ch. 365, *Minors: Contract Actions* (Matthew Bender)], the court must require that 15 percent of the minor's gross earnings under the contract be set aside by the employer in trust, in an account or other savings plan for the minor's benefit [*Fam. Code* § 6752(b)(1)]. In addition, even if a court has not approved the contract, the employer must set aside at least 15 percent of the minor's gross earnings under the contract in trust [*Fam. Code* § 6752(d)(1); *see Fam. Code* § 6750(c) (minor's "gross earnings" defined)].

A trustee's written statement identifying the trust account is required in all cases [*Fam. Code* § 6752(b)(3), (d)(2)]. The contents of the statement are prescribed by statute [*see Fam. Code* § 6753(c)].

[2] FORM**TRUSTEE'S STATEMENT IDENTIFYING ACCOUNT ESTABLISHED FOR MINOR'S EARNINGS**

TRUSTEE'S STATEMENT IDENTIFYING ACCOUNT ESTABLISHED FOR MINOR'S EARNINGS

To: _____[*name of employer*]

[I or We], trustee(s) for the benefit of _____ [name of minor], a minor, hereby declare that the following trust account has been established for the deposit of _____ percent of the minor's gross earnings for services under a contract dated _____, between the minor and _____ [employer's name]:

1. Name and address of financial institution: _____ [full legal name and street address, e.g., Oakview Savings and Loan Association, 1010 Main Street, Oakview, CA 42113].

2. Telephone number of financial institution: _____.

3. Account name and number: [specify, e.g., William T. Evans, trustee for Ronald F. Evans, a minor, Account Number 001234].

4. Name of minor beneficiary: [specify, e.g., Ronald F. Evans, a minor].

5. Name of account trustee(s): _____ [specify, e.g., William T. Evans, father of minor].

[Continue, with any additional information needed by employer to deposit funds into trust account, e.g.:]

6. The routing number of the financial institution for direct deposit of the minor's earnings into the trust account is _____.

Attached to this statement is a true and accurate photocopy of the following information from _____ [name of financial institution] that confirms the existence of the above described account: _____ [specify, e.g., printout dated January 4, 2000, showing creation of Account Number 001234, in the name of William T. Evans, trustee for Ronald F. Evans, a minor].

[I or We] declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [signature(s) of trustee(s)]
[typed name(s)]

[Attach photocopy of any information from financial institution confirming account's creation, such as account agreement, account terms, or passbook, and describe attachment.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview



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31-100B California Legal Forms--Transaction Guide §§ 100B.205-100B.209

[Reserved]

§§ 100B.205[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Ratification and Disaffirmance of Minors' Contracts

31-100B California Legal Forms--Transaction Guide § 100B.210

§ 100B.210 Guaranty by Third Party to Assume Minor's Obligations if Minor Disaffirms Contract

[1] Comment

[a] Use of Form

This form is a guaranty for the benefit of a person who contracts with a minor that the guarantor will be liable for the minor's obligation under the contract in the event that the minor disaffirms the contract before or after reaching the age of majority. Because minors can disaffirm most types of obligations they incur, before or within a reasonable time after reaching majority [*Fam. Code § 6710; see § 100B.22[1]*], adults are often unwilling to contract or conduct business with minors. It is unclear whether a minor is required to return benefits already received under a contract upon disaffirmance of the contract [*see Fam. Code § 6710*]. Even if the requirement is found to exist, it offers only limited protection for the other party, since the item may be used or damaged upon return and the minor may not have other assets with which to compensate the other party for the loss. A guarantee assures performance, by creating an obligation in an adult who does not have the power to disaffirm it [*see Civ. Code § 2787*].

If a guaranty agreement is entered into at the same time as the original obligation, or forms part of the consideration given to the other party, no separate consideration for the guaranty is needed. In all other cases, separate consideration must be given [*Civ. Code § 2792*]. For this reason, the guaranty should be executed at the same time as the contract between the minor and the obligee. A copy of the contract should also be attached to the guaranty agreement.

Guaranties generally must be in writing, but it is not necessary for the writing to express the consideration given for the guaranty [*Civ. Code § 2793; but see Civ. Code § 2974 (exceptions to writing requirement)*]. For a more detailed discussion of the law regarding guaranty agreements, see Ch. 79, *Suretyship, Guaranty, and Indemnity*.

[b] Qualifications of Guarantor

This form is designed for use by a parent or other close adult relative of the minor, but it can be used by any other adult who is willing to guarantee the minor's performance. The guarantor should not be another minor, since the purpose of the guaranty agreement is to assure performance by securing the promise of one who cannot disaffirm his or her

obligations.

[c] Nature of Underlying Obligation

This type of guaranty will be most useful in cases in which a minor has purchased goods or services pursuant to an agreement to make future payments. It can also be used if the minor has promised to perform some other simple obligation. Obligations that would be difficult or impossible to enforce against a third party, such as an obligation to deliver a unique item, or to perform personal services, can be secured under this note by the guarantor's promise to pay a specific sum if the minor disaffirms his or her obligation.

This form should not be used to secure a minor's contract regarding real property or personal property not within his or her immediate control, since minors' contracts in these areas are void, rather than merely disaffirmable [*Fam. Code* § 6701(b), (c)].

This type of guaranty is not necessary to secure a contract that, by statute, cannot be disaffirmed by the minor. Contracts that cannot be disaffirmed on the basis of minority include certain contracts for necessities [*Fam. Code* § 6712; see § 100B.200], consents to various medical treatments [*Fam. Code* §§ 6900-6929; see Ch. 100A, *Personal Affairs of Minors*], and contracts for employment in the sports and entertainment fields that have been approved by the superior court [*Fam. Code* § 6751(a); see § 100B.203[1][b]].

[2] FORM

GUARANTY OF CONTRACT MADE BY MINOR

GUARANTY OF CONTRACT MADE BY MINOR

This guaranty is given by _____ [*name of guarantor*], ("Guarantor"), to induce _____ [*name of obligee*], ("Obligee") to enter into a contract with _____ [*name of minor*], "Minor"). That contract is attached to this agreement as Exhibit A, and is incorporated herein by reference.

Recitals

1. Guarantor and Obligor declare as follows:

(a) Guarantor is the _____ [*relationship, e.g., father*] of Minor.

(b) Guarantor is over 18 years of age.

(c) Minor and Obligor have entered into a contract, on or about this date, under which Minor has agreed to _____ [*briefly describe Minor's obligation*], in exchange for which Obligor has agreed to _____ [*briefly describe Obligor's obligation*].

Guarantee of Obligation

2. If Minor in any manner disaffirms the above-described contract before or after attaining the age of 18, the age of majority in the State of California, or if Minor fails to perform all or any part of Minor's obligation under the contract, Guarantor agrees to [*describe obligation assumed, e.g., pay any amounts outstanding under the contract*] to Obligor, within _____ days after receipt of written notice of Minor's disaffirmance or nonperformance of that obligation.

Executed at _____[*city*], _____[*state*], on _____[*date*].

GUARANTOR

_____ [*signature of Guarantor*]

[*typed name*]

OBLIGEE

_____ [*signature of Obligee*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties Age Contracts Law Types of Contracts General Overview Contracts Law Types of Contracts Guaranty Contracts



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 B. Ratification and Disaffirmance of Minors' Contracts

31-100B California Legal Forms--Transaction Guide § 100B.211

§ 100B.211 Ratification of Contract Made During Minority**[1] Comment--Use of Form**

This form is a statement of ratification by an obligor who has made a disaffirmable but otherwise valid contract during his or her minority and wishes to confirm the obligation after reaching the age of majority. For a note acknowledging and promising to pay a debt incurred during minority, see § 100B.212. Although an obligor could execute this statement on his or her own initiative, he or she would most likely be asked to do so by the other party to the contract.

A ratification, if executed by an obligor aged 18 or over, prevents the obligor from subsequently disaffirming the contract on the basis of minority [see *Hakes Investment Co. v. Lyons* (1913) 166 Cal. 557, 561, 137 P. 911]. In some cases, the other parties to the contract may be willing to increase their consideration if the obligor will ratify the contract. A ratification executed while the obligor is still a minor is not binding, and it does not preclude a later disaffirmance [Fam. Code § 6710; see *Niemann v. Deverich* (1950) 98 Cal. App. 2d 787, 793, 221 P.2d 178].

No particular form is required for a ratification. If the obligor continues to perform under the contract for a reasonable period of time after reaching the age of majority, or fails to take any actions indicative of an intent to disaffirm the contract, ratification may be implied and the obligor will be estopped from subsequently disaffirming the contract [see Fam. Code § 6710; see also *Hastings v. Dollarhide* (1864) 24 Cal. 195, 198]. For a discussion of the reasonable time standard, and actions that may indicate disaffirmance, see § 100B.214[1][c].

[2] FORM**RATIFICATION OF CONTRACT MADE DURING MINORITY****RATIFICATION OF CONTRACT MADE DURING MINORITY**

I, _____ [name of obligor], hereby declare as follows:

1. On _____ [date], I entered into a contract at _____ [city], _____ [

state] with _____ [name of obligee] for [briefly describe subject matter of contract]. A copy of that contract is attached to this Agreement as Exhibit A, and is incorporated herein by reference.

2. My birthdate is _____ [date]. On the date of execution of the above-described contract, I was _____ years of age and a minor under the laws of the State of California. I am now _____ years of age and have attained majority under the laws of the State of California.

3. I understand that under the laws of the State of California, I have the right to disaffirm the above-described contract.

4. [In consideration of _____ (recite consideration),] I hereby ratify and confirm the above-described contract and my obligations thereunder, and waive my right to disaffirm all or any part of it on the basis of minority at the time of its execution.

Executed at _____ [city], _____ [state], on _____ [date].

_____ [signature of obligor]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties Age Contracts Law Remedies Ratification



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31-100B California Legal Forms--Transaction Guide § 100B.212

§ 100B.212 Agreement to Pay Debt Contracted During Minority

[1] Comment

[a] Use of Form

This form is a promissory note by a debtor who wishes to acknowledge a debt incurred during his or her minority and to make a binding promise to pay it. It satisfies the statutory requirements that a negotiable instrument (1) be signed by the maker, (2) contain an unconditional promise to pay a certain amount, (3) be payable on demand or at a definite time, and (4) be payable to order or to bearer [*Com. Code § 3104*]. For a discussion of promissory notes and negotiable instruments generally, see Ch. 55, *Negotiable Instruments* .

[b] Credit Sales and Prohibitions Against Usury

This form will not be effective to ratify debt terms that violate California's constitutional prohibition against usury [*Cal. Const., art. XV, § 1*] or are otherwise illegal. Usurious loan provisions are void [*Epstein v. Frank (1981) 125 Cal. App. 3d 111, 122, 177 Cal. Rptr. 831*] , and void contracts or contractual provisions cannot be ratified [see *Hakes Inv. Co. v. Lyons (1913) 166 Cal. 557, 561, 137 P. 911*] . Debt instruments for consumer credit transactions that do not comply with the disclosure requirements set forth under the Truth in Lending and Unruh Acts [*15 U.S.C. § 1601 et seq.; Civ. Code § 1801 et seq.*] may also be invalid and therefore not subject to ratification. For a discussion of the latter disclosure requirements, see Ch. 45, *Consumer Installment Loans and Credit Sales* .

[2] FORM

AGREEMENT TO PAY DEBT CONTRACTED DURING MINORITY

AGREEMENT TO PAY DEBT CONTRACTED DURING MINORITY

I, _____ [*name of debtor*], hereby declare as follows:

1. On or about _____ [date], I [purchased or borrowed] [describe merchandise or sum of money] from _____ [name of creditor], herein referred to as "Creditor," _____ [for which I agreed to pay \$ _____ or which I agreed to repay] on the following terms and conditions: [specify]. At this time, I have paid Creditor \$ _____ under this agreement.

2. My birthdate is _____. On the date I entered into the above-described agreement, I was _____ years of age and a minor under the laws of the State of California. I am now _____ years of age and have attained majority under the laws of the State of California.

3. [In consideration of _____ (recite consideration advanced by creditor),] I hereby acknowledge my debt to Creditor in the amount of [amount owed under P 1], and agree to pay that amount to Creditor within _____ months of this date, with interest at the annual rate of _____ percent.

Executed at _____ [city], _____ [state], on _____ [date].

DEBTOR

_____ [signature of debtor]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties Age Contracts Law Types of Contracts General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 100B CONTRACTS AND EMPLOYMENT OF MINORS
PART IV. FORMS
B. Ratification and Disaffirmance of Minors' Contracts

31-100B California Legal Forms--Transaction Guide § 100B.213

§ 100B.213 Notice of Nullity of Minor's Conveyance of Real Property

[1] Comment

[a] Use of Form

This form is a declaration that a minor's instrument conveying an interest in real property is a nullity. It should be used if a minor has executed a deed or made a contract purporting to convey an interest in realty, to place subsequent purchasers of realty on notice of the ineffectiveness of the minor's purported conveyance and the resulting cloud on title.

[b] Real Property Conveyances by Minors

Minors lack the capacity to contract regarding real property or any interest in real property [*Fam. Code § 6701(b)*]. Minors' contracts regarding real property interests are void and are not subject to ratification once the minor reaches the age of majority [*Hakes Inv. Co. v. Lyons* (1913) 166 Cal. 557, 561, 137 P. 911] . Although title insurance will normally protect subsequent purchasers of real property, the minor, or the minor's survivors, should record this form to avoid confusion and conflicting claims relating to title. For a discussion of title insurance, see Ch. 26A, *Title Insurance* .

[c] Recording the Notice

This form should be recorded in each county where the minor's original conveyance was recorded [*see Civ. Code § 1213* (constructive notice)]. It should also be sent to all other parties to the original contract. It may be recorded as an instrument that purports to affect title to real property [*see Gov. Code § 27280*]. Instruments that affect title include, but are not limited to, deeds and contracts for sale, real covenants [*Barbieri v. Ongaro* (1962) 208 Cal. App. 2d 753, 757, 25 Cal. Rptr. 471] , and contracts for the harvesting and sale of timber on the land [*Kirsch v. Barnes* (N.D. Cal. 1957) 157 F. Supp. 671, 673 *aff'd on other grounds*, 263 F.2d 692 (9th Cir. 1959)] .

Before this notice may be recorded, its execution must be acknowledged before a notary public [*Gov. Code § 27287*]. The form for the acknowledgment is specified by statute [*Civ. Code § 1189*].

[2] FORM**Notice of Nullity of Minor's Conveyance of Real Property**

Recording requested by _____)
 _____ [name])
 When recorded mail to _____)
 _____ [name])
 _____ [address])
 _____ [city, state, zip])
 _____)

 Space above this line for recorder's use

NOTICE OF NULLITY OF INSTRUMENT EXECUTED BY MINOR

[If minor is deceased, add: _____ (name), as _____ (heir or personal representative) of the estate of] _____ [name of minor], Grantor [or specify appropriate designation] under the [title of previous instrument] ("the instrument"), dated _____, and recorded on _____ [date], hereby DECLARES THE NULLITY OF THE INSTRUMENT on the ground that at the time the instrument was executed, _____ [date], Grantor [or specify appropriate designation] was _____ years of age and a minor under the laws of the State of California. Grantor was born on _____ [date].

The instrument was recorded in Book _____, at Page _____, Official Records of _____ County, and pertained to all real property located in _____ County and described as follows:

[Indent and insert single-spaced legal description.]

Executed at _____ [city], _____ [state], on _____ [date].

_____ [signature of Minor (or Minor's heir or personal representative)]

[typed name (and title, if appropriate)]

[If estate is pending, add:]

Probate No. _____

Superior Court of _____ County

[Continue with the following:]

ACKNOWLEDGMENT

[Acknowledgments taken in California must be in following form (Civ. Code § 1189(a)):]

_____)
 State of California)
 County of _____)

On _____ [date] before me, _____ [name and title of officer taking acknowledgment], personally appeared _____ [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is or are] subscribed to the within instrument and acknowledged to me that _____ [he or she or they] executed the same in _____ [his or her or their] authorized capacities, and that by _____ [his or her or their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ [Seal]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties Age Contracts Law Performance General Overview Contracts Law Types of Contracts General Overview Real Property Law Ownership & Transfer General Overview



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B. Ratification and Disaffirmance of Minors' Contracts

31-100B California Legal Forms--Transaction Guide § 100B.214

§ 100B.214 Notice of Disaffirmance of Contract

[1] Comment

[a] Use of Form

This form is a notice given by a party to a contract that he or she is disaffirming the contract on the ground that he or she was a minor when he or she executed the contract. Most types of contracts entered into by a minor may be disaffirmed by the minor before he or she reaches majority or within a reasonable time after reaching majority [*Fam. Code § 6710*]. If a minor is deceased, his or her heirs may execute a disaffirmance [*Fam. Code § 6710*; see § 100B.216]. No particular form is required to make an effective disaffirmance. A disaffirmance may be made orally, or through actions that clearly indicate an intent to repudiate the contract [*Pereira v. Toscano* (1927) 84 Cal. App. 526, 531, 258 P. 429 ; see *Abdullah v. Abdullah* (1920) 50 Cal. App. 118, 194 P. 411 (act of suing for return of benefits conferred under contract was sufficient communication of disaffirmance)].

[b] Effect of Disaffirmance

A valid disaffirmance has the effect of a rescission [*Warner Bros. Pictures v. Brodel* (1948) 31 Cal. 2d 766, 771, 192 P.2d 949] , which is to return the parties to their pre-contract positions [see *Civ. Code § 1688*; see also *Mamula v. McCulloch* (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571] . Rescission is distinguished from cancellation, which abrogates all remaining unperformed duties under the contract [*Mamula v. McCulloch* (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571 ; see Ch. 77, *Discharge of Obligations*].

Fam. Code § 6710 is silent regarding whether a minor is obligated to return consideration received under a contract when he or she disaffirms the obligation. A party who rescinds a contract must return or offer to return any consideration received [*Civ. Code § 1691*]. Disaffirmance generally is treated in the same manner as rescission, and has the same effect [*Scollan v. Government Emp. Ins. Co.* (1963) 222 Cal. App. 2d. 181, 183, 35 Cal. Rptr. 40] . However, it is not clear whether this rule for rescission would apply to a minor's disaffirmance of a contract. It is probably a good idea for the minor to return the benefits, if he or she can do so without undue hardship, since a refusal to do so may encourage the other party to contest the validity of the disaffirmance.

The disaffirming minor is entitled to recover the reasonable value of any services rendered under the contract [*Abdullah v. Abdullah* (1920) 50 Cal. App. 115, 119, 194 P. 511] .

Paragraph 2 of this form is a clause demanding return of any consideration received from the minor, and Paragraph 3 consists of three alternative clauses regarding the minor's return of any consideration or benefits received. The first alternative should be used if the minor is returning some or all of the consideration received under the contract. The second alternative should be used in conjunction with the first, if the minor is returning only part of the consideration, and by itself if no part of the consideration is being returned. The third alternative should be used if the minor has received intangible benefits, such as services rendered, under the contract.

[c] Time of Disaffirmance

Unlike ratifications, disaffirmances made during minority are effective [Fam. Code § 6710]. In the case of a disaffirmance occurring after the minor has attained the age of majority, the court will determine whether the minor has acted within a reasonable time based on the facts of the case [*Hakes Inv. Co. v. Lyons* (1913) 166 Cal. 557, 560, 137 P. 911] . If, upon reaching majority, the minor is aware of his or her right to disaffirm, the statute of limitations for an action on the contract may serve as a guide to determining a reasonable time [*Hurley v. Southern California Edison Co.* (9th Cir. 1950) 183 F.2d 125, 132 ; see Code Civ. Proc §§ 337 (four-year limitation for actions on written contracts), 339 (two-year limitation for actions on oral contracts)]. If it is determined that the minor did not act within a reasonable time after reaching the age of majority, or that he or she expressly or impliedly ratified the contract after attaining majority, the minor will be estopped from disaffirming the contract [Fam. Code § 6710; see *Hakes Inv. Co. v. Lyons* (1913) 166 Cal. 557, 561, 137 P. 911] . Estoppel theory is not applicable to minors' conduct before they reach majority [see § 100B.22[3]], so ratification or other actions taken by a minor prior to attaining majority will not preclude a later disaffirmance of the contract [*Lackman v. Wood* (1864) 25 Cal. 147, 153] . Disaffirmance may be allowed even when the minor lied about his or her age at the time the contract was entered into [*Williams v. Leon T. Shettler Co.* (1929) 98 Cal. App. 282, 283, 276 P. 1065] .

[d] Contracts That Cannot Be Disaffirmed

Certain contracts for necessities provided to a minor or to his or her family, and court-approved employment contracts under which a minor agrees to perform entertainment or athletic services, cannot be disaffirmed on the basis of minority [Fam. Code §§ 6712, 6751; see §§ 100B.200[1][b], 100B.203[1][c]]. Contracts entered into with talent agencies and approved by the superior court are not subject to disaffirmance [Lab. Code § 1700.37; see Lab. Code § 1700.4 ("talent agency" defined); see *Marathon Entm't, Inc. v. Blasi* (2008) 42 Cal. 4th 974, 986-988, 70 Cal. Rptr. 3d 727, 174 P.3d 741 (Talent Agencies Act, Lab. Code § 1700 et seq., applies to personal manager who solicits or procures employment for artist-client, even if such procurement occurs on one-time basis); see also Ch. 87, *Entertainment Contracts*]. However, contracts with talent agencies or entertainment industry employers that have not been approved by the court may be disaffirmed, and the minor may recover the reasonable value of any services rendered under the contract [Fam. Code §§ 6710, 6711, 6751; Civ. Code § 1691]. A minor's written relinquishment of his or her child to a licensed adoption agency, or consent to the adoption of his or her child, cannot be avoided on the basis of minority [see Fam. Code § 8700(b); but see Fam. Code § 8700(e) (relinquishment may be withdrawn at any time before certified copy of it is filed with State Department of Social Services)]. Contracts entered into by minors in their capacity as public officers or candidates for public office are not subject to disaffirmance [Gov. Code § 275.2]. This form will not be effective to disaffirm contracts in any of these areas.

[2] FORM

NOTICE OF DISAFFIRMANCE OF CONTRACT

NOTICE OF DISAFFIRMANCE OF CONTRACT

TO: _____ [name of other party]
 _____ [address]

1. PLEASE TAKE NOTICE that, pursuant to *California Family Code Section 6710*, I, _____ [name of minor], hereby disaffirm the contract entered into on _____ [date], between [list all signatories] for [briefly describe subject matter of contract] ("the Contract"), [a copy of which is attached,] on the ground that on that date I was _____ years old and a minor under the laws of the State of California. My date of birth is _____.

2. As a result of this disaffirmance, you are required by law to return all consideration received from me under the contract, specifically consisting of: [describe consideration given by minor]. I hereby demand that you return the above-described consideration to me at _____ [address] on or before _____ [date].

[EITHER:]

3. I hereby [restore or return] to you all [or part of the] consideration received by me under the contract, specifically consisting of [describe consideration returned].

[OR]

3. [Part of] [T]he consideration received by me under the contract, specifically consisting of [describe consideration that is not being returned] cannot be returned to you because _____ [state reasons]. I hereby tender to you the sum of \$_____, in the form of [e.g., a certified check], which represents the reasonable value of the above-described consideration.

[OR]

3. I hereby tender to you the sum of \$_____, in the form of [e.g., a certified check], which represents the reasonable value of the benefits received by me under the contract, specifically consisting of: [describe benefits received].

[Continue with the following:]

Executed at _____ [city], _____ [state], on _____ [date].

_____ [signature of minor]
 [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties Age Contracts Law Performance General Overview Contracts Law Performance Discharges & Terminations



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Ratification and Disaffirmance of Minors' Contracts

31-100B California Legal Forms--Transaction Guide § 100B.215

§ 100B.215 Notice of Disaffirmance of Promissory Note

[1] Comment--Use of Form

This form is a notice given by a person who wishes to disaffirm a promissory note executed by him or her on the basis that he or she was a minor when he or she executed the note. Debt instruments executed by minors may be disaffirmed by them during minority or within a reasonable time after reaching the age of majority [*Fam. Code § 6710*]. The heirs of a deceased minor, or of a person who dies shortly after reaching the age of majority, may also disaffirm contracts that the decedent made during his or her minority [*Fam. Code § 6710; see § 100B.216[1][c]*]. This form should be sent to the creditor or to the creditor's assignees, and it may also be sent to any other party that will be affected by the disaffirmance.

Fam. Code § 6710 is silent regarding whether a minor is obligated to return consideration received under a contract when he or she disaffirms the obligation. A party who rescinds a contract must return or offer to return any consideration received [*Civ. Code § 1691*]. Disaffirmance generally is treated in the same manner as rescission, and has the same effect [*Scollan v. Government Emp. Ins. Co. (1963) 222 Cal. App. 2d. 181, 183, 35 Cal. Rptr. 40*] . However, it is not clear whether this rule for rescission would apply to a minor's disaffirmance of a contract. It is probably a good idea for the minor to return the benefits, if he or she can do so without undue hardship, since a refusal to do so may encourage the other party to contest the validity of the disaffirmance.

This form will not be effective to disaffirm an obligation entered into by a minor under the express authority or direction of a statute [*Fam. Code § 6711*]. For a discussion of particular obligations that, pursuant to statute, are not subject to disaffirmance, see §§ 100B.22[2] and 100B.214[1][d].

[2] FORM

NOTICE OF DISAFFIRMANCE OF PROMISSORY NOTE

NOTICE OF DISAFFIRMANCE OF PROMISSORY NOTE

TO: [name of creditor, creditor's assignee, or other person to whom notice is sent]
 _____[address]

1. PLEASE TAKE NOTICE that pursuant to *California Family Code Section 6710*, I, _____[name of minor], hereby disaffirm the promissory note executed by me on _____[date], in the amount of \$ _____, and payable to _____[name] ("Promissory Note"), [a copy of which is attached] on the ground that on that date I was _____ years old and a minor under the laws of the State of California. My date of birth is _____[date].

2. I hereby restore to you, in the form of [e.g., a certified check], the principal amount of \$ _____ received from you under the terms of the loan evidenced by the Promissory Note.

[OR]

2. I hereby restore to you the consideration received by me in exchange for the Promissory Note, specifically consisting of [describe consideration].

[If minor has paid any amounts other than principal under the terms of the note:]

3. I hereby demand that you restore to me the sum of \$ _____, which was paid to you as [or deducted from my account number _____ at _____ (name of institution) in forced payment of] interest [or specify other charges] under the terms of the Promissory Note.

4. I hereby demand that you deliver the Promissory Note to me at _____[address].

Executed at _____[city], _____[state], on _____[date].

_____ [signature of minor]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties Age Contracts Law Negotiable Instruments General Overview Contracts Law Performance Discharges & Terminations



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31-100B California Legal Forms--Transaction Guide § 100B.216

§ 100B.216 Notice of Disaffirmance of Contract by Deceased Minor's Heirs or Personal Representatives

[1] Comment

[a] Use of Form

This form is a notice of disaffirmance by the heirs or personal representatives of a minor who died after executing a disaffirmable contract. On the death of a minor, the heirs or personal representatives may disaffirm the minor's contracts that could have been disaffirmed by the minor during his or her lifetime [*Fam. Code § 6710*; see [c], below]. The rights of minors to disaffirm their contracts are discussed in §§ *100B.22[1]* and *100B.214[1]*.

[b] Nondisaffirmable Obligations of Deceased

Certain contracts made by minors may not be disaffirmed by the minor. These include contracts approved by the superior court under which the minor agreed to render artistic, creative, or professional athletic services; certain contracts for necessities [see § *100B.200[1][b]*]; and other contracts entered into under the express authority or direction of a statute [*Fam. Code § 6711*; see §§ *100B.22[2]*, *100B.214[1][d]*]. This form will not be effective to terminate the liability of a minor's estate for those types of contractual obligations (although in the case of contracts requiring the minor to render personal services, performance will be impossible in any case after the minor's death).

[c] Persons Authorized to Give Notice

Notice of disaffirmance of a deceased minor's contract may be given by either the personal representatives [see *Prob. Code § 58* (definition)] or by the heirs of the minor [*Fam. Code § 6710*; see *Prob. Code §§ 44* ("heirs" defined with reference to intestate succession laws), 6401, 6402 (heirs under laws of intestate succession); see also Ch. 60, *Estate Planning*]. If the minor's estate is administered under court supervision, the administrator of the estate [see *Prob. Code § 8461* (order of priority for appointment of administrator of estate of intestate decedent)] should send this notice. If the estate is disposed of without administration, the heirs, guardian, or trustee of an express trust, if any, should send the notice. The estates of deceased minors generally are disposed of without administration, since spouses, children, large amounts of property, and other complications are not usually involved [see *Prob. Code §§ 13000-13660* (disposition

without administration)).

Because minors generally lack the capacity to dispose of property by will [*Prob. Code § 6100*], an executor normally would not be appointed for the estate of a deceased minor, and for this reason the notice of disaffirmance ordinarily would not be made by an executor or an administrator with the will annexed. However, if a minor became emancipated or reached the age of majority, thereafter made a will, and death occurred soon after, an executor or administrator with the will annexed under such a will might conceivably give this notice to disaffirm a contract or contracts made by the decedent before the decedent had become emancipated or reached the age of majority. For a discussion of the emancipation of minors, see Ch. 100, *Control, Custody, and Support of Minors*. The responsibilities of executors and administrators are discussed generally in Ch. 65, *Executors*.

[d] Desirability of Court Approval

Heirs or personal representatives are not required by statute to seek court approval before giving notice of disaffirmance of a deceased minor's contract [*see Fam. Code § 6710*]. However, it may be desirable to seek court approval in some situations. If there is a possibility that the contract may be void rather than merely voidable, as is the case for minor's contracts concerning real property interests or personal property not within the minor's possession or control [*Fam. Code § 6701; see § 100B.21*], a judicial determination should be obtained so that the heirs or personal representatives will be able to submit a notice of nullity [*see § 100B.213*] rather than a disaffirmance. If it is uncertain whether the contract is subject to disaffirmance, obtaining a judicial determination at the onset of the proceedings may avoid costly and time-consuming litigation of the issue at a later date. If there is a potential for conflicts of interest, as may be the case if the personal representative is the public administrator or a creditor of the deceased, judicial approval of the disaffirmance should be obtained.

[e] Methods for Obtaining Court Approval or Authorization

The usual method for obtaining court authorization is to file a petition for instructions in the probate proceeding. When no other procedure is provided by statute, the executor or administrator may petition the court for instructions about the administration, disposition, management, operation, care, protection, or preservation of the estate [*Prob. Code § 9611*].

When the heirs or personal representatives have given notice of disaffirmance and later decide to seek a judicial determination of the validity or effect of the disaffirmance, a petition to determine heirship is the appropriate procedure. Any time after letters are first issued to a general personal representative [*see Prob. Code § 58(b)* (definition)] and before the filing of the petition for final distribution, the executor or administrator, or any person claiming entitlement to any part of the estate as an heir or creditor, may file a petition setting forth his or her claim and seeking a judicial determination as to persons entitled to distribution of the estate [*Prob. Code § 11700*].

[f] Trustees and Trust Beneficiaries

Because unemancipated minors lack the capacity to delegate power and to contract regarding real property interests and personal property not within their immediate possession or control [*Fam. Code § 6701*], they are unable to create inter vivos trusts for the distribution of their assets on death. However, a minor 12 years of age or older may petition the superior court for the appointment of a guardian [*Prob. Code § 1510*], and then have the guardian create a trust that, on the petition of the guardian or the minor, could be submitted for approval to the court [*Prob. Code § 2403*]. In addition, trusts may be created for minors by third parties, or by court order under various circumstances.

The power of trustees and beneficiaries to disaffirm a contract made during a decedent's minority is very limited. Unless the beneficiaries qualify as heirs or personal representatives of the decedent, they will not have direct authority to disaffirm his or her contracts [*see Fam. Code § 6710*]. They can, however, petition the court for an order instructing the trustee, as personal representative of the decedent, to give the notice of disaffirmance. The trustee also has the same

right to petition for instructions [see *Prob. Code* § 17200(a), (b)(6)]. Under this method, the court would be authorized to make all orders and take all actions necessary and proper to dispose of the matters presented in the petition [*Prob. Code* § 17206]. Thus, the trustee's right to give the notice of disaffirmance, and the validity of the disaffirmance, could be determined at the same time.

A contract properly entered into by the trustee probably is not subject to disaffirmance by reason of the minority of the decedent if the trust instrument expressly confers on the trustee the power to enter into contracts and if the trust was established under judicial direction or authorization [see *Prob. Code* § 2403].

[2] FORM

NOTICE OF DISAFFIRMANCE OF CONTRACT BY MINOR'S HEIRS OR PERSONAL REPRESENTATIVES

NOTICE OF DISAFFIRMANCE OF CONTRACT BY MINOR'S HEIRS OR PERSONAL REPRESENTATIVES

TO: _____ [name of other party]
 _____ [address]

1. Please take notice that, pursuant to *California Family Code Section 6710*, the undersigned as [heirs or personal representative] of _____ [name of decedent] ("Decedent"), who was born on _____ [date], and died on _____ [date], hereby disaffirm(s) the contract entered into between [list all signatories] on _____ [date], for [briefly describe subject matter of contract] ("the Contract"), [a copy of which is attached] on the ground that on that date Decedent was _____ years of age and a minor under the laws of the State of California.

2. As a result of this disaffirmance, you are required by law to deliver to the undersigned all consideration received from Decedent under the contract, specifically consisting of [describe consideration given by decedent]. The undersigned hereby demand(s) that you deliver the above-described consideration to _____ [address] on or before _____ [date].

[EITHER:]

3. The undersigned hereby restore(s) to you all [or part of the] consideration received by Decedent under the contract, specifically consisting of [describe consideration returned].

[OR]

3. [Part of] [T]he consideration received by Decedent under the contract, specifically consisting of [describe consideration that is not being returned], cannot be returned to you because _____ [state reason]. The undersigned hereby tender to you the sum of \$_____, in the form of [e.g., a certified check], which represents the reasonable value of the above-described consideration.

[OR]

3. The undersigned hereby tender to you the sum of _____, in the form of [e.g., a certified check], which represents the reasonable value of the benefits received by Decedent under the contract, specifically consisting of: [describe benefits received].

[Continue with the following:]

4. Neither the undersigned, as the [heirs or personal representative] of Decedent, nor Decedent's estate, have any legal obligation with respect to you under the contract, nor, apart from the receipt of the items described in Paragraph 2, are entitled to exercise any further rights under the contract.

Executed at _____ [city], _____ [state], on _____ [date].

_____ [signature of heir or personal representative]
[typed name], as _____ [Heir or Executor or Administrator] of _____ [name
of decedent]
[Probate No. _____, Superior Court of _____ County, State of California]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties Age Contracts Law Performance Discharges & Terminations Estate, Gift & Trust Law Probate Personal Representatives General Overview



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31-100B California Legal Forms--Transaction Guide §§ 100B.217-100B.229

[Reserved]

§§ 100B.217[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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C. Releases

31-100B California Legal Forms--Transaction Guide § 100B.230

§ 100B.230 Release of Minor's Disputed Contract Claim Against Third Person

[1] Comment

[a] Use of Form

This form is a written release of a minor's disputed claim arising out of a contract, to be executed by the parent or guardian of the minor. It may be used in conjunction with a compromise and settlement agreement executed by the parties to the contract [*see* Ch. 77, *Discharge of Obligations*]. A release of a minor's claim should be executed by the guardian of the minor's estate or, if there is no guardian of the estate, by the minor's parent or parents [*Prob. Code* §§ 2500, 3500]. A minor who has been emancipated through marriage, assumption of military active duty, or judicial declaration may execute his or her own release [*Fam. Code* § 7002; *see* § 100B.11]. For a release of a contract claim against a minor, *see* § 100B.231. For releases relating to tort claims by and against minors, *see* Ch. 100A, *Personal Affairs of Minors* .

[b] Nature of Release

A valid release extinguishes an obligation and constitutes an abandonment of the underlying claim [*Civ. Code* § 1541; *see Pellett v. Sonotone Corp.* (1945) 26 Cal. 2d 705, 711, 160 P.2d 783] . A release generally is executed in exchange for a cash payment by the party against whom the claim is asserted. However, consideration is not necessary to support a written release such as the one contained in this form [*Civ. Code* § 1541]. Oral releases, on the other hand, do require consideration [*Civ. Code* § 1541].

A general release will not cover claims that are undisclosed at the time the release is executed and that, if known, would materially affect the settlement [*Civ. Code* § 1542]. If the parties intend the release to cover later-discovered claims, they should make this clear in the writing [*see Carmichael v. Industrial Acc. Comm'n.* (1965) 234 Cal. App. 2d 311, 315, 44 Cal. Rptr 470] . Paragraph 1 of this form contains alternative provisions regarding the extent of the release. The first alternative is a general release of all claims and contains an optional clause for including later-discovered claims. However, such a reference, in and of itself, will not be sufficient to release all unknown claims. Rather, it must be shown, apart from the words of the release, that there was an intent to include those claims [*Casey v. Proctor* (1963)

59 Cal. 2d 97, 109, 28 Cal. Rptr. 307, 378 P.2d 579 ; see Ch. 77, *Discharge of Obligations*]. The second alternative presented in Paragraph 1 of the form is a narrow release of one specific claim or action only.

Public policy prohibits people from contracting to avoid liability for fraud, willful injury to persons or property, or violations of the law [Civ. Code §§ 1667, 1668]. This form will not be effective as a release from liability for those acts. For a more detailed discussion of the general law concerning releases, see Ch. 77, *Discharge of Obligations* .

[c] Court Approval of Compromise Prior to Filing of Action

In general, the guardian of a minor's estate may compromise claims made by or against the minor without first obtaining court approval [Prob. Code § 2500(a)(1)]. However, a compromise that requires the transfer or encumbrance of property belonging to the minor's estate, or the creation of an unsecured liability of the estate, in an amount or value exceeding \$25,000, must be submitted to the superior court for approval [Prob. Code § 2502]. The compromise or settlement of any claim by the minor against the guardian, or attorney for the guardian, whether or not it arises out of the administration of the estate, must be approved by the court [Prob. Code § 2503(a)]. Court approval is required for the compromise of any claim by the minor for his or her support, maintenance, or education, or that of his or her legal dependents, against any person [Prob. Code § 2504(a)]. The compromise of claims for physical or nonphysical harm, and of wrongful death claims, also requires court approval [Prob. Code § 2504(b), (c)].

Court approval is required for most compromises involving real property interests [Prob. Code § 2501(a); see Prob. Code § 2501(b), (c) (special rules regarding certain leases)]. However, since minors lack the capacity to contract regarding interests in real property [Fam. Code § 6701(b)], a guardian would rarely have occasion to enter into a compromise of a contract claim involving real property. The guardian may file a petition for approval of the compromise in the county where the guardianship proceeding is pending, the county where the guardian or the minor resides, or any county where a suit on the claim could properly have been brought [Prob. Code § 2505(b)].

If there is no guardian of the minor's estate, the minor's parents have the right to compromise contract claims made by or against the minor [Prob. Code § 3500(a)]. Compromise agreements entered into by the minor's parents are valid only after they are approved by the superior court [Prob. Code § 3500(b)]. The parents may petition for approval in the superior court of the county where the minor resides or any county where a suit on the claim could properly have been brought [Prob. Code § 3500(b)]. If the parents are living together, either of them may compromise the minor's claim and execute the release [Prob. Code § 3500(a)(1)]. If they are living apart, the custodial parent is authorized to execute the compromise and release [Prob. Code § 3500(a)(2)]. A valid release may be executed by a parent only after any payment or other property given in exchange for the release has been delivered as specified by the court [Prob. Code §§ 3500(d), 3601].

[d] Court Approval of Compromise After Action Is Filed

After an action or proceeding has been initiated regarding a minor's contract claim, it may be released only by the guardian of the minor's estate or the guardian ad litem (usually, the minor's parent) appointed to represent the minor [Code Civ. Proc. § 372(a)]. Court approval is needed for the release [Code Civ. Proc. § 372(a)], and the guardian may obtain such approval by filing a petition in the court in which the matter is pending [Prob. Code § 2505(a)]. If the action is not in a California court, approval of the release may be obtained from the court in which the action is pending or the court in which the guardianship proceeding is pending [Prob. Code § 2505(c)].

A minor cannot conduct his or her own legal proceedings and must appear through a guardian [Fam. Code § 6601]. For forms relating to the appointment of a guardian ad litem to conduct a minor's legal affairs, see California Forms of Pleading and Practice, Ch. 291, *Guardians ad Litem* (Matthew Bender).

[e] Receiving the Minor's Property

When the court approves any compromise of a minor's claim involving the delivery of money or other property for the minor's benefit, the court will direct the parent, guardian, or payor to pay from that money or property any reasonable attorneys' fees and other expenses incurred by the minor or on the minor's behalf in connection with the proceeding [Prob. Code §§ 3600, 3601]. If there is a guardian of the minor's estate, the balance of the money or property will be delivered to him or her [Prob. Code § 3602(b)], unless the guardian or another interested person petitions the court to order the deposit of some or all of the balance in to an account for the minor's future benefit [Prob. Code § 3602(b)-(f); see Ch. 100A, *Personal Affairs of Minors*]. If there is no guardian of the minor's estate, the court will, on the application of the minor's counsel, order that the money or property be disposed of by one or more of the following methods [Prob. Code § 3611]:

- Appointment of a guardian of the minor's estate, and the delivery of the money or other property to that person.
- Deposit of the money in an insured account in a financial institution in California, or in a single-premium deferred annuity, subject to withdrawal only on the authorization of the court, with any other property to be held on conditions the court determines to be in the best interest of the minor.
- After a hearing by the court, payment of money to any special needs trust established for the benefit of the minor [see Prob. Code §§ 3604, 3605 (requirements for "special needs trust")].
- Payment of up to \$20,000, to be held as otherwise specified by the court, based on the best interests of the minor.
- Payment of up to \$5,000 to the minor's parents, for the benefit of the minor.
- Transfer to a custodian for the minor's benefit under the California Uniform Transfer to Minors Act [Prob. Code §§ 3900-3925; see Ch. 100A, *Personal Affairs of Minors* ; see also Ch. 60A, *Gifts*].
- Payment or delivery of money or other property to the trustee of any trust created by, or approved in, the order or judgment referred to in Prob. Code § 3600. This trust must be revocable by the minor on attaining age 18, and it must contain other terms and conditions, including terms and conditions concerning trustee's accounts and the trustee's bond, as the court determines to be necessary to protect the minor's interests.
- Deposit of the money with the county treasurer, if the county treasurer has been authorized by the county board of supervisors to handle such deposits, and subject to statutory conditions and requirements pertaining to the county treasurer's handling of the deposited funds.

The court will have continuing jurisdiction over any money or property paid under a minor's compromise and release that it has approved, until the minor reaches age 18 [Prob. Code § 3612(a)]. Moreover, if the money or property has been placed in a trust, and the minor has a disability as defined by federal regulations [see 20 C.F.R. § 416.906; Prob. Code § 3603(b)(3)], the trust will continue under the court's jurisdiction until terminated by the court [Prob. Code § 3612(b) (effective January 1, 2005)].

[2] FORM

RELEASE OF MINOR'S CONTRACT CLAIM

RELEASE OF MINOR'S CONTRACT CLAIM

I, _____ [name], the _____ [parent or sole surviving parent or parent having custody and control or guardian of the estate or guardian ad litem under appointment of the Superior Court of _____ County, Proceeding No. _____] of the minor child _____ [name of minor] ("Minor"), agree as follows on behalf of Minor and _____ [his or her] heirs, assigns, executors, and administrators:

Extent of Release

[If all liability under contract is extinguished:]

1. I fully release and discharge _____ [name of party released], and _____ [his or her or its] heirs, assigns, and successors, from all claims, demands, and causes of action [including the action now pending in the _____ Court of _____ County, Proceeding No. _____] (and) including those that Minor is not now aware of and has no reason to suspect the existence of] that Minor has now or may have against _____ [name of party released] regarding the contract entered into between [him or her or it] and Minor on _____ [date] and regarding [briefly describe nature of contract], [a copy of which is attached as Exhibit A], and from any breaches of that contract. The contract is hereby canceled.

[Or, if release is limited to specific claim:]

1. I hereby release and discharge _____ [name of party released], and _____ [his or her or its] heirs, assigns, and successors, from any and all liability arising from [describe breach specifically, e.g., her failure to deliver 200 chocolate bars to Minor on October 15, 2001,] in breach of the contract entered into between _____ [name of breaching party] and Minor on _____ [date] and regarding [briefly describe nature of contract] [a copy of which is attached as Exhibit A]. This release shall not apply to any other past or future breaches of the subject contract by _____ [name of breacher], or _____ [his or her or its] successors or assigns, or in any way release [him or her or it] from the performance of any other duty under the contract.

[Continue with the following:]

Consideration

2. This release is given in consideration of the sum of \$[or describe other property received in exchange for release], which _____ [has been received by me or has been paid as specified by the order of the Superior Court of _____ County in Proceeding No. _____], which is attached as Exhibit B].

[If court approval of release is needed:]

Validity

3. This release will not be valid until it has been approved by the _____ Superior Court of

_____ County.

[Continue with the following:]

Execution

4. This release is given freely and voluntarily, after my investigation, insofar as possible, of all the relevant information and data, both factual and legal. I have read this release and have been advised by _____ [name of attorney], Attorney at Law, in preparing and executing it.

Executed at _____ [city], _____ [state], on _____ [date].

_____ [signature of parent or guardian]

[typed name and relationship or title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Capacity of Parties Age Contracts Law Types of Contracts General Overview Contracts

Law Types of Contracts Releases



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DIVISION VII: PERSONAL TRANSACTIONS
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C. Releases

31-100B California Legal Forms--Transaction Guide § 100B.231

§ 100B.231 Release of Minor From Liability for Breach of Contract

[1] Comment

[a] Use of Form

This form is a release of a minor from liability for breach of a contract. For a release of a minor's claim arising out of a contract, and discussion of the rights of parents and guardians to compromise claims by or against minors, see § 100B.230. For a discussion of the compromise of claims and the execution of releases generally, see Ch. 77, *Discharge of Obligations*.

[b] Consideration for Release

A release generally is executed in exchange for a cash payment by the party against whom the claim is asserted. However, consideration is not necessary to support a written release such as the one contained in this form [*Civ. Code* § 1541]. Oral releases require consideration [*Civ. Code* § 1541].

[c] Effect of Right to Disaffirm Obligations on Minors' Liability for Breach

In many cases, a minor who has breached a contract will not be liable for the breach regardless of whether or not a release is executed. Minors have the right to disaffirm most of their contractual obligations during their minority or within a reasonable time after reaching the age of majority [*Fam. Code* § 6710; see § 100B.22]. A disaffirmance may be made by words and commencement of an action provides sufficient notice of such a disaffirmance [*Pereira v. Toscano* (1927) 84 Cal. App. 526, 531, 258 P. 429], so that a minor who breaches a contract may simply be exercising his or her right to disaffirm the obligation.

If there is a possibility that the contract may be disaffirmable, the other party may be willing to execute a release of the minor's liability for a smaller sum than would be expended by the minor in an action to determine the disaffirmability of the contract. For a more detailed discussion of the rights of minors to disaffirm their contracts, see § 100B.22.

[d] Contracts That Minor May Not Disaffirm

There are three situations in which a minor may be liable for his or her breach of contract. First, if there is a statute making the contract nondisaffirmable, the minor will be liable for the breach to the same extent that an adult would be [see *Fam. Code* § 6711]. Employment contracts in the sports and entertainment industries that have been approved by the superior court, consents to various medical treatments, and certain contracts for necessities are not subject to disaffirmance on the ground of minority [*Fam. Code* §§ 6751, 6921, 6712; see § 100B.22[2]; see also Ch. 100A, *Personal Affairs of Minors*]. Court-approved contracts between minors and talent agencies are not subject to disaffirmance [Lab. Code § 1737.37; see *Lab. Code* § 1700.4 ("talent agency" defined); *Marathon Entm't, Inc. v. Blasi* (2008) 42 Cal. 4th 974, 986-988, 70 Cal. Rptr. 3d 727, 174 P.3d 741 (Talent Agencies Act, *Lab. Code* § 1700 et seq., applies to personal manager who solicits or procures employment for artist-client, even if such procurement occurs on one-time basis); see also Ch. 87, *Entertainment Contracts*]. Also not subject to disaffirmance are contracts entered into by a minor in his or her capacity as a public officer or candidate for public office [*Gov. Code* § 275.2]. A minor's written relinquishment of his or her child to a licensed adoption agency, or consent to the adoption of his or her child, also cannot be avoided on the basis of minority [see *Fam. Code* §§ 8700, 8814(d); but see *Fam. Code* § 8700(e) (relinquishment may be withdrawn at any time before certified copy of it is filed with State Department of Social Services)].

Second, a minor who has breached a disaffirmable contract may decide that he or she would rather accept liability for the breach and continue to enjoy the benefits of the contract, than disaffirm the contract to avoid liability for the breach. A minor may not disaffirm part of a contract, or disaffirm the obligations while retaining the benefits [see *Peers v. McLaughlin* (1891) 88 Cal. 294, 299, 26 P. 119].

Finally, a minor may lose the right to disaffirm a contract by ratifying the obligation, or failing to disaffirm it within a reasonable time, after reaching the age of majority [*Fam. Code* § 6710; see § 100B.22[3]]. For example, if a person (1) entered into a five-year employment contract at age 17, (2) continued to work under that contract for a year and a half after reaching the age of majority, and (3) subsequently quit and was sued for breach of contract, he or she probably would be estopped from disaffirming the contract. Similarly, a minor who executed a written ratification of his or her contract [see § 100B.211] after reaching the age of majority could not disaffirm the contract upon being sued for a later breach [*Hakes Inv. Co. v. Lyons* (1913) 166 Cal. 557, 561, 137 P. 911].

[2] FORM**RELEASE OF MINOR'S LIABILITY FOR BREACH OF CONTRACT****RELEASE OF MINOR'S LIABILITY FOR BREACH OF CONTRACT****Extent of Release**

[If all of minor's liability under contract is extinguished:]

1. I fully release and discharge _____ [name of minor], ("Minor") and Minor's heirs, successors, and assigns, from all rights, claims, and actions, [including the action now pending in the Superior Court of _____ County, Proceeding No. _____,] that I and my successors have now or may have in the future against Minor, arising out of the contract entered into between Minor and myself on _____ [date], regarding [briefly describe subject matter of contract], [a copy of which is attached as Exhibit A]. The contract is hereby canceled.

[Or, if release is limited to specific breach:]

1. I fully release and discharge _____ [name of minor] ("Minor") and Minor's heirs, successors, and assigns, from all rights, claims, and actions [, including the action now pending in the Superior Court of _____ County, Proceeding No. _____,] I and my successors have now or may have in the future against Minor, arising out of _____ [describe breach specifically, e.g., Minor's failure to appear on the motion picture set of "Titanic IV" on the morning of _____ (date), in breach of the contract entered into between Minor and myself on _____ [date], regarding [briefly describe subject matter of contract] [, a copy of which is attached as Exhibit A]. This release shall not apply to any other past or future breach of the contract by Minor or _____ [his or her or its] successors or assigns, or in any way release Minor from the performance of any other duty under the contract.

[Continue with the following:]

Consideration

2. This release is given in consideration of the sum of \$[or describe other property received in exchange for release], my receipt of which is hereby acknowledged.

[If court approval of release is needed:]

Validity

3. This release will not be valid until it has been approved by the Superior Court of _____ County.

[Continue with the following:]

Execution

4. This release is given freely and voluntarily, after my investigation, insofar as possible, of all the relevant information and data, both factual and legal. I have read this release and have been advised by _____ [name of attorney], Attorney at Law, in preparing and executing it.

Executed at _____ [city], _____ [state], on _____ [date].

_____ [signature of party releasing minor]
[typed name, and title if appropriate]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Breach Causes of Action General Overview Contracts Law Formation Capacity of Parties Age Contracts Law Types of Contracts Releases



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31-100B California Legal Forms--Transaction Guide §§ 100B.232-100B.239

[Reserved]

§§ 100B.232[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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31-100B California Legal Forms--Transaction Guide § 100B.240

§ 100B.240 Statement of Intent to Employ Minor and Request for Work Permit (Department of Education Form B-1)

[1] Comment

[a] Use of Form

This form is a combined application by a minor to obtain a work permit, and by an employer to obtain permission to employ the minor. It is the official California Department of Education form (Form B-1). Copies of this form can usually be obtained from the minor's school, or from the local school district administrative offices. It is also available online at the website of the Department of Education, which is located at <http://www.cde.ca.gov>.

If the minor is to be employed in the entertainment industry, the forms illustrated in §§ 100B.241 (application for work permit) and 100B.242 (application for permit to employ) should be used instead of this form. For a discussion of the jobs that are considered to be in the entertainment industry, see § 100B.241[1][b]. Entertainment industry work permits are issued through the Labor Commissioner rather than through the school districts [*Lab. Code § 1308.5*].

[b] Persons for Whom Work Permits Are Not Required

Work permits may be issued to minors between the ages of 12 and 18 [*Educ. Code § 49111*] and are generally required in order for minors to be employed [*see Lab. Code § 1290*]. Work permits are not required for minors who work for their parents, unless the particular industry is subject to special work permit requirements [*Educ. Code § 49141*]. In practice, work permits are not required for minors engaged in self-employment, babysitting, newspaper delivery, yard work, and similar occupations [*see 18 Ops. Cal. Atty. Gen. 114 (1951)*]. A minor who has a high school degree or its equivalent will be exempted from work permit requirements and school-related restrictions on working hours [*Educ. Code § 49101*]. A minor who is not required to attend school for reasons other than having already obtained a high school degree or its equivalent may obtain a Certificate of Age rather than a work permit [*Educ. Code § 49114; see [c], below*].

[c] Permits to Employ

The work permit issued in response to this request form serves as both the minor's permit to work and the employer's permit to employ the minor. Every person, firm, or corporation that employs a minor must have a permit to employ the minor [*Educ. Code § 49160*], except in cases in which (1) the employer is the minor's parent or guardian [*Educ. Code § 49141*]; (2) the minor has obtained a high school degree or its equivalent [*Educ. Code § 49101*]; or (3) the minor is employed by a private person as a babysitter, newspaper carrier, gardener, or the like [*see 18 Ops. Cal. Atty. Gen. 114 (1951)* ; *see also* [b], *above*]. The employer must keep the permit on file during the time the minor is employed [*Educ. Code § 49161*].

In the case of a minor exempted from compulsory school attendance for reasons other than having obtained a high school degree or its equivalent, the employer should have the minor obtain a Certificate of Age, which will serve as a permit to employ the minor. To obtain a Certificate of Age, the minor must appear with his or her parent or guardian before the officer authorized to issue work permits, and submit proof of his or her age [*Educ. Code § 49114*]. This form may be used to request a Certificate of Age.

[d] Effect of Compulsory School Attendance on Minors' Hours of Work

Children between the ages of six and 18 are generally required to attend public or private school, or receive private instruction, full-time [*Educ. Code § 48200*]. Children between the ages of 16 and 18 who are not enrolled full-time must attend special continuation education classes for at least four hours per week [*Educ. Code § 48400*].

Except in very unusual circumstances, work permits will not be issued for employment that will interfere with a child's schooling. Special arrangements involving studio teachers are required for children employed in the entertainment industry, who often work during school hours [*see § 100B.202*]. Unless employed in the entertainment industry, children under the age of 14 may not work on school days [*see Educ. Code § 49111*]. Children 16 and 17 years of age who have completed the seventh grade or its equivalent may work up to four hours on a school day [*Educ. Code § 49112(a)*] (three hours for 14 or 15 years of age), or longer if they are enrolled in school-sponsored vocational or work experience programs [*Educ. Code § 49116(a), (b)*]. Children aged 16 or older also may obtain permits to work up to eight hours on school days preceding nonschool days [*Educ. Code § 49112(c)*].

Industries that are subject to California wage orders [*see 8 Cal. Code Reg. § 11000 et seq.*] or the Fair Labor Standards Act [*29 U.S.C. § 201 et seq.; 29 C.F.R. § 570.1 et seq.*] may be subject to additional, stricter hour limitations on child labor. Effective July 1, 2004, the California Legislature de-funded the Industrial Welfare Commission, which promulgated the California wage orders. However, the wage orders remain in effect, and the Division of Labor Standards Enforcement will continue to enforce them [*see Lab. Code § 61*].

[e] Procedures for Obtaining Work Permit and Permit to Employ

To obtain a work permit for a minor, the minor's parent, guardian, foster parent, or residential shelter services provider should complete the top section of this application form. The minor's prospective employer should provide the information in the box in the next section of the form. The minor's parent, guardian, foster parent, caregiver with whom the child resides, or residential shelter services provider must also sign the form [*see Educ. Code § 49110(c)*]. The minor must present the form, in person, to the officer authorized to issue work permits in the minor's school district (generally the local district superintendent, the chief executive officer or equivalent of a charter school attended by the minor, a person authorized by the superintendent or chief executive, the county superintendent if the minor does not reside in a school district or attend a charter school, or the principal of the minor's public or private school) [*Educ. Code § 49110(b)*]. Local school districts may require the parent or guardian to accompany the minor when he or she submits the work permit. The parent or guardian may wish to accompany the minor in any case, to ask questions about the limitations placed on the minor's employment, or answer any questions the officer may have. If the proposed employment is unusual or might be considered unsuitable for minors, the employer may also wish to accompany the

minor in order to explain the situation to the issuing officer. For a discussion of occupations prohibited to minors under state and federal law, see § 100B.31.

The officer who reviews the form will ask the minor for proof of age and will indicate the type of proof submitted in the appropriate box on the form. School enrollment records, birth or baptism certificates, and passports generally are accepted as proof of age. If no other reliable proof of age is available, the officer will obtain an affidavit from the minor's parent, guardian, or custodian stating the minor's age [*see Educ. Code § 49133(b)*]. Some districts issue work permits at the time the request is submitted; others mail the permits later. Permits to work and to employ must be issued on official California State Department of Education forms [*Educ. Code § 49117*]. The expiration date of the permit will be indicated on the permit form. Permits issued during the school year will expire no later than the fifth day of the next school year [*Educ. Code § 49118*]. To obtain a new permit to replace an expired one, the above-described procedure must be repeated.

[f] Full-Time Work Permits

Most work permits are issued for school vacations or subject to the hour limitations discussed in [d], *above*. Minors between the ages of 14 and 16 who have graduated from an elementary school course may obtain full-time work permits during the school year only if their full-time labor is necessary to support themselves or their families, and no other source of support is available, or if they are in foster care and the purpose of employment is to enable them to gain work skills and habits [*Educ. Code § 49130*]. In practice, these types of permits are very rarely issued. Minors under the age of 16 who are employed full-time during the school year must attend part-time continuation education classes [*Educ. Code § 49135*].

A minor applying for a full-time work permit must be accompanied by his or her parent or guardian [*Educ. Code § 49132*] and must present a medical certificate and a school record for the current term, in addition to the proof of age and employer's statement required on the regular work permit application [*Educ. Code § 49133*]. No fee may be charged for the medical certificate [*Educ. Code § 49133(d)*]. The parent, foster parent, or guardian of the minor must present a sworn statement that he or she is unable to work due to illness or injury, or that, due to the death or desertion of the minor's father, the minor's earnings are needed for family support and sufficient aid cannot be obtained in any other manner [*Educ. Code § 49130*]. The minor or the minor's parents should also contact the Labor Commissioner (Division of Labor Standards Enforcement) to find out whether additional official forms need to be filled out to obtain the full-time work permit.

Minors over the age of 16 may obtain full-time work permits without their parents or guardians appearing before the issuing officer, and without presenting medical certificates or detailed school records [*Educ. Code § 49131*]. They need not show that their full-time labor is necessary for their support or that of their families [*Educ. Code § 49131; see Educ. Code § 49130*]. However, they will be subject to the requirement that they attend part-time continuation education classes [*Educ. Code § 49135*].

[g] Cancellation of Work Permits

Work permits and permits to employ are subject to cancellation at any time by the Labor Commissioner, the Superintendent of Public Instruction, or the person who issued the permit [*Educ. Code § 49164*]. A permit will be canceled if the revoking authority determines that the employment is impairing the minor's health or education, or is in violation of any provision of the permit or any law, or that the conditions for legal issuance were not met [*Educ. Code § 49164*].

[2] FORM

Statement of Intent to Employ Minor and Request for Work Permit

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Employment Relationships Employment Contracts General Overview Labor & Employment Law Wage & Hour Laws Child Labor Labor & Employment Law Wage & Hour Laws Coverage & Definitions Employ



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31-100B California Legal Forms--Transaction Guide § 100B.241

§ 100B.241 Application for Permission to Work in the Entertainment Industry (Form DLSE 277)

[1] Comment

[a] Use of Form

This form is an application for a minor's work permit for employment in the entertainment industry. It is the official form (Form DLSE 277) issued by the California Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE). Copies of this form can be obtained from the local DLSE office or online at the DLSE website which is located at <http://www.dir.ca.gov/DLSE>, as an attachment to the Department's pamphlet covering the child labor laws. This form is used only for the minor's request for a work permit. For the application used by the employer to obtain permission to employ minors, see the form illustrated in § 100B.242. The form illustrated in § 100B.240 should be used to obtain a work permit and permit to employ if the employment is not in the entertainment industry.

[b] Entertainment Industry Occupations

For work permit purposes, minors are employed in the "entertainment industry" if they are involved in work in television and motion pictures, radio broadcasting, theatrical productions, recording, modeling, rodeos, circuses, musical performances, or other entertainment presented to the public [*Lab. Code § 1308.5(a)*; *8 Cal. Code Reg. § 11750*]. The minor's parents or employer should contact the DLSE if they are uncertain whether the proposed employment requires a regular work permit [*see § 100B.240*] or an entertainment industry work permit (this form).

[c] Persons Subject to Work Permit Requirements

Although the relevant provisions of the Labor Code and the California Code of Regulations indicate that entertainment industry work permits are not required by minors of certain ages for certain types of employment [*see Lab. Code § 1308.5* (minors under age 12 appearing in certain types of performances exempted); *8 Cal. Code Reg. § 11750* (minors under school age exempted)], it is the practice of the Division of Labor Standards Enforcement to require permits for all minors working in the industry. However, a permit is not required for the appearance by a minor in any of the following activities [*Lab. Code § 1310*]:

- Church, public, or religious school, or community entertainment.
- School entertainment or any entertainment for charity or for children, for which no admission is charged.
- Single, uncompensated appearance on radio or television that lasts not more than one hour, and for which no admission fee is charged.
- Any one event during a calendar year, occurring on a day on which school attendance is not required or on the day preceding such a day, lasting four hours or less, where a parent or guardian of the minor is present and for which the minor does not receive any compensation.

[d] Schooling Requirements

Minors between the ages of 6 and 18 who have not been exempted from compulsory schooling requirements must receive at least three hours of instruction per school day while working in the entertainment industry [*Educ. Code* § 48224; *see also* 8 *Cal. Code Reg.* § 11760]. The minor's employer is responsible for hiring a studio teacher to oversee the minor's daily studies [8 *Cal. Code Reg.* §§ 11755.2, 11755.4]. The studio teacher is also responsible for supervising the minor at the place of employment, and assuring that the minor's health, safety, and morals are not endangered by the conditions of employment [8 *Cal. Code Reg.* § 11755]. For more detailed coverage of schooling requirements for minors employed in the entertainment industry and the role of studio teachers, *see* § 100B.202.

[e] Procedure for Obtaining Entertainment Industry Work Permit

To obtain a permit for a minor to work in the entertainment industry, the minor or the minor's parent or guardian should fill out the top portion of the application form. The minor's parent or guardian must also sign the form. If the minor is of school age, the appropriate official at the minor's school (usually, the principal or another official designated by the principal) should fill out and sign the School Record section of the form. If the minor is not of school age, the parent or guardian must provide proof of the minor's age, either a certified copy of the minor's birth certificate, the minor's baptismal certificate, the minor's passport, or a letter from the hospital where the minor was born attesting to the date of birth.

When the minor picks up the application form from the DLSE office, he or she should ask if a medical examination will be required for the type of employment sought. If an examination is required, the examining physician should fill out and sign the appropriate portion of the form. If the form is obtained online, similar inquiry should be made by phone.

The completed form, with the appropriate signatures, should be mailed or delivered in person to the local office of the DLSE; faxed copied will not be accepted. No appearance by the minor's parent or guardian is necessary.

Entertainment industry work permits are valid for a maximum period of six months [8 *Cal. Code Reg.* § 11753(b)]. To obtain a new permit to replace an expired one, the above-described procedure must be repeated.

[2] FORM

Application for Permission to Work in Entertainment Industry

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Employment Relationships Employment Contracts General Overview Labor & Employment
Law Wage & Hour Laws Child Labor



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 100B CONTRACTS AND EMPLOYMENT OF MINORS
PART IV. FORMS
D. Work Permits and Related Forms

31-100B California Legal Forms--Transaction Guide § 100B.242

§ 100B.242 Application for Permission to Employ Minors in the Entertainment Industry (Form DLSE 281)

[1] Comment

[a] Use of Form

This form is an application by an employer for permission to employ minors in the entertainment industry. It is the official form (Form DLSE 281) issued by the California Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE). Copies of this form can be obtained from the local DLSE office or online at the DLSE website which is located at <http://www.dir.ca.gov/DLSE>, as an attachment to the Department's pamphlet covering the child labor laws [see 8 Cal. Code Reg. § 11752]. The form illustrated in § 100B.240 should be used instead of this form if the employment is not in the entertainment industry. For a discussion of what constitutes entertainment industry employment, see § 100B.241[1][b].

[b] Nature of Entertainment Industry Permit to Employ

In contrast to the application for a permit to employ used in industries other than the entertainment industry [see § 100B.240], this form is not an application to employ a particular minor. Instead, its purpose is to request a determination by the Labor Commissioner (through the DLSE) that the applicant's studio or other working quarters are a proper environment for the employment of minors generally [see Lab. Code § 1308.6(a)], and that the conditions of employment are not detrimental to the health or education of minors [Lab. Code § 1308.6(b), (c)]. For this reason, the parent or guardian of a minor should not allow the minor to work for any employer unless the employer has a current permit to employ minors.

[c] Issuance, Suspension, and Revocation of Permit

After an application for a permit has been submitted, the DLSE will make any necessary investigation to determine whether the permit should be issued. Permits will not be issued for the employment of minors under conditions that will bring them into close proximity with explosives, unguarded and dangerous moving machinery, aircraft, vessels, or functioning blades or propellers [8 Cal. Code Reg. §§ 11701, 11707]. The permit to employ may be suspended or

revoked at any time by the issuing officer, if the minor's employment is found to be in violation of any law or regulation or otherwise unsuitable for the minor [*Lab. Code § 1300; 8 Cal. Code Reg. § 11758*]. The employer may appeal the suspension or revocation to the Labor Commissioner, who will hold a hearing on the matter and then make the final determination [*8 Cal. Code Reg. § 11758.2*].

[d] Blanket Permits to Employ Minors

An employer who wishes to hire a group or organization of minors for a particular production, but ordinarily does not employ minors, may obtain a blanket permit to employ minors for a limited time and purpose [*8 Cal. Code Reg. § 11754(a), (b)*]. A blanket permit does not represent the Labor Commissioner's determination that the types of employment and working conditions offered by the employer are generally suitable for minors. It signifies that, for the single production described, and under the limitations stipulated, the employment of a designated group of minors is permissible [*see 8 Cal. Code Reg. § 11754*].

Blanket permits are obtained through a written request stating the nature of the production, the purposes for which the minors will be used, and the times and places they will be required. The applicant must give evidence of having made arrangements for studio teachers [*8 Cal. Code Reg. § 11754(c); see § 100B.202*], workers' compensation insurance for the minors [*8 Cal. Code Reg. § 11754(d)*], and the supervision of the minors by at least one parent or other qualified person per every 20 minors or part thereof [*8 Cal. Code Reg. § 11754(e)*]. Blanket permits are issued by the DLSE in the same manner, and subject to the same cancellation provisions, as regular permits to employ minors in the entertainment industry [*see 8 Cal. Code Reg. §§ 11751, 11752*]. Minors who are employed under a blanket permit must have individual work permits as with any other type of entertainment industry employment [*see 8 Cal. Code Reg. § 11753(a); see also § 100B.241*].

[2] FORM

Application for Permission to Employ Minors in the Entertainment Industry

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law
Employment Relationships
Employment Contracts
General Overview
Labor & Employment Law
Wage & Hour Laws
Child Labor



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31-100B California Legal Forms--Transaction Guide § 100B.243

§ 100B.243 Agreement for Pupil Leave of Absence From School

[1] Comment

[a] Use of Form

This form is an agreement allowing a child to take a leave of absence from school for a special employment opportunity or other appropriate purpose. Some schools or school districts handle student leaves of absence more informally, allowing the child to make separate arrangements with each of his or her teachers for homework to be done during the leave and assignments to be made up following the leave, and not requiring the involvement of any administrative officer in the arrangements. The statutory procedure [see [b], *below*] should be used, however, unless the absence will be very brief, to avoid problems that may arise later concerning classroom attendance requirements. If the school provides a form agreement concerning pupil leaves of absence, the child's parent or attorney should read it carefully to be sure that it satisfies the statutory requirements [see *Educ. Code § 48232*].

[b] Statutory Requirements for Leave

The governing board of a school district may adopt a written policy authorizing pupil leaves of absence for the purposes of supervised travel, study, training, or work not available under another education option [*Educ. Code § 48232(a), (b)*]. If this type of policy has been adopted within a district, a child who is at least 15 years old may be granted a leave of absence from school for up to one semester for one of these purposes [*Educ. Code § 48232(b)*] and, on the approval of the local school attendance review board and all of the parties to the original agreement [see [d], *below*], the leave may be extended for an additional semester [*Educ. Code § 48232(e)*]. A leave of absence may not continue past the end of the school year in which it is taken [*Educ. Code § 48232(f)*], and it may be nullified by any party to the agreement at any time for cause [*Educ. Code § 48232(g)*]. No more than 1 percent of the pupils enrolled and in attendance at any school are permitted to take a leave of absence during an academic year [*Educ. Code § 48232(h)*].

The child must be allowed to return to school at any time and must not be penalized from completing academic requirements within a time period equal to that permitted for classmates who are not on leave, plus a period of time equal to the leave. The school will not be required to give makeup sessions for missed classes if the child enrolls at any

time other than the beginning of a semester [*Educ. Code § 48232(d)*].

[c] Type of Work Involved

School officials may be less liberal in granting leaves of absence for work than for travel or specialized study. Most types of work available to children between the ages of 15 and 18 can be accommodated by a regular high school schedule or do not represent opportunities that justify the suspension of formal schooling. A leave of absence might be appropriate to allow a pupil to tour with a professional music or performance group, or to take advantage of an unusual opportunity to study a specialized trade. For situations involving a pupil who needs to work in order to support his or her family or self, a full-time work permit will probably be more appropriate than a leave of absence [*Educ. Code § 49131; see § 100B.32[2]*]. For pupils involved in the motion picture industry or other entertainment industry employments, studio-teacher arrangements rather than leaves of absence are used [*8 Cal. Code Reg. § 11755.2; see § 100B.202*].

[d] Contents of Agreement

A pupil leave of absence will only be allowed pursuant to a written agreement setting forth the conditions under which the leave is to be granted [*Educ. Code § 48232(c)*]. The agreement must explain the purpose of the leave and state that the purpose is one permitted by statute and not available to the pupil under another education option [*Educ. Code § 48232(b), (c)(1), (4)*]. The length of the leave must be stated [*Educ. Code § 48232(c)(2)*]. The agreement must provide that the child will contact or meet with a designated school official at least once a month while the child is on leave [*Educ. Code § 48232(c)(3)*]. If the pupil does not contact the designated school official as stipulated in the agreement, the leave of absence will be nullified [*Educ. Code § 48232(g)*].

The agreement must be executed by the child's parent or guardian, the principal or administrative officer of the child's school, a classroom teacher familiar with the child's academic progress selected by the child, and the district supervisor of child welfare and attendance [*Educ. Code § 48232(c)*]. This form also includes a space for the signature of the child.

[2] FORM

AGREEMENT FOR PUPIL LEAVE OF ABSENCE

AGREEMENT FOR PUPIL LEAVE OF ABSENCE

Pursuant to *Education Code Section 48232*, a leave of absence is hereby granted to _____ [*name of pupil*] (hereafter referred to as "Pupil"), from _____ [*name of school*] (hereafter referred to as "School"), as follows:

Purpose of Leave

1. The purpose of this leave is to allow Pupil to [*briefly describe activity to be undertaken*]. This type of work [or training or travel or study] is not available to Pupil under any other educational option.

Length of Leave

2. The leave of absence will commence on _____ [*date*], and will end on _____ [*date*], subject to Paragraph 4. This period does not exceed a regular School semester. The leave of absence may be extended for an additional period not to exceed one regular School semester, on the written approval of the attendance review board of [*appropriate city, county, or other board designation*] and all parties to this

Agreement. This leave of absence may not be continued beyond the [school year in which leave is taken] school year.

Pupil Meetings

3. During the period specified in Paragraph 2 of this Agreement, Pupil will [meet with or contact] _____ [name of appropriate school official] on at least a monthly basis. Pupil is responsible for arranging these [contacts or meetings], and can reach _____ [name of official] at _____ [telephone number or mailing address] for this purpose.

Termination of Leave

4. Any party may terminate the leave of absence at any time for cause. If the leave of absence is terminated by a party other than Pupil, the termination will only be effective on written notice to Pupil. Cause for termination includes, but is not limited to, any failure by Pupil to comply with Paragraph 3.

Pupil's Rights

5. Pupil is entitled to return to school at any time, and will not be prevented from completing any academic requirements within a time period equal to that of classmates who have not taken leaves of absence, plus a period of time equal to Pupil's leave of absence. If Pupil reenrolls at the beginning of a semester, School will provide makeup sessions for classes missed by Pupil during Pupil's leave of absence. However, School will not be obligated to provide makeup sessions if Pupil reenrolls at any time other than the beginning of a semester.

Dated: _____

_____ [signature of pupil]

[typed name], Pupil

_____ [signature of parent or guardian]

[typed name], _____ [Parent or Guardian] of Pupil

_____ [signature of principal or administrative officer of school]

[typed name and title, and name of school]

_____ [signature of teacher chosen by pupil]

[typed name], Teacher

_____ [signature of district supervisor of child welfare and attendance]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Attendance General Overview Education Law Students General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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31-100B California Legal Forms--Transaction Guide §§ 100B.244-100B.249

[Reserved]

§§ 100B.244[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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E. Parental Entitlement to Earnings

31-100B California Legal Forms--Transaction Guide § 100B.250

§ 100B.250 Notice to Employer of Parent or Guardian's Claim to Minor's Wages or Workers' Compensation Payments

[1] Comment

[a] Use of Form

This form is a notice given by a parent or guardian to a minor's employer, stating that the employer is to pay the minor's wages or workers' compensation payments to the parent or guardian. It is intended for use by the parents or guardians of any employed minor, other than one who has been emancipated [*see Fam. Code § 7002* (definition of "emancipation"); *see also* [c], *below*], or whose parents have expressly relinquished their right to the minor's earnings [*see Fam. Code § 7504*; *see also* Ch. 100, *Control, Custody, and Support of Minors*].

[b] Parents' Entitlement to Child's Earnings

Although a minor's parents are entitled to receive the minor's earnings [*Fam. Code § 7500*] and workers' compensation payments [*Lab. Code § 3605*], an employer may pay the minor directly until the parent or guardian gives notice of his or her intent to claim them [*Fam. Code § 7503*]. Earnings claimed by the parent or guardian need not be preserved for the minor or used for his or her benefit [*Macchi v. La Rocca* (1921) 54 Cal. App. 98, 100, 201 P. 143] . For forms and discussion relating to the relinquishment of parental rights, including the right to claim a minor child's earnings, see Ch. 100, *Control, Custody, and Support of Minors* .

The mother of an unemancipated minor child, and the father, if presumed to be the father [*see Fam. Code § 7611*], are equally entitled to the services and earnings of the child [*Fam. Code § 7500(a)*]. If one parent is dead, is unable or refuses to take custody, or has abandoned the child, the other parent is entitled to the services and earnings of the child [*Fam. Code § 7500(b)*]. These provisions, however, do not apply with respect to services or earnings of an unemancipated minor under a professional entertainment or sports contract of a type described by *Fam. Code § 6750* [*Fam. Code § 7500(c)*]. For discussion of those contracts, see § 100B.33.

A parent, whether solvent or insolvent, may relinquish to the child the right of controlling the child and receiving the

child's earnings. Abandonment by the parent is presumptive evidence of that relinquishment [*Fam. Code § 7504*].

[c] Inapplicability to Emancipated Minors

This form should not be used by the parent or guardian of an emancipated minor. Emancipation of a minor through marriage, active military duty, or the statutory procedure for declaration of emancipation [*Fam. Code § 7002*; see Ch. 100, *Control, Custody, and Support of Minors*] confers on the minor the right to receive and control his or her own earnings, extinguishing the parent or guardian's claim to the minor's earnings [*Fam. Code § 7050(b)*; see *Fam. Code § 7002* (definition of "emancipation")]. The right of a minor to receive and control his or her own earnings is also a feature of most emancipations occurring under existing case law [see *Fam. Code § 7504* (express parental emancipation of child)]. For a discussion of emancipation procedures and the rights of emancipated minors generally, see Ch. 100, *Control, Custody, and Support of Minors* .

[d] Earnings Held in Coogan Trust Account

A minor's earnings under a contract for his or her employment in the entertainment or professional sports industries are subject to special requirements [see *Fam. Code §§ 6750-6753*]. Fifteen percent of the minor's gross earnings under such a contract, whether or not it has been approved by a court, must be set aside by the employer in trust for the benefit of the minor (a "Coogan Trust Account") [*Fam. Code §§ 6752(b)-(i)*, 6753; see *Fam. Code § 6750(c)* (minor's "gross earnings" defined); see also § 100B.33]. Therefore, the parent or guardian may claim only the remainder of the earnings [see *Fam. Code § 7500*].

[e] Taxation of Minors' Earnings

Under federal income tax law, a minor's earnings are included in the minor's gross income and taxable to him or her regardless of who actually claims the earnings, and notwithstanding that the earnings may be considered the property of the minor's parents under state law [*I.R.C. § 73*; *Treas. Reg. § 1.73-1(a)*]. However, if a minor fails to pay the income tax on his or her earnings, the minor's parents generally will be assessed for the amount due [*I.R.C. § 6201(c)*]. A parent whose rights to control and receive the earnings of his or her child have been terminated through adoption, custody orders, or emancipation will not be assessed for the child's unpaid taxes [*I.R.C. §§ 73(c)*, 6201(c)]. California follows federal law regarding the tax treatment of minors' earnings [*Rev. & Tax. Code § 17081*].

[2] FORM

NOTICE TO EMPLOYER OF PARENT OR GUARDIAN'S CLAIM TO MINOR'S WAGES OR WORKERS' COMPENSATION PAYMENTS

NOTICE TO EMPLOYER OF PARENT OR GUARDIAN'S CLAIM TO MINOR'S WAGES OR WORKERS' COMPENSATION PAYMENTS

TO: _____[*name of employer (and workers' compensation carrier if applicable)*]
 _____[*address*]

You are hereby notified as follows:

1. I am the _____[*parent or sole surviving parent or parent having custody and control or guardian of the estate or guardian ad litem under appointment of the Superior Court of _____ County, Proceeding No. _____*] of _____[*name of minor*], a minor child born on [*specify month, day, and year*], and employed by you at _____[*place name and address of employment*].

2. I hereby claim the earnings [or workers' compensation payments] of this minor under the provisions of *Family Code*

Section 7503 [or Labor Code Section 3605]. I direct you to send the minor's earnings [or workers' compensation payments] to me, as they become due, at _____[address], until the minor reaches the age of 18.

Executed at _____[city], _____[state], on _____[date].

_____ [signature of parent or guardian]

[typed name]

_____ [Parent or Guardian]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Parental Duties & Rights Duties General Overview Family Law Parental Duties & Rights Duties Care & Control of Children Labor & Employment Law Employment Relationships Employment Contracts General Overview Labor & Employment Law Wage & Hour Laws Child Labor



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DIVISION VII: PERSONAL TRANSACTIONS
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E. Parental Entitlement to Earnings

31-100B California Legal Forms--Transaction Guide § 100B.251

§ 100B.251 Consent of Parent or Guardian to Assignment of Minor's Wages

[1] Comment

[a] Use of Form

This form is a consent by the parent or guardian of a minor to the minor's assignment of wages. For the accompanying form that the minor would use to execute the actual assignment, see Ch. 76, *Assignments of Rights and Obligations*.

[b] Limitations on the Assignment of Wages

Wages may be assigned only if they are due, or expected to become due, under an existing employment contract [see *Civ. Code § 1045*; see also *Walker v. Rich* (1926) 79 Cal. App. 139, 144, 249 P. 56]. An assignment of wages under an anticipated future employment agreement will not be effective. Wages that have not yet been earned may be assigned only for the purchase of the necessities of life [Lab. Code § 300(h)]. No more than 50 percent of the assignor's wages payable at any time may be assigned [Lab. Code § 300(c)]. An assignor may revoke an assignment of wages at any time by written notice to his or her employer [Lab. Code § 300(e)].

The limitations placed on wage assignments, and the formalities required [see Lab. Code § 300] are not applicable to assignments made by independent contractors [*Fitch v. Pacific Fid. Life Ins. Co.* (1975) 54 Cal. App. 3d 140, 146, 126 Cal. Rptr. 445]. For a discussion of how to determine whether a person is an employee or an independent contractor, see Ch. 84, *Independent Contractors*. For a more detailed discussion of the law regarding wage assignments, see Ch. 76, *Assignments of Rights and Obligations*.

[c] Requirements for Assignment of Wages

In general, any assignment must be evidenced by a writing, signed by the person whose earnings are to be assigned, that identifies the transaction to which the assignment relates [Lab. Code § 300(b)(1)]. The writing must also contain a statement that there is no other assignment in effect involving the same transaction [Lab. Code § 300(b)(5)]. The assignment must be notarized and filed with the assignor's employer, along with an itemized statement of the amount

due to the assignee [*Lab. Code § 300(b)(6)*].

A minor may make an assignment of his or her wages, provided the written consent of a parent or guardian of the minor (this form) is attached to the assignment [*Lab. Code § 300(b)(3)*]. An emancipated minor may execute a wage assignment in the same manner as an adult [*Fam. Code § 7050(b)*]. If the minor is married, the written consent of his or her spouse to the assignment must be attached [*Lab. Code § 300(b)(2)*]. The consent of a parent or guardian will not be necessary in this case, since a minor who has entered into a valid marriage is emancipated by statute [*Fam. Code § 7002(a)*].

[2] FORM

CONSENT OF PARENT OR GUARDIAN TO MINOR'S WAGE ASSIGNMENT

CONSENT OF PARENT OR GUARDIAN TO MINOR'S WAGE ASSIGNMENT

I, _____ [*name*], the _____ [*mother or father or guardian of the estate, under appointment of the Superior Court of _____ County, Proceeding No. _____*] of the minor child _____ [*name of minor*], represent that I am _____ [*the parent entitled to the earnings or the guardian responsible for the management of the estate*] of the minor, and in that capacity give my authorization and consent to the assignment of _____ [*his or her*] wages attached to this document.

Executed at _____ [*city*], _____ [*state*], on _____ [*date*].

_____ [*signature of parent or guardian*]

[*typed name*]

_____ [Parent or Guardian]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Performance Assignment General Overview Family Law Guardians General Overview Family Law Parental Duties & Rights Duties General Overview Family Law Parental Duties & Rights Duties Care & Control of Children Labor & Employment Law Wage & Hour Laws Child Labor



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 100C CHILD CARE FACILITIES

32-100C California Legal Forms--Transaction Guide 100C.syn

§ 100C.syn Synopsis to Chapter 100C: CHILD CARE FACILITIES

§ 100C.01 California Sources

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§ 100C.05 Law Reviews and Periodicals

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[1] Matthew Bender Sources

[2] Additional Text References

§ 100C.08 Pamphlets

§ 100C.09 [Reserved]

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[1] Comment

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[b] Licensure Required

[c] Required Contents and Supporting Documentation for Application

[d] Signature Requirements and Application Fee

[2] FORM

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[1] Comment--Use of Form

[2] FORM

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[1] Comment--Use of Form

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[1] Comment--Use of Form

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[1] Comment--Use of Form

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[1] Comment--Use of Form

[2] FORM

Personnel Report (LIC 500)

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[1] Comment--Use of Form

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[1] Comment--Use of Form

[2] FORM

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[1] Comment

[a] Use of Form

[b] Required Contents of Plan

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[1] Comment

[a] Use of Form

[b] Qualification Requirements for Directors

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[ii] Infant Care Centers

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[c] Qualification and Duty Requirements for Teachers and Aides

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[iv] School-Age Child Care Centers

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[1] Comment--Use of Form

[2] FORM

Job Descriptions

§ 100C.213 Personnel Policies

[1] Comment--Use of Form

[2] FORM

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[1] Comment--Use of Form

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[1] Comment--Use of Form

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[1] Comment--Use of Form

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[1] Comment

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[1] Comment--Use of Form

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Furniture and Play Equipment List

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[1] Comment--Use of Form

[2] FORM

Board Resolution

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[1] Comment

[a] Use of Form

[b] Required Contents of Agreement

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[1] Comment

[a] Use of Form

[b] Licensure Required

[c] Required Contents and Supporting Documentation for Application

[d] Signature Requirements and Application Fee

[2] FORM

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§ 100C.230A Current Children in Your Home--Application for a Family Child Care Home License (LIC 279B)

[1] Comment--Use of Form

[2] FORM

Current Children in Your Home--Application for a Family Child Care Home License (LIC 279B)

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[1] Comment

[a] Use of Form

[b] Persons Required to Complete Statement

[c] Fingerprinting Requirements

[2] FORM

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[1] Comment

[a] Use of Form

[b] Required Contents

[c] Instruction of Plan and Drills

[d] Earthquake Preparedness Checklist

[2] FORM

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[1] Comment--Use of Form

[2] FORM

Property Owner/Landlord Notification (LIC 9151)

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[1] Comment--Use of Form

[2] FORM

Property Owner/Landlord Consent to Expanded Capacity

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[1] Comment--Use of Form

[2] FORM

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[1] Comment--Use of Form

[2] FORM

Child Abuse Index Check (LIC 198A)

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[1] Comment

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[b] Use by Child Care Centers

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[1] Comment--Use of Form

[2] FORM

Local Fire Inspection Authority Information (LIC 9054)

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[1] Comment

[a] Use of Form

[b] Rights Afforded Employees

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[1] Comment

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[b] Personal Rights Afforded Children

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[c] Complaint Procedures

[2] FORM

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§ 100C.252 Notification of Parents' Rights for Child Care Centers (LIC 995)

[1] Comment

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[b] Authorized Representatives' Right to Inspect Facility

[c] Prohibition Against Retaliation

[2] FORM

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§ 100C.252A Notification of Parents' Rights for Family Child Care Homes [LIC 995A]

[1] Comment

[a] Use of Form

[b] Contents of Form

[c] Prohibition Against Retaliation

[2] FORM

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[1] Comment--Use of Form

[2] FORM

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§ 100C.252C Addendum to Notification of Parent's Rights (Regarding Reinstatement) (LIC 995C)

[1] Comment--Use of Form

[2] FORM

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[2] FORM

Child Care Facility Roster (LIC 9040)

§ 100C.254 Unusual Incident/Injury/Death Report (LIC 624)

[1] Comment

[a] Use of Form

[b] Reporting Requirements

[2] FORM

Unusual Incident/Injury/Death Report (LIC 624)

§ 100C.255 Identification and Emergency Information (LIC 700)

[1] Comment--Use of Form

[2] FORM

Identification and Emergency Information (LIC 700)

§ 100C.256 Child's Preadmission Health History--Parent's Report (LIC 702)

[1] Comment--Use of Form

[2] FORM

Child's Preadmission Health History--Parent's Report (LIC 702)

§ 100C.257 Affidavit Regarding Liability Insurance for Family Child Care Home (LIC 282)

[1] Comment

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[b] Liability Insurance or Bond Requirements

[c] Affidavits in Lieu of Insurance or Bond

[2] FORM

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§ 100C.258 Acknowledgment of Abuse Reporting Requirement (LIC 9108)

[1] Comment--Use of Form

[2] FORM

Acknowledgment of Abuse Reporting Requirement (LIC 9108)

§ 100C.259 Physician's Report (LIC 701)

[1] Comment

[a] Use of Form

[b] Medical Assessment Requirements

[c] Exemption on Religious Grounds

[2] FORM

Physician's Report (LIC 701)

§ 100C.260 Consent for Emergency Medical Treatment (LIC 627)

[1] Comment

[a] Use of Form

[b] Exemption on Religious Grounds

[2] FORM

Consent for Medical Treatment (LIC 627)

§ 100C.261 Agreement Allowing Child to Leave Center on Own

[1] Comment

[a] Use of Form

[b] Sign-Out Procedures

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Agreement Allowing Child to Leave Center on Own

§ 100C.262 Infant Care Center's Needs and Services and Activities Plan

[1] Comment

[a] Use of Form

[b] Infant Care Centers

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Infant Care Center's Needs and Services and Activities Plan

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§ 100C.270 Request for Waiver of Licensing Requirements

[1] Comment

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[2] FORM

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§ 100C.271 Withdrawal of License Application

[1] Comment

[a] Use of Form

[b] Withdrawal of Application and Effect on Proceedings Against Applicant

[2] FORM

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§ 100C.272 Notice of Mailing Address Change

[1] Comment--Use of Form

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§ 100C.273 Notice of Intent to Alter Building

[1] Comment--Use of Form

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§ 100C.274 Departmental Notice of Intended Sale of Center

[1] Comment

[a] Use of Form

[b] Additional Notice Required to Buyer

[c] Effect of Compliance or Noncompliance With Notice Requirements

[2] FORM

Departmental Notice of Intended Sale of Center

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[1] Comment

[a] Use of Form

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 100C CHILD CARE FACILITIES

32-100C California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter discusses the licensing and operational requirements applicable to two types of child care facilities covered by the California Child Care Facilities Act: child care centers and family child care homes. Particular attention is given to the numerous forms that must be completed and filed with the Department of Social Services, including the initial licensing forms, the operational forms once the facility has opened, and the administrative forms. This chapter also discusses zoning issues related to child care, insurance issues, tax issues surrounding child care providers, and administrative proceedings. A brief discussion of the Child Care and Development Services Act is also included. This chapter does not discuss the licensing requirements and related provisions under the California Community Care Facilities Act.



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A. Primary Sources

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§ 100C.01 California Sources

[1] Statutes

Child Care and Development Services Act. *Ed Code § 8200 et seq.*

Administrative adjudication of disputes. *Gov. Code § 11500 et seq.*

As applied to Department of Social Services. *Gov. Code § 11501(a).*

Hearing to determine revocation or suspension of license. *Gov. Code § 11503.*

Hearing to determine issuance or renewal of license. *Gov. Code § 11504.*

Notice of defense. *Gov. Code §§ 11505, 11506.*

Discovery and deposition procedures. *Gov. Code §§ 11507.6, 11511.*

Notice of hearing. *Gov. Code § 11509.*

Evidentiary rules. *Gov. Code § 11513.*

Reinstatement of suspended or revoked licenses. *Gov. Code § 11522.*

California Community Care Facilities Act. *H&S Code § 1500 et seq.*

"Child abuse" defined. *H&S Code § 1531.5(c); Pen Code § 11165.6.*

California Child Day Care Facilities Act. *H&S Code § 1596.70 et seq.*

General provisions of Child Day Care Facilities Act applicable to all facilities. *H&S Code §§ 1596.70-1596.895.*

Purposes of Act. *H&S Code § 1596.73.*

"Child day care facility" defined. *H&S Code § 1596.750.*

"Day care center" defined. *H&S Code § 1596.76.*

"Family child care home" defined. *H&S Code § 1596.78.*

"Provider" defined as facility operator. *H&S Code § 1596.791.*

Exempt facilities and arrangements. *H&S Code §§ 1596.792-1596.794.*

Licensure requirement. *H&S Code § 1596.80.*

Specialized services permit requirement. *H&S Code § 1596.805.*

Fire clearance approval requirement. *H&S Code § 1596.809.*

Notification of applicant's or licensee's mailing address change. *H&S Code § 1596.83.*

Provisional licenses. *H&S Code § 1596.84.*

Child roster requirement. *H&S Code § 1596.841.*

Providers rights. *H&S Code § 1596.842.*

Requirement to attend orientation. *H&S Code § 1596.845.*

Sale or exchange of licenses not permitted. *H&S Code § 1596.85.*

Effect of previous denial or revocation of license or exclusion. *H&S Code § 1596.851.* Inspections. *H&S Code § 1596.852.*

Inspection requests and complaint procedure. *H&S Code § 1596.853.*

Denial of license for noncompliance with rules. *H&S Code § 1596.856.*

Parental right to inspect facility. *H&S Code § 1596.857.*

Forfeiture of license. *H&S Code § 1596.858.*

Use of license number in advertising. *H&S Code § 1596.861.*

Health and safety training. *H&S Code § 1596.866.*

Criminal clearance reviews and fingerprinting requirement. *H&S Code § 1596.871.*

Releasing minor to peace officer. *H&S Code § 1596.876.*

Review and investigation of Child Abuse Registry reports *H&S Code § 1596.877.*

Notice of denial of application and appeal. *H&S Code § 1596.879.*

Employee notification of rights. *H&S Code § 1596.881.*

Employee complaint procedure. *H&S Code § 1596.882.*

Grounds for denying, suspending or revoking license. *H&S Code § 1596.885.*

Temporary suspension of licenses. *H&S Code §§ 1596.886, 1596.8865.*

Department verification of non-operation after temporary suspension of license. *Health & Safety Code § 1596.8867.*

Conduct of proceeding for the denial, suspension, or revocation of license. *H&S Code § 1596.887; Gov. Code § 11500 et seq.*

Notice requirement for temporary suspension. *H&S Code § 1596.8895.*

Grounds for barring presence or employment. *H&S Code § 1596.8897.*

Unannounced Department visit after order of immediate exclusion or removal of person from facility. *Health & Safety Code § 1596.8899.*

Actions to enjoin unlicensed facilities. *H&S Code § 1596.89.*

Misdemeanor to commit willful or repeated violations of rules. *H&S Code § 1596.890.*

Civil penalties against unlicensed facilities and right to appeal. *H&S Code § 1596.891.*

Misdemeanor to inform facility of investigation. *H&S Code § 1596.8915.*

Statutes applicable only to child care centers. *H&S Code §§ 1596.90-1597.21.*

Application requirements. *H&S Code § 1596.95.*

Optional toddler program. *H&S Code § 1596.955, 1596.956.*

Provisional licenses. *H&S Code §§ 1596.96, 1597.13.*

Notice of deficiencies and levying of civil penalties. *H&S Code §§ 1596.98, 1596.99.*

Teacher qualifications. *H&S Code § 1597.055.*

Teacher's aide qualifications. *H&S Code § 1597.059(a).*

Written policy statement required. *H&S Code § 1597.07.*

Site and spot visits. *H&S Code §§ 1597.08-1597.091.*

Notice requirements for proposed sale of child care center. *H&S Code § 1597.14.*

Statutes applicable only to family child care homes. *H&S Code §§ 1597.30-1597.621.*

Effect of local building, zoning, and fire codes and regulations. *H&S Code §§ 1597.40, 1597.47.*

Special rules applicable to small family child care homes. *H&S Code §§ 1597.44, 1597.45.*

No discrimination in application of housing laws and building and fire codes to small family child care homes. *H&S Code §§ 1597.45(c), 17910-17995.5.*

Special rules applicable to large family child care homes. *H&S Code § 1597.46.*

No discrimination in application of housing laws and building and fire codes to large family child care homes. *H&S Code §§ 1597.46(d), 17910-17995.5.*

Licensing reviews limited. *H&S Code § 1597.52(a).*

Qualification requirement for large family child care home operators. *H&S Code § 1597.52(b).*

Liability insurance requirements. *H&S Code § 1597.531.*

Application requirements. *H&S Code § 1597.54.*

Site visits. *H&S Code §§ 1597.55a, 1597.55b.*

Notices of deficiencies. *H&S Code § 1597.56.*

Time limit for granting or denying application. *H&S Code § 1597.59.*

Actions against unlicensed facilities. *H&S Code § 1597.61.*

State fire and fire protection laws. *H&S Code § 13000 et seq.*

Child Care Insurance Act. *Ins. Code § 1862 et seq.*

Property tax exemptions for child care facilities. *R&T Code §§ 214, 221.*

[2] Regulations

Child Care and Development Programs. *5 Cal. Code Reg. § 18000 et seq.*

Award of funding for child care and development programs. *5 Cal. Code Reg. §§ 18000-18010.*

Required immunizations for children attending day care facilities. *17 Cal. Code Reg. § 6000 et seq.*

Child care licensing requirements. *22 Cal. Code Reg. § 101151 et seq.*

General requirements applicable to all facilities except family child care homes. *22 Cal. Code Reg. §§ 101151(a), 102351.1.*

Definitions. *22 Cal. Code Reg. § 101152.*

Licensure requirement. *22 Cal. Code Reg. § 101156(a).*

Operating without license. *22 Cal. Code Reg. § 101157.*

Application procedures. *22 Cal. Code Reg. §§ 101168-101187.*

Enforcement provisions. *22 Cal. Code Reg. § 101193 et seq.*

Penalties for noncompliance with regulations. *22 Cal. Code Reg. § 101195.*

Inspection authority of Department and evaluation visits. *22 Cal. Code Reg. §§ 101200, 101201.*

Continuing requirements. *22 Cal. Code Reg. §§ 101212-101231.*

Requirements for physical environment of facility. *22 Cal. Code Reg. §§ 101237-101239.2.*

Infant care center requirements. *22 Cal. Code Reg. § 101351 et seq.*

Director and staff qualifications and duties. *22 Cal. Code Reg. §§ 101415-101416.3.*

Staff-infant ratio requirements. *22 Cal. Code Reg. §§ 101416.5, 101416.8.*

Toddler component. *22 Cal. Code Reg. § 101417.*

Infant needs and services plan. *22 Cal. Code Reg. §§ 101419.2, 101419.3.*

Requirements for physical environment. *22 Cal. Code Reg. §§ 101438.1-101439.1.*

School-age child care center requirements. *22 Cal. Code Reg. § 101451 et seq.*

Continuing requirements. *22 Cal. Code Reg. §§ 101515-101539.*

Staff qualification and duty requirements. *22 Cal. Code Reg. §§ 101515, 101516.2.*

Teacher-child ratio requirement. *22 Cal. Code Reg. § 101516.5.*

Child care centers for mildly ill children. *22 Cal. Code Reg. § 101551 et seq.*

Definitions. *22 Cal. Code Reg. § 101552.*

Continuing requirements. *22 Cal. Code Reg. §§ 101615-101630.*

Staff qualification and duty requirements. *22 Cal. Code Reg. §§ 101615-101616.3.*

Teacher-child ratio requirement. *22 Cal. Code Reg. § 101616.5.*

Daily inspection for illness. *22 Cal. Code Reg. § 101626.1.*

Family child care homes for children. *22 Cal. Code Reg. § 102351.1 et seq.*

Family child care homes exempt from general licensing requirements. *22 Cal. Code Reg. § 102351.1.*

Definitions. *22 Cal. Code Reg. § 102352.*

Operating without license. *22 Cal. Code Reg. § 102357.*

Exemptions from licensure. *22 Cal. Code Reg. § 102358.*

Application procedures. *22 Cal. Code Reg. §§ 102368-102384.*

Inspection authority of Department and site visits. *22 Cal. Code Reg. §§ 102391, 102392.*

Unlicensed facility penalties and appeals. *22 Cal. Code Reg. §§ 102393, 102394.*

Denial, revocation, and suspension of licenses. *22 Cal. Code Reg. §§ 102401, 102402.*

Complaint rights. *22 Cal. Code Reg. § 102403.*

Staffing ratio and capacity requirements. *22 Cal. Code Reg. § 102416.5.*

Admission procedure requirements. *22 Cal. Code Reg. § 102419.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Family Law Family Protection & Welfare Children Abuse, Endangerment & Neglect



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§ 100C.02 Federal Statutes

Child care income tax credit. *I.R.C. § 21.*

Employer-provided child care credit. *I.R.C. § 45F.*

Deductions for use of home as child care facility. *I.R.C. § 280A(c)(4).*

Tax exemption for non-profit corporations providing child care. *I.R.C. § 501(k).*

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Family Law Family Protection &
Welfare Children General Overview Tax Law Federal Tax Administration & Procedure Tax Credits & Liabilities Credits,
Overassessments & Refunds (IRC secs. 6401-6427) General Overview



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§ 100C.05 Law Reviews and Periodicals

Gottman, *From New Research, Experts Discover the Only Discipline Tools You'll Ever Need*, 72 Parents, March 1997, at 68.

Rosen, *How Good Is Your Child's Preschool?* 72 Parents, March 1997, at 59.

Dinwiddie, *The Saga of Sally, Sammy, and the Red Pen: Facilitating Children's Social Problem Solving*, 49 Young Children, July 1994, at 13.

Review of Selected 1989 Cal. Leg., Crimes; Care Facilities--Unauthorized Disclosure of Impending Inspection, 21 Pac. L.J. 406 (1990).

Comment, *Family Day-Care Homes: Local Barriers Demonstrate Needed Change*, 25 Santa Clara L. Rev. 481 (1985).

Comment, *Protecting Children in Licensed Family Day-Care Homes: Can the State Enter a Home Without a Warrant?* 25 Santa Clara L. Rev. 411 (1985).

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Family Law Family Protection & Welfare Children General Overview



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§ 100C.06 Annotations

Annot., Governmental Liability for Negligence in Licensing, Regulating, or Supervising Private Day-Care Home in Which Child Is Injured, 68 A.L.R.4th 266 (1989).

Annot., Tort Liability of Private Nursery School or Day-Care Center, or Employee Thereof, for Injury to Child While Attending Facility, 58 A.L.R.4th 240 (1987).

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Family Law Family Protection & Welfare Children General Overview



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§ 100C.07 Text References

[1] Matthew Bender Sources

California Forms of Pleading and Practice, Ch. 470, *Overview of Public Administrative Law* (Matthew Bender).

[2] Additional Text References

Witkin, Summary of California Law, vol. 10, *Parent and Child* (10th ed. 2005).

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Family Law Family Protection & Welfare Children General Overview



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§ 100C.08 Pamphlets

Cal. Dept. of Social Services, Facing the Facts: A Parent's Guide to the Understanding of Child Sexual Abuse (English-language and Spanish-language versions available).

Legal Topics:

For related research and practice materials, see the following legal topics:

Education LawAdministration & OperationChild Care FacilitiesFamily LawFamily Protection &

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[Reserved]

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§ 100C.10 California Child Day Care Facilities Act

[1] In General

Child care facilities in California are governed by the California Child Day Care Facilities Act (the "Act") [*H&S Code § 1596.70 et seq.*]. The Act is intended to streamline the administration of child care licensing, encourage the development of quality licensing staff, provide child care providers with technical assistance about licensing requirements, enhance consumer awareness of licensing requirements and the benefits of licensed child care, and recognize that affordable, quality licensed child care is critical to the well being of parents and children [*H&S Code § 1596.73*]. The Act invests the State Department of Social Services (referred to in this chapter simply as the "Department") with responsibility for licensing child care facilities. By empowering the Department with licensing responsibilities, the Legislature intended to establish within the Department an organizational structure for child care licensing that is separate from the Department's other licensing activities [*see H&S Code § 1596.72(d)*].

The Act requires that the Department adopt rules and regulations that may be necessary to carry out the Act [*H&S Code § 1596.81(a)*]. The Department has adopted detailed regulations governing general licensing requirements, applications for child care licenses, license enforcement, operating requirements, and related matters [*see 22 Cal. Code Reg. § 101151 et seq.*]. The regulations are designed to ensure the safety and well being of the children, requiring that child care facilities be run by competent persons who have no histories of child abuse or related criminal activity and that the facilities themselves be operated in accordance with legal requirements. A free copy of all applicable regulations is available from the Department [*H&S Code § 1596.855*], and licensees must make their copy of the current licensing regulations available to employees and consumers [*H&S Code § 1596.874(b)*]. The Department must also mail, without charge, printed copies of all revisions of regulations to all resource and referral programs funded under *Educ. Code § 8210* and to any association of child care agencies that has requested copies of regulatory revisions [*H&S Code § 1596.855(b)*].

Although the Department is responsible for licensing child care facilities, it may contract with state, county, or other public agencies to assume those licensing responsibilities [*H&S Code § 1596.82*]. However, most licensing is handled by the state. The Director of Social Services must publish and make available to interested persons an annual list (or

lists) of all licensed child care facilities, other than small family child care homes [see *H&S Code § 1596.78(c)*; see also [2], *below*], and the services for which each facility has been licensed or issued a special permit. The list(s) must also specify the licensed capacity of the facility and whether the facility is licensed by the department or by another public agency [*H&S Code § 1596.86(a)*].

[2] Types of Facilities

The Act recognizes different types of child care facilities. In addition, the Act exempts certain types of facilities from its requirements [see *H&S Code § 1596.792*; see also [4], *below*].

A "child care facility" or "child day care facility" is any facility that provides nonmedical care to children under 18 years of age who are in need of personal services, supervision, or assistance essential for sustaining the activities of daily living, or for the protection of the individual, on less than a 24-hour basis [*H&S Code § 1596.750*; 22 *Cal. Code Reg. § 101152(c)(9)*; see *H&S Code § 1596.75* ("child" defined)]. The term "child care facility" includes "child care centers" [see *H&S Code § 1596.76*; 22 *Cal. Code Reg. § 101152(c)(7)*], "employer-sponsored child care centers" [*H&S Code § 1596.750*; see *H&S Code § 1596.771*], and "family child care homes" [*H&S Code § 1596.750*; 22 *Cal. Code Reg. § 102352(f)(1)*; see *H&S Code § 1596.78*]. A "child care center" is any child care facility other than a family day care home, including infant centers [see § 100C.35[2]], preschools, extended day care facilities, and school-age child care centers [*H&S Code § 1596.76*].

An "employer-sponsored child care center" is any child care facility at the employer's site of business, operated directly or through a provider contract by any person or entity having one or more employees, and available exclusively for the care of children of that employer and of the officers, managers, and employees of that employer [*H&S Code § 1596.771*].

A "family child care home" (or family day care home) is defined as a home that regularly provides care, protection, and supervision of 14 or fewer children in the provider's own home for periods of less than 24 hours a day while the parents or guardians are away, and is either a large family child care home or a small family child care home [*H&S Code § 1596.78(a)*]. A "large family child care home" is a home that provides family day care to no fewer than 7 and not more than 14 children, including children under the age of 10 who reside at the home [*H&S Code § 1596.78(b)*; see *H&S Code § 1597.465* (additional rules for homes with 13 or 14 children)]. A "small family child care home" is a home that provides family day care to eight or fewer children, including children under the age of 10 who reside at the home [*H&S Code § 1596.78(c)*; see *H&S Code § 1597.44* (additional rules for homes with seven or eight children)].

[3] Applicability of Rules and Regulations to Types of Facilities

The Child Day Care Facilities Act [*H&S Code § 1596.70 et seq.*], and the regulations promulgated by the Department of Social Services [22 *Cal. Code Reg. § 101151 et seq.*] govern the establishment and operation of child care facilities in California. The Act is divided into three sections:

- General rules applicable to all child care facilities [*H&S Code §§ 1596.70-1596.895*].
- Specific rules applicable only to child care centers (which include infant care centers, preschools, extended day care facilities, and school-age child day care centers) [*H&S Code §§ 1596.90-1597.21*].
- Specific rules applicable only to family child care homes [*H&S Code §§ 1597.30-1597.621*].

The regulations promulgated under the Act are similarly divided [22 *Cal. Code Reg. § 101151 et seq.*]:

- General regulations that apply to all child care centers. However, unlike the general statutes, the

general regulations are *not* applicable to family child care homes [22 *Cal. Code Reg.* § 102351.1].

- Specific regulations that apply to specific types of centers.
- Specific regulations that apply only to family child care homes.

Consequently, in opening and operating a child care center, close attention must be paid to which rules and regulations apply to which facilities [see *H&S Code* §§ 1596.71, 1596.90, 1597.53; see also 22 *Cal. Code Reg.* §§ 101151(a), 101351, 101451, 101551, 102351.1]:

- Child care centers are governed by *H&S Code* §§ 1596.70-1597.21 and 22 *Cal. Code Reg.* §§ 101151-101239.2.
- Infant care centers are governed by all rules and regulations applicable to child care centers, plus 22 *Cal. Code Reg.* §§ 101351-101439.1.
- School-age child care centers are governed by all rules and regulations applicable to child care centers, plus 22 *Cal. Code Reg.* §§ 101451-101539.
- Child care centers for mildly ill children are governed by all rules and regulations applicable to child care centers, plus 22 *Cal. Code Reg.* §§ 101551-101639.2.
- Family child care homes are governed by *H&S Code* §§ 1596.70-1596.895 and 1597.30-1597.621 and by 22 *Cal. Code Reg.* §§ 102351.1-102424.

Because of this overlapping statutory and regulatory scheme, some of the discussion in Part B of this Legal Background with respect to child care centers is repeated in Part C with respect to the same or similar requirements as applied to family child care homes. Although the statutory authority is the same in many cases, the two types of facilities are governed by different implementing regulations, and these regulations, though often similar, are not always identical. To avoid confusion, therefore, some of the requirements, such as fingerprinting, are discussed separately with respect to these two types of facilities.

[4] Exempt Facilities, Arrangements, and Recreation Programs

[a] Facilities Subject to Other Regulatory Schemes

The Child Day Care Facilities Act [*H&S Code* § 1596.70 *et seq.*] exempts from its requirements the following facilities that are subject to other types of governmental licensing or regulation [see *H&S Code* § 1596.792(a)-(c); see also 22 *Cal. Code Reg.* § 101158(a)(8)]:

- Health facilities [see *H&S Code* § 1250 ("health facilities" defined)];
- Clinics [see *H&S Code* §§ 1200, 1200.1 ("clinic" defined)]; and
- Community care facilities [see *H&S Code* § 1502(a) ("community care facility" defined)].

In addition, licensed alcohol and drug treatment program facilities, administered by the Department of Corrections and Rehabilitation, that house women and their children and are specifically designated for the purpose of providing substance abuse treatment and maintaining and strengthening the family unit are exempt from the Child Day Care Facilities Act [see *H&S Code* § 1596.792(m)].

[b] Extended School Day Care Programs

Extended day care programs operated by public or private schools are exempt from the Act [*H&S Code § 1596.792(h)*]. However, such before- and/or after-school programs for school-age children are only exempt from the regulations if the program is operated by the school and run by qualified teachers employed by the school or the school district [22 *Cal. Code Reg. § 101158(a)(8)(A)*]. If an outside organization or individual uses a public or private school site to operate a child care program, the organization or individual is subject to licensure even when the program is open only to the children enrolled at that school [22 *Cal. Code Reg. § 101158(a)(8)(B)*].

[c] Informal Arrangements

Certain informal facilities that more closely resemble personal arrangements for child care than businesses open to the public are exempt from the Act. For example, family child care homes that provide care for the children of only one family in addition to the operator's own children [*H&S Code § 1596.792(d)*] and arrangements for child care by relatives [*H&S Code § 1596.792(f)*] are exempt.

[d] Facilities Providing Specified Limited Services

The Act exempts facilities and programs that provide specified limited child care services. For example, (1) child care programs that operate only one day per week for no more than four hours that day [*H&S Code § 1596.792(j)*], (2) child care programs offering temporary child care services when the parent or guardian remains on the same premises as the site of the program [*H&S Code § 1596.792(k)*] (exemption inapplicable if site is ski facility, shopping mall, department store, or other similar, prohibited site), and (3) programs providing activities of an instructional nature for children in a classroom-like setting operated on a limited basis during times when school is not normally in session [*see H&S Code § 1596.792(l)*] are exempt.

[e] Cooperative Arrangements Between Parents

Cooperative arrangements between parents for the care of their children in which no payment is involved are also exempt [*H&S Code § 1596.792(e)*]. To qualify for this exemption, the cooperative arrangement must meet all of the following conditions [*H&S Code § 1596.792(e)(1)-(4)*]:

- The parents must combine their efforts so that each parent (or set of parents) rotates as the responsible care giver with respect to all children in the cooperative.
- Any person caring for children must be a parent, legal guardian, stepparent, grandparent, aunt, uncle, or adult sibling of at least one of the children in the cooperative.
- No payment of money or receipt of in-kind income is exchanged for providing care.
- No more than 12 children may receive care in the same home at the same time.

[f] School Parenting or Adult Education Child Care Programs

School parenting or adult education child care programs that are operated by a public school district or by an individual or organization pursuant to a contract with a public school district and whose operation is not by an organization specified in *H&S Code § 1596.793* are exempt [*H&S Code § 1596.792(i)*].

[g] Specified Recreation Programs

The Act exempts specified recreation programs, including certain public recreation programs operated by government

entities [see *H&S Code § 1596.792(g)*]. Certain private recreation programs conducted for children by the Girl Scouts, Boy Scouts, Boys Club, Girls Club, Camp Fire, and similar organizations are also exempt from the Act [*H&S Code § 1596.793*]. However, child day care programs operated by these organizations are subject to the Act [*H&S Code § 1596.793*].

[h] Licensing Waivers for Small Businesses

To encourage and facilitate the establishment of employer-sponsored child care centers [see *H&S Code § 1596.771* (definition)], the Department allows for reasonable waivers of those regulations presenting difficulties to small businesses for licensure, provided that the health and safety of all children is maintained. The applicant must agree to alternative methods of meeting the purpose and intent of any regulation waived [*H&S Code § 1597.71*].

[5] Overview of Administrative Proceedings Under the Act

The following text briefly discusses the administrative proceedings that may be encountered when litigating child day care issues. For a detailed analysis of proceedings and forms related to administrative proceedings in general, see California Forms of Pleading and Practice, Ch. 470, *Overview of Public Administrative Law* (Matthew Bender).

Administrative proceedings that are likely to arise under the California Child Day Care Facilities Act include hearings for the following purposes:

- To determine the validity of a denial, revocation, or suspension of a child care center license or special permit [see *H&S Code §§ 1596.879, 1596.887*].
- To review a notice of deficiency or penalty [see *H&S Code § 1597.56; 22 Cal. Code Reg. § 101196*].
- To appeal assessments of civil penalties for operating an unlicensed facility [see *22 Cal. Code Reg. § 102394*].
- To determine the validity of the Department's prohibition of an individual from employment in a child care facility [see *H&S Code § 1596.8897(e)* (burden of proof on department)].
- To appeal any decision through the Department to the deputy director of the Department of Social Services [*H&S Code § 1596.842(b)(1)*].

Hearings to determine whether a license or special permit has been properly denied, revoked, or suspended, and appeals related to prohibiting individuals from employment in facilities, are governed by the administrative adjudication provisions of the Government Code [see *H&S Code §§ 1596.879, 1596.887(a), 1596.8897(e)*; see also *Gov. Code § 11500 et seq.*]. However, other administrative proceedings that may be encountered, such as the review of deficiency notices and civil penalty assessments, are governed by the Department of Social Service's own regulations [see, e.g., *22 Cal. Code Reg. §§ 101196, 102394*]. If a conflict between the Child Day Care Facilities Act and applicable provisions of the Government Code arise, the provisions of the Government Code prevail [*H&S Code § 1596.887(a)*].

Licensure revocation hearings are given priority calendar preference. In all proceedings to determine the validity of a license denial, revocation, or suspension the standard of proof is the preponderance of the evidence [*H&S Code § 1596.887(b),(c)*].

Hearings required to be conducted under the Government Code are heard by administrative law judges [see *Gov. Code § 11502*]. The hearings are initiated by filing an accusation or statement of issues, depending on the type of hearing, that must clearly identify the acts or omissions being complained of, and set forth the relevant statutes and rules applicable

to the hearing [*see Gov. Code §§ 11503, 11504*]. The individual being served with the accusation or statement of issues (the respondent) has the opportunity to file a notice of defense after which a hearing will be conducted [*see Gov. Code §§ 11505, 11506*]. The respondent must be served with a notice of hearing at least 10 days before the hearing [*Gov. Code § 11509*]. Discovery proceedings, rules of evidence, and conduct at the hearing are all regulated under special rules [*see Gov. Code §§ 11507.6, 11512, 11513*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Family Law Family Protection & Welfare Children General Overview Family Law Family Protection & Welfare Children Abuse, Endangerment & Neglect



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§ 100C.11 Child Care and Development Services Act

The Child Care and Development Services Act [*Ed Code § 8200 et seq.*] is a comprehensive Act covering numerous child care and development services. The Act is geared primarily toward ensuring that parents and children (up to age 13) have access to child care and development programs [*see Ed Code §§ 8201, 8202* (purposes of Act and Legislative intent)], such as resource and referral programs [*see Ed Code §§ 8210-8216*], programs for children with special needs [*see Ed Code §§ 8250-8252*], and services for school-age community child care [*see Ed Code §§ 8460-8481*].

Of special importance for child care providers are the Act's provisions that relate to the potential availability of government funds for assisting providers in opening and operating their facilities [*see, e.g., Ed Code §§ 8275-8279.2*]. These provisions include reimbursement for approvable start-up costs, such as staff orientations, rental deposits, and initial insurance premiums [*see Ed Code § 8275(a)*], the allocation of funds to family child care homes for repairs and renovation to ensure compliance with health and safety standards [*see Ed Code § 8277.1*], and the offering of revolving loans with no interest to child care and development facilities other than family child care homes to ensure compliance with licensing standards [*see Ed Code §§ 8276.5, 8277.2*]. Funding is also authorized for state preschool programs and full-day child development programs for preschoolers [*see Ed Code §§ 8211, 8236*].

Detailed regulations define and implement the many services offered under the Act [*see 5 Cal. Code Reg. §§ 18000-18308*]. As with the regulations implementing the California Child Care Facilities Act [*see 22 Cal. Code Reg. § 101151 et seq.*], the regulations applicable to the Child Care and Development Services Act must be followed if an individual or an organization is taking part in the programs and services of the Act. For child care centers and family child care homes seeking state funds, eligibility requirements must be satisfied [*see, e.g., 5 Cal. Code Reg. § 18001*] and specific application procedures must be followed, including the submission of a complete application in accordance with instructions contained in a Request for Applications [*see 5 Cal. Code Reg. §§ 18000(f), 18002*]. Facilities that are exempt from child care licensing laws [*see § 100C.10[4]*] must comply with the health and safety regulations for child care centers and family child care homes as specified in Title 22 of the California Code of Regulations in order to qualify for state funds [*5 Cal. Code Reg. § 18020*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 100C.12 Zoning Ordinances and Child Care Facilities

Local zoning ordinances historically failed to list family child care homes as permitted uses in residential zones, and their definitions of "family" made it nearly impossible for child care homes to operate legally in "single family" residential zones [see Comment, *Family Day-Care Homes: Local Barriers Demonstrate Needed Change*, 25 *Santa Clara L. Rev.* 481, 493-494 (1985)]. In addition, fire codes, which typically require fire exits and limit the occupancy of structures and rooms, are often too broad to distinguish child care facilities from schools or hospitals.

Recognizing that local zoning regulations and fire codes can constitute significant obstacles to child care services, the Legislature has removed some of these zoning and fire code obstacles, and eased others. It has declared that the public policy of the state is to provide children in family child care homes [see *H&S Code § 1596.78(a)*; see also § 100C.10[2]] with the same home environment that is provided in traditional home settings [*H&S Code § 1597.40(a)*]. It has also declared its purpose of occupying the field to the exclusion of municipal zoning ordinances, building and fire codes, and regulations governing the use or occupancy of family child care homes, and of prohibiting restrictions relating to the use of single-family residences for family child care homes, except as specifically provided in the statutes applicable to family child care homes [*H&S Code § 1597.40(a)*]. Further, restrictions and prohibitions against the use of real property for family child care homes are void [*H&S Code § 1597.40(b)*]. However, when the family child care is or will be located on rental property, the provider (or prospective provider) must notify the landlord [see *H&S Code § 1597.40(d)*].

Small family child care homes providing care for eight or fewer children [*H&S Code § 1596.78(c)*; see *H&S Code § 1597.44* (additional rules for homes with seven or eight children); see also § 100C.10[2]] have been almost entirely exempted from local zoning ordinances and other regulations [see *H&S Code § 1597.45*; see also § 100C.70[2]]. Large family child care homes providing care for 7 to 14 children [*H&S Code § 1596.78(b)*; see *H&S Code § 1597.465* (additional rules for homes with 13 or 14 children); see also § 100C.10[2]] cannot be prohibited on lots zoned for single-family dwellings [*H&S Code § 1597.46(a)*], although zoning authorities may attach certain conditions to use permits for such homes [see *H&S Code § 1597.46(a)(1)-(3)* (permissible conditions)].

Local authorities may adopt restrictions on building heights, setback, or lot dimensions of family child care facilities, as

long as the restrictions are identical to those applied to other single-family residences. Similarly, they may apply local ordinances dealing with health and safety, building standards, environmental impact standards, or other matters properly within the jurisdiction of a local public entity, to family child care homes [*H&S Code § 1597.47*; see, e.g., *H&S Code § 1596.795(a)* (local government permitted to enact and enforce ordinance more stringent than state prohibition against smoking in family child care center)]. Further, local authorities may abate nuisances. However, the ordinance or nuisance abatement may not distinguish family child care facilities from other single-family dwellings, except as permitted by the statutes applicable to family child care homes [*H&S Code § 1597.47*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Family Law Family Protection & Welfare Children General Overview Real Property Law Zoning & Land Use General Overview



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§ 100C.13 Insurance and Child Care Facilities

[1] In General

Prudent business practices, as well as licensing agencies, require that operators of child care facilities obtain adequate insurance coverage including, at a minimum, general liability insurance. Property insurance in case of fire or other damage is also essential. Other types of insurance that a child care facility may purchase include personal property insurance to cover the facility's contents (such as equipment, furniture, and toys), auto insurance if the facility provides transportation for the children, and product liability insurance to cover such items as food served to the children.

The legislature has enacted the Child Care Insurance Act [*Ins. Code §§ 1862-1864*] to ensure the availability, stability, and affordability of liability insurance for child care facilities, and to provide residents of California with an adequate, safe, affordable, and plentiful market of child care services [*Ins. Code § 1862*]. The Act requires all insurers writing child care liability insurance to submit annual reports to the Insurance Commissioner regarding child care liability claims experience for the preceding year. The reports are for the benefit of child care centers and family child care homes and must separately state detailed information such as premiums earned, number of claims filed, total losses incurred, total number of policies canceled, total number of policies nonrenewed, net underwriting gain or loss, and separate allocations of expenses [*see Ins. Code § 1864(a)*].

[2] Family Child Care Home Requirements

Family child care homes must maintain in force either (1) liability insurance covering injury to clients and guests, in the amount of at least \$100,000 per occurrence and \$300,000 in the total annual aggregate, sustained on account of the negligence of the licensee or the licensee's staff, or (2) a bond in the aggregate amount of \$300,000 [*H&S Code § 1597.531(a)*]. In lieu of the liability insurance or bond, family child care homes may obtain affidavits signed by each parent with a child enrolled in the home stating that the parent has been informed that the home does not carry liability insurance or a bond [*H&S Code § 1597.531(a)*; *see § 100C.257*]. If the licensee does not own the premises used as a family child care home, the affidavit must contain additional information. This type of affidavit must also state that the parent has been informed that the liability insurance, if any, of the property owner (or homeowners' association) may not provide coverage for losses arising out of, or in connection with, the operation of the family child care home, except

to the extent that the losses are caused by or result from an action or omission by the owner or association for which the owner or association would otherwise be liable [*H&S Code § 1597.531(a)*].

Family child care homes that maintain liability insurance or a bond, and that provide care in premises that are rented or leased, or shared with a homeowners' association, must name the owner of the property, or the homeowners' association, as an additional insured party on the policy or bond if (1) the owner or governing body of the homeowners' association requests, in writing, to be added as an additional insured party, (2) the addition of the owner or homeowners' association does not cause cancellation or nonrenewal of the insurance policy or bond, and (3) any additional premium assessed is paid by the owner of the property or homeowners' association [*H&S Code § 1597.531(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Insurance Law Business Insurance General Overview



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§ 100C.14 Tax Issues Affecting Child Care Facilities

[1] In General

Various special tax considerations relate to different aspects of child care. The tax discussion in this section focuses on those special tax considerations specifically applicable to individuals and/or organizations that provide child care. Other tax considerations not discussed in this chapter include the following:

- A potential income tax credit available to families paying expenses for child care services [*see I.R.C. § 21*].
- Potential income tax deductions available to employers who contribute to a child day care plan for their employees [*see I.R.C. § 419*].
- An employer tax credit equal to 25 percent of qualified expenses for employee child care and 10 percent of qualified expenses for child care resource and referral services [*I.R.C. § 45F*, effective for tax years beginning after December 31, 2001].

For general analysis of the tax issues related to operating a business, and, in particular, operating a business from one's home, as is the case with operators of family child care homes, see Rabkin & Johnson, *Current Legal Forms with Tax Analysis*, Ch. 12, *Employment and Compensation* (Matthew Bender).

[2] Tax Exemptions for Child Care Providers

An income tax exemption exists for non-profit organizations providing child care services. Specifically, corporations, community chests, funds, and foundations organized and operated exclusively for educational purposes are exempt from paying income taxes [*see I.R.C. § 501(a),(c)*]. The term "educational purposes" includes child care provided away from the child's home if substantially all of the care provided is for purposes of enabling individuals to be gainfully employed, and the services provided by the organization are available to the general public [*I.R.C. § 501(k)*]. To qualify for this exemption the following conditions must be met [*I.R.C. § 501(c)(3)*]:

- No part of the organization's net earnings inures to the benefit of any private shareholder or individual;
- No substantial part of the organization's activities relates to carrying on propaganda, or otherwise attempting to influence legislation; and
- The organization may not participate in, or intervene in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Further, a property tax exemption may exist for property used exclusively for nursery school purposes [see R&T Code § 214(a),(c); see also R&T Code § 221(a) ("nursery school" defined as licensed child care facilities owned and operated to provide child day care for parents unable to care for their children due to their hours of employment)]. This exemption is known as the "welfare exemption," and to qualify all of the following conditions must be met [see R&T Code § 214(a),(c)]:

- The property must be owned and operated by religious, hospital, or charitable funds, foundations, limited liability companies, or corporations, and cannot be organized or operated for profit.
- No part of the owner's net earnings may benefit any private shareholder or individual, nor can the property's use or operation financially benefit any individual.
- The property must be used for the actual operation of the exempt activity, and cannot exceed an amount of property reasonably necessary to accomplish the exempt purpose.
- The property cannot be used for social purposes, including fraternal or lodge purposes, except when that social purpose is clearly incidental to the property's primary purpose.
- The property must be irrevocably dedicated to religious, charitable, scientific, or hospital purposes and, on the liquidation, dissolution, or abandonment by the owner cannot inure to the benefit of any private person.
- The individual seeking the exemption must qualify for the federal exemption under *I.R.C. § 501* [R&T Code § 214(a)(3)(D)].

[3] Tax Deductions for Child Care Providers

The general rule is that individual taxpayers cannot deduct expenses paid in connection with the business use of their home [*I.R.C. § 280A(a)*]. However, several broad exceptions exist to this rule. With regard to homes providing child care services, deductions are allowed for expense items to the extent that they are allocable to the use of any portion of the dwelling unit (which includes houses, apartments, condominiums, mobile homes, and boats) on a regular basis in the taxpayer's trade or business of providing child care for children [*I.R.C. § 280A(c)(4)(A)*; see *I.R.C. § 280A(f)(1)* ("dwelling unit" defined); see also *I.R.C. § 280A(c)(4)(C)* (allocation formula when portions of home not used exclusively for providing child care services), (5) (limits on deduction)]. These deductions apply to expense items accruing for a certain period only if the facility's owner or operator has been granted a license that has not been revoked, the owner or operator has applied for licensure and the application has not been rejected, or the owner or operator is exempt from licensure as a child care center or family child care home under state law [*I.R.C. § 280A(c)(4)(B)*].

Specific items that are usually deductible include toys, equipment, and supplies purchased solely for child care, such as fire extinguishers, beds and bedding, and safety latches [see *I.R.S. Pub. No. 587*]. Additionally, indirect expenses, that

is, items used by both the provider's family and the child care children, may also be deductible, but only on a percentage basis.

[4] Employer-Provided Child Care Credit

Effective for tax years beginning after 2001, employers may claim a tax credit equal to 25 percent of qualified expenses for employee child care and 10 percent of qualified expenses for child care resource and referral services [*I.R.C. § 45F(a)(1)*]. The maximum total credit that may be claimed by a taxpayer cannot exceed \$150,000 per taxable year [*I.R.C. § 45F(a)(2)*].

Qualified child care expenses include costs paid or incurred for the following [*I.R.C. § 45F(c)(1)(A)*]:

- To acquire, construct, rehabilitate or expand property that is to be used as part of the taxpayer's qualified child care facility;
- For the operation of the taxpayer's qualified child care facility, including the costs of training and certain compensation for employees of the child care facility, and scholarship programs; or
- Under a contract with a qualified child care facility to provide child care services to employees of the taxpayer.

To be a qualified child care facility, the principal use of the facility must be for child care (unless it is the principal residence of the taxpayer), and the facility must meet all applicable State and local laws and regulations, including any licensing laws [*I.R.C. § 45F(c)(2)(A)*]. A facility is not treated as a qualified child care facility with respect to a taxpayer unless all of the following requirements are satisfied [*I.R.C. § 45F(c)(2)(B)*]:

- It has open enrollment to the employees of the taxpayer.
- Use of the facility (or eligibility to use the facility) does not discriminate in favor of highly compensated employees of the taxpayer [*see I.R.C. § 414(q)*].
- At least 30 percent of the children enrolled in the center are dependents of the taxpayer's employees, if the facility is the principal trade or business of the taxpayer laws.

Qualified child care resource and referral expenses are amounts paid or incurred under a contract to provide child care resource and referral services to the employees of the taxpayer [*I.R.C. § 45F(c)(3)(A)*]. Qualified child care services and qualified child care resource and referral expenditures must be provided (or be eligible for use) in a way that does not discriminate in favor of highly compensated employees of the taxpayer (within the meaning of *I.R.C. § 414(q)* [*I.R.C. § 45F(c)(3)(B)*]).

Any amounts for which the taxpayer may otherwise claim a tax deduction are reduced by the amount of these credits [*I.R.C. § 45F(f)(2)*]. Similarly, if the credits are taken for expenses of acquiring, constructing, rehabilitating, or expanding a facility, the taxpayer's basis in the facility is reduced by the amount of the credits [*I.R.C. § 45F(f)(1)(A)*]. Credits taken for the expenses of acquiring, constructing, rehabilitating, or expanding a qualified facility are subject to recapture for the first 10 years after the qualified child care facility is placed in service. The amount of recapture is reduced as a percentage of the applicable credit over the 10-year recapture period [*I.R.C. § 45F(d)(1),(2)*]. Recapture takes effect if the taxpayer either ceases operation of the qualified child care facility or transfers its interest in the qualified child care facility without securing an agreement to assume recapture liability for the transferee [*I.R.C. § 45F(d)(3)*]. The taxpayer's tax in the year the recapture event occurs is increased by the amount of the recapture [*I.R.C. § 45F(d)(1)*], but only if the child care credit decreased the taxpayer's tax liability. If the credit before the recapture

event did not decrease the taxpayer's tax liability, the recapture event causes the carryforwards and carrybacks of unused credits to be adjusted [*I.R.C. §§ 39, 45F(d)(4)(A)*]. Any increase in the tax resulting from a recapture event is not treated as a tax for purposes of determining the amount of other credits or for purposes of the alternative minimum tax [*I.R.C. § 45F(d)(4)(B)*]. There is no recapture if the cessation of the operation of a child care facility results from a casualty loss, to the extent the loss is restored by reconstruction or replacement within a reasonable period [*I.R.C. § 45F(d)(4)(C)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Tax Law Federal Income Tax Computation General Overview Tax Law State & Local Taxes Administration & Proceedings General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 100C CHILD CARE FACILITIES
PART II. LEGAL BACKGROUND
A. Overview

32-100C California Legal Forms--Transaction Guide § 100C.15

§ 100C.15 Americans With Disabilities Act Issues

Child care operators should be aware that the Americans With Disabilities Act (ADA) generally applies to child care centers and family child care homes and bars discrimination based on disabilities [see 42 U.S.C. § 12101 *et seq.*]. The ADA applies to child care center premises, any part of a home used as a child care facility, and access, including doors, sidewalks, halls, and restrooms.

The ADA covers children who are experiencing measurable developmental delays in cognitive development, physical development, language and speech development, psycho-social development or self-help skills [see 29 C.F.R. § 1630.2(h)-(j)]. Child care programs must evaluate the individual needs of children on a case-by-case basis and make reasonable accommodations as necessary, rather than rejecting an individual, for example, because the individual is developmentally disabled or hyperactive. Programs must take readily achievable steps to prevent discrimination based on disability, including open access to public facilities, unless they result in an undue burden, that is, significant difficulty or expense [see 42 U.S.C. §§ 12111(9),(10), 12112(b)(5); 29 C.F.R. §§ 1630.9, 1630.15].

The ADA also covers facility clients in terms of access and services, and, assuming at least 15 employees, qualified individuals who, with or without reasonable accommodation, can perform the essential functions of the position [see 42 U.S.C. § 12111(5),(8); 29 C.F.R. § 1630.2(n)]. The ADA bars disability discrimination in job application procedures, hiring, advancement, discharge, compensation, job training, and other terms and privileges of employment [see 42 U.S.C. § 12112(a),(b); 29 C.F.R. §§ 1630.4-1630.13]. However, an employer may refuse to assign an individual with specified infectious and communicable diseases to a job involving food handling if reasonable accommodation will not eliminate the problem [see 42 U.S.C. § 12113(e); 29 C.F.R. § 1630.16(e)].

Although the ADA does not require facilities to accept every child for care, and requires only reasonable accommodation, many concepts readily apply to the development of standard operating procedures that best serve the needs of the children in care. Organizational and operational documents should clearly state the facility's refusal to discriminate based on disability, and nondiscriminatory policies should be set forth in the bylaws, job descriptions, promotional information, admission policies, and ongoing training programs. The facility should keep records of discussions with clients or employees that relate to specific disabilities. Further, the facility should attempt to negotiate

accommodations as the need arises, rather than planning for disabilities that may never need accommodation, and be flexible and willing to make creative accommodations.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights Law
Protection of Disabled Persons
Americans With Disabilities Act
Accommodation
Education
Law
Administration & Operation
Child Care Facilities



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[Reserved]

§§ 100C.16[Reserved]



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CHAPTER 100C CHILD CARE FACILITIES

PART II. LEGAL BACKGROUND

B. Child Care Centers

1. Licensing and Operating Requirements

32-100C California Legal Forms--Transaction Guide § 100C.20

§ 100C.20 Introduction

[1] Governing Law

A "child care center" or "day care center" is any child care facility of any capacity other than a family child care home [see § 100C.70], including infant centers, preschools, extended day care facilities, and school-age child care centers [H&S Code § 1596.76; see also § 100C.10[2]], in which less than 24-hour per day nonmedical care and supervision is provided for children in a group setting. The term "child care center" supersedes "day care center" [22 Cal. Code Reg. § 101152(c)(7)].

Child care centers are subject to licensure in accordance with the Child are Facilities Act [H&S Code § 1596.90], and cannot be licensed under the California Community Care Facilities Act [H&S Code § 1500 et seq.]. The general requirements of the Child Day Care Facilities Act [H&S Code § 1596.70 et seq.], and the general regulations [22 Cal. Code Reg. §§ 101151-101239.2], apply to child care centers [H&S Code § 1596.90; 22 Cal. Code Reg. § 101151]. In addition, specific statutes apply to child care centers [H&S Code §§ 1596.90-1597.21].

[2] License Required

Unless a child care arrangement is exempt from the licensing requirements [see § 100C.10[4]], a current valid license is required to establish, operate, manage, conduct, or maintain a child care center [H&S Code § 1596.80; 22 Cal. Code Reg. § 101156]. A special permit is required if specialized services will be provided within the facility [H&S Code § 1596.805]. Under no circumstances, however, may a licensee operate any facility beyond the conditions and limitations specified on his or her license, including the stated capacity limitation [22 Cal. Code Reg. § 101161(a)]. It is the responsibility of the licensee to ensure compliance with all applicable laws and regulations [22 Cal. Code Reg. § 101151(b)], and unless prior approval is received from the Department, the licensee must maintain continuous compliance with the licensing regulations [22 Cal. Code Reg. § 101175(a)].

If a non-exempt facility is alleged to be providing care and supervision [see 22 Cal. Code Reg. § 101152(c)(3) ("care and supervision" defined)] without a valid license in violation of H&S Code § 1596.80 [see 22 Cal. Code Reg. §

101157(a)], the Department must conduct a site visit and/or evaluation of the facility [22 Cal. Code Reg. § 101157(b); see H&S Code § 1596.853]. If the facility is found to be operating without a license, the Department must issue a Notice of Operation in Violation of Law, and refer the case for criminal prosecution and/or civil proceedings [22 Cal. Code Reg. § 101157(c)]. In addition, the Department can issue an immediate civil penalty [22 Cal. Code Reg. § 101157(d); see H&S Code § 1596.891; see also 22 Cal. Code Reg. § 101198]. Any action brought by the Department against an unlicensed center does not abate with the sale or transfer of the center, except with the written consent of the Department [H&S Code § 1596.894].

Under specified circumstances, an applicant may seek a waiver of, or exception to, licensing and application requirements. The Department can approve the use of alternative child care arrangements if the alternative provides for safe and adequate services that are not detrimental to the health and safety of the children. The request for a waiver or exception must be in writing with substantiating evidence to support the request [22 Cal. Code Reg. § 101175(b)(1),(2); see § 100C.270]. Within 30 days of receipt of the request, the agency must notify the applicant or licensee in writing of the approval or denial, or of the need for additional substantiating documentation. The licensee must maintain and make available for review a copy of the approval or denial at the center [22 Cal. Code Reg. § 101175(b)(3)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Governments State & Territorial Governments Licenses



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CHAPTER 100C CHILD CARE FACILITIES

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1. Licensing and Operating Requirements

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§ 100C.21 Initial Application Procedures for Obtaining License

[1] In General

Any adult may apply for a child care facility license regardless of age, sex, race, religion, color, political affiliation, national origin, disability, marital status, or sexual orientation [22 *Cal. Code Reg. § 101168*; see *Fam. Code § 6502* ("adult" defined)]. The application process to obtain an initial child care center license, or a special permit to provide specialized services within a child care center, is commenced when the applicant files an application with the Department of Social Services, on forms furnished by the Department [*H&S Code § 1596.95*; 22 *Cal. Code Reg. § 101169(a)*; see § 100C.200]. Before filing an application, the applicant must attend an orientation given by the Department of Social Services that outlines the rules and regulations, the scope of operation of a child care facility, the responsibility entailed in operating a facility, and information about the Healthy Schools Act of 2000 and integrated past management practices [*H&S Code § 1596.845*; see 22 *Cal. Code Reg. § 101169(b)*].

The application includes a wide range of information and documents [see 22 *Cal. Code Reg. § 101169(d)*; see also § 100C.200]. In addition, the application must include evidence that the applicant can comply with rules and regulations, is reputable and responsible, and has sufficient financial resources to properly operate the facility [see *H&S Code § 1596.95(a)-(c)*; see also § 100C.200[1]]. Applicants must also disclose certain information regarding past experience and financial involvement with child care facilities, clinics, or health or community care facilities [see *H&S Code § 1596.95(d)*], and whether disciplinary action has been taken regarding the applicant's operation of one of these facilities [see *H&S Code § 1596.95(e)*; see also § 100C.200[1]]. Applicants must also provide satisfactory evidence (1) of the existence of a fire escape and disaster plan for the center, including drill plans [see *H&S Code § 1596.95(f)*], and (2) that the applicant has posted safety signs at the point of entry of the center, including the telephone number of the local health department and child car safety requirements [see *H&S Code § 1596.95(g)*]. If the applicant fails to cooperate with the Department by not properly providing all required information [see *H&S Code § 1596.95(h)*], the application must be denied [*H&S Code § 1596.95(i)*]. The application must be signed by the applicant [22 *Cal. Code Reg. § 101169(e)*], and must be filed with the Department that serves the geographical area in which the facility is located [22 *Cal. Code Reg. § 101169(f)*].

An applicant may withdraw, in writing, an application for a child care center license, a special permit, or a renewal license [22 *Cal. Code Reg. § 101180*]. The withdrawal of an application after filing does not deprive the Department of its authority to institute or continue a proceeding against the applicant for the denial of a license (or to enter an order denying the license) unless the Department consents to the withdrawal in writing [*H&S Code § 1596.854*; see 22 *Cal. Code Reg. § 101180(b)*].

[2] Eligibility of Child Care Personnel

[a] Criminal Record Review

[i] Overview

During the application process--that is, after the submission of the application and before the issuance of an operating license or special permit, the Department will conduct a detailed review of the applicant's criminal past [see *H&S Code § 1596.871*; see also 22 *Cal. Code Reg. § 101170(a)*]. The criminal review process includes obtaining any criminal record on the applicant and other individuals associated with the proposed child care facility [see *H&S Code § 1596.871(b)*; see also 22 *Cal. Code Reg. § 101170(c),(d)-(f)*] for the purpose of determining whether that person has ever been convicted of a crime other than a minor traffic violation or has ever been arrested for violation of specified sections of the Penal Code [see *Pen Code §§ 245, 273.5, 273a(b), 290(c)*; former *Pen Code § 273a(2)*] or for any crime for which the department cannot grant an exemption if the person was convicted and not subsequently exonerated [*H&S Code § 1596.871(a)*; see *H&S Code § 1596.871(f)(1)*]. The following persons are subject to this requirement [*H&S Code § 1596.871(a),(b)(1)(A)-(D)*; see *H&S Code § 1596.871(b)(1)(E)-(G)* (entity requirements)]:

- The applicant for licensure.
- Adults responsible for administration or direct supervision of staff.
- Any person other than a child residing in the facility.
- Any person who provides care and supervision to the children.
- Any staff person, volunteer, and employee who has contact with children.

With respect to the last category listed above, volunteers providing time-limited specialized services and students enrolled or participating at an accredited educational institution are exempt if they are directly supervised by the licensee or a facility employee with a criminal record clearance or exemption, spend no more than 16 hours per week at the facility, and are not left alone with children in care [*H&S Code § 1596.871(b)(1)(D)(i),(ii)*]. A volunteer who is a relative, legal guardian, or foster parent of a child in care is exempt [*H&S Code § 1596.871(b)(1)(D)(iii)*]. A contract repair person retained by the facility is also exempt if the person is not left alone with children in care [*H&S Code § 1596.871(b)(1)(D)(iv)*]. The Department may also exempt similar persons by regulation [*H&S Code § 1596.871(b)(1)(D)(v)*].

Based on the results of the criminal record review, the Department can approve or deny a license, or an individual's employment, residence, or presence in a child care facility [*H&S Code § 1596.885*; 22 *Cal. Code Reg. § 101170(a)*]. However, if it is found that the applicant or any other person subject to the criminal record review has been convicted [see *H&S Code § 1596.871(d)(1)* ("conviction" defined)] of a crime, other than a minor traffic violation, the application must be denied, unless an exemption from disqualification is granted [*H&S Code § 1596.871(a)*; see 22 *Cal. Code Reg. § 101170(j),(k)*; see also [iii], below].

The Department cannot use a record of arrest to deny, revoke, or terminate any application, license, employment, or residence unless it investigates the incident and secures evidence, whether or not related to the incident of arrest, that is admissible in an administrative hearing to establish conduct by the person that may pose a risk to the health and safety of any person who is or may become a client [*H&S Code § 1596.871(e)*].

[ii] Fingerprinting Requirements

It is the intent of the legislature to require the fingerprints of all individuals whose contact with child care center clients may pose a risk to the children's health and safety [*H&S Code § 1596.871*]. An individual is required to obtain either a criminal record clearance or a criminal record exemption from the Department of Social Services before he or she is present in a child day care facility [*H&S Code § 1696.871*]. Before the issuance of a license, the Department must receive a criminal-record clearance on the applicant, the administrator, and all adults residing in the facility [22 *Cal. Code Reg. § 101170(c),(e)*; see 22 *Cal. Code Reg. § 101169(d)(13)*]. In addition, all persons subject to criminal record review [see [i], above] must be fingerprinted as a precondition to employment, residence, or initial presence in the center, and must sign a declaration, under penalty of perjury, regarding prior criminal convictions [*H&S Code § 1596.871(c)(1)(A)*; 22 *Cal. Code Reg. § 101170(d)*].

The licensee must maintain documentation of criminal record clearances of staff, employees, volunteers, and non-client adults residing in the facility in the individual's personnel file. This documentation must be available at the facility for inspection by the Department [22 *Cal. Code Reg. § 101170(g)*].

For a further discussion of the criminal clearance procedures conducted by the Department before the issuance of a license, see § 100C.231[1].

[iii] Exemptions

After review of the criminal record, the Director of Social Services may grant an exemption from disqualification for a license, or from disqualification for employment, residence, or presence in a child care facility, if the director has substantial and convincing evidence to support a reasonable belief that the applicant and the person previously convicted of a crime (if other than the applicant) are of such good character as to justify the issuance of the license or the granting of an exemption [*H&S Code § 1596.871(f)(1)*; see 22 *Cal. Code Reg. § 101170.1(c)*]. The Department may also grant a criminal record exemption that imposes conditions on the individual's continued licensure, employment, and presence in the licensed facility [22 *Cal. Code Reg. § 101170.1(i)*]. The licensee must maintain documentation of any exemptions of staff, employees, volunteers, and non-client adults residing in the facility in the individual's personnel file. This documentation must be available at the facility for inspection by the Department [22 *Cal. Code Reg. § 101170(g)*]. The reasons for the granting or denying of an exemption must be in writing and kept by the Department [22 *Cal. Code Reg. § 101170.1(h)*].

The Department may grant an exemption after reviewing a criminal record transcript [see 22 *Cal. Code Reg. § 101170(g)*] if (1) the applicant/licensee requests an exemption for himself or herself, (2) the applicant/licensee requests an exemption in writing for an individual associated with the facility, or (3) the affected individual requests an individual exemption in writing (and the applicant/licensee chooses not to seek an exemption) and the individual submits substantial and convincing evidence satisfactory to the Department, that he or she has been rehabilitated and is currently of sufficiently good character as to justify being issued or maintaining a license, employment, or residence in a licensed facility [22 *Cal. Code Reg. § 101170.1(c)*; see 22 *Cal. Code Reg. § 101170.1(g)* (grounds for denial)]. The Department may consider factors, including but not limited to the following, as evidence of good character and rehabilitation [22 *Cal. Code Reg. § 101170.1(e)*]:

- The nature of the crime, including whether it involved violence or a threat of violence.

- The period of time since crime was committed and the number of offenses.
- The circumstances surrounding the commission of the crime that would demonstrate the unlikelihood of repetition.
- The individual's conduct since the conviction, including employment or participation in therapy or education, that would indicate changed behavior.
- The granting of a full and unconditional pardon.
- Character references.
- A certificate of rehabilitation from a superior court.
- Evidence of honesty and truthfulness as revealed in exemption application documents and interviews and conversations with the Department.

No exemption may be granted for certain assaults [*see Pen Code § 220*], sexual battery [*see Pen Code § 243.4*], other specified sex crimes [*see Pen Code § 264.1*], child abuse [*see Pen Code §§ 273a(a), 273d; see also former Pen Code § 273a(1)*], failure to register as a sex offender [*see Pen Code § 290(c)*], lewd and lascivious acts with a child or dependent adult [*see Pen Code § 288*], sexual penetration with a foreign object [*see Pen Code § 289*], elder abuse [*see Pen Code § 368*], or certain felonies [*H&S Code § 1596.871(f)(1); see B&P Code § 729; see also Pen Code §§ 206, 215, 347(a), 417(b), 451(a),(b), 667.5(c)*]. The Department will consider criminal convictions from another state or federal court as if the criminal offense were committed in California [*H&S Code § 1596.871(d)(2)*].

If a criminal record exemption is not or cannot be granted, the Department will take one of the following actions [22 *Cal. Code Reg. § 101170.1(p)*]:

- For initial applicants, denial of the application.
- For current licensees, the Department may institute an administrative action, including but not limited to, license revocation.
- For current or prospective employees, exclusion of the affected individual [*see H&S Code § 1596.8897*] and denial of the application or revocation of the license if the individual continues to provide services or reside at the facility.
- For individuals residing in the facility, including spouses, exclusion of the affected individual [*see H&S Code § 1596.8897*] and denial of the application or revocation of the license if the individual continues to provide services or reside at the facility.

PRACTICE TIP:

The Community Care Licensing Department advises that, as of March 2002, no exemptions are currently being granted. A substantial backlog exists.

[iv] Declarations Regarding Prior Criminal Convictions

Following initial licensure, any person subject to the fingerprinting requirement [*see [ii], above*] who is not exempt [*see [iii], above*] must, as a condition to employment, residence, or presence in the child care center, sign a declaration under penalty of perjury regarding any prior criminal conviction [*H&S Code § 1596.871(c)(1)(A)*].

[v] Transfer of Current Criminal Records Clearance

On request, the Department may permit an individual to transfer a current criminal records clearance from one facility to another, provided that the clearance has been processed through a state licensing district office and is being transferred to another state licensing district office. The request must be submitted in writing to the Department. If the person is a California resident, the person must include a copy of the person's driver's license or valid identification card issued by the Department of Motor Vehicles. If the person is not a California resident, the person must include a valid photo identification issued by another state or the federal government [*H&S Code § 1596.871(h)(2)*; *22 Cal. Code Reg. § 101170.1(r)*]. On the request of the licensee, the Department will verify whether the individual has a transferable clearance, provided that the licensee encloses a self-addressed, stamped envelope for that purpose [*H&S Code § 1596.871(h)(1)*; *see H&S Code § 1596.871(h)(2)* (Social Services Department will hold criminal records clearance for two years after employee leaves employment at licensed facility)]. If the Department denies the transfer request, the individual is entitled to an administrative hearing to contest the determination [*22 Cal. Code Reg. § 101170.1(t)*].

[vi] Denial of Criminal Background Clearance

If the Department has denied a criminal background clearance for an individual based on an information search response provided by the Department of Justice, the individual may make a written request to the Department for a copy of that state or federal level criminal offender record information search response [*H&S Code § 1696.871(i)*].

[b] Review of Child Abuse Registry

In addition to the criminal record clearance procedures [*see [a], above*], the Department must check the Child Abuse Registry before granting a license to or otherwise approving a child care center [*H&S Code § 1596.877(b)*]. A license cannot be denied based on registry information unless the child abuse is substantiated [*H&S Code § 1596.877(c)*; *see Pen Code §§ 11170(b)(4), 11165.12(a)*].

[3] Fire and Water Clearances

During the initial application procedures, and before obtaining licensure, applicants must secure and maintain a fire clearance approval from the city or county fire department, the district providing fire protection services, or the State Fire Marshal, whichever has primary jurisdiction over the area where the facility is to be located [*see H&S Code § 1596.809*; *see also 22 Cal. Code Reg. § 101171(a)*]. The request for fire clearance must be made through and maintained by the Department [*22 Cal. Code Reg. § 101171(a)(1)*]. The applicant must notify the Department if the facility plans to admit nonambulatory children so that the appropriate fire clearance can be obtained before those children are accepted [*22 Cal. Code Reg. § 101171(b)*; *see 22 Cal. Code Reg. § 101152(n)(1)* ("nonambulatory person" defined)].

Centers providing water for human consumption from a private source must obtain a water supply clearance before initial licensure. The applicant must provide evidence of an on-site inspection of the source of the water and a bacteriological analysis that establishes the safety of the water, conducted by the local health department, the Department of Health Services, or a licensed commercial laboratory [*see 22 Cal. Code Reg. § 101172(a)(1)*]. After initial licensure, those facilities providing water from a private source must provide the Department with evidence of a bacteriological analysis of the water supply as frequently as is necessary to ensure the children's safety, or annually, semiannually, or quarterly, depending on the facilities' licensed capacity [*see 22 Cal. Code Reg. § 101172(a)(2)*].

[4] Plan of Operation and Disaster Plan

As part of the initial application procedures, the applicant must submit a plan of operation [*see 22 Cal. Code Reg. § 101173*] to the Department [*see 22 Cal. Code Reg. § 101169(d)(12)*]. The plan must be an individualized plan specific to the type of center operated, and include the licensee's own philosophies, methods, programs, and goals. Each licensee

must have and maintain on file a current, written, definitive plan of operation [22 *Cal. Code Reg. § 101173(a)*; see 22 *Cal. Code Reg. § 101173(b)* (contents of plan); see also § 100C.203 (administrative organization)]. The center must operate in accordance with the terms specified in the plan [22 *Cal. Code Reg. § 101173(d)*], and any proposed changes in the plan of operation that affect services to children must be reported to and approved by the Department [22 *Cal. Code Reg. § 101173(c)*; see 22 *Cal. Code Reg. § 101212*].

As a practical matter, applicants rarely prepare a written document titled "Plan of Operation." Rather, most plans of operation consist of several statements, policies, plans, and practices that govern the center. For example, the supplemental instructions to the application presents outlines and suggestions for the individual components of the plan of operation. The forms covering these individual components are forth in §§ 100C.211-100C.220.

In addition, the applicant must prepare and submit an emergency disaster plan with the application for licensure [see 22 *Cal. Code Reg. § 101174*; see also § 100C.210].

[5] Capacity Determination

A child care center license will only be issued for a specific capacity [22 *Cal. Code Reg. § 101179(a)*]; that is, the maximum number of children that are authorized to be provided care and supervision at any one time in any licensed facility [22 *Cal. Code Reg. § 101152(c)(2)*]. As part of the application process, the applicant must specify the maximum number of children to be served by the center [22 *Cal. Code Reg. § 101169(d)(5)*].

As part of the initial licensing process, a determination must be made as to the number of children for whom the facility will provide care and supervision. This capacity determination will be made based on the application review by the Department [see § 100C.22]. This review will consider such factors as the fire clearance [see 22 *Cal. Code Reg. § 101171*; see also [3], *above*], the applicant's ability to comply with applicable law and regulations, any other household members residing at the facility and their individual needs, the physical features of the facility, number of available staff, and any restrictions pertaining to the specific category of facility [see 22 *Cal. Code Reg. § 101179(b)*; see also § 100C.120]. The Department may issue a license for fewer children than requested by the applicant [22 *Cal. Code Reg. § 101179(a)*], and may decrease an existing center's capacity when one or more of the factors listed above change [22 *Cal. Code Reg. § 101179(d)* (if licensee refuses decrease, Department may begin revocation action)]. In addition, the Department may restrict care to specific individuals [22 *Cal. Code Reg. § 101179(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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1. Licensing and Operating Requirements

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§ 100C.22 Initial Application Review by Department and Issuance of License or Provisional License

[1] Notice of Incomplete Application

If the applicant has not provided all required information and documents [*see 22 Cal. Code Reg. § 101169(a)*; *see also §§ 100C.21, 100C.200*], the Department must give the applicant written notice that the application is incomplete and describe what further information is needed to constitute a completed application [*22 Cal. Code Reg. § 101178(a)*]. If the applicant does not complete the application within 30 days after receipt of the notice, the application is deemed withdrawn and the Department will cease review of the application, providing that the Department has not denied or taken action to deny the application [*22 Cal. Code Reg. § 101178(a)(1)*]. However, the 30-day requirement does not apply to centers under construction [*22 Cal. Code Reg. § 101178(a)(1)(A)*].

[2] Action on Complete Application

[a] Granting of Initial License

Within 30 days after receiving all appropriate licensing application materials, as determined by the Department, the Department must conduct a site visit at the proposed center [*H&S Code § 1597.13*]. The Department then must grant or deny an application within that 30-day period, after the site visit has been completed and the center found to be in compliance with licensing standards [*H&S Code § 1597.13*]. However, for organizations that already possess a current valid license to operate a child care facility at another site, the Department has 60 days to review and make a final determination on applications to open another facility [*H&S Code § 1596.96(a)*]. If a determination cannot be made within the 60-day period, the Department will issue a provisional license, provided that no life safety risks exist and on completion of all fire and criminal clearances [*H&S Code § 1596.96(c)*; *see [b], below*].

If the Department determines that all licensing and application requirements have been met, the Department must issue a license [*22 Cal. Code Reg. § 101182(a)*]. The issuance of the license constitutes written notice that the application is complete and the license has been granted [*22 Cal. Code Reg. § 101182(b)*]. No limitations may be imposed on the license solely on the basis that the licensee is a parent who has administered or will continue to administer corporal

punishment to his or her own children, provided that the punishment does not constitute child abuse [22 *Cal. Code Reg. § 101182(c)*; see *H&S Code § 1531.5(c)*; *Pen Code § 11165.6* ("child abuse" defined)]. The effect of the withdrawal of an application for licensure is discussed in § 100C.271[1].

Once a license has been issued, the Department will furnish each licensee with a notice that must be posted at the facility where it can be easily seen by employees and consumers. The notice must identify the Department and how licensing regulations can be obtained, give local telephone numbers where complaints can be made, and contain a statement that employers at child day care centers cannot discharge, demote, suspend, or threaten an employee for taking specified actions [*H&S Code § 1596.874(a)*; see *H&S Code § 1596.881*].

[b] Issuance of Provisional License

[i] Grounds for Issuance

The Department may also issue a provisional license [see 22 *Cal. Code Reg. § 101152(p)(4)* ("provisional license" defined)] to operate a child care center if (1) the center is in substantial compliance with applicable licensing laws, (2) the center has submitted a completed application, and (3) no life safety risks are involved [*H&S Code § 1596.84*; 22 *Cal. Code Reg. § 101181(a)*]. In determining whether any life safety risks are involved, all applicable fire and criminal record clearances must be completed [*H&S Code § 1596.84*]. For example, the Department must issue a provisional license for otherwise qualified applicants who have not yet satisfied the health and safety training requirements [*H&S Code § 1596.866(c)(3)*; 22 *Cal. Code Reg. § 101181(c)*]. The Department may not issue a provisional license if a corporate applicant's board of directors, executive director, and officer are ineligible for licensure [22 *Cal. Code Reg. § 101181(b)*; *H&S Code § 1596.952(b)*].

A provisional license also may be issued to an applicant who already holds a current license for a child care center and who has submitted an application to operate a center at another site. In these cases, the Department must review and make a final determination regarding the application within 60 days of the submission of the completed application [*H&S Code § 1596.96(a)*]. If the Department for any reason is unable to make a final determination within that time frame, it must grant a provisional license, provided that (1) the Department knows of no life safety risks exist and (2) the requisite criminal record clearances and fire safety clearances are complete [*H&S Code § 1596.96(c)*]. If the Department does not issue a provisional license, it must give the applicant, within the same 60-day period, a detailed explanation of the specific reason or reasons for the nonissuance. If the reasons identified in the notice are corrected, the Department must issue the provisional license within five days after the corrections are made [*H&S Code § 1596.96(d)*].

[ii] Duration of Provisional Licenses

A provisional license is valid for up to six months from the date of issuance if the Department determines that full compliance with licensing regulations will be achieved within that time [*H&S Code §§ 1596.84, 1596.96(c)*; see 22 *Cal. Code Reg. § 101181(e)*]. The term of the provisional license may be extended an additional six months, up to a maximum of 12 months, if more than six months will be required to achieve full compliance with licensing standards due to circumstances beyond the applicant's control [*H&S Code §§ 1596.84, 1596.96(c)*; 22 *Cal. Code Reg. § 101181(e)*]. However, if the Department discovers any serious deficiencies during the provisional license period, the Department has authority to institute administrative action or civil proceedings, or to refer the case for criminal prosecution [22 *Cal. Code Reg. § 101181(d)*; see 22 *Cal. Code Reg. § 101152(s)(3)* ("serious deficiencies" are those that represent an immediate or substantial threat to the physical or mental health or safety of children)].

A provisional license will also be issued for a maximum of 90 days to otherwise qualified applicants who have not yet complied with the health and safety training requirements [22 *Cal. Code Reg. § 101181(c)*; see *H&S Code § 1596.866(c)(3)*].

[c] Denial of Licensure

Except with regard to the issuance of provisional licenses based on substantial compliance [*see 22 Cal. Code Reg. § 101181; see also [b], above*], the Department must deny an application for licensure if the Department finds that the applicant is not in compliance with all applicable rules and regulations [*H&S Code § 1596.856; 22 Cal. Code Reg. § 101205(a)*]. However, applicants for initial licenses cannot be denied solely on grounds that the licensee is a parent who has administered or will continue to administer corporal punishment to his or her own child, if that punishment does not constitute child abuse [*22 Cal. Code Reg. § 101205(a)(3); see Pen Code § 11165.6 ("child abuse" defined); see also H&S Code § 1531.5(c) (additional definition of "child abuse")*].

If the application for an initial license is denied, the Department must mail a written notice of denial to the applicant. The notice must inform the applicant of the reasons for the denial and advise the applicant of the right to appeal [*22 Cal. Code Reg. § 101205(b)*]. An applicant for initial licensure whose application has been denied may petition the Department of Social Services for a hearing within 15 days after the mailing of the notice of denial; on receipt of the petition, the department will set a date for the hearing [*H&S Code § 1596.879*]. However, notwithstanding any appeal action, a center whose application for licensure has been denied remains unlicensed and may not operate pending resolution of the appeal [*22 Cal. Code Reg. § 101205(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Family Law Family Protection & Welfare Children Abuse, Endangerment & Neglect Governments State & Territorial Governments Licenses



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§ 100C.23 Continuing Term of License

A license for a child care center is not issued for a finite term. Rather, it continues in effect unless suspended, revoked or forfeited for cause [*see H&S Code §§ 1596.856, 1596.97; see also § 100C.55* (grounds for and effect of suspension, revocation, or forfeiture)].

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§ 100C.24 When New Application Required

Child care centers that are already licensed must file a new application, including all the same information required on the initial application, whenever there is a change in the conditions or limitations described on the current license, or other changes, including but not limited to the following [22 *Cal. Code Reg. § 101185(a)*]:

- Any change in the child care center category, other than the proposed addition of a toddler component to an existing preschool or infant care program.
- The sale or transfer of a majority of the licensee's stock.
- Separation of the licensee from a parent company or merger with another company.
- A change in the licensee.

When the licensee seeks a change in capacity, the number of nonambulatory children, or location, the licensee may transfer documents from an existing application to the new application in lieu of filing an entirely new application and supporting documents. The "new" application must include the filed application, any necessary fire clearance, and an update of the existing application documents affected by the change [22 *Cal. Code Reg. § 101185(b)*].

A new application must also be filed whenever an applicant fails to complete an application within the requisite time period after receipt of notice that his or her application is incomplete [22 *Cal. Code Reg. § 101185(d)*; see § 100C.22[1]].

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§ 100C.25 Compliance With Operating Requirements After Licensure

Once a licensee secures a license, the licensee must comply with strict operating requirements. These operating requirements consist of general requirements applicable to child care centers [*see 22 Cal. Code Reg. §§ 101212-101231*], the special requirements applicable only to infant care centers [*see 22 Cal. Code Reg. § 101415 et seq.; see also § 100C.35[2]*], school-age child care centers [*see 22 Cal. Code Reg. § 101515 et seq.; see also § 100C.35[3]*], and centers for mildly ill children [*see 22 Cal. Code Reg. § 101615 et seq.; see also § 100C.35[4]*]. For a discussion of the special operating requirements applicable to family child care homes, see §§ 100C.74-100C.79.

The licensee must provide care and supervision [*see 22 Cal. Code Reg. § 101152(c)(3)*] ("care and supervision" defined)] as is necessary to meet the children's needs [*22 Cal. Code Reg. § 101229(a)*] (supervision includes visual observation)], and it is the licensee who is accountable for the general supervision of the licensed center, and for the establishment of policies concerning its operation [*22 Cal. Code Reg. § 101214(a)*]. If the licensee is a corporation or an association, the governing body must be active and functioning in order to ensure the licensee's accountability [*22 Cal. Code Reg. § 101214(a)(1)*].

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§ 100C.26 Financial Requirements

Child care center licensees must develop and maintain a financial plan that ensures necessary resources to meet the operating costs of caring for and supervising children [22 *Cal. Code Reg. § 101213(a)(1)*]. The licensee must maintain financial records and submit financial reports as required by the written request of the Department [22 *Cal. Code Reg. § 101213(a)(2),(3)*]. The written request for financial reports must explain the need for disclosure [22 *Cal. Code Reg. § 101213(a)(3)(A)*]. In addition, the Department may reject any financial report, and request and examine additional information, including interim financial statements. The reasons for the rejection must be in writing [22 *Cal. Code Reg. § 101213(a)(3)(B)*].

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§ 100C.27 Personnel Requirements

[1] In General

Child care centers must employ competent employees and at all times have sufficient staff members to meet the individual needs of the children [22 *Cal. Code Reg. § 101216(a)*]. The Department may require the licensee to provide additional staff if the agency determines and documents that additional staff is required for the provision of services necessary to meet the children's needs [22 *Cal. Code Reg. § 101216(b)*]. In determining the need for additional staff, the Department will consider the following factors: the needs of the children, the extent of services provided by the center, the physical arrangement of the center, and whether an emergency or disaster exists. If the Department determines that additional staff is needed, it must provide the licensee with written reasons for its determination [22 *Cal. Code Reg. § 101216(b)*].

Additional personnel and operating requirements applicable to child care centers include the continual observation of the children [see 22 *Cal. Code Reg. § 101226.3*], the supervision of a group of children by a teacher [see 22 *Cal. Code Reg. § 101229*], the establishment and maintenance of written sign-in and sign-out procedures [see 22 *Cal. Code Reg. §§ 101226.1(b), 101229.1*; see also § 100C.122], food service requirements [see 22 *Cal. Code Reg. § 101227*], prohibiting disciplinary actions that violate the children's personal rights [see 22 *Cal. Code Reg. § 101223, 101223.2*; see also §§ 100C.34, 100C.251[1]], and certain activity requirements, such as providing quiet and active play time and napping facilities [see 22 *Cal. Code Reg. § 101230*].

[2] Staffing Requirements

[a] Teacher-Child Ratios

Specified teacher-child ratio standards must be met for maintaining proper supervision of children at the center [see 22 *Cal. Code Reg. § 101216.3*; see also 22 *Cal. Code Reg. § 101216.5* (staffing requirements at parent-cooperative centers)]. In general, a child care center teacher may not be responsible for observing and supervising more than 12 children [22 *Cal. Code Reg. § 101216.3(a)*; see 22 *Cal. Code Reg. § 101216.3(c)* (staffing ratios do not apply to child

development programs funded by state)]. However, the licensee may employ teacher aides, in which case one teacher and one teacher's aide may not supervise more than 15 children [22 Cal. Code Reg. § 101216.3(b)].

[b] Eligibility and Qualifications

Before employment or initial presence in the center, all employees and volunteers subject to a criminal record review [see § 100C.21[2][a]] must either obtain a California clearance or a criminal record exemption, or request a transfer of a criminal record clearance [see 22 Cal. Code Reg. § 101170(f)], or request and be approved for a transfer of a criminal record exemption [see 22 Cal. Code Reg. § 101170.1(r)], unless, on request for a transfer, the Department permits the individual to be employed, reside, or be present at the center [22 Cal. Code Reg. § 101216(i)]. Further, staff members cannot abuse, exploit, or prejudice any child [see 22 Cal. Code Reg. § 101216(j)], must report violations of the children's rights [see 22 Cal. Code Reg. § 101216(k); see also 22 Cal. Code Reg. § 101223 (children's rights); § 100C.251], and must be informed of their own rights [22 Cal. Code Reg. § 101216(l); see H&S Code §§ 1596.881, 1596.882; see also § 100C.250[1]].

Detailed staffing requirements exist for personnel working at child care centers, including qualification and duty requirements for the following personnel:

- Administrators [see 22 Cal. Code Reg. § 101215; 22 Cal. Code Reg. § 101152(a)(1) ("administrator" defined as licensee or adult designated by licensee to act on licensee's behalf in overall management of center)].
- Directors [see 22 Cal. Code Reg. § 101215.1; see also § 100C.211[1]].
- Teachers [see H&S Code §§ 1597.055, 1597.056; 22 Cal. Code Reg. §§ 101216, 101216.1; see also § 100C.211[1]].
- Teacher's aides [see H&S Code § 1597.059; 22 Cal. Code Reg. §§ 101216, 101216.2; see also § 100C.211[1]].

[c] Health and Safety Training

Child care centers must satisfy health care training requirements [see H&S Code §§ 1596.865, 1596.866(a)]. At least one director or teacher must have at least 15 hours of health and safety training [H&S Code § 1596.866(a),(c); see 22 Cal. Code Reg. § 101215.1(m), 101216(f), 101216.1(i)]. This training must include pediatric first aid, pediatric cardiopulmonary resuscitation, and preventative health practices course or courses that include instruction in the recognition, management, and prevention of infectious diseases, including immunizations, and prevention of childhood injuries [H&S Code § 1596.866(a),(c)]. These training requirements are a condition of licensure [H&S Code § 1596.866(a),(c)].

At least one staff member who has a current certificate, issued by an approved program, in pediatric cardiopulmonary resuscitation and pediatric first aid must be present at all times when children are present at the center, or when children are offsite for center activities [H&S Code § 1596.866(b); 22 Cal. Code Reg. § 101216(f)].

Training in pediatric first aid and pediatric CPR must be current at all times. However, training in preventive health practices is a one-time-only requirement [H&S Code § 1596.866(c)(2)].

If the center provides water activities, at least one adult must have a valid water-safety certificate in the center's files and be present during those activities [22 Cal. Code Reg. § 101216.6].

A licensee or staff person who obtains or renews a pediatric first aid certificate [see *H&S Code § 1596.866*] must complete formal training designed to provide instruction in administering inhaled medication to children with respiratory needs before licensees and staff may administer inhaled medication [*H&S Code § 1596.798(a)(4)*].

[d] Age and Health Requirements

In general, child care center staff who supervise employees and/or volunteers and persons who provide any element of care and supervision must be at least 18 years old [22 *Cal. Code Reg. § 101216(d)*]. However, centers may use teacher's aides who are less than 18 years old provided that they are high school graduates or are currently participating in an occupational program conducted by an accredited high school or college [22 *Cal. Code Reg. § 101216.2(b)*; see 22 *Cal. Code Reg. § 101216.2(c)* (age verification requirement)].

All center personnel, including the licensee, the administrator, and volunteers, must be in good health, and physically, mentally, and occupationally capable of performing their assigned tasks. The physical health of all staff members, except volunteers, must be verified by a health screening examination, including a test for tuberculosis, performed by or under the supervision of a physician, not more than one year before or seven days after employment or licensure [22 *Cal. Code Reg. § 101216(g)(1)*; see 22 *Cal. Code Reg. § 101216(g)(2)* (contents)]. Volunteers' good physical health must be verified by a signed statement affirming that the volunteer is in good health and a test for tuberculosis must have been performed not more than one year before or seven days after the volunteer's initial presence in the center [22 *Cal. Code Reg. § 101216(g)(3)*]. Any personnel with evidence of physical illness that poses a threat to the health and safety of children must be relieved of their duties [22 *Cal. Code Reg. § 101216(h)*].

[e] Volunteers Permitted

Volunteers may work at child care centers if they are supervised and not included in the staffing plan [22 *Cal. Code Reg. § 101216(c)*; see 22 *Cal. Code Reg. § 101173(b)(5)* (staffing plan required as part of plan of operation); see also § 100C.211[1]]. Volunteers' good physical health must be verified by a signed statement affirming that the volunteer is in good health and a test for tuberculosis must have been performed not more than one year before or seven days after the volunteer's initial presence in the center [22 *Cal. Code Reg. § 101216(g)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Labor & Employment Law Employment Relationships General Overview



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32-100C California Legal Forms--Transaction Guide § 100C.28

§ 100C.28 Requirements for Physical Environment of Centers

[1] In General

Requirements related to the physical environment of a child care facility are designed to ensure a safe place for the children, employees, and visitors. A child care center must at all times be clean, safe, sanitary, and in good repair, including being free of insects and rodents [22 *Cal. Code Reg. § 101238(a)*], and must provide for the safe storage of cleaning and other potentially dangerous supplies in areas inaccessible to children [22 *Cal. Code Reg. §§ 101226(d), 101238(d),(g),(i), 101238.4(d)*]. Numerous other protective measures must be taken, including providing nonslip materials on rugs [22 *Cal. Code Reg. § 101238(b)(1)*] and an isolation place for ill children [22 *Cal. Code Reg. § 101226.2*].

A center must provide storage space for facility equipment and supplies [22 *Cal. Code Reg. § 101238(d)*], storage space for each child's clothing, personal belongings, and/or bedding [22 *Cal. Code Reg. § 101238.4(a)*], and storage space for play materials and equipment and napping equipment [see 22 *Cal. Code Reg. § 101238.4(b),(c)*; see also [3], [6], *below*]. Firearms and other weapons may not be allowed on or stored on the premises [22 *Cal. Code Reg. § 101238(g)(2)*]. Additional requirements apply to food and medication storage [see 22 *Cal. Code Reg. §§ 101226(e), 101227(a)(14),(15), 101238(g),(h)*; see also § 100C.33[4]].

Child care centers must maintain a comfortable temperature for children at all times [see 22 *Cal. Code Reg. § 101239(a)*], safe and clean windows [see 22 *Cal. Code Reg. § 101239(b)*], adequate lighting and linen [see 22 *Cal. Code Reg. § 101239(d),(g)*], and a proper system for the storage and disposal of solid waste [see 22 *Cal. Code Reg. § 101239(f)*]. Additionally, all outdoor and indoor passageways, stairways, inclines, ramps, open porches, and other areas of potential hazard must be kept free of obstruction [22 *Cal. Code Reg. § 101238(c)*]. Further, fireplaces and open-faced heaters must be inaccessible to the children [22 *Cal. Code Reg. § 101239(c)*]. The smoking of tobacco on the premises of a licensed child care center is also prohibited [*H&S Code § 1596.795(b)*; 22 *Cal. Code Reg. § 101231*].

All water for drinking must be potable, and drinking water from a noncontaminating fixture or container must be readily

available both indoors and outdoors [see 22 Cal. Code Reg. § 101239.2].

[2] Bathroom Facilities

All toilet, hand washing, and bathing facilities must be maintained in a safe and sanitary operating condition [see 22 Cal. Code Reg. § 101238(a),(b) 101239(e)]. If the center accommodates physically handicapped children, the center must provide additional equipment, aids, or conveniences to assist these children [22 Cal. Code Reg. § 101239(e)(4)]. Faucets used by children for personal care and grooming may or may not deliver hot water (with regulated temperature controls) [see 22 Cal. Code Reg. § 101239(e)(1),(3)]; however, faucets delivering water at specified temperatures must be prominently identified by warning signs [see 22 Cal. Code Reg. § 101239(e)(2)]. Additional requirements must be satisfied for toilets and hand washing fixtures, including at least one for every 15 children in the center, plus an additional separate toilet and hand washing fixture designated for use by ill children, by staff, and for emergency use [see 22 Cal. Code Reg. § 101239(h),(i)]. Common towels and washcloths are impermissible [22 Cal. Code Reg. § 101239(j)].

[3] Furniture and Napping Equipment

The center must provide adequate tables and chairs scaled to the size of children [22 Cal. Code Reg. § 101239(k)]. All furniture and equipment must be maintained in good condition, free of sharp, loose, or pointed parts [22 Cal. Code Reg. § 101239(n)]. All play equipment and materials used by children must be appropriate for the children's ages [22 Cal. Code Reg. § 101239(m)], and playground equipment must be securely anchored to the ground unless the equipment is portable by design [22 Cal. Code Reg. § 101239(o)]. No "baby walkers" may be kept or used on the premises of a child care center [H&S Code § 1596.846(b),(c); 22 Cal. Code Reg. § 101239(n)(1); see 16 C.F.R. § 1500.86(a)(4) (definition)].

The center must provide adequate napping equipment, such as cots and mats, and maintain the equipment in a safe condition [see 22 Cal. Code Reg. §§ 101226.2(a)(2), 101230(b), 101239(l), 101239.1; see also [6], below]. Napping mats must meet specified requirements [see 22 Cal. Code Reg. § 101239.1(b)], and both cots and mats must satisfy bedding requirements [see 22 Cal. Code Reg. § 101239.1(c)]. Napping equipment must be arranged to provide access for each child to a walkway without the necessity of walking on or over the cots or mats of other children [22 Cal. Code Reg. § 101239.1(d)]. In addition, centers must provide a mat, cot, couch, or bed in isolation area to care for any sick child [22 Cal. Code Reg. § 101226.2(a)(2)].

All furniture, including cots and mats used for napping, must be arranged so that no exit is blocked [22 Cal. Code Reg. § 101239(p)]. All materials accessible to children, including toys, must be free of toxic substances [22 Cal. Code Reg. § 101239(q)].

[4] Bodies of Water

All bodies of water, including swimming pools, wading pools, hot tubs, spas, fish ponds, and similar bodies of water, when not in use, must be inaccessible to children through the use of fencing, covering, or other means [22 Cal. Code Reg. § 101238(e)]. Centers must have at least a five foot fence around the pool, constructed so that it does not obscure the pool from view and is self-latching at the top of the gate, or an approved pool covering [22 Cal. Code Reg. § 101238(e)(1)]. Above-ground pools must be made inaccessible when not in use by removing or making the ladder inaccessible, or erecting a barricade to prevent access to decking [22 Cal. Code Reg. § 101238(e)(2)]. All in-ground pools and above-ground pools that cannot be emptied after each use must have an operative pump and filtering system [22 Cal. Code Reg. § 101238(f)].

Notwithstanding these requirements, inflatable or other portable plastic wading pools do not require fencing if the sides of the pool are low enough for the children using them to step out without assistance [22 Cal. Code Reg. § 101238.5].

All wading pools must be emptied after each use [22 *Cal. Code Reg. § 101238.5*].

[5] Outdoor Activity Space

Child care centers must provide at least 75 square feet of outdoor activity space per child, based on the center's total licensed capacity, not including areas such as swimming pools, adjacent pool decking, and natural or man-made hazards, including cliffs, condemned buildings, creeks, power lines, rivers, and areas subject to flooding [22 *Cal. Code Reg. § 101238.2(a)*]. The outdoor activity space must be situated to provide a shaded rest area and allow for safe access to the area [22 *Cal. Code Reg. § 101238.2(b)*]. Equipment and activity areas must be arranged in a manner so as to avoid hazard from conflicting activities [22 *Cal. Code Reg. § 101238.2(c)*]. The surface of the outdoor activity space must be maintained in a safe condition for the activities planned and kept free from hazards, including but not limited to holes, broken glass, other debris, and dry grasses that pose a fire hazard [22 *Cal. Code Reg. § 101238.2(d)*]. Areas around and under high climbing equipment, swings, slides, and similar equipment must be properly cushioned, sandboxes must be inspected daily, and playgrounds must be enclosed by an adequate fence at least four feet high [see 22 *Cal. Code Reg. § 101238.2(e)-(g)*]. Any construction or equipment, including but not limited to incinerators, air conditioners, water heaters, or fuse boxes, that cause a hazardous situation in the outdoor activity space, must be made inaccessible to the children [see 22 *Cal. Code Reg. § 101238.2(h)*]. Inflatable or plastic wading pools need not be fenced if they are low enough for children to step out unassisted, but must be emptied after each use [22 *Cal. Code Reg. § 101238.5*; see also [4], above].

[6] Indoor Activity and Storage Space

With regard to indoor activity space, the center must provide at least 35 square feet per child based on the center's total licensed capacity, excluding bathrooms, halls, offices, isolation areas, food preparation areas, storage places, and floor space occupied by shelves, built-in cabinets, and office equipment [22 *Cal. Code Reg. § 101238.3(a)*]. Although floor areas under tables, desks, chairs, and other equipment intended for use as part of children's activities can be included in the calculation of indoor activity space, all floors in the facility must have surfaces that are safe and clean [22 *Cal. Code Reg. § 101238.3(a)(3),(b)*].

The licensee must ensure that each child has individual permanent or portable storage space for each child's clothes, belongings, and/or bedding [22 *Cal. Code Reg. § 101238.4(a)*]. The center must have adequate permanent or portable storage space in playrooms for play materials and equipment. However, outdoor play equipment and materials can be stored outdoors [22 *Cal. Code Reg. § 101238.4(b)*]. Napping equipment must be stored at the center when not in use and combustibles, cleaning equipment, and cleaning agents must be stored in an area separate from food supplies and in a locked cabinet or place inaccessible to children [22 *Cal. Code Reg. § 101238.4(c),(d)*].

[7] Alterations to Center

If a child care center licensee intends to change the physical or structural aspects of the center, the licensee must notify the Department of the proposed change before construction or alteration [22 *Cal. Code Reg. § 101237(a)*]. The Department may require a building inspection if the agency suspects the existence of a hazard to the children's health and safety [22 *Cal. Code Reg. § 101237(b)*].

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§ 100C.29 Written Policy Statements and Admission Policies and Procedures

[1] Written Policy Statements

Every child care center must have a written policy statement that includes the names and qualifications of all current employees, admissions policies, program philosophy, location and telephone number of the nearest local office responsible for child care licensing, disciplinary practices, and the licensee's policy and practice regarding preventive health and care of children with non-life endangering illnesses. The center must retain an affidavit signed by the parent or guardian of every child in the center indicating that he or she has read this policy statement. The center must also provide to all parents, with the consent of all parents involved, a list of parents of children served by the center [*H&S Code § 1597.07; see § 100C.215*].

[2] Written Admission Policy and Procedures

In addition to written admission agreements [*see [3], below, see also § 100C.220*], child care centers must have all admission policies in writing and available to the public [*22 Cal. Code Reg. § 101218(a)*]. These policies must coincide with the limitations stated on the license and must include, but are not limited to, the following [*22 Cal. Code Reg. § 101218(a); see § 100C.217*]:

- Written admission criteria designating those children whose needs can be met by the center's programs and services.
- The ages of children who will be accepted.
- Program activities.
- Any supplementary services.
- Any field trip and transportation arrangements.

- Food service provisions.
- Medical assessment requirements.

Each licensee also must develop, implement, and maintain an admission procedure according to the center's individual program, policies, and needs. The procedures adopted must enable the person in charge of admissions to determine that the child meets the center's criteria [22 *Cal. Code Reg. § 101218.1(a)*]. As part of these admissions procedures, the licensee must inform each child's authorized representative of the right to enter and inspect the center and give each child's authorized representative a copy of the notice of parents' rights [22 *Cal. Code Reg. § 101218.1(b),(e)*; see § 100C.252].

[3] Admission Agreements

Admission agreements must specify basic information for consumers, such as basic and optional services provided by the facility, payment provisions, and modification and refund provisions [see 22 *Cal. Code Reg. § 101219(b)*]. Modifications to the original agreement are required whenever circumstances covered in the agreement change [22 *Cal. Code Reg. § 101219(d)*]. The licensee must comply with all terms and conditions of the agreement [22 *Cal. Code Reg. § 101219(f)*].

The agreement must be signed and dated by the parent or authorized representative of the child and by the licensee or his or her designee no later than seven calendar days following admission [22 *Cal. Code Reg. § 101219(c)*; see § 100C.220[1]]. The agreement automatically terminates on the death of the child, and no liability or debt can accrue after the date of death [22 *Cal. Code Reg. § 101219(g)*].

If any exculpatory clauses are included in the admission agreement or supporting documents, they should be drafted narrowly and carefully, and the enforceability of such clauses should be regarded as questionable in any case. In one case, an agreement exculpating a child care provider from its own negligence was held to be void as against public policy [*Gavin W. v. YMCA of Metropolitan Los Angeles* (2003) 106 *Cal. App. 4th* 662, 671-674, 131 *Cal. Rptr. 2d* 168] .

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§ 100C.30 Recordkeeping Requirements

[1] Operating Records

Child care centers must keep certain records on file as part of the facility's day to day operations [*see § 100C.140*]. The center must maintain the original of each admission agreement on file, as well as a copy of the center's admission policies [22 *Cal. Code Reg. §§ 101218, 101219(e)*; *see § 100C.217*; *see also* [3][a], *below*]. Similarly, the center must keep its plan of operation [22 *Cal. Code Reg. § 101173(a)*; *see § 100C.203*], and its disaster and mass casualty plan on file [22 *Cal. Code Reg. § 101174(a)*; *see § 100C.204*].

[2] Personnel Records

The center must maintain personnel records for the licensee, the administrator, and each employee for at least three years following the termination of employment [22 *Cal. Code Reg. § 101217(a),(c)*], as well as personnel records on all volunteers [22 *Cal. Code Reg. § 101217(b)*]. The records must contain specified information [22 *Cal. Code Reg. § 101217(a)(1)-(14),(b)(1)-(3)*], including the hours actually worked [22 *Cal. Code Reg. § 101217(e)*]. Personnel records must be kept available to the Department to inspect, audit, and copy on demand during normal business hours [22 *Cal. Code Reg. § 101217(c)*]. These records must be maintained either at the center or in a central administrative location where they are readily available to the Department at the center on request [22 *Cal. Code Reg. § 101217(d)*].

[3] Record Requirements for Children

[a] Admission Agreements

Child care centers and a child's authorized representative must complete a current, individual written admission agreements for each child [22 *Cal. Code Reg. § 101219(a)*; *see § 100C.220*]. The licensee keeps the original of the agreement and provides a photocopy to the child's authorized representative [22 *Cal. Code Reg. § 101219(e)*]. The agreement must be maintained at the child care center and kept available for review [22 *Cal. Code Reg. § 101219(a)*].

[b] Individual Records

A child care center must maintain a separate, complete, and current record for each child in the center [22 *Cal. Code Reg. § 101221(a)*; see *H&S Code § 1596.841* (all child day care facilities required to keep current roster of children); see also § 100C.253]. Each record must contain specific information about each child, including, but not limited to, the following [see 22 *Cal. Code Reg. § 101221(b)*; see also *H&S Code § 1596.841*]:

- The name, birthday, and sex of each child.
- The date of admission.
- The names, addresses, and telephone numbers of each child's authorized representative and of relatives or others who can assume responsibility if the authorized representative cannot be reached when needed.
- A signed copy of the admission agreement [see 22 *Cal. Code Reg. § 101219(a),(e)*; see also [a], above; § 100C.220].
- The names, addresses, and telephone numbers of each child's physician, dentist, and any other medical and mental health provider.
- A medical assessment, including ambulatory status [see 22 *Cal. Code Reg. §§ 101220, 101221(b)(8)*; see also [c], below], immunization record [see 22 *Cal. Code Reg. § 101220.1(e)-(g)*], and other specified information, including instructions regarding actions to be taken if the authorized representative or designated physician cannot be reached in an emergency, and a signed consent form for emergency medical treatment [see 22 *Cal. Code Reg. §§ 101220(f)* (religious faith exemption), 101221(b)(8)].
- Record of any illness or injury requiring treatment by a physician or dentist for which the center provided assistance to the child.
- Record of any current medications, including the name of the prescribing physician and any instructions regarding the control and custody of the medications.
- A signed and dated authorization from child's authorized representative for each activity away from the center.
- Date of termination of the center's services.

This information must be updated as necessary to ensure the accuracy of the child's record [22 *Cal. Code Reg. § 101221(f)*]. All information regarding the children is confidential and the licensee is responsible for safeguarding the confidentiality of the contents of the records [22 *Cal. Code Reg. § 101221(c)*]. The children's records cannot be revealed or made available by facility personnel, unless authorized by law, requested by the Department during normal business hours, or the child's authorized representative requests to inspect the records [22 *Cal. Code Reg. § 101221(c)(2),(d),(e)*]. The Department may remove records if necessary for copying for three business days [22 *Cal. Code Reg. § 101221(d)(1),(3)*]. The right to remove designated current records is restricted unless that same information is otherwise readily available in another document or format [see 22 *Cal. Code Reg. § 101221(d)(1)*]. Further, before removing any records, the Department must prepare a list of the records to be removed, sign and date the list on their removal, and leave a copy of the list with the licensee or designated substitute [22 *Cal. Code Reg. § 101221(d)(2)*].

Original or photocopies of the children's records must be retained for at least three years following termination of

services to the child [22 Cal. Code Reg. § 101221(g)].

[c] Children's Medical Assessments

Before, or within 30 days following, the acceptance of each child to a child care center, the licensee must obtain a written medical assessment of the child that enables the assessment of the licensee's ability to provide necessary health related services [22 Cal. Code Reg. § 101220(a)]. The assessment must be performed by, or under the supervision of, a licensed physician [22 Cal. Code Reg. § 101220(a)(1)]. The assessment may not be more than one year old when obtained by the center and must include the following information [22 Cal. Code Reg. § 101220(a)(1),(b)]:

- A record of any infectious or contagious diseases that would preclude care of the child by the licensee.
- Results of a tuberculosis test.
- Identification of special problems and needs of the child.
- Identification of any prescribed medications being taken by the child.
- The child's ambulatory status.

The Department can require the licensee to obtain a current written medical assessment, if necessary to verify the appropriateness of a child's placement [22 Cal. Code Reg. § 101220(c)].

If the requisite medical assessment is not available for a child and cannot be obtained within 30 days of admission, a medical appointment date must be obtained from the parent on the child's admission, and a tuberculosis test must be performed within 30 days after admission [22 Cal. Code Reg. § 101220(d); but see 22 Cal. Code Reg. § 101220(e),(f) (documentation of medical assessment not required for children enrolled in elementary school, and children whose parents practice religious faith healing excepted from requirements)].

Children must also have certain immunizations before being admitted to the center [see 22 Cal. Code Reg. § 101220.1; see also 17 Cal. Code Reg. § 6000 et seq.] unless (1) a physician states in writing that an immunization should not be given to a child and specifies the duration of this exemption; (2) the child's authorized representative provides a written statement that immunizations are contrary to personal or religious beliefs; or (3) the child is also enrolled in elementary school [22 Cal. Code Reg. § 101220.1(e),(i)].

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§ 100C.31 Reporting, Posting, and Notice Requirements

[1] Reporting Requirements

Each licensee and applicant are under a continuing obligation to furnish detailed reports to the Department regarding certain specified events [see 22 Cal. Code Reg. § 101212(a)]. Oral and written reports must be made to the Department if a child has died, been injured, taken ill, or some other unusual event has occurred [see 22 Cal. Code Reg. § 101212(d)(1)(A)-(H)]. These events must also be reported to the child's authorized representative [see 22 Cal. Code Reg. § 101212(f)], and, if the event involves an epidemic outbreak, a poisoning, or some other catastrophe [see 22 Cal. Code Reg. § 101212(d)(1)(E)-(G)], it must be reported to the local health official [22 Cal. Code Reg. § 101212(g)]. Fires or explosions that occur on the premises during the operation of the center must be reported immediately to the local fire authority [22 Cal. Code Reg. § 101212(h); see 22 Cal. Code Reg. § 101212(d)(1)(H)].

Whenever there is an administrative, organizational, or operational change to the center itself [see 22 Cal. Code Reg. § 101212(e)], the change must be reported to the Department within 10 working days following the occurrence [22 Cal. Code Reg. § 101212(e)].

[2] Posting and Notice Requirements

The licensee must permanently post, in an area of the facility that is accessible to parents and guardians, a copy of the written notice setting forth the parents' or guardian's right to enter and inspect the home. This notice, available from the Department, must state the prohibition against retaliation for the exercise of those rights and the right of parents and guardians to review, at the facility site, licensing reports documenting facility visits and substantiated complaints against the facility [H&S Code § 1596.857(d); see also H&S Code § 1596.859 (licensing report requirements)]. This notice must include information stating that the specified registered sex offender database is available to the public at a web site, www.meganslaw.ca.gov, that is maintained by the Department of Justice [H&S Code § 1596.857(d)].

The licensee also must post a notice, available from the Department, that identifies the Department, explains how the licensing regulations may be obtained, provides a local telephone number for complaints, and sets forth the

nonretaliation provisions applicable to employees [*H&S Code § 1596.874*; see *H&S Code § 1596.881*]. The notice must be posted at a location in the facility where the notice can be easily seen by employees and consumers [*H&S Code § 1596.874*].

In addition, on acceptance of each child into a day care facility after January 1, 2007, the licensee must provide the child's parent or guardian with a copy of the Family Child Care Home Notification of Parents' Rights provided by the Department of Social Services. This notice includes information stating that the specified registered sex offender database is available to the public at a web site, www.meganslaw.ca.gov, that is maintained by the Department of Justice. [*H&S Code § 1596.857(e)*]. A provider, however, is not required to provide any additional information regarding the location and proximity of registered sex offenders who reside in the community where the child care facility is located [*H&S Code § 1596.857(f)*].

For further discussion, see § 100C.130.

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§ 100C.32 Telephone, Transportation, and Food Service Requirements

All child care centers must have telephone service on the premises [22 *Cal. Code Reg. § 101224(a)*].

With regard to the potential transportation needs of the children, only drivers licensed for the type of vehicle operated are allowed to transport children [22 *Cal. Code Reg. § 101225(a)*]. In addition, the manufacturer's rated seating capacity of a vehicle cannot be exceeded, and motor vehicles used to transport children must be maintained in a safe operating condition [22 *Cal. Code Reg. § 101225(b),(c)*]. All vehicle occupants must be secured in an appropriate restraint system [22 *Cal. Code Reg. § 101225(d)*; see 22 *Cal. Code Reg. § 101225(f)* (posting requirement)], and children may not be left in parked cars [22 *Cal. Code Reg. § 101225(e)*].

For centers providing meals to children, the Department has drafted detailed food service requirements aimed at ensuring safe food products [see 22 *Cal. Code Reg. § 101227*]. All centers that prepare meals or snacks on site must have a sink, hot and cold running water, refrigeration, and a food storage area, and a food preparation area that is not used for play activities, napping, or passageways for children while being used for food preparation or service [22 *Cal. Code Reg. § 101227(a)(22),(25)*]. The Department may require the center to provide written information, including menus, regarding the food purchased and used over a given period of time if it is necessary to determine whether the licensee is in compliance with food service regulations [22 *Cal. Code Reg. § 101227(b)*]. If the center is required to provide this information, the Department must specify, in writing, the information required from the licensee [22 *Cal. Code Reg. § 101227(b)(1)*].

Additional specific food service requirements apply to full-day and half-day programs [see 22 *Cal. Code Reg. § 101227(a)(5)*]. For example, full-day programs must ensure that each child has a lunch and offer a midmorning and midafternoon snack [22 *Cal. Code Reg. § 101227(a)(5)(A),(B)*].

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§ 100C.33 Health-Related Issues

[1] Illness Assessments

The licensee must inspect children daily for signs of illness [*see 22 Cal. Code Reg. § 101226.1*], and the behavior and health of the children must be continually observed throughout the period of attendance [*22 Cal. Code Reg. § 101226.3(a)*]. Any unusual behavior or signs of illness must be reported to the parents and recorded in the child's record [*22 Cal. Code Reg. § 101226.3(b)*].

The licensee is responsible for ensuring that children with obvious symptoms of illness, such as fever or vomiting, are not accepted at the center. The licensee must pay additional attention to children who have been absent because of illness or who have been exposed to a contagious disease [*22 Cal. Code Reg. § 101226.1(a)*]. The licensee must develop and implement a written inspection procedure that includes the following rules [*22 Cal. Code Reg. § 101226.1(b)*]:

- No child may be accepted without contact between the center staff and the person bringing in the child.
- The licensee must require that the person bringing in the child remain until (1) the child has been determined to be without obvious signs of illness, (2) the child is accepted by a staff member, and (3) the person bringing in the child signs in the child.

In addition, the licensee must develop, maintain, and implement additional written sign-in and sign-out procedures to transfer responsibility for the child [*22 Cal. Code Reg. § 101229.1(a)*]. Sign-in/sign-out sheets [*see 22 Cal. Code Reg. §§ 101226.1, 101229.1*] must be kept on file for one month and be available for review by the Department [*22 Cal. Code Reg. § 101229.1(b)*].

[2] Isolation for Illness

Child care centers must be equipped to isolate and care for any child who becomes ill during the day. The isolation area

must be located so as to afford easy supervision, and may not be located in the kitchen area or the general use toilet area [22 *Cal. Code Reg. § 101226.2(a)(1),(3)*]. The area must be equipped with a mat, cot, couch, or bed for each ill child [22 *Cal. Code Reg. § 101226.2(a)(2)*].

[3] Notification Requirements

The licensee must immediately notify parents of any illness or injury in the center that is more serious than minor cuts or scratches, and obtain their specific instructions with regard to actions to be taken [22 *Cal. Code Reg. § 101226(a)*]. If a child becomes sufficiently ill to warrant isolation, the center must immediately notify the child's authorized representative and request that they remove the child from the center as soon as possible [22 *Cal. Code Reg. §§ 101226(a)(1), 101226.2(b)*].

[4] First Aid, Medications, and Emergency Care

The licensee must maintain specified first aid supplies in a location that is accessible to the staff but not to the children [see 22 *Cal. Code Reg. § 101226(d)*].

If the licensee opts to handle medications, all prescription and nonprescription medications must be stored centrally, in a safe place that is inaccessible to children. Each container must have an unaltered label, and a refrigerator must be used to store all medications requiring refrigeration [22 *Cal. Code Reg. § 101226(e)(1)*]. All prescription and nonprescription medications must be dated and maintained with the child's name [22 *Cal. Code Reg. § 101226(e)(2)*], and must be administered only with the written approval of the child's authorized representative and in accordance with the label directions as prescribed by the child's physician [22 *Cal. Code Reg. § 101226(e)(3)*]. The written document containing the approval and instructions must be maintained in the child's record [22 *Cal. Code Reg. § 101226(e)(3)(B)*; see 22 *Cal. Code Reg. § 101226(e)(4)*]. All medications must be returned to the authorized representative, or disposed of after an attempt to reach the representative, when no longer needed by the child, or when the child withdraws from the center [22 *Cal. Code Reg. § 101226(e)(6)*].

The licensee must make prompt arrangements for obtaining any necessary medical treatment for any child [22 *Cal. Code Reg. § 101226(b)*], and must obtain emergency medical treatment without specific instruction from the authorized representative whenever (1) the representative cannot be reached immediately or (2) the nature of the illness or injury is such that there should be no delay in securing medical treatment [22 *Cal. Code Reg. § 101226(c)*]. Teachers supervising activities away from the center premises must carry either (1) a signed consent form for emergency medical treatment for each child [see 22 *Cal. Code Reg. § 101226(c)(1)(A)*] or (2) the telephone numbers of the authorized representative, relatives, or others who can assume responsibility in an emergency for each child exempted from the requirement for an emergency medical treatment form [see 22 *Cal. Code Reg. § 101226(c)(1)(B)*].

Legal Topics:

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§ 100C.34 Children's Personal Rights

The Department has promulgated a list of children's rights specifically tailored to children attending child care centers [see 22 Cal. Code Reg. § 101223(a)]. These rights are drafted to ensure that children are properly treated and afforded a healthy and safe environment [see 22 Cal. Code Reg. § 101223]. All child care center children, or their authorized representatives, must be personally advised of their rights and given a copy of these rights on admission [22 Cal. Code Reg. § 101223(b); see § 100C.251 (complete list of rights)]. The licensee must ensure that each child is afforded these personal rights [22 Cal. Code Reg. § 101223(c)].

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§ 100C.35 Specialized Programs

[1] Optional Toddler Program

[a] Addition to Existing Programs

Licensed care centers with preschool care or infant care programs may add an optional toddler component [*see 22 Cal. Code Reg. § 101152(i)(2),(p)(2),(t)(1)*] for children between the ages of 18 and 30 months by submitting an amended license application and obtaining the approval of the Department. The toddler component is considered an extension of the preschool or infant care program [*22 Cal. Code Reg. §§ 101169(a)(1)(A), 101185(a)(1)(A), 101216.4(a)(1), 101417(a)(1)*].

[b] Preschool Programs With Toddler Component

When a preschool program has a toddler component, child care general licensing requirements [*see 22 Cal. Code Reg. §§ 101151-101239.2*] apply to children over the age of 24 months. In addition, the provisions of *22 Cal. Code Reg. §§ 101351-101439.1* apply to children between the ages of 18 and 24 months participating in the toddler component. However, certain special rules, described *below*, override these general provisions [*22 Cal. Code Reg. § 101216.4(a)*].

Children in a child care center between the ages of 18 and 30 months may be placed in the toddler program. Children older than 30 months may participate in the toddler program with written permission from the authorized representative; no children may be placed in the preschool program before the age of 30 months without that permission [*22 Cal. Code Reg. § 101216.4(a)(2)*]. In addition, a child whose developmental needs require continuation in a toddler component may remain in that component up to a maximum age of three years [*22 Cal. Code Reg. § 101216.4(a)(3)*].

A ratio of six children to each teacher must be maintained for all children in attendance in the toddler program. An aide who is participating in on-the-job training may be substituted for a teacher when directly supervised by a fully qualified teacher [*22 Cal. Code Reg. § 101216.4(a)(4)*]. The maximum group size, with two teachers (or one fully qualified teacher and one aide) must not exceed 12 toddlers [*22 Cal. Code Reg. § 101216.4(a)(5)*].

The toddler program must be conducted in areas physically separated from those used by older or younger children [22 *Cal. Code Reg. § 101216.4(a)(6)*]. Space planning and usage for the toddler component are governed by 22 *Cal. Code Reg. § 101438.3*. Plans to alternate use of outdoor play space must be approved by the Department [22 *Cal. Code Reg. § 101216.4(a)(6)*]. Requirements for physical separation between children in the toddler component and older or younger children need not apply when a planned activity is being conducted [22 *Cal. Code Reg. § 101216.4(a)(6)(A)*].

[c] Infant Care Programs With Toddler Component

When an infant care center [see [2], *below*] has a toddler component, child care general licensing requirements [see 22 *Cal. Code Reg. §§ 101151-101239.2*] apply, along with the provisions of 22 *Cal. Code Reg. §§ 101351-101439.1* [22 *Cal. Code Reg. § 101417(a)*], except as described in this subsection.

Children in a child care center between the ages of 18 and 30 months may be placed in the toddler program. No children may be placed in the toddler program before the age of 18 months [22 *Cal. Code Reg. § 101417(a)(2)*]. The infant care center must obtain written permission from parents for the placement of their children in the toddler program [22 *Cal. Code Reg. § 101417(a)(3)*].

A ratio of six children to each teacher must be maintained for all children in attendance in the toddler program. An aide who is participating in on-the-job training may be substituted for a teacher when directly supervised by a fully qualified teacher [22 *Cal. Code Reg. § 101417(a)(4)*]. The maximum group size, with two teachers (or one fully qualified teacher and one aide) must not exceed 12 toddlers [22 *Cal. Code Reg. § 101417(a)(5)*].

The toddler program must be conducted in areas physically separated from those used by older or younger children. Space planning and usage for the toddler component are governed by 22 *Cal. Code Reg. § 101438.3*. Plans to alternate use of outdoor play space must be approved by the Department [22 *Cal. Code Reg. § 101417(a)(6)*]. Requirements for physical separation between children in the toddler component and older or younger children need not apply when a planned activity is being conducted [22 *Cal. Code Reg. § 101417(a)(6)(A)*].

[2] Infant Care Centers

An "infant care center" is any facility or part of a facility where less than 24-hour per day, nonmedical care and supervision are provided to infants, that is, children under the age of two, in a group setting [22 *Cal. Code Reg. § 101152(c)(3),(i)(1),(2)* ("care and supervision," "infant," and "infant care center" defined)]. However, children whose developmental needs require continuation in an infant care center can remain there up to three years of age [22 *Cal. Code Reg. § 101361*]. Centers providing group infant care must meet special regulations applicable only to infant care centers [22 *Cal. Code Reg. § 101351*; see 22 *Cal. Code Reg. §§ 101351-101439.1*], as well as the general regulations applicable to child care centers unless specified to the contrary [see 22 *Cal. Code Reg. §§ 101151-101239.2*].

The specific requirements applicable to infant care centers are tailored to the special needs of infants and include standards for staff qualifications and duties [see 22 *Cal. Code Reg. §§ 101415-101416.3*], infant-staff ratios (that is, one teacher for every four infants) [see 22 *Cal. Code Reg. §§ 101416.5, 101416.8*], and establishing an infant's needs and services plan, feeding plan, toilet training plan, and activities plan [see 22 *Cal. Code Reg. §§ 101419.2, 101419.3, 101427, 101428, 101430*; see also § 100C.262]. Additionally, each infant must be constantly supervised and under direct visual observation and supervision by a staff person, and under no circumstances may any infant be left unattended [22 *Cal. Code Reg. § 101429*].

Infant care centers are also subject to additional requirements regulating the center's physical environment [see 22 *Cal. Code Reg. §§ 101438.1-101439.1*]. General sanitation of the center must be maintained, such as washing hands before feedings and after diaper changes, and washing linens used by infants [see 22 *Cal. Code Reg. § 101438.1*; see also 22

Cal. Code Reg. § 101428(b)-(f)]. Any outdoor and indoor activity space must be physically separate from space used by other children in the center, and equipped with age-appropriate toys [see 22 *Cal. Code Reg. §§ 101438.2, 101438.3*]. Further, infant centers must be equipped with appropriate furniture and equipment such as cribs, cots or mats, changing tables, and feeding chairs. These items, and others used by the center, must meet detailed safety requirements to ensure that infants will not be injured while using them [see 22 *Cal. Code Reg. §§ 101439, 101439.1*].

[3] School-Age Child Care Centers

A "school-age child care center" is any child care center or part of a child care center of any capacity where less than 24-hour, nonmedical care and supervision are provided in a group setting to school-age children (that is, children who have either entered the first grade or above, or are in a day care program providing care and supervision exclusively to children enrolled in kindergarten and above) [22 *Cal. Code Reg. § 101152(s)(2)*; see 22 *Cal. Code Reg. § 101152(c)(3)* ("care and supervision" defined)]. Centers providing school-age child care must meet all the general regulations applicable to child care facilities [see 22 *Cal. Code Reg. §§ 101151-101239.2*] and the specific regulations applicable only to school-age child care centers [22 *Cal. Code Reg. § 101451*; see 22 *Cal. Code Reg. §§ 101451-101539*].

School-age child care centers regulations entail standards for director and teacher qualifications and duties [see *H&S Code § 1597.21*; 22 *Cal. Code Reg. §§ 101515, 101516.2*; see also § 100C.211], teacher-child ratios (that is, one teacher and aide to every 28 children) [see 22 *Cal. Code Reg. § 101516.5*], recordkeeping requirements [see 22 *Cal. Code Reg. § 101521*], observing children for signs of illness [see 22 *Cal. Code Reg. § 101526.1*], and providing snacks [22 *Cal. Code Reg. § 101527*]. Further, the center must meet outdoor and indoor activity space requirements [see 22 *Cal. Code Reg. §§ 101538.2, 101538.3*], and the center must maintain toilets that provide for individual privacy and cannot be used simultaneously by girls and boys [see 22 *Cal. Code Reg. § 101539*; but see *H&S Code § 1596.806* (exemption for certain facilities)].

Centers providing care for school-age children need not document medical assessments and immunizations of children enrolled in public or private schools [22 *Cal. Code Reg. §§ 101520, 101520.1*; see 22 *Cal. Code Reg. §§ 101220, 101220.1*]. Children may leave the center on their own with the written permission of their authorized representative, but the center must still sign out those children [22 *Cal. Code Reg. 101529.1(c)*; see § 100C.261].

[4] Child Care Centers for Mildly Ill Children

A "child care center for mildly ill children" is any center or part of a center of any capacity where less than 24-hour per day, nonmedical care and supervision are provided to mildly ill children in a group setting [22 *Cal. Code Reg. § 101552(c)(1)*; see 22 *Cal. Code Reg. § 101552(l)(1),(2)* ("Level I" and "Level II" defined)]. These centers must meet special regulations applicable only to child care centers for mildly ill children [see 22 *Cal. Code Reg. §§ 101551-101639.2*], as well as the general regulations applicable to child care centers unless specified to the contrary [22 *Cal. Code Reg. § 101551*; see 22 *Cal. Code Reg. §§ 101151-101239.2*].

Child care centers for mildly ill children regulations include limitations on capacity and ambulatory status [see 22 *Cal. Code Reg. § 101561*], standards for director and teacher qualifications and duties [see 22 *Cal. Code Reg. §§ 101615, 101616.2*], personnel requirements and teacher-child ratios [see 22 *Cal. Code Reg. §§ 101616.3, 101616.5, 101616.8*], recordkeeping requirements [see 22 *Cal. Code Reg. § 101621*], and observing children for signs of illness [see 22 *Cal. Code Reg. §§ 101626, 101626.1, 101626.3*]. Further, the center must meet outdoor and indoor activity space requirements [see 22 *Cal. Code Reg. §§ 101638.2, 101638.3*], and must maintain toilets that provide for individual privacy and cannot be shared with or used by any other child care component [see 22 *Cal. Code Reg. § 101639*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Education LawAdministration & OperationChild Care Facilities



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§ 100C.36 Use of License Number in Advertising Required

After licensure, each child care center must state its license number in all advertisements, publications, or announcements made with the intent to attract clients [*H&S Code § 1596.861(a)*]. Advertisements, publications, or announcements in which the license number must be revealed include those contained in newspapers or magazines, consumer reports, announcements of intent to commence business, telephone directories, professional or service directories, and radio or television commercials [*H&S Code § 1596.861(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Governments State & Territorial Governments Licenses



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§ 100C.37 Sale of Child Care Center

[1] Licenses Not Subject to Sale or Exchange

No license or special permit issued pursuant to the Child Day Care Facilities Act has any property value for sale or exchange purposes, and a license or special permit cannot be sold or exchanged for any commercial purpose [*H&S Code § 1596.85*]. For a discussion of how licenses can be forfeited, see§ *100C.55[2]*.

[2] Effect of Sale

The sale of a child care center that will result in a new license being issued to the purchaser is subject to several notice and other requirements [*see H&S Code § 1597.14*]. The selling licensee must give 30 days' prior notice of the intended sale to both the Department and to the parents or guardians of children in care [*H&S Code § 1597.14(a)*; *see §§ 100C.274, 100C.275*]. No sale is permitted to occur until 30 days after this required notice is given to the Department [*H&S Code § 1597.14(c)*].

The seller must also give the prospective buyer written notice that a license is required if the buyer intends to continue operation of the property as a child care center, and send a copy of this written notice to the licensing agency [*H&S Code § 1597.14(b)(1)*]. The prospective buyer must submit an application for a license [*see § 100C.200[2]*] within five days after the purchase offer is accepted by the seller [*H&S Code § 1597.14(b)(2)*]. The department will give priority to such an application for licensure to ensure the timely transfer of the property and business, and make a decision within 60 days after submission of the complete application [22 Cal. Code Reg. § 1597.14(d)]. If all of these procedures are followed, the sale may be completed and the buyer will not be considered to be operating an unlicensed facility while the Department makes a final determination on the application for licensure [*H&S Code § 1597.14(e)*]. For further discussion of these requirements, see§ *100C.274[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsGeneral OverviewEducation LawAdministration & OperationChild Care
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[Reserved]

§§ 100C.38[Reserved]



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32-100C California Legal Forms--Transaction Guide § 100C.50

§ 100C.50 Overview

The Department must take specified actions to ensure compliance with the rules and regulations applicable to child care centers. These actions include conducting ongoing programs and seminars for licensing staff and law enforcement agencies, and ensuring that license revocations appear on criminal records [*see H&S Code § 1596.875*]. The Department is also charged with extensive licensing duties relating to applications for initial licenses and renewal licenses. However, licensing reviews must be limited to health and safety considerations, and cannot include review of the content of any educational or training program of the facility [*H&S Code § 1597.05(a)*].

The Department has broad inspection authority [*see H&S Code §§ 1596.852, 1596.8535, 1596.853; see also 22 Cal. Code Reg. §§ 101200(a), 101201; § 100C.51*], and extensive notification duties [*see H&S Code § 1596.98; see also § 100C.52[1]*]. The Department also has numerous remedies that can be used to enforce compliance, including the imposition of monetary penalties [*see § 100C.52[3]*], the issuance of citations [*see § 100C.53*], the issuance of injunctions [*see § 100C.54*], and the revocation or suspension of licenses [*see § 100C.55*]. Willful or repeated violation of any applicable rule or regulation is punishable as a misdemeanor and subjects the guilty party to a fine and/or imprisonment [*see H&S Code § 1596.890*]. These remedies are not exclusive, and can be sought and employed in any combination to enforce provisions of the Child Day Care Facilities Act [*H&S Code § 1596.892*].

For a discussion of the special license enforcement regulations applicable only to family child care homes, see §§ 100C.90-100C.93.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Education Law Administration & Operation Child Care Facilities



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32-100C California Legal Forms--Transaction Guide § 100C.51

§ 100C.51 Inspections and Evaluations

[1] Inspections by Governmental Authorities

The Department, or any authorized officer, employee, or agent of the Department of Social Services may, after presenting proper identification, enter and inspect any child care center for the purpose of ensuring compliance with, or preventing a violation of, applicable rules and regulations. Notwithstanding any other provision of law, these inspections may be conducted only during the period beginning one hour before and ending one hour after the facility's normal business hours or at any time child care services are being provided, unless the Department (1) is investigating a complaint and (2) determines that an inspection or site visit outside the time period beginning one hour before, and ending one hour after, the center's normal operating hours is necessary to protect the health or safety of any child [*H&S Code § 1596.8535(a)*; see *Rush v. Obledo* (1985) 756 F.2d 713, 722 (*H&S Code § 1596.852* violates *Fourth Amendment to the United States Constitution* as overbroad)]. It is a misdemeanor to inform, without proper authorization, a child care center of an impending or proposed inspection or evaluation of that facility. This offense is punishable by a fine and/or imprisonment [see *H&S Code § 1596.8915*].

The Department may observe the physical condition of the children, including conditions that could indicate abuse, neglect, or inappropriate placement [22 *Cal. Code Reg. § 101200(d)*]. In addition, the Department may interview children or staff without prior consent [22 *Cal. Code Reg. § 101200(b)*]. The Department may also inspect, audit, and copy child or child care center records on demand during normal business hours, and remove the records if necessary for copying [22 *Cal. Code Reg. § 101200(b)*; see 22 *Cal. Code Reg. §§ 101217(c), 101221(d)* (removal requirements)]. The licensee must make provisions for private interviews with any children or staff members and for examining records relating to the operation of the child care center [22 *Cal. Code Reg. § 101200(b)(1),(c)(1)*].

The scope of the authority of the Department to inspect a center following a complaint [see *H&S Code § 1596.853*; 22 *Cal. Code Reg. § 101200(a)*] is discussed in [3], *below*.

[2] Parental Inspections

In addition to the Department's right to inspect child care centers [see [1], *above*], the responsible parent or guardian of a child receiving services in a child care center has the right to enter and inspect the center, without advance notice, during the normal operating hours of the center or at any time that the child is receiving services in the center. During inspections, parents or guardians must be respectful of the children's routines and programmed activities. The center must inform parents and guardians of children receiving services from the center of their right to inspect the center [H&S Code § 1596.857(a)].

No center may discriminate or retaliate against any child, parent, or guardian based on (1) the parent's or guardian's exercise of the right to inspect the center or (2) the fact that the parent or guardian has filed a complaint against the center [H&S Code § 1596.857(b); see [3], *below*]. If a center denies a parent or legal guardian the right to enter and inspect the center, or retaliates, the department must issue a warning citation. The department may impose a civil penalty on each subsequent violation [H&S Code § 1596.857(c); see § 100C.52], and may take other appropriate actions, including license revocation [H&S Code § 1596.857(c); see § 100C.55].

The center must permanently post written notice of the right to make an inspection, the prohibition against retaliation, and the right to make a complaint [see [3], *below*] in a center location that is accessible to parents and guardians. This notice, available from the Department, must include information stating that the specified registered sex offender database is available to the public at a web site, www.meganslaw.ca.gov, that is maintained by the Department of Justice [H&S Code § 1596.857(d)]. Furthermore, it must include a statement of the right of parents and guardians to review, at the center site, licensing reports documenting center visits and substantiated complaints against the center [H&S Code § 1596.857(d); see H&S Code § 1596.859 (licensing report requirements)]. However, notwithstanding any of the rights discussed above, the person present who is in charge of the center may deny access to any adult whose behavior presents a risk to the children present in the center, and may deny access to noncustodial parents or guardians on the request of the responsible parent or legal guardian [H&S Code § 1596.857(g)].

[3] Requesting Departmental Inspections

Any person [see H&S Code § 1596.79 ("person" defined)] may request an inspection of any child care center by transmitting to the Department, either orally or in writing, a notice or complaint alleging a violation of the applicable rules and regulations [H&S Code § 1596.853(a)].

On receipt of a complaint, the Department must make a preliminary review. Unless the Department determines that the complaint is willfully intended to harass the licensee or is without any reasonable basis, the Department must make an onsite inspection within 10 days after receiving the complaint, except if the visit would adversely affect the licensing investigation or the investigation of other agencies, including law enforcement agencies [H&S Code § 1596.853(c)]. In either event, the complainant must be promptly informed of the department's proposed course of action. If the department determines that the complaint is without any reasonable basis, then the department must dismiss the complaint, mark the complaint confidential, and bar the disclosure of the complaint to the public. The child care provider must be notified of the dismissal within 30 days of that action [H&S Code § 1596.853(c)].

The substance of the complaint may be provided to the licensee no earlier than at the time of the inspection [H&S Code § 1596.853(b)]. However, absent a specific request from the complainant, neither the substance of the complaint provided to the licensee nor any copy of the complaint or any record made available to the licensee may disclose the name of any person mentioned in the complaint other than the name of the duly authorized officer, employee, or agent of the department conducting the investigation or inspection [H&S Code § 1596.853(b)].

[4] Evaluation and Spot Visits

Each licensed child day care center is subject to unannounced visits by the Department, which is directed to visit these facilities as often as necessary to ensure the quality of care provided [H&S Code § 1597.09(d)]. All site visits must be

unannounced [*H&S Code § 1597.08*].

The Department must conduct an annual unannounced visit to a licensed child day care center under any of the following circumstances [*H&S Code § 1597.09(b)(1)-(4)*]:

- When a license is on probation.
- When the terms of agreement in a facility compliance plan require an annual evaluation.
- When an accusation against a licensee is pending.
- In order to verify that a person who has been ordered out of a child day care center by the Department is no longer at the facility.

The Department must conduct an annual unannounced visit to no less than 20 percent of facilities not subject to an evaluation under any of the circumstances listed above. These unannounced visits must be conducted based on a random sampling methodology developed by the Department [*H&S Code § 1597.09(c)(1)*]. If the total citations issued by the Department exceed the previous year's total by 10 percent, then the following year the Department must increase the random sample by 10 percent of facilities not subject to an evaluation under any of the circumstances listed above. The Department may request additional resources to increase the random sample by 10 percent [*H&S Code § 1597.09(c)(2)*; see Stats. 2008, ch. 759, § 39 (paragraph (c)(2) suspended for 2008-09 and 2009-10 fiscal years)].

Under any circumstances, the Department may not visit a licensed child day care center less often than once every five years [*H&S Code § 1597.09(d)*].

[5] Provider's Rights Applicable to Investigations and Visits

Any site visit conducted by the Department is subject to certain rights afforded the child care provider [see *H&S Code § 1596.842*]. These rights include the right to require the licensing field staff to identify themselves, the right to be advised of the type of visit, the right to receive an accurate report of the evaluator's findings, and the right to an impartial investigation of all complaints [see *H&S Code § 1596.842(a)*].

The Department will provide a copy of the Applicant/Licensee Rights form (LIC 9058) to each applicant and licensee. The form covers site visit rights, appeal rights, and appeal procedures.

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Governments State & Territorial Governments Licenses



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32-100C California Legal Forms--Transaction Guide § 100C.52

§ 100C.52 Notices of Deficiencies and Imposition of Civil Penalties

[1] Notice Requirements

When a licensing evaluation is conducted and a determination is made that a deficiency exists [*see 22 Cal. Code Reg. § 101152(d)(1)*] ("deficiency" defined as any failure to comply with applicable rules and regulations)], the Department conducting the evaluation must issue a notice of deficiency, unless the deficiency is not serious and is corrected during the visit [*22 Cal. Code Reg. § 101193(a)*]. A "serious deficiency" is any deficiency that presents an immediate or substantial threat to the physical or mental health or safety of children in a child care center [*22 Cal. Code Reg. § 101152(s)(3)*].

Child care centers must be notified in writing of all deficiencies in their compliance with applicable child care center rules and regulations [*see H&S Code §§ 1596.90-1597.21; 22 Cal. Code Reg. § 101151 et seq.*], and be given a reasonable time in which to comply [*H&S Code § 1596.98(a)*]. The notice must include reference to the statute or regulation violated, a description of the deficiency, a plan for correcting each deficiency, a date by which the deficiency must be corrected, the amount of penalty being assessed and the date the penalty begins, and the address and telephone number of the licensing office responsible for reviewing notices of deficiencies for the area in which the center is located [*see 22 Cal. Code Reg. § 101193(d)*].

If the notice of deficiency is issued in conjunction with a site visit, the notice (1) must be delivered personally to the licensee at the end of the visit, or (2) if the licensee is not present during the visit, must be left with the person in charge of the center, and another copy must be mailed to the licensee. If the person in charge of the center refuses to accept the notice, (1) a notation of the refusal must be written on the notice, (2) a copy of the notice must be left at the center, and (3) another copy must be mailed to the licensee [*22 Cal. Code Reg. § 101193(c)*]. Additionally, before completion of the visit, a staff member of the center must meet with the evaluator to assess any deficiencies, to develop a plan for correcting the deficiencies, and to acknowledge receipt of the notice [*see 22 Cal. Code Reg. § 101193(b)*].

[2] Correction of Deficiency and Follow-Up Visits

In general, the deficiency that is the subject of the notice must be corrected within 30 days following service of the notice. However, if the deficiency cannot be rectified within 30 days, the notice must specify what actions must be taken within 30 days to begin correction. Furthermore, the evaluation must require correction of the deficiency within 24 hours whenever civil penalties are assessed [see 22 Cal. Code Reg. § 101193(d)(4)(D); see also 22 Cal. Code Reg. § 101195; [3], below].

A follow-up visit to determine compliance with the correction plan must be conducted within 10 working days following the dates of correction specified in the notice of deficiency, unless the licensee has demonstrated that the deficiency was corrected [22 Cal. Code Reg. § 101194(a),(d)]. Unless a follow-up visit is conducted, no penalty may be assessed [22 Cal. Code Reg. § 101194(a)(2); but see 22 Cal. Code Reg. § 101195(i) (one-day immediate civil penalty assessment even when corrected on same day)]. If the follow-up visit indicates that a deficiency was not corrected on or before the date specified in the notice, the evaluator must issue a written notice of penalty [see H&S Code § 1596.98(a); 22 Cal. Code Reg. § 101194(b),(c)]. The notice must state the amount of penalty assessed, the date that payment is due, and the name and address of the agency responsible for collecting the penalty [22 Cal. Code Reg. § 101194(c); see [3], below].

[3] Penalties

[a] Penalties for Noncompliance

On a finding of noncompliance [see [1], [2], above], the Department will levy a civil penalty that must be paid to the department each day until the center is determined to be in compliance [H&S Code § 1596.98(a); 22 Cal. Code Reg. §§ 101194, 101195]. The levying of a civil penalty may be in addition to the revocation, temporary suspension, or suspension of the center's license [H&S Code § 1596.99(a)]. However, no civil penalty may be assessed against a licensed child care center operated by a governmental entity, including a state or city, holding a license [22 Cal. Code Reg. § 101197].

The amount of the civil penalty may not be less than \$25 nor more than \$50 per day for each violation except when the nature or seriousness of the violation or the frequency of the violation warrants a higher penalty or an immediate civil penalty assessment, or both [H&S Code § 1596.99(b); see H&S Code § 1596.99(d) (repeated deficiencies)]. The maximum civil penalty assessment may not exceed \$150 per day [H&S Code § 1596.99(b); 22 Cal. Code Reg. § 101195(a)]. The Department will assess an immediate civil penalty of \$150 per day per violation of any of the following serious violations: (1) fire clearance violations; (2) absence of supervision; (3) accessible bodies of water; (4) accessible firearms and/or ammunition; or (5) refused entry to a facility or any part of it [Health & Safety Code § 1596.99(c); see Health & Safety Code §§ 1596.852, 1596.853, 1597.09]. Ordinarily, a penalty of \$50 per day, per cited violation, is assessed for serious deficiencies that are not corrected by the date specified in the deficiency notice, subject to the \$150 per day maximum [22 Cal. Code Reg. § 101195(a)]. The penalty is assessed for each day following the correction date until compliance is demonstrated [22 Cal. Code Reg. § 101195(f)]. However, notwithstanding these limitations, an immediate penalty of \$100 per cited violation per day (for a maximum of five days) must be assessed if any individual required to be fingerprinted [see H&S Code § 1596.871(b); § 100C.21[2][a][ii]] has neither obtained a Department of Justice clearance or criminal record exemption, nor requested a transfer of a criminal record clearance, nor requested and been approved for a transfer of an exemption [see 22 Cal. Code Reg. § 101170(e)], before the individual works, resides, or volunteers in the facility [22 Cal. Code Reg. § 101195(b)]. In addition, an immediate penalty of \$150 per day must be assessed if a deficiency results in the sickness, injury, or death of a child [22 Cal. Code Reg. § 101195(c)]. Further, if a center is cited for a serious deficiency and repeats that violation within a 12-month period, an immediate penalty of \$150 per day must be assessed until the deficiency is corrected [22 Cal. Code Reg. § 101195(d); see H&S Code § 1596.99(d)]. If the same serious deficiency is then repeated again within 12 months of the penalty assessment for repeated violations [see 22 Cal. Code Reg. § 101195(d)], an immediate penalty of \$150 per day must be assessed until the deficiency is corrected [22 Cal. Code Reg. § 101195(e); see H&S Code § 1596.99(e)]. Immediate penalty assessments begin on the day the deficiency is cited and continue until compliance is demonstrated [

22 Cal. Code Reg. § 101195(f)]. However, in no event may the civil penalties exceed \$150 per day [H&S Code § 1596.99(b)].

If a child care center licensee or the licensee's representative reports to the Department that the deficiency has been corrected, the penalty ceases as of the day that the agency receives the written or verbal notification. If the evaluator determines that the deficiency was not corrected as reported, the civil penalties continue to accrue from the date of the original citation [22 Cal. Code Reg. § 101195(g)]. If necessary, a site visit will be made immediately or within five working days to confirm the correction of the deficiency; if the deficiency has not been corrected, the penalty continues to accrue from the date of the original citation [22 Cal. Code Reg. § 101195(g),(h)].

Penalties must be paid by check or money order to the specified agency on receipt of the notice for payment from the Department, unless the Department orders to the contrary [22 Cal. Code Reg. § 101195(j); but see 22 Cal. Code Reg. § 101198.1(b)(1),(2) (Department may approve arrangement and form of payment)]. The failure to pay required penalties can lead to the filing of a lawsuit by the Department and the suspension or revocation of the child care center license [22 Cal. Code Reg. § 101195(k); see H&S Code § 1596.885(a); see also 22 Cal. Code Reg. § 101198.1(b)]. The transfer, surrender, forfeiture, or revocation of a license does not affect the licensee's responsibility for paying civil penalties accrued while the license was in effect, unless the Department orders to the contrary [22 Cal. Code Reg. § 101198.1(a)(1)]. However, any denial or revocation of licensure for failure to pay civil penalties may be appealed [22 Cal. Code Reg. § 101198.1(c); see H&S Code § 1596.887].

[b] Penalties for Operating Without a License

Civil penalties for operating a child care center without a license are more severe than those assessed for noncompliance [see H&S Code § 1596.891; see also 22 Cal. Code Reg. § 101198]. All centers, except those that are exempt [see § 100C.10[4]], must have a current valid license to establish, operate, manage, conduct, or maintain a child care center [H&S Code § 1596.80; 22 Cal. Code Reg. § 101156; see § 100C.20[2]]. The operation of an unlicensed center subjects the owner and/or operator to an automatic summons to appear in court [H&S Code § 1596.89], a site visit and/or evaluation, civil and criminal proceedings, and the levying of an immediate civil penalty [see 22 Cal. Code Reg. §§ 101157, 101198].

Operators of unlicensed centers may be liable for an immediate civil penalty assessment of \$200 per day [H&S Code § 1596.891(a)]. Mandatory imposition of this penalty occurs if the operator of the center refuses to seek licensure (or fails to submit a completed application), or the application for licensure was denied but the center continues to operate, unless other remedies, including criminal prosecutions, are deemed by the Department of Social Services to be more effective [H&S Code § 1596.891(b); see 22 Cal. Code Reg. § 101198(a)]. Unlicensed operators are exempt from the \$200 per day penalty if the sole reason for nonlicensure is the lack of liability insurance and the reason for operating without liability insurance is not due to any fault of the operator [H&S Code § 1596.891(d)].

The \$200 per day penalty assessed for the continued operation of an unlicensed day care center continues until the operator ceases operation or submits a completed application form [see 22 Cal. Code Reg. § 101198(b)]. If the unlicensed center informs the Department that they have stopped operating, the penalty ends as of the day that the Department receives the notification, but a site visit will be made to verify that operations have actually ceased. If the center continues to operate after reporting the cessation of operations, the \$200 per day penalty accrues without interruption from the date of initial penalty assessment [see 22 Cal. Code Reg. § 101198(c)].

Penalties must be paid by check or money order to the Department on receipt of the notice [22 Cal. Code Reg. § 101198(d)]. The failure to pay assessed penalties may lead to the filing of a lawsuit by the Department or suspension or revocation of the license [see 22 Cal. Code Reg. § 101198(e); see also H&S Code § 1596.885(a)].

[4] Administrative Review and Appeal

[a] Review of Notice of Deficiency or Penalty

Any person has the right to request a review of an adverse licensing decision, including notices of deficiency and civil penalties, unless an administrative proceeding is pending against the person. This request must be made within 10 working days of receipt of the written decision. However, if the deficiency has not been corrected, the assessed penalties will continue to accrue during the review process [22 *Cal. Code Reg. § 101196(a)*].

The Department must acknowledge the request to review a notice of deficiency and/or penalty in writing within 10 days of receipt [*H&S Code § 1596.844*]. The review must be conducted by a higher level staff person than the evaluator who made the licensing decision and issued the notice [22 *Cal. Code Reg. § 101196(b)*]. The reviewer may uphold, amend, or dismiss the licensing decision, or extend the date specified for correcting a deficiency [22 *Cal. Code Reg. § 101196(c)*].

[b] Appeal of Penalty Assessment by Unlicensed Center

Civil penalties assessed against unlicensed centers may be appealed to the director of the Department of Social Services within 10 working days after service of the assessment [*H&S Code § 1596.891(c)*; 22 *Cal. Code Reg. § 101196, 101198(g)*]. However, the \$200 per day penalty continues to accrue during the appeal process for child care centers that continue to operate during the appeal [see 22 *Cal. Code Reg. § 101196(a)(2)*]. The appeal review must be conducted by a higher staff person than the evaluator who issued the penalty. If the reviewer determines the penalty was not issued in accordance with applicable rules and regulations, he or she can amend or dismiss the penalty [22 *Cal. Code Reg. § 101196(b),(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 100C.53 Citations

When the Department has reason to believe that an unlicensed center is operating, or that a licensed center is operating in violation of applicable rules and regulations, the agency is authorized to issue a citation to the center. The citation must be in writing and served on the center operator personally or by registered mail. The citation must specifically describe the nature of the violation and the agency's proposed action and, if the citation was developed pursuant to a site visit and evaluation, must include the plan developed to correct each deficiency [*H&S Code § 1596.893a(a)*]. In considering the appropriateness of the penalty to the alleged violation, the Department will consider the gravity of the violation, the history of previous violations, the number of children affected by the violation, the possibility of a threat to the health and safety of any child, and the availability of equipment or personnel necessary to correct the violation [*H&S Code § 1596.893a(b)*].

Civil penalties may be imposed [*see H&S Code §§ 1596.99, 1597.62*] only after the licensee fails to correct the violation in the time period specified in the deficiency notice developed by the licensee and the evaluator [*see 22 Cal. Code Reg. § 101193(b)*] or the deficiency results in the illness, injury, or death of a child [*22 Cal. Code Reg. § 101195(a)-(c)*]. Civil penalties begin to accrue on the day the evaluator revisits the site and verifies that the violation was not corrected, even if the evaluator's visit is after the time period specified in the plan [*H&S Code § 1596.893b(b)*; *22 Cal. Code Reg. § 101195(f)* (penalty assessed from correction date to date of compliance)].

The center may contest a citation or the proposed civil penalty if, within 10 business days after service of the citation, the center notifies the Department in writing of a request for an informal conference. Within 30 days after receipt of the request, the Department must hold an informal conference at which the agency may affirm, modify, or dismiss the citation or proposed penalty by stating in writing the reasons for that action [*H&S Code § 1596.893a(c)*]. If the penalty contained in the citation is affirmed at the informal conference, the Department must pursue enforcement of the penalty, and the center may pursue an appeal [*H&S Code § 1596.893a(d)*; *see 22 Cal. Code Reg. § 101196* (appeal procedures); *see also § 100C.52[4]*].

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§ 100C.54 Injunctions

A child care center that operates, or threatens to operate, without a license or special permit, subjects itself to an action by the Department of Social Services to enjoin that operation or threat of operation [*see H&S Code § 1596.89; see also H&S Code §§ 1596.80, 1596.805*]. The action must conform to all the requirements necessary to obtain an injunction [*see CCP §§ 525-534*], except the Department need not allege a lack of an adequate legal remedy or irreparable damage or loss [*see H&S Code § 1596.89; see also H&S Code §§ 1596.80, 1596.805*]. If the court finds the Department's allegations to be true regarding the unlicensed operation of a facility, it must enjoin the facility from continuing to operate [*H&S Code § 1596.89*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Injunctions General Overview Education Law Administration & Operation Child Care Facilities



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§ 100C.55 Denial, Suspension, Revocation, and Forfeiture of Licenses

[1] Grounds for Denial, Suspension, or Revocation of Licenses

The Department may deny an application for [see § 100C.22[2][c]], or suspend or revoke, any license, registration, or special permit issued under the California Child Day Care Facilities Act [*H&S Code § 1596.70 et seq.*] based on any of the following grounds [*H&S Code § 1596.885*]:

- Violation of the applicable rules and regulations by the licensee, registrant, or permit holder.
- Aiding, abetting, or permitting the violation of the applicable rules and regulations.
- Conduct that is inimical to the health, morals, welfare, or safety of any person in or receiving care from a child day care center or the people of California.
- The conviction of the licensee or persons subject to the criminal clearance requirements, at any time before or during licensure, of any crime other than a minor traffic violation, [*H&S Code § 1596.885(d)*; see *H&S Code § 1596.871*; see also *22 Cal. Code Reg. § 101170(k)*].
- Engaging in acts of financial malfeasance concerning the operation of a facility, including but not limited to, improper use or embezzlements of client funds and property, fraudulent appropriation for personal gain of facility funds or property, and the willful or negligent failure to provide services for children in care.

Improper conduct, such as child molestation, by a child care center employee, not occurring at the center itself, but that has an impact within the center, is within the scope of conduct that is contrary to the health, safety, welfare, and morals of children at centers, and thus constitutes grounds for revocation of the center's license [see *Adamson v. Department of Social Services (1988) 207 Cal. App. 3d 14, 24, 254 Cal. Rptr. 667*].

[2] Grounds for Forfeiture of Licenses

In addition to the grounds for denying, suspending, or revoking licenses [see [1], *above*], child care center licenses can be forfeited by operation of law before the license expires. Forfeiture occurs if the licensee does any of the following [H&S Code § 1596.858]:

- Sells or otherwise transfers the center or the center's property, unless the change in ownership involves a transfer of stock that does not constitute a majority change in ownership.
- Surrenders the license to the Department of Social Services.
- Moves the center from one location to another.
- Is convicted of certain specified offenses or crimes, including sexual battery or child abuse [see *Pen Code* §§ 220, 243.4, 264.1, 273a(a), 273d, 288, 289, 667.5(c)].
- Dies.
- Abandons the center.

[3] Effect of Previous Revocation or Denial of License or Exclusion

If an applicant was previously issued a license to operate a child care center, clinic [see H&S Code § 1200 *et seq.*], health facility [see H&S Code § 1250 *et seq.*], community care facility [see H&S Code § 1500 *et seq.*], residential care facility for persons with chronic, life-threatening illness [see H&S Code § 1568.01 *et seq.*], or residential care facility for the elderly [see H&S Code § 1569 *et seq.*], or to be a licensed foster family agency [see H&S Code § 1534(b)], and this prior license was revoked within the preceding two years, the Department must stop reviewing the present application until two years have elapsed from the date of the revocation [H&S Code § 1596.851(a)(1),(2)].

In general, if an applicant previously applied for one of the above-mentioned licenses, and the application was denied within the last year, the Department must stop reviewing the present application if the applicant appealed or was informed of his or her right to appeal the decision denying the previous application [see H&S Code § 1596.851(b)]. If the applicant appealed [see H&S Code § 1596.879], that is, if the applicant petitioned for a hearing on the previous denial of a license, the Department must stop reviewing the present application until one year has elapsed from the effective date of the decision and order upholding the denial [H&S Code § 1596.851(b)(1)]. If the Department informed the applicant of the right to appeal, and the applicant did not petition for a hearing, the Department must stop reviewing the application until one year has elapsed from the date of the notification of the denial and the right to petition for a hearing [H&S Code § 1596.851(b)(2)]. However, the Department may continue to review the application after determining that the reasons for the denial of the previous application were due to circumstances and conditions that have been corrected or that no longer exist [H&S Code § 1596.851(b)(3)].

Similarly, if the applicant was excluded from a licensed facility [see H&S Code §§ 1558, 1568.092, 1569.58, 1596.8897], the Department must cease further review of the application unless the excluded individual has been reinstated [H&S Code § 1596.851(a)(3); see *Gov. Code* § 11522].

The cessation of review under these circumstances does not constitute denial of the application [H&S Code § 1596.851(b)(3),(d)].

[4] Temporary Suspension of Licenses

Any license, registration, or special permit may be temporarily suspended before a hearing when, in the opinion of the director of the Department of Social Services, temporary suspension is necessary to protect any child in a child care center from physical or mental abuse, abandonment, or any other substantial threat to health or safety. The director must notify the licensee, registrant, or holder of the special permit of the temporary suspension and its effective date, and at the same time serve the child care provider with an accusation [*H&S Code § 1596.886*; see *Gov. Code § 11503* (hearing to determine suspension of license initiated by filing accusation)]. Within 15 days of receipt of a notice of defense [see *Gov. Code §§ 11505* (notice of defense must be included with service of accusation), 11506 (contents)], the matter must be set for hearing. The hearing must be held as soon as possible, but in no event later than 30 days after receipt of the notice. The temporary suspension of the license remains in effect until the hearing is completed and a final determination on the merits is made. However, the suspension is vacated if the director fails to make a final determination on the merits within that 30-day period [*H&S Code § 1596.886*].

On a temporary suspension pursuant to *H&S Code § 1596.886*, the Department must give written notice to the parent or legal guardian of each child receiving services in the center, and must post a notice of the suspension at the center in a place readily visible and accessible to parents or guardians of children receiving services at the center. The removal of the posted notice while the temporary suspension is in effect is punishable by a fine of \$500 [*H&S Code § 1596.8895(a)*]. If a temporary suspension order is not effected within 30 days after the accusation is filed, the parent or legal guardian of each child receiving services in the facility must be notified in writing that the accusation has been filed [*H&S Code § 1596.8895(b)*]. The Department must conduct an unannounced visit to a facility within 30 days after the effective date of a temporary suspension of a license, in order to ensure that the facility is nonoperational, unless the Department has previously verified that the facility is nonoperational [*Health & Safety Code § 1596.8867(a)*].

On receipt of an accusation indicating the Department's intent to revoke a facility's license, the licensee must provide copies of a summary of the accusation to the parent or legal guardian of each child receiving services in the facility, until that accusation is either dismissed or resolved through the administrative hearing process or stipulated agreement [*H&S Code § 1596.8895(c)(1)*]. Whenever a new child enrolls in the facility, the licensee must provide the child's parent or legal guardian with copies of a summary of any accusation that the licensee has received during the previous 12-month period and that indicates the Department's intent to revoke the facility's license [*H&S Code § 1596.8895(c)(2)*]. Each recipient of the summary must date and sign a statement indicating receipt. The licensee must keep verification of receipt in each child's file [*H&S Code § 1596.8895(c)(3),(4)*].

Further, if a police, sheriff's, probation, or welfare department has a reasonable suspicion that the death or serious injury of a child occurred at a child care center because of abuse or willful neglect by facility personnel, the license, registration, or special permit must be temporarily suspended within two days after the Department receives the evidence [*H&S Code § 1596.8865(a),(b)*; see *Pen Code §§ 11165.9, 11166(a)* ("reasonable suspicion" defined); see also *H&S Code § 1596.8865(d)* ("serious injury" defined)]. The licensee, registrant, or holder of a special permit must be immediately notified of the temporary suspension and served with an accusation [*H&S Code § 1596.8865(b)*; see *Gov. Code § 11503*].

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1. Licensing and Operational Requirements

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§ 100C.70 Introduction

[1] Governing Law

A "family child care home" is defined as a home (either a large family child care home or a small family child care home) that regularly provides care, protection, and supervision of 14 or fewer children in the provider's own home for periods of less than 24 hours a day while the parents or guardians are away [*H&S Code § 1596.78(a)*; see 22 *Cal. Code Reg. § 102352(f)(1)*].

The legislature has recognized that an insufficient number of regulated family child care homes exist in California and that the need for child care facilities will continue to grow [*H&S Code § 1597.30(b),(c)*]. The legislature has determined that the state should develop and maintain an efficient program for regulating family child care homes that ensures the provision of adequate protection, supervision, and guidance to children in a home setting, while not placing undue burdens on the provider [*H&S Code § 1597.30(f),(g)*].

Family child care homes cannot be licensed under the California Community Care Facilities Act [*H&S Code § 1500 et seq.*] and are subject to licensure only in accordance with the Child Day Care Facilities Act [*H&S Code § 1597.53*]. However, family child care homes are a minimally regulated facility. Consequently, although the general requirements of the Child Day Care Facilities Act [see *H&S Code §§ 1596.70-1596.895*] apply to all family child care homes [*H&S Code §§ 1596.71, 1597.53*], the general regulations [see 22 *Cal. Code Reg. §§ 101151-101239.2*] do not apply to family child care homes [22 *Cal. Code Reg. § 102351.1*; see also § 100C.230[1]]. Further, specific statutes and regulations apply to family child care homes [*H&S Code §§ 1597.30-1597.621*; 22 *Cal. Code Reg. §§ 102351.1-102424*].

[2] Types of Family Child Care Homes

[a] Large Family Child Care Homes

The Act recognizes two types of family child care homes: large family child care homes and small family child care homes [see [b], *below*]. A "large family child care home" is a home that provides family child care to no fewer than 7

and not more than 14 children, including children under the age of 10 who reside at the home [*H&S Code § 1596.78(b)*].

The following special rules apply to large family child care homes:

- Cities, counties, or cities and counties may not prohibit large family child care homes on lots zoned for single-family dwellings, but must [*see H&S Code § 1597.46(a)*; *see also § 100C.12*]:
 - Classify these homes as a permitted use of residential property for zoning purposes;
 - Grant nondiscretionary permits to large family child care homes that comply with certain local ordinances; or
 - Require large family child care homes to apply for use permits to allow them to use lots zoned for single family dwellings.
- Large family child care homes are not subject to the California Environmental Quality Act [*see H&S Code § 1597.46(b)*; *see also PR Code § 21000 et seq.*].
- The use of a single family dwelling for purposes of a large family child care home does not constitute a change of occupancy for purposes of state housing laws or local building and fire codes [*H&S Code § 1597.46(d)*; *see H&S Code § 17910 et seq.*].
- Large family child care homes are considered single family residences for purposes of the State Uniform Building Standards Code and local building and fire codes, except with respect to safety provisions adapted by the State Fire Marshal, including (1) requiring a fire extinguisher or smoke detector that meets standards established by the State Fire Marshal, (2) specification as to the number of required exits, and (3) specification as to the floor or floors on which child care may be provided [*H&S Code § 1597.46(e)*; *see H&S Code §§ 13145, 13146*].

If a large family child care home provides care for 13 or 14 children, all of the following conditions must also be satisfied [*H&S Code § 1597.465*]:

- At least one child is enrolled in and attending kindergarten or elementary school and a second child is at least six years of age.
- No more than three infants are cared for during any time when more than 12 children are being cared for.
- The licensee must notify a parent that the facility is caring for two additional school-age children and that there may be up to 13 or 14 children in the facility at one time.
- The licensee must obtain written consent of the property owner when the home is operated on rented or leased property.

[b] Small Family Child Care Homes

A "small family child care home" is defined as a home that provides family child care to eight or fewer children, including children under the age of 10 who reside at the home [*H&S Code § 1596.78(c)*].

The following special rules apply to small family child care homes:

- The use of a single family residence for purposes of a small family child care home is considered a residential use of property for purposes of local ordinances [*H&S Code § 1597.45(a)*].
- No local jurisdiction can impose any business license, fee, or tax for operating a small family child care home [*H&S Code § 1597.45(b)*].
- The use of a single family dwelling for purposes of a small family child care home does not constitute a change of occupancy for purposes of state housing laws or local building codes [*H&S Code § 1597.45(c)*; see *H&S Code § 17910 et seq.*].
- Small family child care homes are not subject to certain fire protection provisions, but must contain a fire extinguisher and smoke detector device that meet standards established by the State Fire Marshal [*H&S Code § 1597.45(d)*; see *H&S Code § 13100 et seq.*].

A small family child care home may provide care for seven or eight children, without an additional adult attendant, if all of the following conditions are satisfied [*H&S Code § 1597.44*]:

- At least one child is enrolled in and attending kindergarten or elementary school and a second child is at least six years of age.
- No more than two infants are cared for during any time when more than six children are being cared for.
- The licensee notifies each parent that the facility is caring for two additional school-age children and that there may be up to seven or eight children in the facility at one time.
- The licensee obtains the written consent of the property owner, when the facility is operated on rented or leased property.

[3] License Requirement

Unless a facility is exempt from the licensing requirements [*see H&S Code § 1596.792*; see also § 100C.10[4]], all family child care homes must obtain a current valid license before providing care [*H&S Code § 1596.80*; 22 *Cal. Code Reg. § 102358*; see *H&S Code §§ 1597.53, 1597.54*]. Licenses have no property value for sale or exchange purposes and cannot be sold, exchanged or otherwise transferred to other individuals or locations [*H&S Code § 1596.85*; 22 *Cal. Code Reg. § 102368(b)*].

If the Department has reason to believe that family child care is being provided without a license, the agency must conduct a site visit to determine whether the home is operating without a license, and whether the continued operation of the home will be dangerous to the health and safety of the children receiving care [22 *Cal. Code Reg. § 102357(a)(1)*]. The Department must notify the unlicensed provider in writing of the requirements for licensure [22 *Cal. Code Reg. § 102357(a)(2)*] and must issue a Notice of Operation in Violation of Law if (1) the unlicensed provider does not apply for licensure within 15 working days from the date of notification; or (2) the Department finds and documents that the continued operation of the home will be dangerous to the health and safety of the children [22 *Cal. Code Reg. § 102357(a)(3),(4)*; see 22 *Cal. Code Reg. § 102357(a)(3)(A)-(F)* (situations endangering health and safety of children)].

The Department may issue an immediate civil penalty against unlicensed family child care homes [22 *Cal. Code Reg. § 102357(b)*; see *H&S Code § 1596.891*; see also 22 *Cal. Code Reg. § 102393* (conditions for assessment of immediate

civil penalties)]. Further, the Department may issue a cease and desist order provided that (1) the unlicensed facility is notified of the licensure requirements and (2) the Department finds and documents that continued operations will be dangerous to the health and safety of the children, or that a license held by the home had been revoked within the past two years; or (3) the home fails to apply for a license within a reasonable time after being notified of the licensing requirements [see *H&S Code § 1597.61(a)*]. If an unlicensed facility does not respond to a properly issued cease and desist order, or the immediate health and safety of the children must be protected, the Department can bring an action to enjoin the home from continuing to operate [*H&S Code § 1597.61(b)*; see *H&S Code § 1596.89*]. Any action brought by the Department against an unlicensed family child care home is instituted and brought by the district attorney's office of the county in which the facility is located [*H&S Code § 1597.61(c)*].

The civil, criminal, and administrative remedies are not exclusive, and may be used in any combination deemed advisable in order to enforce statutes and regulations applicable to family child care homes [22 *Cal. Code Reg. § 102357(c)*; *H&S Code § 1596.892*]. Any action brought by the Department against an unlicensed facility does not abate with the sale or transfer of the facility, except with the written consent of the Department [*H&S Code § 1596.894*].

For discussion of the initial application procedures, see § 100C.71.

Legal Topics:

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§ 100C.71 Initial Application Procedures for Obtaining License

[1] In General

Any person at least 18 years of age is eligible to apply for a family child care home license regardless of age, sex, race, religion, color, political affiliation, national origin, disabilities, or marital status [22 *Cal. Code Reg. § 102368(c)*]. However, no home may be licensed or registered as a large family child care home unless the provider has at least one year's experience as a regulated small family child care home operator, or as an administrator of a licensed child care center, or the director waives this requirement after finding that the applicant has sufficient qualifying experience [*H&S Code § 1597.52(b)*].

The application process to obtain an initial family child care home license is commenced when the applicant files an application with the Department of Social Services on forms furnished by the department [*H&S Code § 1597.54*; 22 *Cal. Code Reg. § 102369(a)*; see § 100C.230]. The application includes a wide range of information and documents [see *H&S Code § 1597.54*; 22 *Cal. Code Reg. § 102369(b)*; see also § 100C.230]. For example, the application must include a statement that the applicant will comply with all rules and regulations governing family child care homes [22 *Cal. Code Reg. § 102369(b)(4)*], and a brief statement confirming that the applicant has sufficient financial resources to operate a home [22 *Cal. Code Reg. § 102369(b)(6)*; *H&S Code § 1597.54(a)*]. Applicants must also provide evidence that the applicant and all other persons residing in the home are of reputable and responsible character, including but not limited to employment history, character references, and criminal record clearance [*H&S Code § 1597.54(f)*; see *H&S Code §§ 1596.871, 1597.59(b)*; see also [2][a], below]. If the applicant fails to cooperate with the Department by not properly providing all required information, the application must be denied [*H&S Code § 1597.54(g)*; see § 100C.93].

[2] Eligibility of Child Care Personnel

[a] Criminal Record Review

[i] Overview

During the application process, the Department will conduct a detailed review of the applicant's criminal history [see *H&S Code § 1596.871*]. The criminal record review process includes securing a criminal record of the applicant, and other individuals associated with the proposed child care facility [see *H&S Code § 1596.871(b)*], for the purpose of determining whether that person has ever been convicted of a crime other than a minor traffic violation, or has ever been arrested for violation of specified sections of the Penal Code [see *Pen Code §§ 245, 273.5, 273a(b), 290(c)*; former *Pen Code § 273a(2)*], or for any crime for which the department cannot grant an exemption if the person was convicted and not subsequently exonerated [*H&S Code § 1596.871(a)*; see *H&S Code § 1596.871(f)(1)*; see also *22 Cal. Code Reg. §§ 102370, 102370.1*].

The following persons are subject to this requirement [*H&S Code § 1596.871(a),(b)(1)(A)-(D)*; see *H&S Code § 1596.871(b)(1)(E)-(G)* (entity requirements)]:

- The applicant for licensure.
- Adults responsible for administration or direct supervision of staff.
- Any person other than a child residing in the facility.
- Any person who provides care and supervision to the children.
- Any staff person, volunteer, and employee who has contact with children.

With respect to the last category listed above, volunteers providing time-limited specialized services and students enrolled or participating at an accredited educational institution are exempt if they are directly supervised by the licensee or a facility employee with a criminal record clearance or exemption, spend no more than 16 hours per week at the facility, and are not left alone with children in care [*H&S Code § 1596.871(b)(1)(D)(i),(ii)*]. A volunteer who is a relative, legal guardian, or foster parent of a child in care is exempt [*H&S Code § 1596.871(b)(1)(D)(iii)*]. A contract repair person retained by the facility is also exempt if the person is not left alone with children in care [*H&S Code § 1596.871(b)(1)(D)(iv)*]. The Department may also exempt similar persons by regulation [*H&S Code § 1596.871(b)(1)(D)(v)*].

Based on the results of the criminal record review, the Department can approve or deny a license, or an individual's employment, residence, or presence, in a child care facility [*H&S Code § 1596.885*; see *22 Cal. Code Reg. §§ 102370, 102370.1*]. If it is found that the applicant or any other person subject to the criminal record review has been convicted [see *H&S Code § 1596.871(d)(1)* ("conviction" defined)] of a crime, other than a minor traffic violation, the application must be denied, unless an exemption for disqualification is granted [*H&S Code § 1596.871(a)*; see *22 Cal. Code Reg. §§ 102370, 102370.1*; see also [iii], below]. The Department may not use a record of arrest to deny, revoke, or terminate any application, license, employment, or residence unless it investigates the incident and secures evidence, whether or not related to the incident of arrest, that is admissible in an administrative hearing to establish conduct by the person that may pose a risk to the health and safety of any person who is or may become a client [*H&S Code § 1596.871(e)*].

For a further discussion of the criminal clearance procedures conducted by the Department before the issuance of a license, see §§ 100C.231, 100C.240.

[ii] Fingerprinting Requirements

It is the intent of the Legislature to require the fingerprints of all individuals whose contact with family child care home clients may pose a risk to the children's health and safety [*H&S Code § 1596.871*]. An individual is required to obtain either a criminal record clearance or a criminal record exemption from the State Department of Social Services before he or she is present in a child day care facility [*H&S Code § 1696.871*]. Before the issuance of a license, the Department

must receive fingerprints from the applicant and all adults residing in the facility, any person who provides care and supervision to the children, and any staff or employee who has contact with the children [see 22 Cal. Code Reg. § 102369(b)(8); H&S Code § 1596.871(a)-(c)]. In addition, all persons subject to criminal record review [see [i], above] must be fingerprinted as a precondition to employment, residence, or initial presence in the home, and must sign a declaration, under penalty of perjury, regarding prior criminal convictions [H&S Code §§ 1596.871(c), 1597.59(b); 22 Cal. Code Reg. § 101170(d)].

For a further discussion of the criminal clearance procedures conducted by the Department before the issuance of a license, see §§ 100C.231, 100C.240.

[iii] Exemptions

After review of the criminal record, the Director of Social Services may grant an exemption from disqualification for a license, or from disqualification for employment, residence, or presence in a family child care home, if the director has substantial and convincing evidence to support a reasonable belief that the applicant and the person previously convicted of a crime (if other than the applicant) are of such good character as to justify the issuance of the license or special permit or the granting of an exemption [H&S Code § 1596.871(f)(1); see 22 Cal. Code Reg. § 102370.1]. For example, if it is found that the applicant (or any other person residing at or regularly visiting the home during the hours of care) has ever been convicted of a crime other than a minor traffic infraction [see H&S Code § 1597.59(b)], the application will be denied, or the license revoked. However, the denial or revocation is not mandatory if (1) the convicted individual has been granted a full and unconditional pardon from the governor or (2) the director determines, after review, that the person is of such good character as to justify the issuance of the license [22 Cal. Code Reg. § 102370.1(c)]. The director may consider, but is not limited to, the following factors in justifying the issuance of a license [22 Cal. Code Reg. § 102370.1(c)(3)]:

- The nature of the offense committed.
- The time elapsed since the offense was committed and the number of offenses.
- The circumstances surrounding the commission of the crime that would demonstrate the unlikelihood of repetition.
- The individual's conduct since the conviction, including employment, education, or participation in therapy, that would indicate changed behavior.
- Character references.
- A certificate of rehabilitation from a superior court.
- Evidence of honesty and truthfulness as revealed in exemption application documents and interviews and conversations with the Department.

The director may not grant an exemption regarding violent or sexual convictions [H&S Code § 1596.871(f); 22 Cal. Code Reg. §§ 102370(g), 102370.1(k)]. Criminal convictions from another state or federal court are treated as if the criminal offense were committed in California [H&S Code § 1596.871(d)(2)].

The licensee must maintain documentation of clearances and exemptions of staff, employees, volunteers, and non-client adults residing in the facility, and must make that documentation available for inspection by the Department at the facility [22 Cal. Code Reg. § 102370(k)].

[iv] Declarations Regarding Prior Criminal Convictions

Following initial licensure, any person subject to the fingerprinting requirement [see [ii], *above*] who is not exempt [see [iii], *above*] must sign, as a condition to employment, residence, or presence in the home, a declaration under penalty of perjury regarding any prior criminal conviction [H&S Code § 1596.871(c)(1)(A)].

[v] Transfer of Current Criminal Records Clearance

On request, the Department may permit an individual to transfer a current criminal records clearance from one facility to another, provided that the clearance has been processed through a state licensing district office and is being transferred to another licensed facility. The request must be submitted in writing to the Department. If the person is a California resident, the person must include a copy of the person's driver's license or valid identification card issued by the Department of Motor Vehicles. If the person is not a California resident, the person must include a valid photo identification issued by another state or the federal government. On the request of the licensee, the Department will verify whether the individual has a transferable clearance, provided that the licensee encloses a self-addressed, stamped envelope for that purpose [H&S Code § 1596.871(h)(1); see H&S Code § 1596.871(h)(2) (Social Services Department will hold criminal records clearance for two years after employee leaves employment at licensed facility); see also 22 Cal. Code Reg. § 102370(j)].

[vi] Denial of Criminal Background Clearance

If the Department has denied a criminal background clearance for an individual based on an information search response provided by the Department of Justice, the individual may make a written request to the Department for a copy of that state or federal level criminal offender record information search response [H&S Code § 1696.871(i)].

[b] Review of Child Abuse Registry

In addition to the criminal record clearance procedures [see [a], *above*], the Department must check the Child Abuse Registry before granting a license to or otherwise approving a family child care home [H&S Code § 1596.877(b)]. For a family child care home license, the agency must also check the child abuse and neglect complaint records of the child protective services agency of the county in which the applicant has resided for the previous two years [H&S Code § 1596.877(a)]. A license cannot be denied based on information from either of these sources unless the child abuse is substantiated [H&S Code § 1596.877(c); see Pen Code §§ 11165.12(b), 11170(b)(4)].

[c] Health and Safety Training

Family child care homes must satisfy health and safety training requirements [see H&S Code §§ 1596.865, 1596.866(a)]. Each licensee must have at least 15 hours of health and safety training [H&S Code § 1596.866(a),(c); see 22 Cal. Code Reg. § 102368(d)]. This training must include pediatric first aid, pediatric cardiopulmonary resuscitation, and preventative health practices course or courses that include instruction in the recognition, management, and prevention of infectious diseases, including immunizations, and prevention of childhood injuries [H&S Code § 1596.866(a),(c)]. These training requirements are a condition of licensure [H&S Code § 1596.866(a),(c)].

Licensees of family child care homes must ensure that at least one staff member has a current certificate, issued by an approved program, in pediatric cardiopulmonary resuscitation and pediatric first aid is present at all times when children are present at the home, or when children are offsite for home activities [H&S Code § 1596.866(b)].

Training in pediatric first aid and pediatric CPR must be current at all times. However, training in preventive health practices is a one-time-only requirement [H&S Code § 1596.866(c)(2)].

A licensee or staff person who obtains or renews a pediatric first aid certificate [see H&S Code § 1596.866] must

complete formal training designed to provide instruction in administering inhaled medication to children with respiratory needs before licensees and staff may administer inhaled medication [*H&S Code § 1596.798(a)(4)*].

[3] Fire Safety Clearance

All large family child care homes must have a fire safety clearance approved by (1) the city or county fire department, (2) the district providing fire protection services, or (3) the state fire marshal, whichever has primary jurisdiction [*H&S Code § 1596.809*; *22 Cal. Code Reg. § 102371*; see *H&S Code § 13235*]. The statute appears to require fire clearances for all family child care homes, but the regulations specify that small homes need not secure a clearance [*compare H&S Code § 1596.809 with 22 Cal. Code Reg. § 102371(b)*]. The summary for the current application booklet states that a fire clearance is required when the application is for seven or more children or nonambulatory children.

[4] Emergency Disaster Plan

The licensee must prepare an emergency disaster action plan on a form provided by the Department [*22 Cal. Code Reg. § 102417(g)(9)*; see *§ 100C.232*]. All children, age and ability permitting, the provider, any assistant provider, and other household members must be instructed in their duties under the disaster plan; as age and ability permit, newly enrolled children must be informed promptly of their duties under the plan. Each home must conduct fire drills and disaster drills at least once every six months. The licensee must document these drills, including the date and time of each drill, and retain the documentation at the home [*22 Cal. Code Reg. § 102417(g)(9)*].

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§ 100C.72 Initial Application Review by Department and Issuance of License or Provisional License

[1] Issuance or Denial of License

Within 30 days after the receipt of all appropriate licensing application materials, the department must conduct an initial site visit [*H&S Code § 1597.59*]. Notwithstanding the requirements of the criminal record review [*see H&S Code § 1596.871(a)*; *see also § 100C.71[2][a]*], the Department must grant or deny a license to a family child care home within 30 days after receiving all appropriate licensing materials, provided that (1) a site visit has actually been completed and the facility is found to be in compliance with licensing standards; and (2) all required persons [*see H&S Code § 1596.871(b)*] have obtained a criminal record clearance or been granted an exemption [*H&S Code § 1597.59(a),(b)*; *see § 100C.230*]. The effect of the withdrawal of an application for licensure is discussed in *§ 100C.271[1]*.

If the requirements for licensure are not met, the Department must deny the application within 30 days after receipt of a completed application [*22 Cal. Code Reg. § 102401(a)*; *see H&S Code § 1596.856*]. In addition, the Department may deny an application for initial licensure if the applicant has failed to pay a civil penalty assessed for operating without a license, in accordance with a final judgment, unless acceptable payment arrangements have been made [*22 Cal. Code Reg. § 102401(b)*; *see 22 Cal. Code Reg. § 102393*].

If the application for an initial license is denied, the Department must immediately notify the applicant in writing. The applicant then has 15 days after the mailing of the notice of denial to petition the Department for a hearing; on receipt of the petition, the department will set a date for a hearing [*22 Cal. Code Reg. § 102401(c)*; *H&S Code § 1596.879*].

Licensing reviews must be limited to health and safety considerations and cannot include reviews of the content of any educational or training program [*H&S Code § 1597.52(a)*]. Further, no limitations may be imposed on the licensee or printed on the license solely on the basis that the licensee is, or admits orally or in writing to being, a parent who has administered or will continue to administer corporal punishment to his or her own children, provided that the punishment does not constitute child abuse [*22 Cal. Code Reg. § 102401(d),(e)*; *see H&S Code § 1531.5(c)*].

[2] Effect of Previous Revocation or Denial of License or Exclusion

If an applicant was previously issued a license to operate a family child care home, clinic [see *H&S Code § 1200 et seq.*], health facility [see *H&S Code § 1250 et seq.*], community care facility [see *H&S Code § 1500 et seq.*], residential care facility for persons with chronic, life-threatening illness [see *H&S Code § 1568.01 et seq.*], or residential care facility for the elderly [see *H&S Code § 1569 et seq.*], and this prior license was revoked within the preceding two years, the Department must stop reviewing the present application until two years have elapsed from the date of the revocation [*H&S Code § 1596.851(a)*].

In general, if an applicant previously applied for one of the above-mentioned licenses, and the application was denied within the last year, the Department must stop reviewing the present application if the applicant appealed or was informed of his or her right to appeal the decision denying the previous application [see *H&S Code § 1596.851(b)*]. When the applicant appealed [see *H&S Code § 1596.879*], that is, when the applicants petitioned for a hearing on the previous denial of a license, the department must stop reviewing the present application until one year has elapsed from the effective date of the decision and order upholding the denial [*H&S Code § 1596.851(b)(1)*]. If the department informed the applicant of the right to appeal, and the applicant did not petition for a hearing, the Department must stop reviewing the application until one year has elapsed from the date of the notification of the denial and the right to petition for a hearing [*H&S Code § 1596.851(b)(2)*]. However, the Department may continue to review the application after determining that the reasons for the denial of the previous application were due to circumstances and conditions that have been corrected or that no longer exist [*H&S Code § 1596.851(b)(3)*].

Similarly, if the applicant was excluded from a licensed facility [see *H&S Code §§ 1558, 1568.092, 1569.58, 1596.8897*], the Department must cease further review of the application unless the excluded individual has been reinstated [*H&S Code § 1596.851(a)(3)*; see *Gov. Code § 11522*].

The cessation of review does not constitute denial of the application [*H&S Code § 1596.851(b)(3),(d)*].

[3] Provisional Licenses

The Department may also issue a provisional license [see *22 Cal. Code Reg. § 101152(p)(4)* ("provisional license" defined)] to operate a family child care home if (1) the home is in substantial compliance with applicable licensing laws, (2) the home has submitted a completed application, and (3) no life safety risks are involved [*H&S Code § 1596.84*]. In determining whether any life safety risks are involved, all applicable fire and criminal record clearances must be completed [*H&S Code § 1596.84*].

A provisional license is valid for up to six months from the date of issuance if the Department determines full compliance with licensing regulations will be achieved within that time [*H&S Code §§ 1596.84, 1596.96(c)*; *22 Cal. Code Reg. § 101181(e)*]. The term of the provisional license may be extended an additional six months, up to a maximum of 12 months, if more than six months will be required to achieve full compliance with licensing standards due to circumstances beyond the applicant's control [*H&S Code §§ 1596.84, 1596.96(c)*; *22 Cal. Code Reg. § 101181(e)*]. However, if the Department discovers any serious deficiencies during the provisional license period, the Department has authority to institute administrative action or civil proceedings, or to refer the case for criminal prosecution [*22 Cal. Code Reg. § 101181(d)*; see *22 Cal. Code Reg. § 101152(s)(3)* ("serious deficiencies" are those that represent an immediate or substantial threat to the physical or mental health or safety of children)].

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§ 100C.73 Continuing Term of License

A license for a family child care home is not issued for a finite term [*see H&S Code § 1597.54*]. Rather, it continues in effect unless suspended, revoked, or forfeited for cause [*see H&S Code § 1596.856; see also § 100C.93* (suspension, revocation, or forfeiture)].

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§ 100C.74 General Operating Requirements

Family child care homes must satisfy special operating requirements [see 22 Cal. Code Reg. §§ 102416-102424], but are not subject to general operating regulations applicable to other child care facilities [22 Cal. Code Reg. § 102351.1]. The license must be kept available in the facility on request [22 Cal. Code Reg. § 102368(a)].

The licensee must be present in the home and ensure that the children in care are properly supervised at all times. If circumstances require the licensee's temporary absence, the licensee must arrange for a substitute adult to care for and supervise the children during the absence. Temporary absences may not exceed 20 percent of the hours that the home is providing care per day [22 Cal. Code Reg. § 102417(a)].

The home must be kept clean and orderly, with adequate heating and ventilation, must maintain telephone service, and must provide safe toys, play equipment, and materials [see 22 Cal. Code Reg. § 102417(b)-(d)]. The licensee must keep the home free from defects or conditions that might endanger a child; "baby walkers" are specifically prohibited [H&S Code § 1596.846(b),(c); 22 Cal. Code Reg. § 102417(g); see 16 C.F.R. § 1500.86(a)(4) (definition)]. Safety precautions include, but are not limited to, the screening of fireplaces and open-face heaters; the maintenance of a fire extinguisher and smoke detector; the fencing or barricading of stairs if children are under five years old; and the establishment of inaccessible locked storage areas for poisons, medicines, firearms, and other dangerous items [see 22 Cal. Code Reg. § 102417(g)]. The smoking of tobacco in a private residence that is licensed as a family child care home is prohibited during the hours of operation as a family child care home and in those areas of the home where children are present. Cities and counties may enact or enforce more stringent ordinances that regulate smoking in these homes [H&S Code § 1596.795(a); 22 Cal. Code Reg. § 102424]. Strict requirements must be satisfied if the facility will be transporting children in motor vehicles, such as requiring car seats for infants and prohibiting leaving children unattended in parked vehicles [see 22 Cal. Code Reg. § 102417(h)-(l)].

Family child care homes must maintain a current roster of children receiving care in the facility [see H&S Code § 1596.841; 22 Cal. Code Reg. § 102417(g)(8); see also § 100C.253], and an emergency information card for each child [22 Cal. Code Reg. § 102417(g)(7); see §§ 100C.76, 100C.255].

When a child shows signs of illness, the child must be separated from the other children and the nature of the illness must be determined. If the child's disease is communicable, the child must be separated from the other children until the infectious stage is over [see 22 Cal. Code Reg. § 102417(e)]. Whenever food is brought from the children's homes, the container must be labeled with the child's name and properly stored or refrigerated [see 22 Cal. Code Reg. § 102417(f)].

The licensee must also comply with liability insurance coverage requirements [22 Cal. Code Reg. § 102417(m),(n); see H&S Code § 1597.531; see also §§ 100C.13[2], 100C.257[1]].

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§ 100C.75 Personnel, Staffing Ratio, and Capacity Requirements

The licensee of a family child care home must meet specified personnel, staffing ratio, and capacity requirements. The licensee must notify all personnel, in writing, of their rights under the Child Day Care Facilities Act [22 *Cal. Code Reg. § 102416*; see *H&S Code §§ 1596.880-1596.883*]. The licensee must provide each employee with a copy of the Notice of Employee's Rights form [see § 100C.250], request that each employee sign and date the notice form acknowledging receipt, and retain the signed notice form in each employee's personnel record [22 *Cal. Code Reg. §§ 102416(a)(1),(2), 102417(q)*]. If the employee refuses to sign the notice form, a dated notation to that effect must be retained in the employee's personnel record [22 *Cal. Code Reg. § 102416(a)(3)*].

With regard to staffing ratios, the capacity specified in the license is the maximum number of children for whom care may be provided [22 *Cal. Code Reg. § 102416.5(a)*]. For small family child care homes, the maximum number of children (including the licensee's children under the age of 10 who live in the home) for whom care must be provided is either (1) four infants, that is, children under the age of two; or (2) six children, no more than three of whom can be infants [22 *Cal. Code Reg. § 102416.5(b)*]. A small home may provide care for up to eight children, without an additional adult attendant, provided that at least one child is enrolled in and attending kindergarten or elementary school and a second child is at least six years of age, no more than two infants are cared for when more than six children are in care, the licensee notifies each parent, and the licensee obtains the written consent of the property owner if the premises are rented or leased [*H&S Code § 1597.44*].

For large family child care homes with an assistant provider, the maximum number of children (including the licensee's children under the age of 10 who live in the home and the assistant provider's children under 10) is 12, no more than four of whom can be infants [22 *Cal. Code Reg. § 102416.5(c)*]. A large home may provide care for up to 14 children, provided that at least one child is enrolled in and attending kindergarten or elementary school and a second child is at least six years of age, no more than three infants are cared for when more than 12 children are in care, the licensee notifies each parent, and the licensee obtains the written consent of the property owner if the premises are rented or leased [*H&S Code § 1597.465*].

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§ 100C.76 Children's Records

The licensee must maintain individual emergency information cards for all children receiving care. The card must include the child's full name, the telephone number and location of the authorized representative (parent, guardian, or other responsible adult) to be contacted in the case of an emergency, the name and telephone number of the child's physician, and the parent's authorization for the licensee or registrant to consent to emergency medical care [22 *Cal. Code Reg. § 102417(g)(7)*; *see § 100C.255*]. The licensee must also ensure that all children satisfy the immunization requirements for children enrolled in a family child care home before admission [22 *Cal. Code Reg. § 102418*; *see H&S Code §§ 1596.813, 1597.541, 120335*; *see also 17 Cal. Code Reg. § 6000, 6015, 6020, 6035(a)*].

The licensee must inform all authorized representatives of their rights, including the right to enter and inspect the home [see *H&S Code § 1596.857(a)*], provide a copy of the notice form provided by the Department, and request that the authorized representative sign and date the form acknowledging that he or she has received and read the notice [22 *Cal. Code Reg. § 102419(a),(b),(d)*; *see H&S Code § 1596.857(d)*; 22 *Cal. Code Reg. § 102419(b)* (posting requirement); *see also § 100C.78*]. The licensee must also provide to all authorized representatives the Caregiver Background Check Process form [LIC 995E] at the time of acceptance of each child into care [22 *Cal. Code Reg. § 102419(c),(d)*]. The licensee must maintain the signed and dated receipt for the parents' rights notice, which includes a receipt statement for the Caregiver Background Check Process form in the child's record [22 *Cal. Code Reg. § 102419(d), 102421(a)*]. If the authorized representative refuses to sign the receipt or the notice form, dated notations to that effect must be placed in the child's record [22 *Cal. Code Reg. § 102419(g)*]. The signed and dated receipts, notice forms, and notations must be retained for at least three years following the termination of service to the child [22 *Cal. Code Reg. § 102421(a)(1)*]. In addition, on acceptance of each child into a day care facility after January 1, 2007, the licensee must provide the child's parent or guardian with a copy of the Family Child Care Home Notification of Parents' Rights provided by the Department of Social Services. This notice includes information stating that the specified registered sex offender database is available to the public at a web site, www.meganslaw.ca.gov, that is maintained by the Department of Justice. [*H&S Code § 1596.857(e)*]. A provider, however, is not required to provide any additional information regarding the location and proximity of registered sex offenders who reside in the community where the child care facility is located [*H&S Code § 1596.857(f)*].

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§ 100C.77 Children's Personal Rights

Each child receiving services from a family child care home has certain rights that cannot be waived or abridged by the licensee, regardless of parental consent or authorization. These rights include being treated with dignity in the child's personal relationship with staff and other persons; receiving safe, healthful, and comfortable accommodations, furnishings, and equipment; having parents or guardians informed of complaint procedures; and being free from corporal or unusual punishment, abuse, or punitive interference with daily functions [see 22 Cal. Code Reg. § 102423(a)].

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§ 100C.78 Posting Requirements

The licensee must permanently post, in an area of the facility that is accessible to parents and guardians, a copy of the written notice setting forth the parents' or guardian's right to enter and inspect the home. It must include information stating that the specified registered sex offender database is available to the public at a web site, www.meganslaw.ca.gov, that is maintained by the Department of Justice [*H&S Code § 1596.857(d)*]. This notice, available from the department, must also state the prohibition against retaliation for the exercise of those rights and the right of parents and guardians to review, at the facility site, licensing reports documenting facility visits and substantiated complaints against the facility [*H&S Code § 1596.857(d)*; *see 22 Cal. Code Reg. § 102419(b)*; *see also H&S Code § 1596.859* (licensing report requirements)]. In addition, the licensee must post a notice, provided by the department, that identifies the Department, explains how the licensing regulations may be obtained, provides the local telephone number where complaints may be made, and sets forth the nonretaliation provisions applicable to employees [*H&S Code § 1596.874*; *see H&S Code § 1596.881*]. The notice must be posted at a location in the facility that can be easily seen by employees and consumers [*H&S Code § 1596.874(a)*].

A copy of the license must be available in the facility [*22 Cal. Code Reg. § 102368(a)*]. To satisfy this requirement, the licensee may post a copy of the license.

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§ 100C.79 Use of License Number in Advertising Required

After licensure, each family child care home must state its license number in all advertisements, publications, or announcements made with the intent to attract clients [*H&S Code § 1596.861(a)*]. Advertisements, publications, or announcements in which the license number must be revealed include those contained in newspapers or magazines, consumer reports, announcements of intent to commence business, telephone directories, professional or service directories, and radio or television commercials [*H&S Code § 1596.861(b)*].

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DIVISION VII: PERSONAL TRANSACTIONS

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C. Family Child Care Homes

1. Licensing and Operational Requirements

32-100C California Legal Forms--Transaction Guide § 100C.80

§ 100C.80 Licenses Not Subject to Sale or Exchange

No license or special permit issued pursuant to the Child Day Care Facilities Act has any property value for sale or exchange purposes, and a license or special permit cannot be sold or exchanged for any commercial purpose [*H&S Code § 1596.85*].

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1. Licensing and Operational Requirements

32-100C California Legal Forms--Transaction Guide §§ 100C.81-100C.89

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32-100C California Legal Forms--Transaction Guide § 100C.90

§ 100C.90 Overview

The Department must take certain actions to ensure compliance with the rules and regulations applicable to family child care homes, including conducting ongoing programs and seminars for licensing staff and law enforcement agencies, and ensuring that license revocations appear on criminal records [see *H&S Code § 1596.875*]. The Department is also charged with extensive licensing duties relating to applications for initial licenses and renewal licenses. However, licensing reviews must be limited to health and safety considerations, and cannot include any review of the content of any educational or training program of the facility [*H&S Code § 1597.52(a)*].

The Department has broad inspection authority [see *H&S Code §§ 1596.852, 1596.8535, 1596.853, 1597.55a, 1597.55b*; see also *22 Cal. Code Reg. §§ 102391, 102392*; § 100C.91]. The Department also has numerous remedies that can be used to enforce compliance, including the imposition of monetary penalties [see § 100C.92; see also § 100C.52[3]], the issuance of citations [see § 100C.53] or injunctions [see § 100C.54], and the denial, suspension, revocation, or forfeiture of licenses [see § 100C.93]. Willful or repeated violation of any applicable rule or regulation is punishable as a misdemeanor and subjects the guilty party to a fine and/or imprisonment [see *H&S Code § 1596.890*]. These remedies are not exclusive, and can be sought and employed in any combination to enforce provisions of the Child Day Care Facilities Act [*H&S Code § 1596.892*].

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32-100C California Legal Forms--Transaction Guide § 100C.91

§ 100C.91 Site Visits and Inspections

[1] Site Visits and Inspections by Governmental Authorities

The licensee must permit the Department to inspect the facility, and to privately interview children or staff, to determine compliance with, or to prevent violations of, family child care laws or regulations [22 *Cal. Code Reg. § 102391(b)*; see *H&S Code §§ 1596.852, 1597.55a(g), 1597.55b(f)*; see also 22 *Cal. Code Reg. § 102392*]. These inspections and interviews may only be conducted during the period beginning one hour before and ending one hour after the facility's normal business hours or at any time child care services are being provided, unless the Department (1) is investigating a complaint and (2) determines that an inspection or site visit outside the time period beginning one hour before, and ending one hour after, the center's normal operating hours is necessary to protect the health or safety of any child [*H&S Code § 1596.8535(a)*; 22 *Cal. Code Reg. § 102391(b)*; see *Rush v. Obledo (1985) 756 F.2d 713, 722 (H&S Code § 1596.852 violates Fourth Amendment to the United States Constitution as overbroad)*]. The licensee must permit the Department to inspect any part of the facility in which family child care services are provided or to which any children have access [22 *Cal. Code Reg. § 102391(c)*; see *H&S Code §§ 1597.55a, 1597.55b*].

An announced site visit is required before the initial licensure of a family home [*H&S Code §§ 1597.55a(a), 1597.55b(a)*; 22 *Cal. Code Reg. § 102392*]. Unannounced site visits mandated by law must occur at least every five years [see *H&S Code § 1597.55a(d), (h)*] and, under some circumstances, at shorter intervals [see *H&S Code §§ 1597.55a(b),(c),(h), 1597.55b(c),(e),(g)* (annually in specified circumstances)].

It is a misdemeanor to inform, without proper authorization, a family child care home of an impending or proposed inspection or evaluation of that facility; this offense is punishable by a fine and/or imprisonment [see *H&S Code § 1596.8915*].

All site visits are subject to rights of the home's operator, including the right to require licensing field staff to identify themselves, the right to be advised of the type of visit, and the right to receive an accurate report of the evaluator's findings [see *H&S Code § 1596.842(a)*; see also § 100C.51[5]]. Further, each licensee has the right, without prejudice

or risk of discriminatory treatment by the Department, to notify the Department of any action or behavior by the licensing representative that the licensee believes to constitute a wrongful application or capricious enforcement of the family child care home regulations [22 *Cal. Code Reg. § 102403(a)*]. In addition, each licensee has the right to complain to the Department regarding any review of any disputed issues [22 *Cal. Code Reg. § 102403(b)*].

The licensee must permit the Department to inspect, audit, and copy children's records or other family child care home records on demand during normal business hours. The Department may remove records for three business days if necessary, for copying [22 *Cal. Code Reg. § 102391(d)(1),(3)*]. The right to remove designated current records is restricted unless that same information is otherwise readily available in another document or format [see 22 *Cal. Code Reg. § 102391(d)(1)*]. Further, before removing any records, the Department must prepare a list of the records to be removed, sign and date the list on their removal, and leave a copy of the list with the licensee or designated substitute [22 *Cal. Code Reg. § 102391(d)(2)*].

[2] Parental Inspections and Requests for Inspections

In addition to the Department's right to inspect family child care homes [see [1], *above*], the responsible parent or guardian of a child receiving family child care has the right to enter and inspect the home, without advance notice, during the normal operating hours or at any time that the child is receiving care [*H&S Code § 1596.857(a)*]. For further discussion, see § 100C.51[2].

Any person may request a Departmental inspection of any home by transmitting, either orally or in writing, a notice or complaint alleging a violation of applicable rules or regulations [*H&S Code § 1596.853(a)*]. For further discussion, see § 100C.51[3].

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32-100C California Legal Forms--Transaction Guide § 100C.92

§ 100C.92 Notices of Deficiencies and Imposition of Civil Penalties

The Department of Social Services must notify family child care homes in writing of all deficiencies in their compliance with applicable rules and regulations and set forth a reasonable time for compliance [*H&S Code § 1597.56; see H&S Code § 1596.844*].

Operators of unlicensed family child care homes are subject to cease and desist orders [*see H&S Code § 1597.61(a); see also § 100C.70[3]*], and orders enjoining them from continuing operations [*see H&S Code §§ 1596.89, 1597.61(b)*]. In addition, civil penalties may be assessed against operators of unlicensed family homes [*see 22 Cal. Code Reg. § 102393*]. The process of appealing this type of penalty assessment [*see 22 Cal. Code Reg. § 102402*] is essentially the same as the appeal process applicable to child care centers operating without a license [*see 22 Cal. Code Reg. §§ 101198, 102394; see also § 100C.52[4][b]*]. The transfer, surrender, forfeiture, or revocation of a license [*see § 100C.93*] does not affect the licensee's responsibility for paying civil penalties accrued while the license was in effect, unless the Department orders to the contrary [*22 Cal. Code Reg. § 102402.1(a)(1)*]. However, any denial or revocation of licensure for failure to pay civil penalties may be appealed [*22 Cal. Code Reg. § 102402.1(c); see H&S Code § 1596.887*].

Legal Topics:

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32-100C California Legal Forms--Transaction Guide § 100C.93

§ 100C.93 Denial, Suspension, Revocation, and Forfeiture of Licenses

[1] Denial

The Department must deny an application for licensure within 30 days after receipt of the completed application if the licensing requirements are not met [22 *Cal. Code Reg.* § 102401(a)]. Whenever it is determined that the licensee or anyone subject to the criminal clearance requirements [see § 100C.71[2]] has a criminal record (and has not been granted an exemption), the license will be denied [H&S Code § 1597.59(b); see H&S Code § 1596.871(b); see also 22 *Cal. Code Reg.* § 102401]. Initial licensure may also be denied if the applicant has failed to pay any final civil penalty assessment unless payment arrangements have been made [22 *Cal. Code Reg.* § 102401(b)]. However, a license may not be denied (or limited) solely on the basis that the applicant is a parent who has administered or will continue to administer corporal punishment not constituting child abuse on his or her own children [22 *Cal. Code Reg.* § 102401(d),(e)].

Immediately after the denial of a licensing application, the Department must notify the applicant in writing. The applicant has 15 days in which to present a written petition for hearing [22 *Cal. Code Reg.* § 102401(c)].

[2] Suspension, Revocation, and Forfeiture

A family child care license may be suspended or revoked on any of the following grounds [see 22 *Cal. Code Reg.* § 102402; see H&S Code §§ 1596.856, 1596.885]:

- The violation by the licensee of the applicable laws, rules, and regulations.
- Aiding, abetting, or permitting the violation of the applicable laws, rules, and regulations.
- Conduct in the operation of a home that is inimical to the health, morals, welfare, or safety of any person in or receiving care from a family child care home or the people of California.

- The conviction, at any time during licensure, of the licensee or persons subject to the criminal clearance requirement [see 22 Cal. Code Reg. § 102369(b)(8); see also H&S Code § 1596.871(b)] of any crime other than minor traffic violations [see 22 Cal. Code Reg. § 102370(g)].
- Engaging in acts of financial malfeasance concerning operations, including, but not limited to, improper use or embezzlement of client funds and property, fraudulent appropriation for personal gain of facility funds and property, or willful or negligent failure to provide services for the care of clients.
- The failure to comply with the health safety training requirements [see § 100C.71(2)(c)].

Improper conduct, such as child molestation, by a family child care home employee not occurring at the home itself, but that has an impact within the home, is within the scope of conduct that is contrary to the health, safety, welfare, and morals of children at family child care homes, and thus constitutes grounds for license revocation [see *Adamson v. Department of Social Services* (1988) 207 Cal. App. 3d 14, 24, 254 Cal. Rptr. 667] .

A family child care home license will be revoked if the facility fails to obtain either liability insurance or an affidavit from each parent of a child enrolled in the facility acknowledging that the facility does not carry insurance [see H&S Code § 1597.531; see also § 100C.257].

A license may be temporarily suspended when necessary to protect any child in a family child care home from physical or mental abuse, abandonment, or any other substantial threat to health or safety [H&S Code § 1596.886; 22 Cal. Code Reg. § 102402(b); see 22 Cal. Code Reg. § 102370]. The Department's authority to suspend a license temporarily is discussed in § 100C.55[4].

A family child care home license may also be forfeited by operation of law [see H&S Code § 1596.858]. The grounds for forfeiture are discussed in § 100C.55[2].

Legal Topics:

For related research and practice materials, see the following legal topics:

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A. Client Interview--Facts and Documents

32-100C California Legal Forms--Transaction Guide § 100C.100

§ 100C.100 Initial Licensure

[1] Facts

1. Facts regarding classification of facility.
 - a. Location where child care services will be provided:
 - (1) Client's home.
 - (2) Location other than client's home.
 - b. Number of children for whom client plans to provide care.
 - c. Ages of children for whom client plans to provide care.
 - (1) Infants (children under age of two).
 - (2) Toddlers (older infants between ages of 18 and 30 months).
 - (3) Preschool children.
 - (4) School-age children.
 - d. Types of services to be provided.
 - (1) Duration of daily care.
 - (2) Whether standard services (i.e., care, supervision, and assisting in personal hygiene),

and/or special services will be provided.

(3) Whether services include medical care to children.

NOTE:

Only facilities providing nonmedical care to children on less than a 24-hour basis are classified as "child day care facilities" [*see H&S Code § 1596.750*].

2. Facts for obtaining license.

a. Client's name, including all names ever used, such as maiden name or aliases, mailing address, telephone number, and age.

b. Name and address of proposed facility.

c. Type of facility license sought.

(1) Child care center.

(2) Infant care center.

(3) School-age day care center.

(4) Center for mildly ill children.

(5) Combination of above.

(6) Large or small family child care home.

NOTE:

If the client intends to operate another kind of facility, or to seek another type of license, licensure may not be required, or licensure may have to be sought under another body of law [*see § 100C.10[4]*].

d. Facts relating to children for whom client intends to provide care, to extent known.

(1) Total number of children.

(2) Age range of children.

(3) Number of ambulatory and nonambulatory children.

(4) Whether mildly ill children will be accepted for care.

(5) Whether children with special needs, such as physical or emotional disabilities, will be accepted for care.

e. Days and hours of operation.

f. Nature of client's licensing plans.

(1) Whether client is opening new facility or purchasing existing facility.

(2) Whether client is changing type or capacity of facility.

(3) Whether client is moving existing facility to new site, or continuing to operate facility after change in licensee's legal status (e.g., from corporation to individual).

g. Whether client has been previously licensed to operate child care center, residential care facility for elderly, community care facility, or health facility, and whether present facility previously has been licensed.

(1) Name and address of previously licensed facility, facility type, license number, and effective dates of licensure.

(2) Whether client has held beneficial ownership of 10 percent or more, or was administrator, general partner, corporate officer, or director of other facility.

(3) Whether any disciplinary actions were taken, and, if so, nature of these actions.

h. Whether client has previously been denied child care center license.

i. If client is seeking child care center license:

(1) Status of applicant or licensee.

(a) Individual.

(b) Profit or nonprofit corporation.

(c) Partnership.

(d) Limited liability company.

(e) Public entity.

(2) Name and title of person to be in charge of center.

(3) Whether client owns or rents facility premises, and if renting, name and address of owner.

(4) Whether major construction is required for facility, and if so dates construction is to begin and end.

(5) Whether source of water for human consumption is private or public.

(6) Financial information.

(a) Names and addresses of banks/financial institutions, including checking and savings account numbers.

(b) Detailed breakdown of client's assets and liabilities.

(7) Client's business and professional experience.

(a) Whether client has owned or operated business, and if so type of business, number of employees, client's title, dates business started and ended, and reasons for termination.

(b) Whether client holds professional license or certificate, and if so type held, period held, and issuing agency.

(c) Whether client is member of professional or technical association and, if so, association name and address.

(d) Names, addresses, telephone numbers and relationships of personal and financial references with knowledge of client's administrative abilities, financial resources, and business practices.

(8) Estimated operating budget.

(a) Number of children who will be accepted per month and average fee to be charged per child.

(b) Other income to be used for operating costs.

(c) Detailed breakdown of operating costs for services, such as food, cleaning, and equipment.

(d) Detailed breakdown of administrative costs, such as salaries, supplies, and insurance.

(e) Detailed breakdown of property costs, such as rent, taxes, utilities, and repairs.

(9) What steps client intends to take to train staff.

(10) Center's purpose and goals, and the basic services, programs, and activities to be provided.

(11) How center will set rates and provide refunds.

(12) Client's theories on discipline and specific forms of discipline that will and will not be used.

(13) Equipment and furniture to be used.

j. If client is seeking family child care home license:

(1) Directions to home.

(2) Name, age, and relationship to applicant of all persons residing in home.

(3) Whether client is financially secure to operate family child care home.

(4) Names, addresses, and telephone numbers of character references.

(5) If client rents or leases property, landlord's address.

(6) Whether client has been operator of small family child care home or administrator of child care center.

NOTE:

Applicants seeking large family child care home licensure must have at least one year's experience as a regulated small family child care home operator or as an administrator of a licensed day care center [*H&S Code § 1597.52(b)*].

k. Whether client, or any other individual who may come into contact with children at facility, has ever been convicted of a crime other than minor traffic violation.

l. Name, address, telephone number, age, title, job description, days and hours of work, and educational and employment background for each individual to be employed at facility, if known.

m. Educational and employment background of client.

(1) Name and location of high school and college(s) attended, date each was completed, course of study, and degrees received.

(2) Names and addresses of last five employers, dates of each employment, basic duties, and reasons for termination.

n. Personal information about client and other individuals to be employed at facility, if known, such as height, weight, eye and hair color, social security number, and driver's license number, which is needed for child abuse index check.

o. General physical and mental health of client and others to be employed at facility.

(1) Whether any physical conditions exist that could impair their ability to provide care.

(2) Whether they have ever been treated for or subject to mental illness, or narcotics or drug use.

p. If client is corporation seeking licensure:

(1) Corporation's name (as filed with Secretary of State), file number, address of principal office, title of contact person, and date and place of incorporation.

(2) Chief executive officer.

(3) Names and addresses of all persons who own 10 percent or more of corporation's stock.

(4) Governing board of directors, including number of board members, terms of office, frequency of meetings, and methods of selection.

(5) Names, addresses, and telephone numbers of corporate officers (president, vice president, secretary, and treasurer), and when their terms expire.

q. If client is partnership seeking licensure:

(1) Name and principal business address of each partner.

(2) Whether each partner is general or limited partner.

(3) Name, title, and telephone number of contact person.

r. If client is limited liability company seeking licensure:

(1) Name and principal business address of each managing member or manager.

(2) File number.

(3) Name, title, and telephone number of contact person.

s. Assignment of each staff member during disaster, and where children will be relocated in case of emergency.

NOTE:

As part of the initial application process, all child care facilities must develop a plan in case of a disaster or emergency [*see* 22 *Cal. Code Reg.* §§ 101174, 102417(g)(9); *see also* §§ 100C.210, 100C.232].

t. Whether facility will be providing transportation arrangements for children and, if so, details of those arrangements to extent known.

u. Whether facility will be serving food and, if so, kinds of food to be served and at what times during day.

[2] Documents

1. If client is corporation:

a. Copy of articles of incorporation, with Secretary of State seal, and any amendments.

b. Copy of bylaws and any amendments.

c. Resolution authorizing filing of child care facility application.

d. If foreign corporation, copy of authorization to do business in California.

2. If client is partnership, copy of partnership agreement.

3. If client is limited liability company, copy of operating agreement.

4. If client is public agency, resolution authorizing filing of child care facility application.

5. If client owns property, documentation of ownership such as property tax statement.

6. If client rents or leases property, copy of rental agreement or lease.

7. Sketch of facility building, including floor plan, grounds, doorways, exits, fences, storage areas, and other areas to be used by children.

8. If client is seeking child care center license:

a. Health screening report for all facility personnel, except volunteers.

NOTE:

All day care center personnel must be in good health and physically, mentally, and occupationally capable of performing assigned tasks. To verify personnel's health, a timely health exam must be completed and a report made by a qualified physician [*see* 22 *Cal. Code Reg. § 101216(g)*]. A health screening report form is provided by the Department of Social Services [*see* § 100C.209].

b. Documentation evidencing that volunteers have had current test for tuberculosis.

c. College transcripts and reference letters of center's director and teachers to verify qualification requirements [*see* § 100C.211].

NOTE:

Teacher transcripts are not needed to obtain initial licensure and need only be maintained at facility site after obtaining license [*see* 22 *Cal. Code Reg. §§ 101216.1(g), 101416.2(d)*].

d. Financial information verification completed by bank or financial institution (form provided by Department of Social Services).

9. If client is seeking family child care home license:

a. Documentation evidencing that client, persons 14 years or older providing care in home, and other adults residing in home have had current test for tuberculosis.

b. Documentation indicating large family child care home applicant has at least one year's experience as small family child care home operator or child care center administrator.

NOTE:

The Department of Social Services may waive this requirement on a finding that the applicant has sufficient qualifying experience [*H&S Code § 1597.52(b)*].

10. Lease or rental agreement or deed depending on whether client rents or owns facility site.

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32-100C California Legal Forms--Transaction Guide §§ 100C.101-100C.109

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B. Preliminary Determinations

32-100C California Legal Forms--Transaction Guide § 100C.110

§ 100C.110 General Licensing Determinations

1. Determine if facility must be licensed under California Child Day Care Facilities Act [*H&S Code § 1596.70 et seq.*]:

a. Does facility constitute a "child care center?"

NOTE:

Only facilities providing nonmedical care to children under 18 years of age who are in need of personal services, supervision, or assistance essential for sustaining the activities of daily living, or for protection of the individual on less than a 24-hour basis are child care facilities and thus subject to licensure [*see H&S Code §§ 1596.750, 1596.80*]. "Day care center" means any child day care facility other than a family day care home, and includes infant centers, preschools, extended day care facilities, and school-age child care centers [*H&S Code § 1596.76*].

b. Is facility exempt from licensing requirements [*see H&S Code § 1596.792; see also § 100C.10[4]*]?

(1) Is facility subject to other governmental regulation or licensing?

NOTE:

Examples of facilities that are subject to other licensing and regulation are health facilities [*H&S Code § 1596.792(a); see H&S Code § 1250*], clinics [*H&S Code § 1596.792(b); see H&S Code § 1202*], community care facilities [*H&S Code § 1596.792(c); see H&S Code § 1502*], and extended day care programs operated by public or private schools [*H&S Code § 1596.792(h)*].

In addition, licensed alcohol and drug treatment program facilities, administered by the

Department of Corrections and Rehabilitation, that house women and their children and are specifically designated for the purpose of providing substance abuse treatment and maintaining and strengthening the family unit are exempt [*see H&S Code § 1596.792(m)*].

(2) Does family child care home provide care for children of only one family in addition to operator's own children [*H&S Code § 1596.792(d)*]?

(3) Does facility provide care only for children of operator's relatives [*H&S Code § 1596.792(f)*]?

(4) Does facility provide free care to 12 or fewer children pursuant to cooperative arrangement among parents when parents rotate as responsible care giver, and care is provided only by and in homes of certain relatives [*see H&S Code § 1596.792(e)*]?

(5) Is facility publicly run recreation program [*see H&S Code § 1596.792(g)*]?

NOTE:

To be eligible for this exemption, a publicly run recreation program must meet specific requirements as to the number of hours per week (and, in most cases, the number of weeks per year) it is in session, based on the age group to which the program is offered [*see H&S Code § 1596.792(g)*].

(6) Is care provided by school parenting or adult education program operated by public school district or individual or organization under contract with public school district [*see H&S Code § 1596.792(i)*]?

NOTE:

For privately run recreation programs, specified programs conducted by the Girl Scouts, Boy Scouts, Boys Club, Girls Club, and Camp Fire are exempt from the Act. However, child care programs operated by these organizations are not exempt [*H&S Code § 1596.793*].

(7) Does facility operate one day per week for no more than four hours on that day [*H&S Code § 1596.792(j)*]?

(8) Is facility providing temporary child care services where parents and guardians remain on premises [*H&S Code § 1596.792(k)*]?

NOTE:

To qualify for this exemption, the facility cannot be operated on the site of a ski facility, shopping mall, department store, or other similar site [*see H&S Code § 1596.792(k)(2)*].

(9) Does facility provide activities of instructional nature in classroom-like setting only during periods in which public schools are normally not in session because of regularly scheduled vacations [*H&S Code § 1596.792(l)*]?

NOTE:

To qualify for this exemption, the total number of sessions during the periods described above cannot exceed 30 days when only school-age children are enrolled or 15 days when children younger than school-age children are enrolled [*see H&S Code § 1596.792(l)(2)*].

2. If licensure is required under the Child Day Care Facilities Act, determine type of facility license sought:

a. Child care center.

NOTE:

A "child care center" or "day care center" means any child day care facility other than a family day care home, and includes infant centers, preschools, extended day care facilities, and school-age child care centers [*H&S Code § 1596.76*] in which less than 24-hour per day nonmedical care and supervision is provided for children in a group setting [*22 Cal. Code Reg. § 101152(c)(7)*]; *see* P c, **below**. "Child care center" includes infant centers [*see 22 Cal. Code Reg. §§ 101152(i)(2), 101351*], child care centers for mildly ill children centers [*see 22 Cal. Code Reg. § 101552(c)(10)*], and school-age child care center [*see 22 Cal. Code Reg. §§ 101152(s)(2), 101451*].

b. Employer-sponsored child care center.

NOTE:

An "employer-sponsored child care center" is any child care center at the employer's site of business, operated directly or through a provider contract by any person or entity having one or more employees, and available exclusively for the care of children of that employer and of the officers, managers, and employees of that employer [*H&S Code § 1596.771*].

c. Family child care home.

NOTE:

A "family child care home" is a home that regularly provides care, protection, and supervision of 14 or fewer children in the provider's own home for periods of less than 24 hours per day while the parents or guardians are away [*H&S Code § 1596.78(a)*].

(1) Small family child care home; or

NOTE:

A "small family child care home" is a home that provides family child care to eight or fewer children, including children under age 10 who reside at the home [*H&S Code § 1596.78(c)*; *see H&S Code § 1597.44* (additional rules for homes with seven or eight children)].

(2) Large family child care home.

NOTE:

A "large family child care home" is a home that provides family child care to no fewer than seven and not more than 14 children, including children under age 10 who reside at the home [*H&S Code § 1596.78(b)*]; *see H&S Code § 1597.465* (additional rules for homes with 13 or 14 children)].

3. Determine whether client is eligible for waiver of or exception to licensing requirements.

NOTE:

To avoid strict compliance with many licensing rules and regulations, some facilities may seek a waiver of the licensing requirements from the Department of Social Services [*see 22 Cal. Code Reg. § 101175(b)*; *see also § 100C.270*]. An employer-sponsored child day care center sponsored by a small business may be eligible for a reasonable waiver of those regulations that present difficulties to the small business [*H&S Code § 1597.71*; *see H&S Code § 1597.70* (legislative findings)].

4. Determine which licensing rules and regulations apply to client's type of facility:

NOTE:

The Child Day Care Facilities Act [*H&S Code § 1596.70 et seq.*] and the regulations promulgated by the State Department of Social Services [*22 Cal. Code Reg. § 101151 et seq.*] govern the establishment and operation of child care facilities in California. However, these rules and regulations are not uniformly applied to all facilities [*see H&S Code §§ 1596.71, 1596.90, 1597.53; see also 22 Cal. Code Reg. §§ 101151(a), 101351, 101451, 101551, 102351.1*]. Consequently, once counsel knows the type of facility license sought (namely, child care center, infant care center, school-age child care center, mildly ill child care center, or family child care home), counsel may then determine which rules and regulations apply to which facilities [*see § 100C.10[3]*].

5. Determine whether any restrictions exist on property or home.

a. Are there private covenants, easements, etc. that would affect opening and/or operation of facility, particularly family child care homes?

NOTE:

While private covenants restricting the use of property as a family child care home are void [*see H&S Code § 1597.40(b),(c)*], the attorney should still ascertain whether or not any such purported restrictions exist, so as to be on guard for potential conflicts with neighbors and/or purchasers of the property.

b. What local zoning ordinances apply that may restrict use of center or home as child care facility?

NOTE:

In some circumstances, local authorities may restrict building heights, setback, and lot dimensions of family child care homes [*see H&S Code § 1597.47*]. However, significant steps have been taken to remove or ease zoning ordinances as they apply to family child care homes in order to make home day care a more feasible day care option [*see H&S Code §§ 1597.40, 1597.45, 1597.46; see also § 100C.12*].

c. Is use permit required for city in which facility will operate [*see § 100C.120*]?

d. If family child care home will be located on rental property, what is landlord's address to which required notices can be sent [*see H&S Code § 1597.40(d)*]?

6. Determine facility's capacity considering:

a. Square footage of classroom and playground space;

NOTE:

For child care centers, at least 35 square feet of indoor activity space (namely, usable classroom space) and 75 square feet of fenced outdoor activity space (namely, suitable playground space) per child specified in the capacity request is required. For example, if the requested capacity is 45 children, there must be 1,575 square feet of classroom space and 3,375 square feet of playground space [*see 22 Cal. Code Reg. §§ 101238.2, 101238.3; see also §§ 100C.28[5],[6], 100C.120*].

b. Number of toilets and sinks;

NOTE:

Child care centers must have at least one toilet and one sink for every group of 15 children or fraction thereof, plus an additional separate toilet and handwashing fixture designated for use by ill children, by staff, and for emergency use [22 *Cal. Code Reg. § 101239(h),(i)*; *see § 100C.28[2]*].

- c. Staff restroom, rest area, and/or office;
- d. Conditions stated on fire clearance [*see § 100C.21[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Governments State & Territorial Governments Licenses



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 100C CHILD CARE FACILITIES

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

32-100C California Legal Forms--Transaction Guide § 100C.111

§ 100C.111 Financial Determinations

1. Determine if client has adequate working capital to fund opening and continued operation of facility.

NOTE:

Family child care home applicants need only submit a brief statement confirming that they are sufficiently financially secure to operate such a facility, and no other specific or detailed financial disclosures are required [*H&S Code § 1597.54(a)*]. In contrast, child care center applicants are required to disclose detailed financial information [*see §§ 100C.205[2]* (Form LIC 403), *100C.206[2]* (Form LIC 404)].

- a. Are funds sufficient to provide the necessary care, supervision, equipment, supplies, and other items required by law?
- b. Will funds from fees charged to parents be sufficient to meet facility's operating costs?

2. Determine if client is eligible to receive government funding for facility [*see Educ. Code §§ 8275-8279.2; see also 5 Cal. Code Reg. § 18000 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawAdministration & OperationChild Care Facilities



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 100C CHILD CARE FACILITIES

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

32-100C California Legal Forms--Transaction Guide §§ 100C.112-100C.119

[Reserved]

§§ 100C.112[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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C. Procedural Guide

32-100C California Legal Forms--Transaction Guide § 100C.120

§ 100C.120 Obtaining Child Care Center License

NOTE:

A child day care center applicant will only be issued a license once all of the following are completed [*see 22 Cal. Code Reg. § 101156*]:

- All application documents are correctly submitted and approved.
- A fire clearance for the facility is on file with the licensing office.
- The center has a qualified director, and any other facility personnel to be employed at time of licensure has met the required qualifications and been cleared by the Department.
- The required fingerprint clearances are on file with the Department.
- The Department has inspected and approved the facility building and grounds.

Centers may not begin operating until a license has actually been issued.

1. Instruct client to attend orientation given by Department of Social Services.

NOTE:

All child care center applicants must attend an orientation that outlines applicable rules and regulations and explains what the operation of such a facility entails [*see H&S Code § 1596.845*].

2. Choose facility site.

a. Ensure that site meets minimum physical environment requirements for building, fixtures, and grounds [*see 22 Cal. Code Reg. §§ 101238-101239; see also §§ 100C.21, 100C.28*].

(1) Site must have at least 35 square feet of indoor activity space per child, not including bathrooms, halls, offices, isolation areas, food preparation areas, and storage space [*see 22 Cal. Code Reg. § 101238.3; see also § 100C.28[6]*].

(2) Site must have at least 75 square feet of fenced outdoor activity space per child, including a shaded rest area and easy access to and from center [*see 22 Cal. Code Reg. § 101238.2(a),(b),(g); see also § 100C.28[5]*].

(3) Site must have at least one toilet and one sink for each group of 15 children, plus an additional separate toilet and handwashing fixture designated for use by ill children, by staff, and for emergency use [*22 Cal. Code Reg. § 101239(h),(i); see § 100C.28[2]*].

(4) Site must have an isolation area for sick children [*see 22 Cal. Code Reg. § 101226.2*].

(5) Site must meet other requirements such as adequate storage space [*see 22 Cal. Code Reg. § 101238.4*], proper heating and ventilation [*see 22 Cal. Code Reg. § 101239*], protective devices on passageways, stairs, and ramps [*see 22 Cal. Code Reg. § 101238(b)*], and proper storage of hazardous materials [*see 22 Cal. Code Reg. § 101238(g)*].

(6) If facility is providing care and supervision to infants (children under age two), site must meet additional requirements [*see 22 Cal. Code Reg. §§ 101438.1-101439.1; see also § 100C.35[2]*].

b. Consider fire clearance requirements when evaluating prospective sites to avoid sites that would clearly fail fire inspection.

NOTE:

Fire clearance requirements are contained in the State Uniform Building Code (Title 24 of the California Code of Regulations).

(1) Searches should probably be limited to first floor of buildings, since clearances are rarely given for facilities where care will be provided on second floor.

(2) Prospective site should have fire resistant siding and roof.

(3) Facility should be accessible to handicapped.

(4) Facility should have at least two exits, neither of which is through kitchen or sliding glass doors.

(5) Building should be at least five feet from adjoining property line and/or contain a two-hour fire wall.

c. Consider applicable zoning ordinances [*see § 100C.12*], whether use permits are required in your

community, and potential neighborhood opposition, any one of which could prevent establishment of center.

NOTE:

City planning and zoning departments often can identify neighborhoods that have opposed child care centers in the past, and conducting door to door surveys can be helpful in determining the neighborhood's attitudes about a child care center. Additionally, local realtors may have information on zoning and neighborhood practices, as well as provide potential sites as they come on the market.

d. Other items to examine when evaluating prospective facility sites include:

- (1) Windows for natural light;
- (2) Safe and clean floors;
- (3) Storage areas within reach of children's play area;
- (4) Bathroom fixtures suitable for size and height of children; and
- (5) Safe accessible parking for parents, guardians, and staff.

e. When suitable site is located, rental or purchase agreement should be contingent on property being licensable as a child care center.

3. Complete and submit all required forms.

NOTE:

All of the forms listed below must be completed in full and submitted to obtain licensure. Required forms are divided into two sections. "Section A" forms (PP a through n, **below**) are pre-printed forms provided by the Department of Social Services in an official application booklet and must be submitted to initiate the licensing process. "Section B" forms (PP o through z, **below**) are either documents completed for other purposes (such as bylaws or school transcripts) or statements about the facility, admission policies, and services offered that must be drafted by the applicant and submitted with the application or the application will be subject to closure.

An application is not complete until all required materials, including all Section A and B forms, except A15 and A16 (fingerprint cards and child abuse index check) have been submitted and the Department has completed a site visit [22 *Cal. Code Reg. § 101152(c)(11)*]. Only completed applications will be considered for final licensure. This rule is significant because facilities that begin operating without submitting a "completed application" subject themselves to imposition of civil penalties [22 *Cal. Code Reg. § 101198(a)(1)*]. Once completed, the attorney and/or client should maintain a copy of all forms sent to the Department. Additionally, all forms submitted should be clearly labeled with the center name and address and sent to the attention of the licensing program analyst assigned to your center.

a. Application [Form LIC 200; *see § 100C.200[2]*].

- (1) Complete all relevant items.

(2) Obtain original signature since signed under penalty of perjury.

(3) Ensure that signature(s) corresponds to type of organization completing application and that signer has proper authority.

NOTE:

If the applicant is a partnership, all partners must sign the application. If the applicant is a corporation, the application must be signed by the chief executive officer or authorized representative [22 Cal. Code Reg. § 101169(e)].

(4) Ensure that capacity request is based on physical features of center [see § 100C.110, P 6], and if combination center license is sought, ensure that capacity for each program is designated.

(5) If applicant is corporation, include board resolution authorizing filing of application [see § 100C.219], and copies of articles of incorporation (with seal) and bylaws with application.

(6) If applicant is partnership, include copy of partnership agreement with application.

NOTE:

The partnership agreement should include a description of what the partnership does, and what happens if the partnership dissolves and how to dissolve it.

(7) Ensure that all requirements of *H&S Code § 1596.95* have been satisfied (i.e., application and other forms indicate evidence of applicant's reputable character, adequate financial resources, etc.).

b. Applicant Information [Form LIC 215; see § 100C.201[2]].

(1) Ensure that all "applicant(s)" complete this form, such as each partner in partnership, or chief executive officer or authorized representative if corporate applicant.

(2) Obtain original signature(s) since signed under penalty of perjury.

c. Designation of Administrative Responsibility [Form LIC 308; see § 100C.202[2]].

(1) Delegate authority to administrator, director, or other appropriate staff to act on behalf of absent licensee.

(2) Consider including subsequent delegation for when designee is not present.

(3) If applicant is corporation, ensure that board resolution authorizes this delegation.

(4) Obtain original signature(s) of applicants/licensees.

d. Administrative Organization form, if applicant is corporation, partnership, public agency, or other type of association [Form LIC 309; see § 100C.203[2]].

(1) Ensure that this form matches information on application.

(2) If applicant is corporation, attach copy of articles of incorporation and any amendments, copy of bylaws and any amendments, and authorizing board resolution.

(3) If applicant is out of state corporation, submit authorization of foreign corporation to do business in California.

(4) If several boards are involved, ensure that lines of authority and responsibility are clear.

(5) If applicant is partnership, attach copy of partnership agreement.

(6) If applicant is public agency, attach copy of resolution or other legal document authorizing application.

e. Estimated Monthly Operating Budget Statement [Form LIC 401; *see* § 100C.204[2]].

(1) Ensure that number of clients corresponds with requested capacity.

(2) Provide documentation, if available, for other sources of income, if any, to fund facility.

(3) Ensure that all operating costs are indicated and reasonable (e.g., salaries are reasonable and provide for at least minimum wage).

(4) Calculate fringe benefits at 25 percent of salary or state why fringe benefits are not applicable.

(5) Ensure that rent amount corresponds with lease or rental agreement.

(6) Ensure that program should at least break even financially.

f. Financial Statement [Form LIC 403; *see* § 100C.205[2]].

(1) Provide realistic estimates of the applicant's assets and liabilities concerning all of applicant's activities.

(2) Use cash value or surrender value rather than face value for life insurance.

(3) If applicant is sole owner of real property, indicate appraised value of property.

(4) If applicant is partnership or corporation, list cost of real property not appraised value.

g. Financial Information Release and Verification [Form LIC 404; *see* § 100C.206[2]].

NOTE:

The applicant must complete Section 1 and return the form to the Department. The agency will send the form to the financial institution. The verification must be sent by the financial institution directly to the Department; the licensee may not hand carry the verification. Separate forms are required for each bank or financial institution with which the applicant does business [*see* Form LIC 404 instructions].

h. Personnel Report [Form LIC 500; *see* § 100C.207].

(1) If combination center license is sought, ensure that form is completed for each component.

(2) Show all positions with days and hours on duty, ensuring requisite staff coverage for all hours of

operation.

(3) Ensure that director, teachers, and other facility staff hired at the time of application are represented on form.

(4) Identify positions with staff not yet hired as "to be hired" and include position title.

(5) Ensure that form indicates director is present full time or, if director is not present full time, designate qualified substitute.

NOTE:

The director, or a duly qualified substitute director must be on the premises during the center's hours of operation [*see 22 Cal. Code Reg. § 101215.1(d),(f); see also § 100C.202[1]*].

(6) Distinguish staff subject to fingerprinting requirement from those who are exempt.

(7) Distinguish staff subject to health screening requirement from those who are exempt.

i. Personnel Record [Form LIC 501; *see § 100C.208[2]*].

(1) Complete and submit form to Department for director/administrator and any program manager only, but instruct client to maintain separate records for all other staff members in facility files for review.

(2) Ensure that educational information on form is supported with proper documentation, such as college transcripts.

j. Health Screening Report for all facility personnel, including applicants, licensees, and employed staff [Form LIC 503; *see § 100C.209[2]*].

(1) Ensure that health exam was performed not more than one year before or seven days after employment [*see 22 Cal. Code Reg. § 101216(g)(1)*].

(2) Ensure that physician performing exam is qualified medical professional and that he or she has signed report.

(3) Ensure that tuberculosis test has been performed and results are shown on report.

k. Emergency Disaster Plan [Form LIC 610; *see § 100C.210[2]*].

NOTE:

A separate form is required for each component of a child care program.

(1) Ensure that alternatives to 911 for emergency service numbers are included, such as police department, poison control center, and hospitals.

(2) Ensure that relocation sites are suitable for number (and age) of children in center.

(3) If use of relocation site requires agreement from some other agency or person, ensure that agreement

is verified in writing.

(4) Attach copy of center's facility sketch, indicating exits [*see* § 100C.241].

l. Fingerprint cards and applicable fees.

NOTE:

An applicant must submit fingerprint images and related information to the Department of Justice and the FBI, through the Department of Justice, for a state and federal level criminal offender record search. The Department of Social Services may issue a license before receipt of the FBI criminal record history if the individual in question executes a statement that he or she has never been convicted of a crime other than a traffic infraction [H&S Code § 1596.871(a)(4)(E)]. An individual must obtain either a criminal record clearance or a criminal record exemption from the Department of Social Services before he or she is present in a child day care facility [H&S Code § 1696.871].

Neither the Department of Social Services nor the Department of Justice will charge a fee for the fingerprinting of an applicant who will serve six or fewer children or any family child care applicant for a license [*see* H&S Code § 1596.871(a)(3) (except during the 2008-2009 and 2009-2010 fiscal years)].

(1) Ensure that completed cards are submitted for all applicants, administrators/directors, hired staff, volunteers, and residents other than clients unless exempt.

(2) Ensure that clearances have been received for applicant and director before licensure.

m. Child Abuse Index Check [Form LIC 198A; *see* § 100C.240[2]; *see also* § 100C.21[2]].

NOTE:

Child Abuse Index Checks are mailed directly to the Department of Justice, together with processing fee, and should be submitted with fingerprint cards [*see* P l, *above*].

n. Facility sketch, including separate sketches for indoor and outdoor space, and additional sketch showing entire facility and relationship between all indoor and outdoor spaces [Form LIC 999; *see* § 100C.241[2]].

(1) Interior sketch should:

(a) Include dimensions of all rooms;

(b) Distinguish between play areas, classrooms and other required areas such as offices, isolation area, and storage areas; and

(c) Show location of major pieces of furniture.

(2) Exterior sketch should:

(a) Show dimensions of playground and other areas; and

(b) Show dimension and location of major equipment and swimming pools.

o. Copies of organizational documents:

(1) If applicant is partnership, copy of partnership agreement.

(2) If applicant is corporation, articles of incorporation with Secretary of State Seal, bylaws, and board resolution to determine identity of agents acting on behalf of corporation.

p. Verification of director qualifications [see § 100C.211; 22 Cal. Code Reg. §§ 101215.1, 101415, 101515].

q. Job descriptions for each person and position, including statement of supervision [see §§ 100C.130, 100C.212].

r. Statement of personnel policies covering selection of staff and conditions of employment [see §§ 100C.130, 100C.213].

s. In-service training for staff [see §§ 100C.130, 100C.214].

t. Child care program description, including statement of goals, schedule of operation, and time of meals and activities [see §§ 100C.130, 100C.215].

NOTE:

The program description should also contain information outlined in the Admissions Policies section of the regulations [see 22 Cal. Code Reg. § 101218(a)].

u. Rules of discipline, including clear prohibition against corporal or unusual punishment [see 22 Cal. Code Reg. § 101223(a)(3); see also § 100C.216].

v. Admission policies [see §§ 100C.130, 100C.217].

w. Sample menu and schedule for one week.

x. List of play equipment and inventory of furniture [see § 100C.218].

(1) Detailed inventory of all items is not required, but list should show different types of equipment that are age appropriate, and that equipment reflects different types of planned activity and matches type of program facility proposed.

(2) If facility is not fully equipped by opening date, submit schedule for completing purchases.

(3) Outdoor equipment list should include both fixed structures and movable outdoor equipment.

y. Copy of lease agreement or deed or property tax bill.

(1) If applicant is renting or leasing, ensure that name and address of owner of facility premises appears on lease.

(2) If lease is conditional on facility being licensed as child day care center, unsigned lease can be submitted initially.

z. If water for human consumption is from private source, water supply clearance must be submitted [see § 100C.21[3]].

4. Submit application fee with application documents.

NOTE:

The amount of the initial application fee (and subsequent annual fees) is assessed based on the capacity range of the center [*see 22 Cal. Code Reg. § 101187(a)*].

5. Obtain fire clearance.

NOTE:

Fire clearance approval is a condition to licensure [*see H&S Code § 1596.809*]. Consequently, even if a day care center has a use permit and meets all other licensing requirements, it will not be issued a license until a fire inspection has been conducted and a clearance is obtained.

Once the application is submitted, the Department will contact the fire marshal's office in the relevant city [*see 22 Cal. Code Reg. § 101171(a)(1)* (request for fire clearance must be made through Department)].

a. During site selection process, evaluate fire clearance issues to avoid sites that would clearly fail fire inspection [*see P 2b, above*].

b. If client intends to admit nonambulatory children, ensure that Department is informed of that intention, so that appropriate fire clearance can be obtained [*see 22 Cal. Code Reg. § 101171(b)*; *see also 22 Cal. Code Reg. § 101152(n)(1)* ("nonambulatory person" defined)].

c. Ensure that facility has at least two fire extinguishers, smoke detectors, and approved bell alarm system.

d. Do not spend money on renovations or repairs unless and until recommended by local fire marshal.

6. Hire sufficient and qualified staff.

NOTE:

Great care must be taken in selecting staff members to work at child day care centers. The staff is a key element that many parents examine in choosing a facility and probably constitutes the facility's major operating expense. Further, centers must not only have a director before licensure, but all hired employees must be cleared by the Department, including criminal clearances, before employment. The Department may require a center to hire additional staff, if it determines additional staff is required [*see 22 Cal. Code Reg. § 101216(b)*].

a. Ensure that prospective employees meet qualification requirements for position sought.

NOTE:

One of the major areas of confusion for day care center applicants is sorting through the detailed qualification requirements for facility personnel. In addition to age requirements [*see 22 Cal. Code Reg. § 101216(d)* (personnel who supervise employees and/or volunteers or who provide any care and supervision must be 18 years old); *see also § 100C.21[2]*], directors, teachers, aides, infant care and school-age personnel must meet very specific educational and employment requirements. The day care center applicant or

licensee must be familiar with the requisite qualifications before publishing job announcements and interviewing prospective employees.

(1) Educational and employment requirements for child care center director [*see 22 Cal. Code Reg. § 101215.1; see also § 100C.211[1][b][i]*].

(2) Educational and employment requirements for infant care center director [*see 22 Cal. Code Reg. § 101415; see also § 100C.211[1][b][ii]*].

(3) Educational and employment requirements for assistant infant care center director [*see 22 Cal. Code Reg. § 101415.1; see also § 100C.211[1][b][ii]*].

(4) Educational and employment requirements for school-age care center director [*see H&S Code § 1597.21; 22 Cal. Code Reg. § 101515; see also § 100C.211[1][b][iii]*].

(5) Educational and employment requirements for child care center teacher [*see H&S Code § 1597.055; see also 22 Cal. Code Reg. § 101216.1; § 100C.211[1][c][i], [ii]*].

(6) Educational and employment requirements for infant care teacher [*see 22 Cal. Code Reg. § 101416.2; see also § 100C.211[1][c][i],[iii]*].

(7) Educational and employment requirements for school-age day care teacher [*see H&S Code § 1597.21; 22 Cal. Code Reg. § 101516.2; see also § 100C.211[1][c][i],[iv]*].

(8) Educational and employment requirements for day care center teacher's aide [*see 22 Cal. Code Reg. § 101216.2; see also § 100C.211[1][c][i],[ii]*].

(9) Educational and employment requirements for infant care aide [*see 22 Cal. Code Reg. § 101416.3; see also § 100C.211[1][c][i],[iii]*].

b. Ensure that adequate personnel are hired to satisfy required staff-children ratios.

(1) Teacher-child ratios for child care centers [*see 22 Cal. Code Reg. § 101216.3; see also § 100C.27[2]*].

(2) Staff-infant ratios for infant care centers [*see 22 Cal. Code Reg. § 101416.5*].

(3) Teacher-child ratios for school-age child care centers [*see 22 Cal. Code Reg. § 101516.5*].

c. Prepare written employment contracts including:

NOTE:

Written employment contracts with child center employees are not required, but have obvious advantages over oral ones should a dispute arise between employer and employee. For general coverage of employment agreements, and an extensive selection of provisions that may be included in these agreements, see Ch. 85, **Employment Agreements** .

- (1) Names of employer (i.e., child care center's name) and employee.
- (2) Address of center.
- (3) Date employment began.
- (4) Dates of probationary period, if applicable.
- (5) Work hours and salary.
- (6) Description of employees duties.
- (7) Date agreement was signed.
- (8) Signatures of employer (e.g., licensee of child care center) and employee.

d. Prepare statement of personnel policies [*see* §§ 100C.130, 100C.213].

7. Additional steps to take before initial licensure.

a. Obtain use permit, if applicable.

NOTE:

Many cities require a use permit to either open or expand a child care center. Consequently, counsel should determine whether a use permit is required for the city in which the center will operate.

(1) Apply for permit at city zoning department, which usually involves completing application, submitting physical plans for building, and paying fee.

(2) Prepare for public hearing, if necessary.

NOTE:

Anyone interested in the application can appear at the public hearing and voice their support, concerns, and/or objections. Counsel should prepare for the hearing by addressing common issues such as the need for child care in the area, how a center will benefit the neighborhood, how additional traffic will be dealt with, and what arrangements will be made for parking. Asking city officials before the hearing what neighborhood objections have been raised may help narrow the issues. Additionally, board members should be given a description of the center's programs and any other information that would support the center's position.

b. Obtain insurance [*see* § 100C.13].

c. Plan advertising campaign.

NOTE:

Advertising a child care center is prohibited until the center is issued a license [*see* 22 Cal. Code Reg. §

101156].

Legal Topics:

For related research and practice materials, see the following legal topics:

Education LawAdministration & OperationChild Care FacilitiesGovernmentsState & Territorial GovernmentsLicenses



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32-100C California Legal Forms--Transaction Guide § 100C.121

§ 100C.121 Obtaining Family Child Care Home License

NOTE:

Family child care homes are minimally regulated facilities. To make family child care a more viable day care option, these homes have been exempted from a majority of the licensing regulations [*see 22 Cal. Code Reg. § 102351.1*]. Therefore, family home licenses are generally easier to obtain than child care center licenses.

1. Instruct client/applicant to attend orientation given by Department of Social Services [*see H&S Code § 1596.845*].
2. Complete and submit required forms.
 - a. Application [Form LIC 279; *see § 100C.230[2]*].
 - (1) Complete all relevant items.
 - (2) Obtain original signature since signed under penalty of perjury.
 - (3) Specify whether license requested is for small or large family child care home.
 - (4) If large family child care home license is sought, include documentation evidencing that applicant has at least one year's experience as regulated small family child care home operator or as administrator of licensed child care center.

NOTE:

This experience requirement may be waived if the applicant has sufficient qualifying experience [*see H&S Code § 1597.52(b)*].

- (5) Confirm that required license fee is submitted with application [*see 22 Cal. Code Reg. § 102384; see also H&S Code § 1596.803*].
- b. Current Children in Your Home list [Form LIC 279B].
- c. Proof that applicant has completed orientation [*see P 1, above*].
- d. Criminal Record Statement and fingerprints for all required personnel [*see § 100C.231* (Form LIC 508); *see also § 100C.71[2]*].

NOTE:

Before initial licensure, the Department must receive fingerprints from the applicant and all adults residing in the facility, any person who provides care and supervision to the children, and any staff or employee who has contact with the children [*see 22 Cal. Code Reg. § 102369(b)(8); see also H&S Code § 1596.871(a)-(c)*]. Further, all persons subject to criminal record review must be fingerprinted as a precondition to employment, residence, or initial presence in the home, and must sign a declaration, under penalty of perjury, regarding prior criminal convictions [*H&S Code §§ 1596.871(c), 1597.59(b); 22 Cal. Code Reg. § 101170(d); see § 100C.231*].

A person subject to the fingerprinting requirements must submit fingerprint images and related information to the Department of Justice and the FBI, through the Department of Justice, for a state and federal level criminal offender record search. The Department of Social Services may issue a license before receipt of the FBI criminal record history if the individual in question executes a statement that he or she has never been convicted of a crime other than a traffic infraction [*H&S Code § 1596.871(a)(4)(E)*].

Neither the Department of Social Services nor the Department of Justice will charge a fee for the fingerprinting of an applicant who will serve six or fewer children or any family child care applicant for a license [*see H&S Code § 1596.871(a)(3)* (except during the 2008-09 and 2009-10 fiscal years)].

An individual must obtain either a criminal record clearance or a criminal record exemption from the Department of Social Services before he or she is present in a child day care facility [*H&S Code § 1696.871*].

- e. Emergency Care and Disaster Action Plan [*see § 100C.232; see also Form LIC 610A instructions*].
- (1) Ensure that alternatives to 911 for emergency service numbers are included, such as police department, poison control center, and hospitals.
 - (2) Ensure that relocation site and alternative relocation site are suitable for number of children in home.
 - (3) Determine whether relocation site requires written agreement to allow children to relocate there during emergency.
 - (4) Attach copy of home's floor plan.
- f. Copy of applicant's signed Statement Acknowledging Requirement To Report Suspected Child Abuse [Form LIC 9108; *see § 100C.258*].

g. Facility sketch covering home and yard [Form LIC 999A; *see* § 100C.241[2]].

h. Local Fire Safety Clearance, if care will be provided for in a large family child care home [*see* 22 Cal. Code Reg. §§ 102369(b)(7), 102371; *see also* H&S Code § 1597.46(e); § 100C.242[2] (Form LIC 9054)].

NOTE:

Small family child care homes must supply evidence that the home contains a fire extinguisher and smoke detector device that meets established standards [H&S Code § 1597.45(d); Cal. Code Reg. § 102369(b)(7)].

i. If applicant is operating on rented or leased property, notify property owner/landlord.

NOTE:

A licensee operating on rented or leased property must maintain proof of control of property in the form of a lease or rental agreement at the home and available for review [22 Cal. Code Reg. § 102417(o)].

j. If applicant applies for capacity of eight children in small home, or 14 children in large home, obtain consent of property owner/landlord.

NOTE:

Such an applicant, and a licensee wishing to increase the capacity of home [*see* H&S Code §§ 1597.44, 1597.465], must obtain the written consent of the property owner/landlord [H&S Code §§ 1597.44(d), 1597.465(d); 22 Cal. Code Reg. § 102417(p)]. The original of the completed and signed consent form must be attached to the facility's license and maintained in the home [22 Cal. Code Reg. § 102417(p)(1)].

k. Evidence of current tuberculosis clearance, not more than one year before or seven days after initial presence in home, for all adults in home during time that children are under care [*see* 22 Cal. Code Reg. § 102369(b)(9)].

l. Proof of completion or enrollment in Preventative Health Practices training.

m. Proof of child care experience if applying for large family child care home license.

n. Pre-Licensing Readiness Guide.

NOTE:

An announced site visit is required before the initial licensure of a family home [*see* H&S Code §§ 1597.55a(a), 1597.55b(a); 22 Cal. Code Reg. § 102392]. The Department of Social Services provides the Pre-Licensing Readiness Guide to prepare for the initial site visit [Form LIC 9217]. The Guide should not be returned to the licensing agency until the home has met all the listed requirements. When the licensing agency receives the guide, a licensing program analyst will contact the applicant to schedule the initial visit [*see* Form LIC 9217].

4. Obtain use permit, if applicable [*see* § 100C.120, P 7].

5. Obtain liability insurance, bond, or, in lieu of insurance or bond, affidavits from each parent with children enrolled in home stating that parent has been informed that home does not carry liability insurance or bond [*see* H&S Code § 1597.531; 22 Cal. Code Reg. § 102417(m),(n); *see also* §§ 100C.13, 100C.257]:

a. Liability insurance must cover injury to clients and guests for minimum of \$100,000 per occurrence

and \$300,000 in total annual aggregate.

b. Bond must be in aggregate amount of \$300,000.

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Governments State & Territorial Governments Licenses



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DIVISION VII: PERSONAL TRANSACTIONS
 CHAPTER 100C CHILD CARE FACILITIES
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32-100C California Legal Forms--Transaction Guide § 100C.122

§ 100C.122 Operating Child Care Center

NOTE:

Once a child care center has been issued a license, the center must adhere to numerous and detailed continuing requirements. It is the licensee's duty to ensure compliance with all applicable rules and regulations [22 *Cal. Code Reg. § 101151(b)*]. The failure to comply with these requirements subjects the licensee to revocation or suspension of the license and/or the imposition of civil penalties [*see H&S Code §§ 1596.885, 1596.98, 1596.99*].

1. Follow required admission procedures and prepare all required forms.

a. Conduct one (or more) personal interview(s) with parents in order to [*see 22 Cal. Code Reg. § 101218.1(a)(2)-(4)*]:

(1) Determine child's individual needs and whether these needs can be met by center.

(2) Provide authorized representative with information about center and child abuse prevention pamphlet.

(3) Obtain all necessary information about child including name, birthday, and medical information [*see 22 Cal. Code Reg. §§ 101220, 101220.1, 101221(b)*; *see also § 100C.256*].

NOTE:

The information that must be maintained for each child in his or her record is discussed in § 100C.30[3] [*see also §§ 100C.140, 100C.225*].

(4) Inform each child's authorized representative of rights, including but not limited to right to enter and

inspect facility premises [*H&S Code § 1596.857(a)*; *22 Cal. Code Reg. § 101218.1(b)*].

(5) Provide authorized representative with copy of notice of parents' rights form, and obtain each parent's or guardian's signature and date signed on form acknowledging receipt of notice [*H&S Code § 1596.857*; *22 Cal. Code Reg. § 101218.1(b),(e)*; *see § 100C.252*].

NOTE:

The licensee must post the Child Care Center Notification of Parents' Rights Poster [PUB 393] in a prominent, publicly accessible area in the child care center at all times [*22 Cal. Code Reg. § 101218.1(c)*].

(6) Provide authorized representative with Caregiver Background Check Process form [LIC 995E] [*22 Cal. Code Reg. § 101218.1(d),(e)*].

b. At admission, personally advise each authorized representative of child's rights [*22 Cal. Code Reg. § 101223(b)*; *see § 100C.251*].

NOTE:

In informing the authorized representative of these rights, make sure to explain the applicable legal provisions regarding filing complaints [*see § 100C.251[1]*].

(1) Provide each authorized representative with copy of rights form [*22 Cal. Code Reg. § 101223(b)(1)*].

(2) Ensure that each authorized representative signs and dates receipt acknowledging notice of rights [*22 Cal. Code Reg. § 101223(b)(1)(A)*].

(3) Ensure that each child is afforded specified rights [*22 Cal. Code Reg. § 101223(c)*].

c. Provide parent or guardian with copy of Family Child Care Home Notification of Parents' Rights, provided by Department of Social Services.

NOTE:

This notice, required on acceptance of each child into a day care facility after January 1, 2007, includes information stating that the specified registered sex offender database is available to the public at a web site, www.meganslaw.ca.gov, that is maintained by the Department of Justice [*H&S Code § 1596.857(e)*]. A provider, however, is not required to provide any additional information regarding the location and proximity of registered sex offenders who reside in the community where the child care facility is located [*H&S Code § 1596.857(f)*].

d. Prepare child care center roster [*see § 100C.253*].

(1) Ensure that form includes child's name, birthdate, and address; parent's or guardian's name and daytime telephone number; name and phone number of child's physician; and date of enrollment and termination [*H&S Code § 1596.841*].

(2) Instruct licensee to keep roster in central location at facility and update roster as necessary.

(3) Instruct licensee to make roster available to Department on request [*H&S Code § 1596.841*].

(4) Instruct licensee to retain roster for three years.

e. Prepare Emergency Information card and Consent to Receive Emergency Medical Care [*see* § 100C.255, 100C.260].

(1) Complete Department of Social Services, Community Care Licensing, Forms LIC 627 and LIC 700.

NOTE:

A signed consent for emergency medical treatment (Form LIC 627; *see* § 100C.260[2]) must be maintained for each child unless the child's authorized representatives (1) adhere to religious faith practicing healing or other spiritual means, (2) provide information relative to the child's health history, and (3) sign a statement that indicates they accept full responsibility for the child's health, their refusal to obtain a medical examination of their child, and their request that no medical care be given to the child [22 Cal. Code Reg. § 101221(b)(8)(C); *see* 22 Cal. Code Reg. § 101220(f)].

(2) Instruct child care center teachers supervising activities away from center to carry with them signed consent forms for emergency medical treatment for each child participating in activity [*see* 22 Cal. Code Reg. § 101226(c)(1)(A)].

NOTE:

For a child not required to have a consent form for emergency medical treatment, the teacher must bring the telephone numbers of the authorized representative, relatives, or others who can assume responsibility for the child in an emergency [22 Cal. Code Reg. § 101226(c)(1)(B)].

f. Prepare sign-in and sign-out sheets [*see* 22 Cal. Code Reg. §§ 101226.1(b), 101229.1].

NOTE:

The licensee must develop and implement a written procedure to sign children in and out of the center. The person who brings the child to, and removes the child from, the center must sign the child in or out. The person must use his or her full legal signature and record the time of day [22 Cal. Code Reg. § 101229.1(a)-(c)]. Sign-in sheets [*see* PP (1), (2), **below**] and sign-out sheets [*see* P (3), **below**] must be kept for one month and be available for review by the Department [*see* 22 Cal. Code Reg. § 101229.1(d)].

(1) Instruct client to implement procedure for inspecting children for illness each day before accepting them for that day, requiring person bringing child to remain until child is cleared [22 Cal. Code Reg. § 101226.1(b)].

(2) Once child has been determined to be without obvious signs of illness, require person bringing child in to sign child in on sign-in sheet [22 Cal. Code Reg. § 101226.1(b)(2)(A)].

(3) Instruct client to develop, maintain, and implement written procedure for signing children out at end of each day [*see* 22 Cal. Code Reg. § 101229.1].

NOTE:

The center staff and the parents of a school-age child may agree in writing to allow the child to enter and/or leave the facility on his or her own. The agreement must be signed and dated by the director and the child's authorized representative, and filed in the child's

record. When such an agreement is on file, the center staff must sign the child in or out when the child arrives or leaves on his or her own [22 Cal. Code Reg. § 101529.1].

g. Prepare Employee Notification of Rights [see § 100C.250].

(1) Instruct licensee to inform all center personnel of their rights [22 Cal. Code Reg. § 101216(l); see H&S Code §§ 1596.881, 1596.882].

(2) Instruct licensee to provide each employee, at time of employment, with copy of Employee Notification of Rights form (LIC 9052) [H&S Code § 1596.881; 22 Cal. Code Reg. § 101216(l)].

(3) Obtain employee's signature, and date signed, on notice form acknowledging receipt [22 Cal. Code Reg. § 101216(l)(1)(A)].

NOTE:

A copy of the executed notification must be kept in the employee's personnel record [22 Cal. Code Reg. § 101216(l)(1)(B)]. If an employee refuses to sign the receipt, a dated notation to that effect must be retained in the employee's records [22 Cal. Code Reg. § 101216(l)(1)(C)].

h. Prepare written policy statement affidavits.

NOTE:

The parent or guardian of each child attending the center must sign an affidavit stating that he or she has read the center's policy statement [H&S Code § 1597.07; see § 100C.215[1]]. A sample policy statement, also referred to as a program description, is set forth in § 100C.215.

2. Instruct client to comply with posting requirements.

a. Post following documents in prominent, publicly accessible location in center:

(1) License [22 Cal. Code Reg. § 101160].

(2) Notice of Parents Right to Inspect Facility (LIC 995) [H&S Code § 1596.857(d); 22 Cal. Code Reg. § 101218.1(b)(2); see § 100C.252].

NOTE:

This notice, informing authorized representatives of the right to make an inspection and the prohibition against retaliation and the right to file a complaint, is available to child care center licensees from the Department. It must include information stating that the specified registered sex offender database is available to the public at a web site, www.meganslaw.ca.gov, that is maintained by the Department of Justice [H&S Code § 1596.857(d)]. The notice must also include a statement of the right of the authorized representative to review licensing reports of visits and substantiated complaints against the center on the center premises [H&S Code § 1596.857(d); see H&S Code § 1596.859].

b. Department of Social Services' notice identifying Department and providing phone number for personal complaints [H&S Code § 1596.874].

c. Personal Rights of Children form in prominent, publicly accessible area in center [22 Cal. Code Reg. § 101223(b)(2);

see § 100C.251].

d. Post Emergency Disaster Plan near telephone [see § 100C.210; LIC 610 form instructions].

e. Post sign at entrance of center providing following information and statements [H&S Code § 1596.95(g); 22 Cal. Code Reg. § 101225(f)]:

NOTE:

The client must provide satisfactory evidence that these signs have been posted as part of the application process [H&S Code § 1596.95(g)].

(1) Telephone number of local health department.

(2) Statement that persons may call local health department for additional information [H&S Code § 1596.95(g)(3)].

(3) "Protect your child--it is the law."

(4) All information specified in Veh. Code §§ 27360 and 27360.5 regarding child passenger restraint systems [H&S Code § 1596.95(g)(2)], including:

(a) "Children under the age of six years, regardless of weight, or children weighing less than 60 pounds, regardless of age, must be in child passenger restraint system meeting applicable federal motor vehicle safety standards."

(b) "Children who are between 6 and 16 years of age, or who are less than 6 years of age and weigh 60 pounds, must be in an appropriate child passenger restraint system or safety belt meeting applicable federal motor vehicle safety standards."

(c) "You may be cited for a violation of the child passenger restraint system provisions. In addition, your automobile insurance rates could be adversely affected as a result."

f. Post menus at least one week in advance in area accessible for review by authorized representative [22 Cal. Code Reg. § 101227(a)(6)].

NOTE:

Copies of menus as served must be dated and kept on file for at least 30 days and made available for review by authorized representative and the Department on request [22 Cal. Code Reg. § 101227(a)(6)].

3. Instruct licensee to comply with reporting requirements.

a. Instruct licensee to report following events to Department by telephone or fax within agency's next working day during normal business hours [see 22 Cal. Code Reg. § 101212(d)(1)]:

NOTE:

A written report must be submitted within seven days following the event [22 Cal. Code Reg. § 101212(d)]. Reports must include the name, age, sex, and date of admission of child involved, the date and nature of the event, the attending physician's name, findings, and treatment, if any, and the case's disposition [22 Cal. Code Reg. § 101212(d)(2); see §

100C.254].

(1) Death of child, or injury to child requiring medical treatment.

(2) Any unusual incident or child absence that threatens physical or emotional health or safety of any child.

(3) Any suspected physical or psychological abuse of any child.

(4) Epidemic outbreaks, poisonings, catastrophes.

(5) Fires or explosions that occur in or on facility premises.

b. Instruct licensee that any of above events must also be reported to child's authorized representative [22 Cal. Code Reg. § 101212(f)].

c. Instruct licensee to report any epidemic, poisoning, or catastrophe to local health officer [22 Cal. Code Reg. § 101212(g)].

d. Instruct licensee to report any fire or explosion to local fire authority [22 Cal. Code Reg. § 101212(h)].

e. Instruct licensee to report following events within 10 working days of occurrence [see 22 Cal. Code Reg. § 101212(e)]:

(1) Organizational changes in licensee or change of licensee [see 22 Cal. Code Reg. § 101185(a)(2)-(5)];

(2) Change in licensee's or applicant's mailing address [see H&S Code § 1596.83; see also § 100C.272];

(3) Change in chief executive officer of corporation, general partner of partnership, or "controlling partners in a limited liability corporation"; and

NOTE:

The reference to "controlling partners in a limited liability corporation" [see 22 Cal. Code Reg. § 101212(e)(3)] apparently refers to the managing members of a limited liability company [see Ch. 12C, **Limited Liability Companies**, for general discussion of the structure of LLCs].

(4) Changes in plan of operation that affect services to children [see § 100C.215].

f. Instruct licensee to report, within 10 days, any change in center's director or teacher designated to act in director's absence [see 22 Cal. Code Reg. § 101212(b)].

NOTE:

When reporting a change in the director, the licensee must submit documentation of qualifications [see 22 Cal. Code Reg. § 101212(b)(1)].

g. Instruct licensee to notify Department before making any structural changes at facility [see 22 Cal. Code Reg. § 101212(c); see also § 100C.273].

4. Ensure compliance with recordkeeping requirements [see § 100C.140].

5. Ensure compliance with all other applicable operating requirements:

a. Maintain teacher-child ratios at all times [see 22 Cal. Code Reg. §§ 101216.3, 101416.5, 101516.5].

b. Ensure that each child is afforded specified personal rights [22 Cal. Code Reg. § 101223(c); see § 100C.251].

c. Ensure maintenance of telephone service on premises [22 Cal. Code Reg. § 101224].

d. Ensure that only properly licensed drivers operate facility vehicles, that manufacturer's rated seating capacity is maintained, that vehicles are maintained in safe operating condition, and that all vehicle occupants are secured in appropriate restraint system [see 22 Cal. Code Reg. § 101225].

e. Ensure satisfaction of all food service requirements, if center provides food [see 22 Cal. Code Reg. § 101227].

f. Ensure adequate care and supervision at all times [see 22 Cal. Code Reg. § 101229].

g. Ensure that all health related services are provided:

(1) Notify authorized representative of any illness or injury more serious than minor cuts and scratches, and obtain their specific instructions on action to be taken [22 Cal. Code Reg. § 101226(a)].

(2) Follow appropriate procedures for obtaining prompt emergency and non-emergency medical treatment [see 22 Cal. Code Reg. § 101226(b),(c)].

NOTE:

Emergency medical treatment must be obtained, without specific instructions, if the authorized representative cannot be reached immediately, or the illness or injury requires medical treatment with no delay [22 Cal. Code Reg. § 101226(c)].

(3) Maintain all required first aid supplies in location accessible to staff but inaccessible to children [see 22 Cal. Code Reg. § 101226(d)].

(4) Keep all prescription and non-prescription medication centrally stored in safe place inaccessible to children, with proper labels, and administer in accordance with label directions and parents' written approval and instructions [see 22 Cal. Code Reg. § 101226(e)].

(5) Inspect children each day for illness before allowing their admission in center, and have person bringing child in sign daily sign-in sheet [see 22 Cal. Code Reg. § 101226.1].

(6) Isolate any child showing obvious signs of illness, and immediately notify authorized representative and request that child be removed from center as soon as possible [see 22 Cal. Code Reg. § 101226.2].

NOTE:

The isolation area cannot be located in the kitchen or general-use toilet area, must be located to afford easy supervision, and must contain a mat, cot, couch, or bed for each ill child [22 *Cal. Code Reg.* § 101226.2(a)].

h. Continually observe behavior and health of each child, and report to parents and record in child's record any unusual behavior or signs of illness [22 *Cal. Code Reg.* § 101226.3].

i. Provide variety of daily activities [see 22 *Cal. Code Reg.* § 101230].

j. Ensure that all additional operating requirements for infant care centers, school-age child care centers, and mildly ill children care centers are met [see, *e.g.*, 22 *Cal. Code Reg.* §§ 101415 *et seq.*, 101515 *et seq.*, 101551 *et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Governments State & Territorial Governments Licenses



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DIVISION VII: PERSONAL TRANSACTIONS
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32-100C California Legal Forms--Transaction Guide § 100C.123

§ 100C.123 Operating Family Child Care Home

NOTE:

Because family child care homes are minimally regulated facilities, they are exempt from many of the detailed operating regulations applicable to child care centers [22 *Cal. Code Reg.* § 102351.1]. However, family child care homes must still satisfy some operating requirements [*see* §§ 100C.70-100C.80]. The failure to comply with applicable rules and regulations can subject the operator to suspension or revocation of his or her license [*see H&S Code* § 1596.885(a)].

1. Prepare required forms.

a. Family Child Care Home Notification of Parents' Rights, provided by Department of Social Services [*H&S Code* § 1596.857(c); 22 *Cal. Code Reg.* § 102419(a); *see* § 100C.252A].

NOTE:

This notice, required on acceptance of each child into a day care facility after January 1, 2007, includes information stating that the specified registered sex offender database is available to the public at a web site, www.meganslaw.ca.gov, that is maintained by the Department of Justice [*H&S Code* § 1596.857(e)]. A provider, however, is not required to provide any additional information regarding the location and proximity of registered sex offenders who reside in the community where the child care facility is located [*H&S Code* § 1596.857(f)]. A copy of this notice must be posted in a prominent, publicly accessible area in the home [22 *Cal. Code Reg.* § 102419(b)].

(1) Inform authorized representative of children receiving services in facility of right to

enter and inspect facility premises [*H&S Code § 1596.857(a)*].

(2) Inform authorized representative of children receiving services in facility of right to be notified and receive written notice listing names of any persons not allowed in home when children are present; to be informed (on request) of name and relationship to home of any adult that has been granted criminal record exemption and that name may be obtained by contacting local licensing office; and to receive Caregiver Background Check Process form [*see § 100C.252A(2)*].

(3) Provide authorized representative with copy of notice form at time of acceptance of child [*22 Cal. Code Reg. § 102419(a)*].

(4) Obtain each authorized representative's signature, and date signed, on form acknowledging receipt of notice [*22 Cal. Code Reg. § 102419(d)*].

NOTE:

If authorized representative refuses to sign the notice form, a dated notation to that effect containing the representative's name and telephone number must be retained in the child's records [*22 Cal. Code Reg. § 102419(g)*].

b. Personal Rights of Children.

NOTE:

Although child care center operators are required to personally advise each child's authorized representative of the child's rights, and to provide a form listing these rights [*see 22 Cal. Code Reg. § 101223; see also § 100C.251*], this requirement does not apply to family child care homes. However, children attending family child care homes are afforded essentially the same rights as children attending child care centers [*see 22 Cal. Code Reg. § 102423(a); see also § 100C.251*], and the official form may be used by family child care home licensees.

(1) Inform parents or guardians of law regarding complaints, and procedures for registering complaints confidentially, including providing address and telephone number of Department's complaint unit [*22 Cal. Code Reg. § 102423(a)(3); see H&S Code § 1596.853* (complaint procedure)].

(2) Provide address and telephone numbers of Department's complaint unit [*see H&S Code § 1596.853* (complaint procedure)].

c. Child Care Facility Roster [*H&S Code § 1596.841; 22 Cal. Code Reg. § 102417(g)(8); see § 100C.253*].

(1) Ensure that form includes each child's name, address, daytime phone number of parent or guardian, and name and phone number of child's physician [*H&S Code § 1596.841*].

(2) Instruct licensee to make roster available to Department on request and retain for three years [*H&S Code § 1596.841; see Form LIC 9040 instructions*].

d. Emergency Information Card and consent for emergency medical treatment [*22 Cal. Code Reg. § 102417(g)(7); see § 100C.255*].

e. Employee Notification of Rights [*see § 100C.250*].

(1) Instruct licensee to inform all personnel of their rights [22 *Cal. Code Reg. § 102416(a)*; see *H&S Code §§ 1596.881, 1596.882*].

(2) Instruct licensee to provide each employee, at time of employment, with copy of Employee Notification of Rights form [*H&S Code § 1596.881*; 22 *Cal. Code Reg. § 102416(a)*].

(3) Obtain employee's signature and signature date on notice form acknowledging receipt [22 *Cal. Code Reg. § 102416(a)(1),(2)*].

NOTE:

If the employee refuses to sign the notice form, a dated notation to that effect must be retained in employee's record [22 *Cal. Code Reg. § 102416(a)(3)*].

2. Instruct client to post following documents in prominent, publicly accessible location in home:

a. Notice of Parents' Rights [*H&S Code § 1596.857(d)*; 22 *Cal. Code Reg. § 102419(b)*; see § 100C.252A].

NOTE:

This notice must include information stating that the specified registered sex offender database is available to the public at a web site, www.meganslaw.ca.gov, that is maintained by the Department of Justice [*H&S Code § 1596.857(d)*].

b. Department's notice identifying Department and providing phone number for personal complaints [*H&S Code § 1596.874*].

c. Home's emergency disaster plan in conspicuous location near telephone [see Form LIC 610A instructions].

3. Instruct licensee to report within 10 calendar days, in writing, any change in his or her mailing address [*H&S Code § 1596.83*; see § 100C.272].

4. Ensure compliance with recordkeeping requirements [see § 100C.141].

5. Ensure compliance with all other applicable operating requirements, including:

a. Capacity and teacher-child ratios [see 22 *Cal. Code Reg. § 102416.5*].

b. Licensee must be present in home at all times, and children must be properly supervised [see 22 *Cal. Code Reg. § 102417(a)*; see also § 100C.75].

c. Home must be clean and orderly, with heating and ventilation for safety and comfort [22 *Cal. Code Reg. § 102417(b)*].

d. Telephone service must be maintained [22 *Cal. Code Reg. § 102417(c)*].

e. Safe toys, play equipment, and materials must be provided [22 *Cal. Code Reg. § 102417(d)*].

f. Children showing signs of illness must be isolated [22 *Cal. Code Reg. § 102417(e)*].

NOTE:

The operator must determine the nature of the illness. If it is determined that the child is suffering from a communicable disease, the child must be separated from the other children until the infectious stage is over [22 *Cal. Code Reg. § 102417(e)*].

g. Food brought from child's home must be properly labeled and stored [see 22 *Cal. Code Reg. § 102417(f)*].

h. Home must be kept free from defects or conditions that might endanger children [22 *Cal. Code Reg. § 102417(g)*].

NOTE:

Family child care homes must have numerous safety precautions, such as screens for fire places and open-face heaters, fire extinguishers and/or smoke detectors, fenced stairs if children younger than five years old are cared for, storage for dangerous items such as cleaning supplies, and adequate fencing for swimming pools [see 22 *Cal. Code Reg. § 102417(g)(1)-(6)*].

i. All children, age and ability permitting, staff, and other members of house must be properly instructed in their duties under disaster plan [see 22 *Cal. Code Reg. § 102417(g)(9)*; see also § 100C.232].

j. Only properly licensed drivers may operate facility vehicles, manufacturer's rated seating capacity of vehicle must be maintained, vehicles must be maintained in safe operating condition, all vehicle occupants must wear seat belts, and infants must use infant car seats whenever being transported [see 22 *Cal. Code Reg. § 102417(h)-(l)*].

k. Mandatory liability insurance coverage requirements must be met [22 *Cal. Code Reg. § 102417(m),(n)*; see *H&S Code § 1597.531*; see also § 100C.257].

Legal Topics:

For related research and practice materials, see the following legal topics:
Education Law Administration & Operation Child Care Facilities



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 100C CHILD CARE FACILITIES

PART III. TRANSACTION GUIDE

D. Drafting Guide

32-100C California Legal Forms--Transaction Guide § 100C.130

§ 100C.130 Supporting Documents Required for Child Care Center License

NOTE:

The documents discussed below are "Section B" forms that must be drafted and submitted with the pre-printed "Section A" forms for initial licensure [*see* § 100C.120, P 3]. These forms may be submitted as individual documents [*see* §§ 100C.211-100C.220], or as part of a larger document. However, all "Section B" forms must be completed and submitted in a timely fashion or the application will be subject to closure.

1. Job descriptions [§ 100C.212].

a. Describe job for each facility employee.

(1) State specific duties and responsibilities.

(2) Specify minimum qualifications

(3) Identify any special skills needed for position.

(4) Outline lines of supervision, such as what position(s) this employee supervises, and what position supervises this employee.

b. Ensure that positions and descriptions match those on personnel report (LIC 500) [*see* § 100C.207[2]].

c. Ensure that job descriptions include minimum qualification requirements for each employee that correspond with licensing requirements.

d. If combination center, draft separate job descriptions for each component.

2. Personnel policies.

NOTE:

Personnel policies must describe the regulatory requirements commonly associated with personnel practices, such as staff coverage, staff qualification, work schedules, and conditions of employment [*see* Supplemental Application Information]. The personnel policy is intended to ensure that staff have a clear understanding of the expectations of the facility, and the benefits due them from their employment. These factors should therefore be used as a guideline when drafting the personnel policies [*see* § 100C.213].

a. Submit one set for all center personnel.

b. Include provisions covering general conditions of employment, such as preemployment screening, vacation time, sick leave, retirement, training, health plans, and other benefits offered.

c. Include provisions relating to pay criteria, such as pay periods and pay days, and, if applicable, merit increases and deductions.

d. Include provisions for working hours, including arrival times, departure times, break times, lunch schedule, procedures for calling in when ill, and overtime.

e. Include provisions for frequency and effect of staff evaluations.

f. Include provisions for conditions of employment, such as health requirements, dress code, if any, work restrictions, and expectations.

g. Include provisions for disciplining facility personnel, such as suspensions, demotions, terminations, notice requirements, and grievance procedures.

3. In-service training plan.

a. Describe general plan for and approach to training [*see* § 100C.214].

b. Specify which staff members are required to participate, how training will be structured, and how frequently training is required.

c. Identify topics to be covered by training.

d. If combination center, draft separate plan for each component.

4. Facility program description [*see* § 100C.215].

NOTE:

This document is designed to comply with the "written policy statement" requirement [*see* H&S Code § 1597.07].

a. Briefly describe purpose and goals of facility, and any specific philosophy or curriculum to be followed.

b. Identify basic and optional services.

c. Include daily activity schedule, covering entire period of daily care.

d. If combination center, draft separate program description for each component.

5. Disciplinary policies [*see § 100C.216*].

a. Include statement that is clear to staff and parents of general philosophy of discipline.

b. Include techniques of discipline that are used and not used, and under what conditions each type will be used.

c. State clearly that corporal punishment and other forms of intimidating and humiliating discipline are prohibited [*see 22 Cal. Code Reg. §§ 101223(a)(3), 101223.2*]

d. Provide for meetings and conferences with authorized representative.

e. Grounds for dismissal or relocation from center or component.

f. If combination center, draft separate, age appropriate rules for each component.

6. Admission policies and procedures [*see 22 Cal. Code Reg. §§ 101218, 101218.1; see also Supplemental Application Information, B9; § 100C.217*].

a. Include admission criteria designating those children whose needs can be met by center's program and services.

b. Include provisions stating range of children's ages that will be accepted, and program activities and any supplemental services.

c. Provide for field trips and transportation arrangements if desired.

d. Include food service provisions.

e. Explain medical assessment requirement.

f. Include provision that separate, personal interviews with parent and children are required before accepting any child. information to supplement general information on program description, if any, such as special services provided, transportation, food arrangements, and field trips

g. Ensure that admission policies and procedures match limitations on initial application (Form LIC 200A; *see § 100C.200[2]*).

h. If combination center, draft separate set of admission policies and procedures for each component.

i. If center covers mildly ill children, state conditions, symptoms, or illnesses for which children will and

will not be accepted for care [22 Cal. Code Reg. § 101619; see § 100C.35[4]].

7. Sample menu [see 22 Cal. Code Reg. § 101227 (detailed requirements); see also 7 C.F.R. § 226.20].

- a. Include provisions for both snacks and meals from four basic food groups, if served.
- b. Ensure that snacks include two basic food groups [see 22 Cal. Code Reg. § 101227(a)(4)].
- c. Specify portion sizes and times that meals are served.
- d. If combination center, draft separate one week menu for each component.

8. List of furniture and play equipment [see § 100C.218].

NOTE:

All furniture, equipment, and toys must be safe and age and program appropriate [see 22 Cal. Code Reg. §§ 101239, 101239.1, 101439, 101439.1].

9. Admission Agreement [see § 100C.220].

a. Specify basic services to be provided and any available optional services [see 22 Cal. Code Reg. § 101219(b)(1),(2)].

b. Include following payment provisions [see 22 Cal. Code Reg. § 101219(b)(3),(5); see also § 100C.220]:

- (1) Basic rate charged and optional service rates.
- (2) Payor.
- (3) Date payments are due.
- (4) Frequency of payments.
- (5) Refund conditions.

c. Include provisions by which agreement can be modified [see 22 Cal. Code Reg. § 101219(b)(4); see also § 100C.220].

NOTE:

The agreement must require that the authorized representative be given at least 30 calendar days prior written notice of any basic rate change [22 Cal. Code Reg. § 101219(b)(4)]. However, agreements involving children whose care is funded at government-prescribed rates may specify that the effective date of a government rate change will be considered the effective date for basic service rate modifications and that no prior notice is required [22 Cal. Code Reg. § 101219(b)(4)(A)].

d. State right of Department to interview children and staff, without prior consent; inspect, audit, and copy child or child care center records on demand during normal business hours; remove records if necessary for copying; and observe children's physical condition [22 Cal. Code Reg. §§ 101200(b)-(d), 101219(b)(6)].

NOTE:

The licensee must make provisions for private interviews with any children or staff members and for examining records relating to the operation of the child care center [22 *Cal. Code Reg. § 101200(b)(1),(c)(1)*].

e. Include provisions by which agreement can be terminated [see 22 *Cal. Code Reg. § 101219(b)(7)*; see also § 100C.220].

f. Do not include any provision exculpating child care provider from liability for its own negligence [see *Gavin W. v. YMCA of Metropolitan Los Angeles (2003) 106 Cal. App. 4th 662, 671-674, 131 Cal. Rptr. 2d 168*].

NOTE:

An agreement exculpating a child care provider from its own negligence has been held to be void as against public policy [*Gavin W. v. YMCA of Metropolitan Los Angeles (2003) 106 Cal. App. 4th 662, 671-674, 131 Cal. Rptr. 2d 168*]. This holding suggests that any exculpatory provision must be carefully and narrowly drafted if it is to have any chance of surviving a challenge on public policy grounds (for example, exculpatory clauses involving recreational activities such as swimming or scuba diving have been upheld) [see *Randas v. YMCA of Metropolitan Los Angeles (1993) 17 Cal. App. 4th 158, 160, 21 Cal. Rptr. 2d 245* (poolside slip-and-fall case); *Madison v. Superior Court (1988) 203 Cal. App. 3d 589, 599 250 Cal. Rptr. 299* (scuba class)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Governments State & Territorial Governments Licenses



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32-100C California Legal Forms--Transaction Guide §§ 100C.131-100C.139

[Reserved]

§§ 100C.131[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

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E. Related and Subsequent Procedures

32-100C California Legal Forms--Transaction Guide § 100C.140

§ 100C.140 Recordkeeping Requirements for Child Care Centers

1. Instruct licensee to maintain following documents in facility file:

a. Copies of all forms submitted to Department for licensure, including:

(1) Copy of disaster and mass casualty plan and Earthquake Preparedness Checklist [22 *Cal. Code Reg. § 101174(a)*; see § 100C.210].

(2) Plan of operation and related materials, including copy of admission agreement [22 *Cal. Code Reg. §§ 101173(a), 101219(e)*; see §§ 100C.211-100C.220].

(3) Copy of admission policy and procedure [see 22 *Cal. Code Reg. §§ 101218, 101218.1(a)*; see also § 100C.217].

(4) If center provides food, sample menus and on-week schedule indicating when meals and snacks are served.

NOTE:

Menus must be written and posted in open area at least one week in advance and copies of menus as served must be dated and kept on file for at least 30 days and made available for review by authorized representative and the Department on request [22 *Cal. Code Reg. § 101227(a)(6)*].

b. Copy of current license.

c. Roster.

d. Documentation that required disaster drills under disaster and mass casualty plan have been conducted [see 22 *Cal.*

Code Reg. § 101174(d)(2)].

NOTE:

All children, age and ability permitting, staff, and/or members of the facility must be instructed in their duties and responsibilities under the disaster plan, and drills must be conducted at least once every six months [*see 22 Cal. Code Reg. § 101174(c),(d)*].

e. Copy of any approval or denial of request for waiver or exception [*22 Cal. Code Reg. § 101175(b)(3)*].

f. If center provide water activities, valid water-safety certificate [*see 22 Cal. Code Reg. § 101216.6*].

2. Instruct licensee to maintain records for each enrolled child, including:

NOTE:

Separate, complete, and current records must be maintained in the center for each child [*22 Cal. Code Reg. § 101221(a)*]. All records and information obtained from or regarding children is confidential and, unless requested by the Department or the child's authorized representative, may not be revealed by the center [*see 22 Cal. Code Reg. § 101221(c)-(e)*]. The licensee is responsible for safeguarding the confidentiality of the information and, except as stated above, may not reveal or make confidential information available. However, the licensee must provide the name, address, and telephone number of a child's authorized representative to a peace officer [*22 Cal. Code Reg. § 101221(c),(h)*; *see H&S Code § 1596.876*]. The Department may remove records if necessary for copying for three business days [*22 Cal. Code Reg. § 101221(d)(1),(3)*]. The right to remove designated current records is restricted unless that same information is otherwise readily available in another document or format [*see 22 Cal. Code Reg. § 101221(d)(1)*]. Further, before removing any records, the Department must prepare a list of the records to be removed, sign and date the list on their removal, and leave a copy of the list with the licensee or designated substitute [*22 Cal. Code Reg. § 101221(d)(2)*]. Original or copies of all children's records must be retained for at least three years following the termination of services [*22 Cal. Code Reg. § 101221(g)*].

a. Record of child's name, birthday, sex, and dates of admission and termination, and whether child is full or part time [*22 Cal. Code Reg. § 101221(b)(1)-(4),(12)*].

b. Identification and emergency information, including [*see § 100C.255*]:

(1) Record of names, addresses, and telephone numbers of following people [*22 Cal. Code Reg. § 101221(b)(5),(7)*]:

(a) Child's parents and/or authorized representative.

(b) Child's physician, dentist, and other medical and mental health providers, if any.

(c) Child's relatives or others who can assume responsibility for child if parent cannot be reached.

(d) Names of others who are authorized to take child from facility.

(2) Record of current medications, including name of prescribing physician, any instructions regarding control and custody of medications [*22 Cal. Code Reg. § 101221(b)(10)*], and written approval and instructions regarding administration of any medication [*22 Cal. Code Reg. § 101226(e)(3)(B)*].

(3) Instructions for action to be taken if child's authorized representative or designated physician cannot be reached in emergency [22 *Cal. Code Reg.* § 101221(b)(8)(B)].

(4) Record of any illness or injury occurring at center that required treatment by physician or dentist [see 22 *Cal. Code Reg.* § 101221(b)(9)].

c. Signed copy of admission agreement [22 *Cal. Code Reg.* §§ 101219(e), 101221(b)(6); see § 100C.220].

d. Copies of parent's preadmission health report [see § 100C.256] and physician's medical assessment, including child's ambulatory status and following health information [22 *Cal. Code Reg.* §§ 101220, 101221(b)(8); see § 100C.259]:

NOTE:

Before or within 30 days after the enrollment of a child, the licensee must obtain a written medical assessment of the child [see 22 *Cal. Code Reg.* § 101220(a)]. If the medical assessment cannot be obtained within the specified time, a medical appointment date must be made at admission, and a tuberculosis test done within 30 days after admission [see 22 *Cal. Code Reg.* § 101220(d); see also § 100C.30[3][c]].

The licensee is not required to document medical assessment on children who are also enrolled in elementary school [22 *Cal. Code Reg.* § 101220(e)]. Further, a licensee may not require a medical assessment for a child whose authorized representative belongs to a religious faith espousing prayer or spiritual healing, provided that the authorized representative provides medical information and executes a statement [22 *Cal. Code Reg.* § 101220(f)].

(1) Dietary restrictions and allergies.

(2) Instructions for when authorized representative or designated physician cannot be reached in emergency.

(3) Signed consent for emergency medical treatment, or statement from parents that they practice religious faith healing [see 22 *Cal. Code Reg.* §§ 101220(f), 101221(b)(8)(C); see also § 100C.260].

(4) Documentation of child's immunization record (blue card) unless child is also enrolled in elementary school [22 *Cal. Code Reg.* § 101220.1(g),(i)].

NOTE:

Before admission, children must be immunized against common diseases [22 *Cal. Code Reg.* § 101220.1(a); see 17 *Cal. Code Reg.* §§ 6000-6075; but see 22 *Cal. Code Reg.* § 101220.1(a)(1) (no documentation or verification requirements for Section 1596.794 centers)]. However, children need not be immunized if a physician provides a written statement that immunization is not required, or the parents provide a written statement that immunization is contrary to their personal or religious beliefs [see 22 *Cal. Code Reg.* § 101220.1(e)(1),(2)]. These written statements must be maintained at the facility for the duration of the child's enrollment [22 *Cal. Code Reg.* § 101220.1(e)].

e. Record of any illness or injury requiring treatment by physician or dentist for which center provided assistance to child.

f. Record of any current medications, including name of prescribing physician and any instructions regarding control and custody of medications.

g. Signed and dated authorization from child's authorized representative for each activity away from center grounds.

h. Receipt for parent's rights notice, signed and dated by each parent, acknowledging receipt of parent's right to enter and inspect premises [*see* Form LIC 995 instructions; *see also* § 100C.252].

i. Receipt for children's personal rights notice [*see* § 100C.251].

j. For school-age child care centers:

(1) Health background report related to child's ability or inability to participate in facility activities [22 *Cal. Code Reg.* § 101521(b)];

(2) Agreement signed and dated by director and authorized representative allowing child to leave center on his or her own [22 *Cal. Code Reg.* § 101529.1(c)].

k. Signed affidavits from parents or guardians of each child that they have read policy statement for center [*see* H&S *Code* § 1597.07].

3. Instruct licensee to maintain copies of following personnel records for staff and volunteers at center [*see* 22 *Cal. Code Reg.* § 101217(a) (licensee, administrator, and employees), (b) (volunteers)]:

NOTE:

All personnel records must be held available to the Department to inspect, audit, and copy on demand during normal business hours [22 *Cal. Code Reg.* § 101217(c)]. The Department may remove records if necessary for copying for three business days [22 *Cal. Code Reg.* § 101217(c)(1),(3)]. The right to remove designated current records is restricted unless that same information is otherwise readily available in another document or format [*see* 22 *Cal. Code Reg.* § 101217(c)(1)]. Further, before removing any records, the Department must prepare a list of the records to be removed, sign and date the list on their removal, and leave a copy of the list with the licensee or designated substitute [22 *Cal. Code Reg.* § 101217(c)(2)]. The records must be maintained at the facility, but the licensee may keep them in a central administrative location, if readily available to the Department at the center on request [*see* 22 *Cal. Code Reg.* § 101217(d)]. Personnel records must document the hours actually worked [22 *Cal. Code Reg.* § 101217(e)].

a. Signed Criminal Record Statement [*see* 22 *Cal. Code Reg.* § 101170(d)].

b. Signed and dated copy of Notice of Employee Rights [*see* § 100C.250], or dated notation that employee refused to sign notice [22 *Cal. Code Reg.* §§ 101216(l), 101217(a)(10)].

c. Job application form for each center employee, including following data [22 *Cal. Code Reg.* § 101217(a); *see* § 100C.208].

(1) Employee's full name.

(2) Employee's driver license number if employee is to transport children.

(3) Date of employment.

(4) Statement signed by employee that he or she is at least 18 years old.

(5) Current home address and telephone number.

(6) Documentation verifying satisfaction of education, background, training and/or experience requirements [see § 100C.211].

(a) Copy of teacher's college transcripts or permit for required teaching credentials [see 22 Cal. Code Reg. § 101216.1].

(b) Verification that teacher's aides who are younger than 18 have completed high school or are currently participating in occupational program [see 22 Cal. Code Reg. § 101216.2(c)].

(c) Infant care teacher's postsecondary transcripts [see 22 Cal. Code Reg. § 101416.2(d)].

(d) Medical training verification.

(7) Past experience, including types of employment and former employers.

(8) Duties of employee.

(9) Termination date if employee is no longer employed.

(10) Documentation of either criminal record clearance or criminal record exemption [see 22 Cal. Code Reg. § 101170(e)].

d. Signed and dated copy of statement acknowledging duty to report child abuse [see § 100C.258].

e. Record of employee's health screening report or good health statement and tuberculosis test result for volunteers [22 Cal. Code Reg. § 101217(b); see 22 Cal. Code Reg. § 101216(g)(2),(3)].

4. Instruct licensee to maintain following licensing and miscellaneous records at center:

a. Current list of qualified teacher substitutes who can be called immediately in case of emergency or illness to ensure compliance with required teacher-child ratios [22 Cal. Code Reg. § 101216.3(e); see 22 Cal. Code Reg. § 101152(q)(1)].

b. Financial records [22 Cal. Code Reg. § 101213(a)(2)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Education Law Administration & Operation Child Care Facilities



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32-100C California Legal Forms--Transaction Guide § 100C.141

§ 100C.141 Recordkeeping Requirements for Family Child Care Homes

NOTE:

The following records are required to be kept complete and current in the facility and available for review [*see* Facilities Forms Request (Form LIC 183)].

1. Instruct licensee to maintain following, including copies of all forms submitted to Department for licensure, in facility file [*see* § 100C.121, P 2]:

- a. Copy of current license.
- b. Roster.
- c. Copy of emergency care and disaster plan and Earthquake Preparedness Checklist [*see* § 100C.232].
- d. Records of fire and disaster drills [*see* 22 Cal. Code Reg. § 102417(g)(9)].

NOTE:

Each family child care home must hold fire drills and disaster drills at least every six months. The licensee must document these drills, including the date and time of each drill. This documentation must be kept at the home [22 Cal. Code Reg. § 102417(g)(9)].

e. Property control documentation [22 Cal. Code Reg. § 102417(o)]:

- (1) If licensee owns property, copy of deed or property tax statement.

(2) If licensee rents property:

(a) Copy of lease or rental agreement.

(b) Copy of notice to landlord.

(c) Copy of landlord consent if eight or 14 children.

NOTE:

A licensee operating on rented or leased property, who wishes to increase the capacity of home [see 22 Cal. Code Reg. §§ 102416.5(b)(3), 102416.5(c)(1)], must obtain the written consent of the property owner/landlord to that increase [22 Cal. Code Reg. § 102417(p)]. The original of the completed and signed consent form must be attached to the facility's license and maintained in the home [22 Cal. Code Reg. § 102417(p)(1)].

f. Liability insurance documents if business is covered.

2. Instruct licensee to maintain records for each enrolled child, including:

a. Copy of identification and emergency information card [22 Cal. Code Reg. § 102421(b); see 22 Cal. Code Reg. § 102417(g)(7); see also § 100C.255].

NOTE:

At a minimum, the written information must include the child's full name; the names, telephone numbers, and addresses of the parents or responsible adult to be contacted in emergency, the name and telephone of child's physician and dentist, and the names of persons authorized to remove the child from the home. The licensee has the option of retaining Child's Preadmission Health History--Parent's Report (Form LIC 702; see § 100C.256[2]) in the file.

b. Consent for medical treatment [see § 100C.260].

c. Affidavit acknowledging no liability insurance signed by each parent if facility is not insured.

d. Receipt for parent's rights notice, signed and dated by each parent, acknowledging receipt of parent's right to enter and inspect premises [22 Cal. Code Reg. §§ 102419(d), 102421(a); see § 100C.252A].

NOTE:

These rights also include the parents' rights to be notified and receive a written notice listing names of any persons not allowed in the home when children are present; to be informed (on request) of the name and relationship to the home of any adult that has been granted a criminal record exemption and that the name may be obtained by contacting the local licensing office; and to receive the Caregiver Background Check Process form [see 22 Cal. Code Reg. § 102419(a),(c)]. The receipt also acknowledges the receipt of the Caregiver Background Check Process form [see § 100C.252A[2]].

This form must also be posted publicly in the home [see Facilities Forms Request (Form LIC 183)]. Signed and dated receipts and notations must be retained for at least three years following the termination of services to the child [22 Cal. Code Reg. § 102421(a)(1)].

e. Consumer Education Handout, Family Child Care for Children (Pub. No. 72), must be kept available for parental review.

NOTE:

This form may be obtained from the applicant's or licensee's analyst [*see* Facilities Forms Request (Form LIC 183)].

f. Notice of capacity change to parents.

g. California School Immunization Record (blue card) for all preschool aged children [*see* Facilities Forms Request (Form LIC 183)].

h. If parent or authorized representative requests information on existing exemption [*see* 22 *Cal. Code Reg. § 102419(a)(8)*], licensee must note, date, and initial request and place in the child's file [22 *Cal. Code Reg. § 102419(d)(2)*].

NOTE:

The licensee must also request that the parent or authorized representative initial the notation documenting the request [22 *Cal. Code Reg. § 102419(d)(2)*].

3. Instruct licensee to maintain personnel records for each employee including:

a. Signed and dated notice acknowledging each employee has received employee's rights form [*see* § 100C.250], or dated notation that employee refused to sign notice [22 *Cal. Code Reg. § 102416(a)*].

b. Documentation of each employee's tuberculosis clearance, signed by doctor or nurse.

c. Copy of criminal record statement [*see* § 100C.231; *see also* Form LIC 508 instructions].

4. Miscellaneous forms:

a. Facilities Forms Request (Form LIC 183).

b. Suspected Child Abuse Report (SS8572) [*see* § 100C.258].

Legal Topics:

For related research and practice materials, see the following legal topics:
Education Law Administration & Operation Child Care Facilities



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 100C CHILD CARE FACILITIES

PART IV. FORMS

A. Initial Licensing Forms

1. Child Care Centers

32-100C California Legal Forms--Transaction Guide § 100C.200

§ 100C.200 Application for Child Care Center License (LIC 200A)

[1] Comment

[a] Use of Form

This form is an application for a child care center license [LIC 200A]. It is provided by the Department of Social Services and must be filed with the Department serving the geographical area in which the facility is located [22 *Cal. Code Reg. § 101169(f)*]. This form should be used only by applicants for child care center licensure [see *H&S Code § 1596.76*; see also *§ 100C.10[2]*]. Applicants seeking a license to operate a family child care home [see *H&S Code § 1596.78*] must complete a different application [see *§ 100C.230*]. However, applicants for licensure of a combination child care center [see 22 *Cal. Code Reg. § 101152(c)(10)* ("combination center" defined)] may file a single application [22 *Cal. Code Reg. § 101169(a)(1)*]. The application should be prepared in duplicate, and the original submitted to the Department [see LIC 200A instructions]. For a step by step procedural guide to completing the application and related documents, see *§ 100C.120*.

This form must be used in any of the following situations:

- Initial licensure [*H&S Code § 1596.95*; 22 *Cal. Code Reg. § 101169(a)*].
- Any change in the child care center category, other than the proposed addition of a toddler component to an existing preschool or infant care program.
- The sale or transfer of a majority of the licensee's stock.
- The licensee separates from a parent company, or merges with another company.
- A change in the licensee.

- Whenever an applicant fails to complete an application within the requisite time period after receipt of notice that his or her application is incomplete [22 *Cal. Code Reg. § 101185(d)*; see § 100C.22[1]].

[b] Licensure Required

No person, firm, partnership, association, or corporation may operate, establish, manage, conduct, or maintain a child care center without a current valid license [*H&S Code § 1596.80*]. The unauthorized operation of a child care center may lead to civil and criminal proceedings, injunctive actions, and the immediate levying of civil penalties [see *H&S Code §§ 1596.89, 1596.891*; see also 22 *Cal. Code Reg. § 101157*]. Any person 18 years of age or over may apply for a license regardless of age, sex, race, religion, color, political affiliation, national origin, disability, marital status, or sexual orientation [22 *Cal. Code Reg. § 101168*].

[c] Required Contents and Supporting Documentation for Application

The application packet includes Section A forms, which are preprinted and available from the Department, and a list of Section B forms that must accompany the application. The Department also provides a supplemental application pamphlet with instructions for completing these forms. However, the Department may require additional information and documentation [see *H&S Code § 1596.95(h)*], and the applicant must cooperate with the Department in providing the verification and/or requested documents [22 *Cal. Code Reg. § 101169(c)*]. The failure to cooperate, by not providing required information or by not providing the information in proper form, will result in the denial of the application [*H&S Code § 1596.95(i)*].

The application must include the name and address of the facility, the name, residence, and mailing address of the applicant, and, if the applicant is leasing or renting, the name and address of the owner of the facility premises [22 *Cal. Code Reg. § 101169(d)(1)-(3)*]. If the applicant is a partnership, the supporting documents must include a copy of the partnership agreement and all documents governing the partnership and the name and principal business address of each partner [22 *Cal. Code Reg. § 101169(d)(2)(A)*; see §§ 100C.201, 100C.203]. If the applicant is a corporation or an association, the application must contain the name, title, and principal business address of each officer, executive director, and member of the governing board [22 *Cal. Code Reg. § 101169(d)(2)(B)*]. If the applicant is a corporation, each member of the board of directors, executive director, and each officer must also list the name of all facilities that they have been licensed to operate, employed by or a member of the board of directors, executive director, or an officer [22 *Cal. Code Reg. § 101169(d)(2)(E)*]. Further, the supporting documents accompanying the application must include a copy of the articles of incorporation, constitution, bylaws, and board resolution authorizing the submission of the application [22 *Cal. Code Reg. § 101169(d)(2)(D)*; see §§ 100C.201, 100C.203, 100C.219]. If the applicant is a corporation that issues stock, the name and address of each person owning more than 10 percent of the stock must be included [22 *Cal. Code Reg. § 101169(d)(2)(C)*].

Satisfactory evidence that the applicant has posted safety signs at the point of entry of the facility must be submitted with the application. These signs must state the telephone number of the local health department, that the local health department may be contacted for additional information, the statement "Protect your child--it is the law," and all information specified in *Veh. Code §§ 27360 and 27360.5* regarding child passenger restraint systems [see *H&S Code § 1596.95(g)*; see also § 100C.122].

[d] Signature Requirements and Application Fee

The application must be signed by each applicant. If the applicant is a partnership, the application must be signed by each general partner. If the applicant is a corporation, county, city, public agency, or other governmental entity, the application must be signed by the chief executive officer or authorized representative [22 *Cal. Code Reg. § 101169(e)*].

A license fee must be submitted with the application and annually thereafter. The amount of the required fee varies,

depending on the capacity range (in number of children) for which the license is issued [*see 22 Cal. Code Reg. § 101187(a)*].

[2] FORM

Application for Child Care Center License (LIC 200A)

[Click here to view image.](#)

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32-100C California Legal Forms--Transaction Guide § 100C.201

§ 100C.201 Applicant Information (LIC 215)

[1] Comment--Use of Form

This form is the Department of Social Services applicant information form for day care center applicants (Form LIC 215). This form must be completed by each applicant for day care center licensure; that is, all individuals, each partner in a partnership, or the chief executive officer or authorized representative in a corporation. If the applicant previously held a license, held a beneficial ownership of 10 percent or more in any child care center, clinic, or health or community care facility, or was an administrator, general partner, corporate officer, or director of a licensed facility, that fact must be disclosed [*H&S Code § 1596.95(d)*]. Further, the applicant must disclose whether any revocation or other disciplinary action was taken against a license held by the applicant for one of the above clinics or facilities [*H&S Code § 1596.95(e)*; see *H&S Code § 1596.851*; see also *§ 100C.55*].

This form can be used, as necessary, to verify qualifications when the applicant intends to be the administrator or director of the center.

This form must be signed by each applicant. If the applicant is a partnership, the application must be signed by each general partner; if the applicant is a corporation, county, city, public agency, or other governmental entity, the application must be signed by the chief executive officer or authorized representative [*22 Cal. Code Reg. § 101169(e)*]. Original signatures are required because the form is signed under penalty of perjury.

[2] FORM

Applicant Information (LIC 215)

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32-100C California Legal Forms--Transaction Guide § 100C.202

§ 100C.202 Designation of Facility Responsibility (LIC 308)

[1] Comment--Use of Form

This form, Department of Social Services Form LIC 308, identifies persons authorized by the licensee to accept responsibility for the center when the licensee is absent. The form is available from the Department.

All child care centers must have an authorized person present at the facility at all times to represent the center and accept licensing reports and other documents from the Department. If the applicant anticipates that he or she cannot be continuously present in the center, the applicant must delegate this authority to the administrator, director if other than licensee, or other appropriate staff. Further, within 10 days of any change in the director or responsible designee, the center must report the change to the Department [*see 22 Cal. Code Reg. § 101212(b)*].

If the applicant is a corporation, the board resolution must authorize this delegation [*see § 100C.219*].

[2] FORM

Designation of Administrative Responsibility (LIC 308)

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Legal Topics:

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32-100C California Legal Forms--Transaction Guide § 100C.203

§ 100C.203 Administrative Organization (LIC 309)

[1] Comment--Use of Form

This form, Department of Social Services Form LIC 309, identifies the administrative organization of the applicant. The form is available from the Department. The information on this form must match the information on the application.

If the applicant is a corporation, the applicant must include the corporate name and file number, the date and place of incorporation, the principal business office and contact person, facts about the board of directors, and the names and addresses of the board officers and persons having beneficial ownership of at least 10 percent of the corporation. The applicant must attach a copy of the articles of incorporation and any amendments, a copy of the bylaws and any amendments, and a copy of the authorizing board resolution [see § 100C.219].

If the applicant is a partnership or public agency, the applicant must complete the appropriate portions of the second page of the form. Public agencies must attach a copy of the resolution or other legal document authorizing the application. Partnerships must attach a copy of the partnership agreement.

[2] FORM

Administrative Organization (LIC 309)

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Legal Topics:

For related research and practice materials, see the following legal topics:

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32-100C California Legal Forms--Transaction Guide § 100C.204

§ 100C.204 Monthly Operating Statement (LIC 401)

[1] Comment--Use of Form

This form, Department of Social Services Form LIC 401, is a monthly operating statement that must be submitted by each applicant for day care center licensure. Together with the other financial forms [see §§ 100C.204A, 100C.205, 100C.205A, 100C.206], these documents provide financial information to the Department to evaluate the applicant's overall financial status and to determine whether the applicant has sufficient financial resources to operate the center and meet expenses. The form is available from the Department.

When completing this form, also referred to as the estimated monthly operating budget, it is important to establish that the program will at least break even financially. The applicant must ensure that the number of clients corresponds with requested capacity and that the stated rent amount corresponds with the lease or rental agreement. The statement must indicate all operating costs, which must be reasonable. For example, reasonable salaries must provide for at least the minimum wage. Fringe benefits should be calculated at 25 percent of salary, or the statement should explain why fringe benefits are not applicable. If other income is available to fund the center, it must be clear and documented [see Form LIC 401 supplemental instructions]. Additional documentation is required [see Form LIC 401a, not reproduced here], and a profit and loss statement must be submitted for other business operations [see Form LIC 401 instructions].

Original signatures are required because the form is signed under penalty of perjury. The failure to sign, date, and attest to the accuracy of the reported information constitutes noncompliance and will cause the statement to be rejected [see Form LIC 401 instructions].

Applicants must also file a supplemental financial information form [see § 100C.204A].

[2] FORM

Monthly Operating Statement (LIC 401)

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32-100C California Legal Forms--Transaction Guide § 100C.204A

§ 100C.204A Supplemental Financial Information (LIC 401a)

[1] Comment--Use of Form

This form, Department of Social Services Form LIC 401a, requires the disclosure of additional financial information and must be submitted by each applicant for licensure. Together with the other financial forms [*see §§ 100C.204, 100C.205, 100C.206*], these documents provide financial information so that the Department can evaluate the applicant's overall financial status and determine whether the applicant has sufficient resources to operate the center and meet expenses.

Each applicant must submit this form, completing Part II. Sole proprietorships must also complete Part I. Each general partner must submit a personal form, completing both parts. The form must also include information at the top of the form to identify (1) the reporting period for the information; (2) the name of the sole proprietor, partner, general partnership, or corporation for whom the information applies; (3) the facility name; and (4) the application or license number [*see Form LIC 401a instructions*].

The applicant or licensee must sign and date this form and attest to the accuracy of the financial information stated. The failure to sign, date, and attest to the information in this form constitutes non-compliance and will result in the rejection of the report [*see Form LIC 401a instructions*]. All reported information is subject to verification and the Department may request additional documentation to support some or all of the reported items. The form is available online or from the Department [*see Form LIC 401a instructions*].

[2] FORM

Supplemental Financial Information (LIC 401a)

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32-100C California Legal Forms--Transaction Guide § 100C.205

§ 100C.205 Balance Sheet (LIC 403)

[1] Comment--Use of Form

This form, Department of Social Services Form LIC 403, is a balance sheet, also referred to as a financial statement, that must be submitted by each applicant for licensure. Together with the other financial forms that must be submitted in connection with the application, [see §§ 100C.204, 100C.204A, 100C.205A, 100C.206], these documents provide financial information to the Department to evaluate the applicant's overall financial status and to determine whether the applicant has sufficient financial resources to operate the center and meet expenses. The form is available from the Department.

This form is designed to provide information concerning the assets and liabilities concerning all of the applicant's activities, not just those related to the child care center. Realistic estimates must be provided, including credit card balances and income and expenses of other businesses. Life insurance amount must be the cash value or surrender value rather than face value for life insurance. If the applicant is sole owner of real property, the form should state the appraised value of property; however, if the applicant is a partnership or corporation, the cost of the real property must be used, not appraised value. Further, the funds or assets must be readily available to the center, that is, not dependent on the sale or transfer of stock or other personal property [see Form LIC 403 supplemental instructions].

If a center will be operated by a husband or wife individually, the information reported must pertain to both, such as individual credit card balances that are listed solely under one name or under both as husband and wife. Such balances may be unrelated to the center's actual operation, or to the person who will actually operate the center [see Form LIC 403 instructions].

If a center will be operated by a partnership, the partners must file this form on behalf of the partnership. In addition, each general partner must file a personal balance sheet to reflect their individual financial position [see Form LIC 403 instructions].

Original signatures are required because the form is signed under penalty of perjury. The failure to sign, date, and attest to the accuracy of the reported information constitutes noncompliance and will cause the statement to be rejected [see Form LIC 403 instructions].

[2] FORM

Balance Sheet (LIC 403)

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32-100C California Legal Forms--Transaction Guide § 100C.205A

§ 100C.205A Balance Sheet Supplemental Schedule (LIC 403a)

[1] Comment--Use of Form

This form, Department of Social Services Form LIC 403a, is a worksheet to be used in compiling the detailed financial information that is then totaled and displayed on the balance sheet form. Accordingly, this form must be completed before completing the balance sheet [see Forms LIC 403 and LIC 403a instructions; *see also* § 100C.205]. If the applicant or licensee files more than one balance sheet, an additional LIC 403a must be completed.

The form must also include the following information at the top of the page: (1) the current date; (2) the entity's name for whom the information is being reported; and (3) the facility name to identify [see Form LIC 403a instructions]. The effective date for the information should be the most current date possible, and must be the same as the date on the balance sheet [see Form LIC 403a instructions].

The applicant or licensee must sign this form and attest to the accuracy of the financial information stated. The failure to sign and attest to the information in this form constitutes non-compliance and will result in the rejection of the report [see Form LIC 403a instructions]. All reported information is subject to verification and the Department may request additional documentation to support some or all of the reported items [see Form LIC 403a instructions]. The form is available online or from the Department.

[2] FORM

Balance Sheet Supplemental Schedule

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32-100C California Legal Forms--Transaction Guide § 100C.206

§ 100C.206 Financial Information Release and Verification (LIC 404)

[1] Comment--Use of Form

This form, Department of Social Services Form LIC 404, is a financial information release and verification form. Together with the other financial forms that must be submitted along with the application [see §§ 100C.204, 100C.205], these documents provide financial information to the Department to evaluate the applicant's overall financial status and to determine whether the applicant has sufficient financial resources to operate the day care center and meet expenses. In particular, this form is used to verify approximately three months of operating budget. A verifiable line of credit from a reputable financial institution is acceptable for start-up funds if the credit is readily accessible [see Form LIC 404 supplemental instructions]. The form is available from the Department.

The applicant must complete Section 1 and return the form to the Department, which, in turn, will forward the form to the relevant financial institution. The verification must be sent by the financial institution directly to the Department; the licensee may not hand carry the verification [see Form LIC 404 supplemental instructions].

Separate forms are required for each bank or financial institution with which the applicant does business [see Form LIC 404 supplemental instructions].

The form must contain the original signature of the applicant; photocopies are not acceptable [see Form LIC 404 supplemental instructions].

[2] FORM

Financial Information Release and Verification (LIC 404)

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32-100C California Legal Forms--Transaction Guide § 100C.207

§ 100C.207 Personnel Report (LIC 500)

[1] Comment--Use of Form

This form, Department of Social Services LIC 500, is a personnel report intended for use in keeping a current roster of all center personnel and all adults residing in the center, including backup personnel, volunteers, and the licensee if he or she is the director/administrator [see Form LIC 500 instructions]. A separate form is required for each child care component [see Form LIC 500 supplemental instructions]. The form is available from the Department.

The form must show all positions, dates of employment, job descriptions, and days and hours on duty. The applicant should confirm that the requisite staff will be present during all hours of operation. The director/administrator and any staff hired at the time of the application should be on the form. Unfilled positions should be listed as "to be hired" and designated by position title [see Form LIC 500 supplemental instructions]. If specialized staff have licenses or certificates, those numbers must be shown on the form [see Form LIC 500 instructions].

The form must identify any staff members who are exempt from the fingerprinting requirement [see § 100C.21[2][a]] or the health screening requirements [see § 100C.27[2][d]; see also Form LIC 500].

The original of this form must be sent to the Department, and the licensee must retain a copy in the facility file [see Form LIC 500 instructions].

[2] FORM

Personnel Report (LIC 500)

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32-100C California Legal Forms--Transaction Guide § 100C.208

§ 100C.208 Personnel Record (LIC 501)

[1] Comment--Use of Form

This form, Department of Social Services Form LIC 501, is a personnel record to be completed by each day care center employee setting forth their personal information, previous employment, education, references, and professional or technical qualifications. The form is available from the Department.

The applicant must submit a completed form to the Department only for the director/administrator and any program manager. All other personnel records must be kept at the center available for review [see Form LIC 501 supplemental instructions].

By signing the form, the employee grants permission for any necessary verification. Original signatures are required as the form is signed under penalty of perjury [see Form LIC 501].

[2] FORM

Personnel Record (LIC 501)

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32-100C California Legal Forms--Transaction Guide § 100C.209

§ 100C.209 Health Screening Report--Facility Personnel (LIC 503)

[1] Comment--Use of Form

This form, Department of Social Services Form LIC 503, is a health screening report available from the Department. The day care center completes the first portion, which identifies the center and the subject to the screening. The subject completes the middle portion, which authorizes the release of medical information. The third portion is prepared by the physician or under the direction of the physician [see Form LIC 503 instructions].

All center personnel, including the licensee, the administrator, and volunteers, must be in good health, and physically, mentally, and occupationally capable of performing their assigned tasks. The physical health of all staff members, except volunteers, must be verified by a health screening examination, including a test for tuberculosis, performed by or under the supervision of a physician, not more than one year before or seven days after employment or licensure [22 Cal. Code Reg. § 101216(g)(1); see 22 Cal. Code Reg. § 101216(g)(2) (contents)]. However, if the applicant has other licensed facilities, or the director has worked at another facility with the same licensee, and an exam is on file, a new health exam is not required unless obvious health problems exist [see Form LIC 503 supplemental instructions]. The good physical health of volunteers must be verified by a signed statement affirming that the volunteer is in good health and a test for tuberculosis must have been performed not more than one year before or seven days after the volunteer's initial presence in the center [22 Cal. Code Reg. § 101216(g)(3)].

If the applicant is a corporation, a health screening and tuberculosis clearance is required for the board president, chief executive officer, or person designated by the board resolution [see Form LIC 503 supplemental instructions].

The report must be signed and dated by a qualified medical professional. Signatures may not be photocopied [see Form LIC 503 supplemental instructions].

[2] FORM

Health Screening Report--Facility Personnel (LIC 503)

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32-100C California Legal Forms--Transaction Guide § 100C.210

§ 100C.210 Emergency Disaster Plan (LIC 610)

[1] Comment

[a] Use of Form

This form, Department of Social Services Form LIC 610, is an emergency disaster plan. It is provided by the Department and must be completed and maintained by each licensee of a child care center to enable the center to handle any emergency that may arise and to protect the safety and well being of each child [*H&S Code § 1596.95(f)*; *22 Cal. Code Reg. § 101174(a)*]. A separate form is required for each child care component [*see Form LIC 610 supplemental instructions*]. This form is not to be used by licensees of family child care homes. Family child care homes are also required to have similar disaster plans but the Department provides a different form for these facilities [*see § 100C.232*].

As indicated on the form, a copy of the form must be posted in a prominent location in the facility near a telephone. Further, the licensee is responsible for keeping the plan current.

[b] Required Contents of Plan

Each child care center's plan is subject to review by the Department. The plan includes a designation of administrative authority and staff assignments; contingency plans for action during an emergency, such as a fire safety plan, providing exit locations, emergency names and telephone numbers; and temporary relocation sites away from the center [*22 Cal. Code Reg. § 101174(b)(1),(2)(A),(B),(D)*]. The relocation sites must be equipped to provide safe temporary accommodations for children [*22 Cal. Code Reg. § 101174(b)(2)(D)*]. If use of the relocation site requires an agreement from some other person, this agreement should be verified in writing [*see Form LIC 610 supplemental instructions*] and a copy kept in the center's files.

The plan must also be accompanied by a floor plan of the facility indicating the facility exits and utility shut-off locations. Furthermore, the plan must include arrangements for the transportation of children during an emergency, the supervision of children during an evacuation or relocation, and for contact after relocation to ensure that relocation has

been completed as planned; if applicable, the plan must address any special methods or procedures needed for the evacuation and relocation of nonambulatory children [22 *Cal. Code Reg. § 101174(b)(2)(C)-(E), (3)*]. Finally the plan must state the means of contacting local agencies, including the fire department, law enforcement agencies, and civil defense and other disaster authorities [22 *Cal. Code Reg. § 101174(b)(2)(F)*].

[c] Instruction and Drill Requirements

The licensee is responsible for instructing all children, age and abilities permitting, and child care personnel, including volunteers, in their duties and responsibilities under the plan [22 *Cal. Code Reg. § 101174(c)*]. Disaster drills must be conducted at least every six months. The completion of these drills does not require travel away from the center premises or contact with local disaster agencies. The drills must be documented and the documentation maintained in the center's files for at least one year [22 *Cal. Code Reg. § 101174(d)*].

[d] Earthquake Preparedness Checklist

Every child care center must include an Earthquake Preparedness Checklist (LIC 9148) as an attachment to its emergency disaster plan. This checklist must be made accessible to the public at the center. However, this checklist is not a requirement for obtaining or maintaining a license for a child care center, and the Department is not responsible for enforcing any component of the checklist or ensuring public accessibility [*H&S Code § 1596.867(a)*].

A sample checklist is available from the Department. However, centers may prepare their own, provided that the checklist does not exceed two typewritten pages [*H&S Code § 1596.867(b)* (licensee may select from suggested procedures)].

[2] FORM

Emergency Disaster Plan (LIC 610)

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32-100C California Legal Forms--Transaction Guide § 100C.211

§ 100C.211 Verification of Director's Teaching Experience

[1] Comment

[a] Use of Form

This form is a verification of a child care center director's qualifications. The director's experience as a teacher under the supervision of a person who would qualify as a director must be verified as having been performed satisfactorily [see 22 Cal. Code Reg. § 101215.1(h),(l)]. The form is suited for licensees who need to verify the teaching experience of a director that they wish to hire for a child care center [see [b][i], [d], *below*]. The form can be adapted to verify the necessary work experience of directors of specialized programs and of teachers and teacher aides [see [b][ii]-[iv], [c], [d], *below*].

[b] Qualification Requirements for Directors

[i] Child Care Centers

To qualify as a director, the individual must first meet the qualification requirements of an administrator [22 Cal. Code Reg. § 101215]. Specifically, he or she must meet the following criteria [22 Cal. Code Reg. § 101215(a)]:

- Be 18 years or older.
- Know the requirements for providing the type of care and supervision needed by children, including being able to communicate with children.
- Know and be able to comply with applicable laws and regulations.
- Be able to maintain or supervise maintenance of financial and other records.

- Be able to establish the center's policy, program, and budget.
- Be able to recruit, employ, train, direct, and evaluate qualified staff.
- Be able to terminate staff members.

Child care center directors must also meet specific educational and employment qualifications [see 22 Cal. Code Reg. § 101215.1(h)-(k),(m)]. Before employment, directors must have completed one of the following [22 Cal. Code Reg. § 101215.1(h)(1)-(4)]:

- High school graduation or GED, plus 15 semester units or equivalent quarter units in early childhood education at an accredited or approved college or university (three units must be in administration or staff relations and 12 units in courses in general areas of child or human growth and development, child and family (or family and community), and program or curriculum), and at least four years of teaching in a licensed child care center or comparable group child care program;
- An AA degree from an accredited or approved college or university with a major or emphasis in early childhood education or child development (with three semester units or equivalent quarter units in administration or staff relations), and at least two years of teaching experience in a licensed child care center or comparable group child care program;
- A bachelor's degree from an accredited or approved college or university with a major or emphasis in early childhood education or child development (with three semester units or equivalent quarter units in administration or staff relations), and at least one year of teaching experience in a licensed child care center or comparable group child care program; or
- A Child Development Site Supervisor Permit or a Child Development Program Director Permit issued by the California Commission on Teacher Credentialing.

Approved schools, colleges, or universities, and correspondence courses they may offer, are institutions that are approved or authorized by the U.S. Department of Education, Office of Postsecondary Education, or by the California Department of Consumer Affairs, Bureau for Private Postsecondary and Vocational Education [22 Cal. Code Reg. § 101215.1(i); see *Educ. Code* § 94700 *et seq.*]. Accredited schools, colleges, or universities, and correspondence courses they may offer, are institutions accredited by either the Accrediting Commission, Distance Education and Training Council, the Western Association of Schools and Colleges, Accrediting Bureau of Health Education Schools, association of Independent Colleges and Schools, or the National Association of Trade and Technical Schools [22 Cal. Code Reg. § 101215.1(j)]. Units earned through correspondence courses from approved or accredited institutions are accepted for meeting the above educational requirements [22 Cal. Code Reg. § 101215.1(k)].

[ii] Infant Care Centers

In addition to the requirements imposed on child care center directors [see 22 Cal. Code Reg. § 101215.1], directors of infant care centers [see 22 Cal. Code Reg. § 101152(i)(3) ("infant care center director" defined); see also § 100C.35[2]], must meet other qualification requirements [see 22 Cal. Code Reg. § 101415]. Specifically, the teaching experience requirements for child care center directors [see [i], *above*] must be completed in an infant care center or comparable group child care program dealing with children under five years of age [22 Cal. Code Reg. § 101415(b)], and at least three of the required course units must be related to the care of infants [22 Cal. Code Reg. § 101415(c)].

If an infant care center has 25 or more infants, an assistant director must be present and on duty [22 Cal. Code Reg. § 101415.1(a); see 22 Cal. Code Reg. § 101152(a)(4) ("assistant infant care center director" defined)]. Assistant infant

care directors work under direction and supervision of the director [22 Cal. Code Reg. § 101415.1(b)(2)(B); and must also meet qualification requirements, such as being a fully qualified infant care teacher and successfully completing specific course requirements [see 22 Cal. Code Reg. § 101415.1(b); see also 22 Cal. Code Reg. § 101416.2 (infant care teacher qualifications)].

[iii] School-Age Child Care Centers

In addition to the requirements imposed on child care center directors [see 22 Cal. Code Reg. § 101215.1], school-age child care center directors [see 22 Cal. Code Reg. § 101152(s)(2) ("school-age child care center" defined); see also § 100C.35[3]], are subject to other requirements [22 Cal. Code Reg. § 101515(a)]. Although all school-age child care centers must have a director [22 Cal. Code Reg. § 101515(b)], combination programs that have a school-age child day care center component [see 22 Cal. Code Reg. § 101152(c)(10) ("combination center" defined)] do not need a separate director; the director of the child care center must maintain ultimate responsibility for the combined program and provide direct supervision and guidance [see 22 Cal. Code Reg. § 101515(b)(1)]. Additionally, in a combination program, the director must designate a fully qualified teacher for the school-age child care center component [22 Cal. Code Reg. § 101515(b)(1)(A); see 22 Cal. Code Reg. § 101516.2; see also [c][iv], below]. Moreover, alternative educational prerequisites exist for directors of school-age child care centers [see H&S Code § 1597.21; 22 Cal. Code Reg. § 101515(c)].

[iv] Center for Mildly Ill Children

In addition to the requirements imposed on child care center directors, infant care center directors, and school-age child care center directors [see 22 Cal. Code Reg. §§ 101215.1, 101415, 101515], directors of Level I or Level II child care centers for mildly ill children must meet additional educational requirements [22 Cal. Code Reg. § 101615(a),(b)]. Directors must complete three postsecondary or equivalent quarter units in the identification, transmission, control, and care of common childhood illnesses and communicable diseases at an approved or accredited college or university and 15 hours of health and safety training [22 Cal. Code Reg. § 101615(b)(1); see [d], below]. Alternative educational prerequisites exist for physicians, physician's assistants, registered nurses, and license vocational nurses seeking to qualify as a director [22 Cal. Code Reg. § 101615(b)(2)]. In a combination program with a Level I or II component, a separate director is not required for each component; however, the director must designate a fully qualified teacher for the Level I or II component [22 Cal. Code Reg. § 101615(e)].

[c] Qualification and Duty Requirements for Teachers and Aides

[i] In General

A teacher's experience must be verified as having been performed in a satisfactory manner under a staff member who would qualify as a teacher or director [see 22 Cal. Code Reg. § 101216.1(c)(1)(B),(2)(C)]. Verifications are also required for teacher's aides who are less than 18 years old [see 22 Cal. Code Reg. § 101216.2(c)] and infant care teachers [see 22 Cal. Code Reg. § 101416.2(c)(2)(A)]. In addition to verification of work experience, a photocopy of teacher's transcripts documenting successful completion of the educational requirements must be maintained at the center [22 Cal. Code Reg. § 101216.1(g)].

[ii] Child Care Centers

Teachers at child care centers must meet specific educational and employment qualifications [see 22 Cal. Code Reg. § 101216.1]. Before employment, teachers must have completed at least six semester units or equivalent quarter units of the educational requirements, and after employment the teacher must properly complete at least two units each semester or quarter until the educational requirement is met [22 Cal. Code Reg. § 101216.1(b)(1)]. The educational and employment requirements are satisfied by completion or obtainment of any one of the following [22 Cal. Code Reg. § 101216.1(c)(1)-(3); but see H&S Code § 1597.055 (conditions for hiring teachers who have not yet obtained full

educational and employment qualifications]):

- Twelve postsecondary semester units or equivalent quarter units in early childhood education or child development completed with passing grades at an accredited or approved college or university [see 22 Cal. Code Reg. § 101216.1(e),(f)], including courses covering general areas of child or human growth and development, child, family and/or community, and program or curriculum, and at least six months of work experience in a licensed child care center or comparable group child care program. This experience must be verified as having been performed in a satisfactory manner, at least three hours per day for a minimum of 50 days in a six-month period, as a paid or volunteer staff member under the supervision of a person who would qualify as a teacher or director.
- A current and valid Child Development Associate (CDA) credential with the appropriate age level endorsement issued by the CDA National Credentialing Program, and at least six months of on-the-job training and/or work experience in a licensed child care center or comparable group child care program. This experience must be verified as having been performed satisfactorily, at least three hours per day for a minimum of 50 days in a six-month period, as a paid or volunteer staff member under the supervision of a person who would qualify as a teacher or director.
- A Children's Development Associate Teacher Permit, Child Development Teacher Permit, or Child Development Master Teacher Permit issued by the California Commission on Teacher Credentialing.

The educational requirements set out above do not apply to teachers who were employed as teachers before May 1, 1970. A teacher employed before this date meets the qualification requirements if there was no break in their employment as a teacher at a child care center for more than three consecutive years [22 Cal. Code Reg. § 101216.1(h)].

Child care centers may use teacher aides to assist teachers in performing their duties if the aide is under the direct supervision of the teacher [22 Cal. Code Reg. § 101216.2(e)]. Teacher aides can also be used to satisfy teacher-child ratios [see 22 Cal. Code Reg. § 101216.3(b), § 101216.2(d)]. To work as an aide, the person must satisfy minimal postsecondary educational requirements [see H&S Code § 1597.059(a); 22 Cal. Code Reg. § 101216.2(d)]. Aides who are younger than 18 years old must provide verification that they are either high school graduates or currently participating in an occupational program conducted by an accredited high school or college [see 22 Cal. Code Reg. § 101216.2(b),(c)]. Each teacher must visually observe aides under his or her supervision whenever the aide is working with children [22 Cal. Code Reg. § 101216.1(j)].

Teachers may not be required to perform housekeeping or maintenance duties that prevent them from performing duties related to providing care and supervision, and persons employed for clerical, housekeeping, and maintenance functions may not be included as teachers in the teacher-child ratio [22 Cal. Code Reg. § 101216.3(g),(h)].

[iii] Infant Care Centers

Before employment, infant care teachers must have completed, with passing grades, at least three postsecondary semester units or equivalent quarter units in early childhood education or child development, and three postsecondary semester or equivalent quarter units related to the care of infants, at an accredited or approved college or university [22 Cal. Code Reg. § 101416.2(b)]. After employment, a teacher who has not completed the required course work must complete at least two units each semester or quarter until the educational requirement is met [see 22 Cal. Code Reg. § 101416.2(b)].

To be a fully qualified infant care teacher, the teacher must successfully complete 12 postsecondary semester or equivalent quarter units in early childhood education or child development at an accredited or approved college or university (at least three of which are related to the care of infants or contain instruction specific to infants), and have at

least six months experience in a licensed infant care center or comparable group child care program for children under five years of age. This experience must be verified as having been performed in a satisfactory manner at least three hours per day for a minimum of 50 days in a six-month period, as a paid or volunteer staff member under the supervision of a person who would qualify as a teacher or director [22 *Cal. Code Reg.* § 101416.2(c)]. A photocopy of each teacher's postsecondary transcript documenting completion of the required course work must be maintained on file at the center [22 *Cal. Code Reg.* § 101416.2(d)].

Further, if required under *H&S Code* § 1596.866 [see § 100C.27[2][c]], infant care teachers must complete 15 hours of prescribed health and safety training [22 *Cal. Code Reg.* § 101416.2(g); see 22 *Cal. Code Reg.* § 101215.1(m)(1)].

Infant care teachers must provide, under the supervision of the director and assistant director, direct care and supervision of infants at the center, and visually observe aides whenever aides are working with infants [22 *Cal. Code Reg.* § 101416.2(e),(f)]. Aides may work at infant care centers if they (1) are under the direct supervision of the director, assistant director, or fully qualified teacher, (2) provide direct care and supervision of infants, and (3) participate in on-the-job training programs [see 22 *Cal. Code Reg.* § 101416.3; see also 22 *Cal. Code Reg.* § 101216(e)].

[iv] School-Age Child Care Centers

Teachers at school-age child care centers [see 22 *Cal. Code Reg.* § 101152(s)(2) ("school-age child care centers" defined); see also 100C.35[3]] must ordinarily satisfy the educational requirements imposed on child care center teachers [see 22 *Cal. Code Reg.* §§ 101216.1, 101516.2(a); see also [ii], above]. However, teachers may use alternative means to satisfy these requirements, such as substituting 12 units or 240 training hours in any combination of the following [*H&S Code* § 1597.21(d); see *H&S Code* § 1597.21(e),(f) (additional alternatives); see also 22 *Cal. Code Reg.* § 101516.2(b),(d)]:

- Recreation, including art, music, and dance.
- Physical education, including indoor and outdoor sports activities.
- Human services and social welfare, including nursing, psychology, sociology, and home economics.
- Units earned toward an elementary or middle school teaching credential.
- Early childhood education, child development, or school-age child units.

In a combination center [see 22 *Cal. Code Reg.* § 101152(c)(10) ("combination center" defined)], a fully qualified child care center teacher must be designated to work closely with the director in planning the daily activities of the school-age child care component. The designated teacher must maintain responsibility for the overall operation of the school-age center component under the direction and supervision of the director of the child care center component [22 *Cal. Code Reg.* § 101516.2(e)].

[v] Center for Mildly Ill Children

In addition to the requirements imposed on child care center teachers, infant care center teachers, and school-age child care center teachers [see 22 *Cal. Code Reg.* §§ 101216, 101216.1, 101416.2, 101516.2], teachers at centers for mildly ill children [see 22 *Cal. Code Reg.* § 101552(c)(10)] must complete three postsecondary or equivalent quarter units in the identification, transmission, control, and care of common childhood illnesses and communicable diseases, and three postsecondary or equivalent quarter units in early childhood education or child development, at an approved or accredited college or university, plus 15 hours of health and safety training [22 *Cal. Code Reg.* § 101616.2(a)-(c); see [d], below].

In a combination center [see 22 Cal. Code Reg. § 101152(c)(10) ("combination center" defined)], a fully qualified child care center teacher must be designated to work closely with the director in planning the daily activities of the Level I or Level II component. The designated teacher must maintain responsibility for the overall operation of that component under the direction and supervision of the director of the child care center component [22 Cal. Code Reg. § 101616.2(e)].

[d] Health and Safety Training

At least one director or teacher at each child care center must have at least 15 hours of health and safety training including pediatric first aid, pediatric cardiopulmonary resuscitation (CPR), and a preventative health practices course or courses that include instruction in the recognition, management, and prevention of infectious diseases, including immunizations, and prevention of childhood injuries [H&S Code § 1596.866(a)(1),(2)]. This training may include instruction in sanitary food handling, child nutrition, emergency preparedness and evacuation, caring for children with special needs, and identification and reporting of signs and symptoms of child abuse [H&S Code § 1596.866(a)(3)]. The completion of health and safety training is a condition of licensure, and pediatric first aid and pediatric CPR training must be current at all times [H&S Code § 1596.866(c)(1),(2); see H&S Code § 1596.866(c)(3) (90-day, nonrenewable provisional license)].

[2] FORM

Verification of Director's Teaching Experience

Verification of Teaching Experience

Dear _____ [name of previous employer] :

_____ [Name of individual seeking employment as director] has applied for a position as a director at a licensed child care center. To determine if _____ [his or her] prior teaching experience qualifies [him or her] to be a director at our center, please provide us with the information outlined below.

Teaching experience is considered qualifying only if it meets the criteria outlined in *Title 22, Section 101215.1 of the California Code of Regulations*. This Section provides that qualifying experience must be as a teacher in a licensed child care center or comparable group home under the supervision of a person who would qualify as a director under the regulations. A teacher may claim one year of work experience if he or she is employed at least three hours per day for a minimum of one hundred days in a calendar year, and if it is verified that the work has been performed satisfactorily.

Thank you for your assistance. If you have any questions or would like to discuss this matter further, please contact me at [telephone number]. Please return this completed form to the address listed below.

Sincerely, _____ [signature of licensee]
[typed name]

_____ [name and address of center]

NAME OF APPLICANT FOR DIRECTOR POSITION _____

Job Title	Employed	Hours per day	Days per week
	From (mo./day/yr.) to (mo./day/yr.)		

Duties and Responsibilities: *[describe duties and responsibilities of person seeking employment as director]*.

Performance Rating:

Was performance satisfactory? Yes _____ No _____

Comments

Date: _____

Signature: _____

Name (please type or print): _____

Position/title: _____

Child Care Center: _____

Address: _____

Telephone number: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Education Law Faculty & Staff General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 100C CHILD CARE FACILITIES

PART IV. FORMS

A. Initial Licensing Forms

1. Child Care Centers

32-100C California Legal Forms--Transaction Guide § 100C.212

§ 100C.212 Job Descriptions

[1] Comment--Use of Form

This form is a job description of each employment position at the child care center. It is a Section B form that must be submitted with the application.

Each job description should identify the specific duties and responsibilities, minimum qualifications, and any special skills needed for the position. Further, each description should outline lines of supervision, such as what positions a particular employee supervises, and what positions supervise that employee. When drafting the descriptions, the positions and descriptions must match those on the personnel report [see § 100C.207], and the minimum qualifications must correspond with licensing requirements [see § 100C.211[1]].

If the center is a combination center, separate job descriptions must be prepared for each component.

[2] FORM

Job Descriptions

Job Descriptions

Our staff consists of one director, four teachers, and two volunteers.

_____ [Name] is our director and _____ [he or she] is responsible for the general operation of the center, which includes supervising all other staff members and volunteers, observing the children, keeping the center's records in order, communicating with the Department, and contacting parents whenever a problem arises. The director also assists in teaching responsibilities and is on the center premises at all times.

Our director, and all child care center directors, must satisfy at least the minimum educational and experience

requirements set forth in 22 Cal. Code Reg. § 101215.1. _____ [name] satisfies these requirements in that _____ [he or she] holds _____ [specify, e.g., a graduate degree in early childhood development, has recently received her Children's Center Supervisory Permit, has _____ (specify at least minimum of 15) hours of qualifying health and safety training, and holds a current pediatric CPR card issued by the Red Cross]. _____ [name] has _____ [identify qualifying experience, e.g., two years prior experience working as a teacher for a child care center].

Our teachers work under the supervision of the director and are responsible for being with the children at all times during the day to meet whatever immediate needs may arise. Each teacher is assigned to a group of [specify not more than 12, e.g., eight] children. They are also responsible for tidying the center at the end of each day after all their children have left, including picking up toys inside and in the playground. They are not responsible for general maintenance and sanitation and cleaning the bathrooms.

Our teachers, and all child care center teachers, must satisfy at least the minimum educational and experience requirements set forth in 22 Cal. Code Reg. § 101216.1. Our child care center requires that each teacher _____ [specify, e.g., hold a current and valid Child Development Associate credential with an appropriate age-level endorsement with at least nine months of work experience in a licensed child care center, or a Child Development Teacher Permit, and have at least 15 hours of qualifying health and safety training].

[For currently employed teachers, add:]

_____ [name] satisfies these requirements in that _____ [he or she] holds _____ [specify, e.g., a current and valid Child Development Associate credential with a preschool endorsement, has worked at a licensed child care center for more than one year, and holds a current pediatric CPR card issued by the Red Cross].

_____ [name] satisfies these requirements in that _____ [he or she] holds _____ [specify, e.g., Child Development Teacher Permit and has _____ (specify at least minimum of 15) hours of health and safety training].

[Repeat as needed.]

[CONTINUE]

Our center staff also includes two volunteers who assist with the care and supervision of our children. Our volunteers must be in good physical health and have a current medical clearance for tuberculosis. Our volunteers are not included in our teacher-child ratios. _____ [name of teacher] is responsible for supervising of our volunteers, who each work three days a week and help the teachers with caring for and supervising the children.

Legal Topics:

For related research and practice materials, see the following legal topics:
Education Law Administration & Operation Child Care Facilities



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CHAPTER 100C CHILD CARE FACILITIES

PART IV. FORMS

A. Initial Licensing Forms

1. Child Care Centers

32-100C California Legal Forms--Transaction Guide § 100C.213

§ 100C.213 Personnel Policies

[1] Comment--Use of Form

This form sets forth sample personnel policies for a child care center. These policies are intended to ensure that the staff have a clear understanding of the expectations of the center, and the benefits due them from their employment. It is a Section B form that must be submitted with the application.

This form states the general conditions of employment, such as preemployment screening, work schedules, vacation time, sick leave, compensation, retirement, training, health plans, and other benefits offered. These policies must also describe the regulatory requirements commonly associated with personnel practices, such as staff coverage, staff qualification, work schedules, and conditions of employment [see Supplemental Application Information].

[2] FORM

Personnel Policies

Personnel Policies

All staff employees are expected to conduct themselves in a professional, competent manner at all times. The primary concern of each and every employee is the health and safety of all children in care at the center. Teachers in particular are expected to be with the children and accessible to their needs. Staff members are prohibited from using foul or abusive language around or to the children.

Anti-Discrimination Policy

The Center will not discriminate against any staff based on age, sex, race, religion, color, political affiliation, national origin, disability, marital status, or sexual orientation.

Preemployment Screening

The Center will screen applicants to verify the requisite education and experience. The Center will advise each prospective employee the employment preconditions include a fingerprint and criminal record clearance, a medical clearance including a tuberculosis clearance, a physical examination and health questionnaire, and a child abuse index check.

Employee Rights

The Center will inform all employees of their rights. Further, the Center will inform each employee of his or her obligations to report suspected child abuse to the Department and to the child protection agency. The Center will retain documentation that all employees were informed of their rights and the abuse reporting procedures.

Work Schedules

The director must arrive at the center no later than 7:30 A.M. and teachers must arrive by 7:45 A.M. No staff member may leave until all the children that he or she is responsible for have been picked up.

Teachers must call in when ill by 7:45 A.M. so that arrangements can be made to obtain a substitute teacher. No staff member will be allowed to work if sick.

Teachers are encouraged to have lunch while the children eat, but if other staff are available to properly supervise the children, each teacher may take a 45-minute lunch break on his or her own. Teachers are also entitled to two 15-minute breaks during the day. However, breaks may only be taken if sufficient staff are available to supervise the children.

Vacation Time and Sick Leave

The director is entitled to three weeks vacation per year. Each teacher is entitled to two weeks vacation per year. Vacation times must be planned well in advance so that adequate substitutes can be obtained.

Each staff member is entitled to one-half day of sick leave per month.

Health Plan

Each employee is entitled to join the health plan offered by the Center.

Pay Provisions and Employee Evaluations

All staff members are paid on the first and fifteenth of the month.

All employees are to be evaluated once every two months. The evaluations are to be conducted by the director. Employees may be entitled to certain benefits, such as pay increases and bonuses, depending on results of the evaluations.

Termination

The termination of any staff member requires 30 days notice. However, conditions for immediate termination from employment include any mental, verbal, or physical abuse of any child in care, violation of our disciplinary rules, two poor evaluations in a six-month period, violation of any applicable licensing law that affects the health and safety of any child in care, or being under the influence of alcohol or illegal drugs while working with the children.

A probationary period of one month may be established at the discretion of the director.

Any grievances that an employee may have should first be brought to the attention of the director. If no resolution is obtained, the problem can be brought to the licensee.

Legal Topics:

For related research and practice materials, see the following legal topics:
Education Law Administration & Operation Child Care Facilities



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CHAPTER 100C CHILD CARE FACILITIES

PART IV. FORMS

A. Initial Licensing Forms

1. Child Care Centers

32-100C California Legal Forms--Transaction Guide § 100C.214

§ 100C.214 In-Service Training Plan

[1] Comment--Use of Form

This form establishes a child care center's in-service training plan for existing staff. It is a Section B form that must be submitted with the application. The form describes the center's general approach to training and specifies which staff members must participate as a condition of employment. The form also identifies training subjects, how the training will be provided, and how frequently training is required.

If the child care center is a combination center, a separate plan should be prepared for each component.

[2] FORM

In-Service Training Plan

In-Service Training Plan

All teachers must participate in our ongoing training program. The program is designed to provide our teachers with the skills they need to properly supervise and care for the children during the daily schedule. Teachers must take one semester course in child development each year and attend two weekend workshops related to child care activities.

Once a month each teacher must meet with the center's director to discuss his or her general responsibilities, the daily schedule, individual children, and/or any other relevant topics. All staff members must attend a staff meeting held once a month.

Teachers must also continue health care training, as determined by the director, including but not limited to, food preparation and sanitation practices and prevention of infectious diseases. At a minimum, each teacher must maintain a current and valid certificate in pediatric first aid and CPR.

Teachers are also encouraged to volunteer their time in community-related child care programs.

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Governments State & Territorial Governments Licenses



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CHAPTER 100C CHILD CARE FACILITIES

PART IV. FORMS

A. Initial Licensing Forms

1. Child Care Centers

32-100C California Legal Forms--Transaction Guide § 100C.215

§ 100C.215 Facility Program Description

[1] Comment--Use of Form

This form is a facility program description that sets forth a general overview of the philosophies, goals, and objectives of the program and outlines the services to be provided by the center. It is a Section B form that must be submitted with the application.

This form is drafted to comply with the written policy statement required of every child care center [*H&S Code § 1597.07; see § 100C.29[1]*]. The center must retain an affidavit signed by the parent or guardian of every child in care indicating that he or she has read this policy statement [*H&S Code § 1597.07*].

A child care center may meet this requirement using a pamphlet or brochure that advertises the center's services, provided that the material includes a brief statement of the center's purpose, goals, and program methods and outlines the complete operation of the center [*see Supplemental Application Information, B7*].

This form contains many components that are covered in other statements and center documents. The applicant should review all Section A and Section B forms to ensure consistency before submitting the application packet.

[2] FORM

Facility Program Description

[*Child care center letterhead*]

Program Description

Our mission is to provide a physically and emotionally safe and nurturing environment for children to grow and learn

about themselves, their peers, and the world. We focus on the differing needs of children depending on their particular stage of development. We place special emphasis on the social and emotional development of our children, particularly conflict resolution and emotional intelligence. We also emphasize a structured environment for the children that consists primarily of providing the same caregivers each day and adhering to a daily schedule (see daily schedule, below).

Our program is designed to provide a safe, warm, stimulating, and fun place for children to grow and learn outside of their home. We believe that to be an effective environment for learning we need to be respectful of the individual child, his or her family, and cultural background. We celebrate the multiplicity of the human family. We actively support each child's unique self and encourage their place as the primary agent of their own learning and growth.

Health and safety standards regarding all aspects of the children's care are strictly observed. We are periodically inspected by Community Care Licensing and copies of the licensing reports are available for your review. The location and telephone number of the office responsible for the Department of this facility is _____[*address and phone number of Department*].

Our center will inform parents, children, and employees of their rights under the law, including personal rights, inspection rights, and complaint procedures.

Daily Schedule

7:00 A.M. Center opens and an informal health inspection is conducted to determine signs of obvious illness. Parents must remain on premises until their child is accepted. Children must remain in central playroom until all children have arrived.

9:00 A.M. Active play time (either indoors or outside in playground) such as climbing, running, etc.

10:00 A.M. Clean-up.

10:15 A.M. Light snacks.

10:30 A.M. Circle-time with games, music, etc.

11:00 A.M. Quiet play time (inside only) at tables for coloring, writing, games, etc. Children who wish to nap may do so.

11:45 A.M. Wash hands for lunch.

12:00 P.M. Lunch.

1:00 P.M. Active play time outside in playground.

2:00 P.M. Rest period for all children.

3:00 P.M. Light snacks and structured activities.

4:00 P.M. Free time. Parents arrival for pick-up begins.

NOTE:

Two to three times a week we visit the park on Main Street. We also provide the children with a hot lunch every day, as well as two light snacks, one in the morning and one in the afternoon. Weekly menus are posted on the wall in the kitchen for parents to review. Before admission of any child, the parent must inform us of any foods to which his or her child is allergic.

Admission Policies and Procedures

Our center accepts all children within the required age range for admission. We serve children aged three and above who are toilet trained, up to the time that they are enrolled in kindergarten. The center is equipped to care for children with physical or emotional disabilities, depending on the extent of the disability. To ensure that we can meet a child's special needs, prior to admission we will request a complete social, psychological, and/or medical assessment of the child. In all cases, before we admit a child, we require a personal meeting with a parent to discuss the child's needs, how our facility can meet those needs, and other records and information that we will need. We also request to meet with the child. Further, before any child can be admitted to the center, the parents must provide a record showing that immunizations are completed and up to date, and evidence that a physical examination and tuberculosis test has been done within 30 days of the child's admission.

Our center offers a variety of educational and recreational activities (see schedule above), quiet activities, and snacks and meals. At least twice a week we walk to the park on Main Street where we spend approximately one hour in the large playground there. Additionally, once a month we try to take the children on a field trip to the zoo, beach, or another appropriate location. Transportation for these trips is provided by us as we have two large vans equipped with safety equipment and seat belts. Parents are given ample notice of any intended trip, and will be requested to sign and return a permission slip.

Parents are required to drop their children off in the morning and pick them up in the afternoon. Unless otherwise agreed, we do not provide transportation arrangements for any child in care. Parents are required to comply with our sign-in and sign-out procedures.

Staff Members: Qualifications and Duties

Our staff consists of one director, four teachers, and two volunteers. Our director is responsible for the general operation of the center, which includes supervising all other staff members, observing the children, keeping the center's records in order, communicating with the Department, and contacting parents whenever a problem arises. The director also assists in teaching responsibilities and is on the center premises at all times. Our director, teachers and volunteers all meet or exceed state requirements for their positions.

Rate-Setting Policy and Policy on Refunds

Admission fees are based on the needs of the child on a per day basis. That is, fees are charged depending on the number of days per month the child attends the facility and whether the child requires special care and supervision in addition to the ordinary care and supervision provided. Rates are the same for all children and are generally not negotiable.

Refunds may be provided up until the child has completed his or her first month at the facility, but only after the parent and the facility director have discussed the reasons for withdrawing the child from the facility and the director believes a refund is appropriate. Further details of the fee arrangement and refund policy are discussed in the admission agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Education Law Administration & Operation Health Services



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 100C CHILD CARE FACILITIES

PART IV. FORMS

A. Initial Licensing Forms

1. Child Care Centers

32-100C California Legal Forms--Transaction Guide § 100C.216

§ 100C.216 Discipline Policies

[1] Comment--Use of Form

This form is a statement of a child care center's disciplinary rules. A discipline statement defines the center's philosophy regarding the purposes of discipline, informs the parents of the manner in which the center will discipline their children, and provides a framework for training staff. This form is a Section B form that must be submitted with the application. The Department will evaluate the discipline policies to ensure that they do not violate the personal rights of children. If the Department has reason to believe that the applicant lacks a clear understanding of what constitutes corporal punishment, or the statements are unclear, the Department may request additional information [see Supplemental Application Information, B8].

The statement should clearly state the techniques of discipline that are used and not used, and under what conditions each type will be used. Further, the statement should clearly prohibit corporal punishment and other forms of intimidating and humiliating discipline [see 22 Cal. Code Reg. §§ 101223(a)(3), 101223.2]. Finally, the statement should provide for meetings and conferences with the children's authorized representative and specify grounds for dismissal or relocation from the center or a component of the center [see Supplemental Application Information, B7].

[2] FORM

Discipline Policies

Our center believes that children find security and direction when there is consistent adult guidance and discipline. Children explore, observe, feel, interact, and learn through interaction with people and their world. All behaviors, even disruptive ones, are learned; children need to know what we expect from them before they can meet our expectations. We expect our teachers to serve as models for appropriate behavior and to use constructive and preventative methods of discipline.

Therefore, our center believes that proper discipline is an essential element in a child's development. The disciplinary

policy that we have developed is intended to protect each child and help him or her learn acceptable behavior. Each staff member has been fully instructed in our policy and rules, will follow them, and will help your child to understand and follow them. Our general policy is discipline with love and acceptance. Additionally, we will not allow behavior to continue if it appears that your child will hurt himself or herself or others around him or her, or that property will be damaged. In implementing this policy there are certain practices we will and will not use.

Disciplinary Practices We Will Not Use:**NO CORPORAL PUNISHMENT****NO VIOLATION OF CHILDREN'S PERSONAL RIGHTS**

No staff member is allowed to use any corporal punishment, which is defined as the use of negative physical touching. Examples include spanking, hitting, slapping, or pinching; pulling hair, arms, or ears; or lifting a child against his or her will for a punitive reason. Staff members are also strictly prohibited from using any practice that inflicts pain, humiliates, intimidates, ridicules, coerces, or threatens physical or mental abuse on any child in care. Additionally, staff members are not allowed to use for punitive purposes any techniques related to interfering with a child's daily living functions, such as preventing a child from eating, sleeping, taking medication, or going to the bathroom.

No staff member may use prone containment or similar disciplinary techniques, except as a last resort emergency physical control technique designed to prevent injury to bystanders, the assaulting child, other children, or staff.

None of these prohibited disciplinary practices may be included in a child's needs and services plan. Further, authorized representatives, parents, or guardians may not consent to the use of these prohibited disciplinary practices.

Disciplinary Practices We Will Use:

1. Prevention. Teachers will plan ahead for possible areas of conflict and ensure that children know that there are sufficient toys and snacks, that everyone will have a turn, and that everyone knows the basic rules of the center.
2. Ignoring negative behavior if that behavior is trivial.
3. Distracting child's attention from the disruptive behavior by directing the child to some other acceptable activity or toy.
4. Emphasizing words over physical actions. Children often express themselves by physical behavior, not talking, and this can lead to one child hurting another unintentionally.
5. Talking with the child alone, not in front of others, to explain why his or her behavior is unacceptable. Additionally, discussing with the child what the potential consequences are if the negative behavior persists.
6. Talking out conflicts. If a child hurts another child, after comforting the hurt child, the teacher will sit down with both children and help each put their thoughts and emotions into words. The teacher will not show favoritism and will maintain a calm demeanor.

If several attempts at positive discipline have failed, the teacher will inform the director. If the unacceptable behavior continues, the director will contact the child's authorized representative to discuss the matter and may schedule a conference. If the director and teacher conclude that the child may require additional professional guidance, the director must schedule a conference. The center reserves the right to dismiss a child (and require the child's immediate removal from the center) when, in the opinion of the center, the child's needs can no longer be met at the center.

Legal Topics:

For related research and practice materials, see the following legal topics:

Education LawAdministration & OperationChild Care Facilities



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CHAPTER 100C CHILD CARE FACILITIES

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A. Initial Licensing Forms

1. Child Care Centers

32-100C California Legal Forms--Transaction Guide § 100C.217

§ 100C.217 Admission Policies

[1] Comment

[a] Use of Form

This form sets forth a child care center's admission policies. It is a Section B form that must be submitted to the Department of Social Services with the application [see Application booklet instructions; Supplemental Application Information, B9]. If the child care center will be a combination center, separate admission policies and procedures are required for each component.

The admission policy statement should include the following information [see Application booklet instructions; Supplemental Application Information, B9]:

- Admission criteria designating those children whose needs can be met by center's program and services, including medical assessment and personal interview requirements.
- Range of children's ages that will be accepted.
- Program activities and any supplemental services.
- Field trips and transportation arrangements if provided.
- Food service provisions.
- Rate setting policies and refund policy.

A copy of the proposed admission agreement [see § 100C.220] must be attached to the admission policies [see Application booklet instructions].

[b] Centers for Mildly Ill Children

In addition to the standard requirements [see [a], *above*], the written admission policies for child care centers for mildly ill children must specify the conditions, symptoms, or illnesses for which children will and will not be accepted for care [22 *Cal. Code Reg. § 101619*; see § 100C.35[4]].

[2] FORM**Admission Policies**

Admission Policies

_____ [Name of center] accepts all children within the required age range for admission. We serve children aged three and above who are toilet trained, up to the time that they are enrolled in kindergarten. The center is equipped to care for children with physical or emotional disabilities, depending on the extent of the disability. [Optional: We do not discriminate on the basis of delays in cognitive development, physical development, language and speech development, psycho-social development or self-help skills.]

To ensure that we can meet a child's special needs, before admission we will request a complete social, psychological, and/or medical assessment of the child. In all cases, before we admit a child, we require a personal meeting with a parent to discuss the child's needs, how our facility can meet those needs, and other records and information that we will need. We also request a meeting with the child. Before admission, the center, working together with the parents, will develop a specific needs and service plan for each child being admitted into care.

Before any child can be admitted to the center, parents must provide a record showing that immunizations are completed and up to date, and evidence that a physical examination and tuberculosis test have been performed within 30 days of the child's admission.

Our center will inform parents, children, and employees of their rights under the law, including personal rights, inspection rights, and complaint procedures.

Our center offers a variety of educational and recreational activities, quiet activities, and snacks and meals. At least twice a week we walk to the park on Main Street where we spend approximately one hour in the large playground there. Additionally, once a month we try to take the children on a field trip to the zoo, beach, or another appropriate location. Transportation for these trips is provided by us as we have two large vans equipped with safety equipment and seat belts. Parents are given ample notice of any intended trip, and will be requested to sign and return a permission slip.

We also provide the children with a hot lunch every day, as well as two light snacks, one in the morning and one in the afternoon. Weekly menus are posted on the wall in the kitchen for parents to review. Prior to admission of any child, the parent must inform us of any foods to which his or her child is allergic.

Parents are required to drop their children off in the morning and pick them up in the afternoon. Unless otherwise agreed, we do not provide transportation arrangements for any child in care. Parents are required to comply with our sign-in and sign-out procedures.

Rate-Setting Policy and Policy on Refunds

Admission fees are based on the needs of the child on a per day basis. That is, fees are charged depending on the number of days per month the child attends the facility and whether the child requires special care and supervision in

addition to the ordinary care and supervision provided. Rates are the same for all children and are generally not negotiable.

Refunds may be provided up until the child has completed his or her first month at the facility, but only after the parent and the facility director have discussed the reasons for withdrawing the child from the facility and the director believes a refund is appropriate. Further details of the fee arrangement and refund policy are discussed in the admission agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Education Law Administration & Operation Child Care Facilities



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CHAPTER 100C CHILD CARE FACILITIES

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A. Initial Licensing Forms

1. Child Care Centers

*32-100C California Legal Forms--Transaction Guide § 100C.218***§ 100C.218 Furniture and Play Equipment List****[1] Comment--Use of Form**

This form is a list of indoor and outdoor furniture and play equipment. It is a Section B form that must be submitted to the Department of Social Services with the application. The Department will accept a copy of the inventory list used for insurance purposes [see Application package instructions; see also Supplemental application information, B11].

The regulations only require a limited amount of furniture and equipment [see 22 Cal. Code Reg. §§ 101226.2, 101239(k)-(q), 101239.1]. However, all furniture and equipment must be appropriate for the child care program [22 Cal. Code Reg. § 101239(m)]. The center must provide tables and chairs, scaled to the size of the children; a cot, bed, or couch for ill children; and cots or floor mats for napping [see 22 Cal. Code Reg. §§ 101226.2, 101239(k)-(q), 101239.1]. For further discussion, see § 100C.28[3].

The list should identify furniture and play equipment and indicate how the different items are age appropriate and are suited to and match planned activities. The outdoor equipment list should include both fixed structures and movable outdoor equipment. If the center will not be fully equipped by the opening date, the list should be accompanied by a schedule for completing purchases.

[2] FORM**Furniture and Play Equipment List**

Furniture and Play Equipment List

_____ [Center name] has the furniture and equipment set forth below in and around the center for the use of children in care. _____ [Center name] maintains all of these items in good condition, and warrants that all of these items are age-appropriate to the children in our care.

Tables and Chairs: _____

Toys: _____

Play Equipment:

Indoor: _____

Outdoor: _____ [*identify both fixed structures and movable outdoor play equipment*]

Sleeping/napping Equipment: _____ [*specify cribs, cots, or mats as program appropriate*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Governments State & Territorial Governments Licenses



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CHAPTER 100C CHILD CARE FACILITIES

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A. Initial Licensing Forms

1. Child Care Centers

32-100C California Legal Forms--Transaction Guide § 100C.219

§ 100C.219 Board Resolution

[1] Comment--Use of Form

This form is a resolution by the board of directors of a corporation authorizing an individual within the corporation to file an application and all requisite supporting documents, on the corporation's behalf, for a child care center license. The form may be adapted to designate more than one person. All persons who will sign the application must be authorized to do so by the board resolution [see Supplemental Application Information, § A1].

A meeting will need to be called at which a quorum is present. The minutes of the meeting must contain the following statements:

- The meeting was called on a specific date and that a quorum was present.
- The meeting was called for the purpose of designating someone within the corporation to represent the corporation in the licensing process.
- The name of the designated person.
- The designated person has the authority to submit an application to the licensing agency.
- The designated person will be designated as the administrator, manager, or agent of the child care facility and will be authorized to receive licensing documents at the facility on behalf of the board.
- A motion was made, seconded, and passed, and these are the minutes of the meeting.

A copy of the minutes, or an excerpt, must accompany the board resolution as part of the application. The minutes or excerpt must be signed by a board officer attesting that the minutes or excerpt contains a true and correct account of the

Board meeting.

[2] FORM

Board Resolution

RESOLUTION OF BOARD OF DIRECTORS

On _____ [date], a duly called meeting of the Board of Directors of _____ [name of corporation], a California corporation, was held. A quorum was present at the meeting, which was called for the purpose of designating an individual within the corporation to submit an application for a child care license. On motion duly made, seconded, and [unanimously] carried, [all or a quorum] of the Directors of _____ [name of corporation], adopted the following resolution.

RESOLVED that _____ [name and title of person authorized to submit application] is authorized to apply for and submit all required documents for licensure as a child care center on behalf of the Board.

FURTHER RESOLVED that _____ [name of authorized person] is designated as the [administrator or manager or agent] of the proposed child care center, and is expressly authorized to receive, on behalf of the Board, any and all licensing documents, including inspection reports, consultations, accusations, and civil and administrative processes.

[If any directors voted against the resolution, add, if desired:]

The following directors voted against the adoption of the resolution:

_____ [name]

_____ [name]

[If any directors abstained from voting, add, if desired:]

The following directors abstained from voting.

_____ [name]

_____ [name]

[CONTINUE]

There being no further business, the meeting was duly adjourned.

_____ Dated:

_____ [signature]

[typed name]

_____ [title, e.g., Corporate Secretary or Assistant Corporate Secretary]

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawAdministration & OperationChild Care Facilities



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1. Child Care Centers

32-100C California Legal Forms--Transaction Guide § 100C.220

§ 100C.220 Admission Agreement

[1] Comment

[a] Use of Form

This form is a contract between a child care center and the child's "authorized representative" (parent or guardian) for the care of a child at the center. Generally this type of agreement is a printed form with blank spaces for filling in information specific to each individual contract. This form is drafted in that format.

Individual admission agreements must be completed and maintained for each child attending a child care center [22 *Cal. Code Reg. § 101219(a)*], and a sample admission agreement must be submitted with the plan of operation as part of the initial licensure process [see Application booklet instructions; see also § 100C.200]. When signed by the parent and the licensee of a child care center, the admission agreement obligates the parties to a periodic agreement for child care.

The admission agreement must be signed and dated by the parent or authorized representative of the child, and by the licensee or his or her representative, no later than seven calendar days following the child's admission to the facility [22 *Cal. Code Reg. § 101219(c)*]. Modifications to the original agreement are required whenever circumstances covered in the agreement change and must be signed and dated [22 *Cal. Code Reg. § 101219(d)*]. The original of the agreement must be retained by the licensee, and a copy of the agreement must be provided to the parent and/or authorized representative of the child [22 *Cal. Code Reg. § 101219(e)*]. The licensee must comply with all terms and conditions of the admission agreement [22 *Cal. Code Reg. § 101219(f)*]. The agreement automatically terminates on the death of the child, and no liability or debt can accrue after the date of death [22 *Cal. Code Reg. § 101219(g)*].

This form can also be used for family child care homes, even though the law does not require a written agreement for day care in family child care homes. Written agreements can be very useful for family child care operators by serving as a record of the terms of the agreement to which both parents and operators may refer from time to time, and by setting forth the necessary details of services provided, fees, and other agreements that might be overlooked in an oral agreement.

[b] Required Contents of Agreement

Admission agreements must specify the following data [22 *Cal. Code Reg. § 101219(b)*; see Supplemental Application Information, B9; see also § 100C.130, P 9]:

- Basic services provided by the center.
- Available optional services.
- Payment provisions, including the basic rate charged, optional service rates, the payor, dates payments are due, and the frequency of payments.
- Modification conditions, including a provision that the center give written notice to the parent or authorized representative of any basic rate change, at least 30 calendar days before the change.
- Refund conditions.
- The right of the Department to interview children and staff without prior consent; inspect, audit, and copy child or child care center records on demand during normal business hours; remove records if necessary for copying; and observe children's physical condition [22 *Cal. Code Reg. § 101200(b)-(d)*].
- Conditions under which the agreement may be terminated.

[c] Use of Exculpatory Provisions

This agreement does not contain any provisions limiting the liability of the day care center. Some agreements have included such limitations. However, an agreement exculpating a child care provider from its own negligence has been held to be void as against public policy [*Gavin W. v. YMCA of Metropolitan Los Angeles* (2003) 106 *Cal. App. 4th* 662, 671-674, 131 *Cal. Rptr. 2d* 168] . This holding suggests that any exculpatory provision must be carefully and narrowly drafted if it is to have any chance of surviving a challenge on public policy grounds. For example, exculpatory clauses involving recreational activities such as swimming or scuba diving have been upheld [see *Randas v. YMCA of Metropolitan Los Angeles* (1993) 17 *Cal. App. 4th* 158, 160, 21 *Cal. Rptr. 2d* 245 (poolside slip-and-fall case); *Madison v. Superior Court* (1988) 203 *Cal. App. 3d* 589, 599 250 *Cal. Rptr. 2d* 299 (scuba class)].

[2] FORM**Admission Agreement****CHILD CARE CENTER ADMISSION AGREEMENT**

_____[Name of day care center]

_____[License number]

_____[Address]

_____[Telephone number]

Date of Agreement: _____

Name of Child: _____ Age: _____ Date of Birth: _____

Name(s) of Child's Parent(s) or Guardian(s): _____

_____ [name of first parent or guardian]
 _____ [legal relationship, e.g., mother or father or legal guardian]

_____ [name of other parent or guardian]
 _____ [legal relationship, e.g., father or mother or legal guardian]

The parent(s) or guardian(s) listed above are referred to in this Agreement as the "Authorized Representative(s)" of the child named above.

AGREEMENT

Parties

1. This agreement is made by and between _____ [name of day care center] (hereafter referred to in this Agreement as the "Center"), and the person(s) named above as Authorized Representative(s) of the child whose name is stated above.

Agreement to Provide Day Care

2. Center agrees to provide day care for the child named above (hereafter referred to in this agreement as the "Child"), on the terms and conditions specified in this Agreement.

Authorized Representative(s)

3. The Authorized Representative(s) warrant(s) and represent(s) that _____ [his or her or their] relationship to Child is correctly stated above, and that _____ [he is or she is or they are] the legal custodian(s) of Child. If more than one Authorized Representative is listed above, either person named above as an Authorized Representative may exercise any of the rights or duties of an Authorized Representative as specified in this Agreement.

Licensing

4. Center is a child care center as defined in *H&S Code Section 1596.76*. Center is licensed under the California Department of Social Services to provide day care to _____ [specify number of children for whom center is licensed to provide care] children. For this purpose, "child care" means nonmedical care for children who are in need of personal services, supervision, or assistance essential to sustain the activities of daily living, or for protection on less than a 24-hour basis.

Basic Care

5. Center agrees to provide the following child care to Child: [specify basic services to be provided, e.g., (1) continuous observation, care, and supervision, as required; (2) assistance with bathing and other personal needs, as required; and (3) assistance, as needed, in taking prescribed medications]. Further, Center will provide _____ [specify optional services available, if any, e.g., transportation arrangements if requested by Child's Authorized Representative].

Hours and Days

6. Authorized Representative may deliver Child to Center no earlier than _____ A.M., and pick Child up no later than _____ P.M. on [*days, e.g., every weekday or every Monday, Wednesday and Friday*], commencing on _____ [*date*].

Registration Fee

7. Authorized Representative(s) shall pay Center a registration fee of \$_____ at the time this Agreement is executed. Authorized Representative(s) are entitled to a refund of the registration fee under the following condition(s): _____ [*specify condition(s) for refund, e.g., Child has been unable to attend Center after fee was paid*].

Periodic Payments

8. Authorized Representative shall pay Center the sum of \$_____ per [*week or month*], in advance, for regular child care provided during the hours specified in Paragraph 6, above, payable [*specify dates or times of payment, e.g., on the first day of each month or each Monday*] during the term of this Agreement. A late charge of \$[per day] will be assessed if the [*e.g., weekly or monthly*] fee is not paid by [*e.g., the fifth weekday of the month, excluding holidays*].

Extended Hours

9. Authorized Representative must notify Center at least [*specify time, e.g., 4 hours*] in advance on any day that Authorized Representative wishes Center to provide extended care. Authorized Representative agrees to pay \$_____ per hour for any extended hours of day care. Center shall bill Authorized Representative for all charges for extended hours of care as provided in this paragraph, and any such charges shall be payable in full with the next [*weekly or monthly*] payment for child care due after receipt of the bill.

Late Pickup

10. Authorized Representative agrees to pay Center the further sum of \$_____ for each and every half hour or portion of a half hour of care necessitated by the late pickup of Child. For this purpose, "late pickup" means any pickup after [*specify same time as in Paragraph 6, e.g., 6:00 P.M.*], unless Authorized Representative _____ notifies Center within the time limits specified in Paragraph 9, above, of a need for extended hours of care. Center will bill Authorized Representative for all late pickup charges, and any such charges shall be payable in full with the next [*weekly or monthly*] payment for regular child care due after receipt of the bill.

Food

[*If food is to be provided by Authorized Representative(s):*]

11. Authorized Representative shall be responsible for providing all food for the child. Center will not provide any food or meals.

[OR, if operator is to provide food:]

11. Center shall provide lunch for Child, as well as one snack in the morning and one snack in the afternoon.

[CONTINUE]

Supplies

12. It is the responsibility of Authorized Representative to provide the following items: [*specify items to be provided, e.g., disposable diapers, wipes, bottles, toys, or blankets, if any, and changes of clothing*].

Injury or Illness Policy

13. Center will not accept any child who, by reason of illness or injury, cannot participate in day care activities, or who presents a danger to other children in the Center. This restriction includes children with fevers, severe colds, or other symptoms of illness. Center reserves the right to judge whether a child can participate in day care activities or presents a danger to other children. If Authorized Representative has any question as to the health of Child, it is Authorized Representative's responsibility to telephone Center before bringing Child to Center to discuss Child's condition.

Notice to Authorized Representative of Injury or Illness Occurring at Center

14. In the event that Child becomes ill or is injured after arriving at Center, Center will attempt to notify Authorized Representative by telephone. Simultaneously with execution of this Agreement, Authorized Representative must execute and deliver an emergency information card as required by California regulations. This card will include Child's full name, telephone number, and location of a parent or other responsible adult to be contacted in an emergency. The card will also include the name and telephone number of the child's physician and the authorization for _____ [*name of operator*] to consent to emergency medical care as authorized by regulations.

Child Vacations

15. Authorized Representative will not be charged for any vacation periods during which Center is open and Child is not delivered to Center as provided in this Agreement, if both of the following conditions are met:

- (1) Authorized Representative has notified Center in writing at least [*specify time, e.g., one week or 30 days*] in advance of the first day of any such vacation; and
- (2) The total vacation time does not exceed [*number, e.g., 4 weeks*] per calendar year.

Center Vacation Periods

16. Center will be closed for vacation, and no day care will be provided, [*specify, e.g., from December 24th through January 1st and during the month of July*]. Center reserves the right to change these dates, or specify additional time periods[, up to _____ days per year], on at least [*specify notice period; should be enough to provide substantial lead time for parents to make other child care arrangements, e.g., 90-day*] written notice to Authorized Representative. No charges for regular child care shall be due for any period during which Center is closed for vacation.

Holidays

17. Center will be closed, and no day care will be provided, on the following holidays: _____ [*specify holidays, e.g., New Year's Day, Presidents' Day (date observed), Memorial Day (date observed), Independence Day, Labor Day, Thanksgiving Day, the day after Thanksgiving, Christmas Day, and the day after Christmas*]. If any of these holidays falls on a day when Child would normally be provided day care at Center as provided in this Agreement, the holiday will be a paid holiday, and there shall be no adjustment in the regular day care charges for any period during which the holiday falls.

Rights of Department

18. Authorized Representative acknowledges that pursuant to California regulations, the [*specify California Department of Social Services or Department*] has authority to do the following: (1) interview Center children and staff without prior consent; (2) inspect, audit, and copy child or Center records on demand during normal business hours; (3) remove records from Center if necessary for copying; and (4) observe the physical condition of Center children, including conditions that could indicate abuse, neglect or inappropriate placement. Center will provide space for these private interviews and for examining records relating to Center operations.

Modification of Agreement

19. On any change in the fees charged to Authorized Representative, Center agrees to notify Authorized Representative, in writing, at least [*specify, e.g., 30 days before the change takes effect*]. Any other modification of the terms and conditions provided for in this agreement must be in writing, agreed to by each Authorized Representative and by Center, and signed and dated by each Authorized Representative and by Center.

Termination

20. Authorized Representative or Center may terminate this Agreement at any time by giving [*specify time, e.g., 30 days or two weeks*] written notice of termination to the other party. Center may terminate this Agreement at any time for nonpayment of any charges provided for in this Agreement, including any charges for regular child care, extended hours of day care, and charges for late pickup.

Each Authorized Representative named at the beginning of this Agreement hereby acknowledges that he or she has read this Agreement and agrees to its terms and conditions.

AUTHORIZED REPRESENTATIVE(S)

_____ [*signature*]

Date: _____

_____ [*signature*]

Date: _____

CENTER

_____ [*signature of licensee or director*]

[*typed name*]

_____ [*name of center*]

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Governments State & Territorial Governments Licenses



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 100C CHILD CARE FACILITIES

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A. Initial Licensing Forms

1. Child Care Centers

32-100C California Legal Forms--Transaction Guide §§ 100C.221-100C.229

[Reserved]

§§ 100C.221[Reserved]



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CHAPTER 100C CHILD CARE FACILITIES

PART IV. FORMS

A. Initial Licensing Forms

2. Family Child Care Homes

32-100C California Legal Forms--Transaction Guide § 100C.230

§ 100C.230 Application for Family Child Care Home License (LIC 279)

[1] Comment

[a] Use of Form

This form is an application for a family child care home license. It is provided by the Department of Social Services (Form LIC 279) and must be fully completed and filed with the appropriate Department [*H&S Code § 1597.54; 22 Cal. Code Reg. § 102369(a)*]. The form should be used only by applicants for large or small family child care homes [*see H&S Code § 1596.78* ("family child care home" defined); *see also § 100C.10[2]*]. Applicants seeking a license to operate a child care center [*see H&S Code § 1596.76* ("child care center" defined)], must complete a different application [*see § 100C.200*].

This form may be used to seek initial licensure, when a licensed home changes locations, and when the licensee seeks to change the home's capacity [*see Form LIC 279 instructions*].

[b] Licensure Required

No person, firm, partnership, association, or corporation may operate, establish, manage, conduct, or maintain a family child care home without a current valid license [*H&S Code § 1596.80*]. Any person 18 years of age or over may apply for a license regardless of age, sex, race, religion, color, political affiliation, national origin, handicaps, or marital status [*22 Cal. Code Reg. § 102368(c)*]. Operating a family child care home without a license may lead to civil and/or criminal proceedings, injunctive actions, and the immediate levying of civil penalties [*see H&S Code §§ 1596.89-1596.891; see also 22 Cal. Code Reg. § 102357; §§ 100C.90-100C.93*].

For a step by step procedural guide to completing the application and related documents, see § 100C.121, Paragraph 2.

[c] Required Contents and Supporting Documentation for Application

When submitting an application, the applicant must provide all of the following information [22 *Cal. Code Reg.* § 102369(b)(1)-(3)]:

- The name, address, telephone number, and confirmation that the applicant is 18 years of age or over.
- The age and number of children to whom care will be provided.
- The name and age of every person residing in the home where care will be provided.

The name, address, and telephone number of the city or county fire department, the district providing fire protection, or the State Fire Marshal's Office having jurisdiction in the area where the facility is located, criminal record statements, and fingerprints must also be included with the application [22 *Cal. Code Reg.* § 102369(b)(8); see *H&S Code* § 1596.871(a)-(c); see also §§ 100C.231, 100C.242].

The applicant must also state on the application that he or she will comply with all laws and regulations governing family child care homes [22 *Cal. Code Reg.* § 102369(b)(4)]. Although *H&S Code* § 1597.54(e) appears to require that family child care home applicants show evidence of ability to comply with the general regulations, more specific authority clarifies that family child care homes are not subject to the general regulations [22 *Cal. Code Reg.* § 102351.1]. The application must also contain evidence (1) of a current tuberculosis clearance for any adult in the home during the time children are under care and (2) that the applicant and all other persons residing in the home are of reputable and responsible character, including but not limited to evidence of required criminal record clearances, employment histories, and character references [*H&S Code* § 1597.54(d),(f); see 22 *Cal. Code Reg.* § 102369(b)(9)].

The application must include a brief statement confirming that the applicant is financially secure to operate the facility. Aside from this statement, the Department may not require any other specific or detailed financial disclosures [*H&S Code* § 1597.54(a); 22 *Cal. Code Reg.* § 102369(b)(6)]. For a large family child care home, the applicant must provide substantiation that he or she has at least one year of experience as a regulated small family child care home operator or as an administrator, director, or teacher at a licensed child care center [22 *Cal. Code Reg.* § 102369(b)(5)].

For a small family child care home, evidence must be submitted that the home contains a fire extinguisher or smoke detector device, or both, that meets required safety standards. For a large family child care home, evidence is required that the home meets specific fire safety standards [*H&S Code* § 1597.54(b)(1); see 22 *Cal. Code Reg.* § 102369(b)(7); see also *H&S Code* §§ 1597.45(d), 1597.46(c)]. For any size family child care home, satisfactory evidence must be submitted that there is a fire escape and disaster plan for the facility and that fire drills and disaster drills will be conducted at least once every six months. The documentation of these drills must be maintained at the facility on a form prepared by the Department and must include the date and time of the drills [*H&S Code* § 1597.54(b)(2)].

The applicant must also provide any other information required by the Department [*H&S Code* § 1597.54(h)], and must cooperate with the Department in completing the application. Failure to cooperate with the Department (by not providing required information and/or not providing the information in proper form) results in denial of the application [*H&S Code* § 1597.54(g)].

[d] Signature Requirements and Application Fee

Each applicant must sign the application under penalty of perjury. The signatures should match the names listed at the top of the form [see Form LIC 279 instructions].

A license fee must accompany the application and be paid annually after licensure. The amount of the required fee varies, depending on the capacity (in number of children) for which the license is issued [see 22 *Cal. Code Reg.* § 102384; see also *H&S Code* § 1596.803(a)].

[2] FORM

Application for Family Child Care Home License (LIC 279)

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Education LawAdministration & OperationChild Care FacilitiesGovernmentsState & Territorial GovernmentsLicenses



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32-100C California Legal Forms--Transaction Guide § 100C.230A

§ 100C.230A Current Children in Your Home--Application for a Family Child Care Home License (LIC 279B)

[1] Comment--Use of Form

This form is a list of names, birth dates, sex, and relationship of each child living in a family child care home. It is provided by the Department of Social Services (Form LIC 279B), and must be completed as a condition to licensure. The form must be submitted with the application for family child care home licensure.

[2] FORM

Current Children in Your Home--Application for a Family Child Care Home License (LIC 279B)

[Click here to view image.](#)

Legal Topics:

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32-100C California Legal Forms--Transaction Guide § 100C.231

§ 100C.231 Criminal Record Statement (LIC 508)

[1] Comment

[a] Use of Form

This form is a criminal record statement regarding prior criminal convictions other than minor traffic violations. It is provided by the Department of Social Services (Form LIC 508), and must be completed by certain individuals as a condition of licensure, employment, residence, or presence in a family child care home [see [b], *below*]. The form must be submitted with the application for family child care home licensure [see *H&S Code § 1596.871(a),(c),(h)*; see also *22 Cal. Code Reg. § 102370(a)*].

The signing of this statement is only one part of the entire criminal clearance review that the applicant, and other individuals who may come into contact with children, must go through. Fingerprinting [see [c], *below*], a check of the Child Abuse Index [see §§ *100C.21[2][b]*, *100C.71[2][b]*], and other criminal clearance reviews are also conducted. For a discussion of the criminal review process, see § *100C.21[2]* (child care centers) and § *100C.71[2]* (family child care homes).

[b] Persons Required to Complete Statement

As a condition of employment, residence, or presence in a family child care home, the following individuals must sign a declaration under penalty of perjury regarding prior criminal convictions [see *H&S Code § 1596.871(a)-(c)*; see also *22 Cal. Code Reg. § 102370(c)*]:

- All applicants for licensure.
- All adults responsible for administration or direct supervision of staff.
- Any person, other than a child, residing in the home.

- Any person who provides care and supervision to children.
- Any staff person, volunteer, or employee who has contact with the children.

With respect to the last category listed above, volunteers providing time-limited specialized services and students enrolled or participating at an accredited educational institution are exempt if they are directly supervised by the licensee or a facility employee with a criminal record clearance or exemption, spend no more than 16 hours per week at the facility, and are not left alone with children in care [*H&S Code § 1596.871(b)(1)(D)(i),(ii)*]. A volunteer who is a relative, legal guardian, or foster parent of a child in care is exempt [*H&S Code § 1596.871(b)(1)(D)(iii)*]. A contract repair person retained by the facility is also exempt if the person is not left alone with children in care [*H&S Code § 1596.871(b)(1)(D)(iv)*]. The Department may also exempt similar persons by regulation [*H&S Code § 1596.871(b)(1)(D)(v)*].

Certain employees of child care and development programs under contract with the State Department of Education who have completed a criminal records clearance as a condition of employment are not required to sign the statement [*H&S Code § 1596.871(b)(1)(H)-(I)*].

[c] Fingerprinting Requirements

The individuals required to complete the Criminal Record Statement [*see [b], above*] also must, as a condition to employment, residence, or presence in a facility, be fingerprinted unless exempt. Further, each individual must sign a declaration under perjury regarding any prior criminal conviction [22 *Cal. Code Reg. § 102370(c)*]. The licensee must submit the fingerprint images and related information to the Department of Justice and the FBI, through the Department of Justice, or satisfy criminal records clearance transfer requirements [*see H&S Code § 1596.871(h)(1)*] before the person's employment, residence, or initial presence in the family child care home [*H&S Code § 1596.871(c)(1)(A)*].

Exemptions can be obtained for employees of, or individuals present in, family child care homes [22 *Cal. Code Reg. § 102370.1*]. In determining whether individuals are eligible for the exemption, the Department considers the nature of the offense (including whether it involved violence or a threat of violence), the time elapsed since the offense and the number of offenses, the circumstances surrounding the commission that would demonstrate the unlikelihood of repetition, subsequent actions that indicate rehabilitation, character references, any certificate of rehabilitation, and evidence of honesty and truthfulness as revealed in exemption application documents and interviews and conversations with the Department [22 *Cal. Code Reg. § 102370.1(c)(3)*].

If it is determined on the basis of fingerprints submitted that the person has been convicted of a sex offense against a minor, sexual battery, abusing or endangering the health of a child, any felony, or other specified crimes, the Department will notify the licensee to immediately terminate the person's employment, remove the individual from the home, or bar the person from entering the home [*H&S Code § 1596.871(c)(2)*; *see Pen Code §§ 243.4, 273a, 273d, 273g, 289, 368*]. If the conviction was for another crime except a minor traffic violation, the licensee must, on notification by the Department, immediately comply but may seek an exemption. However, only the Department can determine if the person may remain in the home until a decision on the exemption is rendered [*H&S Code § 1596.871(c)(2)*; *see H&S Code § 1596.871(f)*]. A licensee's failure to comply with the prohibition against employment, contact with clients, or presence in the home will result in a deficiency citation and immediate assessment of civil penalties, and constitutes grounds for disciplining the licensee [*H&S Code § 1596.871(c)(2)*; *see H&S Code §§ 1596.885, 1596.886* (disciplinary action)].

Concurrently with notification to the licensee, the Department must notify the affected individual of his or her right to seek an exemption. The individual may seek an exemption only if the licensee terminates the person's employment or removes the person from the home after receiving notice from the Department [*H&S Code § 1596.871(c)(4)*]. The

Department may issue an exemption on its own motion if the person's criminal history indicates that the person is of good character based on the age, seriousness, and frequency of the conviction or convictions [*H&S Code § 1596.871(c)(3)*].

The agency cannot use a record of arrest to deny, revoke, or terminate any application, license, employment, or residence unless it investigates the incident and secures evidence, whether or not related to the incident of arrest, that is admissible in an administrative hearing to establish conduct by the person that may pose a risk to the health and safety of any person who is or may become a client [*H&S Code § 1596.871(e)*].

PRACTICE TIP:

The Community Care Licensing Department advises that, as of March 2002, no exemptions are currently being granted. A substantial backlog exists.

[2] FORM

Criminal Record Statement (LIC 508)

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Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Governments State & Territorial Governments Licenses



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32-100C California Legal Forms--Transaction Guide § 100C.232

§ 100C.232 Emergency Disaster Plan (LIC 610A)

[1] Comment

[a] Use of Form

This form is an emergency disaster plan developed by the applicant to handle any emergency and to protect the safety and well-being of children. It is provided by the Department of Social Services (Form LIC 610A), and must be submitted with the application for family child care home licensure [see *H&S Code § 1597.54*; see also *22 Cal. Code Reg. § 102417(g)(9)*]. Child care centers must also have an emergency plan, but the Department provides a different form for these facilities [see *§ 100C.210*].

A copy of the home's emergency disaster plan must be posted in a conspicuous location near a telephone [see Form LIC 610A instructions].

[b] Required Contents

The plan includes a designation of administrative authority, emergency names and telephone numbers, exit locations, temporary relocation sites, utility shut-off locations, and the location of a first aid kit. A floor plan of the home must also accompany the plan, indicating all exits. The licensee is responsible for updating information in the plan as required [see Form LIC 610A instructions].

[c] Instruction of Plan and Drills

All children, age and ability permitting, the provider, any assistant provider, and other household members must be instructed in their duties under the emergency disaster plan. As age and ability permit, newly enrolled children must be informed promptly of their duties under the plan. Each home must conduct fire drills and disaster drills at least once every six months. The licensee must document these drills, including the date and time of each drill, and retain that documentation at the home [see *22 Cal. Code Reg. § 102417(g)(9)*].

[d] Earthquake Preparedness Checklist

Every family child care home must include an Earthquake Preparedness Checklist as an attachment to its emergency disaster plan. This checklist must be made accessible to the public at the home. However, this checklist is not a requirement for obtaining or maintaining a license for a family child care home [*H&S Code § 1596.867(a)*; see *H&S Code § 1596.867(b)* (suggested contents for checklist and two typewritten pages restriction)]. The Earthquake Preparedness Checklist (Form LIC 9148) is illustrated in § 100C.210[2].

[2] FORM**Emergency Disaster Plan (LIC 610A)**

[Click here to view image.](#)

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32-100C California Legal Forms--Transaction Guide § 100C.233

§ 100C.233 Property Owner/Landlord Notification (LIC 9151)

[1] Comment--Use of Form

This form is a notification to be sent to the owner or landlord of the premises of a family child care home informing him or her that a family child care home will be operated on the property. The form is available from the Department of Social Services (Form LIC 9151).

Prospective family child care home operators who intend to open a home on rented or leased premises must provide 30 days' written notice to the landlord or owner before beginning operations [*H&S Code § 1597.40(d)(1)*; see *H&S Code § 1597.40(d)(2)* (less notice for relocation)]. On the commencement or knowledge of the operation of a family child care home on his or her property, the landlord or property owner may require the family child care home operator to pay an increased security deposit for operation of the home, notwithstanding any other provision of law. The increase in deposit may be required regardless of whether a lesser amount is required of tenants who do not operate family child care homes. However, in no event may the total security deposit charged exceed the maximum allowable under existing law [*H&S Code § 1597.40(d)(4)*].

If the operator plans to operate a small family child care home with a capacity of seven or eight children, or a large family child care home with a capacity of 13 or 14 children, the operator must receive written permission from the property owner or landlord [*H&S Code §§ 1597.44(d), 1597.465(d)*; see *§ 100C.234*].

[2] FORM

Property Owner/Landlord Notification (LIC 9151)

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Education LawAdministration & OperationChild Care FacilitiesReal Property LawOwnership & TransferGeneral
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32-100C California Legal Forms--Transaction Guide § 100C.234

§ 100C.234 Property Owner/Landlord Consent to Expanded Capacity

[1] Comment--Use of Form

This form is a letter to be sent to the owner or landlord of the property to be used for a family child care home to secure the owner's or landlord's consent to expanded capacity [see *H&S Code §§ 1597.44(d), 1597.465(d)*]. A completed copy of this form must be submitted with the application for licensure if the applicant is applying for expanded capacity. If the applicant does not submit a consent, the license will be limited to the standard capacities for small or large family child care homes [see Application packet instructions]. However, if the applicant seeks a capacity of no more than 6 children for a small child care home, or no more than 12 children for a large home, the applicant must only notify the property owner or landlord [see § 100C.233] and is not required to use this form.

A small family child care home operated on rented or leased property may provide care for more than six and up to and including eight children if, among other requirements, the operator obtains the written consent of the property owner [H&S Code § 1597.44(d)]. Similarly, a large family child care home may provide care for more than 12 children and up to and including 14 children if, among other requirements, the operator obtains the written consent of the property owner or landlord of rented or leased property to be used as a family child care home [H&S Code § 1597.465(d)].

This form may also be adapted for use when an existing licensee seeks to expand the capacity of an existing family child care home.

[2] FORM

Property Owner/Landlord Consent to Expanded Capacity

FAMILY CHILD CARE HOME
CONSENT TO EXPANDED CAPACITY

Attention: _____[Name of property owner/landlord]

By letter dated _____ [*specify date of notice*], you were informed of our intention to operate a family child care home located at _____ [*home address*]. We have decided to seek a [small or large] family child care home license with a capacity of [seven or eight or 13 or 14] children. By law, we must first obtain your written consent to this use of your property.

Please sign the consent form below. If you have any questions, please feel free to call us and discuss the matter.

Thank you, _____ [*signature*]
 _____ [*typed name and title*]

_____ [*name of home*]
 _____ [*address*]
 _____ [*telephone number*]

CONSENT

I acknowledge that I own the property located at _____ [*home address*]. I consent to _____ [*name*]'s operation of a _____ [small family child care home with a capacity of seven or eight children or large family child care home with a capacity of 13 or 14 children].

_____ [*signature*]
 _____ [*typed name and title*]
 _____ [*address*]
 _____ [*telephone number*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Real Property Law Ownership & Transfer General Overview



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32-100C California Legal Forms--Transaction Guide § 100C.235

§ 100C.235 Pre-Licensing Readiness Guide--Family Child Care Home (LIC 9217)

[1] Comment--Use of Form

This form is a pre-licensing readiness guide for individuals who are applying for a family child care home license. It is provided by the Department of Social Services (Form LIC 9217), and must be completed prior to obtaining an initial home visit appointment, which is required for licensure.

[2] FORM

Pre-Licensing Readiness Guide-Family Child Care Home (LIC 9217)

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

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32-100C California Legal Forms--Transaction Guide §§ 100C.236-100C.239

[Reserved]

§§ 100C.236[Reserved]



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3. Supporting Documents Used by Both Entities

32-100C California Legal Forms--Transaction Guide § 100C.240

§ 100C.240 Child Abuse Index Check (LIC 198A)

[1] Comment--Use of Form

This form, Department of Social Services Form LIC 198A, is a child abuse index check. The purpose of the child abuse index check is to ensure that no one in the facility has a history of abusing children. The form is available from the Department.

The licensee is responsible for submitting this form, a fingerprint card, and the appropriate fee directly to the Department of Justice [see Form LIC 198A instructions]. Separate forms for each person subject to the criminal record clearance requirement must be submitted with the application [see *H&S Code § 1596.871(a),(b)*]. A separate fee of \$15, by check or money order payable to the Department of Justice, is required for each child abuse index check [see Form LIC 198A instructions].

A separate child abuse index check form is required for the following persons [see *H&S Code § 1596.871(a),(b)(1)(A)-(D)*; see also Form LIC 198A instructions; Family home application packet instructions]:

- All applicants for licensure.
- All adults responsible for administration or direct supervision of staff.
- Adults residing in the home.
- Any person providing care and supervision to the children.
- Any other person required to submit a fingerprint card.
- Any staff person, volunteer, and employee who has contact with children.

With respect to the last category listed above, volunteers providing time-limited specialized services and students enrolled or participating at an accredited educational institution are exempt if they are directly supervised by the licensee or a facility employee with a criminal record clearance or exemption, spend no more than 16 hours per week at the facility, and are not left alone with children in care [*H&S Code § 1596.871(b)(1)(D)(i),(ii)*]. A volunteer who is a relative, legal guardian, or foster parent of a child in care is exempt [*H&S Code § 1596.871(b)(1)(D)(iii)*]. A contract repair person retained by the facility is also exempt if the person is not left alone with children in care [*H&S Code § 1596.871(b)(1)(D)(iv)*]. The Department may also exempt similar persons by regulation [*H&S Code § 1596.871(b)(1)(D)(v)*].

For further discussion of the criminal record clearance requirement, see § 100C.21[2] (child care centers) and § 100C.71[2] (family child care homes).

The Child Abuse Registry must be checked before granting a license for a child care center or family child care home [*H&S Code § 1596.877(b)*]. However, a license cannot be denied based on registry information unless the child abuse is substantiated [*H&S Code § 1596.877(c)*].

[2] FORM

Child Abuse Index Check (LIC 198A)

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Family Law Family Protection &

Welfare Children General Overview Family Law Family Protection & Welfare Children Abuse, Endangerment & Neglect



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32-100C California Legal Forms--Transaction Guide § 100C.241

§ 100C.241 Facility Sketch (LIC 999)

[1] Comment

[a] Use of Form

This form, Department of Social Services Form LIC 999, is a blank facility sketch covering the floor plan and the outdoor space of a child care facility. The form, available from the Department of Social Services, must be submitted with the initial application for licensure for both child care centers and family child care homes [see Form LIC 198A instructions; Family home application packet instructions].

The applicant must label the rooms and circle the rooms to be used for child care. The sketch must indicate door and window exits to be used in an emergency. Further, the sketch must include dimensions and keep close to scale [see Form LIC 999 instructions].

The yard sketch should show the overall yard size and all buildings in the yard, including the center or home (without detail), garage, and storage buildings. The sketch must indicate walks, driveways, play area, storage areas, gardens, recreation areas, major equipment, fences, and gates. Potentially hazardous areas, such as pools, garbage storage, and animal pens, must be shown on the sketch [see Form LIC 999 instructions; see also Supplemental Application Information, A17].

[b] Use by Child Care Centers

The applicant must submit a facility sketch including a floor plan of all rooms in the center building(s) intended for the use of the children in care with the initial application. The sketch must include the location and number of toilets, sinks, rooms to be used by nonambulatory children, exits, playground, fences, and other outdoor space intended for use by children, and distinguish between play areas, classrooms, office space, isolation area, and storage areas [see Supplemental Application Information, A17].

Child care centers must submit separate sketches of indoor and outdoor space for each component of the child care program, plus one sketch showing the entire center and the relationship between the indoor and outdoor spaces of all components, as well as any other use of the buildings [see Supplemental Application Information, A17].

This form may also be used to indicate emergency exits. If a sketch is used solely to indicate exits, the form should be attached to the center's emergency disaster plan [see § 100C.210].

[c] Use by Family Child Care Homes

The applicant must submit a facility sketch showing the home and yard with the initial application [see [a], *above*]. The sketch must note the areas that are off limits to the children in care and identify all exits [see Family home application packet instructions]. A copy of the form showing emergency exits should be attached to the home's emergency disaster plan [see § 100C.232].

[2] FORM

Facility Sketch (LIC 999)

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Legal Topics:

For related research and practice materials, see the following legal topics:

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3. Supporting Documents Used by Both Entities

32-100C California Legal Forms--Transaction Guide § 100C.242

§ 100C.242 Local Fire Inspection Authority Information (LIC 9054)

[1] Comment--Use of Form

This form, Department of Social Services Form LIC 9054, is used by applicants to identify the local fire inspection authority that is responsible for inspecting the facility and issuing a fire clearance. The form is available from the Department.

During the initial application procedures, and before obtaining licensure, applicants for child care center licensure, and applicant for large family child care homes licensure, must secure and maintain a fire clearance approval from the city or county fire department, the district providing fire protection services, or the State Fire Marshal, whichever has primary jurisdiction over the area where the facility is to be located [*see H&S Code § 1596.809; see also 22 Cal. Code Reg. §§ 101171(a), 102371*]. The actual request for fire clearance is made and maintained by the Department [*22 Cal. Code Reg. §§ 101171(a), 102371*]. The applicant use this form to expedite the fire clearance process.

The applicant must notify the Department if the facility plans to admit nonambulatory children so that the appropriate fire clearance can be obtained before those children are accepted [*22 Cal. Code Reg. § 101171(b); see 22 Cal. Code Reg. § 101152(n)(1)* ("nonambulatory person" defined)].

Small family child care homes are not subject to the fire clearance requirement, but must contain a fire extinguisher and smoke detector device that meet standards established by the State Fire Marshal [*H&S Code § 1597.45(d); 22 Cal. Code Reg. § 102371(b)*]. Although the summary for the current application booklet states that a fire clearance is required when the application is for seven or more children or nonambulatory children, this numerical limitation is intended to distinguish between large and small homes rather than between small homes and small homes with expanded capacity.

[2] FORM

Local Fire Inspection Authority Information (LIC 9054)

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Legal Topics:

For related research and practice materials, see the following legal topics:

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32-100C California Legal Forms--Transaction Guide §§ 100C.243-100C.249

[Reserved]

§§ 100C.243[Reserved]



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B. Operational Forms

32-100C California Legal Forms--Transaction Guide § 100C.250

§ 100C.250 Notice of Employee Rights (LIC 9052)

[1] Comment

[a] Use of Form

This form, Department of Social Services Form LIC 9052, is a notification to all child care facility employees of their rights under the California Child Day Care Facility Act. The form is available from the Department. The licensee must give a copy of this notice to all child care center and family child care home personnel at the time of employment. The employee must sign the receipt acknowledging the copy, and the licensee must keep the acknowledgment in the employee's file [22 *Cal. Code Reg.* §§ 101216(l), 102416(a); see *H&S Code* § 1596.881]. If an employee refuses to sign the notice form, a dated notation to that effect must be maintained in the employee's personnel record [22 *Cal. Code Reg.* §§ 101216(l)(1)(C), 102416(a)(3)].

[b] Rights Afforded Employees

The rights and complaint procedures afforded employees of child care facilities are designed to ensure that employees are not discriminated against and that the health and safety of children are maintained by ensuring that the facility is following all rules and regulations [see *H&S Code* §§ 1596.880-1596.883]. Specifically, employers [see *H&S Code* § 1596.880(b) ("employer" defined)] cannot discharge, demote, or suspend, or threaten to do so, or in any manner discriminate against, any employee who takes any of the following actions [*H&S Code* § 1596.881]:

- Makes any good faith oral or written complaint to the Department of Social Services, an appropriate law enforcement agency, or the employer or employer's representative regarding the employer's violation of any licensing or other laws.
- Institutes, or causes to be instituted, any proceeding against the employer.
- Is, or will be, a witness or testify in a proceeding regarding the violation of any licensing or other laws.

- Refuses to perform work in violation of a licensing law or regulation after notifying the employer of the violation.

In addition to the above rights, a specific complaint procedure has been established for employees. An employee's claim alleging the employer's violation of the above rights must be submitted to both the employer within 45 days of the alleged violation and to the Division of Labor Standards and Enforcement no later than 90 days after the alleged violation [*H&S Code § 1596.882(a)*]. On receipt of the complaint, the Division of Labor Standards and Enforcement must make whatever investigation it deems appropriate, and within 30 days of receiving the complaint, review the facts of the complaint and set a hearing date or notify the parties of its decision [*H&S Code § 1596.882(b),(e)*].

If the Division of Labor Standards and Enforcement determines that the employer has violated one of the employee's rights, it must bring legal action against the employer [*H&S Code § 1596.882(c)*]. In any action against the employer, the court, for cause shown, may issue restraining orders and other appropriate relief including rehiring, reinstatement, and back pay [*H&S Code § 1596.882(d)*]. Except for other remedies available to the employee under a collective bargaining agreement, the above complaint procedure is the employee's exclusive means for presenting claims against the employer regarding violation of his or her rights [*H&S Code § 1596.882(f)*]. Employers who willfully refuse to rehire, promote, or restore an employee or former employee who has been determined to be eligible for rehiring or promotion by an appropriate complaint procedure, are guilty of a misdemeanor [*H&S Code § 1596.883*].

[2] FORM

Notice of Employee Rights (LIC 9052)

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Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Governments State & Territorial Governments Licenses



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B. Operational Forms

32-100C California Legal Forms--Transaction Guide § 100C.251

§ 100C.251 Personal Rights of Children (LIC 613A)

[1] Comment

[a] Use of Form

This form, Department of Social Services Form LIC 613A, is a list of the personal rights afforded children attending child care centers. It is provided by the Department. Child care centers must inform each child's authorized representative of these personal rights [see [b][i], *below*] and give each a copy of the children's personal rights form at the time of admission [22 *Cal. Code Reg. § 101223(b)*; see 22 *Cal. Code Reg. § 101223(c)* (licensee must ensure provision of children's rights)].

The center must ask the authorized representative to sign and date the acknowledgment of receipt statement and place the receipt in the child's file [22 *Cal. Code Reg. § 101223(b)(1)(A)*]. Further, the notice must be posted in a prominent area within the center that is publicly accessible [22 *Cal. Code Reg. § 101223(b)(2)*].

Family child care home licensees are not required to distribute this form, although children attending family child care homes are also entitled to similar specified rights [see 22 *Cal. Code Reg. § 102423(a)*; see also [b][ii], *below*].

[b] Personal Rights Afforded Children

[i] Child Care Centers

Each child receiving services from a child care center has the following personal rights [22 *Cal. Code Reg. § 101223(a)*]:

- To be accorded dignity in his or her personal relationships with staff and other persons.
- To be accorded safe, healthful, and comfortable accommodations, furnishings, and equipment to meet his or her needs.

- To be free from corporal or unusual punishment, infliction of pain, humiliation, intimidation, ridicule, coercion, threat, mental abuse, or other actions of a punitive nature, including the interference with daily living functions, such as eating, sleeping, or toileting, or withholding shelter, clothing, medication, or aids to physical functioning.
- To be informed, and have his or her authorized representative informed, by the licensee of the law regarding complaints, including the address and telephone number of the complaint receiving unit of the Department, and of information regarding confidentiality [*see H&S Code § 1596.853; see also [c], below*].
- To be free to attend religious services or activities of his or her choice and to have visits from the spiritual advisor of his or her choice (but attendance at religious services must be on a voluntary basis as decided by the authorized representative).
- Not to be locked in any room, building, or center premises during the day or night, but this right does not preclude licensees from locking exterior doors and windows or from establishing rules for the protection of children provided the children can exit the center.
- Not to be placed in any restraining device, except certain specified postural and supportive restraints to prevent children from falling are allowed if approved in advance by the Department and other requirements are satisfied [*see 22 Cal. Code Reg. § 101223(a)(7)*].
- To receive or reject medical care, or health-related services, except for minors for whom a guardian, conservator, or other legal authority has been appointed [*22 Cal. Code Reg. § 101223(a)(8)*].

The foregoing list sets forth the minimum rights of children in child care centers, and the licensee may provide for additional rights of children [*see 22 Cal. Code Reg. § 101223(a)*].

[ii] Family Child Care Homes

Although a different regulation guarantees personal rights to children attending family child care homes, the rights are essentially the same as those provided child care center children. Each child receiving services from a family child care home has the following rights, which cannot be waived or abridged by the licensee regardless of parental consent or authorization [*22 Cal. Code Reg. § 102423(a)*]:

- To be treated with dignity in his or her personal relationship with staff and other persons.
- To receive safe, healthful, and comfortable accommodations, furnishings, and equipment.
- To have parents or guardians informed by the licensee of the law regarding complaints and the procedures for registering complaints confidentially, including the address and telephone number of the Department's complaint unit [*see H&S Code § 1596.853; see also [c], below*].
- To be free from corporal or unusual punishment, pain, humiliation, intimidation, ridicule, coercion, threat, mental abuse, or other punitive acts, including interference with daily functions of living, such as eating, sleeping, toileting, or withholding shelter, clothing, medication, or aids to physical functioning.

[c] Complaint Procedures

A part of each child's personal rights is the right to have his or her authorized representative informed by the licensee of the law regarding complaints [see 22 Cal. Code Reg. §§ 101223(a)(4), 102423(a)(3); see also H&S Code § 1596.853]. The licensee may fulfill this obligation by personally advising each authorized representative of the law or by making it a standard provision in the facility's admission agreement.

Any person may request an inspection of any child care center by sending a notice to the Department alleging a violation of any requirement imposed on child care facilities by California law. The complaint may be made orally or in writing [H&S Code § 1596.853(a)]. The identity of the complainant will remain confidential, and, unless the complainant requests otherwise, neither the substance of the complaint nor any copy of the complaint or of any record published, released, or otherwise made available to the licensee may disclose the name of any person named in the complaint except for the duly authorized officer, employee, or agent of the Department conducting the investigation or inspection [H&S Code § 1596.853(b)]. Child care providers must post permanent notices informing parents and guardians of their right to file complaints with the Department [H&S Code § 1596.857(d)].

For further discussion of the complaint procedures, see §§ 100C.51[2],[3] (day care centers), and 100C.91[2] (family child care homes).

[2] FORM

Personal Rights of Children (LIC 613A)

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Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Family Law Family Protection & Welfare Children General Overview



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32-100C California Legal Forms--Transaction Guide § 100C.252

§ 100C.252 Notification of Parents' Rights for Child Care Centers (LIC 995)

[1] Comment

[a] Use of Form

This form, Department of Social Services Form LIC 995, is a notification of parents' rights containing a list of those rights and an acknowledgment of receipt. The form is available from the Department. The notice advises children's authorized representatives of their rights to enter and inspect the child care center in which their child is receiving care. Among other items, the notice also advises parents that they are entitled to be informed, on request of the name and type of association to the child care center of any adult that has been granted a criminal record exemption and that the name may be obtained by contacting the local licensing office, and to receive the Caregiver Background Check Process form [see § 100C.252[2]].

Child care centers must give the authorized representative a copy of the notice form and request that the receipt at the bottom of the form be signed and dated [see *H&S Code § 1596.857*; see also *22 Cal. Code Reg. § 101218.1(b),(e)*]. The signed and dated receipt must then be maintained in the child's file to document proper notification [see *22 Cal. Code Reg. § 101218.1(c)*; see also LIC 995 instructions].

This notice must be posted in a prominent area within the center that is publicly accessible [*H&S Code § 1596.857(d)*]. It must include information stating that the specified registered sex offender database is available to the public at a web site, www.meganslaw.ca.gov, that is maintained by the Department of Justice [*H&S Code § 1596.857(d)*].

When providing this form to the authorized representative, child care centers must also provide a copy of the Caregiver Background Check Process form [LIC 995E] [*22 Cal. Code Reg. § 102419(c)*]. This form also serves as a receipt for the Caregiver Background Check Process form [see *22 Cal. Code Reg. § 102419(d)(1)*; see also § 100C.252[2]].

A variant of this form [LIC 995A] is used for family child care homes [see § 100C.252A].

[b] Authorized Representatives' Right to Inspect Facility

On presentation of identification, the responsible parent or guardian of a child receiving services in a child care center has the right to enter and inspect the facility, without advance notice, during the normal operating hours of the facility, or at any time that the child is receiving services in the facility [*H&S Code § 1596.857(a)*]. When inspecting facilities, parents must be respectful of the children's routines and programmed activities [*H&S Code § 1596.857(a)*]. The person present who is in charge of a child care facility may deny access to an adult whose behavior presents a risk to children present in the facility, and may deny access to noncustodial parents or guardians if requested by the responsible parent or legal guardian [*H&S Code § 1597.857(g)*]. In the absence of a legal right to deny access, however, child care facilities may be subject to warnings or penalties for failure to allow inspections. The Department will issue a warning citation for the first violation of the right [*H&S Code § 1596.857(c)*]. For any subsequent violation, the Department may impose a civil penalty of \$50 per violation and take action to revoke the facility's license [*H&S Code § 1596.857(c)*].

[c] Prohibition Against Retaliation

No child care center may discriminate or retaliate against any child or parent or guardian because the parent or guardian has exercised his or her right to inspect the facility, or has lodged a complaint with the Department against the facility [*H&S Code § 1596.857(b)*].

[2] FORM

Notification of Parents' Rights (LIC 995)

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Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Family Law Family Protection & Welfare Children General Overview



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32-100C California Legal Forms--Transaction Guide § 100C.252A

§ 100C.252A Notification of Parents' Rights for Family Child Care Homes [LIC 995A]

[1] Comment

[a] Use of Form

This form, Department of Social Services Form LIC 995A, is a notification of parents' rights, containing a list of those rights and an acknowledgment of receipt, for use by family child care homes [see 22 Cal. Code Reg. § 102419]. The form is available from the Department.

At the time of acceptance of each child into care after January 1, 2007, family care homes must provide the child's parent or guardian with a copy of this notice, the Caregiver Background Check Process form (LIC 995E), and the Family Child Care Consumer Awareness Information (LIC 9212) [see H&S Code § 1596.857(e); 22 Cal. Code Reg. § 102419(d)]. The home must request the child's parent or authorized representative to sign and date the bottom portion of this notice form, which acknowledges that the parent or authorized representative has received and read this notice [22 Cal. Code Reg. § 102419(d)(1); see H&S Code § 1596.857]. The signed and dated receipt must then be maintained in the child's file to document proper notification [see 22 Cal. Code Reg. §§ 102419(d)(1), 102421(a)]. If a parent or guardian refuses to sign the receipt, a dated notation to that effect, containing the parent or authorized representative's name and telephone number, must be retained in the child's records [22 Cal. Code Reg. § 102419(g)].

This notice must be posted in a prominent area within the home that is publicly accessible [H&S Code § 1596.857(d)]. It must include information stating that the specified registered sex offender database is available to the public at a web site, www.meganslaw.ca.gov, that is maintained by the Department of Justice [H&S Code § 1596.857(d),(e)]. A provider, however, is not required to provide any additional information regarding the location and proximity of registered sex offenders who reside in the community where the child care facility is located [H&S Code § 1596.857(f)].

[b] Contents of Form

This notice advises children's authorized representatives of their rights to enter and inspect the family child care home in which their child is receiving care [see 22 Cal. Code Reg. § 102419(a)(1); H&S Code § 1596.857]. For further

discussion of these rights, see § 100C.252[1][b].

Among other items, the notice also advises authorized representatives of their rights (1) to be notified and receive a written notice listing names of any persons not allowed in the home when children are present if the Department has excluded someone from the home in writing after January 1, 2001; (2) to be informed (on request) of the name and relationship to the home of any adult that has been granted a criminal record exemption and that the name may be obtained by contacting the local licensing office; (3) to receive the Caregiver Background Check Process form; and (4) to be informed whether the facility has or does not have liability insurance that covers injury to client due to the negligence of the licensee or employees [see 22 Cal. Code Reg. § 102419(a); see also [2], below]. The form also includes an addendum and acknowledgment regarding any exclusion from the home and any subsequent reinstatement [see [2], below].

[c] Prohibition Against Retaliation

No family child care home may discriminate or retaliate against any child or any child's parent or authorized representative because the parent or authorized representative has exercised his or her right to inspect the family child care home or has lodged a complaint with the Department against the family child care home [22 Cal. Code Reg. § 102419(f)].

[2] FORM

Notification of Parents' Rights for Family Child Care Homes [LIC 995A]

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32-100C California Legal Forms--Transaction Guide § 100C.252B

§ 100C.252B Addendum to Notification of Parent's Rights (Regarding Removal/Exclusion) (LIC 995B)

[1] Comment--Use of Form

This form, Department of Social Services Form LIC 995B, is an addendum to the *form in § 100C.252A*. The form is available from the Department. A family child care home must provide a copy of this form sent by the Department, that is still in effect, to one parent or authorized representative of every child when the parent or authorized representative arranges for child care services or on the first day the child receives care, whichever is first [22 *Cal. Code Reg. § 102419(h)*].

If the home was notified by the Department to remove an individual, or bar entry by an individual, while the Department considered granting or denying a criminal record exemption for the individual [see 22 *Cal. Code Reg. § 102370.1(a)*], then the home must provide a copy of this form to one parent or authorized representative of every child currently in care within one day of receipt of this form from the Department [22 *Cal. Code Reg. § 102370.1(b)(2)*].

On receiving notice from the Department to remove an individual from the home [see *H&S Code § 1596.871(c)(2)*] or to exclude an individual from the home [see *H&S Code § 1596.8897*], the home must provide a copy of this form to one parent or authorized representative of every child currently in care within one day of receipt of the notice and this form from the Department [22 *Cal. Code Reg. § 102417(r)(2)*].

Whenever the home provides a copy of this form, the home must obtain a signed and dated receipt from the parent or authorized representative that acknowledges that he or she was given a copy of this form [22 *Cal. Code Reg. §§ 102370.1(b)(3), 102417(r)(3), 102419(i)*]; see the bottom of this form. The signed and dated receipt must be maintained in the child's file and be made available to the Department on request [22 *Cal. Code Reg. §§ 102370.1(b)(4), 102417(r)(4), 102419(j)*].

[2] FORM

Addendum to Notification of Parent's Rights (Regarding Removal/Exclusion) (LIC 995B)

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32-100C California Legal Forms--Transaction Guide § 100C.252C

§ 100C.252C Addendum to Notification of Parent's Rights (Regarding Reinstatement) (LIC 995C)

[1] Comment--Use of Form

This form, Department of Social Services Form LIC 995C, is an addendum to the *form in § 100C.252A*. The form is available from the Department.

If a family child care home was notified by the Department to remove an individual, or bar entry by an individual, while the Department considered granting or denying a criminal record exemption for the individual [*see 22 Cal. Code Reg. § 102370.1(a)*], then on receiving further notice from the Department that the individual may return to the home, the home must provide a copy of this form to one parent or authorized representative of every child in care within one day of receipt of the notice and this form from the Department [*22 Cal. Code Reg. § 102370.1(b)(2)(A)*].

If the home received notice from the Department to remove an individual from the home [*see H&S Code § 1596.871(c)(2)*] or to exclude an individual from the home [*see H&S Code § 1596.8897*], then on receiving further notice from the Department that the individual may return to the home, the home must provide a copy of this form to one parent or authorized representative of every child in care within one day of receipt of the notice and this form from the Department [*22 Cal. Code Reg. §§ 102417(r)(2)(A), 102419(h)(1)*].

Whenever the home provides a copy of this form, the home must obtain a signed and dated receipt from the parent or authorized representative that acknowledges that he or she was given a copy of this form [*22 Cal. Code Reg. §§ 102370.1(b)(3), 102417(r)(3), 102419(i)*]. (See the bottom of this form.) The signed and dated receipt must be maintained in the child's file and be made available to the Department on request [*22 Cal. Code Reg. §§ 102370.1(b)(4), 102417(r)(4), 102419(j)*].

[2] FORM

Addendum to Notification of Parent's Rights (Regarding Reinstatement) (LIC 995C)

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B. Operational Forms

32-100C California Legal Forms--Transaction Guide § 100C.253

§ 100C.253 Child Care Facility Roster (LIC 9040)

[1] Comment--Use of Form

This form, Department of Social Services Form LIC 9040, is a child care facility roster. Child day care centers and family child care homes must maintain a current roster of children who are provided care in the facility [*H&S Code § 1596.841*; *22 Cal. Code Reg. § 102417(g)(8)*]. This form is available from the Department of Social Services, but it is an optional form that may be used by the facility to comply with roster requirements.

The roster must include the name, address, and daytime telephone number of the child's parent or guardian, and the name and telephone number of the child's physician, and the date of enrollment and departure [*H&S Code § 1596.841*]. The roster must be kept in a central location at the facility, updated as needed, and made available to the Department on request. Child care rosters must be retained in the facility's files for three years [*see Form LIC 9040 instructions*].

[2] FORM

Child Care Facility Roster (LIC 9040)

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B. Operational Forms

32-100C California Legal Forms--Transaction Guide § 100C.254

§ 100C.254 Unusual Incident/Injury/Death Report (LIC 624)

[1] Comment

[a] Use of Form

This form, Department of Social Services Form LIC 624, is a report of an unusual incident, injury, death, occurring at a child care center. Although child care centers are required to use it whenever a child is injured or dies at the facility, or some other unusual event occurs that endangers the health and safety of the children [*see 22 Cal. Code Reg. § 101212; see also [b], below*], operators of family child care homes should also make it their custom and practice to complete the report on the occurrence of any injury, death, or unusual event.

[b] Reporting Requirements

Child care centers are under a continuing obligation to furnish reports to the Department regarding certain specified events that occur during the operation of the center [*see 22 Cal. Code Reg. § 101212*]. The Department must be informed of the following events by the next working day during regular business hours [*22 Cal. Code Reg. § 101212(d)*]:

- The death of any child from any cause.
- Any injury to any child that requires medical treatment.
- Any unusual incident or child absence that threatens the physical or emotional health or safety of any child.
- Any suspected physical or psychological abuse of any child.
- Epidemic outbreaks.

- Poisonings.
- Catastrophes.
- Fires or explosions that occur in or on the facility premises.

Within seven days of the event, the center must complete and return an original of this form to the Department [22 *Cal. Code Reg. § 101212(d)*; see also Form LIC 624 instructions]. The report must state the name, age, sex, and date of admission of the child involved, the date and nature of the event, the attending physician's name, findings, and treatment, if any, and the disposition of the case [22 *Cal. Code Reg. § 101212(d)(2)*].

The occurrence of any of the above events must also be reported to the child's authorized representative [22 *Cal. Code Reg. § 101212(f)*], and events involving epidemic outbreaks, poisonings, and catastrophes must be reported to the local health officer when appropriate [22 *Cal. Code Reg. § 101212(g)*; see 17 *Cal. Code Reg. §§ 2500, 2502*]. Additionally, fires or explosions in or on the facility premises must be immediately reported to the local fire authority, and in areas without an organized fire service, a report must be made to the State Fire Marshal within 24 hours [22 *Cal. Code Reg. § 101212(h)*].

Other events that must be reported within 10 working days of the event are organizational changes at the facility; changes in the licensee's or applicant's mailing address [see § 100C.272]; changes in the chief executive officer of a corporation, the general partners of a partnership, or the controlling members of a limited liability company; and changes in the plan of operation that affect services to the children [22 *Cal. Code Reg. § 101212(e)* (regulation refers to "controlling partners of limited liability corporation"); see 22 *Cal. Code Reg. § 101185(a)(2)-(5)* (organizational changes required to be reported)].

[2] FORM

Unusual Incident/Injury/Death Report (LIC 624)

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32-100C California Legal Forms--Transaction Guide § 100C.255

§ 100C.255 Identification and Emergency Information (LIC 700)

[1] Comment--Use of Form

This form, Department of Social Services Form LIC 700, is an identification and emergency information form available from the Department of Social Services. It is designed for use by child care centers. The form must be completed by the parent or guardian, and a signed copy of the form must be kept in the child's file [*see 22 Cal. Code Reg. § 101221*].

Although family child care homes must maintain an emergency information card for each child receiving care, the use of this particular form is not required. However, the completed form includes all the information required by regulation [*22 Cal. Code Reg. § 102417(g)(7)*] and therefore may be used by family child care homes.

[2] FORM

Identification and Emergency Information (LIC 700)

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Legal Topics:

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B. Operational Forms

32-100C California Legal Forms--Transaction Guide § 100C.256

§ 100C.256 Child's Preadmission Health History--Parent's Report (LIC 702)

[1] Comment--Use of Form

This form, Department of Social Services Form LIC 702, is a child's preadmission health history report and is available from the Department of Social Services. The form must be completed by the parent, and is used to determine whether or not the child care center can meet the child's needs. The form requires information about previous illnesses, general health, social development, and daily routines. The form should be kept in the child's personal file.

[2] FORM

Child's Preadmission Health History--Parent's Report (LIC 702)

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Legal Topics:

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B. Operational Forms

32-100C California Legal Forms--Transaction Guide § 100C.257

§ 100C.257 Affidavit Regarding Liability Insurance for Family Child Care Home (LIC 282)

[1] Comment

[a] Use of Form

This form, Department of Social Services Form LIC 282, is an affidavit in which the parents or guardians of a child being cared for in a family child care home state that they have been informed that the family child care home does not carry liability insurance or a bond as otherwise required by law [*see H&S Code § 1597.531; see also [b], below*]. Use of this form, available from the Department of Social Services, is mandatory [*H&S Code § 1597.531(a)*].

Neither the execution of this form nor the lack of insurance or bond affects the right of parents to bring a legal action against the home [*see [2], below*].

[b] Liability Insurance or Bond Requirements

All family child care homes for children must either maintain liability insurance for injuries to clients and guests or post a bond [*H&S Code § 1597.531(a)*]. If liability insurance is maintained, it must be in the amount of at least \$100,000 per occurrence and \$300,000 in the total annual aggregate and cover claims based on the negligence of the child care licensee or its employees. If a bond is posted, it must be in the amount of \$300,000 [*H&S Code § 1597.531(a); see H&S Code § 1597.531(b)*] (conditions for naming property owner, if other than home operator, and homeowners' associations, on policy or bond); *see also § 100C.13[2]*].

[c] Affidavits in Lieu of Insurance or Bond

In lieu of the requisite liability insurance or bond [*see [b], above*], a family child care home may maintain a file of affidavits signed by each parent with a child enrolled in the home [*H&S Code § 1597.531*]. The affidavits must state that the parent has been informed that the family child care home does not carry liability insurance or a bond according to standards established by the state of California [*H&S Code § 1597.531(a)*].

If the provider does not own the premises used as the family child care home, or the premises are shared with a homeowners' or condominium association, the affidavit must also state that the parent has been informed that the liability insurance, if any, of the property's owner, or association, may not provide coverage for losses arising out of, or in connection with, the operation of the home, except for losses caused by, or resulting from, an action or omission by the property owner or homeowners' association, for which the owner or association would otherwise be liable under the law [*see H&S Code § 1597.531(a)*].

The affidavits must be on a form provided by the Department and be reviewed at each licensing inspection [*H&S Code § 1597.531(a)*].

[2] FORM

Affidavit Regarding Liability Insurance for Family Child Care Home (LIC 282)

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Insurance Law General Liability Insurance General Overview



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32-100C California Legal Forms--Transaction Guide § 100C.258

§ 100C.258 Acknowledgment of Abuse Reporting Requirement (LIC 9108)

[1] Comment--Use of Form

This form, Department of Social Services Form LIC 9108, is a statement acknowledging the requirement to report suspected child abuse. This form is available from the Department.

Whenever a mandated reporter in his or her professional capacity or within the scope his or her employment has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect, the mandated reporter must make an official report [*Pen Code § 11166(a)*; *see Pen Code § 11165.9* (appropriate agencies)]. The mandated reporter must report telephonically to the agency immediately or as soon as is practicably possible, and prepare and send, fax, or electronically transmit a written follow-up within 36 hours of receiving information about the incident [*Pen Code § 11166(a)*]. The term "mandated reporter" is broadly defined [*see Pen Code § 11165.7(a)*] and includes licensees, administrators, and employees of child care facilities [*Pen Code § 11165.7(a)(10)*].

The licensee must give each employee a copy of specified Penal Code statutes before employment [*Pen Code § 11166.5(a)*]. By signing the acknowledgment of responsibility, the employee acknowledges its receipt [*see [2], below*]. The licensee must give a copy to the employee and retain the original in the employee's file [*see [2], below*].

[2] FORM

Acknowledgment of Abuse Reporting Requirement (LIC 9108)

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Family Law Family Protection &

WelfareChildrenAbuse, Endangerment & Neglect



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32-100C California Legal Forms--Transaction Guide § 100C.259

§ 100C.259 Physician's Report (LIC 701)

[1] Comment

[a] Use of Form

This form, Department of Social Services Form LIC 701, is a physician's report that must be used by child care centers to secure a health evaluation from a physician, physician's assistant, or licensed nurse practitioner before admitting the child to the center [see [b], *below*]. This assessment enables the licensee to assess whether the center can provide the necessary health-related services to the child [22 *Cal. Code Reg. § 101220(a)*]. The form is available from the Department of Social Services.

A copy of this form must be retained in the child's file [see 22 *Cal. Code Reg. § 101221(b)(8)*; see §§ 100C.30[3][c], 100C.140].

[b] Medical Assessment Requirements

Before, or within 30 days following the acceptance of each child to a child care center, the licensee must obtain a written medical assessment performed by, or under the supervision of, a licensed physician. The assessment cannot be more than one year old when obtained by the center [22 *Cal. Code Reg. § 101220(a)*]. The assessment must include the following information [22 *Cal. Code Reg. § 101220(b)*]:

- A record of any infectious or contagious diseases that would preclude care of the child by the licensee.
- The results of a test for tuberculosis.
- The identification of special problems and needs of the child.
- The identification of any prescribed medications being taken by the child.

- The child's ambulatory status.

The Department can require the licensee to obtain a current written medical assessment, if necessary to verify the appropriateness of a child's placement [22 Cal. Code Reg. § 101220(c)].

If the requisite medical assessment is not available for a child and cannot be obtained within 30 days of admission, a medical appointment date must be obtained from the parent on the child's admission, and a tuberculosis test must be performed within 30 days after admission [22 Cal. Code Reg. § 101220(d); but see 22 Cal. Code Reg. § 101220(e),(f) (documentation of medical assessment not required for children enrolled in elementary school, and children whose parents practice religious faith healing excepted from requirements)].

[c] Exemption on Religious Grounds

A physician's report is not required for children whose authorized representatives adhere to religious faith healing or other spiritual practices. To be exempt, the authorized representative must provide information relative to the child's health history, and sign a statement including all of the following [22 Cal. Code Reg. § 101220(f)]:

- A statement indicating that they will accept full responsibility for the child's health.
- Their refusal to obtain a medical examination of their child.
- A request that no medical care be given to the child.

[2] FORM

Physician's Report (LIC 701)

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Family Law Family Protection & Welfare Children Abuse, Endangerment & Neglect



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32-100C California Legal Forms--Transaction Guide § 100C.260

§ 100C.260 Consent for Emergency Medical Treatment (LIC 627)

[1] Comment

[a] Use of Form

This form, Department of Social Services Form LIC 627, is a consent for emergency medical and dental care. The licensee must secure a consent form from the authorized representative of all children in care unless the child is exempt [see [b], *below*]. The form is available from the Department of Social Services.

When child care center teachers supervise activities away from the center premises, they must carry a copy of this form for each child, or the telephone numbers of the authorized representatives, relatives, or others who can assume responsibility in an emergency for each child excepted from the requirement for an emergency medical treatment consent form because of religious faith healing practices [22 *Cal. Code Reg. § 101226(c)(1)(B)*; see [b], *below*].

A signed consent form for emergency medical treatment must be retained in the child's file unless the child is exempt [22 *Cal. Code Reg. § 101221(b)(8)(C)*; see [b], *below*].

[b] Exemption on Religious Grounds

This consent form is not required for children whose authorized representatives adhere to religious faith healing or other spiritual practices. To be exempt, the authorized representative must provide information relative to the child's health history, and sign a statement including all of the following [22 *Cal. Code Reg. § 101221(b)(8)(C)*; see 22 *Cal. Code Reg. § 101220(f)*]:

- A statement indicating that they will accept full responsibility for the child's health.
- Their refusal to obtain a medical examination of their child.
- A request that no medical care be given to the child.

The licensee must retain a copy of this statement in the child's files [*see 22 Cal. Code Reg. § 101221(b)(8)(C)*].

[2] FORM

Consent for Medical Treatment (LIC 627)

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Education LawAdministration & OperationChild Care FacilitiesFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & Neglect



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32-100C California Legal Forms--Transaction Guide § 100C.261

§ 100C.261 Agreement Allowing Child to Leave Center on Own

[1] Comment

[a] Use of Form

This form is an agreement under which the authorized representative of a child attending a school-age child care center consents to allow the child to leave the center on his or her own. This type of agreement is of course applicable only for those children who are old enough to leave by themselves, and should be entered into only by parents who believe their children are responsible enough to leave the facility by themselves.

Any agreement between centers and parents under which school-age children are permitted to leave the center on their own must be in writing, signed and dated by the director and authorized representative, and filed in the child's records [22 *Cal. Code Reg. § 101529.1(c)*]. Typically such an agreement will be very simple and informal document. This form therefore is drafted in a "permission slip" format that allows for the names of the parties, and any significant conditions or limitations on the permission granted, to be written in by hand.

[b] Sign-Out Procedures

All child care centers must develop, maintain, and implement a written procedure to transfer responsibility for the child from the center to the authorized representative. The procedure must include, at a minimum, a sign-out sheet signed by the person removing the child from the center [22 *Cal. Code Reg. § 101229.1*]. School-age children whose authorized representative has agreed that they can leave the center on their own, must still be signed out by center staff [22 *Cal. Code Reg. § 101529.1(c)*].

[2] FORM

Agreement Allowing Child to Leave Center on Own

AGREEMENT ALLOWING CHILD TO LEAVE CENTER ON OWN

_____ [Name of day care center]

[License number]

_____ [Address]

[Telephone number]

_____ [Name(s) of authorized representative(s)], the Authorized representative(s) of
 _____ [name of child], agree(s) to allow _____ [name of child] to leave
 _____ [name of day care center] on his or her own, subject to the conditions and limitations noted
 below.

Conditions and Limitations: _____ [specify, e.g., Johnny may not leave on his own before 3:20 PM and
 may leave only on Mondays and Fridays. He may not leave on his own during severe rain, wind, storm, flood, or other
 weather conditions.]

_____ [name of day care center] agrees that a staff member will sign Child out on the regular sign-out
 sheet before allowing Child to leave on his/her own.

AUTHORIZED REPRESENTATIVE

_____ [signature]

_____ [street address]

_____ [city, state, and zip]

_____ [telephone]

Dated: _____

_____ [name of center]

By _____ [signature of director]

Dated: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
 Education Law Administration & Operation Child Care Facilities



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32-100C California Legal Forms--Transaction Guide § 100C.262

§ 100C.262 Infant Care Center's Needs and Services and Activities Plan

[1] Comment

[a] Use of Form

This form is an infant care center's needs and services and activities plan. This type of plan must be used by child care centers that provide services to children under the age of two. This form includes a sample feeding plan, diaper changing schedule, and activities plan, but does not include a toilet training plan.

Unlike this form, plans may also be submitted in chart form. Charts that, for example, place the required services in the left column (such as feeding schedules and indoor and outdoor activities) and the days of the week along the top are acceptable so long as all the required information is included in the chart.

[b] Infant Care Centers

[i] In General

An "infant care center" is any child care center or part of a center where less than 24-hour per day, nonmedical care and supervision are provided to infants (that is, children under two years of age) in a group setting [22 *Cal. Code Reg.* § 101152(i)(1),(2); see 22 *Cal. Code Reg.* § 101152(c)(3) ("care and supervision" defined)]. However, children whose developmental needs require continuation in an infant care center may remain there up to three years of age [22 *Cal. Code Reg.* § 101361].

Child care centers providing group infant care are highly regulated. They are subject to all the regulations applicable to all child care centers [see 22 *Cal. Code Reg.* §§ 101151-101239.2] and the special regulations applicable only to infant care centers [22 *Cal. Code Reg.* § 101351; see 22 *Cal. Code Reg.* §§ 101351-101439.1]. These include all operating requirements and requirements for the physical environment that child care centers must meet, plus special operating and physical environment requirements applicable only to infant care centers [see § 100C.35[2]]. These special operating requirements include the development of a needs and services plan [see 22 *Cal. Code Reg.* §§ 101419.2,

101419.3; *see also* [ii], *below*], a feeding plan [*see* 22 Cal. Code Reg. § 101427; *see also* [iii], *below*], a toilet training plan [*see* 22 Cal. Code Reg. § 101428; *see also* [iv], *below*], and an activities plan [*see* 22 Cal. Code Reg. § 101430; *see also* [v], *below*].

[ii] Needs and Services Plan

Before an infant's first day at the center, the infant care center director or assistant director must complete a needs and services plan with assistance from the infant's authorized representative. The authorized representative's participation in preparing the plan must be verified by his or her signature on the plan [22 Cal. Code Reg. § 101419.2(a)]. The needs and services plan must be in writing and include an individual feeding plan, toilet training plan, if applicable, any services that may be needed by the child that differ from those provided by the center's normal program, such as special exercises for physically handicapped infants, and a plan for subsequent personal interviews with the authorized representative [22 Cal. Code Reg. § 101419.2(b)]. The center must provide authorized representative with a copy of the plan and any subsequent updates [22 Cal. Code Reg. § 101419.2(c)].

The plan must be updated at least quarterly, or as often as needed to ensure its accuracy, by the director, assistant director, or teacher with help from the child's authorized representative. The authorized representative's participation in updating the plan must be verified by his or her signature on the plan [22 Cal. Code Reg. § 101419.3].

[iii] Feeding Plan

In addition to the general food service requirements [22 Cal. Code Reg. § 101227; *see* § 100C.32], centers must prepare individual feeding plans for each infant [22 Cal. Code Reg. § 101427(a),(b)]. The director or assistant director and the infant's authorized representative and/or physician must develop the plan before the infant's first day at the center [22 Cal. Code Reg. § 101427(b)(1),(2)]. The authorized representative's participation in developing and updating the plan must be verified by his or her signature on the plan [22 Cal. Code Reg. § 101427(b)(2)(A)]. All feeding must occur in accordance with the plan [22 Cal. Code Reg. § 101427(c)].

The plan must include instructions for special diet, a feeding schedule, whether the infant is receiving breast milk or type of formula, a schedule to introduce solid foods, food consistency, food likes and dislikes, food allergies, and a schedule to introduce cups and utensils [*see* 22 Cal. Code Reg. § 101427(b)(3)(A)-(H)]. The plan must be updated as frequently as requested by the authorized representative, or as necessary to reflect changes in the plan, and the director or assistant director must discuss current feeding theory with the parents, including the dangers of honey [22 Cal. Code Reg. § 101427(b)(4),(5)]. Bottle-fed infants must be fed at least once every four hours, and the center must have appropriate food available for the infants [22 Cal. Code Reg. § 101427(c)(1),(2)].

Numerous other requirements must be satisfied by the center regarding the feeding of infants, including the regulation of the type, storage, and preparation of formula allowed, the labeling of bottles and food brought by the parents, the sterilization of bottles and nipples, and the holding of infants while being fed [*see* 22 Cal. Code Reg. § 101427(d)-(j),(n)]. Additionally, honey or corn syrup cannot be served to infants, commercially prepared baby food in jars must be transferred to a dish before being given to infants, arrangements for privacy, if requested, must be given to mothers who want to nurse their babies, and bathing or rinsing diapers or clothes is not allowed in the food preparation area [22 Cal. Code Reg. § 101427(k)-(m),(o)].

[iv] Toilet Training Plan

The center must have a written toilet training plan for infants being toilet trained [22 Cal. Code Reg. § 101428(a)]. The director or assistant director and the infant's authorized representative must develop a plan [22 Cal. Code Reg. § 101428(a)(1)], which must include methods of toilet training and the introduction and use of appropriate training equipment and clothing [22 Cal. Code Reg. § 101428(a)(2)]. An infant cannot be required to wear diapers during toilet

training unless the plan specifically so indicates [22 Cal. Code Reg. § 101428(a)(3)]. The plan must be followed, and center staff must have ready access to the plan for infants in their care [22 Cal. Code Reg. § 101428(a)(4),(5)].

Other detailed requirements must be met for facilities caring for the special needs of infants, including keeping infants clean and dry at all times by having sufficient changes of clothing, placing soiled clothing in air tight containers, and requirements for the changing of diapers [22 Cal. Code Reg. § 101428(b)-(d)]. When potty chairs are used, additional requirements must be met, as well as providing instructions and assistance in hand washing after use of a toilet [22 Cal. Code Reg. § 101428(e),(f)].

[v] Activities Plan

Infant care centers must also develop, maintain, and implement a written plan to ensure indoor and outdoor activities designed to meet the needs of infants. The plan must include providing for quiet and active play, rest and relaxation, eating, toileting, individual attention, and being held by care providers [22 Cal. Code Reg. § 101430(a)(1)]. The center must ensure that the infants participate in these activities and be given an opportunity to sleep without distraction or disturbance from other activities, but no infant may be forced to sleep, stay awake, or stay in the napping area [22 Cal. Code Reg. § 101430(a)(2),(3) (center may schedule nap for infants over 12 months)].

[2] FORM

Infant Care Center's Needs and Services and Activities Plan

Infant Needs and Services and Activities Plan

Child's name: _____

Child's parents: _____

Work telephone: _____ Home telephone: _____

Date of Birth: _____

Date of admission: _____

Pediatrician: _____ Telephone: _____

I. FEEDING PLAN:

1. _____ [Infant's name] is to be fed [specify whether infant is receiving breast milk or formula and if receiving formula specify brand name, e.g., Acme Infant Formula with Iron] pursuant to the following schedule: [describe how often, at what times during day, etc. infant is to be fed, e.g., on demand or every three hours at the top of the hour].

[Choose one of the following:]

[If infant has been introduced to solid foods:]

2. In addition to receiving [milk or formula] pursuant to the above schedule, _____ [infant's name] is to

receive [describe solid foods infant is to receive, consistency, and schedule for providing solids, e.g., strained carrots, bananas, peas, or the like once a day at 12:00 P.M.]. _____ [Infant's name] is not to be fed [describe food(s) to which infant has shown allergic reaction] as _____ [he or she] has shown an allergic reaction to these foods. _____ [Infant's name] has shown a preference for [describe food that infant likes], and has shown a dislike for [describe food that infant does not like].

[If infant has not been introduced to solid foods:]

2. In addition to receiving [milk or formula] pursuant to the above schedule, _____ [infant's name] is to receive solid foods starting on _____ [specify date solids will be introduced].
 _____ [He or She] is to receive [describe types of food to be given and consistency, e.g., a different strained vegetable for each week of the first five weeks, and after the first five weeks strained fruits can be introduced, a different fruit each week]. These foods are to be given [describe schedule for providing solids, e.g., at 12:00 P.M. each day for the first four weeks and then at 12:00 P.M. and 4:00 P.M.].

[CONTINUE]

3. _____ [Infant's name] is to be provided cups and utensils during meal times on _____ [specify date cups and utensils are to be introduced, if they have not already been introduced, as well as types of cups and utensils to be introduced].

[OPTIONAL]

[If infant's physician has given special instructions:]

4. By direction of _____'s [infant's name] pediatrician, [describe any special instructions relating to special diet or feeding e.g., no low iron formula is to be provided].

[CONTINUE]

II. DIAPER CHANGING:

1. _____'s [Infant's name] diaper is to be changed [describe how often infant is to be changed, e.g., every two hours or when needed]. [Describe type of diaper used at home, e.g., Pampers (size medium) are used at home].
2. [Describe any special diapering needs].

III. SLEEPING:

1. [Describe infant's sleeping schedule and patterns including when infant is to be given naps each day, how long the naps usually last, how often infant is awakening at night, and other relevant information relating the infant's sleeping habits].

IV. ACTIVITIES PLAN:

1. _____ [Infant's name] is to receive at least _____ hours per day of active play

time. Active play time includes *[describe activities to be included in active play time, e.g., climbing, walking, and running]*.

_____ *[Infant's name]* is to receive at least _____ hours per day of quiet play time. Quiet play time includes _____ *[describe activities to be included in quiet play time, e.g., being read to and being allowed to watch Teletubbies and Sesame Street]*.

The activities set forth above may be conducted either inside or outside, but _____ *[infant's name]* is to have at least _____ hours per day when _____ *[he or she]* is brought outside, weather permitting. *[Add, if desired: For outside activities, _____ (infant's name) must be adequately protected from the weather, including, if necessary, the application of a sunscreen designed for infants].*

2. _____ *[Infant's name]* is to be allowed to rest whenever _____ *[he or she]* is acting tired, and must be put down for a nap pursuant to the sleeping schedule described in III, above. All eating activities are to be conducted in accordance with the feeding plan described in I, above.

3. _____ *[Infant's name]* is to be physically held by an infant care provider at least _____ hours per day. Providers are allowed to pick up _____ *[infant's name]* whenever desired.

Executed on _____ *[date]*.

_____ *[signature of parent(s)]*

_____ *[signature of director]*

[typed name]

_____ *[name of center]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education Law Administration & Operation Child Care Facilities



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[Reserved]

§§ 100C.263[Reserved]



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C. Miscellaneous Forms

32-100C California Legal Forms--Transaction Guide § 100C.270

§ 100C.270 Request for Waiver of Licensing Requirements

[1] Comment

[a] Use of Form

This form is a request for a waiver of one or more licensing requirements applicable to child care centers. Before requesting a waiver, the applicant should first determine whether it is exempt from the licensing requirements under the California Child Day Care Facilities Act [see § 100C.10[4]]. If the facility is exempt, a request for a waiver is not necessary.

A written request for a waiver or exception must be submitted to the Department of Social Services and be accompanied by substantiating evidence supporting the request [22 *Cal. Code Reg. § 101175(b)(2)*]. The request is usually made by a letter to the Department specifying the specific requirement for which the waiver or exception is sought.

[b] Appropriateness of Waivers or Exceptions; Contents of Request

Licensing agencies may approve the use of alternative concepts, programs, services, procedures, techniques, equipment, space, personnel qualifications or staffing ratios, or the conduct of experimental or demonstration projects if that alternative provides safe and adequate services, and is not detrimental to the health and safety of any child in care [22 *Cal. Code Reg. § 101175(b)(1)*]. Waivers often relate to situations when the facility physically cannot meet a licensing requirement, such as not having the required square footage for outdoor activity space. Alternatively, exceptions are usually sought when a facility cannot presently meet a certain licensing requirement, but the requirement will be satisfied at some time in the near future. An example of an exception is when a teacher does not presently meet the qualification requirements but will fulfill the requirements by taking the necessary courses when the next school year begins.

The Department will notify the applicant in writing of the approval or denial of the request within 30 days of the receipt of the request for waiver or exception. Alternatively, the Department will inform the applicant of the need for additional information to substantiate the request within the same time frame [22 *Cal. Code Reg. § 101175(b)(3)*]. The

applicant/licensee must maintain a copy of the approval or denial in the center records and available for review [22 Cal. Code Reg. § 101175(b)(3)(A)].

[2] FORM

Request for Waiver of Licensing Requirements

Request for Waiver of Licensing Requirement

Dear [Name of licensing analyst assigned to center]:

This letter is a request for a waiver of [specify licensing requirement(s) for which waiver is sought, e.g., the square footage requirement for outdoor activity space pursuant to Title 22, Section 101238.2, of the California Code of Regulations]. Our center cannot meet this requirement because _____ [describe reasons why licensing requirement cannot be satisfied, e.g., the outdoor activity space consists of 65 square feet per child].

To overcome this deficiency our center will _____ [specify plan that remedies deficiency and/or substantiates request, e.g., only allow five children at a time to be present in the outdoor area]. Thank you for your help in this matter and if you have any further questions please do not hesitate to contact me directly.

Sincerely, _____ [signature of applicant]
[typed name]

_____ [name and address of center]

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Governments State & Territorial Governments Licenses



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DIVISION VII: PERSONAL TRANSACTIONS
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32-100C California Legal Forms--Transaction Guide § 100C.271

§ 100C.271 Withdrawal of License Application

[1] Comment

[a] Use of Form

This form is a request to withdraw an application for an initial child care facility license. It should be used after the initial application for a child care center or family child care home license has been filed [see §§ 100C.200, 100C.230] when the applicant no longer desires to open a child care facility.

[b] Withdrawal of Application and Effect on Proceedings Against Applicant

Applicants have the right to withdraw an application for an initial or renewal license. The application for withdrawal must be in writing [22 Cal. Code Reg. § 101180]. Although these regulatory requirements do not specifically apply to family child care homes [see 22 Cal. Code Reg. § 102351.1], no applicable law precludes the withdrawal of a family child care home license application, and prudence suggests that the request be presented in writing. Additionally, applications for child care center licenses are deemed withdrawn if, after 30 days from receiving notice from the Department that the application is incomplete, the applicant still does not complete the application [22 Cal. Code Reg. § 101178(a)(1); see 22 Cal. Code Reg. § 101152(c)(11); see also § 100C.22[1]].

The withdrawal of an application for a child care center or family child care home license after filing does not, unless the Department consents to the withdrawal in writing, deprive the Department of the authority to institute or continue a proceeding brought against the applicant for denial of the license on legal grounds [H&S Code § 1596.854].

[2] FORM

Withdrawal of License Application

Request for Withdrawal of License Application

Dear *[Name of licensing analyst assigned to facility]*:

On _____ *[specify date initial application was filed]*, I filed an application for
_____ *[specify type of facility license applied for, e.g., a large family child care home license]*. By this
letter, I am requesting that you withdraw my application as I no longer desire to open a child care facility. If you have
any further questions please do not hesitate to contact me at *[telephone number]*.

Date: _____.

Sincerely, _____ *[signature of applicant]*
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Administration & Operation Child Care Facilities Governments State & Territorial Governments Licenses



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32-100C California Legal Forms--Transaction Guide § 100C.272

§ 100C.272 Notice of Mailing Address Change

[1] Comment--Use of Form

This form is a notification by an applicant for a child care center license, or an existing licensee of such a facility, that his or her mailing address has changed. All applicants or licensees must notify the Department of Social Services, in writing, of any change in their mailing address within 10 calendar days of the change [*H&S Code § 1596.83*].

[2] FORM

Notice of Mailing Address Change

Notice of Mailing Address Change

Dear [*Name of licensing analyst assigned to facility*]:

I am writing to inform you that my new mailing address is _____ [*specify new mailing address*]. Please forward all correspondence to this new address. If you have any further questions please do not hesitate to contact me.

Date: _____.

Sincerely, _____ [*signature of applicant or licensee*]
[*typed name*]

_____ [*name and address of facility*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Education Law Administration & Operation Child Care Facilities



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 100C CHILD CARE FACILITIES

PART IV. FORMS

C. Miscellaneous Forms

*32-100C California Legal Forms--Transaction Guide § 100C.273***§ 100C.273 Notice of Intent to Alter Building****[1] Comment--Use of Form**

This form is a notification by a licensed care center that the center intends to make structural changes at the facility. Licensees must notify the Department before any actual construction or alterations are made to existing or new buildings [22 Cal. Code Reg. § 101237(a)]. Because notification is required before changes are made, the form should be used by centers that intend to make proposed changes but have not yet made the changes. The Department has authority to require a building inspection if the agency suspects that a hazard to the children's health and safety exists [22 Cal. Code Reg. § 101237(b)].

[2] FORM**Notice of Intent to Alter Building**

Notice of Intent to Alter Building

Dear *[Name of licensing analyst assigned to center]*:

I am writing to inform you of our intention to *[describe type of alteration(s) proposed at site, e.g., add a kitchen]* at _____ *[name, address, and license number of center]*. We would like to begin construction as soon as possible, and would appreciate it if you would contact me if you have any questions, or would like to inspect the premises.-

Sincerely, _____ *[signature of licensee]*
 _____ *[typed name]*

_____ *[name and address of center]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Education LawAdministration & OperationChild Care FacilitiesGovernmentsState & Territorial GovernmentsLicenses



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32-100C California Legal Forms--Transaction Guide § 100C.274

§ 100C.274 Departmental Notice of Intended Sale of Center

[1] Comment

[a] Use of Form

This form is a notice to the Department of Social Services of the intended sale of a licensed child care center. It must be given to the Department by the licensee (seller) for any sale of the center that will result in a new license being issued to the buyer [*H&S Code § 1597.14(a)*]. The notice must be given to the Department at least 30 days before the transfer of the property or business, or at the time that a bona fide offer is made, whichever period is longer [*H&S Code § 1597.14(a)(1)*]. A notice of intended sale must also be given to the parents or legal guardians of all children cared for in the center [*H&S Code § 1597.14(a)(1),(2)*; *see § 100C.275[2]*]. The sale cannot be finalized until at least 30 days after the seller gives this notice to the Department [*H&S Code § 1597.14(c)*].

The applicable statute requires only that notice of the seller's intent to sell the center be given to the Department. It does not specifically require that any other details regarding the proposed sale be included in the notice. Absent future legislation or the promulgation of regulations covering this matter, specific information regarding the proposed sale, if any, that is included in the notice is at the seller's discretion.

[b] Additional Notice Required to Buyer

In addition to the notice of proposed sale that must be given to the Department (this form), the seller of a licensed child care center must also give written notice to the prospective buyer that the buyer must obtain a license to operate the center. The seller must then send a copy of this written notice to the Department. The prospective buyer must then submit an application for a license [*see § 100C.200[2]*] within five days after the seller accepts the buyer's offer to purchase [*H&S Code § 1597.14(b)(2)*]. However, none of these requirements apply if the proposed buyer does not intend to continue operating the purchased property as a day care center [*see H&S Code § 1597.14(b)(1)*].

[c] Effect of Compliance or Noncompliance With Notice Requirements

Ordinarily, if a licensee sells a child care center to a buyer who will continue after the sale to operate the facility as a child care center, the property and business may not be transferred until the buyer qualifies for a license or a provisional license [*H&S Code § 1597.14(b)*]. However, if the parties to the sale comply with all notice requirements discussed in [a] and [b], *above*, the transfer may be completed and the buyer will not be considered to be operating an unlicensed facility while the Department makes a final determination on the application for licensure [*H&S Code § 1597.14(e)*]. The Department gives priority to applications submitted relative to a sale in order to ensure timely transfer of the property and business [*H&S Code § 1597.14(d)*].

[2] FORM

Departmental Notice of Intended Sale of Center

Notice of Intent to Sell Child Care Center

TO: Department of Social Services

FROM: _____ [*Name of licensee*]

RE: Proposed Sale of _____ [*Name of center*]

I am the licensee under the license issued to operate _____ [*name of child care center*]. This letter informs you that I have entered into an agreement to sell the center [*add if appropriate: and the property on which it is located*].

[*If buyer intends to continue operation of property as center, continue with the following:*]

I have notified the buyer, in writing, that the buyer must obtain a license to continue operation of the child care center. A copy of that notice is enclosed for your records.

_____ Dated:

Sincerely, _____ [*signature of licensee*]
[*typed name*]

_____ [*name and address of center*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Education Law Administration & Operation Child Care Facilities



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32-100C California Legal Forms--Transaction Guide § 100C.275

§ 100C.275 Parental Notice of Intended Sale of Child Care Center

[1] Comment

[a] Use of Form

This form is a notice to parents of the proposed sale of a licensed child care center. If a sale will result in a new license being issued, the licensee must notify the parents (or legal guardian) of children in the center of the licensee's intent to sell the center. The notice must be given at least 30 days before the transfer of the property or business, or at the time that a bona fide offer is made, whichever period is longer [*H&S Code § 1597.14(a)(1)*]. Notice must also be given to the Department of Social Services [*see § 100C.274[2]*]. For children who are admitted to the center after the licensee has given notice of the intended sale to the Department, the licensee must give this notice to their parents (or legal guardian) before entering into an admission agreement [*H&S Code § 1597.14(a)(2)*].

Although the selling licensee is solely responsible for giving this notice, the buyer may wish to have some input into the precise language used. Because the buyer is interested in maintaining maximum enrollment during the transition stage, he or she may want the notice to contain certain "comfort" assurances regarding the new ownership of the center. For example, these might include assurances that the sale should not interrupt day-to-day activities of the center and/or that there will be continuity in staff members at the center. If the seller is not willing to include these or similar matters in the notice, the buyer may consider including them in a separate notice to parents.

[b] Additional Notice and Other Requirements

In addition to this notice, the seller is also required to notify the buyer that the buyer must obtain a license in order to operate the child care center. A copy of that notice must be sent to the Department [*H&S Code § 1597.14(b)(1)*]. Additional requirements for the proposed sale of a child care center are discussed in § 100C.274[1].

[2] FORM

Parental Notice of Intended Sale of Child Care Center

Notice of Intent to Sell Child Care Center

TO: _____ [Name of parents or legal guardian] of _____ [name of child enrolled in center]

FROM: _____ [Name of licensee]

RE: Proposed Sale of _____ [name of facility]

This letter is to inform you that I have entered into an agreement to sell the child care center [add if appropriate: and the property on which it is located]. The sale will be effective on or around _____ [date of escrow closing if known, provided that date is at least 30 days after notice of intended sale was given to Department].

[If desired, add information regarding buyer, transition stage, continued operation of center, or other matters.]

_____ Dated:

Sincerely, _____ [signature of licensee]
[typed name]

_____ [name and address of center]

Legal Topics:

For related research and practice materials, see the following legal topics:
Education Law Administration & Operation Child Care Facilities



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CHAPTER 101 VITAL RECORDS

32-101 California Legal Forms--Transaction Guide 101.syn

§ 101.syn Synopsis to Chapter 101: VITAL RECORDS

§ 101.01 California Sources

[1] Statutes

[2] Regulations

§§ 101.02-101.04 [Reserved]

§ 101.05 Law Reviews and Periodicals

§ 101.06 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 101.07-101.09 [Reserved]

§ 101.10 Live Birth Registration

[1] Duty to Register

[2] "Live Birth" Defined

[3] Medical and Health Report

[4] Foundling Registration

[5] Delayed Registration

§ 101.11 Fetal Death Registration

§ 101.12 Death Registration

§ 101.12A Marriage Records

§ 101.13 Amending Records

§ 101.14 Adoption Information

[1] In General

[2] Requests for Medical Background Report

[3] Requests for Information About Birth Parents

[4] Requests for Information About Adoptees

[5] Time for Action on Request

§§ 101.15-101.99 [Reserved]

§ 101.100 Facts

[1] Request for Adoption Information

Scope

[2] Amending Certificate of Birth, Death, or Marriage

Scope

§ 101.101 Documents

Scope

§§ 101.102-101.109 [Reserved]

§ 101.110 Live Birth Registration

Scope

§ 101.111 Foundling Registration

Scope

§ 101.112 Delayed Birth Registration

Scope

§ 101.113 Death Registration

Scope

§ 101.114 Fetal Death Registration

Scope

§ 101.115 Amending Certificate

Scope

§ 101.116 Request for Adoption Information

Scope

§§ 101.117-101.129 [Reserved]

§ 101.130 Filing Certificate of Live Birth

Scope

§ 101.131 Filing Foundling Report

Scope

§ 101.132 Application for Delayed Registration of Birth

Scope

§ 101.133 Filing Certificate of Fetal Death

Scope

§ 101.134 Filing Death Certificate

Scope

§ 101.135 Obtaining Adoption Information

Scope

§ 101.136 Obtaining Certified Copy of Birth, Marriage, Fetal Death, or Death Certificate

Scope

§§ 101.137-101.149 [Reserved]

§ 101.150 Amending Erroneous Certificate

Scope

§ 101.151 Amendment of Medical and Health Data in Birth or Death Record by Supplemental Information

Scope

§ 101.152 Supplemental Name Report for Birth Certificate

Scope

§ 101.153 Amendment of Birth Record After Adoption

Scope

§ 101.154 Amendment of Birth Record After Adjudication of Facts of Parentage

Scope

§ 101.155 Amendment of Birth Record After Acknowledgment of Paternity

Scope

§ 101.156 Amendment of Birth Record to Reflect Court-Ordered Name Change

Scope

§ 101.157 Amendment of Birth Record to Reflect Sex Change

Scope

§ 101.158 Amendment of Birth Record to Delete Racial Slurs

Scope

§§ 101.159-101.199 [Reserved]

§ 101.200 Certificate of Live Birth

[1] Comment

[a] Use of Form

[b] Contents of Certificate

[c] Contents of Confidential Portions of Birth Certificate

[d] Access and Disclosure

[e] Objection to Furnishing Confidential Information

[2] FORM

Certificate of Live Birth

§ 101.201 Medical and Health Report

[1] Comment

[a] Use of Form

[b] Confidentiality

[2] FORM

Medical and Health Report

§ 101.202 Certificate of Finding of Unknown Child

[1] Comment

[a] Use of Form

[b] Contents of Form

[2] FORM

Certificate of Finding of Unknown Child

§ 101.203 Application for Delayed Registration of Birth

[1] Comment

[a] Use of Form

[b] Affidavits and Documentary Evidence

[c] Supporting Documents Required

[d] Verification

[e] Penalties for False Certificate or Affidavit

[2] FORM

Application for Delayed Registration of Birth

§§ 101.204-101.209 [Reserved]

§ 101.210 Certificate of Fetal Death

[1] Comment

[a] Use of Form

[b] "Fetal Death" Defined

[c] Medical and Health Data

[2] FORM

Certificate of Fetal Death

§ 101.211 Certificate of Death

[1] Comment

[a] Use of Form

[b] Contents of Certificate

[c] Preparation of Certificate

[d] Responsibility of Attending Physician

[e] Responsibility of Coroner

[2] FORM

Certificate of Death

§§ 101.212-101.219 [Reserved]

§ 101.220 Application to Amend Record by Affidavit (Birth Records or Records of Death That Occurred Prior to January 1, 1994)

[1] Comment

[a] Use of Form

[b] Permissible Types of Amendments

[c] Additional Documentation

[d] Review and Acceptance of Amendment

[e] Supplemental Name Reports for Birth Certificates

[f] Amendment of Birth Record After Adoption

[g] Revision of Birth Records to Reflect Sex Change

[h] Amendment of Birth Records to Delete Racial Slurs

[2] FORM

Application to Amend Record by Affidavit

§ 101.220A Application to Amend a Death Record (Records of Death That Occurred On or After January 1, 1994)

[1] Comment

[a] Use of Form

[b] Permissible Types of Amendments

[c] Amendment of Death Record of Previously Unidentified Body

[d] Amendment of Medical and Health Section Data

[2] FORM

Application to Amend a Death Record (Records of Death That Occurred On or After January 1, 1994)

§ 101.220B Application to Amend a Marriage Record

[1] Comment--Use of Form

[2] FORM

Application to Amend a Marriage Record

§ 101.221 Application for Amendment of Birth Record After Adjudication of Facts of Parentage

[1] Comment--Use of Form

[2] FORM

Application for Amendment of Birth Record After Adjudication of Facts of Parentage

§ 101.222 Application for Amendment of Birth Record After Acknowledgment of Paternity/Parentage

[1] Comment--Use of Form

[2] FORM

Application for Amendment of Birth Record After Acknowledgment of Paternity

§ 101.223 Application for Amendment of Birth Record to Reflect Court-Ordered Change of Name

[1] Comment--Use of Form

[2] FORM

Application for Amendment of Birth Record to Reflect Court-Ordered Change of Name

§ 101.224 Application for Certified Copy of Birth, Marriage, or Death Record

[1] Comment

[a] Use of Form

[b] Certified Birth and Death Records Available Only to Authorized Persons

[c] Informational Certified Copy Available to Anyone

[d] Contents of Certified Copy

[e] Marriage Records

[2] FORM

[a] Application for Certified Copy of Birth Record

Application for Certified Copy of Birth Record

[b] Application for Certified Copy of Death Record

Application for Certified Copy of Death Record

[c] Application for Certified Copy of Marriage or Divorce Record

Application for Certified Copy of Marriage or Divorce Record

§§ 101.225-101.229 [Reserved]

§ 101.230 Consent for Contact Between Adult Adoptee and Birth Parents

[1] Comment--Use of Form

[2] FORM

Consent for Contact Between Adult Adoptee and Birth Parents

§ 101.231 Consent or Nonconsent by Birth Parents to Disclosure of Their Names to Adoptee

[1] Comment

[a] Use of Form

[b] Subsequent Change

[2] FORM

Consent or Nonconsent by Birth Parents to Disclosure of Their Names to Adoptee

§ 101.232 Consent or Nonconsent by Adult Adoptee to Disclosure of Name to Birth Parents, with Optional Request for Disclosure of Identities of Birth Parents

[1] Comment

[a] Use of Form

[b] Disclosure of Birth Parent's Identities

[2] FORM

Consent or Nonconsent by Adult Adoptee to Disclosure of Name to Birth Parents, with Optional Request for Disclosure of Identities of Birth Parents



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 101 VITAL RECORDS

32-101 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers various vital records, specifically birth certificates, fetal death certificates, marriage certificates, and death certificates. It discusses how to file, amend, or obtain copies of these records. This chapter also discusses delayed birth registrations and foundling registrations. Finally, it outlines the procedures required for an adult adoptee to obtain information regarding his or her birth parents [see *Fam. Code* §§ 9200-9206].

For discussion of adoption, see *California Forms of Pleading and Practice*, Ch. 12, *Adoptions*. For further discussion of birth and death records, including administrative proceedings [see *Health & Safety Code* §§ 102525-102610] and court proceedings [see *Health & Safety Code* §§ 103450-103490] to establish a record of birth or death, see *California Forms of Pleading and Practice*, Ch. 99, *Birth and Death, Establishing the Fact of*. For detailed discussion of marriage and marriage records, see *California Forms of Pleading and Practice*, Ch. 359 *Marriage* (Matthew Bender)].



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PART I. RESEARCH GUIDE

A. Primary Sources

32-101 California Legal Forms--Transaction Guide § 101.01

§ 101.01 California Sources

[1] Statutes

Marriage licenses and certificate of registry. *Fam. Code § 350 et seq.*

Endorsement and return of marriage licenses. *Fam. Code §§ 422, 423.*

Issuance of marriage certificate. *Fam. Code § 424. Fam. Code § 424.*

Confidential marriages. *Fam. Code § 500 et seq.*

Confidentiality of adoption records and certificate of adoption. *Fam. Code § 9200.*

Release of adoption information to public agencies, licensed adoption agencies, and others. *Fam. Code § 9201.*

Release of medical reports. *Fam. Code § 9202.*

Disclosure of identity of birth parents and of adult adoptee. *Fam. Code § 9203.*

Waiver of confidentiality of adoption records. *Fam. Code § 9204.*

Request for contact with biological sibling. *Fam. Code § 9205.*

Release of letters, photographs, or other personal property. *Fam. Code § 9206.*

Vital statistics. *Health & Safety Code §§ 102100-103800.*

General provisions. *Health & Safety Code §§ 102100-102155.*

Marriage registration. *Health & Safety Code §§ 103125-103180.*

Final decrees of marital dissolution or legal separation. *Health & Safety Code §§ 103200, 103205.*
 Live birth registration. *Health & Safety Code §§ 102400-102475.*
 Fetal death registration. *Health & Safety Code §§ 102950-103205.*
 Amendment of records. *Health & Safety Code §§ 103225-103445.*
 Administrative proceeding to establish record of birth, death, or marriage. *Health & Safety Code §§ 102525-102610.*
 Court proceeding to establish record of birth, death, or marriage. *Health & Safety Code §§ 103450-103490.*
 Foreign birth or death, recording certification of. *Health & Safety Code §§ 103501-103505.*
 Certified copy and verification of records. *Health & Safety Code §§ 103525-103595.*
 Fees of state and local registrars. *Health & Safety Code §§ 103600-103730.*
 Penalties. *Health & Safety Code §§ 103775-103800.*

[2] Regulations

Public health records and statistics.
 Access to records of registrars. *17 Cal. Code Reg. §§ 901, 902.*
 Late registration of births and deaths. *17 Cal. Code Reg. § 908.*
 Birth certificates of deceased persons. *17 Cal. Code Reg. §§ 910-912.*
 Live birth defined. *17 Cal. Code Reg. § 915.*
 Fetal death defined. *17 Cal. Code Reg. § 916.*

Adoptions. *22 Cal. Code Reg. §§ 35000-35409.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarriageCertificates & LicensesGeneral OverviewFamily LawPaternity & SurrogacyBirth
 CertificatesGeneral Overview



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PART I. RESEARCH GUIDE

A. Primary Sources

32-101 California Legal Forms--Transaction Guide §§ 101.02-101.04

[Reserved]

§§ 101.02[Reserved]



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PART I. RESEARCH GUIDE

B. Secondary Sources

32-101 California Legal Forms--Transaction Guide § 101.05

§ 101.05 Law Reviews and Periodicals

Barnes, Nichols & Schlottman, *Missing Abroad*, 3 *Cal. Law.* 35 (Dec. 1983).

Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 *Fam. L.Q.* 173 (1983).

Madigan, *The Significance of the Death Certificate*, 1983 *Med. Trial Tech. Q.* 192 (1983).

Damme, *Controlling Genetic Disease Through Law*, 15 *U.C. Davis L. Rev.* 801 (1982).

Comment, *Breaking the Seal: Constitutional and Statutory Approaches to Adult Adoptees' Right to Identity*, 75 *N.W.U. L. Rev.* 316 (1980).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law
Marriage Certificates & Licenses
General Overview
Family Law
Paternity & Surrogacy
Birth Certificates
General Overview



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PART I. RESEARCH GUIDE

B. Secondary Sources

32-101 California Legal Forms--Transaction Guide § 101.06

§ 101.06 Text References

[1] Matthew Bender Sources

California Legal Forms (Matthew Bender).

Ch. 63, *Will Provisions* .

Ch. 104, *Medical and Hospital Services* .

California Forms of Pleading and Practice (Matthew Bender).

Ch. 12, *Adoptions*.

Ch. 99, *Birth and Death, Establishing the Fact of*.

Ch. 359, *Marriage*.

Ch. 377, *Name, Change of* .

[2] Additional Text References

Witkin, Summary of California Law, vol. 10, *Parent and Child* (10th ed. 2005).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarriageCertificates & LicensesGeneral OverviewFamily LawPaternity & SurrogacyBirth
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B. Secondary Sources

32-101 California Legal Forms--Transaction Guide §§ 101.07-101.09

[Reserved]

§§ 101.07[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 101 VITAL RECORDS
PART II. LEGAL BACKGROUND

32-101 California Legal Forms--Transaction Guide § 101.10

§ 101.10 Live Birth Registration

[1] Duty to Register

Every live birth [*see 17 Cal. Code Reg. § 915*; [2], *below*] must be registered within 10 days of the date of birth with the local registrar of births and deaths for the district in which the birth occurred [*Health & Safety Code § 102400*]. If the birth is in a hospital or a state-licensed alternative birth center, the hospital or center administrator or his or her representative is responsible for registering the certificate of live birth [*Health & Safety Code § 102405*; *see Health & Safety Code § 1204(b)(4)* ("alternative birth center" defined)]. If the birth is not in a hospital or a state-licensed alternative birth center, the attending physician or, in the absence of a physician, the professionally licensed midwife or, in the absence of a physician or midwife, either parent, is responsible for entering the information on the certificate [*see Health & Safety Code § 102425* and discussion in § 101.200[1][b]], getting the required signatures, and registering the certificate [*Health & Safety Code § 102415*].

The local registrar of births and deaths must carefully examine each birth certificate presented to him or her before accepting the certificate for registration. If a certificate is not properly completed, the registrar must not accept it until further information is furnished as required by law [*Health & Safety Code § 102305*]. The local registrar must then transmit certificates accepted for registration to the State Registrar of Vital Statistics [*Health & Safety Code § 102345*].

[2] "Live Birth" Defined

A "live birth" occurs when a product of conception breathes or shows any other evidence of life after being completely extracted or expelled from its mother. Other evidences of life include beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles. In determining whether a birth is a live birth, it does not matter whether the umbilical cord has been cut or the placenta is attached [*17 Cal. Code Reg. § 915*].

[3] Medical and Health Report

For each live birth that is registered, a confidential [*see Health & Safety Code § 102460* (confidentiality)] medical and health report must be completed [*see Health & Safety Code § 102445* (contents of medical and health report); *see also § 101.201*] and submitted to the State Registrar of Vital Statistics for filing [*Health & Safety Code § 102450(b)*]. If the

birth occurs in a hospital, the hospital administrator or the administrator's representative must complete the report and submit it to the local registrar. If the birth is not in a hospital, the local registrar must complete the medical and health report when he or she receives the certificate of live birth for registration [*Health & Safety Code § 102450(a)*]. In either case, the local registrar must then submit the completed report to the State Registrar for filing [*Health & Safety Code § 102450(b)*].

[4] Foundling Registration

When an unidentified live child less than one year old is found, the person or institution with whom the child is placed must register a certificate of finding with the local registrar of births and deaths within four days of the finding [*Health & Safety Code § 102500; see § 101.202*]. The certificate of finding serves the purposes of a certificate of live birth [*Health & Safety Code § 102515*] and must contain [*Health & Safety Code § 102505*]:

- The name [*see Health & Safety Code § 102510* (person or institution where child is placed to name child) and discussion in § 101.03[1][b]], sex, and color or race of the child;
- The date and place of finding; and
- The name of the person or institution with whom the child is placed.

If the child is identified later, and a certificate of birth is found or obtained, this identification must be reported to the State Registrar, who will enter it on the certificate of finding [*Health & Safety Code § 102520*].

[5] Delayed Registration

A person 18 years of age or older who was born in California and whose birth has not been registered may file an application with the State Registrar for the delayed registration of his or her birth [*Health & Safety Code § 102535; see § 101.203*]. If the person is under age 18, application for delayed registration may be made only by that person's mother, father, or legal guardian or by the attending physician or principal attendant at the birth [*Health & Safety Code § 102535*]. A delayed certificate of birth is not evidence in an action or proceeding involving estates of decedents or a proceeding to establish heirship, unless the affidavit of at least one person who knew the facts was filed at the time the certificate was obtained [*Health & Safety Code § 102530*].

An application for delayed registration of birth must be accompanied by affidavits and documentary evidence to enable the State Registrar to determine whether the birth did in fact occur at the place and date alleged [*Health & Safety Code § 102550*]. If such evidence is not available, the person seeking delayed registration must petition the superior court to judicially establish the fact of birth [*see Health & Safety Code § 103450; see also California Forms of Pleading and Practice, Ch. 99, Birth and Death, Establishing the Fact of* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarriageCertificates & LicensesGeneral OverviewFamily LawMarriageCertificates & LicensesRequirementsFamily LawPaternity & SurrogacyBirth CertificatesGeneral Overview



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§ 101.11 Fetal Death Registration

Every fetal death in which the fetus has advanced to or beyond the twentieth week of uterogestation must be registered with the local registrar of births and deaths of the district in which death was officially pronounced. The fetal death must be registered within eight days of the death and before any disposition of the fetus [*Health & Safety Code § 102950; see § 101.210*]. The funeral director or a person acting in lieu of a funeral director must prepare the certificate and register it with the local registrar [*Health & Safety Code § 102955*].

The local registrar of births and deaths must carefully examine each death certificate presented to him or her before accepting the certificate for registration. If a certificate is not properly completed, the registrar must not accept it until further information is furnished as required by law [*Health & Safety Code § 102305*].

A "fetal death" is a death before the complete expulsion or extraction from its mother of a product of conception, irrespective of the duration of pregnancy. The death is indicated by the fact that after the separation the fetus does not breathe or show any other evidence of life, such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles [*17 Cal. Code Reg. § 916*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacyGeneral Overview



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32-101 California Legal Forms--Transaction Guide § 101.12

§ 101.12 Death Registration

Every death must be registered with the local registrar of births and deaths in the district in which the death is officially pronounced or the body found. Registration must take place within eight days of death and before any disposition of the human remains [*Health & Safety Code § 102775*]. The local registrar of births and deaths cannot accept any certificate for registration unless and until it contains all information required by law [*see Health & Safety Code § 102305*].

Any beneficially interested person may petition the superior court for an order judicially establishing the fact, time, and place of a death [*Health & Safety Code § 103450(a)*]. This procedure can be used, for example, when a death was not previously registered, or a certified copy of the death certificate cannot be obtained. The petition must be filed with the clerk of the superior court of the county in which the death took place or in which the decedent was domiciled at the time of death [*Health & Safety Code § 103450(a)*; *see also Health & Safety Code § 103466* (procedure for determination of death in event of mass fatalities incident)]. If the allegations of the petition are established to the court's satisfaction at the hearing, the court may issue an order determining that the death did in fact occur at the time and place shown by the proof at the hearing [*Health & Safety Code § 103475*]. The order is made on State Registrar Form VS-109 (not reproduced in this chapter) and is effective when a certified copy is filed with the State Registrar [*Health & Safety Code § 103485*]. For additional discussion and forms, see *California Forms of Pleading and Practice*, Ch. 99, *Birth and Death, Establishing the Fact of* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Governmental Information General Overview Estate, Gift & Trust Law Probate General Overview



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32-101 California Legal Forms--Transaction Guide § 101.12A

§ 101.12A Marriage Records

At the time the parties to a marriage apply for a marriage license [*see Fam. Code § 350 et seq.* (marriage licenses)], they must obtain a certificate of registry of marriage from the county clerk [*Fam. Code § 359(a)*]. The applicants must fill out the certificate in the presence of the county clerk issuing the marriage license, and present it to the person solemnizing the marriage (clergy member, civil official, or other authorized person) [*Fam. Code § 359(c)*; *see Fam. Code § 400* (authorized persons)]. The person solemnizing the marriage must complete the certificate of registry and return it and the endorsed marriage license [*see Fam. Code § 422* (endorsement requirements)] to the county recorder of the county in which the license was issued within 10 days after the ceremony [*Fam. Code §§ 359(c),(d), 423*; *Health & Safety Code §§ 103150, 103175*; *see also Fam. Code § 307*; *Health & Safety Code § 103180* (registration for members of religious denominations not having clergy to solemnize or enter marriage)]. At the request of either party to a marriage, the person solemnizing the marriage must issue a marriage certificate [*Fam. Code § 424*].

Any beneficially interested person may petition the superior court for an order judicially establishing the fact, time, and place of a marriage [*Health & Safety Code § 103450(a)*]. This procedure can be used, for example, if the marriage was not previously registered as required by law, or copies of the marriage documents cannot be obtained. The petition must be filed with the clerk of the superior court of the county in which the death took place or in which the decedent was domiciled at the time of death [*Health & Safety Code § 103450(a)*]. If the allegations of the petition are established to the court's satisfaction at the hearing, the court may issue an order determining that the marriage did in fact occur at the time and place shown by the proof at the hearing [*Health & Safety Code § 103475*]. The order is made on State Registrar Form VS-122 (not reproduced in this chapter) and is effective when a certified copy is filed with the State Registrar [*Health & Safety Code § 103485*]. For additional discussion and forms, see *California Forms of Pleading and Practice*, Ch. 359, *Marriage* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarriageCertificates & LicensesGeneral OverviewFamily LawMarriageCertificates & LicensesRecording



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32-101 California Legal Forms--Transaction Guide § 101.13

§ 101.13 Amending Records

Any erroneous record of a birth, death, or marriage may be amended [*Health & Safety Code §§ 103225-103255*]. The process begins with an affidavit under oath by the person asserting that the error exists [*Health & Safety Code § 103225*]. For further discussion of how to amend an erroneous birth or death record, see § 101.220[1].

There are reasons for amendment other than error. A death record may be amended when a previously unidentified body is identified [*Health & Safety Code §§ 103275, 103280*]. Medical and health section data on birth and death records may be amended when the information given is modified by supplemental information [*Health & Safety Code § 103300*]. Birth records may be amended by supplemental name reports [*Health & Safety Code §§ 103325-103340*] or to reflect a court-ordered name change [*Health & Safety Code §§ 103400-103410*; see § 101.223 see also *Wynn v. Superior Court* (2009) 176 Cal. App. 4th 346, 350 ; 98 Cal. Rptr. 3d 86 (trial court has authority to adjudicate facts concerning biological relationship, and is obligated to order the issuance of a new birth certificate where plaintiff seeks to correct original birth certificate so it would state the actual names of her birth parents as opposed to the fictitious names her mother used when the original certificate was prepared)]. Birth records may also be amended by establishing a new birth certificate in the following circumstances:

- After adoption [*Health & Safety Code §§ 102625-102710*].
- After adjudication of the facts of parentage [*Health & Safety Code §§ 102725-102735*; see § 101.221].
- After acknowledgment of paternity [*Health & Safety Code §§ 102750-102765*; see § 101.222].
- To reflect a change of sex [*Health & Safety Code §§ 103425-103445*].

For forms and for further discussion of amendments, see §§ 101.220-110.220B].

Birth records also may be amended by establishing a new birth certificate for the purpose of deleting entries in the original certificate regarding race or color that, in the registrant's opinion, "constitute racial slurs or are otherwise

offensive" or contain a "derogatory, demeaning, or colloquial racial descriptor" [*Health & Safety Code* §§ 103260, 103355]. The State Registrar of Vital Statistics must defer to the registrant's determination that an entry is offensive [*Health & Safety Code* §§ 103260(a), 103355]. Once a new birth certificate is established, the old certificate will be supplanted and will not be made available for public inspection [*Health & Safety Code* §§ 103260, 103365, 103375]. The State Registrar will provide a certified copy of the new birth certificate to the registrant without additional charge [*Health & Safety Code* §§ 103260(b)(2), 103370; see *Health & Safety Code* § 103700 (application fee for new certificate)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawPaternity & SurrogacyBirth CertificatesGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesAlterations



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32-101 California Legal Forms--Transaction Guide § 101.14

§ 101.14 Adoption Information

[1] In General

Licensed adoption agencies, in cooperation with the Department of Social Services, maintain records concerning the medical and social history of the birth parents of children who are released by their parents or otherwise made available for adoption [see *Fam. Code* §§ 9200, 9201]. In addition, a licensed adoption agency or the Department may release information to help adoptees and adoptive parents to contact the adoptee's birth parents, in cases in which the following occur [*Fam. Code* § 9203(a), (c)]:

- The relinquishment or consent to adoption was signed or the birth parent's rights were involuntarily terminated by court action on or after January 1, 1984; and
- Neither the birth parent nor the adoptee has indicated that he or she does not wish to have his or her name or address disclosed.

For adoptions in which the relinquishment or consent was signed or the birth parent's rights were involuntarily terminated by court action before January 1, 1984, disclosure of this information may be available under *Fam. Code* § 9204. Adoptees and their biological siblings who are at least 18 years old may also use the service described above to locate each other [*Fam. Code* § 9205]. Letters, photographs, and other items of personal property may be deposited with the Department or a licensed adoption agency for delivery to adoptees, adoptive parents, and birth parents [*Fam. Code* § 9206].

[2] Requests for Medical Background Report

Before a child is placed for adoption, the Department of Social Services or the delegated county adoption agency [see *Fam. Code* § 8515 (definition)] must submit a written medical report to the prospective adopting parents, who must acknowledge in writing the receipt of the report. The report must cover the child's medical background and any available medical background on the biological parents [see *Fam. Code* §§ 8608, 8706, 8817, 8909].

The report on the child must contain all known diagnostic information, including current medical reports, psychological

evaluations, scholastic information, and all known information on the child's developmental history and family life [see *Fam. Code* §§ 8608, 8706, 8817, 8909]. The biological parents may provide a blood sample so that DNA testing can be done at a later date. However, they are not required to do so, and their failure to provide a sample will not affect the adoption [Fam. Code §§ 8706(c), 8817(d), 8909(c)]. The report form must include inquiries to elicit information about any genetic or hereditary illness, disease, or defect [see *Fam. Code* §§ 8608, 8706, 8817, 8909].

Adoptees who are 18 or older, married adoptees, and the adoptive parents of adoptees under 18 are entitled to a copy of the medical background report. If the Department of Social Services or the licensed adoption agency that made the report does not provide a copy of it on the request of a qualified adoptee or parent, the adoptee or parent may petition the superior court for review of the reasonableness of that action. Any names and addresses in the report will be removed unless the person requesting the report has already received that information [Fam. Code § 9202(c); see [3], below].

[3] Requests for Information About Birth Parents

The Department of Social Services or the adoption agency must disclose the names and addresses of record of the birth parents on the request of an adoptee who is 21 or older, if the birth parents have consented in writing to this disclosure [Fam. Code § 9203(a)(1); see § 101.231 (consent to disclosure)]. The Department or the adoption agency must disclose the names and addresses of the birth parents on the request of the adoptive parent of an adoptee who is under age 21 if the Department finds that the disclosure is justified by medical necessity or other extraordinary circumstances [Fam. Code § 9203(a)(3)]. These disclosure provisions apply only to adoptions in which the relinquishment for or consent to adoption was signed or the birth parent's rights were involuntarily terminated by court action on or after January 1, 1984 [Fam. Code § 9203(g)]. However, notwithstanding the above, contact between an adult adoptee and his or her birth parents may also be arranged if each has filed a written consent with the Department or the licensed adoption agency that handled the adoption [Fam. Code § 9204; see § 101.135].

[4] Requests for Information About Adoptees

On request of the birth parent of an adoptee who is 21 or older, the Department of Social Services or the adoption agency must disclose the name and address of the adoptee, if the adoptee has indicated in writing that he or she wishes his or her name and address to be disclosed [Fam. Code § 9203(a)(2)]. This requirement applies only to adoptions in which the relinquishment for or consent to adoption was signed or the birth parent's rights were involuntarily terminated by court action on or after January 1, 1984 [Fam. Code § 9203(g)]. However, notwithstanding the above, contact between an adult adoptee and his or her birth parents may also be arranged if each has filed a written consent with the Department or the licensed adoption agency that handled the adoption [Fam. Code § 9204; see § 101.135].

[5] Time for Action on Request

The Department of Social Services must respond to a request for information under *Fam. Code* § 9203(a) within 20 working days of the receipt of the request [Fam. Code § 9203(d)]. If a licensed adoption agency was a party to the adoption, the Department may respond by forwarding the request to that agency within the same 20 working days [Fam. Code § 9203(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Adoption General Overview Family Law Adoption Procedures General Overview



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32-101 California Legal Forms--Transaction Guide §§ 101.15-101.99

[Reserved]

§§ 101.15[Reserved]



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A. Client Interview--Facts and Documents

32-101 California Legal Forms--Transaction Guide § 101.100

§ 101.100 Facts

[1] Request for Adoption Information

1. Name, address, and telephone number of client.
2. Age of adopted child.
3. Agency, if any, that handled adoption in question.
4. Address and telephone number of adoption agency.
5. Date of adoption.
6. Place of adoption.

[2] Amending Certificate of Birth, Death, or Marriage

NOTE:

The facts necessary to fill in the original certificates of live birth, fetal death, marriage, and death are not covered here. The facts required are set out in the forms themselves [*see* §§ 101.200, 101.210, 101.211]. For the same reason, the facts necessary to complete a certificate of finding of an unknown child or a delayed registration of birth, or to secure a copy of a birth or death certificate, are not covered here [*see* §§ 101.202, 101.203, 101.224].

1. Error that exists in original certificate.
2. Source of knowledge about event.
3. Name of one other credible person with knowledge of facts.
4. Facts of birth as reported on original certificate.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawAdoptionGeneral OverviewFamily LawAdoptionProceduresGeneral Overview



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A. Client Interview--Facts and Documents

32-101 California Legal Forms--Transaction Guide § 101.101

§ 101.101 Documents

1. For amending erroneous record by affidavit [*see* §§ 101.220-110.220B]:
 - a. Certified copy of original certificate.
 - b. Affidavit to amend.
 - c. Supporting affidavit.
2. For amending birth record after adjudication of parentage [*see* § 101.221]:
 - a. Copy of original certificate, to provide facts of birth required to complete items (1) to (7) in Part I of *form in* § 101.221[2].
 - b. Certified copy of court order.
3. For amending birth record after court-ordered name change [*see* § 101.223]:
 - a. Copy of original certificate, to provide facts of birth required to complete items (1) to (6) in *form in* § 101.223[2].
 - b. Certified copy of court order.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawAdoptionGeneral OverviewFamily LawAdoptionDisclosuresGeneral OverviewFamily

LawAdoptionProceduresAdoption of Adults



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A. Client Interview--Facts and Documents

32-101 California Legal Forms--Transaction Guide §§ 101.102-101.109

[Reserved]

§§ 101.102[Reserved]



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B. Preliminary Determinations

32-101 California Legal Forms--Transaction Guide § 101.110

§ 101.110 Live Birth Registration

1. Has "live birth" occurred?

NOTE:

A "live birth" occurs when a product of conception breathes or shows any other evidence of life after being completely extracted or expelled from its mother. It does not matter whether the umbilical cord has been cut or the placenta is attached [*17 Cal. Code Reg. § 915; see § 101.10[2]*].

2. Who should register birth?

NOTE:

A live birth in a hospital or a state-licensed alternative birth center should be registered by the hospital or center administrator or his or her representative [*Health & Safety Code § 102405; see Health & Safety Code § 1204(b)(4)* ("alternative birth center" defined)]. A live birth outside a hospital or a state-licensed alternative birth center should be registered by the physician or professionally licensed midwife in attendance or, in the absence of a physician or midwife, by one of the parents [*Health & Safety Code § 102415*].

a. Was birth in hospital?

b. Was physician present?

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesGeneral
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§ 101.111 Foundling Registration

1. Is the child all of following [*Health & Safety Code § 102500*]:

- a. Alive?
- b. Unidentified?
- c. Less than one year old?

2. What name is to be given to child [*see Health & Safety Code §§ 102505, 102510*]?

NOTE:

The person or institution with whom the child is placed must name the child [*Health & Safety Code § 102510*] as well as register the certificate of finding [*Health & Safety Code § 102500*].

3. Where was child found [*see Health & Safety Code § 102510*]?

4. What has date of birth been determined to be [*see Health & Safety Code § 102510*]?

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesGeneral Overview



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32-101 California Legal Forms--Transaction Guide § 101.112

§ 101.112 Delayed Birth Registration

1. Can necessary affidavits and documentary evidence be obtained?

NOTE:

An application for delayed registration of birth must be accompanied by affidavits and documentary evidence that enable the State Registrar of Vital Statistics to determine whether the birth did occur at the place and date alleged [*Health & Safety Code § 102550; see § 101.203*]. Examples of acceptable documentary evidence include hospital records, church records, school records, census records, social security records, newspaper notices, and voting registration records [*see Health & Safety Code § 102580; § 101.203[1][b]*].

2. Who will make application?

NOTE:

The application must be made by the person whose birth is being registered if he or she is 18 years of age or over [*Health & Safety Code § 102535; see § 101.203*].

a. Is person whose birth is to be registered over 18 years of age [*see Health & Safety Code § 102535*]?

b. If person is not over 18, is application to be made by one of following [*Health & Safety Code § 102535*]:

(1) Mother?

(2) Father?

(3) Legal guardian?

(4) Attending physician?

(5) Principal attendant at birth?

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesGeneral
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§ 101.113 Death Registration

1. Where was body found [*see Health & Safety Code § 102775*]?
2. Where was death officially pronounced [*see Health & Safety Code § 102775*]?
3. When did death occur?
4. Who is responsible funeral director [*see Health & Safety Code § 102780*]?
5. What person or source is best qualified to supply required information for certificate [*see Health & Safety Code § 102790*]?
6. Who was attending physician [*see Health & Safety Code §§ 102795, 102800, 102825*]?
7. Should coroner be notified [*see Health & Safety Code § 102850; § 101.211[1][e]*]?

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Probate General Overview Family Law Paternity & Surrogacy General Overview



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B. Preliminary Determinations

32-101 California Legal Forms--Transaction Guide § 101.114

§ 101.114 Fetal Death Registration

1. Has "fetal death" occurred?

NOTE:

A "fetal death" is the death of a product of conception before it is completely expelled or extracted from its mother. Death is indicated by the failure of the fetus to breathe or show any other evidence of life after the separation from its mother [17 Cal. Code Reg. § 916; *see* § 101.210[1][b]].

2. Did fetus reach twentieth week of uterogestation?

NOTE:

Only those deaths in which the fetus has advanced to or beyond the twentieth week of uterogestation need be registered [Health & Safety Code § 102950].

3. Was physician in attendance?

NOTE:

If a physician was in attendance, that physician must complete the medical and health section of the certificate [Health & Safety Code § 102975]. If no physician was in attendance, the coroner must be notified [Health & Safety Code §§ 102850, 103000; *see* §§ 101.210[1][c], 101.112[1][e]], and must complete the medical and health section [Health & Safety Code § 103005].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative LawGovernmental InformationGeneral OverviewEstate, Gift & Trust LawProbateGeneral
OverviewFamily LawPaternity & SurrogacyGeneral Overview



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B. Preliminary Determinations

32-101 California Legal Forms--Transaction Guide § 101.115

§ 101.115 Amending Certificate

1. Is certificate in error?

NOTE:

If the facts are incorrectly stated in a certificate of birth, marriage, death, or fetal death, an affidavit stating the necessary changes may be filed with the state or local registrar [*Health & Safety Code § 103225*; *see §§ 101.220-110.220B*].

2. Is there one other credible person with knowledge of facts available to file required supporting affidavit [*see Health & Safety Code § 103225*]?

3. If certificate to be amended is birth certificate:

a. Is there conflicting information about parentage in original certificate?

NOTE:

The procedure for amending certificates applies to birth certificates only in the absence of conflicting information about parentage in the original certificate [*Health & Safety Code § 103230*]. Entries such as "unknown," "not given," "refused to state," and "obviously fictitious names" do not constitute conflicting information about parentage [*Health & Safety Code § 102155*].

b. Is name of child missing from certificate?

NOTE:

If a birth certificate is registered without the name of the child, the local registrar will give the parents a special blank for a supplemental name report [*Health & Safety Code §*

103325]. The parents should complete and return this report as soon as the child is named [Health & Safety Code § 103330].

c. Has medical and health data on original birth certificate been modified by supplemental information?

NOTE:

A physician or coroner with knowledge of supplemental information that modifies the medical and health section data of any record of a death, fetal death, or live birth may file with the state or local registrar a declaration of the changes necessary to correct the record [Health & Safety Code § 103300].

d. Has child been adopted?

NOTE:

The State Registrar of Vital Statistics will establish a new birth certificate on receipt of a report of the adoption of any child born in California whose certificate is on file in the Registrar's office [Health & Safety Code § 102635].

(1) Has adopting parent (or parents) requested that new certificate not be established?

NOTE:

The State Registrar of Vital Statistics will not establish a new birth certificate on receipt of an adoption report if the adopting parents request that no new certificate be established [Health & Safety Code § 102640].

(2) Was adoption a single-parent adoption with request by adopting parent that this be reflected in new birth certificate?

NOTE:

If an adoption is a single-parent adoption, this may be reflected in the new birth certificate if the adopting parent so requests [Health & Safety Code § 102650].

(3) Have adopting parents requested omission of any of following information [Health & Safety Code § 102675]:

(a) Specific name and address of hospital or other facility where birth occurred?

(b) City and county of birth?

(c) Color and race of parents?

e. Have facts of parentage been adjudicated [see § 101.221]?

NOTE:

On receipt of a certified copy of a court order determining the existence or nonexistence of the parent-child relationship, together with the application and fee, the State Registrar will establish a new certificate for the child, if the original birth record is on file in the State Registrar's office [Health & Safety Code § 102725].

f. Have father and mother acknowledged paternity of child by affidavit [see § 101.222]?

NOTE:

In the absence of conflicting information on the original birth certificate, an application to amend the birth certificate, including the parents' affidavits, may be filed with the State Registrar's office [*Health & Safety Code § 102750*]. On receipt of the application and payment of the fee, the State Registrar will, in the absence of conflicting information on the original birth certificate [*see Health & Safety Code § 102155* (definition of "absence of conflicting information relative to parentage")], review the application for acceptance. If it is accepted, he or she will establish a new birth certificate for the child [*Health & Safety Code § 102755*].

- g. Has name of person born in California been changed by court order [*see § 101.223*]?

NOTE:

When the name of a person born in California is changed by court order, an application including an affidavit of this change may be filed with the State Registrar's office [*Health & Safety Code § 103400*]. On receipt of the application, the affidavit, and a certified copy of the court order, and on payment of the required fee, the State Registrar will review the application for acceptance for filing. If the application is accepted, the State Registrar will file the amendment and note the fact of the amendment on the original birth certificate [*Health & Safety Code § 103405*].

- h. Has sex of person born in California been changed by surgical treatment?

NOTE:

If a person born in California has had surgical treatment to change his or her sexual characteristics to those of the opposite sex, a new birth certificate may be prepared for this person reflecting the change in sex and any court ordered name change. A petition for the issuance of a new birth certificate must be filed with the superior court of the county where the petitioner lives [*Health & Safety Code § 103425; see Health & Safety Code §§ 103430, 103435* (procedure for petition); *see also § 101.220[1][g]*]. However, *Health & Safety Code § 103425* requirement that petition for change of gender on a California birth certificate by an out-of-state residence, be filed in the county of residence, violates Equal Protection and Privileges and Immunities clauses, therefore a California trial court has jurisdiction to order issuance of new California birth certificate [*Somers v. Superior Court* (2009) 172 Cal. App. 4th 1407, 1414 ; 92 Cal. Rptr. 3d 116] .

4. Have medical and health data on original certificate been modified by supplemental information?

NOTE:

A physician or coroner with knowledge of supplemental information that modifies the medical and health section data of any record of a death, fetal death, or live birth may file with the state or local registrar a declaration of the changes necessary to correct the record [*Health & Safety Code § 103300*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesAlterations



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B. Preliminary Determinations

32-101 California Legal Forms--Transaction Guide § 101.116

§ 101.116 Request for Adoption Information

NOTE:

The disclosure provisions of *Fam. Code § 9203* apply only to those adoptions in which the relinquishment for or consent to adoption was signed on or after January 1, 1984 [*Fam. Code § 9203(g)*].

1. Is person making request one of following [*Fam. Code § 9203(a)*]:

- a. Adoptee 21 years of age?
- b. Birth parent of 21-year-old adoptee?
- c. Adoptive parent of adoptee under 21 years of age?

2. Is one of following two requirements met [*Fam. Code § 9203(a)*]:

- a. Is adoptee 21 years of age?
- b. If adoptee is not yet 21, do the following apply:
 - (1) Is request by adoptive parent or parents on behalf of adoptee?
 - (2) Is disclosure justified by:
 - (a) Medical necessity?
 - (b) Other extraordinary circumstances?

3. Has adoptee or birth parent consented in writing to disclosure [*Fam. Code* § 9203(a)(1), (c); see §§ 100.231, 100.232 (consent forms)]?

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawAdoptionGeneral OverviewFamily LawAdoptionDisclosuresGeneral OverviewFamily
LawAdoptionProceduresGeneral Overview



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B. Preliminary Determinations

32-101 California Legal Forms--Transaction Guide §§ 101.117-101.129

[Reserved]

§§ 101.117[Reserved]



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C. Procedural Guide

32-101 California Legal Forms--Transaction Guide § 101.130

§ 101.130 Filing Certificate of Live Birth

1. Establish that live birth has occurred [*see 17 Cal. Code Reg. § 915; § 101.10[2]*].
2. Ensure that certificate of live birth is completed as form requires [*see § 101.200*].

NOTE:

Depending on the circumstances of the birth, the certificate of live birth must be registered by the hospital or state-licensed alternative birth center administrator, the attending physician or professionally licensed midwife, or one of the parents [*see Health & Safety Code §§ 102405, 102415 and discussion in § 101.10[1]*].

3. Ensure that medical data supplemental work sheet is completed by proper party [*see § 101.201[2]*].

NOTE:

For hospital births, the hospital administrator or his or her representative must submit the medical and health report to the local registrar. For live births outside a hospital, the local registrar will complete the medical and health report when he or she receives the certificate of live birth for registration [*Health & Safety Code § 102450(a)*].

4. Have parent or other informant sign certificate [*Health & Safety Code § 102425(a)(7)*].
5. Obtain signature and certification of attending physician or principal attendant [*Health & Safety Code § 102425(a)(8)*].
6. Submit certificate to local registrar within 10 days of birth [*Health & Safety Code § 102400*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesGeneral
Overview



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C. Procedural Guide

32-101 California Legal Forms--Transaction Guide § 101.131

§ 101.131 Filing Foundling Report

1. Ascertain name of child as given by person or institution with whom child is placed [*Health & Safety Code § 102510*].

NOTE:

The person or institution with whom the child is placed must name the child [*Health & Safety Code § 102510*] as well as register the certificate of finding [*Health & Safety Code § 102500*].

2. Complete certificate of finding of unknown child [*see § 101.202*].

3. Be sure that person or institution with whom child is placed registers certificate with local registrar within four days of finding child [*Health & Safety Code § 102500*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawAdoptionGeneral OverviewFamily LawPaternity & SurrogacyGeneral Overview



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C. Procedural Guide

32-101 California Legal Forms--Transaction Guide § 101.132

§ 101.132 Application for Delayed Registration of Birth

1. Complete application for delayed registration of birth as form requires.
2. Include necessary affidavits and documentary evidence [Health & Safety Code § 102858; *see* § 101.203]:

NOTE:

The application must be accompanied by the affidavits and documentary evidence necessary to determine whether the birth actually occurred at the time and place alleged [Health & Safety Code § 102550].

- a. Two pieces of documentary evidence, at least one of which supports parentage;
 - b. One piece of documentary evidence and one affidavit executed by physician or other principal attendant; or
 - c. One piece of documentary evidence and two affidavits executed by mother, father, or other persons having knowledge of facts of birth.
3. To comply with documentary evidence requirement, gather and include evidence such as following [Health & Safety Code § 102580]:
 - a. Hospital records of birth.
 - b. Baptismal certificates or other church records.

- c. School records.
- d. Census records.
- e. Social security records.
- f. Military service records.
- g. Voting registration records.
- h. Birth certificates of children of person whose birth is being registered.
- i. Certificates of registry of marriage.
- j. Newspaper notices of birth.

4. File application, supporting documents, and required fee with State Registrar of Vital Statistics at State Department of Health Services, Office of Vital Records, 304 S Street, Sacramento, CA 94814 [*Health & Safety Code §§ 102600, 103695*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Paternity & Surrogacy General Overview Family Law Paternity & Surrogacy Birth Certificates General Overview



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32-101 California Legal Forms--Transaction Guide § 101.133

§ 101.133 Filing Certificate of Fetal Death

1. If physician was in attendance, have physician do following [*Health & Safety Code § 102975*]:
 - a. Complete medical and health section of certificate.
 - b. Sign certificate and attest to facts stated in medical and health section.
 - c. Within 15 hours of death, either:
 - (1) Deposit certificate at place of death; or
 - (2) Deliver certificate to funeral director at his or her place of business or at physician's office.
2. If there was no attending physician, notify coroner, who will complete medical and health section, sign certificate, and deliver it to funeral director within three days after examining body [*Health & Safety Code § 103005*].
3. Have funeral director prepare certificate [*see § 101.210*] and register it with local registrar within eight days after death and before any disposition of fetus [*Health & Safety Code §§ 102950, 102955*].

NOTE:

The funeral director (or a person acting in lieu of the funeral director) is responsible for getting the required information (other than medical and health section data) from the person or source best qualified to supply it [*Health & Safety Code § 102960*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative LawGovernmental InformationGeneral OverviewEstate, Gift & Trust LawProbateGeneral
OverviewFamily LawPaternity & SurrogacyGeneral Overview



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C. Procedural Guide

32-101 California Legal Forms--Transaction Guide § 101.134

§ 101.134 Filing Death Certificate

1. Have attending physician, or his or her designated agent, do following [*Health & Safety Code § 102825*]:

NOTE:

A physician may designate one or more other physicians who have access to his or her records to act as his or her agent for the purpose of completing death certificates, provided that the agent acts in consultation with the designating physician [*Health & Safety Code § 102825*].

a. Complete medical and health section, including cause of death, within 15 hours after death [*see Health & Safety Code § 102800*].

b. Specify:

(1) Time in attendance.

(2) Time physician last saw deceased alive.

(3) Hour and day on which death occurred, except in deaths required to be investigated by coroner [*see P 2, below*].

c. Indicate existence of any cancer of which he or she has actual knowledge.

d. Within 15 hours of death [*see Health & Safety Code § 102800*]:

(1) Deposit certificate at place of death; or

(2) Deliver certificate to funeral director at his or her place of business or at physician's office.

2. Notify coroner immediately on obtaining knowledge of death that occurred under any of following circumstances, or on receiving charge of body in which death occurred under any of following circumstances [*Health & Safety Code § 102850*]:

NOTE:

Failure to notify the coroner when required is a misdemeanor [*Health & Safety Code § 102850*].

- a. Without medical attendance.
- b. During continued absence of attending physician.
- c. If attending physician is unable to state cause of death.
- d. When suicide is suspected.
- e. Following injury or accident.
- f. When it is reasonable to suspect death was caused by criminal act.

3. If death must be investigated by coroner, coroner will [*Health & Safety Code § 102860*]:

- a. Complete medical and health section data, including cause of death, within three days after examination of body [*see Health & Safety Code § 102800*].
- b. State hour and day on which death occurred.
- c. Indicate the existence of any cancer of which he or she has actual knowledge.

4. Have funeral director prepare certificate and register it with local registrar within eight days after death and before any disposition of human remains [*Health & Safety Code §§ 102775, 102780*].

NOTE:

The funeral director is responsible for getting the required information (other than medical and health section data) from the person or source best qualified to supply it [*Health & Safety Code § 102790*]. Deaths must be registered within eight days following the death and before any disposition of the human remains [*Health & Safety Code §§ 102775, 102950*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Governmental Information General Overview Estate, Gift & Trust Law Probate General Overview Family Law Paternity & Surrogacy General Overview



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32-101 California Legal Forms--Transaction Guide § 101.135

§ 101.135 Obtaining Adoption Information

1. To obtain copy of medical report [*see Fam. Code §§ 8706, 8817, 8909* (medical report required for adoption); *see also § 101.14[2]*]:

a. Make request for copy of medical report to Department of Social Services or to licensed adoption agency that made report [*Fam. Code § 9202*].

b. Include information identifying requester as [*Fam. Code § 9202(a)*]:

(1) Adult or married adoptee; or

NOTE:

To establish the marital status of a requesting minor adoptee, include a certified copy of his or her marriage certificate [*Fam. Code § 9202(a)(1)*].

(2) Adoptive parent of adoptee under age of 18.

c. If Department of Social Services or adoption agency denies copy of medical report, consider whether to file petition with superior court for review of reasonableness of denial of request [*see Fam. Code § 9202(b)*].

2. To request name and address of birth parent or adoptee:

NOTE:

The procedure summarized below is appropriate for adoptions in which the relinquishment for or consent to adoption was signed or the birth parent's rights were involuntarily terminated by court action on or after January 1, 1984 [*Fam. Code § 9203(g)*].

a. Confirm that requester is one of the following [*Fam. Code § 9203(a)*]:

- (1) Adoptee age 21 or over.
- (2) Birth parent of adoptee age 21 or over.
- (3) Adoptive parent of adoptee under age 21.

b. Have client complete and execute form of request prescribed by Department of Social Services (Department) including affidavit establishing identity of requester [*see Fam. Code § 9203(b)*].

c. If client is adoptive parent of adoptee under age 21, draft document that describes the medical necessity or other extraordinary circumstances justifying disclosure.

NOTE:

The name and address of a birth parent may be disclosed on the request of an adoptive parent of an adoptee who is under the age of 21 only on a finding by the Department or by the adoption agency that a medical necessity or other extraordinary circumstances justify the disclosure [*Fam. Code § 9203(a)(3)*].

d. File request form and supporting documentation, if any, with [*see Fam. Code § 9203(a)*]:

- (1) Department; or
- (2) Adoption agency that performed adoption.

e. Advise client that requested information will be disclosed under following circumstances [*Fam. Code § 9203(a)*]:

- (1) In case of request by adult adoptee, if birth parent has signed written consent authorizing disclosure [*see § 101.231*].
- (2) In case of request by birth parent of adult adoptee, if adoptee has indicated in writing, pursuant to Department's registration program, that he or she wishes his or her name and address to be disclosed [*see § 101.232*].
- (3) In case of request by adoptive parent of adoptee under age 21, only if Department or adoption agency determines that medical necessity or other extraordinary circumstances justify disclosure.

3. To request that contact between adult adoptee and his or her birth parent be arranged, take following steps:

NOTE:

The procedure summarized here is exclusively for contact between an adult adoptee and his or her birth parent, and it applies notwithstanding any other provision of law [*see Fam. Code § 9204*]. Unlike the procedure outlined in P 2, **above**, this procedure may be used regardless of whether the relinquishment or consent to adoption was signed before, on, or after January 1, 1984.

a. Have client (adult adoptee or birth parent) execute written consent to contact on form prescribed by Department [*Fam. Code § 9204; see §§ 101.231* (consent by birth parents), *101.232* (consent by adult adoptee)].

b. Submit executed consent form to Department or licensed agency that handled adoption, and request that it arrange for contact between adoptee and birth parent [*Fam. Code § 9204*].

c. Notify client that Department or adoption agency is authorized to arrange contact only if adult adoptee and his or her birth parent have each filed a written consent [*Fam. Code § 9204*].

NOTE:

Neither the Department nor a licensed adoption agency may solicit, directly or indirectly, the execution of a written consent [*Fam. Code § 9204*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawAdoptionGeneral OverviewFamily LawAdoptionProceduresGeneral Overview



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32-101 California Legal Forms--Transaction Guide § 101.136

§ 101.136 Obtaining Certified Copy of Birth, Marriage, Fetal Death, or Death Certificate

1. Make request for desired record to State Registrar of Vital Statistics, local registrar, or county recorder [*Health & Safety Code § 103525*].

NOTE:

On request and payment of the fee, the State Registrar of Vital Statistics, the local registrar, or the county recorder will supply a certified copy of the record of any birth, marriage, death, or fetal death registered with him or her [*Health & Safety Code § 103525(a)*]. The birth, marriage, death should be registered with the state and with the county where the birth marriage, occurred [*see Health & Safety Code § 102400*] or where death was pronounced or the body was found [*see Health & Safety Code §§ 102775, 102950*]. For the official request forms, see § 101.224[2][a]-[c].

The State Registrar, local registrar, or county recorder may issue a certified copy of a birth, death, or fetal death certificate only to an authorized person [*Health & Safety Code §§ 130525(b), 103526*]. Other applicants are only entitled to an informational certified copy [*Health & Safety Code § 103526(b)*]. For further discussion, see § 101.224[1].

Note that the State Registrar will not process requests for marriage records for the years 1905-1948, 1987-1997, and 2000 to the present. These records can be obtained only through the local county recorder's office. The State Registrar will process requests for marriage records from 1949-1986 and 1998-1999, if accompanied by a note stating that the requesting party is unable to identify the specific county where the license was issued, but advises that the waiting period may be 2 to 3 years. The office strongly recommends that such records be obtained from the county recorder's office of the county in which the marriage occurred [*see Instructions to Dept. of Health Services Form VS-113a, reproduced in § 101.224[2][c]*].

2. Pay required fee [*Health & Safety Code § 103525*; see *Health & Safety Code §§ 103525.5, 103625, 103645* (amount of fees)].

3. If requested record is amended birth certificate, furnish information adequate to identify and locate amended record [*Health & Safety Code § 103530*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law
Governmental Information
General Overview
Family Law
Marriage
Certificates & Licenses
General Overview
Family Law
Paternity & Surrogacy
General Overview
Family Law
Paternity & Surrogacy
Birth
Certificates
General Overview



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32-101 California Legal Forms--Transaction Guide §§ 101.137-101.149

[Reserved]

§§ 101.137[Reserved]



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D. Related and Subsequent Procedures

32-101 California Legal Forms--Transaction Guide § 101.150

§ 101.150 Amending Erroneous Certificate

NOTE:

The procedure for amending certificates applies to birth certificates only in the absence of conflicting information about parentage in the original certificate [*Health & Safety Code § 103230; see § 101.115, P 3a, NOTE*].

1. Obtain appropriate form from Office of Vital Records:

a. To amend birth records or records of death that occurred prior to January 1, 1994 by affidavit, obtain and file official Department of Health Services/Office of Vital Records application Form VS 24(S) [for information and illustration of form, *see § 101.220*].

b. To amend birth records or records of death that occurred on or after January 1, 1994 by affidavit, obtain and file official Department of Health Services/Office of Vital Records Form VS 24(L) [for information and illustration of form, *see § 101.220A*].

c. To amend a marriage record, obtain and file official Department of Health Services/Office of Vital Records application Form VS 24(C) [for information and illustration of form, *see § 101.220B*].

2. Assert error by affidavit stating facts necessary to correct record [*Health & Safety Code § 103225*].

3. Support application to amend with affidavit of one other credible person having knowledge of facts [*Health & Safety Code § 103225*].

4. File application and supporting affidavit with State Registrar of Vital Statistics or local registrar [

Health & Safety Code § 103225; see § 101.220-101.220B; see also § 101.115].

NOTE:

An application to amend a certificate that has not yet been transmitted to the State Registrar will be reviewed for acceptance by the local registrar [*Health & Safety Code § 103235*]. If the certificate to be amended has already been sent to the State Registrar, the application to amend will be reviewed for acceptance by the State Registrar [*Health & Safety Code § 103240*]. The address of the State Registrar is State Department of Health Services, Office of Vital Records, 304 S Street, Sacramento, California 95814.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawPaternity & SurrogacyBirth CertificatesGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesAlterations



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D. Related and Subsequent Procedures

32-101 California Legal Forms--Transaction Guide § 101.151

§ 101.151 Amendment of Medical and Health Data in Birth or Death Record by Supplemental Information

1. Have physician or coroner make declaration under penalty of perjury.

NOTE:

A physician or coroner with knowledge of information that supplements the medical and health data in a birth, death, or fetal death record may make a declaration under penalty of perjury [*Health & Safety Code § 103300*; *see Code Civ. Proc. § 2015.5*; *see also § 101.220[1][d]*].

2. Be sure that coroner or physician files declaration with state or local registrar [*see Health & Safety Code § 103300*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Governmental Information General Overview Estate, Gift & Trust Law Probate General Overview Family Law Paternity & Surrogacy Birth Certificates Alterations



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D. Related and Subsequent Procedures

32-101 California Legal Forms--Transaction Guide § 101.152

§ 101.152 Supplemental Name Report for Birth Certificate

1. Be sure that parent or parents complete supplemental name report received from local registrar.

NOTE:

If a birth certificate is registered without the name of the child, the local registrar will give the parents a special blank for a supplemental name report [*Health & Safety Code § 103325*]. The parents should complete and return this report as soon as the child is named [*Health & Safety Code § 103330*].

2. Have parent or parents return report to local registrar.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Paternity & Surrogacy Birth Certificates Alterations



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D. Related and Subsequent Procedures

32-101 California Legal Forms--Transaction Guide § 101.153

§ 101.153 Amendment of Birth Record After Adoption

NOTE:

The State Registrar of Vital Statistics will establish a new birth certificate on receipt of a report of adoption [*see Health & Safety Code § 102625*] from any court of record that has jurisdiction of a child born in California whose birth certificate is on file in the Registrar's office [*Health & Safety Code § 102635*].

1. To prevent establishment of new birth record after adoption, have parents request that new certificate not be established.

NOTE:

The State Registrar of Vital Statistics will not establish a new birth certificate on receipt of an adoption report if the adopting parents request that no new certificate be established [*Health & Safety Code § 102640*].

2. To prevent new birth certificate from including following information, have parents request that new certificate omit following [*Health & Safety Code § 102645*]:

- a. Specific name and address of hospital or other facility where birth occurred.
- b. Color and race of parents.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawAdoptionGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewFamily LawPaternity &

SurrogacyBirth CertificatesAlterations



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D. Related and Subsequent Procedures

32-101 California Legal Forms--Transaction Guide § 101.154

§ 101.154 Amendment of Birth Record After Adjudication of Facts of Parentage

NOTE:

On receipt of a certified copy of a court order determining the existence or nonexistence of the parent-child relationship, together with the application and fee, the State Registrar will establish a new certificate for the child, if the original birth record is on file in the State Registrar's office [*Health & Safety Code § 102725*].

1. Obtain certified copy of court order.
2. Complete application for amended birth record [*see § 101.221*].
3. Submit following to State Registrar of Vital Statistics at State Department of Health Services, Office of Vital Records, 304 S Street, Sacramento, California 95814 [*Health & Safety Code § 102725*]:
 - a. Application for amended birth record.
 - b. Certified copy of court order.
 - c. Fee [*see Health & Safety Code § 103710*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law
Paternity & Surrogacy
Birth Certificates
Alterations
Family Law
Paternity & Surrogacy
Proof of
Paternity
General Overview



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D. Related and Subsequent Procedures

32-101 California Legal Forms--Transaction Guide § 101.155

§ 101.155 Amendment of Birth Record After Acknowledgment of Paternity

NOTE:

The State Registrar of Vital Statistics may, in the absence of conflicting information on the original birth certificate [*see Health & Safety Code § 102155* (definition of "absence of conflicting information relative to parentage"); *see also § 101.115*, P 3a, NOTE], establish a new birth certificate for a child whose mother and father acknowledge the child's paternity by affidavit [*Health & Safety Code §§ 102750, 102755*].

1. Obtain affidavits regarding child's paternity [*Health & Safety Code § 102755*].
2. Complete application for amended birth record [*see § 101.222*].
3. Submit following to State Registrar of Vital Statistics at State Department of Health Services, Office of Vital Records, 304 S Street, Sacramento, California 95814 [*Health & Safety Code § 102755*]:
 - a. Application for amended birth record.
 - b. Affidavits.
 - c. Fee [*see Health & Safety Code § 103715*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawName ChangesGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesAlterationsFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of

PaternityGeneral Overview



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D. Related and Subsequent Procedures

32-101 California Legal Forms--Transaction Guide § 101.156

§ 101.156 Amendment of Birth Record to Reflect Court-Ordered Name Change

1. Obtain certified copy of court order changing name [*see Health & Safety Code § 103400; see also § 101.135, P 3g*].
2. Complete application for amended birth record [*see § 101.223*].
3. Submit following to State Registrar of Vital Statistics at State Department of Health Services, Office of Vital Records, 304 S Street, Sacramento, California 95814 [*Health & Safety Code § 103405*]:
 - a. Application for amended birth record.
 - b. Certified copy of court order.
 - c. Affidavit that name has been changed by court order [*see Health & Safety Code § 103400*].
 - d. Fee [*see Health & Safety Code § 103720*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawName ChangesGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesAlterationsFamily LawPaternity & SurrogacyEstablishing PaternityGeneral Overview



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D. Related and Subsequent Procedures

32-101 California Legal Forms--Transaction Guide § 101.157

§ 101.157 Amendment of Birth Record to Reflect Sex Change

NOTE:

A person born in California who has had surgical treatment to change his or her sexual characteristics to those of the opposite sex may have a new birth certificate prepared reflecting the change in sex and any court ordered name change [*Health & Safety Code § 103425; see § 101.220[1][g]*].

1. If name has already been changed, do following:

a. Obtain affidavit of physician documenting sex change [*Health & Safety Code § 103430(a)*].

b. Obtain certified copy of court order changing name (if applicable) [*Health & Safety Code § 103430(c)*].

c. File following with superior court of county where petitioner resides [*Health & Safety Code §§ 103425, 103430*]:

(1) Petition for issuance of new birth certificate.

(2) Physician's affidavit.

(3) Certified copy of court order changing name.

d. If court grants petition, file following within 30 days with State Registrar of Vital Statistics at State Department of Health Services, Office of Vital Records, 304 S Street, Sacramento, California 95814 [*Health & Safety Code § 103430(c)*]:

(1) Certified copy of court's decree ordering new birth certificate.

(2) Fee [*see Health & Safety Code § 103725*].

2. If name has not yet been changed, do following [*Health & Safety Code § 103435*]:

NOTE:

For more detailed discussion of procedures for changing a name, see California Forms of Pleading and Practice, Ch. 377, **Name, Change of** (Matthew Bender).

a. File with superior court of county where petitioner resides petition for:

(1) Change of name [*see Code Civ. Proc. §§ 1275-1279.6*]; and

(2) Issuance of new birth certificate.

b. If court grants petition:

(1) Obtain certified copy of decree.

(2) File certified copy of decree within 30 days with [*Health & Safety Code § 103435*]:

(a) Secretary of State; and

(b) State Registrar of Vital Statistics at State Department of Health Services, Office of Vital Records, 304 S Street, Sacramento, CA 94814.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawName ChangesGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesAlterations



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D. Related and Subsequent Procedures

32-101 California Legal Forms--Transaction Guide § 101.158

§ 101.158 Amendment of Birth Record to Delete Racial Slurs

NOTE:

Birth records may be amended by establishing a new birth certificate for the purpose of deleting entries in the original certificate regarding race or color that, in the registrant's opinion, "constitute racial slurs or are otherwise offensive" or contain a "derogatory, demeaning, or colloquial racial descriptor" [*Health & Safety Code §§ 103260(a), 103355*]. The State Register of Vital Statistics must defer to the registrant's determination that an entry is offensive [*Health & Safety Code §§ 103260, 103355*]. Once the new birth certificate is established, it will supplant previous certificates; the replaced certificate will not be made available for public inspection [*Health & Safety Code §§ 103260(c), 103365, 103370*]. The State Register will provide a certified copy of the new birth certificate to the registrant without additional charge [*Health & Safety Code §§ 103260(b)(2), 103370*].

1. Obtain application for establishment and issuance of new birth certificate to replace original from State Registrar of Vital Statistics or local Vital Records office.
2. Complete application, including following information [*Health & Safety Code §§ 103260(b), 103355*]:
 - a. Certification that entry or entries in original birth certificate regarding race or color contain term or terms that in opinion of registrant constitute racial slurs or are otherwise offensive.
 - b. Identification of offensive term or terms to be deleted and proper entries for race or color to be substituted.

3. File application and required fee with State Registrar of Vital Statistics at State Department of Health Services, Office of Vital Records, MS 5103, P.O. Box 997410, Sacramento, CA 95899-7410 [*Health &*

Safety Code §§ 103260, 103360; see Health & Safety Code § 103700 (fee)].

NOTE:

No fee is required for amendments filed within one year of the date of the occurrence occasioning the amendment [*Health & Safety Code § 103700*].

One of the two statutory schemes governing the procedure for amending birth certificates to correct racial slurs permits "any person who was born in this state and whose birth is registered in this state" to request an amendment to his or her birth certificate [*Health & Safety Code § 103355*]. The other contains similar language but also provides that a conservator, or if the registrant is a minor, his or her parent or guardian, may make the request [*Health & Safety Code § 103260(a)*]. Until case law or the amendment of these statutes clarifies whether a minor may file the request himself or herself, it may be advisable for a minor to file the request through a parent or a guardian.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Paternity & Surrogacy Birth Certificates Alterations



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PART III. TRANSACTION GUIDE

D. Related and Subsequent Procedures

32-101 California Legal Forms--Transaction Guide §§ 101.159-101.199

[Reserved]

§§ 101.159[Reserved]



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CHAPTER 101 VITAL RECORDS

PART IV. FORMS

A. Birth Certificates

32-101 California Legal Forms--Transaction Guide § 101.200

§ 101.200 Certificate of Live Birth

[1] Comment

[a] Use of Form

This form is a certificate of live birth [*see 17 Cal. Code Reg. § 915; § 101.10[2]*] to be used to register the birth with the local registrar of births and deaths for the district in which the birth occurs. The certificate must be filed within 10 days of the date of birth [*Health & Safety Code § 102400*]. If the birth occurs in a hospital or a state-licensed alternative birth center, the hospital or center administrator or the administrator's representative must register the certificate with the local registrar [*Health & Safety Code § 102405*]. If the birth is not in a hospital or a state-licensed alternative birth center, the attending physician or, in the absence of a physician, the professionally licensed midwife in attendance, must register the certificate. If no physician or midwife is present, one of the parents must fill out the certificate [*see Health & Safety Code § 102425*], obtain the required signatures, and register the certificate with the local registrar [*Health & Safety Code § 102415*]. The local registrar transmits accepted certificates to the State Registrar of Vital Statistics [*Health & Safety Code § 102345*].

A medical and health report must also be submitted to the State Registrar of Vital Statistics for each registration of a live birth submitted to the local registrar [*Health & Safety Code §§ 102450, 102460; see § 101.201*].

[b] Contents of Certificate

The certificate of live birth must contain all of the following information [*Health & Safety Code § 102425(a)*]:

- The full name and sex of the child.
- The date of birth, including the month, day, hour, and year.
- The place of birth.

- The full name of the father, his birthplace, and his date of birth, including month, day, and year. If the parents are not married to each other, the father's name may not be listed on the birth certificate unless the father and the mother sign a voluntary declaration of paternity at the hospital before the birth certificate is prepared. The birth certificate may be amended at a later date to add the father's name only if the child's paternity is established by a judgment of a court of competent jurisdiction or by the filing of a voluntary declaration of paternity [*Health & Safety Code § 102425(a)(5)*].
- The full birth name of the mother, her birthplace, and her date of birth, including month, day, and year.
- Multiple births and the birth order of multiple births.
- The signature, and relationship to the child, of a parent or other informant, and the date signed.
- The name, title, and mailing address of the attending physician and surgeon or principal attendant, the signature and certification of live birth by the attending physician and surgeon or principal attendant or certifier, the date signed, and the name and title of the certifier if that person is someone other than the attending physician and surgeon or principal attendant.
- The date the certificate is accepted for registration and the signature of the local registrar.
- A state birth certificate number and the local registration district and number.
- A blank space for entry of the date of death with a caption "Date of Death."

In addition to the items required by *Health & Safety Code § 102425(a)*, the second section of the certificate of live birth must contain confidential medical and social information [*see [c], below*].

[c] Contents of Confidential Portions of Birth Certificate

In addition to the items required by *Health & Safety Code § 102425(a)* [*see [b], above*], the second section of the certificate of live birth must contain medical and social information that is to be kept confidential [*Health & Safety Code §§ 102425(b), 102430(a)*]. This information is to be clearly labeled "Confidential Information for Public Health Use Only" and must include all of the following [*Health & Safety Code § 102425(b)*]:

- The birth weight.
- The pregnancy history.
- The race and ethnicity of the mother and father.
- The residence address of the mother.
- A blank space for entry of the census tract for the mother's address.
- The date of the first prenatal care visit, the number of prenatal care visits, and commencing January 1, 2007, the date of the last prenatal care visit.
- The date of the last normal menses and, commencing January 1, 2007, an obstetric estimate of the completed weeks of gestation at delivery.

- A description of any complications and procedures of the pregnancy and any concurrent illnesses, congenital malformation, and any complication and procedures of labor and delivery, including surgery, provided that the information is essential medical information and appears in total on the face of the certificate.
- Commencing January 1, 2007, hearing screen results.
- The mother's and father's occupations and kind of business or industry.
- The education level of the mother and father.
- The principal source of payment for prenatal care, which must include Medi-Cal, private insurance, self-pay, other sources, and any other categories determined by the State Department of Health Services.
- The expected principal source of payment for delivery, which must include Medi-Cal, private insurance, self-pay, other sources, and any other categories determined by the State Department of Health Services.
- An indication of whether the child's parent desires the automatic issuance of a social security number to the child.
- The social security numbers of the mother and father unless the parent, with good cause, objects to the disclosure [*see Health & Safety Code § 102150(b)*].

The form illustrated does not provide spaces for some of the information listed above. An updated form, with appropriate spaces for all the information required, is available from the local Registrar of Vital Statistics.

[d] Access and Disclosure

Access to the confidential second part of the certificate is limited to the following [*Health & Safety Code § 102430(a)*]:

- The State Department of Health Services staff.
- The local registrar's staff, when approved by the local registrar.
- The local health department's staff, when approved by the local health officer.
- The county coroner.
- Persons with a valid scientific interest, as determined by the State Registrar, who are engaged in demographic, epidemiological, or other similar studies related to health, and who agree to maintain confidentiality.
- The parent who signed the certificate or, if no parent signed the certificate, the mother.
- The person named on the certificate.
- A person who has petitioned to adopt the person named on the certificate [*see Fam. Code §§ 9200, 9203; Health & Safety Code § 102705*].

The State Department of Health Services may transmit to the Social Security Administration the information necessary to issue a social security number to a child if the child's parent has requested the issuance of a social security number to the child [*Health & Safety Code § 102440; see Health & Safety Code § 102425(b)(14)*]. In addition, a parent's social security number contained in the certificate is accessible to the Department of Child Support Services and local child support agencies for purposes of operating the Child Support Enforcement Program [*Health & Safety Code § 102447; see 42 U.S.C. § 651 et seq.*].

The State Department of Health Services maintains a record of all persons who are given access to the confidential portion of a birth certificate. The record of access is open to public inspection during normal operating hours of the Department [*Health & Safety Code § 102430(b)*].

A person who releases a copy of the confidential portion of a certificate of live birth to anyone other than a person allowed access under *Health & Safety Code § 102430(a)* is guilty of a misdemeanor. Further, a person who is either the subject of or the source of information for a birth certificate and who has reason to believe that confidential information has been linked with his or her identity and disclosed to an unauthorized person has a civil right of action against the person releasing the information and may seek punitive damages [*Health & Safety Code § 102475*].

[e] Objection to Furnishing Confidential Information

If either parent objects to furnishing information about the parents required for the confidential section of the birth certificate [see [c], above] by *Health & Safety Code § 102425(b)(3)* (race and ethnicity) or *Health & Safety Code § 102425(b)(10)* (occupation and kind of business or industry), that information need not be entered on the birth certificate [*Health & Safety Code § 102150(a)*]. In addition, a parent is not required to disclose his or her social security number pursuant to *Health & Safety Code § 102425(b)(15)* if the parent has good cause for not disclosing it [*Health & Safety Code § 102150(b)*].

[2] FORM

Certificate of Live Birth

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Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacyBirth CertificatesGeneral Overview



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PART IV. FORMS

A. Birth Certificates

32-101 California Legal Forms--Transaction Guide § 101.201

§ 101.201 Medical and Health Report

[1] Comment

[a] Use of Form

This form is the medical and health report that must be submitted to the State Registrar of Vital Statistics for each registration of a live birth submitted to the local registrar [*Health & Safety Code §§ 102450, 102455, 102460; see § 101.200*]. If the birth occurs in a hospital, the hospital administrator or his or her representative must submit the report to the local registrar, who in turn submits it to the State Registrar [*Health & Safety Code § 102450*]. If the birth occurs outside a hospital, the local registrar must complete and submit the report [*Health & Safety Code § 102450(a)*]. The report is not kept on file in the offices of the local registrars [*Health & Safety Code § 102450(b)*].

As prescribed by the State Registrar, the medical and health report consists of two parts. They are the Certificate of Live Birth--Medical Data Supplemental Work Sheet and the Race Identification Work Sheet. Both parts of the prescribed form are reproduced in [2], below.

Neither the mother, the father, nor the child may be identified in the report [*Health & Safety Code § 102455(c)*]. The parent or informant must be told of the purposes for which the information is collected, the confidential nature of the report, and that completion of the specific items of the report is voluntary [*Health & Safety Code § 102455(a)*]. If either parent objects to furnishing the information requested in a specific item or items of the report, that information will not be entered in the report [*Health & Safety Code § 102455(b)*].

[b] Confidentiality

The contents of the report are limited to medical, health, and social data necessary to evaluate or improve the health of mother or child [*Health & Safety Code § 102455*]. Except for purposes of statistical tabulation, the report is confidential. Access to the report is limited to the following [*Health & Safety Code § 102460*]:

- State and local registrar's staff;

- State and local health department staff;
- People with a valid educational or scientific interest, as determined by the State Registrar, who are engaged in demographic and epidemiological studies for health purposes.

The State Department of Health Services maintains a record of all persons who are given access to the report. The record of access is open to public inspection during normal operating hours of the Department [*Health & Safety Code § 102460*].

[2] FORM

Medical and Health Report

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Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawHealthcareGeneral Overview



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A. Birth Certificates

32-101 California Legal Forms--Transaction Guide § 101.202

§ 101.202 Certificate of Finding of Unknown Child

[1] Comment

[a] Use of Form

This form is a certificate of finding of an unidentified live child of less than one year of age. The certificate must be registered with the local registrar of births and deaths by the person or institution with whom the child is placed within four days after the finding [*Health & Safety Code § 102500*]. The certificate serves all the purposes of a certificate of live birth [*Health & Safety Code § 102515*]. If the child is later identified and a certificate of birth is either discovered or obtained, this information must be reported to the State Registrar of Vital Statistics, who will enter it on the certificate of finding [*Health & Safety Code § 102520*].

[b] Contents of Form

The certificate includes the child's name, sex, and color or race, the date and place of finding, and the name of the person or institution with whom the child is placed [*Health & Safety Code § 102505*]. The person or institution with whom the child is placed gives the child a name. The place in which the child was found is considered the child's legal place of birth. The date of birth is determined as closely as possible and the date so determined is considered the child's legal date of birth [*Health & Safety Code § 102510*].

[2] FORM

Certificate of Finding of Unknown Child

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Legal Topics:

For related research and practice materials, see the following legal topics:
 Family LawPaternity & SurrogacyBirth CertificatesGeneral Overview



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A. Birth Certificates

32-101 California Legal Forms--Transaction Guide § 101.203

§ 101.203 Application for Delayed Registration of Birth

[1] Comment

[a] Use of Form

This form is a reproduction of the official Department of Health Services/Office of Vital Records application form (Form VS 85) for delayed registration of a birth. It may be filed with the State Registrar of Vital Statistics for delayed registration of the birth of any person born in California whose birth has not been registered. If the person whose birth is being registered is 18 years of age or older, then only that person can make the application. If the person whose birth is being registered is under the age of 18, application for delayed registration may be made only by that person's mother, father, or legal guardian, or by the attending physician or the principal attendant at the birth [*Health & Safety Code § 102535*].

NOTE:

The application must be filed ONLY on an original copy of the form obtained directly from the Office of Vital Records. Photocopies and other reproductions are not acceptable. Because of this, the form cannot be downloaded from the internet, and must be ordered from the Office of Vital Records either by their online forms request site located at www.dhs.ca.gov/hisp/chs/ovr/ovrformsreq.asp or by their phone at the office's customer service line (916) 445-2684. The office advises that online ordering usually is faster. The office will include with the form its instructional pamphlet containing detailed information on the application process and completing the form, and a sample illustration of a filled-in form.

After it is accepted by the State Registrar, the application constitutes a delayed certificate of birth [*Health & Safety Code § 102600*]. The State Registrar will send a certified copy of the delayed certificate of birth to the applicant with no additional cost [*Health & Safety Code § 102605*] beyond the application fee required by *Health and Safety Code Section 103695*. Certified copies will also be sent to the local registrar and the county recorder of the area where the birth occurred [*Health & Safety Code § 102610*].

[b] Affidavits and Documentary Evidence

An application for delayed registration of birth must be accompanied by affidavits and documentary evidence that will enable the State Registrar of Vital Statistics to determine whether the birth in fact occurred at the place and date alleged [Health & Safety Code § 102550]. The application itself includes blanks for making the necessary affidavits and for an abstract of any supporting documents.

An affidavit accompanying an application for the delayed registration of a birth must be a written statement executed under oath by a person who was at least five years old at the time of the birth and knew the facts about the birth. The affidavit must include the full name of the person whose birth is being registered, the names of his or her parents, the date and place of birth, and the basis of the affiant's knowledge of these facts [Health & Safety Code § 102575].

Documentary evidence that may be submitted with an application for delayed registration of birth may be either the original or a certified copy of a record executed at least five years before the date of application. The documentary evidence must substantiate the date and place of birth. If the person whose birth is being registered is under 12 years of age, the record need only have been executed at least two years before the date of the application. Examples of documentary evidence generally considered acceptable include hospital records, baptismal certificates or other church records, school records, census records, social security records, military service records, voting registration records, birth certificates of children of the person whose birth is being registered, certificates of registry of marriage, and newspaper notices of birth [Health & Safety Code § 102580].

[c] Supporting Documents Required

The application for delayed registration of birth must be accompanied by the following documentary evidence and affidavits [Health & Safety Code § 102585]:

- Two pieces of documentary evidence, at least one of which supports the parentage;
- One piece of documentary evidence and one affidavit executed by the physician or other principal attendant; or
- One piece of documentary evidence and two affidavits executed by the mother, the father, or other persons having knowledge of the facts of the birth.

[d] Verification

The supporting affidavit must be executed under oath [Health & Safety Code § 102757]. Any matter that under California law is required or permitted to be supported or proved by a written oath or affidavit may be supported or proved by an unsworn declaration if the following four requirements are met [Code Civ. Proc. § 2015.5]:

- The declaration is in writing;
- The declaration is signed by the declarant;
- The declaration recites that it is certified or declared to be true under penalty of perjury; and
- If executed in California, the declaration states the place and date of execution; or, if executed anywhere, whether inside or outside of California, it states the date of execution and that it is certified or declared under penalty of perjury under the laws of the State of California.

[e] Penalties for False Certificate or Affidavit

It is a felony to make, file, or cause the making or filing of a false delayed certificate of birth or a false affidavit accompanying an application for the delayed registration of a birth. This offense also carries a civil penalty of \$5,000, which may be recovered in an action by the Attorney General in any court of competent jurisdiction [*Health & Safety Code § 103800*].

[2] FORM**Application for Delayed Registration of Birth**

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Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesGeneral Overview



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32-101 California Legal Forms--Transaction Guide §§ 101.204-101.209

[Reserved]

§§ 101.204[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 101 VITAL RECORDS

PART IV. FORMS

B. Death Certificates

32-101 California Legal Forms--Transaction Guide § 101.210

§ 101.210 Certificate of Fetal Death

[1] Comment

[a] Use of Form

This form is a certificate of fetal death. Each fetal death in which the fetus has advanced to or beyond the twentieth week of uterogestation must be registered with the local registrar of births and deaths within eight days after the event and before disposition of the fetus [*Health & Safety Code § 102950*]. The local registrar of births and deaths must carefully examine each death certificate presented for registration. If a certificate is not properly completed, the registrar must not accept it until further information is furnished as required by law [*Health & Safety Code § 102305*].

A certificate of fetal death has two sections. The first section contains items necessary to establish the fact of the fetal death. The second contains medical and health data, and is labeled "Confidential Information for Public Health use Only" [*Health & Safety Code § 103025*]. The information included in the second section must be kept confidential under *Health & Safety Code § 102430* [*Health & Safety Code § 103025*; see *Health & Safety Code § 102430* and discussion in § 101.200[1][c] (confidentiality)]. The funeral director or a person acting in lieu of a funeral director is responsible for getting the required information (other than medical and health data) from the person or source best qualified to supply it [*Health & Safety Code § 102960*]. He or she must then prepare the certificate and register it with the local registrar [*Health & Safety Code § 102955*].

[b] "Fetal Death" Defined

A "fetal death" is the death of a product of conception before it is completely expelled or extracted from its mother. Death is indicated by the failure of the fetus to breathe or show any other evidence of life after the separation from its mother. Other evidences of life include beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles [*17 Cal. Code Reg. § 916*].

[c] Medical and Health Data

If a physician is in attendance on the delivery of the fetus, he or she must state on the certificate the time of the fetal death or delivery, the direct causes of the fetal death, the conditions, if any, that gave rise to these causes, and any other medical and health data required on the certificate. The physician must complete the required information, sign the certificate, and either deposit the certificate at the place of death or deliver it to the attending funeral director within 15 hours of the time of death [*Health & Safety Code § 102975*].

If no physician and surgeon was in attendance at delivery, or under other specified circumstances described by statute [*see Health & Safety Code § 102850; § 101.211[e]*], a physician and surgeon, physician assistant, funeral director, or other person who has knowledge of the death or has charge of the body must notify the coroner [*Health & Safety Code §§ 102850, 103000*]. The coroner must state on the certificate the time of fetal death, the direct causes of the fetal death, the conditions, if any, that gave rise to these causes, and any other medical and health data required on the certificate. The coroner must complete the required information, sign the certificate, and deliver the death certificate to the attending funeral director within three days after examining the fetus [*Health & Safety Code § 103005*].

[2] FORM

Certificate of Fetal Death

[Click here to view image.](#)

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Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Governmental Information General Overview Estate, Gift & Trust Law Probate General Overview Family Law Paternity & Surrogacy General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

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B. Death Certificates

32-101 California Legal Forms--Transaction Guide § 101.211

§ 101.211 Certificate of Death

[1] Comment

[a] Use of Form

This form is a certificate of death. Every death must be registered with the local registrar of births and deaths in the district in which death is officially pronounced or the body is found [*Health & Safety Code § 102775*]. The funeral director or a person acting in lieu of a funeral director must register the death certificate [*Health & Safety Code § 102780*] within eight days after death and before any disposition of the human remains [*Health & Safety Code § 102775*]. The local registrar of births and deaths must carefully examine each death certificate presented to him or her before accepting the certificate for registration. If a certificate is not properly completed, the registrar must not accept it until further information is furnished as required by law [*Health & Safety Code § 102305*].

[b] Contents of Certificate

A death certificate has two sections. The first section contains the items necessary to establish the fact of death, including the following [*Health & Safety Code § 102875(a)*]:

- Personal data about the decedent, including his or her full name, sex, color or race, marital status, spouse's name, date of birth, age at death, birthplace, usual residence, and occupation and industry or business;
- The date of death, including the month, day, and year;
- The place of death;
- The full name of the decedent's father and the father's birthplace;
- The full maiden name of the decedent's mother and the mother's birthplace;

- The name and address of the informant;
- The signature and license number of the embalmer if the body was embalmed, or the name of the embalmer if affixed by the attorney-in-fact [*see Health & Safety Code § 102805*];
- The name of the funeral director or the person acting as the funeral director;
- The date and place of interment or removal;
- The certification and signature of the attending physician and surgeon, or the certification and signature of the coroner when required to act by law [*see [e], below*]; and
- The date the certificate is accepted for registration and the signature of the local registrar.

The person completing the portion of the certificate setting forth the cause of death may attest to its accuracy by use of an electronic signature substitute, or some other indicator of authenticity approved by the State Registrar of Vital Statistics in lieu of a signature [*Health & Safety Code § 102875(a)(7)*]. The embalmer and the local registrar may do the same [*Health & Safety Code § 102875(a)(6), (8)*].

The second section of a death certificate contains medical and health data, including the following [*Health & Safety Code § 102875(b)*]:

- Any disease or conditions leading directly to death, and their antecedent causes;
- Operations and major findings from those operations;
- Accident and injury information; and
- Information indicating whether the decedent was pregnant at the time of death, or within the year before death, if known, as determined by observation, autopsy, or review of the medical record.

[c] Preparation of Certificate

The death certificate is prepared by the funeral director or a person acting in lieu of a funeral director [*Health & Safety Code § 102780*]. The funeral director must obtain the required information (other than medical and health section data) from the person or source best qualified to supply this information [*Health & Safety Code § 102790*].

The medical and health section data and the time of death will be completed and attested to by the physician last in attendance if the physician is legally authorized to do so, or by the coroner when the circumstances of the death require the coroner to act [*Health & Safety Code § 102795; see [e], below*]. If the decedent was a patient in a skilled nursing or intermediate care facility at the time of death, the "medical and health" (and the "time of death") sections of the death certificate may be completed by a licensed physician assistant under the supervision of the physician last in attendance, except in deaths required to be investigated by the coroner [*Health & Safety Code § 102825*].

The medical and health section data and the physician's or coroner's certification must be completed by the attending physician within 15 hours after death or by the coroner within three days after examining the body. The physician will deposit the certificate at the place of death or deliver it to the attending funeral director within 15 hours after the death [*Health & Safety Code § 102800*]. If the death certificate is prepared by the coroner, the coroner will deliver the certificate to the attending funeral director within three days after examining the body [*Health & Safety Code § 102860*];

see [3], below].

[d] Responsibility of Attending Physician

The physician last in attendance on the deceased is responsible for stating on the death certificate the disease or condition directly leading to death, any antecedent causes, other significant conditions contributing to death, and any other medical and health data required by the certificate. He or she must also specify the time in attendance, the time he or she last saw the deceased alive, and the hour and day on which death occurred, unless the death must be investigated by the coroner [see [e], below]. The physician must specifically indicate the existence of any cancer [see *Health & Safety Code § 103885(h)* (definition of "cancer")] of which he or she has actual knowledge [*Health & Safety Code § 102825*]. A physician may designate one or more other physicians who have access to his or her records to act as his or her agent for the purpose of completing death certificates, provided that the agent acts in consultation with the designating physician [*Health & Safety Code § 102825*].

[e] Responsibility of Coroner

A physician, physician assistant, surgeon, funeral director, or any other person must immediately notify the coroner when he or she has knowledge of a death or charge of a body if the death occurred in any of the following ways [*Health & Safety Code § 102850*]:

- Without medical attendance;
- During the continued absence of the attending physician;
- When the attending physician is unable to state the cause of death;
- When suicide is suspected;
- Following an injury or an accident; or
- Under circumstances that afford a reasonable ground to suspect that death was caused by the criminal act of another.

The coroner who has the duty of investigating a death that has occurred under one of the circumstances listed above must ascertain as many as possible of the facts required by *Health & Safety Code Sections 102775-102880* on death registration [*Health & Safety Code § 102855*]. The coroner must state on the death certificate the disease or condition directly leading to death, any antecedent causes, other significant conditions contributing to death, and any other medical and health data required by the certificate. He or she must also specify the hour and day on which death occurred. The coroner must specifically indicate the existence of any cancer [see *Health & Safety Code § 103885(h)* (definition of "cancer")] of which he or she has actual knowledge [*Health & Safety Code § 102860*].

In any case involving an infant under the age of one year when the gross autopsy results in a presumed diagnosis of sudden infant death syndrome, the coroner must notify the local health officer within 24 hours of the gross autopsy [*Health & Safety Code § 102865*].

If the coroner or medical examiner investigating a death cannot otherwise establish the identity of the body or remains, he or she must have a qualified dentist examine the body or remains. If the coroner or medical examiner is still unable to identify the body after the dental examination, then he or she must prepare and forward the dental examination records to the Department of Justice [*Health & Safety Code § 102870*].

[2] FORM

Certificate of Death

[Click here to view image.](#)

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Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Governmental Information General Overview Estate, Gift & Trust Law Probate General
Overview Family Law Paternity & Surrogacy General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 101 VITAL RECORDS

PART IV. FORMS

B. Death Certificates

32-101 California Legal Forms--Transaction Guide §§ 101.212-101.219

[Reserved]

§§ 101.212[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 101 VITAL RECORDS

PART IV. FORMS

C. Amendments and Requests for Copies

32-101 California Legal Forms--Transaction Guide § 101.220

§ 101.220 Application to Amend Record by Affidavit (Birth Records or Records of Death That Occurred Prior to January 1, 1994)

[1] Comment

[a] Use of Form

This form is a reproduction of the official Department of Health Services/Office of Vital Records application form (Form VS 24(S)) to amend a record by affidavit. This form is used in the following situations [*Affidavit to Amend a Birth Record* (Office of Vital Records, 12/1/2006), p. 1; *Affidavit to Amend a Death Record* (Office of Vital Records, 1/1/2006), p. 1]:

- To amend a birth record.
- To amend a death record for a death that occurred prior to January 1, 1994. For deaths that occurred after that date, Form VS 24(L) [*see § 101.220A*] should be used in place of this form.
- To amend a death record for a court-ordered delayed death registration, regardless of the date

This form should not be used to amend a marriage record. Form VS 24(C) [*see § 101.220B*] should be used for that purpose.

When completed, this form may be filed with either the Office of Vital Records in Sacramento or the local county registrar. The required fee must accompany the form [*see Health & Safety Code § 103700*].

NOTE:

The application must be filed ONLY on an original copy of the form obtained directly from the Office of Vital Records. Photocopies and other reproductions are not acceptable. Because of this, the form cannot be downloaded from the internet, and must be ordered from the Office of Vital Records either by their online forms request site located at www.dhs.ca.gov/hisp/chs/ovr/ovrformsreq.asp or by their phone at

the office's customer service line (916) 445-2684. The office advises that online ordering usually is faster. The office will include with the form its instructional pamphlet containing detailed information on the application process and completing the form, and a sample illustration of a filled-in form.

To amend a record, the person asserting the error must make an affidavit under oath stating the changes necessary to make the record correct. This affidavit must be supported by the affidavit of one other credible person having knowledge of the facts [*Health & Safety Code § 103225*]. This procedure applies to birth certificates only if the originally registered birth certificate contains no conflicting information about parentage [*Health & Safety Code § 103230*; see *Health & Safety Code § 102155* (entries such as "unknown," "not given," "refused to state," and "obviously fictitious names" do not constitute conflicting information about parentage)].

[b] Permissible Types of Amendments

Amendments may be made to do any of the following [*Affidavit to Amend a Birth Record* (Office of Vital Records, 12/1/2006), p. 1; see *Health & Saf. Code § 103225* (record may be amended "whenever the facts are not correctly stated")]:

- Correct spelling errors.
- Add information to blank items, except as specified below.
- Correct the spelling of the parent's names or add statistical information.

Amendments cannot be used to make any of the following changes, for which a court order is required [*Affidavit to Amend a Birth Record* (Office of Vital Records, 12/1/2006), p. 1]:

- Completely change the first, middle, or last name of the registrant.
- Transpose the registrant's middle name.
- Add or delete the registrant's first, middle, or last name.
- Translate the registrant's name into another language.

This form cannot be used to change or add the father's name to a birth certificate [*Affidavit to Amend a Birth Record* (Office of Vital Records, 12/1/2006), p. 2], nor can it be used to change or remove the signatures, or the names or the informant or certifiers on a registered birth certificate, because these items cannot be changed or removed [*Affidavit to Amend a Birth Record* (Office of Vital Records, 12/1/2006), p. 1].

For the amendment of a birth record after adjudication of the facts of parentage, see § 101.221. For amendment of a birth record after acknowledgment of paternity, see § 101.222. For the amendment of a birth record to reflect a court-ordered change of name, see § 101.223. For forms and discussion relating to the statutory procedure for changing an individual's name, see California Forms of Pleading & Practice, Ch. 377, *Name, Change of* (Matthew Bender).

[c] Additional Documentation

The Office of Vital Records has provided the following list of materials that must accompany an application to amend a birth certificate [*Affidavit to Amend a Birth Record* (Office of Vital Records, 12/1/2006), p. 2]:

- A photocopy of the current birth certificate, if the applicant has one (this is not required, but will

assist the office in identifying the exact record to be amended).

- To correct names listed on the birth certificate that are the result of a hospital error, supporting documentation from the hospital is required.
- If parents are changing their own information on their child's birth certificate, copies of their birth certificates or other supporting documentation such as passports or drivers' licenses must be included.
- If a certified copy of the amended record is being requested, a notarized sworn statement must be included.

[d] Review and Acceptance of Amendment

Processing time for birth record amendments is approximately 7 months, subject to change based on the Office of Vital Records workload [*Affidavit to Amend a Birth Record* (Office of Vital Records, 12/1/2006), p. 6].

If the amendment relates to a certificate that has not been transmitted to the State Registrar of Vital Statistics, the local registrar reviews the amendment for acceptance. If it is accepted, the local registrar files the amendment and notes the fact and date of the amendment on the otherwise unaltered original certificate [*Health & Safety Code § 103235*]. If the amendment relates to a certificate that has been transmitted to the State Registrar, the amendment will be transmitted to the State Registrar who will review it [*Health & Safety Code § 103240*]. If the amendment is accepted, the State Registrar will transmit copies of it to the local registrar and county recorder in whose offices copies of the original record are on file [*Health & Safety Code § 103245*]. The State Registrar will send the applicant a certified copy of the newly amended record without additional charge, unless the amendment is filed within one year of the date of occurrence of the event [*Health & Safety Code § 103250*]. The amendment will be filed with and becomes a part of the record to which it pertains [*Health & Safety Code § 103255*].

[e] Supplemental Name Reports for Birth Certificates

If a certificate of live birth has been registered but the child's name has not been entered, the local registrar will make out and deliver to the child's parents a special blank for a supplemental report of the child's name [*Health & Safety Code § 103325*]. The parents must complete the report and return it to the local registrar as soon as they name the child [*Health & Safety Code § 103300*]. The State Registrar of Vital Statistics will send the applicant a certified copy of the newly amended birth record without additional cost, unless the amendment is filed within one year of the date of birth [*Health & Safety Code § 103335*].

[f] Amendment of Birth Record After Adoption

The State Registrar of Vital Statistics will establish a new birth certificate on receipt of a report of adoption [*see Health & Safety Code § 102625* (court clerk to forward report of adoptions)] from any court of record, wherever located, that has jurisdiction of a child born in California who has a birth certificate on file in the State Registrar's office [*Health & Safety Code § 102635*]. The new birth certificate supplants any birth certificate previously registered for the child and is the only birth certificate open to public inspection [*Health & Safety Code § 102880*]. If the adopting parent or parents so request, however, a new birth certificate will not be established [*Health & Safety Code § 102640*].

If the State Registrar receives a court report of adoption concerning a child born in California for whom no original record of birth is on file, the court report constitutes a delayed birth registration. The court report must state the date and place of birth [*Health & Safety Code § 102690*].

The new birth certificate bears the child's name as shown in the report of adoption, the names and ages of the adopting

parents, and the date and place of birth. No reference is made in the new birth certificate to the adoption of the child [Health & Safety Code § 102645], unless an unmarried person adopts the child and requests that the new certificate reflect the fact that it is a single-parent adoption [Health & Safety Code § 102650]. The new certificate is identical with a birth certificate registered for the birth of a child of natural parents, except, if the adopting parents so request, the new birth certificate will not include the specific name and address of the hospital or other facility where the birth occurred, the color and race of the parents, or both [Health & Safety Code § 102645]. Moreover, at any time after a new birth certificate has been issued, the adopting parents may request another amended certificate that omits the specific name and address of the hospital or other facility where the birth occurred, the city and county of birth, or the color and race of the parents [Health & Safety Code § 102675].

When a new birth certificate is established by reason of adoption, the State Registrar will inform the local registrar and the county recorder whose records contain copies of the original certificate. If it is practical to do so, the copies must be forwarded to the State Registrar for filing with the original certificate. If this is not practical, a cover must be sealed over the copy in a way that does not destroy or deface the copy, and a verified statement of this action must be forwarded to the State Registrar [Health & Safety Code § 102685].

The court report of adoption must be filed with the original record of birth, which remains as a part of the records of the State Registrar of Vital Statistics [Health & Safety Code § 102700]. Records and information other than the newly issued birth certificate are available only on the order of the superior court of the county of the adopted child's residence or the superior court of the county granting the order of adoption [Health & Safety Code § 102705].

[g] Revision of Birth Records to Reflect Sex Change

A person born in California who has undergone surgical treatment to change his or her sexual characteristics to those of the opposite sex may have a new birth certificate prepared. The new birth certificate will reflect the change of gender and any change of name accomplished by a court order. The petition for the issuance of a new birth certificate must be filed with the superior court of the county where the petitioner resides [Health & Safety Code § 103425]. However, Health & Safety Code § 103425 requirement that petition for change of gender on a California birth certificate by an out-of-state residence, be filed in the county of residence, violates Equal Protection and Privileges and Immunities clauses, therefore a California trial court has jurisdiction to order issuance of new California birth certificate [*Somers v. Superior Court* (2009) 172 Cal. App. 4th 1407, 1414 ; 92 Cal. Rptr. 3d 116] .

The petition for issuance of a new birth certificate must be accompanied by a physician's affidavit documenting the sex change and, if applicable, a certified copy of the court order changing the applicant's name [Health & Safety Code § 103430(a)]. Any person who can show to the court good reason against the change of the certificate may file objections to the petition. At the hearing, the court may examine on oath the petitioner and any other person who has knowledge of facts relevant to the application. At the conclusion of the hearing, the court will either make an order to issue a new certificate or dismiss the petition [Health & Safety Code § 103430(b)]. A certified copy of the court's decree ordering the new birth certificate will be filed with the State Registrar of Vital Statistics within 30 days from the date of the decree. The State Registrar will establish a new birth certificate for the applicant on receiving the copy of the decree and the required fee [Health & Safety Code § 103430(c); see Health & Safety Code § 103725 (fee for establishing new birth record to reflect sex change is \$11)].

In lieu of separate proceedings, a petitioner may file with the superior court a single petition for a change of name and issuance of a new birth certificate reflecting a change of gender [Health & Safety Code § 103435; see Code Civ. Proc. §§ 1275-1279.6 (procedure for change of name)]. Within 30 days a certified copy of the court's decree will be filed with both the Secretary of State and the State Registrar of Vital Statistics. Upon receiving the copy of the court's decree, the State Registrar will issue a new birth certificate [Health & Safety Code § 103435].

The new birth certificate supplants any birth certificate previously registered for the applicant [Health & Safety Code §

103440]. It indicates the sex of the registrant as it has been surgically altered and, if accompanied by a court order, reflects any change of name specified in the application. Nothing in the form or content of the new birth certificate indicates that it is not the registrant's original birth certificate [*Health & Safety Code § 103430(d)*].

The new birth certificate is the only one open to public inspection. The application and supporting affidavit are filed with the original record of birth, which remains as a part of the records of the State Registrar. Records and information other than the newly issued birth certificate are available only on written request of the registrant or a court order [*Health & Safety Code § 103440*].

When the new birth certificate is established, the State Registrar transmits copies for filing to the local registrar and the county recorder whose records contain copies of the original certificate. If it is practical to do so, the copies of the local registrar and the county recorder are in turn forwarded to the State Registrar. If this is not practical, a cover must be effectually sealed over the copy of the original certificate without defacing or destroying it. A verified statement of this action must be forwarded to the State Registrar. Thereafter, the information contained in the original record is available only on the written request of the registrant or a court order [*Health & Safety Code § 103440*].

The State Registrar will transmit a certified copy of a newly established birth certificate to the registrant without additional charge [*Health & Safety Code § 103445*].

[h] Amendment of Birth Records to Delete Racial Slurs

Birth records may be amended and a new birth certificate established for the purpose of deleting entries in the original certificate regarding race or color that, in the registrant's opinion, "constitute racial slurs or are otherwise offensive" or contain a "derogatory, demeaning or colloquial racial descriptor" [*Health & Safety Code §§ 103260(a), 103355*]. For a discussion of the procedure for and effect of this type of amendment, see § 101.158.

[2] FORM

Application to Amend Record by Affidavit

[Click here to view image.](#)

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Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Governmental Information General Overview Estate, Gift & Trust Law Probate General Overview Family Law Paternity & Surrogacy General Overview Family Law Paternity & Surrogacy Birth Certificates Alterations



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PART IV. FORMS

C. Amendments and Requests for Copies

32-101 California Legal Forms--Transaction Guide § 101.220A

§ 101.220A Application to Amend a Death Record (Records of Death That Occurred On or After January 1, 1994)

[1] Comment

[a] Use of Form

This form is a reproduction of the official Department of Health Services/Office of Vital Records application form (Form VS 24(L)) to amend a death record. This form is used to amend death certificates for deaths that occurred on or after January 1, 1994 [*Affidavit to Amend a Death Record* (Office of Vital Records, 1/1/2006), p. 1]. To amend a death certificate for a death occurring prior to that date, or a court-ordered delayed death registration regardless of the date, Form VS 24(S) [*see § 101.220*] should be used in place of this form.

When completed, this form may be filed with either the Office of Vital Records in Sacramento or the local county registrar. The required fee must accompany the form [*see Health & Safety Code § 103700*].

NOTE:

The application must be filed ONLY on an original copy of the form obtained directly from the Office of Vital Records. Photocopies and other reproductions are not acceptable. Because of this, the form cannot be downloaded from the internet, and must be ordered from the Office of Vital Records either by their online forms request site located at www.dhs.ca.gov/hisp/chs/ovr/ovrformsreq.asp or by their phone at the office's customer service line (916) 445-2684. The office advises that online ordering usually is faster. The office will include with the form its instructional pamphlet containing detailed information on the application process and completing the form, and a sample illustration of a filled-in form.

For additional information on the amendment of vital records generally, see *§ 101.220*.

[b] Permissible Types of Amendments

This form can be used to do any of the following [*Affidavit to Amend a Death Record* (Office of Vital Records,

2/1/2006), p. 1]:

- Correct spelling errors.
- Add information not known at the time of death.
- Add an "AKA" ("also known as") to the decedent's name.
- Correct most items on the certificate, except those noted below.

This form cannot be used to [*Affidavit to Amend a Death Record* (Office of Vital Records, 1/1/2006), p. 1]:

- Change the informant's name that is listed on the original death certificate.
- Correct the date, time, place, or cause of death. This information can be changed only by a physician or coroner.

[c] Amendment of Death Record of Previously Unidentified Body

When a person unidentified at the time of the original registration of the death is subsequently identified, the coroner having jurisdiction will register a death certificate with the local registrar. This death certificate will give the name of the deceased and all statistical particulars concerning him or her that have been discovered [*Health & Safety Code* § 103275].

[d] Amendment of Medical and Health Section Data

A certifying physician or coroner who has knowledge of information supplemental to that originally furnished in the medical and health section of a death, fetal death, or live birth record may make a declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5; see also § 101.203[d]*] stating the changes necessary to make the information correct. The declaration may be filed with the state or local registrar [*Health & Safety Code* § 103300].

[2] FORM

Application to Amend a Death Record (Records of Death That Occurred On or After January 1, 1994)

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Governmental Information General Overview Estate, Gift & Trust Law Probate General Overview Family Law Paternity & Surrogacy General Overview



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PART IV. FORMS

C. Amendments and Requests for Copies

32-101 California Legal Forms--Transaction Guide § 101.220B

§ 101.220B Application to Amend a Marriage Record

[1] Comment--Use of Form

This form is a reproduction of the official Department of Health Services/Office of Vital Records application form (Form VS 24(C)) to amend a marriage record. This form can be used to correct any information on the marriage certificate that is not correct--such as incorrect dates of birth, a party's prior marital information, and so on [see *Health & Safety Code § 103225*].

When completed, this form may be filed with either the Office of Vital Records in Sacramento or the local county registrar, unless the marriage is a confidential marriage [see *Fam. Code § 500 et seq.*], in which case the application must be filed with the county registrar inasmuch as the Office of Vital Records does not maintain records of confidential marriage [*Affidavit to Amend a Death Record* (Office of Vital Records, 9/1/2005), p. 1; see *Fam. Code § 511*].

The required fee must accompany the form [see *Health & Safety Code § 103700*], as well as a photocopy of the current marriage certificate [*Affidavit to Amend a Death Record* (Office of Vital Records, 9/1/2005), p. 1].

NOTE:

The application must be filed ONLY on an original copy of the form obtained directly from the Office of Vital Records. Photocopies and other reproductions are not acceptable. Because of this, the form cannot be downloaded from the internet, and must be ordered from the Office of Vital Records either by their online forms request site located at www.dhs.ca.gov/hisp/chs/ovr/ovrformsreq.asp or by their phone at the office's customer service line (916) 445-2684. The office advises that online ordering usually is faster. The office will include with the form its instructional pamphlet containing detailed information on the application process and completing the form, and a sample illustration of a filled-in form.

For additional information on the amendment of vital records generally, see § 101.220.

[2] FORM

Application to Amend a Marriage Record

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarriageGeneral OverviewFamily LawMarriageCertificates & LicensesGeneral Overview



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C. Amendments and Requests for Copies

32-101 California Legal Forms--Transaction Guide § 101.221

§ 101.221 Application for Amendment of Birth Record After Adjudication of Facts of Parentage

[1] Comment--Use of Form

This form is an application for the preparation of an amended birth record after the adjudication of the facts of parentage. The State Registrar of Vital Statistics will establish a new birth certificate for a child whose original birth record is on file with the State Registrar and with respect to whom the existence or nonexistence of a parent-child relationship has been determined by a California court or a court of another state. The State Registrar will do so on receipt of a certified copy of the court order, application, and payment of the required fee [*Health & Safety Code* § 102725; see *Health & Safety Code* § 103710].

All records and information other than the newly issued birth certificate will be available only on court order [*Health & Safety Code* § 102730]. The State Registrar will furnish a certified copy of the newly amended record of birth to the registrant without additional cost [*Health & Safety Code* § 103300].

[2] FORM

Application for Amendment of Birth Record After Adjudication of Facts of Parentage

[Click here to view image.](#)

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawPaternity & SurrogacyBirth CertificatesAlterationsFamily LawPaternity & SurrogacyEstablishing
PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityGeneral Overview



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PART IV. FORMS

C. Amendments and Requests for Copies

32-101 California Legal Forms--Transaction Guide § 101.222

§ 101.222 Application for Amendment of Birth Record After Acknowledgment of Paternity/Parentage

[1] Comment--Use of Form

This form is an application for the preparation of an amended birth record after the acknowledgment of paternity. The State Registrar of Vital Statistics may establish a new birth certificate for a person whose mother and father acknowledge the child's paternity by affidavit. In order for a new birth certificate to be issued, the original certificate of live birth must not contain conflicting information [*see Health & Safety Code § 102155* (entries such as "unknown," "not given," "refused to state," and "obviously fictitious names" do not constitute conflicting information about parentage)], and the application must be accompanied by the parent's affidavits [*Health & Safety Code § 102750, 102755*] and the required fee [*Health & Safety Code § 102755; see Health & Safety Code § 103715*].

All records and information other than the newly issued birth certificate will be available only on court order [*Health & Safety Code § 102760*]. The State Registrar will furnish a certified copy of the new record of birth to the registrant without additional cost [*Health & Safety Code § 102765*].

[2] FORM

Application for Amendment of Birth Record After Acknowledgment of Paternity

[Click here to view image.](#)

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Paternity & Surrogacy Birth Certificates Alterations Family Law Paternity & Surrogacy Establishing Paternity General Overview Family Law Paternity & Surrogacy Proof of Paternity General Overview



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C. Amendments and Requests for Copies

32-101 California Legal Forms--Transaction Guide § 101.223

§ 101.223 Application for Amendment of Birth Record to Reflect Court-Ordered Change of Name

[1] Comment--Use of Form

This form is an application to amend a birth certificate to reflect a court-ordered change of name. If a person born in California has changed his or her name by court order, he or she may file with the State Registrar of Vital Statistics an application that includes an affidavit of this fact [*Health & Safety Code § 103400*]. In addition to the affidavit, the application must be accompanied by a certified copy of the court order and the required fee [*Health & Safety Code § 103405*; see *Health & Safety Code § 103720* (fee for establishing amended record of birth after court ordered name change)]. The State Registrar will file the amendment and note the fact of the amendment on the otherwise unaltered original birth certificate. The amendment is filed with and becomes a part of the record to which it pertains [*Health & Safety Code § 103405*]. The State Registrar will furnish a certified copy of the new record of birth to the registrant without additional cost [*Health & Safety Code § 103410*].

[2] FORM

Application for Amendment of Birth Record to Reflect Court-Ordered Change of Name

[Click here to view image.](#)

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawName ChangesGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesAlterationsFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityGeneral Overview



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C. Amendments and Requests for Copies

32-101 California Legal Forms--Transaction Guide § 101.224

§ 101.224 Application for Certified Copy of Birth, Marriage, or Death Record

[1] Comment

[a] Use of Form

These official Department of Health Services forms may be used to request a certified copy of a birth certificate, marriage or divorce record, death certificate:

■ Dept. of Health Services Form VS 111, Application for Certified Copy of Birth Records [*see § 101.224[2][a]* (form)].

■ Dept. of Health Services Form VS 112, Application for Certified Copy of Death Records [*see § 101.224[2][b]* (form)].

■ Dept. of Health Services Form VS 113a, Application for Certified Copy of Marriage or Divorce Record [*see § 101.224[2][c]* (form)].

The above forms may be obtained from the Office of Vital records or downloaded from the Department of Health Services website at http://www.dhs.ca.gov/publications/forms/bmd_certs.htm

Subject to the limitations discussed in this section, copies of birth, death, and marriage records are available on request and payment of the required fee [*see Health & Safety Code § 103525*] from the county of occurrence or from the Office of Vital Records online or at the following address:

Office of Vital Records--MS 5103
P.O. Box 997410
Sacramento, CA 95899-7410

The office has records dating from July 1, 1905. Records before that date may be available from the county recorder in

the county in which the event occurred. Births before July 1, 1905, as well as births that were not registered when they occurred, may have been filed as delayed birth registrations [see § 101.10[5]].

The State Registrar, local registrar, or county recorder, on request and payment of the required fee, must supply to any applicant a certified copy of the record of any birth, death, or fetal death registered with the official [Health & Safety Code § 103525(a)]. When a birth certificate contains a printed section at the bottom containing medical and social data, or labeled "Confidential Information for Public Health Use Only," that section may not be reproduced in a certified copy of the record except as specifically authorized by Health & Safety Code § 102430 [Health & Safety Code § 103525(a); see § 101.200[1][d] (access to confidential portion of record)].

[b] Certified Birth and Death Records Available Only to Authorized Persons

The Registrar, local registrar, or county recorder may provide certified copies of birth and death records only as authorized by Health & Safety Code § 103526 or § 103526.5 [Health & Safety Code § 103525(b)]. Under Health & Safety Code § 103526, the State Registrar, local registrar, or county recorder may furnish a certified copy of a birth or death record only to an "authorized person" [Health & Safety Code § 103526(a)]. An "authorized person" is any of the following [Health & Safety Code § 103526(c); see Health & Safety Code § 103526(d) (person who asks funeral establishment to request death certificate warrants truthfulness of his or her relationship to decedent and is personally liable for all damages resulting from any breach of that warranty)]:

- For requests for certified copies of confidential marriage records, only a party to the confidential marriage.
- For requests for certified copies of birth, death, or non-confidential marriage records, a person who is any of the following:
 - The registrant, or a parent or legal guardian of the registrant.
 - A party entitled to receive the record as a result of a court order, or an attorney or licensed adoption agency seeking the birth record to comply with Fam. Code §§ 3140 or 7603.
 - A member of a law enforcement agency or a representative of another governmental agency, as provided by law, who is conducting official business.
 - A child, grandparent, grandchild, sibling, spouse, or domestic partner of the registrant.
 - An attorney representing the registrant or the registrant's estate, or any person or agency empowered by statute or appointed by a court to act on behalf of the registrant or the registrant's estate.
 - Any agent or employee of a funeral establishment, acting in the course and scope of his or her employment, who orders certified copies of a death certificate on behalf of any individual specified in Health & Safety Code § 7100(a)(1)-(5).

An authorized person's written request for a certified copy of a birth or death record must be accompanied by a notarized statement, sworn under penalty of perjury, that the requester is an authorized person [Health & Safety Code § 103526(a); see Gov. Code § 27201.5(b)]. If the request is made in person, the official must take a statement, sworn under penalty of perjury, that the requester is signing his or her own legal name and is an authorized person [Health &

Safety Code § 103526(a)].

Any member of a law enforcement agency or a representative of another governmental agency who orders a certified copy of a birth or death record in conducting official business is not required to provide a notarized statement [Health & Safety Code § 103536(e)(1)]. Likewise, an agent or employee of a funeral establishment who orders a certified copy of a death certificate on behalf of specified individuals is not required to provide a notarized statement [Health & Safety Code § 103536(e)(2)].

[c] Informational Certified Copy Available to Anyone

A requestor who is not an authorized person, or is an authorized person who is unable to satisfy the requirements of Gov. Code § 103526(a), is only entitled to an informational certified copy displaying a legend that states "INFORMATIONAL, NOT A VALID DOCUMENT TO ESTABLISH IDENTITY" [Gov. Code § 103526(b)(1)]. If the requestor is not an authorized person, or is an authorized person who is unable to satisfy the requirements of Gov. Code § 103526(a), the official must not release a certified copy of a confidential marriage record unless otherwise authorized by law [Gov. Code § 103526(b)(2)]. Beginning on July 1, 2007 (but only after the statewide database becomes operational and the full calendar year of the birth and death indices and images is entered into the statewide database and is available for the respective year of the birth or death certificate for which an informational copy is requested), an informational certified copy may only be printed from the single statewide database prepared by the State Registrar, and must be electronically redacted to remove any signatures [Health & Safety Code § 103526(f)]. Local registrars and county recorders may not issue such certificates from any other source [Health & Safety Code § 103526(f)].

[d] Contents of Certified Copy

Each certified copy of a birth or death record must include the date issued and the name, signature, and seal of the issuing officer, and must be printed on chemically sensitized security paper [Health & Safety Code § 103526.5].

[e] Marriage Records

The restrictions on copies of birth and death records do not apply to marriage records [see Health & Safety Code §§ 103526, 103536.5; discussed in [b][c], above], so anyone may obtain a certified copy of a marriage or divorce record [see Health & Safety Code § 103525].

Requests for marriage certificates should be made to the county recorder's office in the county where the license was issued, rather than to the State Registrar. The State Registrar will not process requests for public marriages that occurred from July 1905 through 1948, 1987 through 1997, or 2000 to the present. If the marriage occurred from 1949 through 1986, or 1998 through 1999, the State Registrar will process the request if it is accompanied by a note stating that the requesting party is unable to identify the specific county where the license was issued, but advises that it can take 2 to 3 years [see Instructions to Dept. of Health Services Form VS 113a, reproduced in § 101.224[2][c]]. County recorders' offices ordinarily have a much faster turnaround time.

[2] FORM

[a] Application for Certified Copy of Birth Record

Application for Certified Copy of Birth Record

[Click here to view image.](#)

[b] Application for Certified Copy of Death Record

Application for Certified Copy of Death Record

[Click here to view image.](#)

[c] Application for Certified Copy of Marriage or Divorce Record

Application for Certified Copy of Marriage or Divorce Record

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative LawGovernmental InformationGeneral OverviewEstate, Gift & Trust LawProbateGeneral
OverviewFamily LawMarriageCertificates & LicensesGeneral OverviewFamily LawPaternity & SurrogacyBirth
CertificatesGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 101 VITAL RECORDS

PART IV. FORMS

C. Amendments and Requests for Copies

32-101 California Legal Forms--Transaction Guide §§ 101.225-101.229

[Reserved]

§§ 101.225[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 101 VITAL RECORDS

PART IV. FORMS

D. Adoption Information

32-101 California Legal Forms--Transaction Guide § 101.230

§ 101.230 Consent for Contact Between Adult Adoptee and Birth Parents

[1] Comment--Use of Form

This is the official Department of Social Services Form AD-904, the consent form that an adult adoptee or a birth parent must sign to authorize the Department or a licensed adoption agency to arrange for contact between the adoptee and the birth parent. Use of the official form is mandatory [*Fam. Code § 9204*]. Once completed, the form should be sent directly to the adoption agency that handled the adoption, if known. Otherwise, the form should be sent the Department of Social Services, Adoptions Branch, in Sacramento [*see form instructions*]. The form may be obtained from any county Department of Social Services (Post-Adoption Unit).

The Department of Social Services or the adoption agency will not attempt to arrange contact between an adult adoptee and a birth parent unless the adoptee and his or her birth parent have each filed a written consent with the Department or the licensed agency. Neither the Department nor a licensed adoption agency may solicit, directly or indirectly, the execution of the written consent [*Fam. Code § 9204*].

Also illustrated are the related Department of Social Services official form AD-904A for disclosure of information regarding adult siblings of an adult adoptee, and Department of Social Services official form AD-904B, a waiver of rights to confidentiality for siblings under age 18.

[2] FORM

Consent for Contact Between Adult Adoptee and Birth Parents

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawAdoptionConsentGeneral OverviewFamily LawAdoptionConsentBiological Parents



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 101 VITAL RECORDS

PART IV. FORMS

D. Adoption Information

32-101 California Legal Forms--Transaction Guide § 101.231

§ 101.231 Consent or Nonconsent by Birth Parents to Disclosure of Their Names to Adoptee

[1] Comment

[a] Use of Form

This form is the official Department of Social services form (Form AD-908) by which the birth parent or parents of an adoptee may indicate their consent or nonconsent to the disclosure of his, her, or their name(s) and address(es) to an adoptee. This consent must be obtained before a disclosure concerning the birth parent or parents requested under *Fam. Code § 9203(a)* [see § 101.14[3], [4], [5]] may be granted. This form is set out in *Fam. Code §§ 8702(b)* (agency adoptions) and 8818(b) (independent adoptions) and is to be signed by the birth parents at the time the relinquishment or consent to adoption is signed [*Fam. Code § 8818(a)(5)*].

The Department will file the consent in the office of the clerk of the court in which the adoption took place. The file is not open to inspection by any persons other than the parties to the adoption proceedings, their attorneys, and the Department, except on order of the judge of the superior court [*Fam. Code § 8818(a)(5)*].

[b] Subsequent Change

The birth parent, at any time, may change his or her decision as to whether the parent wishes his or her name and address disclosed. In that case, the birth parent must send a notarized letter to that effect (by certified mail, return receipt requested) to the Department of Social Services [*Fam. Code § 8818(a)(4)*].

[2] FORM

Consent or Nonconsent by Birth Parents to Disclosure of Their Names to Adoptee

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawAdoptionConsentGeneral OverviewFamily LawAdoptionConsentBiological ParentsFamily
LawAdoptionDisclosuresGeneral Overview



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CHAPTER 101 VITAL RECORDS

PART IV. FORMS

D. Adoption Information

32-101 California Legal Forms--Transaction Guide § 101.232

§ 101.232 Consent or Nonconsent by Adult Adoptee to Disclosure of Name to Birth Parents, with Optional Request for Disclosure of Identities of Birth Parents

[1] Comment

[a] Use of Form

This form is the official Department of Social services form (Form AD-908A) by which the an adult adoptee my indicate his or her consent or nonconsent to the disclosure of his or her name and address to his or her birth parents. The form also contains a box by which the adoptee requests information on the birth parents if the parents have consented to such disclosure [for discussion of consent by birth parents to disclosure of this information, *see § 101.231[1]*].

[b] Disclosure of Birth Parent's Identities

The Department of Social Services is authorized to disclose the identity of the birth parents to an adoptee who has attained age 21, on the adoptee's request, if the birth parents have given written consent to that disclosure [*Fam. Code § 9203(a)(1)*]. This form must be used for making this request [*see Fam. Code § 9203(b)* (DSS required to prescribe form)]. The DSS is required to respond to the request, or forward it to the licensed adoption agency that was a party to the adoption, within 20 working days after receipt [*Fam. Code § 9203(d)*]. The information will not be disclosed if the birth parent has indicated that he or she does not wish his or her name to be disclosed [*Fam. Code § 9203(c)*]. Alternatively, the adoptee may complete a consent for contact form [*see § 101.230*] and, if a consent is received from both parties, names and addresses can be mutually disclosed so that they may contact one another [*see Fam. Code § 9204(a)*]. Neither the department nor a licensed adoption agency may solicit, directly or indirectly, the execution of a written consent [*Fam. Code § 9204(a)*].

[2] FORM

Consent or Nonconsent by Adult Adoptee to Disclosure of Name to Birth Parents, with Optional Request for Disclosure of Identities of Birth Parents

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Adoption Consent General Overview Family Law Adoption Consent Biological Parents Family
Law Adoption Disclosures General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102 BAILMENTS

32-102 California Legal Forms--Transaction Guide 102.syn

§ 102.syn Synopsis to Chapter 102: BAILMENTS

§ 102.01 California Statutes

§§ 102.02-102.04 [Reserved]

§ 102.05 Annotations

§ 102.06 Law Reviews and Periodicals

§ 102.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 102.08-102.09 [Reserved]

§ 102.10 Bailment Defined

§ 102.11 Deposits

[1] Voluntary and Involuntary Deposits

[2] Gratuitous Deposits and Deposits for Hire

[3] Deposits for Safekeeping or for Exchange

[4] Termination of Deposits

§ 102.12 Obligations and Liability of Depositary

[1] In General

[2] Delivery on Demand

[3] Notice of Loss or Injury of Deposit

[4] Notice of Adverse Claims

[5] Notice to True Owner of Goods Wrongfully Deposited

§ 102.13 Deposits for Keeping

[1] Duties of Depositor

[2] Depositary's Lien for Storage Charges

§ 102.14 Deposits of Perishable Property

§ 102.15 Deposits of Animals

[1] Rights and Duties of Depositary

[2] Required Notices

[a] Shelters that Give Surrendered Animals to Biological Supply or Research Facility

[b] Sale of Equines for Slaughter

§ 102.16 Deposits for Repair or Alteration

§ 102.17 Deposits With Keepers of Residence Facilities

[1] Liability

[2] Lien on Goods of Guests

§ 102.18 Bailment for Parking

[1] In General

[2] No Bailment When Owner Retains Possession of Vehicle

§ 102.19 Private Bulk Storage of Grain

§§ 102.20-102.99 [Reserved]

§ 102.100 Client Interview--Facts and Documents

[1] Facts

Scope

[2] Documents

Scope

§§ 102.101-102.109 [Reserved]

§ 102.110 Notices Given When Deposit is Made

Scope

§ 102.111 Notices Given During Term of Deposit

Scope

§ 102.112 Notices Given in Connection With Termination of Deposit

Scope

§ 102.113 Notices and Documents for Private Bulk Storage of Grain

Scope

§§ 102.114-102.199 [Reserved]

§ 102.200 Simple Contract for Deposit (Bailment) for Hire

[1] Comment

[a] Use of Form

[b] Limitation of Liability

[c] Statement of Noninsurance

[d] Termination of Deposits

[e] Delivery of Property

[2] FORM

Simple Contract for Deposit (Bailment) for Hire

§ 102.201 Bailment Contract for Automobile Parking or Storage

[1] Comment

[a] Use of Form

[b] Contents of Form

[2] FORM

Bailment Contract for Automobile Parking or Storage

§§ 102.202-102.209 [Reserved]

§ 102.210 Depositor's Declaration of Value of Deposited Property

[1] Comment--Use of Form

[2] FORM

Depositor's Declaration of Value of Deposited Property

§ 102.211 Receipt for Deposited Property With Statement of Noninsurance

[1] Comment

[a] Use of Form

[b] Failure to Provide Receipt, Statement, or Both

[2] FORM

Receipt for Deposited Property With Statement of Noninsurance

§ 102.212 Notice of Nonliability for Valuables Not Deposited in Hotel Safe

[1] Comment

[a] Use of Form

[b] Limitation on Innkeeper's Liability for Loss of Guest's Property

[c] Notice Requirement

[2] FORM

Notice of Nonliability for Valuables Not Deposited in Hotel Safe

§ 102.213 Notice of Loss of or Injury to Deposited Property

[1] Comment

[a] Use of Form

[b] Depositary's Liability

[2] FORM

Notice of Loss of or Injury to Deposited Property

§ 102.214 Notice of Adverse Proceedings Against Deposited Property

[1] Comment--Use of Form

[2] FORM

Notice of Adverse Proceedings Against Deposited Property

§ 102.215 Notice to True Owner of Wrongfully Detained Property

[1] Comment

[a] Use of Form

[b] Required Notification

[2] FORM

Notice to True Owner of Wrongfully Detained Property

§ 102.216 Notice of Sale of Perishable Property

[1] Comment

[a] Use of Form

[b] Sale of Perishable Deposit for Salvage

[2] FORM

Notice of Sale of Perishable Property

§ 102.217 Notice by Gratuitous Depositary to Remove Property

[1] Comment

[a] Use of Form

[b] Gratuitous Deposit Defined

[c] Duty of Care

[2] FORM

Notice by Gratuitous Depositary to Remove Property

§ 102.218 Notice of Termination of Storage

[1] Comment--Use of Form

[2] FORM

Notice of Termination of Storage

§§ 102.219-102.229 [Reserved]

§ 102.230 Bill of Sale for Grain to Remain in Private Bulk Storage

[1] Comment

[a] Use of Form

[b] Private Bulk Grain Storage Law

[c] Marking Storage Facilities

[d] Contents of Bill of Sale

[e] Passage of Title

[2] FORM

Bill of Sale for Grain to Remain in Private Bulk Storage

§ 102.231 Notice of Sale of Grain in Private Bulk Storage

[1] Comment

[a] Use of Form

[b] Required Posting of Notice

[c] Required Form of Notice

[2] FORM

Notice of Sale of Grain in Private Bulk Storage



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102 BAILMENTS

32-102 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter provides general coverage of the law of bailments (or "deposits") of personal property. The transaction guide includes a procedural guide to notices required during the term of the deposit, notices given in connection with termination of the deposit, and notices and documents for private bulk storage of grain. Forms include general bailment contracts, various statutory notices, and a bill of sale and notice of sale of grain in private bulk storage.

Specialized types of bailments are covered elsewhere in this publication. For discussion of the disposition of property left in the possession of landlords by paying guests or tenants, see Ch. 35B, *Modification and Termination of Leases* . For coverage of bailments that take the form of leases or rentals of personal property, see Ch. 53, *Personal Property Leasing* . For discussion of the storage of commercial, noncommercial, and household goods, see Ch. 54A, *Storage of Goods* . Liens that may arise out of a bailment are discussed in Ch. 102A, *Personal Property Liens* . The rights and obligations of dealers in personal property are covered in Ch. 102B, *Pawnbrokers, Finance Lenders, and Secondhand Goods Dealers* . Procedures available to a bailee for dealing with property that has been abandoned in the bailee's care are covered in Ch. 102C, *Lost and Unclaimed Property* . Laws, procedures, and forms relating to the sale, consignment, and lending of works of art are covered in Ch. 102E, *Sales and Loans of Artwork* .



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 102 BAILMENTS

PART I. RESEARCH GUIDE

A. Primary Sources

32-102 California Legal Forms--Transaction Guide § 102.01

§ 102.01 California Statutes

Bailment contracts with automobile parking lots. *Civ. Code §§ 1630, 1630.5.*

Nature and creation of deposits. *Civ. Code §§ 1813-1818.*

Depository's obligations. *Civ. Code §§ 1822-1828.*

Deposits for keeping. *Civ. Code §§ 1833-1865.*

General provisions. *Civ. Code §§ 1833-1840.*

Indemnity. *Civ. Code § 1833.*

Depository of animals. *Civ. Code §§ 1834-1834.9.*

Use. *Civ. Code § 1835.*

Damage. *Civ. Code § 1836.*

Sale of perishable deposit for salvage. *Civ. Code § 1837.*

Loss or injury to deposit explanation. *Civ. Code § 1838.*

Depository's compensation. *Civ. Code § 1839.*

Limit of depository's liability. *Civ. Code § 1840.*

Gratuitous deposits. *Civ. Code §§ 1844-1847.*

Deposits for hire (storage). *Civ. Code §§ 1851-1857.*

Deposits for repair, alteration, or sale. *Civ. Code §§ 1858-1858.3.*

Inn boarding, lodging, and apartment house keepers. *Civ. Code §§ 1859-1865.*

Deposits for exchange. *Civ. Code § 1878.*

Private bulk storage of grain. *Civ. Code §§ 1880-1881.2.*

Loans for use or bailment. *Civ. Code §§ 1884-1896.*

Bailment of personal property. *Civ. Code §§ 1955-1959.*

Wrongful conversion of personal property. *Civ. Code § 3336.*

Personal property leases. *Com. Code § 10101 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 102 BAILMENTS

PART I. RESEARCH GUIDE

A. Primary Sources

32-102 California Legal Forms--Transaction Guide §§ 102.02-102.04

[Reserved]

§§ 102.02[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 102 BAILMENTS

PART I. RESEARCH GUIDE

B. Secondary Sources

32-102 California Legal Forms--Transaction Guide § 102.05

§ 102.05 Annotations

Annot., Liability of Bank or Safe-Deposit Company for Its Employee's Theft or Misappropriation of Contents of Safe-Deposit Box, 39 A.L.R.4th 543 (1985) .

Annot., Bailee's Liability for Bailor's Expense of Recovering Stolen Subject of Bailment, 80 A.L.R.3d 264 (1977) .

Annot., Bailor's Right of Direct Action Against Bailee's Theft Insurer for Loss of Bailed Property, 64 A.L.R.3d 1207 (1975) .

Annot., Bailee's Duty to Insure Bailed Property, 28 A.L.R.3d 513 (1969) .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 102 BAILMENTS

PART I. RESEARCH GUIDE

B. Secondary Sources

32-102 California Legal Forms--Transaction Guide § 102.06

§ 102.06 Law Reviews and Periodicals

Merrill, Thomas W., *The Property/Contract Interface*, 2001 *Columbia L. Rev.* 773 (May 2001).

Bouley, Sara E., *Where's the Beef? Allocating the Burden of Proof in Bailment Agreements Involving Missing Cattle Grazing on Public Rangeland*, 1996 *Utah L. Rev.* 1031 (1996).

Helmholz, R.H., *Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care*, 41 *U. Kan. L. Rev.* 97 (1992).

Note, *Bailor Beware: Limitations and Exclusions of Liability in Commercial Bailments*, 41 *Vand. L. Rev.* 129 (1988).

Note, *Bailment Liability: Toward a Standard of Reasonable Care*, 61 *U.S.C. L. Rev.* 2117 (1988).

Baker, "The Unclaimed Personal Property Problem: A Legislative Proposal," 19 *Stan L Rev* 619 (1967).

Note, "Presumption of Negligence of Parking Lot Owner for Damage to Parked Car," 14 *Stan L Rev* 200 (1961).

Comment, *Owner's Recovery Against Subbailee Limited to First Bailee's Liability*, 12 *Stan. L. Rev.* 264 (1959).

Sweet, *Burden of Proof of Bailee's Negligence in Connection With His Failure to Redeliver*, 8 *Hastings L. J.* 89 (1956).

Note, *Bailments: Extension of Bailee's Liability by Contract: Effect of Express Promise to Return Bailed Article*, 3 *UCLA L. Rev.* 382 (1956).

Personal Property--Bailments--Burden of Proof--Destruction of Goods While in Bailee's Possession, 23 *So Cal. L Rev* 409 (1950).

Note, "Bailments What Constitutes Slightest Degree of Duty on Bailee--Liability of Lessee Toward Personal Property of Prior Lessee Left on Premises," *20 So. Cal. L Rev* 91 (1946).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal PropertyTortsVicarious LiabilityBailees



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 102 BAILMENTS

PART I. RESEARCH GUIDE

B. Secondary Sources

32-102 California Legal Forms--Transaction Guide § 102.07

§ 102.07 Text References

[1] Matthew Bender Sources

California Legal Forms (Matthew Bender).

Ch. 35B, *Modification and Termination of Leases* .

Ch. 53, *Personal Property Leasing* .

Ch. 54A, *Storage of Goods* .

Ch. 102A, *Personal Property Liens* .

Ch. 102B, *Pawnbrokers, Finance Lenders, and Secondhand Goods Dealers* .

Ch. 102C, *Lost and Unclaimed Property* .

Ch. 102E, *Sales and Loans of Artwork* .

California Forms of Pleading and Practice (Matthew Bender).

Ch. 16, *Airplanes and Airports*.

Ch. 23, *Animals: Civil Liability*.

Ch. 57, *Art*.

Ch. 93, *Bailment* .

Ch. 274, *Garages and Gas Stations*.

Ch. 297, *Hotels and Motels* .

[2] Additional Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, § 663; vol. 13, *Personal Property*, §§ 156-194 (10th ed. 2005).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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DIVISION VII: PERSONAL TRANSACTIONS

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PART I. RESEARCH GUIDE

B. Secondary Sources

32-102 California Legal Forms--Transaction Guide §§ 102.08-102.09

[Reserved]

§§ 102.08[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102 BAILMENTS
PART II. LEGAL BACKGROUND

32-102 California Legal Forms--Transaction Guide § 102.10

§ 102.10 Bailment Defined

Under the common law, "bailment" is "the delivery of a thing to another for some special object or purpose, on a contract, express or implied, to conform with the objects or purposes of the delivery" [*Windeler v. Scheers Jewelers* (1970) 8 Cal. App. 3d 844, 850, 88 Cal. Rptr. 39] . The purpose of a bailment may be to store property, protect it, repair it, permit its use, or accomplish virtually any other legal purpose [see *H. S. Crocker Co., Inc. v. McFaddin* (1957) 148 Cal. Spp. 2d 639, 648, 307 P.2d 429] .

A bailment is a contract. Therefore, the assent of both parties is necessary before a bailment, either express or implied in fact, can come into existence. As in every contractual obligation, a bailee's duties must be assumed voluntarily; these duties ordinarily cannot be imposed on a person without his or her consent [*Gordon H. Ball, Inc. v. Parreira* (1963) 214 Cal. App. 2d 697, 703, 29 Cal. Rptr. 679 ; *H. S. Crocker Co., Inc. v. McFaddin* (1957) 148 Cal. App. 2d 639, 644, 307 P.2d 429 ; see, e.g., *Sackett v. Public Storage Management* (1990) 222 Cal. App. 3d 1088, 1089, 1092-1093, 272 Cal. Rptr. 284 (storage unit operator placing its own lock on renter's unit, after renter's lock was vandalized, did not create involuntary bailment)]. A bailment cannot be implied if it appears that the parties intended that the party in possession hold the property in some capacity other than as bailee. Intent may be shown from the parties' relationship and from the circumstances of the transaction [*H. S. Crocker Co., Inc. v. McFaddin* (1957) 148 Cal. App. 2d 639, 644, 307 P.2d 429] . A bailment may be implied if a person knowingly takes property into possession or control for the purpose of creating a bailment--that is, with notice or knowledge that goods are in fact in his or her possession and are the property of the bailor [*Gordon H. Ball, Inc. v. Parreira* (1963) 214 Cal. App. 2d 697, 703-704, 29 Cal. Rptr. 679] . Unless the receiving party is obligated to return or account for the property, however, there is a sale rather than a bailment [*Associated Beverage Co. v. Board of Equalization* 224 Cal. App. 3d 192, 209, 273 Cal. Rptr. 639] .

Bailments are traditionally classified as for (1) the sole benefit of the bailor, (2) the sole benefit of the bailee, or (3) the benefit of both parties. Under this classification system, the party serving *without* the benefit has a lesser standard of care [*Pemberton v. Barber* (1962) 199 Cal. App. 2d 534, 542, 18 Cal. Rptr. 784] .

Under California law, bailments are "deposits," bailors are "depositors," and bailees are "depositories" [see *Civ. Code* § 1814]. The common-law classifications and rules governing bailments have been codified using those terms [see *Civ. Code* §§ 1813-1881.2].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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CHAPTER 102 BAILMENTS
PART II. LEGAL BACKGROUND

32-102 California Legal Forms--Transaction Guide § 102.11

§ 102.11 Deposits

[1] Voluntary and Involuntary Deposits

A deposit may be voluntary or involuntary [*Civ. Code § 1813*]. A voluntary deposit is made when the depositor gives to the depositary, with his or her consent, the possession of personal property to keep for the benefit of the depositor or of a third party [*Civ. Code § 1814*]. An involuntary deposit is made in one of the following ways [*Civ. Code § 1815*]:

- When the owner of personal property, without negligence, accidentally leaves or places it in the possession of any person.
- When the owner of personal property commits it, out of necessity, to the care of any person in cases of fire, shipwreck, inundation, insurrection, riot, or similar extraordinary emergencies.
- When a live, stray animal is delivered to, picked up by, or held by any person or public or private entity.
- When a live animal is abandoned or left [*see Penal Code § 597.1*] in or about any premises or real property that have been vacated on, or immediately preceding, the termination of a lease or other rental agreement or foreclosure of the property.

The depositary of an involuntary deposit is bound to take charge of the thing deposited, if able to do so [*Civ. Code § 1816(a)*]. Any person or entity with whom a live animal is involuntarily deposited must immediately notify animal control officials for purposes of retrieving the animal [*Civ. Code § 1816(b)*].

Civ. Code §§ 1815 and 1816 presuppose the express or implicit acceptance of the personal property involved, in order to make the depositary liable for its care. Thus, the adjective "involuntary" qualifying the word "deposit" in those statutes indicates that the deposit is involuntarily *made* rather than involuntarily *received* [*Gordon H. Ball, Inc. v. Parreira* (1963) 214 Cal. App. 2d 697, 702, 29 Cal. Rptr. 679] . For example, the owner of a self-storage facility did not become an involuntary bailee of the property stored in a leased unit by placing a lock on the leased unit after it had been

vandalized, then immediately notifying the occupant in writing to inspect the unit for stolen items and to replace the lock with one of the occupant's locks, as was required by the lease agreement. The owner's actions were not consistent with consent to the duties of an involuntary bailee. Instead, they were consistent with the terms of the lease agreement. Thus, the owner had no liability for subsequent theft of items from the unit [*Sackett v. Public Storage Management* (1990) 222 Cal. App. 3d 1088, 1089, 1092-1093, 272 Cal. Rptr. 284] .

[2] Gratuitous Deposits and Deposits for Hire

A deposit may be gratuitous or for hire. A gratuitous deposit is a deposit for which the depositary receives no consideration beyond the mere possession of the thing deposited [Civ. Code § 1844]. An involuntary deposit is gratuitous, the depositary being entitled to no reward [Civ. Code § 1845; see [1], above]. However, an involuntary depositary of any live animal may accept advertised rewards or rewards freely given by the animal's owner [Civ. Code § 1845]. A gratuitous depositary must use at least slight care for the preservation of the thing deposited [Civ. Code § 1846(a); see Civ. Code § 1846(b) (gratuitous depositary of living animal); see also § 102.15]. The duties of a gratuitous depositary cease when the thing deposited is restored to its owner, or when the depositary gives reasonable notice to the owner to remove the property and the owner fails to do so within a reasonable time [Civ. Code § 1847; see § 102.217 (form for notice)]. An involuntary depositary, however, cannot give this notice until the emergency that gave rise to the deposit is past [Civ. Code § 1847(b)]. Moreover, if the depositary is a public pound, a shelter operated by a society for the prevention of cruelty to animals, or a humane shelter, the duty to provide care, as required by Civ. Code § 1846, continues until a public pound or private shelter is lawfully relieved of its responsibility of care for a living animal [see Civ. Code § 1847(b)].

A deposit that is not gratuitous is called storage, or a deposit for hire. The depositary in such a case is called a depositary for hire [Civ. Code § 1851]. A depositary for hire must use at least ordinary care for the preservation of the thing deposited [Civ. Code § 1852].

A finder of lost property is not bound to take charge of it, unless the person is otherwise required to do so by contract or law. However, one who does so is deemed a depositary for the owner, with the rights and obligations of a depositary for hire. If a person or public or private entity finds money, goods, things in action, or other personal property, or saves any domestic animal from harm, neglect, drowning, or starvation, that person must inform the owner, if the owner is known, within a reasonable time and make restitution to the owner without compensation other than a reasonable charge for saving and taking care of the property [Civ. Code § 2080]. Any person who takes possession of a live domestic animal must provide for humane treatment for the animal [Civ. Code § 2080; see generally Ch. 102C, *Lost and Unclaimed Property*].

[3] Deposits for Safekeeping or for Exchange

A deposit may be for safekeeping or for exchange [Civ. Code § 1813]. A deposit for safekeeping (also called a deposit for keeping) is one in which the depositary is bound to return the identical thing deposited [Civ. Code § 1817; see § 102.12[1]]. A deposit for exchange is one in which the depositary is bound only to return a thing corresponding in kind to that which is deposited [Civ. Code § 1818]. A deposit for exchange transfers to the depositary the title to the deposited property and creates between the depositary and the depositor the relationship of debtor and creditor only [Civ. Code § 1878].

[4] Termination of Deposits

In the absence of an agreement about the length of time during which a deposit is to continue, it may be terminated by the depositor at any time and by the depositary on reasonable notice [Civ. Code § 1854; see § 102.218 (form for notice)]. Notwithstanding an agreement respecting the length of time during which a deposit is to continue, the depositor may terminate the deposit by paying all that would become due to the depositary in case of the deposit

continuing for the balance of the term [*Civ. Code* § 1855].

Regardless of its express terms, a contract of bailment may be terminated at any time by the mutual consent of the parties [*Rackliff v. Coronet Construction Co. (1958) 157 Cal. App. 2d 419, 424, 321 P.2d 50*] .

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DIVISION VII: PERSONAL TRANSACTIONS

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32-102 California Legal Forms--Transaction Guide § 102.12

§ 102.12 Obligations and Liability of Depositary

[1] In General

A depositary's duties and liabilities are prescribed by statutes regulating employment and service generally [*Civ. Code § 1839; see Civ. Code §§ 2019-2082*].

A depositary may not use the thing deposited for keeping, or permit it to be used, for any purpose without the consent of the depositor. If the deposited property is purposely fastened by the depositor, the depositary may not open it without the depositor's consent, except in case of necessity [*Civ. Code § 1835*].

A depositary is liable for any damage that happens to the deposited property while the depositary is wrongfully using that property, unless the damage would inevitably have happened even without the wrongful use [*Civ. Code § 1836*]. A depositary's liability for negligence will not exceed the amount that the depositor states, or the amount that the depositary has reason to believe, is the value of the property deposited [*Civ. Code § 1840; see § 102.210* (depositor's declaration of value of deposited property)].

[2] Delivery on Demand

A depositary must deliver the deposited property on demand to the person for whose benefit it was deposited, regardless of whether the deposit was made for a specified time. This requirement does not apply, however, if the depositary (1) has a lien on the property [*see Ch. 102A, Personal Property Liens*] or (2) has been forbidden or prevented from delivering the property by the owner of the property, or by act of the law, and has given the owner a notice of adverse claims [*Civ. Code § 1822; see Civ. Code § 1825* (notice of adverse claims); *see also* [4], *below*]. Without a demand, the depositary is not bound to deliver the property. This is true even if the deposit is made for a specified time [*Civ. Code § 1823; but see Downey v. Martin Aircraft Service (1950) 96 Cal. App. 2d 94, 100, 214 P.2d 581* (demand unnecessary to support action if property destroyed)].

The depositary must deliver the property at his or her residence or place of business, whichever is most convenient for the depositary [*Civ. Code § 1824*]. If the deposited property is owned jointly or in common by persons who cannot agree on the manner of its delivery, the depositary may deliver to each his or her proper share, if that can be done

without injury to the property [*Civ. Code § 1827*]. If a deposit is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, the deposit or any part of it, or any increase in its value, may be delivered or paid to either of the persons or to the survivor or survivors in due course of business [*Civ. Code § 1828*].

[3] Notice of Loss or Injury of Deposit

If a thing is lost or injured during its deposit and the depositary refuses to inform the depositor of the circumstances under which the loss or injury occurred, the depositary is presumed to have willfully or by gross negligence permitted the loss or injury to occur, to the extent that he or she has information concerning those circumstances or willfully misrepresents them to the depositor [*Civ. Code § 1838*]. For a form giving notice of loss or injury, see § 102.213[2].

[4] Notice of Adverse Claims

A depositary must give prompt notice to the person for whose benefit the deposit was made of any proceedings taken adversely to that person's interest in the deposited property that may tend to excuse the depositary from the obligation to deliver it [*Civ. Code § 1825*]. For a form illustrating this notice, see § 102.214[2].

[5] Notice to True Owner of Goods Wrongfully Deposited

A depositary who believes that property deposited with him or her is wrongfully detained from its true owner may give the true owner notice of the deposit. Within a reasonable time after notice is given, the owner must (1) claim the property, (2) sufficiently establish his or her right to it, and (3) indemnify the depositary against any claim of the depositor. If the recipient of the notice fails to take these steps, the depositary is exonerated from liability to that person on returning the property to the depositor or on assuming, in good faith, a new obligation changing the depositary's position in respect to the thing to his or her prejudice [*Civ. Code § 1826*]. For a form illustrating this notice, see § 102.215[2].

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§ 102.13 Deposits for Keeping

[1] Duties of Depositor

A depositor must indemnify the depositary (1) for all damage caused to the depositary by the defects of the thing deposited, and (2) for all expenses necessarily incurred by the depositary concerning that thing, other than those involved in the nature of the undertaking [*Civ. Code § 1833*].

[2] Depositary's Lien for Storage Charges

A depositary for hire has a lien for storage charges and for advances and insurance incurred at the request of the depositor, as well as for money necessarily expended in and about the care, preservation, and keeping of the property stored [*Civ. Code § 1856*]. In addition, the depositary has a lien for money advanced at the request of the depositor to discharge a prior lien, and for the expenses of a sale if default has been made in satisfying a valid lien [*Civ. Code § 1856*]. The rights of the depositary for hire to the lien are regulated by the statutory scheme governing liens in general [*Civ. Code § 1856; see Civ. Code § 2872 et seq.; see also Ch. 102A, Personal Property Liens*].

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§ 102.14 Deposits of Perishable Property

If a thing deposited for safekeeping is in actual danger of perishing before instructions can be obtained from the depositor, the depositary may sell it for the best price obtainable and retain the proceeds as a deposit, giving immediate notice of the proceedings to the depositor [*Civ. Code § 1837*]. For a form illustrating this notice, see *§ 102.216[2]*.

In the case of a deposit for hire, if the depositary is unable, from any cause other than lack of ordinary care and diligence on the depositary's part, to deliver perishable property, baggage, or luggage received for storage or to collect charges for storage due, the depositary may cause the property to be sold on the open market to satisfy the lien for storage [*Civ. Code § 1857*; see *§ 102.13[2]*, above]. However, under this provision, the depositary may not sell any property other than perishable property unless charges for the storage of that property have been due and unpaid for one year at the time of the sale [*Civ. Code § 1857*].

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32-102 California Legal Forms--Transaction Guide § 102.15

§ 102.15 Deposits of Animals

[1] Rights and Duties of Depositary

A depositary of living animals must provide them with suitable food and shelter, and treat them kindly [*Civ. Code § 1834*]. Any depositary that fails to perform these duties may be liable for civil damages as provided by law [*Civ. Code § 1834*]. It is the policy of the state of California that no adoptable animal should be euthanized if it can be adopted into a suitable home [*Civ. Code § 1834.4(a)*]. Adoptable animals include only those animals that are at least eight weeks of age and that, subsequent to the time the animal is impounded, have manifested no sign of a behavioral or temperamental defect or of a disease, injury, or condition that adversely affects, or is likely to adversely affect, the animal's health [*Civ. Code § 1834.4(a)*]. It is also California's policy that no treatable animal be euthanized [*Civ. Code § 1834.4(b)*]. A treatable animal includes any animal that is not adoptable but that could become adoptable with reasonable efforts [*Civ. Code § 1834.4(b)*].

A gratuitous depositary of a living animal must provide the animal with necessary and prompt veterinary care, adequate nutrition and water, shelter, and must treat it humanely [*Civ. Code § 1846(b)*]. If the animal has any identification, the gratuitous depositary must make reasonable attempts to notify the owner of the animal's location [*Civ. Code § 1846(b)*]. Any gratuitous depositary that does not have sufficient resources or desire to provide that care must promptly turn the animal over to the appropriate care facility [*Civ. Code § 1846(b)*]. Unlike other involuntary (that is, gratuitous) depositories, an involuntary depositary of any live animal may accept advertised rewards or rewards freely given by the animal's owner [*Civ. Code § 1845*].

In the absence of a different agreement or usage, a depositary for hire is entitled to one week's hire for the sustenance and shelter of living animals during any fraction of a week, and to half a month's hire for the storage of any other property during any fraction of a half-month [*Civ. Code § 1853*].

Notwithstanding any other provision of law, if an animal is delivered to a veterinarian, dog kennel, cat kennel, pet-grooming parlor, animal hospital, or any other animal care facility pursuant to a written or oral agreement, and the owner of the animal does not pick it up within 14 calendar days after the day on which the animal was due to be picked up, the animal is deemed to be abandoned. The person into whose custody the animal was placed for care must first try

for a period of not less than 10 days to find a new owner for the animal. If unable to place the animal with a new owner within that time, the person must destroy the abandoned animal humanely. If the animal was left with a veterinarian, or with a facility that has a veterinarian, and a new owner cannot be found, the veterinarian must humanely destroy the animal. A notice must be posted in a conspicuous place, or included in conspicuous type on a written receipt, to warn each person depositing an animal at an animal care facility of these requirements [*Civ. Code § 1834.5*].

An animal abandoned under these conditions must not be used for scientific or any other type of experimentation [*Civ. Code § 1834.6*; see *Civ. Code § 1834.9* (animal testing, excluding testing for medical research, is prohibited in California when validated alternatives exist)]. In addition, the abandoned animal is not permitted to be turned over to a pound or animal regulation department of a public agency [*Civ. Code § 1834.6*].

[2] Required Notices

[a] Shelters that Give Surrendered Animals to Biological Supply or Research Facility

In any pound or animal regulation department of a public or private agency where animals are turned over dead or alive to a biological supply facility or a research facility, a sign (meeting statutory measurement requirements) stating: "Animals Turned In To This Shelter May Be Used For Research Purposes or to Supply Blood, Tissue, or Other Biological Products" must be posted in a place where it will be clearly visible to a majority of persons when turning animals over to the shelter [*Civ. Code § 1834.7(a)*]. (For purposes of this requirement, "animal research facility" includes any laboratory, firm, association, corporation, copartnership, and educational institution [*Civ. Code § 1834.7(b)*]. A "biological supply facility" includes any blood bank, laboratory, firm, association, corporation, copartnership, or educational institution that sells biological materials such as blood or animals, either alive or dead, to research facilities, educational institutions, or veterinarians [*Civ. Code § 1834.7(c)*]). This statement must also be included on owner surrender forms [*Civ. Code § 1834.7(a)*]. The owner surrender forms must also include the definition of "biological supply facility" [*Civ. Code § 1834.7(a)*; see *Civ. Code § 1834.7(c)* (definition)].

[b] Sale of Equines for Slaughter

At any public auction or sale where equines are sold, the management of the auction or sale must either post a sign (meeting statutory measurement requirements) or insert into its consignment agreement with the seller a notice, in boldface type, stating: "WARNING: Horses sold on these premises may be purchased for slaughter. As a possible safeguard, seller can set minimum bid above current slaughter prices" [*Civ. Code § 1834.8(a), (b)*; see *Civ. Code § 1834.8(c)* (management of auction or sale must post current slaughter prices or make them available to sellers on request)]. If a sign is used, it must be posted in a conspicuous place, so that it will be clearly visible to a majority of persons attending the sale. If the notice is inserted into the consignment agreement, space must be provided adjacent to the notice for the seller to initial his or her acknowledgment of the notice [*Civ. Code § 1834.8(a)*].

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§ 102.16 Deposits for Repair or Alteration

Every depositary, on accepting property from a customer, must present the customer with a written receipt. The receipt must include a statement, if applicable, that the deposited property is not insured or protected to the amount of its actual cash value by the depositary against loss occasioned by theft, fire, and vandalism while the property remains with the depositary [*Civ. Code §§ 1858.1*]. For these purposes, "depositary" means a person who in the ordinary course of business regularly receives property from customers for the purpose of repair or alteration [*Civ. Code § 1858(b)*], and "property" means personal property used for or intended for personal, family, or household purposes, but does not include any motor vehicle within the meaning of *Veh. Code § 415* ("motor vehicle" defined as vehicle that is self-propelled, with specified exceptions) [*Civ. Code § 1858(c)*]. For a form illustrating the required statement, see § 102.211[2].

A depositary who fails to furnish either the receipt or the statement if required to do so, or who makes any misrepresentation in a receipt, is strictly liable to the customer for any loss from theft, fire, or vandalism while the property remains with the depositary. In addition, the depositary forfeits any lien or other right to hold the property arising from services rendered in holding, repairing, altering, or selling the property [*Civ. Code § 1858.2*; see *Civ. Code §§ 1856* (lien for charges), 1857 (foreclosure by sale of deposit of perishables); see also Ch. 102A, *Personal Property Liens*]. Furthermore, the failure of a depositary to furnish a receipt or statement as required under these rules is deemed to be a willful act for purposes of *Ins. Code § 533*, which provides that an insurer is not liable for a loss caused by the willful act of the insured [*Civ. Code § 1858.2*].

A depositary who, by insurance or by self-insurance, protects property deposited by customers from loss or damage from theft, fire, or vandalism while the property remains with the depositary, need not make or deliver to customer any notice of that insurance [*Civ. Code § 1858.3*].

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32-102 California Legal Forms--Transaction Guide § 102.17

§ 102.17 Deposits With Keepers of Residence Facilities

[1] Liability

The liability of an innkeeper, hotelkeeper, furnished apartment house keeper, furnished bungalow court keeper, boardinghouse keeper, lodging house keeper, or operator of a licensed hospital, rest home, or sanitarium for losses of or injuries to personal property is that of a depositary for hire [*Civ. Code § 1859; see Civ. Code § 1861.1* (definitions)]. However, this liability may not exceed the sum of \$1,000 in the aggregate or, for each item of described property, the respective sums of \$500 for each trunk and its contents, \$250 for each valise or traveling bag and its contents, \$250 for each box, bundle, or package and its contents, or \$250 for all other personal property of any kind. These limits do not apply if the depositary has consented in writing with the property owner to assume a greater liability [*Civ. Code § 1859*].

If an innkeeper (or a hotelkeeper, boardinghouse keeper, lodging house keeper, or operator of a licensed hospital, rest home, or sanitarium) keeps a fireproof safe and gives guests the required notice, he or she is not liable for any loss of or injury to money, jewelry, documents, furs, fur coats, fur garments, or other articles of unusual value and small size that are not deposited with him or her to be placed in the safe [*Civ. Code § 1860*]. This limitation of liability does not apply to the extent that the innkeeper's own acts contribute to the loss or injury. The notice must inform guests of the existence of the safe, and of the fact that the innkeeper will not be liable for loss of or injury to the specified articles unless they are placed in the safe [*Civ. Code § 1860*]. The innkeeper may give this notice in person, or may post a printed notice in a prominent place in the office or the room occupied by the guest [*Civ. Code § 1860*]. For a form illustrating this notice, see § 102.212[2].

The liability of an innkeeper is limited in any case to the sum of \$500 for any or all property of the kind described above, belonging to any individual guest, unless the innkeeper has given the guest a written receipt for property exceeding that value [*Civ. Code § 1860*].

[2] Lien on Goods of Guests

Hotel, motel, inn, boardinghouse, and lodging-house keepers have a lien on the baggage and other property belonging to or legally under the control of their guests, boarders, tenants, or lodgers that are in the hotel, motel, inn, or boarding or

lodging house for the proper charges due from the guests, boarders, tenants, or lodgers for their accommodation, board, and lodging and room rent [*Civ. Code* § 1861]. The lien is also available to secure payment for any extras that are furnished at the request of the guests, boarders, tenants, or lodgers for all money paid for or advanced to them, and for the costs of enforcing the lien. However, the lien is not available against any property that is exempt from enforcement of a money judgment [*Civ. Code* § 1861].

The lien may be enforced only after final judgment in an action brought to recover the charges or money. During the pendency of the proceeding, the plaintiff may take possession of the baggage and property pursuant to a writ of possession [*Civ. Code* § 1861; see *Civ. Code* §§ 1861.1-1861.27; see also *California Forms of Pleading and Practice*, Ch. 297, *Hotels and Motels*, §§ 297.70-297.74. (Matthew Bender)]. However, if any baggage or property becoming subject to this lien does not belong to the guest, lodger, tenant, or boarder who incurred the charge or indebtedness secured by the lien at the time the charge or indebtedness was incurred, and if the hotel, motel, inn, boardinghouse or lodging-house keeper entitled to the lien receives notice of that fact at any time before the sale of the baggage or property, then that baggage and property will not be subject to the lien [*Civ. Code* § 1861].

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32-102 California Legal Forms--Transaction Guide § 102.18

§ 102.18 Bailment for Parking

[1] In General

If a parking lot operator charges a fee and the vehicle and keys are left with an attendant, a bailment for hire arises [*U Drive & Tour, Ltd. v. System Auto Parks, Ltd.*, 28 Cal. App. 2d Supp. 782, 784, 71 P.2d 354, disapproved on other grounds, 180 Cal. App. 3d 713 (1986) ; see [2], below (licenses distinguished)]. Under this bailment for hire, the parking lot operator must use reasonable care to preserve the vehicle against loss or damage [*Beetson v. Hollywood Athletic Club* (1930) 109 Cal. App. 715, 718, 293 P. 821] .

A parking lot operator may limit his or her liability only by conforming a printed contract to statutory requirements [Civ. Code § 1630; see *Cal. State Auto etc. Bureau v. Barrett Garages, Inc.* (1967) 257 Cal. App. 2d 71, 79-81, 64 Cal. Rptr. 699 ; see also § 102.201]. The operator must post a copy of the contract, printed in large type in an area at least 17 by 22 inches, in a conspicuous place at each entrance of the parking lot [Civ. Code § 1630]. However, mere compliance with these conditions does not create a contract between the parties sufficient to relieve a parking lot operator of liability for its negligence. It is a question of fact in each case whether the bailor assented to the terms of the contract. The critical question is whether under the circumstances a prudent person, acting reasonably, would or would not have read the exculpatory provisions [*Cal. State Auto. etc. Bureau v. Barrett Garages, Inc.* (1967) 257 Cal. App. 2d 71, 79, 64 Cal. Rptr. 699] .

If the parking lot operator requires the vehicle bailor to leave his or her keys, the operator may not be exempted from liability for the theft of the vehicle [Civ. Code § 1630.5]. For further discussion of bailment involving parking lot operators, see California Forms of Pleading and Practice, Ch. 93, *Bailment* (Matthew Bender).

[2] No Bailment When Owner Retains Possession of Vehicle

If a driver parks his or her vehicle in a parking lot, locks the doors, carries away the keys, receives no receipt for parking, and may remove the vehicle at will, no bailment is created. The fact that an automobile was locked and the keys retained by the owner would not necessarily preclude a finding that a bailment existed. In order to constitute a bailment, however, possession of the article must be given the bailee. Thus, if the vehicle owner reserves possession of the car at all times, and the parking lot operator acquires no dominion over the vehicle nor any right to control removal

of it, no bailment is created. The vehicle owner merely acquires a license to park his or her car on the premises; the owner assumes no responsibility for safekeeping the car and is not liable for theft or damage [*Porter v. Los Angeles T. Club* (1940) 40 Cal. App. 2d Supp. 840, 841-842, 105 P.2d 956] .

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§ 102.19 Private Bulk Storage of Grain

The Private Bulk Grain Storage Law [*see Civ. Code §§ 1880-1881.2*] governs the storage, after sale, of grains in storage facilities owned or operated by the seller. "Grain," in this context, means barley, corn, flax, hay, grain sorghums, oats, rice, rye, and wheat [*Civ. Code § 1880.1*]. Grain that has been stored in private bulk storage facilities may be sold by bill of sale without delivery of the grain, provided that the requirements of this law are met [*Civ. Code § 1880.3*]. These sales also are not subject to the delivery requirements of *Civ. Code § 3440* or any other section requiring delivery or actual and continued change of possession of goods sold [*Civ. Code § 1880.3*].

The storage of grain pursuant to this law does not make the depositary a warehouse keeper or storer of goods for hire, and no storage facility under the law is deemed a warehouse or public place of storage [*Civ. Code § 1881.2*]. For additional coverage of requirements under the Private Bulk Grain Storage Law, see §§ 102.230 and 102.231.

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[Reserved]

§§ 102.20[Reserved]



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PART III. TRANSACTION GUIDE

A. Preliminary Determinations

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§ 102.100 Client Interview--Facts and Documents

[1] Facts

1. Name, address, and telephone number of depositor.
2. Name, address, and telephone number of owner of property (if different from depositor).
3. Name, address, and telephone number of depositary.
4. Type, description, and approximate valuation of property.
5. Nature of intended deposit, such as:
 - a. Gratuitous deposit.
 - b. Deposit for hire, for:
 - (1) Storage.
 - (2) Parking.
 - (3) Alteration or repair.
 - (4) Keeping of animal.
 - (5) Keeping of perishable property.
 - (6) Keeping of valuables in residence facilities.

(7) Other.

6. Terms of deposit.

- a. Whether oral or written agreement.
- b. Duration of agreement.
- c. Consideration.
- d. Rights and duties of parties.

[2] Documents

- 1. Copy of deposit contract, if any.
- 2. Any notices or other correspondence sent or received by client regarding deposit contract or property.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 102 BAILMENTS

PART III. TRANSACTION GUIDE

A. Preliminary Determinations

32-102 California Legal Forms--Transaction Guide §§ 102.101-102.109

[Reserved]

§§ 102.101[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 102 BAILMENTS

PART III. TRANSACTION GUIDE

B. Procedural Guide

32-102 California Legal Forms--Transaction Guide § 102.110

§ 102.110 Notices Given When Deposit is Made

1. Advise depositor to notify depositary of value of property to preserve right to claim damages in amount of actual loss in case of damage or destruction due to negligence of depositary [*see §§ 102.200, 102.210*].

NOTE:

A depositary's liability for negligence will not exceed the amount that the depositor states, or the amount that the depositary has reason to believe, is the value of the property deposited [*Civ. Code § 1840*].

2. Advise depositary who holds property for alteration or repair to give each customer [*see Civ. Code § 1858.1*]:

NOTE:

A depositary who fails to furnish a receipt, or a statement if required, or who makes any misrepresentation in the receipt, is strictly liable to the customer for any loss occasioned by theft, fire, or vandalism while the property is in the possession of the depositary, and forfeits any lien or other right to hold the property arising from services rendered [*Civ. Code § 1858.2*].

a. Receipt for property [*see § 102.211*].

b. If applicable, statement that property is not covered by insurance against loss due to theft, fire, or vandalism.

3. Advise depositary who is innkeeper to:

a. Notify guests of the following, if applicable [*see Civ. Code § 1860; see § 102.212*]:

NOTE:

The innkeeper may give this notice in person, or may post a printed notice in a prominent place in the office or the room occupied by the guest [*Civ. Code § 1860*].

(1) Fireproof safe is located on premises; and

(2) Keeper is not responsible for valuables not placed in safe.

b. Give guest receipt for deposited property, noting value of property [*see § 102.211*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 102 BAILMENTS

PART III. TRANSACTION GUIDE

B. Procedural Guide

32-102 California Legal Forms--Transaction Guide § 102.111

§ 102.111 Notices Given During Term of Deposit

1. If property is lost or damaged while in possession of depositary, advise depositary to notify depositor of circumstances surrounding loss or damage, including [*see § 102.213*]:

NOTE:

If the depositary refuses to notify the depositor of the circumstances under which the loss or damage occurred (to the extent that the depositary has information concerning those circumstances), or willfully misrepresents those circumstances, the depositary is presumed to have willfully, or by gross negligence, permitted the loss or damage to occur [*Civ. Code § 1838*].

- a. Date of loss or damage.
- b. Nature and extent of loss or damage.
- c. Cause of loss or damage.
- d. All other pertinent circumstances.

2. If adverse proceedings are instituted against deposited property (*e.g.*, attachment, garnishment, execution, or similar proceedings), advise depositary to notify person for whose benefit deposit was made of the following information [*see Civ. Code § 1825; see § 102.214*]:

- a. Nature of adverse proceeding.
- b. Name of person instituting proceeding.

- c. Date proceeding commenced.
- d. Action number, court, or other appropriate identification of proceeding.

3. If depositary believes that property is being detained from its true owner, advise depositary to give owner the following information [see *Civ. Code* § 1826; see § 102.215]:

- a. Description of property.
- b. Date deposited.
- c. Person who deposited property.
- d. Statement that depositary believes person to whom notice is addressed is true owner.
- e. Statement that person notified may claim property by:
 - (1) Proving ownership; and
 - (2) Indemnifying depositary from liability for delivery.

f. Statement that failure to claim property within specified or reasonable time will exonerate depositary from liability to person to whom notice given.

4. If perishable property is involved:

a. If property is in actual danger of perishing before instructions can be obtained from depositor, advise depositary to [see *Civ. Code* § 1837]:

- (1) Sell property for best price obtainable;
- (2) Retain proceeds as deposit; and
- (3) Notify depositor, providing him or her with [see § 102.216]:
 - (a) Statement of cause of emergency or circumstances under which property was subject to perishing.
 - (b) Statement that instructions for disposition of property could not be obtained before property would perish.
 - (c) Statement that property was sold for best price obtainable.
 - (d) Date of sale.
 - (e) Price obtained.
 - (f) Statement that amount is held for benefit of depositor.

b. If depositary for hire is unable to deliver perishable property or to collect charges for storing it (from any cause other than want of ordinary care and diligence of depositary), advise depositary to sell property in open market to satisfy lien

for storage [*Civ. Code § 1857*].

NOTE:

The rights of a depositary for hire to a lien for storage and other charges are regulated by the statutory scheme governing liens generally [*Civ. Code § 1856*; **see § 102.13[2]**; **see also** Ch. 102A, ***Personal Property Liens***].

5. If depositary for hire is unable (from any cause other than want of ordinary care and diligence of depositary) to deliver baggage or luggage received for storage, or to collect storage charges, advise depositary to sell property in open market to satisfy lien for storage [*Civ. Code § 1857*].

NOTE:

This provision is applicable to baggage and luggage only if storage charges have been due and unpaid for one year at the time of the sale [*Civ. Code § 1857*]. The rights of a depositary for hire to a lien for storage and other charges are regulated by the statutory scheme governing liens generally [*Civ. Code § 1856*; **see § 102.13[2]**; **see also** Ch. 102A, ***Personal Property Liens***].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 102 BAILMENTS

PART III. TRANSACTION GUIDE

B. Procedural Guide

32-102 California Legal Forms--Transaction Guide § 102.112

§ 102.112 Notices Given in Connection With Termination of Deposit

1. To terminate gratuitous deposit, advise depositary to [*Civ. Code § 1847*]:

- a. Return property to owner; or
- b. Notify owner to remove property within reasonable time [*see § 102.217*].

NOTE:

If the deposit is involuntary, arising out of necessity from an extraordinary emergency, the depositary must wait until an emergency has passed before giving this notice [*Civ. Code § 1847(b)*]. Moreover, if the depositary is a public pound, a shelter operated by a society for the prevention of cruelty to animals, or a humane shelter, the duty to provide care, as required by *Civ. Code § 1846*, continues until the public pound or private shelter is lawfully relieved of its responsibility of care for a living animal [*see Civ. Code § 1847(b)*].

2. To terminate deposit for hire:

- a. Advise depositor to demand delivery of property:

NOTE:

A depositary is not bound to deliver deposited property without a demand, even if the deposit is made for a specified time [*Civ. Code § 1823; see Civ. Code § 1822* (exceptions to requirement of delivery on demand); *see also § 102.12[2]*].

(1) At any time, if parties have not agreed to specific term of deposit [*Civ. Code § 1854*];

(2) At time specified in deposit agreement [*see Civ. Code § 1854*]; or

(3) At any time, notwithstanding time specified in deposit agreement, on payment of all charges that would become due to depositary if agreement continued for full term [*Civ. Code § 1855*].

b. Advise depositary to terminate deposit [*Civ. Code § 1854*]:

(1) At time specified in deposit agreement; or

(2) In absence of agreement regarding term of deposit, on reasonable notice to owner of property [*see § 102.218*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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CHAPTER 102 BAILMENTS

PART III. TRANSACTION GUIDE

B. Procedural Guide

32-102 California Legal Forms--Transaction Guide § 102.113

§ 102.113 Notices and Documents for Private Bulk Storage of Grain

1. Advise seller of grain in private bulk storage to post the following on each storage facility [*Civ. Code § 1880.2*]:

- a. Notice stating: "Private bulk storage only."
- b. Designating number.

2. Prepare bill of sale containing [*see § 102.230[2]*]:

a. All of following required provisions [*Civ. Code § 1880.4*]:

- (1) Date and place where sale is to be made;
- (2) Names of seller and buyer;
- (3) Statement of estimated quantity and kind of grain;
- (4) Statement of location and designating numbers of storage facilities in which grain is stored;
- (5) Statement of price per unit; and
- (6) Statement of amount received by seller.

b. Any of following optional provisions [*Civ. Code § 1880.5*]:

(1) Provision that total price is based upon estimated weight and that total price may be adjusted in accordance with outturn weight.

(2) Statement that buyer may have free use of designated storage facilities until specified date and that any extension beyond specified date granted by seller must be endorsed under signature of seller on bill of sale.

(3) Statement that seller has legal right to extend to buyer use of designated storage facilities.

(4) Statement that actual possession of grain by buyer is to be taken on board trucks at storage facility, on railroad cars, in storage facility, or otherwise as may be agreed on.

(5) Statement that if actual possession is not taken within time specified, due to any cause not chargeable to seller, seller may consign grain at buyer's risk and expense to specified destination.

3. Have seller execute bill of sale and deliver it to buyer [*Civ. Code § 1880.4*].

NOTE:

Execution and delivery of a bill of sale by a seller passes the seller's title to the grain without actual delivery of the grain [*Civ. Code §§ 1880.3, 1880.6*].

4. Advise seller to [*Civ. Code § 1880.7*]:

a. Post notice of sale on grain storage facilities immediately after sale [*see § 102.231[2]*].

b. Maintain notice in conspicuous place on storage facility while grain is stored there.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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B. Procedural Guide

32-102 California Legal Forms--Transaction Guide §§ 102.114-102.199

[Reserved]

§§ 102.114[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 102 BAILMENTS

PART IV. FORMS

A. Bailment Contracts

32-102 California Legal Forms--Transaction Guide § 102.200

§ 102.200 Simple Contract for Deposit (Bailment) for Hire

[1] Comment

[a] Use of Form

This form illustrates a simple contract for a deposit for hire. The contract should include a complete description of the property to be transferred to the depositary, the purpose and term of the deposit, the consideration paid, the depositor's instructions for delivery of the property at the termination of the agreement, and all other terms and conditions agreed to by the parties.

[b] Limitation of Liability

A depositary's liability for negligence will not exceed the amount that the depositor states, or the amount that the depositary has reason to believe, is the value of the property deposited [*Civ. Code § 1840*]. It is to the depositor's advantage to specify the value of the property at the time of the deposit to assure that the depositary is aware of the extent of his or her liability. If the depositary intends to limit that liability further (for example, by including an exculpatory provision against his or her own negligence), the limitation must be stated unequivocally in the contract [*Vinnell Co. v. Pacific Elec. Ry. Co.* (1959) 52 Cal. 2d 411, 414-415, 340 P.2d 604 ; see *Fahey v. Gledhill* (1983) 33 Cal. 3d 884, 894, 663 P.2d 197 (bailor could not avoid liability under *Civ. Code § 1858 et seq.* when agreement did not clearly and unequivocally exclude liability for negligence)].

[c] Statement of Noninsurance

On receiving property from a customer for repair or alteration, a depositary must present the customer with a written receipt for the property [*see Civ. Code § 1858* (definitions)]. Unless the depositary protects the property to the amount of its actual cash value for loss or damage occasioned by theft, fire, or vandalism while the property remains with the depositary, the receipt must include a statement notifying the customer that the property is not protected in that manner [*Civ. Code § 1858.1*]. No statement is necessary if the depositary does protect the property by insurance, or by self-insurance, for loss or damage from theft, fire, or vandalism while in the depositary's possession [*Civ. Code § 1858.3*].

]. For further discussion, see § 102.211.

[d] Termination of Deposits

It is generally good practice to include a provision specifying the length of time during which a deposit is to continue. Notwithstanding such a provision, however, the contract may be terminated by the depositor on paying all that would become due to the depositary in case of the deposit continuing for the balance of the term [*Civ. Code* § 1855]. In addition, a contract of bailment may be terminated at any time by the mutual consent of the parties [*Rackliff v. Coronet Construction Co.* (1958) 157 Cal. App. 2d 419, 424, 321 P.2d 50] .

[e] Delivery of Property

A depositary must deliver the deposited property on demand to the person for whose benefit it was deposited, whether the deposit was made for a specified time or not [*Civ. Code* § 1822]. Although by statute the place of delivery must be the depositary's residence or place of business, whichever is most convenient for the depositary [*Civ. Code* § 1824], the parties presumably are free to agree on an alternative place of delivery. The requirement of delivery does not apply if the depositary (1) has a lien on the property [see Ch. 102A, *Personal Property Liens*] or (2) has been forbidden or prevented from delivering the property by the real owner of the property, or by act of the law, and has given the owner a notice of adverse claims [*Civ. Code* § 1822; see *Civ. Code* § 1825 (notice of adverse claims); see also § 102.214]. Without a demand, the depositary is not bound to deliver the property. This is true even if the deposit is made for a specified time [*Civ. Code* § 1823].

[2] FORM

Simple Contract for Deposit (Bailment) for Hire

CONTRACT FOR DEPOSIT

This Agreement is between _____ [*name of depositor*] ("Depositor"),
 _____ [*address*], and _____ [*name of depositary*] ("Depositary"),
 _____ [*address*].

Consideration and Term for Deposit

[*EITHER*]

[*If term is fixed, and consideration is to be paid in full in advance:*]

1. Depositary agrees to take possession of [*describe property precisely*] ("Property") for the purpose of [*specify, e.g., storage*] for a period of [*term*] on payment of \$ _____ from Depositor, receipt of which is acknowledged.

[*OR, if term is indefinite and consideration is to be paid periodically:*]

1. Depositary agrees to take possession of [*describe property precisely*] ("Property") for the purpose of [*specify, e.g., storage*] on a [*specify period, e.g., month-to-month*] basis on payment of \$ _____ per [*period, e.g., month*], payable [*e.g., on the first of each month*], until Depositor demands delivery of the Property. Depositor agrees to give Depositary a minimum of _____ days' notice before demanding delivery.

[Continue with the following:]

Valuation of Property

2. The declared fair market value of the Property is \$_____.

Limitation of Liability

[EITHER]

3. If the Property is lost or damaged from any cause during the term of this Agreement without Depositary's fault, Depositary will not be liable for that loss or damage. If the Property is lost or damaged during the term of this Agreement and fault of Depositary is established, Depositary's liability under this Agreement is limited to the value of the Property declared in Paragraph 2, above.

[OR]

3. If the Property is lost or damaged from any cause during the term of this Agreement, including the negligence of Depositary, Depositary will not be responsible for that loss or damage.

[Continue with the following:]

Insurance

4. [Depositor or Depositary] agrees to insure the Property, at [Depositor's or Depositary's] expense, at the value of the Property declared in Paragraph 2, above, for loss or damage occasioned by theft, fire, or vandalism while the Property remains with Depositary.

Condition and Use of Property

5. Depositary agrees to keep the Property in as good condition as it was in when received and to deliver the Property to Depositor at the termination of this Agreement in that condition, normal wear and tear excepted. Depositor expressly [grants or withholds] permission for Depositary to use the Property during the term of this Agreement.

Delivery of Property

6. On the termination of this Agreement, Depositary shall _____[specify, e.g., deliver the Property to Depositor at the following address: _____ or hold the Property until Depositor demands its delivery].
Dated: _____

DEPOSITOR

[*name of depositor*]

_____ [*signature*]

DEPOSITARY

[*name of depositary*]

By _____ [*signature*]

[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 102 BAILMENTS

PART IV. FORMS

A. Bailment Contracts

32-102 California Legal Forms--Transaction Guide § 102.201

§ 102.201 Bailment Contract for Automobile Parking or Storage

[1] Comment

[a] Use of Form

This form is a sample contract for parking or storing a motor vehicle. The contract ordinarily is printed on the face of the ticket or receipt issued to the bailor at the time of delivery of the vehicle. Valet parking services at restaurants and other businesses also often use similar printed ticket contracts.

[b] Contents of Form

A printed contract for the parking or storage of a motor vehicle is not binding, either in whole or in part, on the vehicle owner or on the person who leaves the vehicle with another, unless the contract conforms to specified statutory requirements.

The caption "This contract limits our liability-read it" must be printed at the top of the contract in capital letters of 10 point type or larger, and the remaining provisions of the contract must be legibly printed in eight-point type or larger [Civ. Code § 1630(a), (b)]. A copy of the contract, printed in large type in an area of at least 17 by 22 inches, must be posted in a conspicuous place at each entrance of the parking lot [Civ. Code § 1630]. The benefits of the contract may not be conditioned on a waiver of these statutory requirements, and acceptance of those benefits will not be construed as a waiver of the requirements [Civ. Code § 1630(c)]. City governments are authorized to enact ordinances that are more restrictive, but these minimum requirements must be met [Civ. Code § 1630].

The provisions of any contract of bailment for the parking or storage of a motor vehicle cannot exempt the bailee from liability, either in whole or in part, for the theft of a motor vehicle if the vehicle is parked or stored with the bailee and the bailee requires the keys to be left in the vehicle [Civ. Code § 1630.5]. The statute does not appear to specifically address such issues as theft of *parts* of a motor vehicle (such as stereo equipment, hubcaps, or batteries) or liability for theft of personal property contained in a vehicle, whether separately or in connection with a theft of the vehicle itself, but in practice contracts of this type universally attempt to exclude liability, at least for loss or damage to personal

property, as a matter of course.

This type of printed contract is commonly drafted to be as restrictive as possible to discourage claims by customers and limit the operator's liability to the minimum permitted by law. In addition to the provisions in this form, such contracts often include other restrictive provisions such as (1) a dollar limitation on damages, and (2) limitation on the time within which lawsuits may be filed. These do not appear in the attached form due to questions regarding their enforceability in this context under California law.

[2] FORM

Bailment Contract for Automobile Parking or Storage

THIS CONTRACT LIMITS OUR LIABILITY-READ IT

By accepting this ticket, Customer acknowledges having read and agreed to the following terms and conditions of bailment:

1. Customer has delivered and Company, whose name is printed below, accepts delivery of one motor vehicle, for the purpose of parking and/or storage, at the rates posted on the premises, until Customer demands the return of the vehicle.
2. Customer assumes no liability for damage of any kind, whether due to collision, fire, theft, or otherwise, except any damage directly attributable to the negligence of Company. Company's liability under this agreement will be limited to the fair retail used-car value of the vehicle as of the date of its delivery under this agreement. Customer agrees to inspect Customer's vehicle before leaving the lot. Any claim of damage to or loss of Customer's vehicle must be reported and itemized writing on Company's form before car is taken from lot. Should Company agree to make repairs to Customer's car at Company's expense, Company may elect, on Customer's demand for repairs, to have those repairs made at a facility of Company's choice.
3. Company assumes no liability for damage due to faulty mechanical condition of the vehicle or any negligence attributable to Customer, for loss of articles left in the vehicle, for damage to the vehicle due to articles left inside the vehicle, or for the loss of use of the vehicle.
4. Parking attendant has no authority to modify any of the above terms and conditions.

_____ *[printed name of company]*
 _____ *[address]*
 _____ *[telephone number]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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CHAPTER 102 BAILMENTS

PART IV. FORMS

A. Bailment Contracts

32-102 California Legal Forms--Transaction Guide §§ 102.202-102.209

[Reserved]

§§ 102.202[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 102 BAILMENTS

PART IV. FORMS

B. Statutory Notices

*32-102 California Legal Forms--Transaction Guide § 102.210***§ 102.210 Depositor's Declaration of Value of Deposited Property****[1] Comment--Use of Form**

This form is a declaration by a depositor of the value of deposited property. A depositary's liability for negligence will not exceed the amount that the depositor states, or the amount that the depositary has reason to believe, is the value of the property deposited [*Civ. Code § 1840*]. It is to the depositor's advantage to specify the value of the property at the time of the deposit, to assure that the depositary is aware of the extent of his or her liability.

[2] FORM**Depositor's Declaration of Value of Deposited Property**

DECLARATION OF VALUE

To _____ [*name of depositary*]:

I declare that, to the best of my knowledge and belief, the fair market value of the [*describe property deposited*] deposited with you on _____ [*date*] is \$_____.

Dated: _____

DEPOSITOR

_____ [*signature*][*typed name*]**Legal Topics:**

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 102 BAILMENTS

PART IV. FORMS

B. Statutory Notices

32-102 California Legal Forms--Transaction Guide § 102.211

§ 102.211 Receipt for Deposited Property With Statement of Noninsurance

[1] Comment

[a] Use of Form

This form is a receipt for personal property deposited by a customer for the purpose of repair or alteration [*see Civ. Code § 1858* (definitions)]. The notice may be used as a receipt for deposited property in other situations with minor alterations.

On receiving property from a customer for one of those purposes, a depositary must present the customer with a written receipt for the property. Moreover, unless the depositary protects the property to the amount of its actual cash value for loss or damage occasioned by theft, fire, or vandalism while the property remains with the depositary, the receipt must include a statement notifying the customer that the property is not protected in that manner [*Civ. Code § 1858.1*]. No statement is necessary if the depositary does protect the property by insurance, or by self-insurance, for loss or damage from theft, fire, or vandalism while in the depositary's possession [*Civ. Code § 1858.3*].

[b] Failure to Provide Receipt, Statement, or Both

A depositary who fails to furnish a receipt, or a statement if required, or who makes any misrepresentation in the receipt, is strictly liable to the customer for any loss occasioned by theft, fire, or vandalism while the property is in the possession of the depositary. In addition, the depositary forfeits any lien or other right to hold the property arising from services rendered in holding, repairing, altering, or selling the property [*Civ. Code § 1858.2*; *see Civ. Code §§ 1856* (lien for charges), 1857 (foreclosure by sale of deposited perishables); *see also § 102.16* (deposits for repair or alteration), Ch. 102A, *Personal Property Liens*].

An insurer is not liable for a loss caused by the willful act of the insured [*Ins. Code § 533*]. For this purpose, the failure of a depositary to furnish a receipt or statement as required under these rules is deemed to be a willful act [*Civ. Code § 1858.2*].

[2] FORM**Receipt for Deposited Property With Statement of Noninsurance****RECEIPT FOR PROPERTY**

Received from _____ [name of depositor] on _____ [date] at the address printed below, the following property: [list and/or describe property], to be [repaired or altered] as follows: [specify repair or alteration to be made].

[Add if appropriate:]

STATEMENT OF NONINSURANCE

THIS IS TO NOTIFY YOU that the property described above is not insured or protected to the amount of its actual cash value against loss from theft, fire, or vandalism while the property remains in [my or our] possession. The customer assumes full risk and responsibility for insuring the described property against any such loss.

_____ [name of depositary]

By _____ [signature]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 102 BAILMENTS

PART IV. FORMS

B. Statutory Notices

32-102 California Legal Forms--Transaction Guide § 102.212

§ 102.212 Notice of Nonliability for Valuables Not Deposited in Hotel Safe

[1] Comment

[a] Use of Form

This form is a notice that an innkeeper may post to avoid liability to guests for losses of valuable articles that the guests may keep on the premises. The notice informs guests that the innkeeper has a safe in which they may deposit their valuables and that the innkeeper is not responsible for valuables not placed in the safe. For purposes of this discussion, the term "innkeeper" includes innkeepers, hotel keepers, boardinghouse keepers, lodging house keepers, and operators of licensed hospitals, rest homes, and sanitariums; the term "guest" includes guests, patients, boarders, and lodgers [see *Civ. Code § 1860*].

[b] Limitation on Innkeeper's Liability for Loss of Guest's Property

The liability of an innkeeper (and of the keeper of a furnished apartment house or a furnished bungalow court) for losses of or injuries to the personal property of guests is that of a depositary for hire [*Civ. Code § 1859*; see *Civ. Code § 1852* (duty of ordinary care)]. However, in each case this liability is limited to an aggregate of \$1,000, and to a maximum of the following amounts for the specified items: \$500 for each trunk and its contents; \$250 for each valise or traveling bag and its contents; \$250 for each box, bundle, or package and its contents; and \$250 for all other personal property of any kind. These limitations on liability may be waived if the innkeeper has consented in writing, with the owner of the property, to assume greater liability [*Civ. Code § 1859*].

[c] Notice Requirement

If an innkeeper keeps a fireproof safe and gives guests the required notice, the innkeeper is not liable for any loss of or injury to money, jewelry, documents, furs, fur coats, fur garments, or other articles of unusual value and small size that are not deposited with the innkeeper to be placed in the safe, except to the extent that the innkeeper's own acts contribute to the loss or injury. The notice must inform guests of the existence of the safe, and of the fact that the innkeeper will not be liable for loss of or injury to the specified articles unless they are placed in the safe. The innkeeper

may give this notice in person, or may post a printed notice in a prominent place in the office or the room occupied by the guest [*Civ. Code § 1860*].

The liability of an innkeeper is limited in any case to the sum of \$500 for any or all property of this kind belonging to any individual guest, unless the innkeeper has given a receipt in writing to that guest for receipt of property in excess of that value [*Civ. Code § 1860*]. A check that does not disclose the value of the property received is not a receipt for this purpose [*Robert Altman, Inc., v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 279, 11 Cal. Rptr. 838*] . For a form that may be used as a receipt in this situation, refer to § 102.211[2].

[2] FORM

Notice of Nonliability for Valuables Not Deposited in Hotel Safe

NOTICE OF NONLIABILITY FOR VALUABLES

THIS IS TO NOTIFY YOU that a fireproof safe is kept on the premises for the storage of valuables. The management will not be liable for any damage to or loss of any money, jewelry, documents, furs, fur coats, fur garments, or other article of unusual value and small size belonging to any [*specify, e.g., guest or patient or border or lodger*], unless the article is deposited with the management for placement in the safe. In no event will the liability of the management exceed the sum of \$500 for any or all valuables of any individual [*specify, e.g., guest or patient or border or lodger*] without a written receipt for the property signed by an authorized representative of the management.

_____ [*name of establishment*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 102 BAILMENTS

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B. Statutory Notices

32-102 California Legal Forms--Transaction Guide § 102.213

§ 102.213 Notice of Loss of or Injury to Deposited Property

[1] Comment

[a] Use of Form

This form is a notice by a depositary to a depositor of loss of or injury to the depositor's property in the possession of the depositary.

[b] Depositary's Liability

A depositary is liable for any damage to deposited property that occurs during the depositary's wrongful use of that property, unless that damage was inevitable even without the wrongful use [*Civ. Code § 1836*]. If property is lost or injured during its deposit, the depositary must give the depositor notice of the circumstances under which the loss or injury occurred, to the extent that the depositary has information concerning those circumstances [*see Civ. Code § 1838*].

If the depositary refuses to inform the depositor of the circumstances of the loss or injury to the property, or willfully misrepresents those circumstances to the depositor, the depositary is presumed to have willfully, or by gross negligence, permitted the loss or injury to occur [*Civ. Code § 1838*]. If the depositary's acts are deemed to be willful, his or her insurance will not cover any liability resulting from those acts [*Ins. Code § 533*].

[2] FORM

Notice of Loss of or Injury to Deposited Property

[name of depositor]

[street address]

[city, state, zip code]

NOTICE OF LOSS OR DESTRUCTION OF PROPERTY

THIS IS TO NOTIFY YOU that the [*describe property*] that you deposited with us on _____ [*date of deposit*] was [*specify, e.g., lost or destroyed or damaged*] as a result of [*specify, e.g., a fire*] that occurred on _____ [*date*].

The circumstances of the [loss or damage] were as follows: [*describe circumstances, including cause, nature, and extent of loss or damage, and any other pertinent circumstances*].

Dated: _____

_____ [*name of depositary*]

By _____ [*signature*]

[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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B. Statutory Notices

*32-102 California Legal Forms--Transaction Guide § 102.214***§ 102.214 Notice of Adverse Proceedings Against Deposited Property****[1] Comment--Use of Form**

This form is a notice of proceedings taken adversely to the interests of a person for whose benefit property has been stored or deposited. The notice must be given promptly by the depositary to inform affected persons of any adverse proceedings that might tend to excuse the depositary from delivering the thing to him or her [*Civ. Code § 1825*]. The adverse proceedings may be attachment, garnishment, execution, or any other type of adverse claim that might defeat the depositor's claim to the property.

[2] FORM**Notice of Adverse Proceedings Against Deposited Property**

[name of depositor]

[street address]

[city, state, zip code]

NOTICE OF ADVERSE PROCEEDINGS

As required by *California Civil Code Section 1825*, we are notifying you that the [specify property] stored with us on _____ [date of deposit] under a contract dated _____ was [specify nature of adverse proceeding, e.g., attached or levied on] in action number _____ in the _____ Court for _____ County on _____ [date]. Unless you take the necessary steps to resolve this [specify, e.g., attachment or levy] proceeding, we will dispose of the property described above in accordance with law. Once we dispose of the property in this way, we will no longer have any duty to return the property to you as stated in our contract.

Dated: _____

_____ [*name of depositary*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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B. Statutory Notices

32-102 California Legal Forms--Transaction Guide § 102.215

§ 102.215 Notice to True Owner of Wrongfully Detained Property

[1] Comment

[a] Use of Form

This form is a notice by a depositary who believes that property placed in his or her care is being wrongfully detained from its true owner.

[b] Required Notification

If a depositary suspects that deposited property has been wrongfully detained, the depositary may notify the true owner and permit him or her to claim it within a reasonable time [*Civ. Code § 1826*]. The true owner must sufficiently establish his or her right to the property, and must indemnify the depositary against the claim of the depositor [*Civ. Code § 1826*]. If the person notified fails within a reasonable time to claim the property and indemnify the depositary, and the depositary either returns the property to the depositor or enters in good faith into a new agreement that changes his or her position with respect to the property to his or her prejudice, the depositary is exonerated from liability to the person to whom he or she gave the notice [*Civ. Code § 1826*].

[2] FORM

Notice to True Owner of Wrongfully Detained Property

[name of true owner]
 [street address]
 [city, state, zip code]

NOTICE OF WRONGFULLY DETAINED PROPERTY

THIS IS TO NOTIFY YOU that _____ [*name of depositor*] has deposited certain property with us that we believe to be owned by you. The property is described as follows: [*describe property*]. The property is currently stored at _____ [*address*].

If this property is yours, you may claim it by proving to our satisfaction that it is yours, and by indemnifying us against any claims that may arise from the delivery of the property to you. If you do not claim the property within [*specify reasonable time period, e.g., 30 days*], we will _____ [*specify action, e.g., return the property to the person named above who deposited it with us or dispose of the property in accordance with law*], and we will have no liability to you for having done so.

Dated: _____

_____ [*name of depositary*]

By _____ [*signature*]

[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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32-102 California Legal Forms--Transaction Guide § 102.216

§ 102.216 Notice of Sale of Perishable Property

[1] Comment

[a] Use of Form

This form is a notice of the sale of property that was in danger of perishing while in the possession of a depositary.

[b] Sale of Perishable Deposit for Salvage

When deposited property is in actual danger of perishing before instructions can be obtained from the depositor regarding its disposition, the depositary may sell it for the best price obtainable and retain the proceeds as a deposit for the benefit of the depositor [*Civ. Code § 1837*]. The depositary must give immediate notice of these proceedings to the depositor [*Civ. Code § 1837*].

[2] FORM

Notice of Sale of Perishable Property

_____ [*name of depositor*]
 _____ [*street address*]
 _____ [*city, state, zip code*]

NOTICE OF SALE OF STORED PERISHABLE PROPERTY

THIS IS TO NOTIFY YOU that the [*describe property*] that you deposited with us on _____ [*date*] was in immediate danger of perishing due to [*describe cause or circumstance giving rise to emergency*] before we could obtain instructions from you regarding its disposition. Therefore, we were forced to sell the property at the best price obtainable to prevent a further or total loss. The property was sold on _____ [*date*] for

\$_____. We are holding that sum as a deposit for your account. Please let us know what to do with these funds.

Dated: _____

_____ [*name of depositary*]

By _____ [*signature*]

[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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B. Statutory Notices

32-102 California Legal Forms--Transaction Guide § 102.217

§ 102.217 Notice by Gratuitous Depositary to Remove Property

[1] Comment

[a] Use of Form

This form is a notice to the owner of gratuitously deposited property to remove that property within a reasonable time from the possession of the depositary. The notice provides a means by which a gratuitous depositary may terminate his or her duties toward deposited property without having to deliver the property to its owner. Unless the deposit is involuntary as the result of an extraordinary emergency [*see Civ. Code § 1815(b)*] or the depositary is a public pound, a shelter operated by a society for the prevention of cruelty to animals, or a humane shelter [*see Civ. Code §§ 1815(c), 1847(b)*], the depositary may give this notice to the owner at any time [*see Civ. Code § 1847(b); [c], below*].

[b] Gratuitous Deposit Defined

A gratuitous deposit is a deposit for which the depositary receives no consideration beyond the mere possession of the thing deposited [*Civ. Code § 1844*]. The term includes involuntary deposits [*Civ. Code § 1845*]. However, an involuntary depositary of any live animal may accept advertised rewards or rewards freely given by the animal's owner [*Civ. Code § 1845*]. An involuntary deposit is made in the following ways [*Civ. Code § 1815*]:

- By the accidental leaving or placing of personal property in the possession of a person, without negligence on the part of the property's owner.
- In cases of fire, shipwreck, inundation, insurrection, riot, or like extraordinary emergencies, by the owner of personal property committing it, out of necessity, to the care of any person.
- By the delivery to, or pick up by, and the holding of, a stray live animal by any person or public or private entity.
- By leaving or abandoning [*see Penal Code § 597.1*] a live animal in or about any premises or real

property that have been vacated on, or immediately preceding, the termination of a lease or other rental agreement or foreclosure of the property.

[c] Duty of Care

A gratuitous depositary must use at least "slight" care for the preservation of the thing deposited [*Civ. Code § 1846(a)*; see *Civ. Code § 1846(b)* (gratuitous depositary of living animal); see also § 102.15]. The duties of a gratuitous depositary cease (1) on the restoration of the thing deposited to its owner [*Civ. Code § 1847(a)*] or (2) on the depositary giving reasonable notice to the owner to remove it and the owner's failing to do so within a reasonable time [*Civ. Code § 1847(b)*]. In the case of an involuntary deposit that is the result of an emergency, however, the depositary may not give this notice until the emergency that made the deposit necessary is past [*Civ. Code § 1847(b)*; see *Civ. Code § 1815(b)*]. Moreover, if the depositary is a public pound, a shelter operated by a society for the prevention of cruelty to animals, or a humane shelter, the duty to provide care, as required by *Civ. Code § 1846*, continues until a public pound or private shelter is lawfully relieved of its responsibility of care for a living animal [see *Civ. Code § 1847(b)*; see also *Civ. Code § 1846(c)* (compliance with all other requirements of Food and Agricultural Code regarding impounding of live animals is required)].

[2] FORM

Notice by Gratuitous Depositary to Remove Property

_____ [name of owner of property]
 _____ [street address]
 _____ [city, state, zip code]

NOTICE TO REMOVE PROPERTY

THIS IS TO NOTIFY YOU that I have property in my possession that I believe belongs to you. The property, [describe property], was deposited with me at _____ [address] on or about _____ [date of deposit], under the following circumstances: [describe].

Please arrange to remove this property on or before _____ [specify date giving reasonable time for removal]. If you do not remove the property by that date, it will remain on the premises entirely at your risk, and I will not be responsible for its preservation or care.

Dated: _____

_____ [name of depositary]
 By _____ [signature]
 [typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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B. Statutory Notices

*32-102 California Legal Forms--Transaction Guide § 102.218***§ 102.218 Notice of Termination of Storage****[1] Comment--Use of Form**

This form is a notice by which a depositary may terminate a deposit for hire, or "storage" [see *Civ. Code § 1851* ("storage" means a deposit that is not gratuitous)]. In the absence of an agreement concerning the length of time during which a deposit is to continue, it may be terminated by the depositor at any time, and by the depositary on reasonable notice [*Civ. Code § 1854*].

[2] FORM**Notice of Termination of Storage**

_____[name of depositor]
 _____[street address]
 _____[city, state, zip code]

NOTICE OF TERMINATION

THIS IS TO NOTIFY YOU that the storage of [describe property], made by you at our premises at _____[address] on _____[date of deposit], will end on _____[date]. Please make any necessary arrangements for removal of the property on or before that date. The property may be picked up between the hours of _____ and _____ on the payment of \$_____ due for storage charges.
 Dated: _____

_____[name of depositary]
 By _____[signature]
 [typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Property



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B. Statutory Notices

32-102 California Legal Forms--Transaction Guide §§ 102.219-102.229

[Reserved]

§§ 102.219[Reserved]



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C. Private Bulk Storage of Grain

32-102 California Legal Forms--Transaction Guide § 102.230

§ 102.230 Bill of Sale for Grain to Remain in Private Bulk Storage

[1] Comment

[a] Use of Form

This form is a bill of sale for a sale of grain that is to remain in private bulk storage. For a notice of sale to be posted on the issuance of this bill of sale, see § 102.231. For forms relating to the assignment of a bill of sale to a bank as security for a loan, see Ch. 43, *Commercial Loans*.

[b] Private Bulk Grain Storage Law

The Private Bulk Grain Storage Law [*see Civ. Code §§ 1880-1881.2*] governs the storage, after sale, of grains, including for example, barley, corn, flax, hay, grain, sorghums, oats, rice, rye, and wheat in storage facilities owned or operated by the seller [*see Civ. Code § 1880.1* (definitions)]. Grain that has been stored in private bulk storage facilities may be sold by bill of sale without delivery of the grain, provided that the requirements of this law are met. These sales are also not subject to the delivery requirements of *Civ. Code § 3440* or any other section requiring delivery or actual and continued change of possession of goods sold [*Civ. Code § 1880.3*]. The storage of grain in accordance with this law does not make the depositary a warehouse keeper or storer of goods for hire, and no storage facility under the law is deemed a warehouse or public place of storage [*Civ. Code § 1881.2*].

[c] Marking Storage Facilities

To qualify the sale and private bulk storage of grain under this law, the seller of the grain must conspicuously mark each storage facility with the words "private bulk storage only" and with a designating number. These markings must be maintained at all times during which grain remains in private bulk storage in the storage facility [*Civ. Code § 1880.2*]. Failure to comply with these marking requirements, or with the posting requirements of *Civ. Code § 1880.7* [*see § 102.231*], is punishable as a misdemeanor [*Civ. Code § 1881.1*].

[d] Contents of Bill of Sale

On the sale of grain that is to remain in private bulk storage, the seller must execute and deliver to the buyer a bill of sale that contains all of the following [*Civ. Code § 1880.4*]:

- The date and place where made.
- The names of the seller and the buyer.
- A statement of the estimated quantity and kind of grain.
- A statement of the location and designating numbers of the storage facilities in which the grain is stored.
- A statement of the price per unit and a statement of the amount received by the seller.

In addition to these required statements, the bill of sale may also contain other provisions, including any one or more of the following [*Civ. Code § 1880.5*]:

- Provisions that the total price is based upon the estimated weight and that the total price may be adjusted in accordance with the outturn weight.
- A statement that the buyer may have free use of the designated storage facilities until a specified date, and that any extension beyond the specified date granted by the seller must be endorsed under the signature of seller on the bill of sale.
- A statement that the seller has the legal right to extend to the buyer the use of the designated storage facilities.
- A statement that actual possession of the grain by the buyer is to be taken on board trucks at the storage facility, or on railroad cars, or in the storage facility, or as may be agreed on.
- A statement that if actual possession is not taken within the time specified, due to any cause not chargeable to the seller, the seller may consign the grain at the buyer's risk and expense to a specified designation.

[e] Passage of Title

The execution and delivery by a seller of a bill of sale for grain in private bulk storage passes the seller's title to the covered grain to the buyer. The buyer may convey title acquired in this manner to subsequent assignees by endorsing and delivering the bill of sale to them [*Civ. Code § 1880.6*].

Because the execution and delivery of the bill of sale alone is sufficient to pass title to the privately stored grain, no delivery of any portion of the grain may be made without presenting the bill of sale to the seller or other person in charge of the storage facility, with the amount of grain to be delivered plainly endorsed on the bill of sale [*Civ. Code § 1880.8*]. This requirement does not apply to any consignment of the grain by the seller to the buyer on the expiration of the time for delivery specified in the bill of sale [*Civ. Code § 1880.8*]. Furthermore, presentation of the bill of sale by the holder to the seller is presumptive evidence that the person presenting it is entitled to delivery of the described grain, unless the seller has knowledge of facts or circumstances sufficient to place the seller on notice that the possession of the instrument by that person is unlawful [*Civ. Code § 1880.9*].

[2] FORM**Bill of Sale for Grain to Remain in Private Bulk Storage****BILL OF SALE FOR GRAIN IN PRIVATE BULK STORAGE**

1. By this Bill of Sale, made on _____ [date], at _____ [city], County of _____, State of California, _____ [name of seller] ("Seller") sells to _____ [name of buyer] ("Buyer") all _____ [his or her or its] right, title, and interest in approximately _____ [estimated quantity, e.g., 500 bushels] of [type of grain] stored on the premises of the Seller at _____ [address of storage facilities] in bulk storage facilities number(s) [insert designating numbers of the storage facilities in which the grain is stored]. In consideration for this sale, Buyer agrees to pay to Seller the sum of \$ _____ per _____ [specify unit, e.g., bushel or pound], receipt of [\$ _____ of] which is acknowledged by Seller.

[Add the following optional provisions, as appropriate:]

2. The total consideration for the grain sold under this Bill of Sale is based on the estimated weight stated above and will be adjusted in accordance with the outturn weight when delivered to Buyer. Any difference will be paid by or refunded to Buyer at that time.

3. Buyer will have full and free use of the storage facilities designated above until _____ [date]. Any extension of the right to use those storage facilities beyond that date granted by the Seller must be endorsed under the signature of Seller on this Bill of Sale to be binding.

4. Seller warrants to Buyer that Seller has the legal right to extend to Buyer the use of the storage facilities designated above for the prescribed period, and that Seller has complied with the provisions of the Private Bulk Grain Storage Law with regard to the marking of those storage facilities.

5. Actual possession of the grain sold under this Bill of Sale is to be taken [specify manner, e.g., on board trucks at the storage facility or on railroad cars or as may be agreed on between the parties].

6. If Buyer does not take actual possession of the grain sold under this Bill of Sale within the time specified above, due to any cause not chargeable to Seller, the Seller may consign that grain at the Buyer's risk and expense to [specify destination].

[Continue with the following:]

Dated: _____

_____ [name of seller]

By: _____ [signature]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Bulk Sales (Article 6) General Overview Contracts Law Types of Contracts Bailments Contracts Law Types of Contracts Personal Property



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C. Private Bulk Storage of Grain

32-102 California Legal Forms--Transaction Guide § 102.231

§ 102.231 Notice of Sale of Grain in Private Bulk Storage

[1] Comment

[a] Use of Form

This form is a notice of sale that must be posted on grain storage facilities containing grain in private bulk storage for which a bill of sale has been issued by the seller [*see Civ. Code § 1880.7*].

For a bill of sale of grain in private bulk storage and further discussion of the requirements of the Private Bulk Grain Storage Law [*see Civ. Code §§ 1880-1881.2*], see § 102.230.

[b] Required Posting of Notice

The notice of sale must be posted immediately on the issuance of the bill of sale, and must be maintained in a conspicuous place on the storage facility at all times during which the grain continues to be stored there [*Civ. Code § 1880.7*].

[c] Required Form of Notice

The notice must be in substantially the form illustrated below [*Civ. Code § 1880.7*].

If any grain in private bulk storage is not removed or delivered on or before the original date of delivery specified in the bill of sale and in this notice of sale, the seller may continue to store the grain to the order of the buyer on whatever terms the parties may agree upon [*Civ. Code § 1881*]. If the parties extend the date by which the buyer is to remove the grain from the storage facility, that fact and the extended date must appear on the notice [*Civ. Code § 1880.7*].

[2] FORM

Notice of Sale of Grain in Private Bulk Storage

NOTICE OF SALE

On _____ [date], grain in the storage facility numbered _____, estimated to be _____ bushels of [*specify the kind of grain*] was transferred and sold as follows:

Name of Seller: _____

Address of Seller: _____

Name of Original Buyer: _____

Address of Buyer: _____

Grain must be removed by Buyer on or before _____ [date].

Date by which grain must be removed by Buyer has been extended to _____ [extended removal date].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Bulk Sales (Article 6) General Overview Contracts Law Types of Contracts Bailments Contracts Law Types of Contracts Personal Property



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102A PERSONAL PROPERTY LIENS

32-102A California Legal Forms--Transaction Guide 102A.syn

§ 102A.syn Synopsis to Chapter 102A: PERSONAL PROPERTY LIENS

§ 102A.01 California Sources

[1] Statutes

[2] California Attorney General Opinions

§ 102A.02 Federal Statutes

§§ 102A.03-102A.04 [Reserved]

§ 102A.05 Law Reviews and Periodicals

§ 102A.06 Annotations

§ 102A.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 102A.08-102A.09 [Reserved]

§ 102A.10 "Lien" Defined

§ 102A.11 Classification of Liens

[1] In General

[2] General Liens

[3] Special Liens

§ 102A.12 Creation and Effect of Liens

§ 102A.13 Redemption of Property Subject to Lien

§ 102A.14 Extinction of Liens

§ 102A.15 Lien Sales

§ 102A.16 Judicial Enforcement of Liens

§ 102A.17 Constitutionality of Lien Enforcement

§§ 102A.18-102A.99 [Reserved]

§ 102A.100 Facts

[1] Facts Regarding Lien Claimant

Scope

[2] Facts Regarding Person Whose Property Is Subject to Lien

Scope

[3] Facts Regarding Property Subject to Lien

Scope

[4] Facts Regarding Transaction Giving Rise to Lien Claim

Scope

§ 102A.101 Documents

Scope

§§ 102A.102-102A.109 [Reserved]

§ 102A.110 Validity of Lien Claim

Scope

§ 102A.111 Motor Vehicle Liens

Scope

§ 102A.112 Livestock Service Liens

Scope

§ 102A.113 Vessel Liens

Scope

§§ 102A.114-102A.119 [Reserved]

Scope

§ 102A.120 Lien Sale of Vehicle Valued at Over \$4,000

Scope

§ 102A.121 Lien Sale of Vehicle Valued at \$4,000 or Less

Scope

§ 102A.122 Disposition of Vehicle Valued at \$500 or Less and Impounded Under Public Authority

Scope

§§ 102A.123-102A.129 [Reserved]

§ 102A.130 Drafting Proposal to Retain Livestock

Scope

§ 102A.131 Proposing to Accept Livestock in Lieu of Payment

Scope

§§ 102A.132-102A.139 [Reserved]

§ 102A.140 Lien Sale of Vessel Valued at Over \$1,500

Scope

§ 102A.141 Lien Sale of Vessel Valued at \$1,500 or Less

Scope

§§ 102A.142-102A.149 [Reserved]

§ 102A.150 Lien Sale of Vehicle Valued Over \$4,000

Scope

§ 102A.151 Lien Sale of Vehicle Valued at \$4,000 or Less

Scope

§ 102A.152 Disposal of Vehicle Valued at \$500 or Less and Impounded Under Public Authority

Scope

§ 102A.153 Lien Sale of Vessel

Scope

§§ 102A.154-102A.199 [Reserved]

§ 102A.200 Notice to and Consent of Legal Owner for Services to or Storage of Motor Vehicle

[1] Comment

[a] Use of Form

[b] Vehicle Repair Lien

[i] Nature of Lien

[ii] Creation and Extinguishment of Vehicle Repair Liens

[iii] Attorneys' Fees

[iv] Limitations on Storage Charges

[c] Vehicle Towing and Storage Lien

[i] Creation and Extinguishment of Lien

[ii] Limitation on Storage Charges

[iii] Lien Sale Procedure for Vehicles Valued at \$4,000 or Less

[iv] Lien Sale Procedure for Vehicles Valued at More Than \$4,000

[2] FORM

Notice to and Consent of Legal Owner for Services to or Storage of Motor Vehicle

§ 102A.201 Report to Department of Justice by Garage Keeper That Vehicle Has Been Stored for 30 Days

[1] Comment

[a] Use of Form

[b] Notice Requirement

[2] FORM

Report to Department of Justice by Garage Keeper That Vehicle Has Been Stored for 30 Days

§ 102A.202 Release of Interest [DMV Form REG 658]

[1] Comment

[a] Use of Form

[b] Release of Interest

[2] FORM

Release of Interest [DMV Form REG 658]

§ 102A.203 Vehicle/Vessel Registration Information Request for Processing Lien Sales [DMV Form INF 1126]

[1] Comment--Use of Form

[2] FORM

Vehicle/Vessel Registration Information Request for Processing Lien Sales [DMV Form INF 1126]

§ 102A.204 Application for Original Registration [DMV Form REG 343]

[1] Comment--Use of Form

[2] FORM

Application for Original Registration [DMV Form REG 343]

§§ 102A.205-102A.219 [Reserved]

§ 102A.220 Application for Lien Sale Authorization and Lienholder's Certification [DMV Form REG 656]

[1] Comment

[a] Use of Form

[b] Lien Sale of Vehicle Valued at Over \$4,000

[i] In General

[ii] Contents of Application

[iii] DMV Processing

[iv] Declaration of Opposition

[v] Notice From Lienholder

[vi] Conduct of Lien Sale

[c] Disposition of Lien Sale Proceeds

[i] In General

[ii] Claims Against Proceeds by Parties Other Than Lienholder

[d] Redemption of Vehicle

[i] Before Sale

[ii] After Sale

[2] FORM

Application for Lien Sale Authorization and Lienholder's Certification [DMV Form REG 656]

§ 102A.221 Notice of Pending Lien Sale [DMV Form REG 280]

[1] Comment

[a] Use of Form

[b] Sending Notice of Pending Lien Sale

[2] FORM

Notice of Pending Lien Sale [DMV Form REG 280]

§ 102A.222 Certification of Lien Sale for Vehicle Valued Over \$4,000 or From Self-Storage Facility [DMV Form REG 168]

[1] Comment

[a] Use of Form

[b] Redemption Period

[2] FORM

Certification of Lien Sale for Vehicle Valued Over \$4,000 or From Self-Storage Facility [DMV Form REG 168]

§§ 102A.223-102A.229 [Reserved]

§ 102A.230 Lienholder's Certification and Notice of Pending Lien Sale [DMV Form REG 668]

[1] Comment

[a] Use of Form

[b] Lien Sales of Vehicles Valued at \$4,000 or Less

[i] In General

[ii] Required Contents of Notice of Pending Lien Sale

[iii] Declaration of Opposition

[iv] Notice From Lienholder

[v] Conduct of Lien Sale

[c] Disposition of Lien Sale Proceeds

[i] In General

[ii] Claims Against Proceeds by Parties Other Than Lienholder

[d] Recovery of Sale Costs on Redemption of Vehicle

[2] FORM

Lienholder's Certification and Notice of Pending Lien Sale [DMV Form REG 668]

§ 102A.231 Certification of Lien Sale for Vehicle Valued at \$4,000 or Less [DMV Form REG 168A]

[1] Comment--Use of Form

[2] FORM

Certification of Lien Sale for Vehicle Valued at \$4,000 or Less [DMV Form REG 168A]

§§ 102A.232-102A.239 [Reserved]

§ 102A.240 Notice of Intent to Dispose of Vehicle Valued at \$500 or Less [DMV Form REG 684]

[1] Comment

[a] Use of Form

[b] Liens on Vehicles Impounded by Public Agency

[i] Nature of Lien

[ii] Personal Property Within Vehicle

[iii] Assignment of Lien

[iv] Appropriate Lien Sale Procedure

[c] Disposal of Vehicle Valued at \$500 or Less

[i] Notice Requirements

[ii] Declaration of Opposition

[iii] Sale of Vehicle to Licensed Dismantler or Scrap Iron Processor

[d] Recovery of Costs

[2] FORM

Notice of Intent to Dispose of Vehicle Valued at \$300 or Less Removed by Public Agency for Reasons Other than Abandonment [DMV Form REG 684]

§ 102A.241 Statement of Facts Concerning Disposal of Vehicle Valued at \$500 or Less [DMV Form REG 686]

[1] Comment--Use of Form

[2] FORM

Statement of Facts Concerning Disposal of Vehicle Valued at \$300 or Less Removed By a Public Agency for Reasons Other than Abandonment [DMV Form REG 686]

§§ 102A.242-102A.249 [Reserved]

§ 102A.250 Assignment of Lien for Services on or Storage of a Motor Vehicle

[1] Comment

[a] Use of Form

[b] Assignments of Motor Vehicle Liens

[2] FORM

Assignment of Lien for Services on or Storage of a Motor Vehicle

§ 102A.251 Notice of Assignment of Lien for Services on or Storage of Vehicle

[1] Comment--Use of Form

[2] FORM

Notice of Assignment of Lien for Services on or Storage of Vehicle

§§ 102A.252-102A.259 [Reserved]

§ 102A.260 Verified Claim of Breeder's Lien

[1] Comment

[a] Use of Form

[b] Nature of Breeder's Lien

[c] Recording Breeder's Lien

[2] FORM

Verified Claim of Breeder's Lien

§ 102A.261 Notice to Secretary of State and Director of Food and Agriculture of Livestock Lien

[1] Comment

[a] Use of Form

[b] Liens on Livestock Sold or Delivered to Meatpackers

[i] In General

[ii] Required Contents of Notice of Lien

[iii] Filing Fee and Mailing of Notice

[2] FORM

Notice to Secretary of State and Director of Food and Agriculture of Livestock Lien

§ 102A.262 Livestock Service Lienholder's Proposal to Accept Livestock in Satisfaction of Claim

[1] Comment

[a] Use of Form

[b] Livestock Service Lien

[c] Creation and Effect of Lien

[d] Retention of Livestock

[e] Sale of Livestock

[f] Acceptance of Livestock in Lieu of Payment

[2] FORM

Livestock Service Lienholder's Proposal to Accept Livestock in Satisfaction of Claim

§ 102A.263 Notice to Interested Parties of Proposal to Retain Livestock

[1] Comment--Use of Form

[2] FORM

Notice to Interested Parties of Proposal to Retain Livestock

§ 102A.264 Release of Interest in Livestock Subject to Lien

[1] Comment

[a] Use of Form

[b] Release of Interest

[2] FORM

Release of Interest in Livestock Subject to Lien

§ 102A.265 Notice of Assignment of Livestock Service Lien

[1] Comment

[a] Use of Form

[b] Assignment of Livestock Service Lien

[2] FORM

Notice of Assignment of Livestock Service Lien

§ 102A.266 Notice of Claim of Dairy Cattle, Poultry, or Fish Supply Lien

[1] Comment

[a] Use of Form

[b] Contents of Notice of Claim of Lien

[c] Filing Procedures

[d] Priority of Lien

[e] Duration of Filing

[f] Assignment of Lien

[g] Enforcement of Lien

[h] Termination of Lien

[i] Public Access to Lien Information

[j] Application of Uniform Commercial Code

[2] FORM

Notice of Claim of Dairy Cattle, Poultry, or Fish Supply Lien

§ 102A.267 Notice of Agricultural Chemical or Seed Lien

[1] Comment

[a] Use of Form

[b] Attachment of Lien

[c] Contents of Notice to Lien Debtor

[2] FORM

Notice of Agricultural Chemical or Seed Lien

§ 102A.268 Notice of Claim of Agricultural Chemical or Seed Lien

[1] Comment

[a] Use of Form

[b] Contents of Notice of Claim of Lien

[c] Filing Procedures

[d] Priority of Lien

[e] Duration of Filing

[f] Assignment of Lien

[g] Enforcement of Lien

[h] Termination of Lien

[i] Public Access to Lien Information

[j] Application of Uniform Commercial Code

[2] FORM

Notice of Claim of Agricultural Chemical or Seed Lien

§ 102A.269 Notice of Harvester's Lien [Form DLSE-1]

[1] Comment

[a] Use of Form

[b] Limitations on Harvesters' Liens

[c] Effect of Owner's Bond for Payment of Wages

[d] Enforcement of Lien

[2] FORM

Notice of Harvester's Lien [Form DLSE-1]

§§ 102A.270-102A.279 [Reserved]

§ 102A.280 Statement of Facts for Vessel Lien Under Boater's Lien Law [DMV Form REG 256]

[1] Comment

[a] Use of Form

[b] Boater's Lien Law In General

[c] Creation of Lien

[d] Consent Requirement

[2] FORM

Statement of Facts for Vessel Lien Under Boater's Lien Law [DMV Form REG 256]

§ 102A.281 Request for Consent to Vessel Services or Storage in Excess of \$1,500

[1] Comment

[a] Use of Form

[b] Consent Requirement

[2] FORM

Request for Consent to Vessel Services or Storage in Excess of \$1,500

§ 102A.282 Release of Interest in Vessel by Registered and Legal Owners [DMV Form BOAT 153]

[1] Comment

[a] Use of Form

[b] Release of Interest

[2] FORM

Release of Interest in Vessel by Registered and Legal Owners [DMV Form BOAT 153]

§§ 102A.283-102A.289 [Reserved]

§ 102A.290 Application for Lien Sale Authorization and Lienholder's Certification [DMV Form BOAT 152]

[1] Comment

[a] Use of Form

[b] Lien Sales of Vessels Valued Over \$1,500

[i] In General

[ii] Contents of Application

[iii] DMV Processing

[iv] Declaration of Opposition

[v] Notice From Lienholder

[vi] Conduct of Lien Sale

[c] Disposition of Lien Sale Proceeds

[i] In General

[ii] Claims Against Proceeds by Parties Other Than Lienholder

[iii] Redemption of Vessel

[2] FORM

Application for Lien Sale Authorization and Lienholder's Certification [DMV Form BOAT 152]

§ 102A.291 DMV Notice of Application to Hold Lien Sale, With Declaration of Opposition Attached

[1] Comment

[a] Use of Form

[b] Notice of Lien Sale by DMV

[c] Submitting Declaration of Opposition

[2] FORM

DMV Notice of Application to Hold Lien Sale, With Declaration of Opposition Attached

§ 102A.292 Notice of Pending Lien Sale [DMV Form BOAT 166]

[1] Comment

[a] Use of Form

[b] Sending Notice of Pending Lien Sale

[2] FORM

Notice of Pending Lien Sale [DMV Form BOAT 166]

§ 102A.293 Certificate of Lien Sale for Vessel or Vessel with Trailers Valued Over \$1,500 [DMV Form BOAT 178]

[1] Comment--Use of Form

[2] FORM

Certificate of Lien Sale for Vessel or Vessel with Trailers Valued Over \$1,500 [DMV Form BOAT 178]

§§ 102A.294-102A.299 [Reserved]

§ 102A.300 Lienholder's Certification and Notice of Pending Lien Sale [DMV Form BOAT 156]

[1] Comment

[a] Use of Form

[b] Procedure for Lien Sales of Vessels Valued at \$1,500 or Less

[c] Required Contents of Notice of Pending Lien Sale

[d] Declaration of Opposition

[e] Conduct of Lien Sale

[2] FORM

Lienholder's Certification and Notice of Pending Lien Sale [DMV Form BOAT 156]

§ 102A.301 Declaration of Opposition [DMV Form BOAT 158]

[1] Comment

[a] Use of Form

[b] Submitting Declaration of Opposition

[2] FORM

Declaration of Opposition [DMV Form BOAT 158]

§§ 102A.302-102A.309 [Reserved]

§ 102A.310 Assignment of Lien for Services on or Storage of a Vessel

[1] Comment

[a] Use of Form

[b] Assignments of Vessel Liens

[2] FORM

Assignment of Lien for Services on or Storage of a Vessel

§ 102A.311 Notice of Assignment of Lien for Services on or Storage of Vessel

[1] Comment--Use of Form

[2] FORM

Notice of Assignment of Lien for Services on or Storage of Vessel

§§ 102A.312-102A.319 [Reserved]

§ 102A.320 Notice of Intention to Commence Work and to Claim Lien

[1] Comment

[a] Use of Form

[b] Persons Entitled to Lien

[c] Property Not Subject to Lien

[d] Enforcement by Sale

[2] FORM

Notice of Intention to Commence Work and to Claim Lien

§ 102A.321 Notice of Sale to Satisfy Lien

[1] Comment

[a] Use of Form

[b] Time and Manner of Notice

[c] Proceeds of Sale

[d] Right of Redemption

[e] Serviced Products of Nominal Value

[2] FORM

Notice of Sale to Satisfy Lien

§ 102A.322 Summary of Statutory Lien Sale Procedure for Charges Not Exceeding \$150, and Owner's Declaration

[1] Comment

[a] Use of Form

[b] When Procedure May Be Used

[c] Subsequent Notices to Property Owner

[d] Storage Fees

[e] Sale of Property

[f] Right of Redemption

[g] Proceeds of Sale

[h] Serviced Products of Nominal Value

[2] FORM

Summary of Statutory Lien Sale Procedure for Charges Not Exceeding \$150, and Owner's Declaration

§ 102A.323 Posted Summary of Statutory Lien Sale Procedure for Charges Not Exceeding \$150

[1] Comment

[a] Use of Form

[b] Notice Requirements

[2] FORM

Posted Summary of Statutory Lien sale Procedure for Charges Not Exceeding \$150

§ 102A.324 Notice of Service Dealer's Intent to Dispose of Serviced Product of Nominal Value

[1] Comment

[a] Use of Form

[b] "Owner" Defined

[c] "Nominal Value" Defined

[d] Manner of Notice

[2] FORM

Notice of Service Dealer's Intent to Dispose of Serviced Product of Nominal Value

§ 102A.325 Notice of Lien on Articles of Clothing or Household Goods

[1] Comment

[a] Use of Form

[b] Grounds for Sale

[c] Storage and Warehouses Excepted

[d] Manner of Notice

[e] Proceeds of Sale

[2] FORM

Notice of Lien on Articles of Clothing or Household Goods

§ 102A.326 Posted Notice of Lien on Garments, Clothing, Wearing Apparel, or Household Goods

[1] Comment--Use of Form

[2] FORM

Posted Notice of Lien on Garments, Clothing, Wearing Apparel, or Household Goods

§ 102A.327 Notice of Jeweler's Lien

[1] Comment

[a] Use of Form

[b] Notice Requirements

[c] Proceeds of Sale

[2] FORM

Notice of Jeweler's Lien

§§ 102A.328-102A.339 [Reserved]

§ 102A.340 Notice to Shipper of Carrier's Lien

[1] Comment--Use of Form

[2] FORM

Notice to Shipper of Carrier's Lien

§ 102A.341 Notice of Sale to Satisfy Carrier's Lien

[1] Comment

[a] Use of Form

[b] Lien Sale Notice Requirements

[c] Timing of Sale

[d] Perfected Security Interests and Minimum Bid

[e] Application of Proceeds

[f] Right of Redemption

[g] Shipper's Liability

[2] FORM

Notice of Sale to Satisfy Carrier's Lien

§ 102A.342 Preliminary Notice of Self-Service Storage Facility Lien

[1] Comment

[a] Use of Form

[b] Grounds for Lien

[c] Contents of Preliminary Notice

[d] Notice of Lien Sale

[e] Vehicle and Vessel Liens

[2] FORM

Preliminary Notice of Self-Service Storage Facility Lien

§ 102A.343 Notice of Self-Service Storage Facility Lien Sale and Declaration in Opposition to Lien Sale

[1] Comment

[a] Use of Form

[b] Attachment of Lien

[c] Contents of Notice of Lien Sale

[d] Declaration in Opposition to Lien Sale

[e] Advertisement of Lien Sale

[f] Security Interests

[g] Pre-Sale Redemption

[h] Manner of Lien Sale

[i] Rights of Good Faith Purchaser

[2] FORM

Notice of Self-Service Storage Facility Lien Sale and Declaration in Opposition to Lien Sale

§ 102A.344 Notice to Potentially Liable Party of Hospital Lien on Damages Recovered by Injured Person

[1] Comment

[a] Use of Form

[b] Nature of Hospital Lien

[c] Who Must Receive Notice

[d] Contents of Notice

[e] Liability for Payment of Lien Claim

[2] FORM

Notice to Potentially Liable Party of Hospital Lien on Damages Recovered by Injured Person

§ 102A.345 Notice to Customer by Bank or Savings and Loan Association of Exercise of Setoff Against Customer's Account

[1] Comment

[a] Use of Form

[b] Grounds for Lien

[c] Distinction Between Banker's Lien and Right of Setoff

[d] Limitations on Use of Setoff

[e] Notice Requirements

[2] FORM

Notice to Customer by Bank or Savings and Loan Association of Exercise of Setoff Against Customer's Account



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102A PERSONAL PROPERTY LIENS

32-102A California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers the substance, creation, and use of personal property liens, and includes specific discussion of the statutory provisions governing a variety of types of personal property liens. The Legal Background generally discusses the definition, classification, creation, and constitutionality of liens. The forms section includes forms covering liens for motor vehicles, vessels, and transactions involving livestock, agriculture, personal property, and service providers. Miscellaneous lien forms, including liens for carriers, jewelers, self-service storage facilities, hospitals, banks, and savings and loan associations are also provided.

The extensive statutory scheme governing mechanics' liens [*see Civ. Code § 3082 et seq.*] is discussed separately in Ch. 31, *Mechanics' Liens*. Ch. 31, *Mechanics' Liens*, also discusses liens of design professionals. For discussion of liens created in favor of a landlord on a tenant's abandonment of personal property for costs associated with storage, removal, or sale of such property, see Ch. 35B, *Modification and Termination of Leases*. Transactions in which a secured interest is created pursuant to Division 9 of the Commercial Code [*Com. Code § 9101 et seq.*] are covered in detail in Ch. 42, *Secured Transactions*. For discussion of agricultural liens--other than certain liens available for livestock breeders and servicers, suppliers of feed and materials for dairy cattle, and fish, and poultry, and suppliers of agricultural chemicals and seeds, which are discussed in this chapter--see Ch. 48, *Agricultural Financing*, and Ch. 49, *Agricultural Contracts*. For discussion and forms relating to transactions in which a lien in property is created in favor of a pawnbroker, personal property broker, or pledgor, see Ch. 102B, *Pawnbrokers, Personal Property Brokers, and Secondhand Goods Dealers*.



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32-102A California Legal Forms--Transaction Guide § 102A.01

§ 102A.01 California Sources

[1] Statutes

Statutory liens.

Aircraft repair liens. *Bus. & Prof. Code* §§ 9790-9798.4.

Self-service storage liens. *Bus. & Prof. Code* §§ 21702-21711.

Innkeepers' liens. *Civ. Code* § 1861.

Liens in general. *Civ. Code* §§ 2872-2914.

Hospital liens. *Civ. Code* §§ 1862.5, 3045.1-3045.6.

Land vendors' liens. *Civ. Code* §§ 3046-3048.

Artisan and service liens for labor, storage, repair, or protection. *Civ. Code* §§ 3051, 3051a, 3052, 3052b.

Carriers' liens. *Civ. Code* §§ 2144, 2191, 3051.5, 3051.6.

Jewelers' liens. *Civ. Code* § 3052a.

Service dealers' liens. *Civ. Code* § 3052.5.

Factors' liens. *Civ. Code* § 3053.

Bankers' liens. *Civ. Code* § 3054.

Mining liens. *Civ. Code* § 3060.

Threshers and harvesters' liens. *Civ. Code* §§ 3060-3061.6.

Breeders' liens. *Civ. Code* §§ 3062-3064.1.

Loggers' liens. *Civ. Code* §§ 3065, 3065a.

Cleaners and launderers' liens. *Civ. Code* § 3066.

Motor vehicle liens. *Civ. Code* §§ 3067-3074.

Livestock servicers' liens. *Civ. Code* §§ 3080-3080.22.

Mechanics' liens. *Civ. Code* §§ 3109-3154.

Abused Animals, Expenses for Keeping. *Code Civ. Proc.* § 1208.5.

Aircraft liens. *Code Civ. Proc.* §§ 1208.61-1208.70.

Warehousemen's lien. *Com. Code* §§ 7206, 7209, 7210, 7307, 7308.

Farm products liens. *Food & Agric. Code* §§ 55631-55653.

Poultry and fish supply liens. *Food & Agric. Code* §§ 57501-57545, 57700.
Agricultural chemical and seed liens. *Food & Agric. Code* §§ 57551-57595, 57700.
Livestock liens. *Food & Agric. Code* §§ 55701-55704.
Dairy cattle supply liens. *Food & Agric. Code* §§ 57401-57414.
Vessel liens. *Harb. & Nav. Code* §§ 500-509.
Removal of parked and abandoned vehicles. *Veh. Code* §§ 22651-22711.
Liens on stored vehicles. *Veh. Code* §§ 22851-22856.

[2] California Attorney General Opinions

Constitutionality of vessel lien sale procedures. 64 *Cal. Op. Att'y Gen.* 742 (1981) .

Relative priority of liens to secure payment for health services rendered to person injured by tortfeasor. 63 *Cal. Op. Att'y Gen.* 808 (1980) .

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawMaritime LiensGeneral OverviewReal Property LawNonmortgage LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.02

§ 102A.02 Federal Statutes

Maritime liens for provision of necessities. *46 U.S.C. §§ 31341-31343.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawMaritime LiensPriority & SourcesContractsMaritime Lien Act



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[Reserved]

§§ 102A.03[Reserved]



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32-102A California Legal Forms--Transaction Guide § 102A.05

§ 102A.05 Law Reviews and Periodicals

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King, *Avoiding Tax Liens on Personal Property in Bankruptcy: A Look at the Interplay Between the Bona Fide Purchaser Provisions of the Tax and Bankruptcy Codes*, 31 *Cal. W. L. Rev.* 1 (Fall 1994).

Meyer, 1990 Agricultural Law Assoc. Annual Conf. II, *Should the Unique Treatment of Agricultural Liens Continue?*, 24 *Ind. L. Rev.* 1315 (1991).

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Lambe, *Enforceability of Subordination Agreements*, 19 *Real Prop. Prob. & Tr. J.* 631 (1984).

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Comment, *California Garagemen's Liens--Impact and Aftermath of Adams v. Department of Motor Vehicles*, 6 *Pac. L.J.* 98 (1975).

Note, *Banker's Lien and Equitable Setoff: Constitutional and Policy Considerations for Protecting Bank Customers*, 27 *Stan. L. Rev.* 1149 (1975).

Note, *Lien, and the Alter Ego Doctrine*, 48 *S. Cal. L. Rev.* 56 (1974).

Note, *Spangler v. Memel: Deficiency Judgments and the Junior Lienor*, 24 *Hastings L.J.* 453 (1973).

Note, *Banking Setoff: A Study in Commercial Obsolescence*, 23 *Hastings L.J.* 1585 (1972).

Note, *A Bankruptcy Trustee's Avoiding Power, a Creditor's Attachment*

Kennedy, The Inchoate Lien in Bankruptcy: Some Reflections on Rialto Publishing Co. v. Bass, 17 *Stan. L. Rev.* 793 (1965).

Shanks, *The Tax Lien Tamed*, 8 *UCLA L. Rev.* 339 (1961).

Hogan, *The Innkeeper's Lien at Common Law*, 8 *Hastings L.J.* 33 (1956).

Anderson, *Federal Tax Liens--Their Nature and Priority*, 41 *Cal. L. Rev.* 214 (1953).

Note, *Admiralty: Supply Liens: Effect of Provision in Time Charter That Charterer Is to Provide and Pay for Supplies: Waiver*, 29 *Cal. L. Rev.* 59 (1940).

Comment, *What Constitutes a Ship or Vessel for Purposes of Satisfaction of the Claims of Maritime Tort and Contract Creditors*, 27 *Cal. L. Rev.* 572 (1939).

Note, *Admiralty --Personal Property-- Fixtures--Maritime Liens*, 12 *S. Cal. L. Rev.* 306 (1939).

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawMaritime LiensGeneral OverviewReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens



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§ 102A.06 Annotations

Annot., State or Municipal Towing, Impounding, or Destruction of Motor Vehicles Parked or Abandoned on Streets or Highways, 32 A.L.R. 4th 728 (1984) .

Annot., Private Person's Enforcement of Lien Through Self-Help as Act "Under Color of State Law" Within Meaning of 42 U.S.C.S. § 1983, 32 A.L.R. Fed. 431 (1977).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.07

§ 102A.07 Text References

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California Legal Forms (Matthew Bender).

Ch. 31, *Mechanics' Liens* .

Ch. 35B, *Modification and Termination of Leases*.

Ch. 42, *Secured Transactions* .

Ch. 48, *Agricultural Financing* .

Ch. 49, *Agricultural Contracts* .

Ch. 79, *Suretyship, Guaranty, and Indemnity* .

Ch. 54A *Storage of Goods* .

Ch. 102B, *Pawnbrokers, Personal Property Brokers, and Secondhand Goods Dealers*.

Ch. 102D, *Registration and Transfer of Vehicles, Vessels, and Aircraft*. California Forms of Pleading and Practice (Matthew Bender).

Ch. 24, *Animals: Liens* .

Ch. 342, *Liens and Wage Preferences* .

[2] Additional Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, § 81 et seq. (banker's lien and setoff); vol. 13, *Personal Property*, §§ 216-245 (10th ed. 2005).

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens



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[Reserved]

§§ 102A.08[Reserved]



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32-102A California Legal Forms--Transaction Guide § 102A.10

§ 102A.10 "Lien" Defined

A lien is a charge imposed, by means other than a transfer in trust, on specific property that is thereby made into security for the performance of an act [*Civ. Code § 2872; see Code Civ. Proc. § 1180* (parallel definition excluding exemption for "transfers in trust")]. In its broadest sense, a lien is a legal claim or charge on real or personal property as security for the payment of a debt or obligation. The term applies in every case in which real or personal property is charged with the payment of a debt [*Taylor v. S & M Lamp Co. (1961) 190 Cal. App. 2d 700, 711, 12 Cal. Rptr. 323*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawNonmortgage LiensGeneral Overview



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§ 102A.11 Classification of Liens

[1] In General

At common law, liens dependent on possession existed in favor of persons to whom a debt or obligation was owed [see *City of San Diego v. Higgins* (1896) 115 Cal. 170, 178, 46 P. 923]. California statutes have codified and expanded the common law liens and provide extensive protection for those persons [see, e.g., *Civ. Code § 3046 et seq.* (lines of sellers, bankers, seamen, carriers, artisans, miners, breeders, threshers, and lodgers)].

Liens are classified in a number of ways. They may be classified according to the type of obligation giving rise to the lien -- either general or special [see *Civ. Code § 2873*; [2], [3], *below*]. Liens may be further classified based on the source of the authority granting the lien -- contractual, statutory, or equitable [see Ch. 42, *Secured Transactions*]. Liens also are described as possessory or nonpossessory. Distinguishing among types of liens is significant if enforcement actions become necessary [See California Forms of Pleading and Practice, Ch. 342, *Liens and Wage Preferences* (Matthew Bender)].

[2] General Liens

Liens are either general or special [*Civ. Code § 2873*; see [2], *below* (special liens)]. A general lien is one that the lienholder is entitled to enforce as a security for the performance of all the obligations, or all of a particular class of obligations, that exist in his or her favor against the owner of the property [*Civ. Code § 2874*]. A general lien covers the indebtedness to the lienholder that has arisen from a series of transactions. General liens include the following:

- A vendor's lien on real property [see *Civ. Code §§ 3046-3048*; see also Ch. 25A, *Security Instruments for Real Estate Financing*].
- A laundry proprietor's lien [see *Civ. Code § 3051*; see also §§ 102A.320, 102A.321].
- A factor's lien [see *Civ. Code § 3053*].
- A banker's lien [see *Civ. Code § 3054*; see also § 102A.345].

- A livestock servicer's lien [*see Civ. Code § 3080.01; see also §§ 102A.261-102A.265*].

[3] Special Liens

A special lien is one that the lienholder can enforce only as security for the performance of a particular act or obligation, and for the performance of any obligations that are incidental to that act or obligation [*Civ. Code § 2875*]. A special lien arises from a single transaction between the lienholder and the property owner. Examples of special liens include a lien for services performed on personal property [*see Civ. Code § 3051; see also §§ 102A.320, 102A.321*], a jeweler's lien [*see Civ. Code § 3052a; see also § 102A.327*], and a purchaser's lien on real property [*see Civ. Code § 3050*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Bankers Liens & Rights of Setoff Bankers Liens Real Property Law Nonmortgage Liens Mechanics' Liens



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DIVISION VII: PERSONAL TRANSACTIONS
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32-102A California Legal Forms--Transaction Guide § 102A.12

§ 102A.12 Creation and Effect of Liens

A lien may be created by contract of the parties or by operation of law [*Civ. Code § 2881*]. Notwithstanding an agreement of the parties to the contrary, a lien or contract for a lien does not transfer title to the underlying property subject to the lien [*Civ. Code § 2888*]. The creation of a lien does not of itself imply that any person is bound to perform the act for which the lien is security [*Civ. Code § 2890*]. Furthermore, the existence of a lien on property does not of itself entitle the person in whose favor the lien exists to a lien on the same property for the performance of any other obligation than that which the lien originally secured [*Civ. Code § 2891*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawMaritime LiensGeneral OverviewBanking LawBankers Liens & Rights of SetoffBankers LiensReal Property LawNonmortgage LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.13

§ 102A.13 Redemption of Property Subject to Lien

Any person having an interest in property subject to a lien has the right to redeem the property from the lien at any time after the claim is due and before the right of redemption is foreclosed [*Civ. Code § 2903*]. Redemption is made by performing, or offering to perform, the act for which the lien is security and paying, or offering to pay, any damages to which the lienholder is entitled for delay [*Civ. Code § 2905*]. On redemption, the person redeeming becomes subrogated to all the benefits of the lien, as against all owners of other interests in the property, except insofar as the redeemer was required to make the redemption for their benefit [*Civ. Code § 2903*].

A person holding a lien inferior to another on the same property has the following rights: (1) to redeem the property from the superior lien in the same manner that the owner might, and (2) to be subrogated to all the benefits of the superior lien, when necessary for the protection of his or her interests, on satisfying the claim secured by the lien [*Civ. Code § 2904*].

Certain statutory liens provide specific procedures for redemption of property subject to those liens [*see, e.g., Civ. Code § 3071(k)* (motor vehicles); *Harb. & Nav. Code § 506.5* (vessels)]. For discussion of redemption of motor vehicles subject to liens, see § 102A.220. For discussion of redemption of vessels subject to liens, see § 102A.290.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.14

§ 102A.14 Extinction of Liens

Because a lien is considered accessory to the act for the performance of which it is a security, whether any person is bound for that performance or not, it is extinguishable in a manner similar to any other accessory obligation [*Civ. Code* § 2909]. If the property subject to the lien is sold in satisfaction of the underlying claim, or if the lienholder wrongfully converts the property, the lien terminates [*Civ. Code* § 2910]. A lien also is extinguished by the lapse of time within which an action can be brought on the principal obligation [*Civ. Code* § 2911(1); see *Code Civ. Proc.* §§ 312-366.3 (statutes of limitations)].

Unless otherwise agreed to by the parties, if the lienholder voluntarily returns property subject to a possessory lien to its owner, the lien is extinguished as to that property. Further, notwithstanding any agreement of the parties, the voluntary restoration of the property to the owner extinguishes the lien as to creditors of the owner and persons subsequently acquiring title to the property, or subsequent lienholders, in good faith and for value [*Civ. Code* § 2913].

The partial performance of an act secured by a lien does not extinguish the lien on any part of the property subject to the lien, even if it is divisible [*Civ. Code* § 2912].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawNonmortgage LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.15

§ 102A.15 Lien Sales

Subject to the requirements of constitutional due process [*see* § 102A.17], many possessory lienholders are entitled by statute to enforce liens, after satisfying notice requirements, by selling the property subject to the lien. If, for example, a lienholder under *Civ. Code* § 3072 (which pertains to liens on motor vehicles valued at \$4,000 or less) is not paid the amounts owed for his or her services, the lienholder may sell the vehicle after giving proper notice to the vehicle owner of the lien and his or her right to a hearing on the matter [*see Civ. Code* § 3072; *see also* § 102A.230]. This right of sale also applies to other liens, including livestock and vessels [*see, e.g.*, §§ 102A.262, 102A.290].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.16

§ 102A.16 Judicial Enforcement of Liens

Some liens can be enforced only by obtaining a final judgment in court after filing a civil suit. The statutes creating these liens make no provision for enforcement by merely retaining property, giving notice to the owner, and holding a lien sale. Examples of liens that can be enforced only by filing suit include the innkeeper's lien [*see Civ. Code § 1861*], the landlord's lien [*see Civ. Code § 1861a*], the factor's lien [*see Civ. Code § 3053*], the thresher's lien [*see Civ. Code § 3061*], and the logger and lumber-millman's lien [*see Civ. Code §§ 3065-3065c*]. In addition, due to the uncertainty surrounding aircraft liens because of the unconstitutionality of the involuntary sale provisions of the aircraft lien law [*Martin v. Heady (1980) 103 Cal. App. 3d 580, 582, 163 Cal. Rptr. 117 ; see Code Civ. Proc. §§ 1208.65-1208.68*], those liens should be enforced only by obtaining a final judgment. The enforcement of these liens is beyond the scope of this chapter. For discussion of the procedure for enforcing liens by civil action, See California Forms of Pleading and Practice, Ch. 318, *Judgments*, and Ch. 342, *Liens and Wage Preferences* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewReal Property
LawNonmortgage LiensJudgment Liens



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32-102A California Legal Forms--Transaction Guide § 102A.17

§ 102A.17 Constitutionality of Lien Enforcement

The constitutionality of summary prejudgment remedies, including lien sales, was cast into serious doubt as the result of several United States Supreme Court and California court decisions. For instance, the United States Supreme Court struck down a Wisconsin statute that allowed a creditor to institute garnishment proceedings having the effect of freezing the salary of the alleged debtor [*see Sniadach v. Family Finance Corp. (1969) 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349*]. The Court found that the statute provided the creditor with a means of depriving the debtor of the enjoyment of his earnings without any opportunity to be heard and to tender any defense that he might have, and therefore held that the statute constituted a taking of property without due process in violation of the *Fourteenth Amendment* [*Sniadach v. Family Finance Corp. (1969) 395 U.S. 337, 342, 89 S. Ct. 1820, 23 L. Ed. 2d 349*]. A subsequent United States Supreme Court case invalidated, on similar grounds, writs of replevin providing for prejudgment repossession of goods [*see Fuentes v. Shevin (1972) 407 U.S. 67, 83, 92 S. Ct. 1983, 32 L. Ed. 2d 556*].

California cases have also invalidated, on procedural due process grounds, statutes providing for wage garnishment [*see McCallop v. Carberry (1970) 1 Cal. 3d 903, 83 Cal. Rptr. 666, 464 P.2d 122*], claim and delivery [*see Blair v. Pitchess (1971) 5 Cal. 3d 258, 96 Cal. Rptr. 42, 486 P.2d 1242*], prejudgment attachment of checking accounts [*see Randone v. Appellate Dep't of Superior Court (1971) 5 Cal. 3d 536, 96 Cal. Rptr. 709, 488 P.2d 13*], involuntary lien sales of aircraft [*see Martin v. Heady (1980) 103 Cal. App. 3d 580, 163 Cal. Rptr. 117*], and motor vehicle lien sales [*see Adams v. Department of Motor Vehicles (1974) 11 Cal. 3d 146, 113 Cal. Rptr. 145, 520 P.2d 961*].

As a result of these and other decisions, California enacted more restrictive statutes concerning vessel liens [*see Harb. & Nav. Code §§ 500-509; see also § 102A.280-102A.311*], livestock service liens [*see Civ. Code §§ 3080-3080.22; see also § 102A.260-102A.265*], and motor vehicle liens [*see Civ. Code §§ 3067-3074; see also §§ 102A.200, 102A.241*]. By guaranteeing notice and hearing rights for the property owners, these statutory liens comply with the due process requirements imposed under federal and state decisions.

Statutory liens not complying with the due process requirements still exist [*see, e.g., Code Civ. Proc. §§ 1208.61-1208.70* (aircraft repair liens)]. To enforce these liens, the lienholder may not rely on the invalid statutory scheme, but rather must resort to common law remedies, such as first obtaining a court judgment [*Adams v. Department of Motor Vehicles (1974) 11 Cal. 3d 146, 153 n.13, 157, 113 Cal. Rptr. 145, 520 P.2d 961*; *see California*

Forms of Pleading and Practice, Ch. 318, *Judgments* , and Ch. 342, *Liens and Wage Preferences* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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32-102A California Legal Forms--Transaction Guide §§ 102A.18-102A.99

[Reserved]

§§ 102A.18[Reserved]



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A. Client Interview--Facts and Documents

32-102A California Legal Forms--Transaction Guide § 102A.100

§ 102A.100 Facts

[1] Facts Regarding Lien Claimant

1. Name and address of party claiming lien.
2. Legal status of lien claimant:
 - a. Individual.
 - b. Partnership.
 - c. Corporation.
 - d. Limited liability company.
 - e. Other entity (e.g., unincorporated association, trust).
3. Type of business, if any, lien claimant operates.
4. Name, address, and telephone number of counsel representing lien claimant, if any.

[2] Facts Regarding Person Whose Property Is Subject to Lien

1. Name and address of owner of property subject to lien:

- a. Legal owner.
 - b. Registered owner.
 - c. Other interested parties.
2. Legal status of owner or owners of property:
- a. Individual.
 - b. Husband and wife.
 - c. Partnership.
 - d. Corporation.
 - e. Limited liability company.
 - f. Other entity (e.g., unincorporated association, trust).
3. Name, address, and telephone number of counsel representing lien claimant, if any.

[3] Facts Regarding Property Subject to Lien

1. If property is vehicle:
- a. Year, make, and model.
 - b. Vehicle identification number.
 - c. Description.
 - d. Location.
 - e. Estimated value of vehicle.
 - f. License number of vehicle.
 - g. State of registration.
2. If property is livestock:
- a. Type of animal.
 - b. Brand or other identifying mark.
 - c. Weight and other descriptive characteristics, if available.

d. Location.

e. Estimated value of livestock.

3. If property is vessel:

a. Year, make, and model.

b. Hull identification number.

c. Description.

d. Location.

e. Estimated value of vessel.

f. State of registration.

4. If property is other personal property:

a. Description sufficient to identify, including the following if available:

(1) Type of property

(2) Year, make, and model.

(3) Serial number.

(4) License and/or registration number, if property is of a type required to be licensed and/or registered by any government entity.

b. Location.

c. Estimated value.

[4] Facts Regarding Transaction Giving Rise to Lien Claim

1. Place of performance.

2. Date of performance.

3. Party performing.

4. Type of service provided:

a. Repairs.

b. Storage.

- c. Care.
- d. Safekeeping.
- 5. Value of service provided.
- 6. Name of person requesting performance of service.
- 7. Date on which payment for services was due.
- 8. Amount paid on account, if any.
- 9. Whether transaction was performed pursuant to written agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.101

§ 102A.101 Documents

1. Instruments showing title to property subject to lien.
2. Written estimates regarding value of services before commencement.
3. Invoices showing value of services provided.
4. Written agreements evidencing transaction on which lien claim is based.

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-102A California Legal Forms--Transaction Guide §§ 102A.102-102A.109

[Reserved]

§§ 102A.102[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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32-102A California Legal Forms--Transaction Guide § 102A.110

§ 102A.110 Validity of Lien Claim

1. Determine whether party has either of following types of valid lien claims:

a. Statutory possessory lien, such as:

NOTE:

Valid possessory liens require that the lien claimant have possession of the property to which the lien will attach [*see, e.g., Harb. & Nav. Code § 502(a); see also § 102A.11[1]*].

(1) Vehicle lien for repairs, labor, materials, storage, rental of parking space [*see Civ. Code § 3068; see also § 102A.111*].

(2) Livestock service lien for grazing, feeding, boarding, general care, transportation, or other services [*see Civ. Code § 3080(c)* ("livestock service" defined); *see also § 102A.131*].

(3) Vessel lien for repairs, labor, supplies, materials, storage [*see Harb. & Nav. Code §§ 501(c), (d), 502(a); see also §§ 102A.140, 102A.141*].

(4) Other possessory lien:

(a) Innkeeper's lien on baggage or property of tenants or guests [*see Civ. Code § 1861*].

(b) Keeper of rental unit's lien on baggage or property of tenants or guests [*see Civ. Code § 1861a*].

(c) General personal property lien [*see Civ. Code § 3051; see also §§ 102A.320*]

-102A.323 (forms)].

(d) Carrier's lien [*see Civ. Code* § 3051.5; *see also* §§ 102A.340, 102A.341 (forms)].

(e) Jeweler's lien [*see Civ. Code* § 3052a; *see also* § 102A.327 (form)].

(f) Service dealer's lien on serviced product of nominal value [*see Civ. Code* § 3052.5; *see also* § 102A.324].

(g) Factor's lien [*see Civ. Code* § 3053].

(h) Banker or savings and loan association's lien [*see Civ. Code* § 3054; *see also* § 102A.345].

(i) Garment cleaner's lien [*see Civ. Code* § 3066; *see also* § 102A.325, 102A.326 (forms)].

(j) Lien for rental of self-service storage facility space [*see Bus. & Prof. Code* §§ 21700-21711; *see also* §§ 102A.342, 102A.343 (forms)].

b. Statutory nonpossessory lien:

(1) Hospital lien [*see Civ. Code* §§ 3045.1-3045.6; *see also* § 102A.344].

(2) Mining lien [*see Civ. Code* § 3060; *see also* Ch. 31, *Mechanics' Liens*].

(3) Thresher's lien [*see Civ. Code* § 3061].

(4) Harvester's lien [*see Civ. Code* §§ 3061.5, 3061.6; *see also* § 102A.269[2] (form)].

(5) Breeder's lien [*see Civ. Code* §§ 3062-3064.1].

(6) Logger and lumber-millman's lien [*see Civ. Code* §§ 3065-3065c].

(7) Lien for provision of livestock to a meatpacker [*see Food & Agric. Code* § 55702(a); *see also* § 102A.261].

(8) Dairy cattle supply lien [*see Food & Agric. Code* §§ 57401-57414; *see also* § 102A.266[2] (form)].

(9) Poultry or fish supply lien [*see Food & Agric. Code* §§ 57501-57545; § 102A.266].

(10) Agricultural chemical or agricultural seed lien [*see Food & Agric. Code* §§ 57551-57595; *see also* §§ 102A.267[2], 102A.268[2] (forms)].

2. If party requesting services is not legal owner, determine whether proper notice was given to legal owner of property for value of services exceeding the following statutory maximums:

NOTE:

If the value of the services performed on the property exceeds the statutory maximum and those services

were requested by someone other than the legal owner of the property, the owner must be notified, or in the case of vessels and vehicles, the owner's consent must be obtained, before the services begin. Failure to notify the owner and/or obtain the owner's consent invalidates a lien claim to the extent that it exceeds the statutory limit [*Civ. Code* §§ 3051a, 3068(c); *Harb. & Nav. Code* § 502(b)].

a. For general personal property liens [*see Civ. Code* § 3051a]:

(1) \$300, for work, services, or care; and

(2) \$200, for safekeeping.

b. For vehicles [*see Civ. Code* § 3068(c)(1); *see also* §§ 102A.111, 102A.200]:

(1) \$1500, for work or services, subject to limitations of *Veh. Code* § 10652.5 (when name and address of legal owner is known or ascertainable); and

(2) \$1025, for storage, safekeeping, or parking rentals.

(3) \$1250 for any storage or safekeeping, performed at the request of any person other than the legal owner or lessor, if the lienholder files an application for authorization to conduct a lien sale within 30 days of commencement of vehicle's storage or safekeeping [*see Veh. Code* § 3071 (application to conduct lien sale)].

NOTE:

These statutory maximums apply unless before beginning any work, services, storage, safekeeping, or rental of parking space, the lienholder gives written notice (by personal service or by registered letter) to the legal owner named in the registration certificate, and obtains the legal owner's consent before any work, services, storage, safekeeping, or rental of parking space are performed [*Civ. Code* § 3068(c)(1)].

c. \$1,500, for services to vessels [*see Harb. & Nav. Code* § 502(b); *see also* § 102A.281[2] (form)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawNonmortgage LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.111

§ 102A.111 Motor Vehicle Liens

1. Vehicle repair lien [*Civ. Code § 3068(a)*].

a. Determine whether following facts exist to support enforceable lien:

(1) Lien claimant is entitled to compensation for any of following:

(a) Making repairs or performing labor on vehicle and furnishing supplies or materials for vehicle.

(b) Storage, repair, or safekeeping of vehicle.

(c) Rental of parking space for vehicle.

(2) Vehicle is subject to registration requirements of Vehicle Code [*see Veh. Code § 4000 et seq.*].

(3) Lien claimant has maintained possession of vehicle.

NOTE:

On completion of the work or services, the lienholder may not dismantle, disengage, remove, or strip from the vehicle the parts used to complete the work or services [*Civ. Code § 3068(a)*].

The lien is dependent on possession [*Civ. Code § 3068(a)*]. If possession is lost through trick, fraud, or device, the repossession of the vehicle by the lienholder revives the lien. However, any lien revived by repossession is subordinate to any right, title, or interest of any person under any sale, transfer, encumbrance, lien, or other interest acquired or secured in good faith and for value between the time of the loss of possession and the time of repossession [*Civ. Code § 3070(a)*].

(4) Lien claimant has either:

NOTE:

The lien is deemed to arise on the presentation of the written statement of charges, or 15 days after work or services are completed, whichever occurs first [*Civ. Code* § 3068(a)].

(a) Presented written statement of charges for completed work or services to registered owner, or

(b) Completed work or services at least 15 days before lien is claimed.

b. Determine whether legal owner has consented to performance of work, services, storage, safekeeping, or rental of parking space, by either of following means:

(1) By requesting those services; or

(2) After receiving written notice from lienholder that services have been requested by someone other than legal owner or lessor, by giving written consent before services are performed.

NOTE:

If the services are requested by anyone other than the legal owner or lessor of the vehicle, the lienholder must give actual written notice of the services to be performed, by personal service or registered letter, to the legal owner named in the registration certificate, and must obtain the written consent of that legal owner before any services are performed. Otherwise, the lien is invalid to the extent that it exceeds \$1500, for work or services, subject to limitations of *Veh. Code* § 10652.5 (when name and address of legal owner is known or ascertainable), \$1025 for storage, safekeeping, or rental of parking space, or \$1250 for storage, safekeeping, or rental of parking space if an application to conduct a lien sale in accordance with *Civ. Code* § 3071 is made within 30 days after commencement of storage [*Civ. Code* § 3068(c)(1); *see* § 102A.120].

c. If lien arose because work or services were performed with consent of registered owner, determine whether:

(1) Lienholder received written demand from legal owner or lessor to inspect vehicle by personal service or certified mail (with return receipt requested) in accordance with *Civ. Code* § 3068(b)(3), and

(2) Lienholder has permitted inspection of vehicle, during lienholder's normal business hours, at least 24 hours and no later than 72 hours after receiving written demand.

NOTE:

The lien that arises because work or services have been performed on a vehicle with the consent of the registered owner is extinguished, and no lien sale may be conducted, if the lienholder, after written demand by the legal owner or the lessor to receive a written copy of the work order or invoice reflecting the services or repairs performed and the authorization to perform the services or repairs, fails to provide that copy to the legal owner or lessor, or his or her agent, within ten days [*see Civ. Code* § 3068(b)(4)]. See § 102A.120 for a discussion of other ways the lien may be extinguished, and for steps the lienholder may take to avoid its extinguishment.

d. If any portion of lien includes charges for care, storage, or safekeeping of, or for rental of parking space for, vehicle for period in excess of 60 days, determine whether lienholder has filed written storage report with DMV [*see Civ. Code* § 3068(c)(2)].

NOTE:

Subject to the limitation in *Veh. Code § 10652.5* (procedure when name of legal owner is known or can be ascertained), if any portion of the lien includes charges for the care, storage, or safekeeping of, or for the rental of parking space for, a vehicle for a period in excess of 60 days, the portion of the lien occurring after the expiration of this period is invalid unless a written storage report has been filed with the DMV [*Civ. Code § 3068(c)(2)*; *see Veh. Code §§ 10650, 10652*].

- e. If any portion of lien includes charges for care, storage, or safekeeping of vehicle, determine whether request has been made for release of vehicle [*see Civ. Code § 3068(c)(3)*].

NOTE:

If a request is made for the release of a vehicle within 24 hours after it is placed in storage, the charge for the care, storage, or safekeeping of the vehicle may not exceed that for one day of storage. If the request is made more than 24 hours after the vehicle is placed in storage, charges may be imposed on a full, calendar day basis for each full or partial day that the vehicle is in storage [*Civ. Code § 3068(c)(3)*].

2. Vehicle towing and storage lien [*Civ. Code § 3068.1(a)*; *Veh. Code § 22851*].

a. Determine whether following facts exist to support enforceable lien:

(1) Lien claimant has towed or stored vehicle authorized to be removed by any of the following:

(a) Public agency;

(b) Private property owner in accordance with *Veh. Code § 22658*; or

(c) Lessee, operator, or registered owner of vehicle.

(2) Vehicle is subject to registration requirements of Vehicle Code [*see Veh. Code § 4000 et seq.*].

(3) Lien claimant has maintained possession of vehicle.

NOTE:

The lien is dependent on possession, and is deemed to arise on the date of possession of the vehicle. Possession is deemed to arise when the vehicle is removed and is in transit [*Civ. Code § 3068.1(a)*; *Veh. Code § 22851*]. If possession is lost through trick, fraud, or device, the repossession of the vehicle by the lienholder revives the lien. However, any lien revived by repossession is subordinate to any right, title, or interest of any person under any sale, transfer, encumbrance, lien, or other interest acquired or secured in good faith and for value between the time of the loss of possession and the time of repossession [*Civ. Code § 3070(a)*].

b. Determine whether request has been made for release of vehicle.

NOTE:

If a request is made for the release of a vehicle within 24 hours after it is placed in storage, the charge for the care, storage, or safekeeping of the vehicle may not exceed that for one day of storage. If the request is made more than 24 hours after the vehicle is placed in storage, charges may be imposed on a full, calendar day basis for each full or partial day that the vehicle is in storage [*Civ. Code § 3068.1(a)*].

c. Determine whether:

(1) Lienholder received written demand from legal owner or lessor to inspect vehicle by personal service or certified mail (with return receipt requested) pursuant to *Civ. Code § 3068.1(d)(1)*, and

(2) Lienholder has permitted inspection of vehicle by legal owner or lessor, or his or her agent, during lienholder's normal business hours, at least 24 hours and no later than 72 hours after receiving written demand.

NOTE:

The lien is extinguished, and no lien sale may be conducted, if the lienholder does not permit the inspection in a timely manner [*Civ. Code § 3068.1(d)(1)*]. See § 102A.120 for other ways the lien may be extinguished, and for steps the lienholder may take to avoid its extinguishment.

d. Determine whether legal owner or lessor has complied with inspection and vehicle release policies of impounding public agency [*see Civ. Code § 3068.1(d)(1)*].

e. Determine whether amount claimed for storage exceeds posted rates.

NOTE:

The lien is extinguished, and no lien sale may be conducted, if posted rates are exceeded [*Civ. Code § 3068.1(d)(2)*]. See § 102A.120 for other ways the lien may be extinguished, and for steps the lienholder may take to avoid its extinguishment.

3. Determine fair market value of vehicle.

NOTE:

Separate lien sale procedures apply to vehicles having an estimated value of \$4,000 or less [*see Civ. Code § 3071; see also § 102A.120*], and those having an estimated value exceeding \$4,000 [*see Civ. Code § 3072; see also § 102A.121*]. A special procedure is required for the disposal of vehicles valued at \$500 or less by a public agency authorizing the towing or storage or both of such vehicles [*see Veh. Code §§ 22851.8, 22851.10; see also Veh. Code § 22670 (determination of vehicle value); § 102A.122*].

4. If lienholder is tow truck operator, determine whether lienholder is likely to have deficiency claim against [*Civ. Code § 3068.2*]:

NOTE:

A tow truck operator is entitled to a deficiency judgment in an amount equal to the towing and storage charges for up to 120 days of storage, plus the lien sale processing fee in accordance with *Civ. Code § 3074*, less the amount received from the sale of the vehicle [*Civ. Code § 3068.2(a), (b); see Civ. Code § 3068.2(d), (e)* (liability when registered owner has transferred vehicle before its removal)]. Storage charges incurred after the sale are not included in calculating the amount received from the sale [*Civ. Code § 3068.2(c)*].

a. Registered owner (if vehicle is not leased, or is leased with a driver); or

b. Lessee (if vehicle is leased without a driver).

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawNonmortgage LiensGeneral OverviewTransportation LawPrivate VehiclesGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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32-102A California Legal Forms--Transaction Guide § 102A.112

§ 102A.112 Livestock Service Liens

1. Determine whether following facts required for valid lien exist:

a. Livestock is one of following subject to Livestock Service Lien Law [*Civ. Code § 3080(a)*; *see Civ. Code §§ 3080-3080.22* (Livestock Service Lien Law)]:

- (1) Cattle.
- (2) Sheep.
- (3) Swine.
- (4) Goats.
- (5) Horses.
- (6) Mules.
- (7) Other equine.

b. Prospective lienholder has provided any of following to livestock:

- (1) Grazing.
- (2) Feeding.
- (3) Boarding.

(4) General care.

(5) Transportation.

(6) Other services.

c. Prospective lienholder has maintained possession of livestock [*see Civ. Code § 3080.01*].

d. Prospective lienholder has not been paid for service rendered in connection with livestock.

2. Determine amount of lien.

3. Determine value of livestock.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawNonmortgage LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.113

§ 102A.113 Vessel Liens

1. Determine whether following facts required for valid lien sale exist [*Harb. & Nav. Code* §§ 501, 502]:

a. Vessel is subject to registration requirements of Vehicle Code [*see Veh. Code* §§ 9850-9880].

b. Prospective lienholder has done any of following to vessel:

- (1) Made repairs.
- (2) Performed labor.
- (3) Furnished supplies or materials.
- (4) Provided storage.
- (5) Provided slip space in a marina.

NOTE:

Boats that are left in a leased boat slip in a marina after the lessor has obtained an unlawful detainer judgment against the lessee of the slip must be disposed of under the Boaters Lien Law [*Harb. & Nav. Code* §§ 500-509] since that law provides the exclusive means of enforcing possessory vessel liens [*Mariners Bay Co. v. Department of Motor Vehicles* (1991) 229 Cal. App. 3d 808, 815, 280 Cal. Rptr. 292] .

c. Prospective lienholder has maintained possession of vessel.

d. Prospective lienholder has not been paid for service rendered in connection with vessel.

2. Determine amount of lien [see *Harb. & Nav. Code* § 502(b)].

NOTE:

If the work was requested by anyone other than the legal owner of the vessel, the portion of the lien in excess of \$1,500 for services or storage is not enforceable without the legal owner's prior written consent to the work [*Harb. & Nav. Code* § 502(b)]. However, if the owner does not respond to a valid request for consent, his or her consent will be presumed after a 15-day period for charges related to storage of the vessel, or a 30-day period otherwise [*Harb. & Nav. Code* § 502(d)]. For further discussion of the owner's consent and the value of the lien, see § 102A.281.

3. Determine fair market value of vessel.

NOTE:

Before any lien sale of the vessel, the lien claimant must obtain and submit a declaration containing a licensed yacht and ship broker's opinion of the fair market value of the vessel [*see Harb. & Nav. Code* § 507].

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty Law
Maritime Liens
General Overview



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32-102A California Legal Forms--Transaction Guide §§ 102A.114-102A.119

[Reserved]

§§ 102A.114[Reserved]



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NOTE:

Failure to comply with the applicable requirements of the following procedures voids the lien sale [*Civ. Code* §§ 3071 (**I**), 3072(j)]. These procedures are not applicable if the vehicle is a mobilehome [**see** *Health & Safety Code* § 18008 (definition)], a manufactured home [**see** *Health & Safety Code* § 18007 (definition)], or a commercial modular (commercial coach) [*Civ. Code* § 3067.2; **see** *Health & Safety Code* § 18001.8 (definition)].



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32-102A California Legal Forms--Transaction Guide § 102A.120

§ 102A.120 Lien Sale of Vehicle Valued at Over \$4,000

1. If lien involves fees or charges for parking and storage, advise lienholder to notify legal owner by certified mail, return receipt requested, of intent to enforce lien [*see Civ. Code § 3071 (l)*].

NOTE:

Any lien for fees or storage charges for parking and storage of a motor vehicle is subject to the requirements of *Veh. Code § 10652.5* [*Civ. Code § 3071 (l)*]. Under that section, no fee or service charge may be imposed for parking and storage of the vehicle for the period beginning with the 16th day of possession and continuing until three days after written notice by certified mail, return receipt requested, is sent to the legal owner by the lienholder, provided that the name and address of the legal owner is known or may be ascertained from Department of Motor Vehicles records [*Veh. Code § 10652.5(a)*].

2. Have lienholder obtain and complete application for lien sale authorization [*Civ. Code § 3071(a)*].

NOTE:

If a vehicle repair and storage lien arises under *Civ. Code § 3068* because work or services have been performed on vehicle with consent of registered owner, the lien will be extinguished, and no lien sale may be conducted, unless one of the following occurs within 30 days after lien arises: (1) the lienholder applies to the DMV for authorization to conduct a lien sale, or (2) an action is filed in court [*Civ. Code § 3068(b)(1)*]. This kind of lien is deemed to arise at the time a written statement of charges for completed work or services is presented to the registered owner, or 15 days after the work or services are completed, whichever occurs first [*Civ. Code § 3068(a)*]. On completion of the work or services, the lienholder may not dismantle, disengage, remove, or strip from the vehicle the parts used to complete the work or services [*Civ. Code § 3068(a)*].

A towing and storage lien arising under *Civ. Code* § 3068.1 may be for a period not exceeding 120 days if an application for an authorization to conduct a lien sale has been filed pursuant to *Civ. Code* § 3071 [*Civ. Code* § 3068.1(c)]. The application must be made on a prescribed form obtainable from the DMV [*see* § 201A.220]. If the lien includes repairs, the Bureau of Automotive Repair number is required [*see Bus. & Prof. Code* § 9884.16 (registration as prerequisite for lien or suit)].

3. Mail application with required nonrefundable fee to: Department of Motor Vehicles, Lien Sale Section, P.O. Box 932317, Sacramento, California 94232-3170.

NOTE:

On receipt of the application, the DMV will notify the vehicle registry agency in any other state in which the vehicle is registered of the pending lien sale [*see Civ. Code* § 3071(b)(1)]. The DMV will also send a Warning Notice of Lien Sale, a copy of the application for lien sale authorization, and a return envelope preaddressed to the DMV, to the registered and the legal owners at their addresses of record, and to any other persons whose names and addresses are listed on the application [*see Civ. Code* § 3071(b)(2)]. This notice must inform the interested persons that an application has been filed to conduct a lien sale and that they have a right to a hearing in court [*see Civ. Code* § 3071(c)(1), (2)]. The notice also must state that if a hearing is desired, the interested person must file a Declaration of Opposition form with the DMV, signed under penalty of perjury, within 10 days of the date DMV mailed its notice [*Civ. Code* § 3071(c)(3)]. The notice sent by DMV must also inform its recipients that if the Declaration of Opposition form is signed and returned to DMV, the lienholder will be allowed to sell the vehicle only if he or she obtains a court judgment (or is unable to effect service under required procedures [*see Civ. Code* § 3071(e)]), or if he or she obtains a subsequent release from the declarant [*Civ. Code* § 3071(c)(4)]. Other matters relating to the interested party's right to contest any lawsuit that is filed and potential liability for court costs must also be included in the DMV notice [*see Civ. Code* § 3071(c)(5), (6)].

If the DMV receives a Declaration of Opposition form in the time provided, the DMV must notify the lienholder within 16 days of receiving that form, that a lien sale will not be conducted unless the lienholder files an action in court within 30 days of the DMV notice to the lienholder. A lien sale of the vehicle may not be conducted unless a judgment is subsequently entered in favor of the lienholder or the declarant subsequently releases his or her interest in the vehicle. If a money judgment is entered in favor of the lienholder and the judgment is not paid within five days after becoming final, then the judgment may be enforced by a lien sale [*Civ. Code* § 3071(d)].

If the lienholder is unable to serve the declarant under the Declaration of Opposition form (or his or her authorized agent) after following required procedures for service [*see Civ. Code* § 3071(e)], the lienholder may proceed with the judicial proceeding or proceed with the lien sale without a judicial proceeding. However, the lienholder must first notify the DMV of the inability to effect service and provide documents that support the attempted service. On receipt of these items, the DMV will send authorization of the sale to the lienholder and send notification of the authorization to the declarant [*Civ. Code* § 3071(e)].

4. On receipt of authorization to conduct lien sale, have lienholder give notice of sale as follows [*Civ.*

Code § 3071(f):

a. Advertise once in newspaper of general circulation published in county at least five days, but not more than 20 days, prior to sale, not counting day of sale itself.

NOTE:

If there is no newspaper of general circulation in the county, notice must be posted in three of the most public places in the town in which the vehicle is located and at the location of the sale. The notice must be posted for 10 consecutive days prior to and including the day of sale [*Civ. Code § 3071(f)(1)*].

b. Send Notice of Pending Lien Sale [*see § 102A.221*] to each of following [*Civ. Code § 3071(f)(2)*]:

NOTE:

The notice must be sent by certified mail with return receipt requested 20 days prior to the sale, not including the day of sale [*Civ. Code § 3071(f)(2)*].

(1) Registered and legal owners of vehicle, if registered in California.

(2) All persons known to have an interest in vehicle.

(3) DMV.

5. Advise lienholder to make vehicle available for inspection at location easily accessible to public at least one hour before sale and have vehicle at place of sale at time and date specified on notice of sale [*Civ. Code § 3071(j)*].

NOTE:

The lienholder is entitled to recover actual costs, not exceeding \$100 for a vehicle valued at over \$4,000, incurred in preparation for the sale if the vehicle is redeemed prior to the sale. The lienholder may not recover these charges if the vehicle is redeemed before the third day of possession [*Civ. Code § 3074*].

6. Advise lienholder to conduct sale in commercially reasonable manner [*Civ. Code § 3071(j)*].

NOTE:

Sealed bids must not be accepted [*Civ. Code § 3071(j)*].

7. After sale, advise person who conducted sale to do both of following [*Civ. Code § 3071(h)*]:

a. Remove and destroy vehicle's license plates.

b. Submit completed "Notice of Release of Liability" form to Department of Motor Vehicles within five days of sale.

NOTE:

The Department of Motor Vehicle will retain all submitted "Notice of Release of Liability" forms for two years [*Civ. Code § 3071(i)*].

8. Following redemption period, have lienholder deliver all completed lien sale documents to buyer [*Civ. Code § 3071(k)*; *see § 102A.150*].

NOTE:

Within 10 days after the lien sale of a vehicle, the legal or registered owner may redeem the vehicle on payment of the amount of the sale, and all costs and expenses of the sale, together with 12 percent annual interest. If the vehicle is not redeemed, all lien sale documents required by the DMV must be completed and delivered to the buyer [*Civ. Code* § 3071(k)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawNonmortgage LiensGeneral OverviewTransportation LawPrivate VehiclesGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.121

§ 102A.121 Lien Sale of Vehicle Valued at \$4,000 or Less

NOTE:

The procedures outlined below apply to vehicles that have a value of \$4,000 or less [*see Civ. Code* §§ 3068.1(b), 3072(a); *see also Veh. Code* § 22670 (determination of value)]. In the case of liens for towing and storage arising pursuant to *Civ. Code* § 3068.1, this procedure must be commenced within 15 days of the date the lien arises; otherwise, no storage accrues beyond that time [*Civ. Code* § 3068.1(b); *see Civ. Code* § 3068.1(a) (lien arises on possession)]. If a completed notice of pending lien sale form [*see* P 2a, *below*] has been filed within the 15-day period, the storage lien may be for a period no longer than 60 days. The storage lien may be for a period not exceeding 120 days if (1) a Declaration of Opposition is filed pursuant to *Civ. Code* § 3072; (2) the vehicle has an out-of-state registration; (3) the vehicle identification number was altered or removed; or (4) a person who has an interest in the vehicle becomes known to the lienholder after the lienholder has complied with *Civ. Code* § 3072(b) [*Civ. Code* § 3068.1(b)].

1. Have lienholder apply to DMV for names and addresses of all registered and legal owners of record of vehicle to be sold [*Civ. Code* § 3072(a)].

NOTE:

The request must include a description of the vehicle, including make, year, model, identification number, license number, and state of registration. If the vehicle identification number is not available, the DMV must request an inspection of the vehicle by a peace officer, licensed vehicle verifier, or departmental employee before releasing the names and addresses of the registered and legal owners and interested parties [*Civ. Code* § 3072(a)]. For a possessory lien for towing or storage of a vehicle, the removal of which was authorized by a public agency, a private property owner pursuant to *Veh. Code*

§ 22658, or a lessee, operator, or registered owner of the vehicle, lien sale proceedings must commence within 15 days after the date the lien arises or else storage charges may not accrue beyond the 15-day period [*see Civ. Code § 3068.1(a), (b)*].

2. Immediately on receipt of names and addresses of registered and legal owners, have lienholder send following to those owners, and to any other person known to have an interest in vehicle [*Civ. Code § 3072(b)*]:

NOTE:

The following forms and enclosures must be sent by certified mail, return receipt requested, or by United States Postal Service Certificate of Mailing [*Civ. Code § 3072(b)*]. They must be sent not less than 31 days nor more than 41 days from the date of sale stated in the Lienholder's Certification and Notice of Pending Lien Sale [*see Civ. Code § 3072(c)(2); see also § 102A.230*]. All notices must be signed under penalty of perjury and must include information and statements required by statute [*see Civ. Code § 3072(c)*].

Any lien for fees or storage charges for parking and storage of a motor vehicle is subject to the requirements of *Veh. Code § 10652.5* [*Civ. Code § 3072(j)*]. Under that section, no fee or service charge may be imposed for parking and storage of the vehicle for the period commencing with the 16th day of possession and continuing until three days after written notice by certified mail, return receipt requested, is sent to the legal owner by the lienholder, provided that the name and address of the legal owner is known or may be ascertained from Department of Motor Vehicles records [*Veh. Code § 10652.5(a)*].

a. Lienholder's Certification and Notice of Pending Lien Sale [*see § 102A.230* (form)].

NOTE:

This form must be fully completed, including (on the reverse side) the names and addresses of the recipients. If the lien includes an amount for repairs, the Bureau of Automotive Repair business license number is also required [*see Bus. & Prof. Code § 9884.16* (registration as prerequisite for lien or suit)].

b. Certification of Lien [*see § 102A.231* (form)].

NOTE:

Although this form is not required by *Civ. Code § 3072*, the DMV requires its submission with the forms required under that section.

c. Declaration of Opposition (blank form) [*see § 102A.230*].

d. Return envelope preaddressed to: Department of Motor Vehicles, Lien Sale Section, P.O. Box 932317, Sacramento, California 94232-3170.

NOTE:

If the DMV receives a Declaration of Opposition form that is postmarked within 10 days after the date the Certification and Notice of Pending Lien Sale is mailed by the lienholder [*see Civ. Code § 3072(c)(4)(C)*], it must, within 16 days of the receipt of the Declaration, mail the lienholder a notification that the sale may not be conducted unless the lienholder obtains a court judgment in his or her favor on the claim giving rise to the lien, or the

declarant whose name appears on the Declaration has signed a release of interest in the vehicle [*Civ. Code § 3072(d)*; **see** *Civ. Code § 3071.5* (release)]. The action in which a judgment is to be obtained must be filed within 30 days of notification by the DMV to the lienholder that a Declaration of Opposition has been filed [*Civ. Code § 3072(d)*; **see** *Civ. Code § 3072(e)* (service)]. If a money judgment is entered in favor of the lienholder and the judgment is not paid within five days after becoming final, then the judgment may be enforced by lien sale proceedings [*Civ. Code § 3072(d)*].

Process in the judicial proceeding may be served on the declarant under the Declaration of Opposition form in person or by certified mail, return receipt requested. If the lienholder attempts service by mail at the address for the declarant shown on the Declaration of Opposition form and the mail is returned unclaimed, or if the lienholder has been unsuccessful in obtaining personal service after following required procedures [**see** *Civ. Code § 3072(e)*], the lienholder may proceed with the judicial proceeding or proceed with the lien sale without a judicial proceeding [*Civ. Code § 3072(e)*]. However, the lienholder must first notify the DMV of the inability to effect service and provide documents that support the attempted service. On receipt of these items, the DMV will send authorization of the sale to the lienholder and send notification of the authorization to the declarant [*Civ. Code § 3072(e)*].

3. Have lienholder send completed copy of Lienholder's Certification and Notice of Pending Lien Sale [*see § 102A.230* (form)] to DMV by certified mail on same day that documents described in P (2), *above*, are mailed to owners and other interested persons [*Civ. Code § 3072(b)*].

4. If sale is authorized [*see* P 2d NOTE, *above*], have lienholder post Notice of Pending Lien Sale [*see § 102A.230*], at least 10 consecutive days prior to and including day of sale, at following locations [*Civ. Code § 3072(f)*]:

- a. Premises of business office of lienholder, in conspicuous place; and
- b. At site of forthcoming sale, if sale is scheduled to occur at place other than premises of business office of lienholder.

NOTE:

The notice must remain posted until the sale is completed [*Civ. Code § 3072(f)*]. The sale itself must take place at least 31 but not more than 41 days after the certified letters containing the Lienholder's Certification and Notice of Pending Lien Sale are sent [*Civ. Code § 3072(c)(2)*].

5. On day of sale, advise lienholder to ensure vehicle has been available for inspection at location easily accessible to public at least one hour before sale [*Civ. Code § 3072(i)*].

6. Advise lienholder to conduct sale on date and time and at location specified in notices, in commercially reasonable manner.

NOTE:

No sealed bids will be accepted [*Civ. Code § 3072(g)*].

7. After sale, advise person who conducted sale to do both of following [*Civ. Code § 3072(g)*]:

- a. Remove and destroy vehicle's license plates.

b. Submit completed "Notice of Release of Liability" form to Department of Motor Vehicles within five days of sale.

NOTE:

The Department of Motor Vehicle will retain all submitted "Notice of Release of Liability" forms for two years [*Civ. Code* § 3072(h)].

8. After sale, advise lienholder to deliver immediately all completed lien sale documents to buyer [*Civ. Code* § 3072(i); *see* § 102A.151].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Nonmortgage Liens General Overview Transportation Law Private Vehicles General Overview



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32-102A California Legal Forms--Transaction Guide § 102A.122

§ 102A.122 Disposition of Vehicle Valued at \$500 or Less and Impounded Under Public Authority

NOTE:

This procedure is to be followed by a garage keeper in possession of a vehicle valued at \$500 or less that has been removed to the garage on authorization by a public agency [*see Veh. Code § 22851*]. The garage keeper has a lien on the vehicle that may be foreclosed to obtain compensation for towing and storage of the vehicle for a period not exceeding 60 days, or 120 days if an application for authorization to conduct a lien sale [*see Civ. Code § 3068.1*] has been filed within 30 days after the removal of the vehicle to the garage [*Veh. Code § 22851(a)*]. However, if a request is made for the release of the vehicle within 24 hours of the time it is placed in storage, the lienholder may not impose a charge that exceeds that for one day of storage. If the request is made more than 24 hours after the vehicle is placed in storage, charges may be imposed on a full, calendar day basis for each full or partial day that the vehicle is in storage [*Civ. Code § 3068.1(a)*]. No lien attaches to personal property in or on the vehicle [*Veh. Code § 22851(b)*]. For further discussion, see § 102A.240[1].

This procedure also applies to the lien of a local impounding authority for satisfaction of bail for all outstanding notices of parking violation issued by the local authority for the vehicle [*Veh. Code § 22851.1; see Veh. Code § 41103* (requirements governing notices of parking violations)].

Towing, storage, and parking liens arising under the Vehicle Code on vehicles with a value exceeding \$500 are satisfied in accordance with the procedures set forth in *Civ. Code §§ 3067-3074* [*Veh. Code § 22851.4; see §§ 102A.120, 102A.121*].

1. Within 15 working days from date lienholder acquired possession of vehicle, make request to DMV for names and addresses of all persons having an interest in vehicle [*Veh. Code § 22851.8*].

NOTE:

No storage charge may accrue beyond the 15-day period if the request for names and addresses from the DMV is not made within that period [*Veh. Code* § 22851.8(a)].

2. On receipt of information from DMV, send following to registered and legal owners and any other person known to have interest in vehicle [*Veh. Code* § 22851.8(b)]:

NOTE:

The forms used for effectuating the disposal of the vehicle are prescribed by the DMV [*Veh. Code* § 22851.6(b)]. The forms and enclosures must be sent either by certified mail, return receipt requested, or by United States Postal Certificate of Mailing [*Veh. Code* § 22851.8(b)].

a. Notice of Intent to Dispose of Vehicle Valued at \$500 or Less [*see Veh. Code* § 22851.8(c) (contents of notice); *see also* § 102A.240[2] (form)].

b. Declaration of Opposition to Disposal of Vehicle Valued at \$500 or Less (blank form) [*see* § 102A.240].

c. Return envelope preaddressed to the lienholder.

NOTE:

If the lienholder receives a valid Declaration of Opposition within 10 days of the date the notice was mailed, the vehicle cannot be disposed of unless a release of interest is obtained from the declarant or an action is filed in court within 20 days of the date the notice was mailed and a judgment is subsequently obtained in the lienholder's favor [*Veh. Code* § 22851.8(d)]. If a money judgment is entered in favor of the lienholder and the judgment is not paid within five days after becoming final, then the lienholder may dispose of the vehicle through a dismantler or scrap iron processor [*Veh. Code* § 22851.8(d)]. If the lienholder is unable to serve a declarant who executes a Declaration of Opposition form as required by statute [*see Veh. Code* § 22851.8(e)(1)], the lienholder may proceed with the judicial proceeding or proceed with the lien sale without a judicial proceeding [*Veh. Code* § 22851.8(e)(2)]. However, the lienholder must first notify the DMV of the inability to effect service and provide documents that support the attempted service. On receipt of these items, the DMV will send authorization of the sale to the lienholder and send notification of the authorization to the declarant [*Veh. Code* § 22851.8(e)(2)].

If proof of service is effected on the declarant, the proof of service must be submitted to the DMV with other required documents [*Veh. Code* § 22851.8(e)(2); *see Veh. Code* § 22851.10 (other required documents)]. If a valid Declaration of Opposition is not received, the lienholder may dispose of the vehicle to a licensed dismantler or scrap iron processor not earlier than 15 days after the Notice of Intent to Dispose of Vehicle was mailed [*Veh. Code* § 22851.10(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Nonmortgage Liens General Overview Transportation Law Private Vehicles General Overview



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32-102A California Legal Forms--Transaction Guide §§ 102A.123-102A.129

[Reserved]

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32-102A California Legal Forms--Transaction Guide § 102A.130

§ 102A.130 Drafting Proposal to Retain Livestock

NOTE:

If the lienholder desires, he or she may accept any portion or all of the livestock in his or her possession in lieu of the amount owed for the provision of livestock services [Civ. Code § 3080.21]. For further discussion of the Livestock Service Lien Law [*see Civ. Code §§ 3080-3080.22*], see §§ 102A.262[1], 102A.263[1], 102A.264[1].

1. Set forth name and address of lienholder.
2. State nature of transaction giving rise to lien claim.
3. Set forth proposal to retain all or portion of livestock in lieu of payment.
4. Include statement of owner's right to object to proposal.
5. Include statement directing owner to return executed release of interest if owner agrees to proposal.
6. State that owner's objection to proposal or failure to return executed release of interest will cause lienholder to initiate lien sale proceedings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.131

§ 102A.131 Proposing to Accept Livestock in Lieu of Payment

1. Draft notice of proposal to accept livestock in lieu of payment [*see* § 102A.262; *see also* § 102A.130].
2. Send notice to owner or other person indebted to lienholder for livestock services.

NOTE:

The proposal must be given to the livestock owner or other person owing payment for livestock services, and to any person claiming a lien or security interest in the livestock [*Civ. Code* § 3080.21; *see* *Civ. Code* § 3080.17(a) (requirements for notice of sale)].

3. If owner objects in writing to proposal within 21 days, proceed with sale of livestock [*Civ. Code* § 3080.21].

NOTE:

For discussion and forms covering the required judicial procedures for the sale of livestock under the Livestock Service Lien Law, see California Forms of Pleading and Practice, Ch. 24, **Animals: Liens** (Matthew Bender).

4. If owner approves proposal, obtain his or her release of interest in livestock and retain portion of livestock necessary to cover claim [*Civ. Code* § 3080.21; *see* *Civ. Code* § 3080.20 (release); *see also* § 102A.264].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.140

§ 102A.140 Lien Sale of Vessel Valued at Over \$1,500

1. To protect his or her lien, lienholder must either obtain or do one of following within 60 days after lien has arisen [*Harb. & Nav. Code § 502(f)*]:

NOTE:

A lien is deemed to arise at the time a written statement of charges for completed work or services is presented to the registered owner [*Harb. & Nav. Code § 502(a)*].

- a. Obtain DMV authorization to conduct lien sale [*see Harb. & Nav. Code § 503(a)*]; or
- b. File action based on claim that gives rise to lien.

NOTE:

Any lien arising because work or services have been performed on a vessel with the consent of the registered owner will be extinguished unless the lienholder applies for an authorization to conduct a lien sale within 60 days after the lien has arisen or, if no application is made, an action in court is filed within 60 days after the lien has arisen [*Harb. & Nav. Code § 502(f)*].

2. Obtain and complete application for lien sale authorization [*Harb. & Nav. Code § 503(a)*].

NOTE:

Application must be made on a prescribed form obtainable from the DMV [*Harb. & Nav. Code § 508.5; see § 102A.290*].

3. Mail application with required nonrefundable fee to Department of Motor Vehicles, Lien Sale Section, P.O. Box 932317, Sacramento, CA 94232-3170.

NOTE:

Within 15 days after receipt of the application, the DMV must (1) notify the vessel registry agency in any other state in which the vessel is registered of the pending lien sale [*Harb. & Nav. Code* § 503(b)(1)]; (2) apply a vessel registration stop order or title transfer stop order [*Harb. & Nav. Code* § 503(b)(3)]; and (3) notify the applicant of any outstanding property tax lien on the vessel of which the DMV has been notified pursuant to *Rev. & Tax. Code* § 3205(b) [*Harb. & Nav. Code* § 503(b)(4)].

Within the same 15-day period the DMV must also mail a notice [*see* § 102A.291], a copy of the application [*see* § 102A.290], and a return envelope preaddressed to the DMV to both the registered and legal owners at their addresses of record with the DMV, and to any other person whose name and address is listed in the application [*Harb. & Nav. Code* § 503(b)(2)]. The notice will inform the interested persons that an application has been made to conduct a lien sale, that the DMV has placed a vessel registration stop order or title transfer stop order on the vessel, and that the person has a right to a hearing in court [*Harb. & Nav. Code* § 503(c)(1), (2)]. If a hearing is desired, the interested person must file a Declaration of Opposition form with the DMV, signed under penalty of perjury, within 15 days of the date the notice was mailed [*Harb. & Nav. Code* § 503(c)(3); *see* § 102A.291]. If the DMV receives a Declaration of Opposition form in the time provided, the DMV must notify the lienholder within 16 days of receipt that a lien sale may not be conducted unless the lienholder files an action in court within 60 days of that notice. The sale may not be subsequently conducted unless either a judgment is subsequently entered in favor of the lienholder or the declarant subsequently releases his or her interest in the vessel [*Harb. & Nav. Code* § 503(d); *see Harb. & Nav. Code* § 505; *see also* § 102A.282]. If the lienholder files suit and serves process on the declarant by certified mail at the address shown on the Declaration of Opposition and the mail is returned unclaimed, the DMV must promptly authorize the sale [*Harb. & Nav. Code* § 503(e)].

4. On receipt of authorization to conduct lien sale, give notice of sale as follows [*Harb. & Nav. Code* § 503(f)]:

a. Advertise once in newspaper of general circulation published in county in which vessel is located at least 10 days, but not more than 30 days, prior to sale, not counting day of sale itself.

NOTE:

If there is no newspaper of general circulation in the county, notice must be posted in three of the most public places in the area in which the vessel is located and at the location of the sale. The notice must be posted for 10 consecutive days prior to and including the day of sale [*Harb. & Nav. Code* § 503(f)(1)].

b. Send notice of lien sale to each of following [*Harb. & Nav. Code* § 503(f)(2)]:

NOTE:

The notice must be sent by mail with return receipt requested 20 days prior to the sale, not including the day of sale [*Harb. & Nav. Code* § 503(f)(2)].

(1) Registered and legal owners of vessel, if registered in California.

(2) All persons known to have an interest in vessel.

(3) DMV.

5. Make vessel available for inspection at location easily accessible to public at least one hour before sale and have vessel at place of sale at time and date specified on notice of sale [*Harb. & Nav. Code § 506*].

NOTE:

The lienholder is entitled to recover actual costs, not exceeding \$100 for a vessel without a trailer or \$125 for a vessel with a trailer, incurred in preparation for the sale [*Harb. & Nav. Code § 507.5*].

6. Conduct sale in commercially reasonable manner [*Harb. & Nav. Code § 506*].

NOTE:

Sealed bids must not be accepted [*Harb. & Nav. Code § 506*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.141

§ 102A.141 Lien Sale of Vessel Valued at \$1,500 or Less

1. Apply to the DMV for names and addresses of all registered and legal owners of record of vessel to be sold [*Harb. & Nav. Code § 504(a)*].

NOTE:

In most instances, the lienholder can secure registered owner and legal owner information through a local DMV office. The lienholder also may secure the information by submitting the Request for Information (DMV Form REG 443), together with the required fee, directly to the DMV Lien Sale Section: Department of Motor Vehicles, Lien Sale Section, P.O. Box 932317, Sacramento, CA 94232-3170.

2. Immediately on receipt of names and addresses of registered and legal owners, send following to those owners and to any other person known to claim interest in vessel [*Harb. & Nav. Code § 504(b)*]:

NOTE:

The following forms and enclosures must be sent by mail, return receipt requested [*Harb. & Nav. Code § 504(b)*]. They must be sent not less than 35 days nor more than 60 days from the date of sale stated in the Lienholder's Certification and Notice of Pending Lien Sale [*see Harb. & Nav. Code § 504(d)(2)*; *see also § 102A.300*].

- a. Lienholder's Certification and Notice of Pending Lien Sale [*see § 102A.300*].
- b. Blank Declaration of Opposition [*see § 102A.301*].
- c. Return envelope preaddressed to Department of Motor Vehicles, Lien Sale Section,

P.O. Box 932317, Sacramento, CA 94232-3170.

NOTE:

If a Declaration of Opposition form is received by the DMV that was postmarked within 15 days after the date the Certification and Notice of Pending Lien Sale was mailed by the lienholder, the DMV, within 16 days of the receipt of the Declaration, must mail the lienholder a notification that the sale may not be conducted unless the lienholder either obtains a favorable court judgment on the claim giving rise to the lien, or the declarant whose name appears on the Declaration has signed a release of interest in the vessel [*Harb. & Nav. Code § 504(e)*]; *see Harb. & Nav. Code § 505* (release)]. The action for which a judgment is obtained must be filed within 20 days of notification by the DMV to the lienholder that a Declaration of Opposition has been filed [*Harb. & Nav. Code § 504(e)*]. For purposes of a court action on the claim giving rise to the lien, service on the declarant by certified mail with return receipt requested, signed by the declarant or his or her authorized agent at the address shown on the Declaration of Opposition, is effective. If the mail is returned unclaimed the lienholder may proceed with the sale [*Harb. & Nav. Code § 504(f)*].

3. Send completed copy of Lienholder's Certification and Notice of Pending Lien Sale [*see § 102A.300*] to DMV by mail on same day that documents described in P 2, *above*, are mailed to owners and other interested persons [*Harb. & Nav. Code § 504(b)*].

4. Conduct sale on date and time specified in notices and in commercially reasonable manner [*Harb. & Nav. Code § 506*].

NOTE:

No sealed bids may be accepted [*Harb. & Nav. Code § 506*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide §§ 102A.142-102A.149

[Reserved]

§§ 102A.142[Reserved]



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32-102A California Legal Forms--Transaction Guide § 102A.150

§ 102A.150 Lien Sale of Vehicle Valued Over \$4,000

1. Hold vehicle available for redemption by registered or legal owner for 10 days after sale [*Civ. Code § 3071(k)*].

NOTE:

For discussion of redemption of a vehicle before or after a lien sale takes place, see § 102A.220[1].

2. Disburse proceeds of lien sale as follows [*Civ. Code § 3073*]:

a. Pay lienholder amount necessary to discharge lien and the cost of processing vehicle [*Civ. Code § 3073(a)*].

NOTE:

The cost of processing the vehicle may not exceed \$100 for a vehicle valued at over \$4,000 [*Civ. Code § 3073(a)*].

b. Unless different disposition is required by federal law, forward to DMV any balance within 15 days of sale for deposit in Motor Vehicle Account in State Transportation Fund [*Civ. Code § 3073(b)*].

NOTE:

Any person claiming an interest in the vehicle may file a claim with the DMV for any portion of the remaining funds. On determining that the claimant is entitled to an amount from the balance forwarded to the DMV, the DMV will forward it to the claimant. The amount due cannot exceed the amount forwarded to the Department. The DMV cannot honor any claim filed after three years from the date the funds were deposited with the DMV [*Civ. Code § 3073(c)*].

3. Comply with all clearance requirements of DMV by completing and delivering following documents to the buyer [see *Civ. Code* § 3071(k)], assembled in order listed:

a. Application for Original Registration [see § 102A.204].

NOTE:

If the vehicle was acquired by a licensed dismantler, a Report of Vehicle to Be Dismantled (DMV Form REG 42) must be included in lieu of the Application for Original Registration.

b. Application for Lien Sale Authorization and Lienholder's Certification [see § 102A.220].

c. One of following documents, as appropriate:

(1) Authorization for Lien Sale of a Vehicle Valued Over \$4,000 (DMV Form REG 338);

(2) Certified copy of judgment entered in lienholder's favor; or

(3) Release of Interest, signed by declarant [see § 102A.202].

d. Evidence of mailing and posting [see § 102A.222] with postal receipts attached.

NOTE:

The certificate must contain evidence that at least 20 days before the sale, not including the day of sale, the lienholder notified the DMV, both the registered and the legal owners of the vehicle, if registered in California, and all other persons known to have an interest in the vehicle of the date, time, and place of the sale. These notices must be sent by certified mail with return receipt requested [*Civ. Code* § 3071(f)(2); **see** *Civ. Code* § 3071(g) (additional required information)].

e. Warning Notice of Lien Sale.

f. Evidence that the sale was advertised as required by *Civ. Code* § 3071(f)(1).

g. Certification of Sale [see § 102A.222] from lienholder to buyer.

NOTE:

If there is no buyer at the sale, the lienholder must enter his or her own name as both buyer and seller. If the lienholder sells the vehicle at a later date, he or she must complete and give to the buyer a bill of sale [DMV Lien Sale Instructions, REG 669].

h. Bills of sale, as necessary to complete chain of ownership from buyer at lien sale to current owner.

i. Dealer's report of sale, if applicable [see *Veh. Code* § 4456 (use of report of sale forms)].

j. Appropriate registration fees and any other fees required by DMV [see *Veh. Code* §§ 9250-9271].

k. Evidence of record information obtained from DMV regarding ownership of, and other persons

interested in, vehicle [see § 102A.203].

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawNonmortgage LiensGeneral OverviewTransportation LawPrivate VehiclesGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.151

§ 102A.151 Lien Sale of Vehicle Valued at \$4,000 or Less

NOTE:

There is no right to redeem a vehicle valued at \$4,000 or less from a lien sale [*see Civ. Code § 3072(f)*;
cf. Civ. Code § 3071(k) (redemption of vessel valued at more than \$4,000)].

1. Disburse proceeds as follows [*Civ. Code § 3073*]:

a. Pay to lienholder amount necessary to discharge lien and cost of processing vehicle
[*Civ. Code § 3073(a)*].

NOTE:

The cost of processing the vehicle may not exceed \$70 for vehicle valued at \$4,000 or
less [*Civ. Code § 3073(a)*].

b. Unless different disposition is required by federal law, forward to DMV any balance within five days
of sale for deposit in Motor Vehicle Account in State Transportation Fund [*Civ. Code § 3073(b)*].

NOTE:

Any person claiming an interest in the vehicle may file a claim with the DMV for any portion of the
remaining funds. On determining that the claimant is entitled to an amount from the balance forwarded
to the DMV, the DMV will forward it to the claimant. The amount due cannot exceed the amount
forwarded to the Department. The DMV cannot honor any claim filed after three years from the date the
funds were deposited with it [*Civ. Code § 3073(c)*].

2. Immediately after sale, deliver to buyer the following items, as required by DMV [*see Civ. Code § 3072(i)*]:

- a. Application for Original Registration [*see* § 102A.204].
- b. One copy of Warning Notice of Lien Sale [*see* § 102A.230] that was posted and signed by lienholder as original.
- c. Evidence of mailing and posting [*see* § 102A.231] with postal receipts attached.
- d. Certification of Sale [*see* § 102A.231] signed and completed by lienholder.

NOTE:

If there is no buyer, the lienholder must show his or her name as both buyer and seller. If the vehicle is later sold, the buyer must be given a bill of sale [DMV Lien Sale Instructions, REG 669].

- e. Statement of Facts (DMV Form REG 256) certifying that at least 31 but not more than 41 days have elapsed since Warning Notice of Lien Sale [*see* § 102A.230] was mailed to registered and legal owners of record and all interested persons and that DMV has not issued notice prohibiting sale [*see Civ. Code* § 3072(c)(2)].
- f. Evidence of record information obtained from DMV regarding owners and other persons having interest in vehicle sold [*see* § 102A.203].
- g. Certificate of Non-Operation (DMV Form REG 102) for any period vehicle has not been operated, parked, or driven on any California highway during time vehicle was in lienholder's possession.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Nonmortgage Liens General Overview Transportation Law Private Vehicles General Overview



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32-102A California Legal Forms--Transaction Guide § 102A.152

§ 102A.152 Disposal of Vehicle Valued at \$500 or Less and Impounded Under Public Authority

1. If vehicle is redeemed before disposal, recover from redeeming party actual cost incurred in processing for disposal not to exceed maximum permitted by statute [*see Veh. Code § 22851.12*].

NOTE:

These costs may begin to accrue and become part of the possessory lien when the lienholder requests the names and addresses of all persons having an interest in the vehicle from the DMV. Not more than 50 percent of the allowable fee may be charged until the lien sale notifications are mailed to all interested parties and the lienholder or the registration service agent has possession of the required lien processing documents. The lienholder may not recover these costs if the vehicle is redeemed before the third day of possession [*Veh. Code § 22851.12*].

2. Send following information to DMV within five days of disposing of vehicle [*Veh. Code § 22851.10(b)*]:

- a. Statement, signed under penalty of perjury, that properly executed Declaration of Opposition form was not received.
- b. Copy of notice sent to all interested persons.
- c. Certification from public agency, garage-keeper, or garage-keeper's agent that made determination of value of vehicle [*see Veh. Code § 22670* (valuation of vehicle)].
- d. Copy of court judgment in favor of lienholder, if received, or proof of service [*see Veh. Code § 22851.8(d)* (judgment), (e)(proof of service)].

e. Name, address, and telephone number of licensed dismantler or scrap iron processor who received vehicle.

NOTE:

A scrap metal processor [*see Veh. Code § 221(a)(3)* (definition)] who acquires a vehicle is not required to submit a certificate of non-operation or pay fees otherwise required for current registration of the vehicle if he or she submits to the DMV a properly endorsed certificate of title and any available license plates or registration documents, or documentation that the vehicle was acquired and will be disposed of pursuant to the statutes governing abandoned vehicles [*Veh. Code § 9564; see Veh. Code § 22669* (removal of abandoned vehicles from public or private property); *Veh. Code §§ 22850-22856* (liens of stored vehicles)].

f. Statement of amount received for vehicle.

NOTE:

No lien attaches to any personal property in or on the vehicle. That property must be given to the registered owner or his or her agent on demand and without charge during normal business hours, which are defined by statute to be Monday through Friday, from 8 AM to 5 PM, inclusive, except state holidays. A gate fee may be charged for returning property after normal business hours, weekends, and state holidays. The maximum hourly charge for nonbusiness hours releases must be one-half the hourly tow rate charged for initially towing the vehicle, or less [*Veh. Code § 22851(b)*]. Additionally, the lienholder is not responsible for property after any vehicle has been disposed of pursuant to this chapter. [*Veh. Code § 22851(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.153

§ 102A.153 Lien Sale of Vessel

1. Hold vessel available for redemption by registered or legal owner for 10 days after sale [*Harb. & Nav. Code § 506.5*].
2. Disburse proceeds of lien sale as follows [*Harb. & Nav. Code § 507.5*]:
 - a. Pay to lienholder amount necessary to discharge lien and actual cost of selling vessel not to exceed \$100 for vessel without trailer, or \$125 for vessel with trailer [*Harb. & Nav. Code § 507.5(a)*].
 - b. Forward balance to DMV within 15 days of sale [*Harb. & Nav. Code § 507.5(b)*].

NOTE:

Any person claiming an interest in the vessel may file a claim with the DMV for any portion of the remaining funds. On determining that the claimant is entitled to an amount from the balance forwarded to the DMV, the DMV will forward it to the claimant. The amount due cannot exceed the amount forwarded to the Department. The DMV cannot honor any claim filed after three years from the date the funds were deposited with the DMV [*Harb. & Nav. Code § 507.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-102A California Legal Forms--Transaction Guide §§ 102A.154-102A.199

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A. Motor Vehicle Liens
1. General Forms

32-102A California Legal Forms--Transaction Guide § 102A.200

§ 102A.200 Notice to and Consent of Legal Owner for Services to or Storage of Motor Vehicle

[1] Comment

[a] Use of Form

This form is for use by a garage or auto repair person when someone other than the legal owner or lessor of a motor vehicle requests work on or storage of the vehicle, and the estimated cost exceeds [*Civ. Code § 3068(c)(1)*]:

- \$1500, for work or services, subject to limitations of *Veh. Code § 10652.5* (when name and address of legal owner is known or ascertainable); or
- \$1025, for storage, safekeeping, or parking rentals; or
- \$1250 for any storage or safekeeping, performed at the request of any person other than the legal owner or lessor, if the lienholder files an application for authorization to conduct a lien sale within 30 days commencing storage of the vehicle [*see Veh. Code § 3071* (lien sales)].

The garage or auto repair person's lien for services is not enforceable in excess of those amounts unless, before beginning the work or service, the lienholder gives written notice (by personal service or registered letter) to the legal owner named in the registration certificate and obtains the legal owner's written consent to perform the work or services [*Civ. Code § 3068(c)(1)*].

For discussion of liens against abandoned vehicles removed by a public agency, including forms and specific coverage of the disposal of vehicles valued at less than \$500, see §§ 102A.240, 102A.241. For discussion of vessel liens and forms relating to vessel liens and vessel lien sales, see §§ 102A.280-102A.311.

[b] Vehicle Repair Lien

[i] Nature of Lien

Every person who makes repairs or performs labor on and furnishes supplies or materials for a vehicle, or who stores or repairs a vehicle or holds it for safekeeping, or who rents parking space for a vehicle, has a possessory lien for the compensation to which he or she is entitled if the vehicle is of a type required to be registered under the Vehicle Code [Civ. Code § 3068(a)]. "Manufactured homes," "mobilehomes," and "commercial modulars" (also referred to as "commercial coaches") subject to registration under the Health & Safety Code are not subject to this Civil Code lien provision [Civ. Code § 3067.2; see Health & Safety Code §§ 18007, 18008, 18001.8 (definitions)].

[ii] Creation and Extinguishment of Vehicle Repair Liens

A possessory vehicle lien arises at the time a written statement of the charges for completed work or services is presented to the registered owner, or 15 days after the work or services are completed, whichever occurs first [Civ. Code § 3068(a)]. On completion of the work or services, the lienholder may not dismantle, disengage, remove, or strip from the vehicle the parts used to complete the work or services [Civ. Code § 3068(a)]. The lien is extinguished and no lien sale may take place unless (1) the lienholder applies for an authorization to conduct a lien sale within 30 days after the lien has arisen, or (2) an action in court is filed within that same time period [Civ. Code § 3068(b)(1); see § 102A.220 (lien sales)].

Any lien that arises because work or services have been performed on a vehicle with the consent of the registered owner is also extinguished, and no lien sale may be conducted, if the lienholder fails to permit the legal owner or lessor, or his or her agent, to inspect the vehicle after the legal owner or lessor has made a written demand to inspect the vehicle. The written demand must be made by either personal service or certified mail with return receipt requested. The lienholder must permit the inspection to occur during the lienholder's normal business hours, within a period of time not sooner than 24 hours nor later than 72 hours after receipt of the legal owner or lessor's written demand for inspection [Civ. Code § 3068(b)(3)].

Any lien that arises because work or services have been performed on a vehicle with the consent of the registered owner is extinguished, and no lien sale may be conducted, if the lienholder, after written demand by the legal owner or the lessor to receive a written copy of the work order or invoice reflecting the services or repairs performed and the authorization to perform the services or repairs, fails to provide that copy to the legal owner or lessor, or his or her agent, within ten days [Civ. Code § 3068(b)(4)].

On extinguishment of the lien, the lienholder must turn over the possession of the vehicle to the legal owner or lessor on demand at the place where the work or services were performed. The transfer of possession is conditioned on payment by the legal owner or lessor, by cashier's check or in cash, of only the amount to which the lienholder is entitled for storage, safekeeping, or parking space rental [Civ. Code § 3068(b)(2); see Civ. Code § 3068(c) (authorized charges); see also [iv], below].

[iii] Attorneys' Fees

In any action brought by or on behalf of a vehicle owner or lessor to recover a vehicle alleged to be wrongfully withheld by a person claiming a lien under Civ. Code § 3068, the prevailing party may collect attorneys' fees and costs up to the maximum amount permitted by statute [see Civ. Code § 3068(d)].

[iv] Limitations on Storage Charges

If 24 hours or less after a vehicle is placed in storage, a request is made for the release of the vehicle, the charge for the care, storage, or safekeeping of the vehicle may not exceed that for one day of storage. If the request is made more than 24 hours after the vehicle is placed in storage, charges may be imposed on a full, calendar day basis for each full or

partial day that the vehicle is in storage [*Civ. Code* § 3068(c)(3)].

If any portion of a vehicle lien includes charges for care, storage, safekeeping, or rental of parking space for a vehicle in excess of 60 days, the portion of the lien accruing after that period is invalid unless the lienholder complies with certain statutory conditions [*see Civ. Code* § 3068(c)(2)]. These conditions include keeping records pertaining to the vehicle and reporting possession of the vehicle to the California Department of Justice [*see Veh. Code* §§ 10650, 10652]. For further discussion and a form that may be used to comply with the notice requirement for periods exceeding 60 days, see § 102A.201.

Any lien for fees or storage charges for parking and storage of a motor vehicle is subject to the requirements of *Veh. Code* § 10652.5 [*Civ. Code* §§ 3071 (l), 3072(j)]. Under that section, no fee or service charge may be imposed for parking and storage of the vehicle for the period beginning with the 16th day of possession and continuing until three days after written notice by certified mail, return receipt requested, is sent to the legal owner by the lienholder, provided that the name and address of the legal owner is known or may be ascertained from Department of Motor Vehicles records [*Veh. Code* § 10652.5(a)].

[c] Vehicle Towing and Storage Lien

[i] Creation and Extinguishment of Lien

Every person has a possessory lien for the compensation to which he or she is legally entitled for towing and storage of any vehicle subject to registration requirements that has been authorized to be removed by a public agency, a private property owner pursuant to *Veh. Code* § 22658, or a lessee, operator, or registered owner of the vehicle. The lien arises on the date of possession of the vehicle. Possession is deemed to arise when the vehicle is removed and is in transit [*Civ. Code* § 3068.1(a)].

The lien is extinguished, and no lien sale may be conducted, if the lienholder fails to permit the legal owner or lessor, or his or her agent, to inspect the vehicle after the legal owner or lessor has made a written demand to inspect the vehicle. The written demand must be made by either personal service or certified mail with return receipt requested. The lienholder must permit the inspection to occur during the lienholder's normal business hours, within a period of time not sooner than 24 hours nor later than 72 hours after receipt of the legal owner or lessor's written demand for inspection. The legal owner or lessor must comply with inspection and vehicle release policies of the impounding public agency [*Civ. Code* § 3068.1(d)(1)].

The lien is also extinguished if the amount claimed by the lienholder for storage exceeds posted rates [*Civ. Code* § 3068.1(d)(2)].

[ii] Limitation on Storage Charges

A person seeking to enforce a lien for the storage and safekeeping of the vehicle may not impose a charge exceeding that for one day of storage if, 24 hours or less after the vehicle is placed in storage, a request is made for the vehicle's release. If the request is made more than 24 hours after the vehicle is placed in storage, charges may be imposed for each full or partial day that the vehicle is in storage [*Civ. Code* § 3068.1(a)].

Any lien for fees or storage charges for parking and storage of a motor vehicle is subject to the requirements of *Veh. Code* § 10652.5 [*Civ. Code* §§ 3071 (l), 3072(j)]. Under that section, no fee or service charge may be imposed for parking and storage of the vehicle for the period commencing with the 16th day of possession and continuing until three days after written notice by certified mail, return receipt requested, is sent to the legal owner by the lienholder, provided that the name and address of the legal owner is known or may be ascertained from Department of Motor Vehicles records [*Veh. Code* § 10652.5(a)].

[iii] Lien Sale Procedure for Vehicles Valued at \$4,000 or Less

If the vehicle has been determined to have a value that does not exceed \$4,000, the lien sale is governed by the requirements of *Civ. Code* § 3072 [*Civ. Code* § 3068.1(b); see *Veh. Code* § 22670 (determination of vehicle value); see also §§ 102A.230, 102A.231]. These lien sale proceedings must begin within 15 days after the lien arises; storage charges may not accrue beyond the 15-day period unless lien sale proceedings have been instituted [*Civ. Code* § 3068.1(b)]. The storage lien may be for a period not exceeding 60 days if a completed notice of a pending lien sale form has been filed pursuant to *Civ. Code* § 3072 within 15 days after the lien arises. Notwithstanding this 60-day limitation, the storage lien may be for a period not exceeding 120 days if any one of the following occurs [*Civ. Code* § 3068.1(b)]:

- A Declaration of Opposition is filed with the Department of Motor Vehicles pursuant to *Civ. Code* § 3072.
- The vehicle has an out-of-state registration.
- The vehicle identification number was altered or removed.
- A person who has an interest in the vehicle becomes known to the lienholder after the lienholder has complied with *Civ. Code* § 3072(b).

[iv] Lien Sale Procedure for Vehicles Valued at More Than \$4,000

If the vehicle has been determined to have a value of over \$4,000, the lien sale is governed by *Civ. Code* § 3071 [*Civ. Code* § 3068.1(c); see *Veh. Code* § 22670 (determination of vehicle value); see also §§ 102A.220-102A.222]. The storage lien applies to a storage period not exceeding 60 days. However, if an application to conduct a lien sale has been filed within 30 days after the lien arises, the lien applies to a storage period not exceeding 120 days [*Civ. Code* § 3068.1(c); see *Civ. Code* § 3071; see also § 102A.220 (application to conduct lien sale)].

[2] FORM**Notice to and Consent of Legal Owner for Services to or Storage of Motor Vehicle**

Notice to and Consent of Legal Owner for Services to or Storage of Motor Vehicle

_____[name of legal owner]
 _____[street address]
 _____[city, state, zip]

AUTHORIZATION OF _____ [REPAIRS or STORAGE or RENTAL OF PARKING SPACE]

This is to notify you that _____[name] has requested us to [specify nature of work or services, e.g., overhaul the engine of or store or rent parking space for] a [specify make, model, year, and license number of vehicle], of which you are the record legal owner, at an established cost of \$_____. Before we can [begin work on or store or rent a parking space for] the vehicle described above, we need your signed authorization. Please sign as indicated below and return one copy of this notice to us.

Dated: _____

_____[name of garage]
 _____[signature]
 _____[typed name]

AUTHORIZATION

I, _____ [*name of legal owner*], consent to the above-described [repairs or storage or safekeeping or rental of parking space].

Dated: _____

_____ [*signature of legal owner*]

_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation Law Private Vehicles General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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 1. General Forms

32-102A California Legal Forms--Transaction Guide § 102A.201

§ 102A.201 Report to Department of Justice by Garage Keeper That Vehicle Has Been Stored for 30 Days

[1] Comment

[a] Use of Form

This form is a letter that may be used to notify the California Department of Justice that a garage, parking lot, or trailer park has had the possession of a stored automobile for 30 days [see *Veh. Code § 10652*]. Compliance with the record-keeping and notice requirements contained in *Veh. Code §§ 10650* and *10652* will preserve a vehicle lienholder's right to collect accruing charges for the care, storage, safekeeping, or rental of parking space for a vehicle in excess of 60 days [see *Civ. Code § 3068(c)(2)*; see also *§ 102A.200[1][c][ii]*]. If a vehicle is towed in connection with a parking or traffic violation, and the name and address of the vehicle's legal owner is known or can be ascertained from registration records in the vehicle or from DMV records, no fee or service charge may be imposed on the legal owner for parking or storage of the vehicle for the period beginning on the 16th day of possession and continuing until three days after the date the person in possession of the vehicle sends the owner written notice [*Veh. Code § 10652.5(a)*; see *Veh. Code § 10652.5(d)*] (limitation not applicable to motor vehicle stored by levying officer acting under authority of judicial process); see also *Civ. Code §§ 3071 (l), 3072(j)* (notice required to enforce lien for parking and storage)].

[b] Notice Requirement

Whenever any vehicle of a type subject to registration under the Vehicle Code has been stored in a garage, repair shop, parking lot, or trailer park for 30 days, the keeper must report this possession to the Department of Justice by receipted mail. On receipt of the notification, the Department must immediately contact the legal owner of record [*Veh. Code § 10652*]. The notice requirement does not apply to any vehicle stored by a peace officer or person authorized to enforce parking laws and regulations pursuant to *Veh. Code § 22850 et seq.* [*Veh. Code § 10652*; see *Veh. Code § 22651* (circumstances in which removal by these persons is permitted)].

[2] FORM

Report to Department of Justice by Garage Keeper That Vehicle Has Been Stored for 30 Days

Report to Department of Justice by Garage Keeper That Vehicle Has Been Stored for 30 Days

California Department of Justice
Division of California Justice Information Services
Bureau of Criminal Information and Analysis
Systems Information Section
P.O. Box 903387
Sacramento, CA 94203-3870
(916) 227-3686 (CALNET) 498-3686
FAX: (916) 227-3741

This is to report, pursuant to *Vehicle Code Section 10652*, that the following vehicle has been stored in a [specify, e.g., garage or repair shop or parking lot or trailer park] located at _____[address] for more than 30 days, from _____[specify dates of possession], inclusive: [describe vehicle by giving make, model, year, license number, and identification number or engine number, if available].

Dated: _____

_____[name of garage keeper]

_____[signature]

_____[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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 1. General Forms

32-102A California Legal Forms--Transaction Guide § 102A.202

§ 102A.202 Release of Interest [DMV Form REG 658]

[1] Comment

[a] Use of Form

This form is a DMV form for the release of a registered owner's or legal owner's interest in a motor vehicle subject to a lien (see backside of form). It is generated by the DMV when a request for lien sale has been denied because the registered or legal owner of a vehicle (or other party with an interest) executes and timely files a DMV Declaration of Opposition form [see §§ 102A.230, 102.240] after a lienholder has initiated proceedings with the DMV to conduct a lien sale. By signing the Release of Interest after a lien has arisen on a vehicle of any value, both the registered and the legal owners release all of their interest in the vehicle and give the lienholder permission to proceed with the lien sale.

When a properly executed and timely filed DMV Declaration of Opposition form is filed, the lien sale may not be conducted unless the lienholder subsequently obtains a judgment or unless the declarant releases his or her interest in the vehicle [Civ. Code §§ 3071(d) (vehicles valued over \$4,000), 3072(d)(vehicles valued at \$4,000 or less); Veh. Code § 22851.8(d) (vehicles valued at \$500 or less and impounded under public authority)]. However, the lienholder may proceed with a judicial proceeding or proceed with a lien sale of the vehicle without a judicial proceeding if service on the declarant by mail or in person is unsuccessful, provided attempted service complies with required procedures and is substantiated [Civ. Code §§ 3071(e) (vehicles valued over \$4,000), 3072(e)(vehicles valued at \$4,000 or less); Veh. Code § 22851.8(e) (vehicles valued at \$500 or less and impounded under public authority)].

In order to transfer the registration of the vehicle after the lien sale, the buyer of the vehicle must submit the Release of Interest, or a copy, along with an Application for Original Registration to the Department of Motor Vehicles [see § 102A.204]. For discussion of vehicle lien sales in general, see § 102A.200[1]. For further discussion of the transfer and registration of vehicles in transactions not involving lien sales, see Ch. 102D, *Registration and Transfer of Vehicles, Vessels, and Aircraft*.

[b] Release of Interest

A registered or legal owner of a vehicle in the possession of a lienholder may release any interest in the vehicle after the lien has arisen. For example, when a rightful claim on which a lien is based exceeds the value of the vehicle, the registered or legal owners may release their interest and avoid the expense of contesting the claim. The release must be dated when signed and a copy must be given to the person releasing the interest at the time of signing [*Civ. Code* § 3071.5(a)]. The release must be in at least 12-point type [*Civ. Code* § 3071.5(b)].

The release must contain the following information [*Civ. Code* § 3071.5(b)]:

- The vehicle's description, including the year and make, the engine or vehicle identification number, and the license number, if available;
- The names and addresses of both the registered and the legal owners, if available;
- A statement of the amount of the lien and the facts concerning the claim that gives rise to the lien;
- A statement that the person releasing the interest understands that (1) he or she has a legal right to a court hearing before any lien sale of the vehicle, and (2) he or she is giving up the right to appear to contest the claim of the lienholder; and
- A statement that (1) the person releasing the interest gives up any interest he or she may have in the vehicle, and (2) he or she is giving the lienholder permission to sell the vehicle.

[2] FORM

Release of Interest [DMV Form REG 658]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)General OverviewTransportation LawPrivate VehiclesGeneral Overview



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1. General Forms

32-102A California Legal Forms--Transaction Guide § 102A.203

§ 102A.203 Vehicle/Vessel Registration Information Request for Processing Lien Sales [DMV Form INF 1126]

[1] Comment--Use of Form

This form is the official DMV form used by a lienholder to request information from the DMV about a vehicle in the lienholder's possession. It is available from any DMV office or may be downloaded from the DMV website located at www.dmv.ca.gov. The form is used to initiate the lien sale process, because the lienholder must, at the outset, obtain the names and addresses of registered and legal owners and other interested parties to provide them with notice of the impending lien sale [see §§ 102A.220, 102A.230, 102A.240].

The form may be submitted to any local DMV office. On request, the DMV will provide information about legal owners, registered owners, and other interested parties of a particular vehicle. However, local DMV offices can provide only current information (that is, information for the current year and the preceding three years). Requests for older information and other special requests should be made to the DMV's Sacramento office.

[2] FORM

Vehicle/Vessel Registration Information Request for Processing Lien Sales [DMV Form INF 1126]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawShippingRegulations & StatutesLicensing & RegistrationTransportation LawCommercial VehiclesLicensing & RegistrationTransportation LawPrivate VehiclesVehicle RegistrationGeneral Overview



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1. General Forms

32-102A California Legal Forms--Transaction Guide § 102A.204

§ 102A.204 Application for Original Registration [DMV Form REG 343]

[1] Comment--Use of Form

This form is the official DMV application for registration of a vehicle, DMV Form REG 343. It is available from any DMV office or may be downloaded from the DMV website located at www.dmv.ca.gov.

This two-part application form is used for vehicles being registered for the first time and for nonresident vehicles brought into California. This form may also be used to reregister a vehicle after it has been junked, salvaged, or removed from the DMV's database. The completed and signed application must be submitted with the appropriate fees within 20 days of the date the vehicle is first operated in California.

The buyer of a vehicle sold at a lien sale, or the person in whose name the vehicle is to be registered after the lien sale, must complete and submit this application for registration, along with other documents relating to the lien sale, to the DMV in order to transfer registration of the vehicle. Form REG 343 should be submitted with other supporting documents; it should not be mailed by itself. The other documents required for registration depend on the value of the vehicle sold at the lien sale.

For discussion and forms covering the lien sales of vehicles valued between \$500 and \$4,000, see §§ 102A.121, 102A.230, 102A.231. For discussion and forms covering the lien sales of vehicles valued at greater than \$4,000, see §§ 102A.120, 102A.220-102A.222.

[2] FORM

Application for Original Registration [DMV Form REG 343]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawPrivate VehiclesVehicle RegistrationGeneral Overview



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32-102A California Legal Forms--Transaction Guide §§ 102A.205-102A.219

[Reserved]

§§ 102A.205[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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2. Vehicles Valued at Greater Than \$4,000

32-102A California Legal Forms--Transaction Guide § 102A.220

§ 102A.220 Application for Lien Sale Authorization and Lienholder's Certification [DMV Form REG 656]

[1] Comment

[a] Use of Form

This form is the official DMV form used by a lienholder to initiate a lien sale of a vehicle valued at over \$4,000. Many commonly used forms are available at any DMV office or may be downloaded from the DMV website located at www.dmv.ca.gov. However, most of the lien sale forms are *not* available online, and many are not available at local DMV offices. This form is available by mail from the DMV Lien Sale Unit, P.O. Box 932317, Sacramento, CA 94323 by calling the Unit at (916) 657-7617. Forms are also available from the DMV Material Management, Forms Order Desk, 4201 Sierra Point Drive, Suite 112, Sacramento, CA 95834 by faxing the request to (916) 928-7900. The fax should include the title of the form, the form number, the quantity desired (a six month supply is recommended), a contact name and telephone number, and a shipping address, which must be a physical address. If forms are being requested for an organization, the request should be on the organization's letterhead. Questions should be directed to (916) 657-6560.

If the subject vehicle is valued at \$4,000 or less, the lienholder does not need DMV authorization [*see Civ. Code § 3072(a); see also §§ 102A.230, 102A.231*]. Regardless of the vehicle's value, if the lienholder has obtained a release of interest from the registered owner or legal owner, DMV authorization for the lien sale is not required [*see Civ. Code § 3071.5; see also § 102A.202*].

In addition to the requirements listed below, any lien for fees or storage charges for parking and storage of a motor vehicle is also subject to the requirements of *Veh. Code § 10652.5* [*Civ. Code § 3071 (l)*]. Under that section, no fee or service charge may be imposed for parking and storage of the vehicle for the period commencing with the 16th day of possession and continuing until three days after written notice by certified mail, return receipt requested, is sent to the legal owner by the lienholder, provided that the name and address of the legal owner is known or may be ascertained from Department of Motor Vehicles records [*Veh. Code § 10652.5(a)*].

[b] Lien Sale of Vehicle Valued at Over \$4,000**[i] In General**

If the value of the vehicle subject to the lien is determined to exceed \$4,000, the lienholder must apply to the DMV for the issuance of an authorization to conduct a lien sale. The application must be executed under penalty of perjury and must contain specified information [*Civ. Code § 3071(a)*; see [ii], below]. The lienholder must submit the completed application to the DMV with the appropriate filing fee. The lienholder may recover the filing fee if a lien sale is conducted or if the vehicle is redeemed [*Civ. Code § 3071(a)*].

[ii] Contents of Application

The application to conduct a lien sale must contain the following information [*Civ. Code § 3071(a)*]:

- Description of the vehicle, including the year and make, the vehicle identification number, the license number, the state of registration, and, if the vehicle is a motorcycle, the engine number.
- The names and addresses of both the registered and the legal owners of the vehicle, if ascertainable from the registration certificates within the vehicle, and the name and address of any person who the lienholder knows (or reasonably should know) claims an interest in the vehicle.
- A statement of the amount of the lien and the facts concerning the claim that gives rise to the lien.

With respect to the first item above, if the vehicle identification number is not available, the DMV must request an inspection of the vehicle by a peace officer, licensed vehicle verifier, or departmental employee before accepting the application [*Civ. Code § 3071(a)(1)*].

[iii] DMV Processing

On receipt of the application to conduct a lien sale of the vehicle, the DMV must contact the vehicle registry agency of the applicable state if the vehicle appears to be registered outside of California [*Civ. Code § 3071(b)(1)*]. In addition, the DMV must notify, by certified mail, both the registered and the legal owners of the vehicle and any other person named in the application [*Civ. Code § 3071(b)(2)*]. The notice must state the following [*Civ. Code § 3071(c)*]:

- That an application has been made with the DMV to conduct a lien sale.
- That the person notified has a right to a court hearing;
- That if a court hearing is desired, a signed Declaration of Opposition form must be signed and returned to the DMV within ten days after the date that the notice was mailed by DMV;
- That if the Declaration of Opposition form is signed and returned to the DMV, the lienholder will be allowed to sell the vehicle only if he or she obtains a favorable court judgment or the declarant's release or if the declarant cannot be served as required by statute [*see [iv], below*];
- That if a court action is filed, the declarant must be notified of the lawsuit at the address shown on the Declaration of Opposition form and may appear to contest the claim; and
- That the person may be liable for court costs if a judgment is entered in favor of the lienholder.

[iv] Declaration of Opposition

If any of the registered or legal owners (or other interested persons) wish to contest a vehicle lien sale, they may request a court hearing by completing a Declaration of Opposition and returning it to the DMV within 10 days after the DMV mailed notice of the sale to them [*Civ. Code* § 3071(c)(3)]. On timely receipt of an executed Declaration of Opposition form, the DMV must notify the lienholder (within 16 days after receiving the form) that a lien sale may not be conducted unless the lienholder files an action in court within 30 days. A lien sale of the vehicle may not be conducted unless a judgment is subsequently entered in favor of the lienholder or the declarant subsequently releases his or her interest in the vehicle. If a money judgment is entered in favor of the lienholder and the judgment is not paid within five days after becoming final, then the judgment may be enforced by the statutory lien sale procedure described in this comment [*Civ. Code* § 3071(d)].

There is one exception to the general rule that the lienholder must have a favorable judgment or a release from the declarant prior to proceeding with a lien sale in cases in which a Declaration of Opposition has been filed. Under this exception, the lienholder may proceed with a judicial proceeding or a lien sale without a judicial proceeding, if attempted service on the declarant by required methods is unsuccessful and those attempts are substantiated to the DMV [*see Civ. Code* § 3071(e)].

[v] Notice From Lienholder

On receipt of the DMV's authorization to conduct a lien sale, the lienholder must comply with certain notice requirements [*see Civ. Code* § 3071(f)]. At least five days but not more than 20 days before the lien sale (not counting the day of the sale) the lienholder must give notice of the sale by advertising once in a newspaper of general circulation published in the county in which the vehicle is located. If there is no newspaper published in the county, notice must be given by posting a Notice of Pending Lien Sale form in three of the most public places in the town in which the vehicle is located and at the place where the vehicle is to be sold for 10 consecutive days before and including the day of the sale [*Civ. Code* § 3071(f)(1); *see* § 102A.221].

The lienholder must also send a Notice of Pending Lien Sale form 20 days before the day of the sale (not counting the day of the sale) to specified parties [*see Civ. Code* § 3071(f)(2); *see also* § 102A.221].

[vi] Conduct of Lien Sale

Prior to the commencement of the lien sale, the vehicle must be made available for inspection at a location easily accessible to the public for at least one hour before the sale. Further, the vehicle must be made available at the time and date specified on the notice of sale [*Civ. Code* § 3071(j)].

The lien sale must be conducted in a commercially reasonable manner [*Civ. Code* § 3071(j)]. The statute, however, does not specify what constitutes "commercially reasonable." Sealed bids may not be accepted at the lien sale [*Civ. Code* § 3071(j)].

[c] Disposition of Lien Sale Proceeds

[i] In General

The proceeds of a vehicle lien sale must be disposed of in a specified manner [*see Civ. Code* § 3073]. The lienholder must receive the amount necessary to discharge the lien and the cost of processing the vehicle. The "cost of processing the vehicle" may not exceed the maximum amount set by statute, which varies depending on the value of the vehicle [*Civ. Code* § 3073(a); *see also* [d], *below*]. The balance, if any, must be forwarded to the DMV within 15 days after the vehicle is sold, unless a contrary disposition is required under federal law [*Civ. Code* § 3073(b)].

[ii] Claims Against Proceeds by Parties Other Than Lienholder

Any person claiming an interest in a vehicle sold at a lien sale may file a claim with the DMV for any portion of the funds from the lien sale that the DMV received and deposited in the Motor Vehicle Account. If the DMV determines that the claimant is entitled to a portion of the funds, it will pay that amount. However, the amount paid may not exceed the balance amount received by the DMV. The DMV will not honor any claim unless it is filed within three years of the date the funds were deposited in the Motor Vehicle Account [*Civ. Code § 3073(c)*].

[d] Redemption of Vehicle

[i] Before Sale

A legal or registered owner of a vehicle subject to lien sale may redeem the vehicle before the sale by paying the claimed amount on which the lien arose [*see Civ. Code § 3074*]. On redemption, a lienholder may recover the actual costs incurred in lien sale preparations from any person who redeems the vehicle before a lien sale is conducted. These costs may commence and become part of the possessory lien when the lienholder requests from the DMV the names and addresses of all persons having an interest in the vehicle. The costs may not be recovered in the case of any vehicle redeemed before the third day of possession by the lienholder. Further, the costs may not exceed the maximum amount set by statute, which varies depending on the value of the vehicle [*see Civ. Code § 3074*].

[ii] After Sale

Within 10 days after the lien sale of any vehicle, the legal or registered owner may redeem the vehicle on payment of the amount of the sale, and all costs and expenses of the sale, together with 12 percent annual interest. If the vehicle is not redeemed, all lien sale documents required by the DMV must be completed and delivered to the buyer [*Civ. Code § 3071(k); see § 102A.222*].

Following the sale, the person who conducts the sale must remove and destroy the vehicle's license plates and, within five days of the sale, submit a completed "Notice of Release of Liability" form to the Department of Motor Vehicles [*Civ. Code § 3071(h)*]. The Department of Motor Vehicles will retain all submitted "Notice of Release of Liability" forms for two years [*Civ. Code § 3071(i)*].

[2] FORM

Application for Lien Sale Authorization and Lienholder's Certification [DMV Form REG 656]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Nonmortgage Liens Judgment Liens Transportation Law Commercial Vehicles Licensing & Registration Transportation Law Private Vehicles Vehicle Registration General Overview



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2. Vehicles Valued at Greater Than \$4,000

32-102A California Legal Forms--Transaction Guide § 102A.221

§ 102A.221 Notice of Pending Lien Sale [DMV Form REG 280]

[1] Comment

[a] Use of Form

This form is a DMV Notice of Pending Lien Sale. Many commonly used forms are available at any DMV office or may be downloaded from the DMV website located at www.dmv.ca.gov. However, most of the lien sale forms are *not* available online, and many are not available at local DMV offices. This form is available by mail from the DMV Lien Sale Unit, P.O. Box 932317, Sacramento, CA 94323 by calling the Unit at (916) 657-7617. Forms are also available from the DMV Material Management, Forms Order Desk, 4201 Sierra Point Drive, Suite 112, Sacramento, CA 95834 by faxing the request to (916) 928-7900. The fax should include the title of the form, the form number, the quantity desired (a six month supply is recommended), a contact name and telephone number, and a shipping address, which must be a physical address. If forms are being requested for an organization, the request should be on the organization's letterhead. Questions should be directed to (916) 657-6560.

If the value of the vehicle subject to a lien exceeds \$4,000, the lienholder must use this form to give written notice to the vehicle's owners in advance of the sale [see [b], *below*]. For discussion of lien sales of vehicles valued at over \$4,000, see §§ 102A.120 and 102A.220[1].

[b] Sending Notice of Pending Lien Sale

After the lienholder obtains authorization from the DMV to conduct a lien sale on a vehicle valued at more than \$4,000, he or she must send this notice, at least 20 days before the date of the sale (not counting the date of sale), to the legal owners and registered owners of the vehicle, if the vehicle is registered in California; the DMV in Sacramento; and all other persons known to have an interest in the vehicle. The notice must be sent by certified mail with return receipt requested [*Civ. Code* § 3071(f)(2)]. For a form used to obtain information concerning the registered owner, legal owner, and other interested persons, see § 102A.203[2].

[2] FORM

Notice of Pending Lien Sale [DMV Form REG 280]

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Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawNonmortgage LiensGeneral OverviewTransportation LawPrivate VehiclesVehicle
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DIVISION VII: PERSONAL TRANSACTIONS
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 2. Vehicles Valued at Greater Than \$4,000

32-102A California Legal Forms--Transaction Guide § 102A.222

§ 102A.222 Certification of Lien Sale for Vehicle Valued Over \$4,000 or From Self-Storage Facility [DMV Form REG 168]

[1] Comment

[a] Use of Form

This form is the official DMV form for certification of a lien sale for a vehicle valued over \$4,000 or a vehicle that was stored in a self-storage facility. Many commonly used forms are available at any DMV office or may be downloaded from the DMV website located at www.dmv.ca.gov. However, most of the lien sale forms are *not* available online, and many are not available at local DMV offices. Forms are available by mail from the DMV Lien Sale Unit, P.O. Box 932317, Sacramento, CA 94323 by calling the Unit at (916) 657-7617. Forms are also available from the DMV Material Management, Forms Order Desk, 4201 Sierra Point Drive, Suite 112, Sacramento, CA 95834 by faxing a request to (916) 928-7900. The fax should include the title of the form, the form number, the quantity desired (a six month supply is recommended), a contact name and telephone number, and a shipping address, which must be a physical address. If forms are being requested for an organization, the request should be on the organization's letterhead. Questions should be directed to (916) 657-6560.

This form is to be completed by the lienholder and given to the buyer following the 10-day redemption period after the lien sale [see *Civ. Code* § 3071(k); see also [b], below]. The lienholder must attach to this form the vehicle record obtained from the DMV and/or a certified copy of a court judgment or release of interest in the vehicle [see *Civ. Code* §§ 3071(c)(4), 3071.5]. In addition, the lienholder must attach the receipts for certified notices sent to the registered and legal owners of the vehicle, all other interested persons, and the DMV [see *Civ. Code* § 3071(f)(2)]. For detailed discussion of the steps involved in conducting a lien sale for vehicles valued over \$4,000, see § 102A.220[1].

[b] Redemption Period

Within 10 days after the lien sale of a vehicle, the legal or registered owner may redeem the vehicle on payment of the amount of the sale, and all costs and expenses of the sale, together with 12 percent annual interest. If the vehicle is not

redeemed, all lien sale documents required by the DMV, including this certification, must be completed and delivered to the buyer [*Civ. Code § 3071(k)*].

[2] FORM

Certification of Lien Sale for Vehicle Valued Over \$4,000 or From Self-Storage Facility [DMV Form REG 168]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawNonmortgage LiensGeneral OverviewTransportation LawPrivate VehiclesGeneral Overview



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32-102A California Legal Forms--Transaction Guide §§ 102A.223-102A.229

[Reserved]

§§ 102A.223[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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 3. Vehicles Valued At \$4,000 or Less

32-102A California Legal Forms--Transaction Guide § 102A.230

§ 102A.230 Lienholder's Certification and Notice of Pending Lien Sale [DMV Form REG 668]

[1] Comment

[a] Use of Form

This form is the official DMV form for a lienholder's certification and notice of a pending lien sale of a vehicle valued at \$4,000 or less. Many commonly used forms are available at any DMV office or may be downloaded from the DMV website located at www.dmv.ca.gov. Although this form does not appear on the list of available forms on Forms page of the DMV website, it is available (as of mid-2002) at www.dmv.ca.gov/forms/reg/reg668.htm. The form is also available by mail from the DMV Lien Sale Unit, P.O. Box 932317, Sacramento, CA 94323 by calling the Unit at (916) 657-7617. The form may also be ordered from the DMV Material Management, Forms Order Desk, 4201 Sierra Point Drive, Suite 112, Sacramento, CA 95834 by faxing a request to (916) 928-7900. The fax should include the title of the form, the form number, the quantity desired (a six month supply is recommended), a contact name and telephone number, and a shipping address, which must be a physical address. If forms are being requested for an organization, the request should be on the organization's letterhead. Questions should be directed to (916) 657-6560.

For discussion and forms covering lien sales of vehicles valued at greater than \$4,000, see §§ 102A.220-102A.222.

This form contains the certification of lien and blank declaration of opposition that must accompany the notice of lien sale when delivered to the registered and legal owners and other interested persons [*see Civ. Code § 3072(b)*].

In addition to the requirements listed below, any lien for fees or storage charges for parking and storage of a motor vehicle is subject to the requirements of *Veh. Code § 10652.5* [*Civ. Code § 3072(j)*]. Under that section, no fee or service charge may be imposed for parking and storage of the vehicle for the period commencing with the 16th day of possession and continuing until three days after written notice by certified mail, return receipt requested, is sent to the legal owner by the lienholder, provided that the name and address of the legal owner is known or may be ascertained from Department of Motor Vehicles records [*Veh. Code § 10652.5(a)*].

[b] Lien Sales of Vehicles Valued at \$4,000 or Less**[i] In General**

A lienholder begins the lien sale of a vehicle valued at \$4,000 or less by applying to the DMV for the names and addresses of both the registered and the legal owners of record [*see Civ. Code § 3072(a); see also § 102A.203*]. This request to the DMV must include certain identification information for the vehicle, including the vehicle identification number [*see Civ. Code § 3072(a)*]. If that number is not available, the DMV must request an inspection of the vehicle by a peace officer, licensed vehicle verifier, or departmental employee before releasing the names and addresses of the registered and legal owners and interested parties [*Civ. Code § 3072(a)*].

After receiving the names and addresses from the DMV, the lienholder must immediately send a completed Notice of Pending Lien Sale form, a blank Declaration of Opposition, and a return envelope preaddressed to the DMV, to both the registered and the legal owners of the vehicle, and to any other person known to have an interest in the vehicle [*Civ. Code § 3072(b)*]. The DMV also requires the inclusion of a DMV Certificate of Lien form. This form contains all these required forms and notices. The forms must be sent by certified mail, return receipt requested, or by United States Postal Service Certificate of Mailing [*Civ. Code § 3072(b)*].

The lienholder must also send to the DMV by certified mail, on the same day as the forms are sent to the interested parties, a completed Notice of Pending Lien Sale form [*Civ. Code § 3072(b)*].

[ii] Required Contents of Notice of Pending Lien Sale

All Notice of Pending Lien Sale forms sent to persons having an interest in the vehicle must contain the following information [*Civ. Code § 3072(c)*]:

- The description of the vehicle, including the year and make, the vehicle identification number, the license number, state of registration, and, if the vehicle is a motorcycle, the engine number.
- The specific date of sale, which must not be less than 31 days nor more than 41 days from the date of mailing; the exact time of sale; and the place of sale.
- The names and addresses of both the registered and the legal owners of the vehicle, and the name and address of any person known to have an interest in the vehicle.
- A statement of the amount of the lien and the facts concerning the claim that gives rise to the lien.
- A statement that the person notified has a right to a court hearing.
- A statement that if a court hearing is desired, a signed Declaration of Opposition form must be returned to the DMV within ten days of the mailing of the Notice of Pending Lien Sale form.
- A statement that if the Declaration of Opposition form is signed and returned to the DMV, the lienholder will be allowed to sell the vehicle only if he or she obtains a court judgment or the declarant's release or if the declarant cannot be served as required by statute [*see [iii], below*].
- A statement that if a court action is filed, the declarant must be notified of the lawsuit at the address shown on the Declaration of Opposition form and may appear to contest the claim.
- A statement that the person may be liable for court costs if a judgment is entered in favor of the

lienholder.

[iii] Declaration of Opposition

If any registered or legal owners (or other interested persons) wish to contest a vehicle lien sale, they may request a court hearing by completing the Declaration of Opposition and returning it to the DMV within 10 days after the Notice of Pending Lien Sale was mailed to them [*see Civ. Code § 3072(c)(4)(C)*]. On timely receipt of an executed Declaration of Opposition form, the DMV must notify the lienholder (within 16 days of receiving the form) that a lien sale may not be conducted unless the lienholder files an action in court within 30 days of the notice and judgment is subsequently entered in favor of the lienholder or the declarant subsequently releases his or her interest in the vehicle. If a money judgment is entered in favor of the lienholder and the judgment is not paid within five days after becoming final, the judgment may be enforced by the statutory lien sale procedure described in this Comment [*Civ. Code § 3072(d)*]. Even if a favorable judgment or release is not obtained by the lienholder after a Declaration of Opposition has been filed, the lienholder may proceed with a judicial proceeding or proceed with a lien sale without a judicial proceeding if attempted service on the declarant by required methods is unsuccessful and those attempts are substantiated to the DMV [*see Civ. Code § 3072(e)*].

[iv] Notice From Lienholder

At least 10 days before the lien sale (including the day of the sale), the lienholder must post a Notice of Pending Lien Sale in a conspicuous place on the premises of the lienholder's business office. If the pending lien sale is scheduled to occur at a place other than the business premises of the lienholder, the Notice of Pending Lien Sale must also be posted at the site of the forthcoming sale [*Civ. Code § 3072(f)*]. The posted Notice of Pending Lien Sale form must include the specific date and exact time of the sale, and a description of the vehicle, including the make, year, model, identification number, license number, and state of registration. If the vehicle to be sold is a motorcycle, the posted notice must include the engine number. The notice must remain posted until the sale is completed [*Civ. Code § 3072(f)*].

[v] Conduct of Lien Sale

The vehicle must be made available for inspection at a location easily accessible to the public for at least one hour before the sale. Further, the vehicle must be made available at the time and date specified on the notice of sale [*Civ. Code § 3072(i)*].

The lien sale must be conducted in a commercially reasonable manner [*Civ. Code § 3072(i)*]. The statute, however, does not specify what constitutes "commercially reasonable." Sealed bids may not be accepted at the lien sale [*Civ. Code § 3072(i)*].

All lien sale documents required by the DMV must be delivered to the buyer immediately following the sale [*Civ. Code § 3072(i)*; *see § 102A.231*].

Following the sale, the person who conducted the sale must remove and destroy the vehicle's license plates and, within five days of the sale, submit a completed "Notice of Release of Liability" form to the Department of Motor Vehicles [*Civ. Code § 3072(g)*]. The Department of Motor Vehicles will retain all submitted "Notice of Release of Liability" forms for two years [*Civ. Code § 3072(h)*].

[c] Disposition of Lien Sale Proceeds

[i] In General

The proceeds of a vehicle lien sale must be disposed of in a specified manner [*see Civ. Code § 3073*]. The lienholder must receive the amount necessary to discharge the lien and the cost of processing the vehicle. The "cost of processing

the vehicle" may not exceed the maximum amount set by statute, which varies depending on the value of the vehicle [Civ. Code § 3073(a); see also [c], below].

The balance of the proceeds, if any, must be forwarded to the DMV within five days after the vehicle is sold, unless a contrary disposition is required under federal law [Civ. Code § 3073(b)].

If the sale proceeds are insufficient to discharge the towing and storage lien of a tow truck operator pursuant to Civ. Code § 3068.1, the operator has a deficiency claim against the registered owner of the vehicle (if the vehicle was not leased or was leased with a driver) [Civ. Code § 3068.2(a); see Civ. Code § 3068.2(d), (e) (liability when registered owner has transferred the vehicle before its removal)] or against the lessee of the vehicle (if the vehicle was leased without a driver) [Civ. Code § 3068.2(b)]. The amount of the claim is the amount of the towing and storage charges, not to exceed 120 days of storage, plus the lien sale processing fee in accordance with Civ. Code § 3074, less the amount received from the lien sale [Civ. Code § 3068.2(a), (b)]. Storage costs incurred after the sale are not included in calculating the amount received from the sale [Civ. Code § 3068.2(c)].

[ii] Claims Against Proceeds by Parties Other Than Lienholder

Any person claiming an interest in a vehicle sold at a lien sale may file a claim with the DMV for any portion of the funds from the lien sale that the DMV received and deposited in the Motor Vehicle Account. If the DMV determines that the claimant is entitled to a portion of the funds, it will pay that amount. However, the amount paid may not exceed the balance amount received by the DMV. The DMV may not honor any claim unless the claim has been filed within three years of the date the funds were deposited in the Motor Vehicle Account [Civ. Code § 3073(c)].

[d] Recovery of Sale Costs on Redemption of Vehicle

A legal or registered owner of a vehicle subject to lien sale may redeem the vehicle before the sale by paying the claimed amount on which the lien arose [see Civ. Code § 3074]. On redemption, the lienholder may recover the actual costs incurred in lien sale preparations from any person who redeems the vehicle before a lien sale is conducted. These costs may begin and become part of the possessory lien when the lienholder requests from the DMV the names and addresses of all persons having an interest in the vehicle. However, the costs may not be recovered in the case of any vehicle redeemed before the third day of possession by the lienholder [Civ. Code § 3074]. Furthermore, the costs may not exceed the maximum amount by statute, which varies depending on the value of the vehicle [see Civ. Code § 3074].

[2] FORM

Lienholder's Certification and Notice of Pending Lien Sale [DMV Form REG 668]

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Legal Topics:

For related research and practice materials, see the following legal topics:

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DIVISION VII: PERSONAL TRANSACTIONS
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32-102A California Legal Forms--Transaction Guide § 102A.231

§ 102A.231 Certification of Lien Sale for Vehicle Valued at \$4,000 or Less [DMV Form REG 168A]

[1] Comment--Use of Form

This form is the official DMV form for certification of a lien sale for a vehicle valued at \$4,000 or less. Many commonly used forms are available at any DMV office or may be downloaded from the DMV website located at www.dmv.ca.gov. However, most of the lien sale forms are *not* available online, and many are not available at local DMV offices. This form is available by mail from the DMV Lien Sale Unit, P.O. Box 932317, Sacramento, CA 94323 by calling the Unit at (916) 657-7617. Forms are also available from the DMV Material Management, Forms Order Desk, 4201 Sierra Point Drive, Suite 112, Sacramento, CA 95834 by faxing a request to (916) 928-7900. The fax should include the title of the form, the form number, the quantity desired (a six month supply is recommended), a contact name and telephone number, and a shipping address, which must be a physical address. If forms are being requested for an organization, the request should be on the organization's letterhead. Questions should be directed to (916) 657-6560.

This form is to be completed by the lienholder and given to the buyer along with the other lien sale documents immediately following the lien sale [*see Civ. Code § 3072(i)*]. The lienholder must attach to this form the vehicle record obtained from the DMV and/or a certified copy of a court judgment or release of interest in the vehicle [*see Civ. Code §§ 3072(c)(4)(D), 3071.5*]. In addition, the lienholder must attach the receipts for certified notices sent to the registered and legal owners of the vehicle, all other interested persons, and the DMV [*see Civ. Code § 3072(b)*]. For a detailed discussion of the steps involved in conducting a lien sale for vehicles valued at \$4,000 or less, see *§ 102A.230[1]*.

[2] FORM

Certification of Lien Sale for Vehicle Valued at \$4,000 or Less [DMV Form REG 168A]

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Legal Topics:

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32-102A California Legal Forms--Transaction Guide §§ 102A.232-102A.239

[Reserved]

§§ 102A.232[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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A. Motor Vehicle Liens

4. Liens on Vehicles Valued at \$500 or Less and Impounded Under Public Authority

32-102A California Legal Forms--Transaction Guide § 102A.240

§ 102A.240 Notice of Intent to Dispose of Vehicle Valued at \$500 or Less [DMV Form REG 684]

[1] Comment

[a] Use of Form

This form is the DMV Notice of Intent to Dispose of a Vehicle Valued at \$500 or Less [*see Veh. Code § 22851.8* (procedure for sale of low value vehicles); [c], *below*].

Many commonly used forms are available at any DMV office or may be downloaded from the DMV website located at www.dmv.ca.gov. However, most of the lien sale forms are *not* available online and many are not available at local DMV offices. This form is available by mail from the DMV Lien Sale Unit, P.O. Box 932317, Sacramento, CA 94323 by calling the Unit at (916) 657-7617. Forms are also available from the DMV Material Management, Forms Order Desk, 4201 Sierra Point Drive, Suite 112, Sacramento, CA 95834 by faxing the request to (916) 928-7900. The fax should include the title of the form, the form number, the quantity desired (a six month supply is recommended), a contact name and telephone number, and a shipping address, which must be a physical address. If forms are being requested for an organization, the request should be on the organization's letterhead. Questions should be directed to (916) 657-6560.

This form may be used by a lienholder seeking to satisfy a lien on a vehicle valued at \$500 or less, which was ordered towed or stored by a public agency [*see Veh. Code §§ 22851(a), 22851.8*]. Although the form in [2], *below*, states that it is for vehicles valued at \$300 or less, it may be used until a revised form is available reflecting the change in value to \$500. For discussion and forms covering other lien sales of vehicles valued at \$4,000 or less, see §§ 102A.230, 102A.231. For discussion and forms covering lien sales of vehicles valued at more than \$4,000, see §§ 102A.220-102A.222.

[b] Liens on Vehicles Impounded by Public Agency

[i] Nature of Lien

Whenever a vehicle has been removed to a garage pursuant to Division 11, Chapter 10 of the Vehicle Code [see *Veh. Code* § 22651 *et seq.* (removal of abandoned and certain other vehicles)], and the keeper of the garage has received the notice or notices required by law, the keeper has a lien dependent on possession for compensation for towing and for the impounded vehicle's care and safekeeping for a period not exceeding 60 days. If an application for an authorization to conduct a lien sale has been filed pursuant to *Civ. Code* § 3068.1 within 30 days after the removal of the vehicle to the garage, the lien may cover a period of 120 days. If the vehicle is not recovered by the owner within that period, or the owner is unknown, the keeper of the garage may satisfy the lien in the manner provided below [*Veh. Code* § 22851(a)]. Possession is deemed to arise when the vehicle is removed and is in transit [*Veh. Code* § 22851(a)]. The same possessory lien arises for towing and storage charges resulting from removal of a vehicle from private property at the authorization of the property owner [see *Veh. Code* § 22658].

Vehicles impounded for parking violations [see *Veh. Code* § 22651(i)] are also subject to the lien of the impounding local authority, dependent on the possession of the garage keeper, for satisfaction of bail for all outstanding notices of parking violation when no one has answered the charge in the notice of parking violation given, or filed an affidavit of nonownership, pursuant to and within the time specified in *Veh. Code* § 41103(b) [*Veh. Code* § 22851.1]. These liens are enforced by the procedures applicable to towing and storage liens described below [see *Veh. Code* § 22851.1(a)].

[ii] Personal Property Within Vehicle

The lien does not apply to any personal property found within the vehicle. Further, any personal property found within the vehicle must be returned to the vehicle's registered owner or his or her agent on demand and without charge during normal business hours, which are defined by statute to be Monday through Friday, from 8AM to 5PM, inclusive, except state holidays. The lienholder is not responsible for any property after disposal of the vehicle [*Veh. Code* § 22851(b)].

[iii] Assignment of Lien

Liens granted to keepers of vehicles authorized for removal pursuant to *Veh. Code* §§ 22651-22711, governing removal of parked and abandoned vehicles, may not be assigned [*Veh. Code* § 22851(a)]. For discussion and forms covering the assignability of vehicle liens, see §§ 102A.250, 102A.251.

[iv] Appropriate Lien Sale Procedure

If a vehicle is determined to have a value exceeding \$500, a lien sale of the vehicle must comply with either *Civ. Code* § 3071 (vehicles valued at over \$4,000) or *Civ. Code* § 3072 (vehicles valued at \$4,000 or less) [*Veh. Code* § 22851.4; see *Veh. Code* § 22670 (value estimation); see also §§ 102A.220-102A.231]. If a vehicle (other than an abandoned vehicle) is determined to have a value of \$500 or less, the vehicle must be disposed of in accordance with the statutory procedures discussed below [see *Veh. Code* § 22851.6(a); see also *Veh. Code* §§ 22851.8, 22851.10 (procedures)]. Different disposal procedures apply if a low-valued vehicle were towed and stored because it was determined by a police officer or other authorized person to be abandoned [see *Veh. Code* § 22851.3 (procedures); see also *Veh. Code* § 22669 (removal of abandoned vehicles from state or private property)]. Note that the reverse side of the form discussed in this comment contains another form, Notice of Intent to Dispose of a Vehicle Valued at \$500 or Less Removed by a Public Agency CVC § 22669 [see *Veh. Code* §§ 22669 (removal of abandoned vehicles from state or private property by peace officer or any other employee of a public agency authorized under *Veh. Code* §§ 22669, 22851.3 (procedure for disposition of low value vehicles removed pursuant to *Veh. Code* § 22669)]. The latter form is not reproduced here.

[c] Disposal of Vehicle Valued at \$500 or Less

[i] Notice Requirements

A person acquiring a lien on a vehicle valued at \$500 or less that has been authorized for removal by a public agency

must comply with *Veh. Code* §§ 22851.8 and 22851.10 in disposing of the vehicle [*Veh. Code* § 22851.6(a); see *Veh. Code* § 22670 (value determination); but see *Veh. Code* § 22851.3 (different disposition procedure for low-value, "abandoned" vehicles)]. Within 15 days of taking possession of the vehicle, the lienholder must request from the DMV the names and addresses of all persons having an interest in the vehicle [*Veh. Code* § 22851.8(a); see § 102A.203]. A storage charge may not accrue beyond the 15-day period unless the lienholder makes the request for the names and addresses of interested persons within this time period [*Veh. Code* § 22851.8(a)].

Immediately on receipt of the names and addresses of both the registered and the legal owners of the vehicle, the lienholder must complete and send this form to the owners and any other persons with an interest in the vehicle [*Veh. Code* § 22851.8(b)(1); see *Veh. Code* § 22851.6(b) (forms must be prescribed by DMV)]. Although the statute specifies that this form must be accompanied by "a blank form of Declaration of Opposition [see *Veh. Code* § 22851.8(b)(2)], the latter form no longer exists independently, but instead the DMV has revised this notice form [DMV form REG 684] to include the required Declaration of Opposition [see [2], below].

The notice must be accompanied by a return envelope preaddressed to the lienholder [*Veh. Code* § 22851.8(b)(3)]. The form must be sent by certified mail, return receipt requested, or by United States Postal Service Certificate of Mailing [*Veh. Code* § 22851.8(b)]. The form itself specifies that the notice also may be sent by "a method of mailing that provides evidence of mailing and a control number, such as registered mail, Federal Express, Express Mail, etc." [see [2], below].

[ii] Declaration of Opposition

This form includes a Declaration of Opposition [see [i], above]. If the owners or other interested persons want to stop the disposal of the vehicle, they must complete and sign the bottom portion of the form and return it to the lienholder within 10 days of the date the notice was sent [see *Veh. Code* § 22851.8(c)(3)(D)]. If the lienholder receives a completed Declaration of Opposition postmarked within the 10-day period, he or she cannot dispose of the vehicle unless the lienholder obtains a release of interest from the declarant or a court action is filed within 20 days of the date the notice was mailed and a judgment is obtained in the lienholder's favor [*Veh. Code* § 22851.8(d); see *Civ. Code* § 3071.5 (release of interest in vehicle subject to lien under Civil Code required information); § 102A.202 (form for release of interest)].

If a money judgment is entered in favor of the lienholder and the judgment is not paid within five days after becoming final, then the lienholder may dispose of the vehicle through a dismantler or scrap iron processor [*Veh. Code* § 22851.8(d)]. Even if the lienholder does not obtain a favorable judgment or a release from the declarant after a Declaration of Opposition has been filed, the lienholder may proceed with a judicial proceeding, or proceed with a lien sale without a judicial proceeding, if attempted service on the declarant by required methods is unsuccessful and those attempts are substantiated to the DMV [see *Veh. Code* § 22851.8(e)(2)].

If service is effected on the declarant, the proof of service must be submitted to the DMV with other required documents [*Veh. Code* § 22851.8(e)(2); see *Veh. Code* § 22851.10 (other required documents); § 102A.241[1]]. If a completed Declaration of Opposition is not received, the lienholder may dispose of the vehicle to a licensed dismantler or scrap iron processor not earlier than 15 days after the Notice of Intent to Dispose of a Vehicle Valued at \$500 or Less was mailed [*Veh. Code* § 22851.10(a)].

[iii] Sale of Vehicle to Licensed Dismantler or Scrap Iron Processor

If the vehicle remains unclaimed, or reasonable towing and storage charges remain unpaid, the lienholder may dispose of the vehicle only to a licensed dismantler or scrap iron processor [*Veh. Code* § 22851.10(a)]. Generally, the lienholder may dispose of the vehicle no earlier than 15 days after the date of mailing the Notice of Intent to Dispose of a Vehicle Valued at \$500 or Less [see *Veh. Code* § 22851.10(a)]. For further discussion of the documents required in conjunction

with the disposal of the vehicle to a licensed dismantler or scrap iron processor, see § 102A.241.

[d] Recovery of Costs

A lienholder may recover the actual costs incurred in the processing for disposal of any vehicle from any person who redeems the vehicle before disposal. These costs may begin and become part of the possessory lien when the lienholder requests from the DMV the names and addresses of all persons having an interest in the vehicle. The costs may not be recovered in the case of any vehicle redeemed before the third day of possession by the lienholder. Further, the costs may not exceed the maximum amount set by statute, which varies depending on whether the vehicle is valued at less or more than \$4,000 [see *Veh. Code* § 22851.12; see also §§ 102A.220, 102A.230].

[2] FORM

Notice of Intent to Dispose of Vehicle Valued at \$300 or Less Removed by Public Agency for Reasons Other than Abandonment [DMV Form REG 684]

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Legal Topics:

For related research and practice materials, see the following legal topics:

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32-102A California Legal Forms--Transaction Guide § 102A.241

§ 102A.241 Statement of Facts Concerning Disposal of Vehicle Valued at \$500 or Less [DMV Form REG 686]

[1] Comment--Use of Form

This form is a DMV Statement of Facts for Vehicles Valued at \$500 or Less.

Many commonly used forms are available at any DMV office or may be downloaded from the DMV website located at www.dmv.ca.gov. However, most of the lien sale forms are *not* available online, and many are not available at local DMV offices. This form is available by mail from the DMV Lien Sale Unit, P.O. Box 932317, Sacramento, CA 94323 by calling the Unit at (916) 657-7617. Forms are also available from the DMV Material Management, Forms Order Desk, 4201 Sierra Point Drive, Suite 112, Sacramento, CA 95834 by faxing the request to (916) 928-7900. The fax should include the title of the form, the form number, the quantity desired (a six month supply is recommended), a contact name and telephone number, and a shipping address, which must be a physical address. If forms are being requested for an organization, the request should be on the organization's letterhead. Questions should be directed to (916) 657-6560.

Although the form in [2], *below*, states that it is for vehicles valued at \$300 or less, it may be used until a revised form is available reflecting the change in value to \$500. This form must be completed by a towing service or garage keeper who has disposed of a vehicle that is valued at less than \$500 and that was towed or stored under authority of a public agency. The form must be submitted to the licensed dismantler or scrap iron processor within five days after the disposition of the vehicle [*Veh. Code* § 22851.10(b)]. In addition to the information that must be provided on the form, the form must be accompanied by a copy of the Notice of Intent to Dispose of a Vehicle Valued at \$500 or Less Removed By a Public Agency for Reasons Other Than Abandonment CVC § 22851.8 [*see* § 102A.240], the certification from the public agency that made the determination of value [*see Veh. Code* § 22670], and either proof of service [*see Veh. Code* § 22851.8(e)] or a copy of any judgment entered in favor of the lienholder [*Veh. Code* § 22851.10(b); *see Veh. Code* § 22851.8(d) (judgment in favor of lienholder)].

[2] FORM

Statement of Facts Concerning Disposal of Vehicle Valued at \$300 or Less Removed By a Public Agency for Reasons Other than Abandonment [DMV Form REG 686]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawNonmortgage LiensGeneral OverviewTransportation LawPrivate VehiclesGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102A PERSONAL PROPERTY LIENS
PART IV. FORMS

A. Motor Vehicle Liens

4. Liens on Vehicles Valued at \$500 or Less and Impounded Under Public Authority

32-102A California Legal Forms--Transaction Guide §§ 102A.242-102A.249

[Reserved]

§§ 102A.242[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102A PERSONAL PROPERTY LIENS
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A. Motor Vehicle Liens
5. Assignments

32-102A California Legal Forms--Transaction Guide § 102A.250

§ 102A.250 Assignment of Lien for Services on or Storage of a Motor Vehicle

[1] Comment

[a] Use of Form

This form is an assignment of a lien for services on or storage of a motor vehicle. It may be used by a lienholder to assign his or her lien for labor or storage charges on a particular vehicle. Such liens are expressly assignable [*see Civ. Code § 3069; [b], below*]. For discussion of assignments in general, see Ch. 76, *Assignments of Rights and Obligations*. For discussion of motor vehicle liens in general, see § 102A.200[1][b]. For discussion and a form for notice of the assignment of a lien for services or storage, see § 102A.251.

[b] Assignments of Motor Vehicle Liens

Liens for labor or materials, or for the storage or safekeeping of a vehicle when abandoned on private property, may be assigned by written instrument. However, the assignment must be accompanied by the transfer of possession of the vehicle. Moreover, the lienholder must give written notice of the assignment, including the name and address of the person to whom the lien is assigned, to both the registered and the legal owners of the vehicle either by personal delivery or by registered or certified mail [*Civ. Code § 3069*].

[2] FORM

Assignment of Lien for Services on or Storage of a Motor Vehicle

ASSIGNMENT OF CLAIM AND LIEN FOR _____ [SERVICE or STORAGE] CHARGES ON VEHICLE

For value received, the undersigned hereby assigns to [name of assignee] all _____ [his or her] right, title, and interest in and to _____ [his or her] claim in the amount of \$ _____,

together with the lien arising under *Civil Code Section 3068* for [specify service performed, or the storage] of [identify vehicle by make, year, model, license number, and any other appropriate information] at [place where service was performed or vehicle stored] on _____[date or dates of service or storage].

Dated: _____

_____ [name of lienholder]

_____ [signature]

_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Performance Assignment General Overview Real Property Law Nonmortgage Liens General Overview Transportation Law Private Vehicles General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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 A. Motor Vehicle Liens
 5. Assignments

32-102A California Legal Forms--Transaction Guide § 102A.251

§ 102A.251 Notice of Assignment of Lien for Services on or Storage of Vehicle**[1] Comment--Use of Form**

This form is a notice of the assignment of a motor vehicle lien. It may be used for notifying the owner of a vehicle that the lien for repair or storage charges has been assigned. This type of notice is required to effectuate a valid assignment of a motor vehicle lien [Civ. Code § 3069]. For discussion of assignments in general, see Ch. 76, *Assignments of Rights and Obligations*. For discussion of motor vehicle liens in general, see § 102A.200[1][b]. For discussion and a form for the assignment of a motor vehicle lien, see § 102A.250.

[2] FORM**Notice of Assignment of Lien for Services on or Storage of Vehicle**

_____[name of registered or legal owner]
 _____[street address]
 _____[city, state, zip]

NOTICE OF ASSIGNMENT OF LIEN

You are hereby notified in accordance with *Civil Code Section 3069* that the undersigned, on [date of assignment], assigned all _____[his or her] right, title, and interest in and to the claim and lien on [description of vehicle] for [services performed or storage charges] in the amount of \$ _____ on _____[specify date or dates of service or storage].

The claim and lien described above have been assigned to [name of assignee] of [address of assignee]. All further matters with regard to the subject vehicle or lien on the vehicle should be referred to the assignee.

Dated: _____

_____ *[name of lienholder]*
_____ *[signature]*
_____ *[typed name]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Performance Assignment General Overview Transportation Law Private Vehicles General Overview



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32-102A California Legal Forms--Transaction Guide §§ 102A.252-102A.259

[Reserved]

§§ 102A.252[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Agricultural Liens

32-102A California Legal Forms--Transaction Guide § 102A.260

§ 102A.260 Verified Claim of Breeder's Lien

[1] Comment

[a] Use of Form

This form is a verified claim of a breeder's lien. It is designed to give notice of a stallion, jack, or bull owner's claim of lien on a mare, cow, and offspring for the agreed price of breeding services. For discussion and forms involving liens available to livestock servicers, see §§ 102A.262-102A.264. For discussion and a form covering liens available to persons selling or furnishing livestock to meatpackers, see § 102A.261.

[b] Nature of Breeder's Lien

Every person who owns or has charge of a stallion, jack, or bull used for breeding purposes has a lien for the agreed price of its services on any mare, cow, and the offspring occurring as a result of those services. A person entitled to a breeder's lien forfeits that entitlement if he or she willfully makes, or instigates another to make, false representations regarding the stallion, jack, or bull's pedigree or breeding [*Civ. Code § 3062*].

[c] Recording Breeder's Lien

A person claiming a breeder's lien, within 90 days after the service for which the lien is claimed, must record a verified claim in the recorder's office for the county in which the mare or cow is kept [*Civ. Code § 3063*]. The claim must contain the following information [*Civ. Code § 3063*]:

- A description of the mare or cow.
- The date and place of service.
- The name of the mare or cow's owner or reputed owner.

- A description of the stallion, jack, or bull.
- The name of the person who owns or is in charge of the stallion, jack, or bull.
- The amount of the lien claimed.

Before the breeder's lien may be recorded, it must be acknowledged before a notary public [*Civ. Code § 3063* (requiring verification); *see Gov. Code § 27287* (acknowledgment as prerequisite to recording)]. This form includes an acknowledgment. The form for acknowledgment of an instrument before a notary public is prescribed by statute [*Civ. Code §§ 1188, 1189(a)*]. If the breeder's lien is properly recorded, it will constitute notice to subsequent purchasers and encumbrancers of the mare, cow, and offspring for one year after it is recorded [*see Civ. Code § 3063*].

[2] FORM

Verified Claim of Breeder's Lien

CLAIM OF BREEDER'S LIEN

The undersigned owner of a [stallion or jack or bull] claims a lien under *Civil Code Section 3062* on [description of mare or cow] and on that [mare's or cow's] offspring for services performed on _____ [date of service] at [place of service]. The [mare or cow] on which this lien is claimed is owned by _____ [name owner or reputed owner].

The [stallion or jack or bull] that performed the services for which this lien is claimed is [name or other appropriate description] and is [owned by or in the charge of] _____ [name].

The amount agreed on for the breeding services claimed in this lien is \$_____.

Dated: _____

I certify under penalty of perjury that the contents of this instrument are true and correct.

[signature of owner or person in charge of stallion, jack, or bull]

[typed name]

Acknowledgment

[Acknowledgments taken in California must be in substantially the following form (*Civ. Code § 1189(a)*):]

State of California

County of _____

On _____ [date], before me, _____ [name and title of officer taking acknowledgment], personally appeared [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument and acknowledged to me that _____ [he or she or they] executed the same in _____ [his or her or their] authorized _____ [capacity or capacities], and that by _____ [his or her or their] signature [s] on the instrument the person [s], or the entity upon behalf of which the person [s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ [Seal]

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral OverviewReal Property LawNonmortgage LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.261

§ 102A.261 Notice to Secretary of State and Director of Food and Agriculture of Livestock Lien

[1] Comment

[a] Use of Form

This form is a notice informing the Secretary of State and the Director of Food and Agriculture that the person filing the notice is claiming a nonpossessory lien on livestock sold or furnished to a meatpacker, and on the proceeds and products of that livestock, under *Food & Agric. Code* § 55702. This notice is in the form of a standard form UCC-1 financing statement that has been partially filled in to add the special language that needs to be added when form UCC-1 is used to provide notice of this type of lien. Although *Food & Agric. Code* § 55702 does not expressly require that form UCC-1 be used for this type of lien [*cf. Food & Agric. Code* §§ 57405(d) (dairy cattle supply lien--*see* § 102A.66), 57516 (poultry and fish supply lien--*see* § 102A.266), 57567 (agricultural chemical or seed lien--*see* § 102A.267), all of which *require* that form UCC-1 be used for those categories of liens], the Secretary of State's office specifies that Form UCC-1 is required to be used for various filings after July 1, 2001, and includes livestock liens on the list of filings for which UCC-1 is to be used. For detailed discussion of the use of Form UCC-1, and an illustration of the Secretary of State's official instructions accompanying the form, see *Ch. 42, Secured Transactions*, § 42.211.

ELECTRONIC FORMS NOTE

Blank electronic copies of Form UCC-1 that may be filled in and printed out for filing can be obtained at the official website of the California Secretary of State, Business Programs Division. The current link to the Secretary of State's UCC forms may be accessed via links from the UCC information page which is located at <http://www.ss.ca.gov/business/ucc/ucc.htm>. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or emailing us at cal.custquest@lexis.com and requesting an electronic copy of CLF Form 42.211. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will require Adobe Acrobat Reader version 3.0 or higher.

This form must be filed within 21 days after the date of delivery of the livestock to a meatpacker in order to prevent

expiration of the lien at the end of the 21-day period [*Food & Agric. Code* § 55702(c)]. If this notice is filed, the lien will continue in force for a period of five years from the date of filing [*Food & Agric. Code* §§ 55702(c), (f), 55703].

For discussion and forms involving liens for livestock servicers, see §§ 102A.262-102A.265.

[b] Liens on Livestock Sold or Delivered to Meatpackers

[i] In General

A person who sells or furnishes livestock to a meatpacker has a nonpossessory statutory lien on the livestock and on the identifiable proceeds and products of that livestock, for the unpaid part of the purchase price, or if no purchase price has been agreed on, for the unpaid value of the livestock at the time of transfer of possession [*Food & Agric. Code* § 55702(a); see *Food & Agric. Code* § 55701(a) ("livestock" defined), (b) ("meatpacker" defined)]. This lien is not available if the buyer is a "buyer in the ordinary course of business" [*Food & Agric. Code* § 55702(b); see *Com. Code* § 1201b(9) (definition)], or if the sale was made on credit terms [*Food & Agric. Code* § 55702(d)].

The lien begins on the date of the transfer of the livestock, and has priority over all other liens without regard to the time of their attachment or perfection [*Food & Agric. Code* § 55702(a)]. However, if a written, verified notice of the lien is filed with the California Secretary of State and Director of Department of Food and Agriculture within 21 days from the date of livestock delivery, the lien is valid for five years or until a lien foreclosure action is determined [*Food & Agric. Code* § 55703]. Without notice, the lien expires after 21 days from the date of livestock delivery [*Food & Agric. Code* § 55702(e); see [ii], below].

[ii] Required Contents of Notice of Lien

A notice of livestock lien served under *Food & Agric. Code* § 55702 must contain the following [*Food & Agric. Code* § 55702(e)]:

- The name and address of the person filing the notice.
- A statement of the amount demanded by the person filing after deducting all credits and offsets.
- The name and address of the meatpacker who received the livestock.
- A description of the livestock delivered and the date of delivery.
- A statement that the amount claimed is a true and bona fide existing debt as of the date of the statement.
- A statement that the amount claimed is a true and bona fide existing debt as of the date on which payment was due for the livestock.

This information has been inserted in Item 4 of the attached form.

[iii] Filing Fee and Mailing of Notice

Food & Agric. Code § 55702(f) specifies that every notice of livestock lien filed with the Secretary of State must be accompanied by the fees required under *Com. Code* § 9501 *et seq.* "in the case of a financing statement not on the standard form." The quoted statement at the end of the preceding sentence appears to be a legislative oversight, since after July 1, 2001, the Secretary of State's office generally will no longer accept nonstandard UCC-1 filings [see *Com. Code* §§ 9516(b)(1), 9521(a); see also *Ch. 42, Secured Transactions*, § 42.211[1]]. In any case filing fees are now

predicated on the number of pages being filed rather than on whether the document being filed is "standard" or "nonstandard" [*see Com. Code § 9525; Gov. Code § 12194*].

For discussion of filing procedures applicable to form UCC-1 generally, see *Ch. 42, Secured Transactions, § 42.211*. The notice should be mailed to Secretary of State, Uniform Commercial Code, P.O. Box 942835, Sacramento, CA 94235-0001.

[2] FORM

Notice to Secretary of State and Director of Food and Agriculture of Livestock Lien

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral OverviewReal Property LawNonmortgage LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.262

§ 102A.262 Livestock Service Lienholder's Proposal to Accept Livestock in Satisfaction of Claim

[1] Comment

[a] Use of Form

This form is a lienholder's proposal to accept specified livestock in satisfaction of a claim for compensation stemming from the provision of livestock services. It may be used by a lienholder who prefers to accept the livestock for payment rather than sell under the statutory lien sale procedures. This proposal should be sent to the owners of the livestock and any other interested parties and should be accompanied by a release of interest form [see § 102A.264].

For discussion and forms covering the court-supervised proceedings necessary to conduct a lien sale for satisfaction of a livestock service lien, see *California Forms of Pleading and Practice*, Ch. 24, *Animals: Liens* (Matthew Bender).

For discussion and a form covering breeders' liens, see § 102A.260. For discussion and a form involving the lien available to a person selling or furnishing livestock to a meatpacker, see § 102A.261.

[b] Livestock Service Lien

The Livestock Service Lien Law governs liens on "livestock" [see *Civ. Code* §§ 3080-3080.22]. "Livestock" is defined as any cattle, sheep, swine, goat, horse, mule, or other equine [*Civ. Code* § 3080(a)]. These possessory liens are available to persons providing "livestock services" to secure payment for those services [see *Civ. Code* § 3080.01 (existence, conditions, and priority of livestock liens); [c], *below*]. "Livestock services" are any and all grazing, feeding, boarding, or general care (including animal health services) that is obtained or provided by a livestock servicer or his or her employee. The term also includes transportation or other services rendered by a person to livestock for the owner of that livestock, or for any person acting by or under the owner's authority [*Civ. Code* § 3080(c)]. A livestock servicer may be an individual, corporation, partnership, joint venture, cooperative, association, or other organization or entity that provides livestock services [*Civ. Code* § 3080(b)].

Liens by veterinarians for veterinary services rendered are governed by *Civ. Code* § 3051, the specific veterinary lien

statute, not by *Civ. Code* § 3080, the general livestock lien statute [see *Jakubaitis v. Fischer* (1995) 33 Cal. App. 4th 1601, 1605-1606, 40 Cal. Rptr. 2d 39 (*Civ. Code* § 3051, not *Civ. Code* § 3080, governed billing dispute between veterinary hospital and owners of horse that had received veterinary services; court reasoned that legislature's omission of veterinary care from *Civ. Code* § 3080 indicated its intention to retain *Civ. Code* § 3051 as governing scheme for veterinary surgeons and veterinary proprietors in possession while creating new statutory scheme for other livestock servicers)].

[c] Creation and Effect of Lien

A livestock servicer has a general lien on the livestock in his or her possession to secure the performance of all obligations of the livestock owner to the livestock servicer for both (1) the provision of livestock services to the livestock in the livestock servicer's possession and (2) the provision of livestock services to other livestock for which livestock services were provided in connection with or as part of the same livestock service transaction, if those livestock services were provided in the 12 months immediately preceding the date on which the lien arose [*Civ. Code* § 3080.01].

The lien arises as the charges for the livestock services come due. The lien has priority over all other liens and security interests in the livestock [*Civ. Code* § 3080.01(b); see Ch. 42, *Secured Transactions*]. The lien secures the owner's contractual obligations to the lienholder for the provision of livestock services, the lienholder's reasonable charges for the provision of livestock services after the lien has arisen as set forth in *Civ. Code* § 3080.02 (rights and remedies of lienholder), and the lienholder's costs of lien enforcement, including attorneys' fees [*Civ. Code* § 3080.01(b); see [c], below].

[d] Retention of Livestock

A lienholder may retain possession of the livestock and charge the owner for the reasonable value of providing livestock services to the livestock until the owner's obligations secured by the lien have been satisfied [*Civ. Code* § 3080.02(a)].

[e] Sale of Livestock

A lienholder may proceed to sell all or any portion of the livestock if [*Civ. Code* § 3080.02(b); see *Civ. Code* § 3080.16 (manner of sale)]:

- He or she obtains a judicial order authorizing the sale [see *Civ. Code* § 3080.06]; or
- A judgment authorizing the sale has been entered in favor of the lienholder on the claim that gave rise to the lien [see *Civ. Code* § 3080.02(c)]; or
- The livestock owner has released, after the lien has arisen, his or her interest in the livestock [see *Civ. Code* § 3080.20 (release); see also § 102A.264].

[f] Acceptance of Livestock in Lieu of Payment

At any time after a livestock service lien has arisen, the lienholder may propose to retain any portion or all of the livestock in satisfaction of any portion or all of the claim against the owner or other person indebted to the lienholder for livestock services [*Civ. Code* § 3080.21]. The proposal must be made in writing to the owner and written notice of the proposal must be given to all interested persons [*Civ. Code* § 3080.21; see *Civ. Code* § 3080.17(a) (interested persons)].

If, within 21 days after the notice was sent, the lienholder receives objection in writing from a person entitled to receive notification, the lienholder must sell the livestock in compliance with the statutory procedure [*Civ. Code* § 3080.21; see

Civ. Code §§ 3080.03-3080.19 (sale Procedure); California Forms of Pleading and Practice, Ch. 24, *Animals: Liens* (Matthew Bender)]. If no written objection is received, the lienholder may retain the livestock as proposed in satisfaction of all or a portion of the claim against the owner and other persons indebted to the lienholder for livestock services. However, the lienholder must obtain the owners' and other interested persons' release of interest in the livestock [*Civ. Code* § 3080.21; see *Civ. Code* § 3080.20 (release); see also § 102A.264]. If the owner fails to respond and fails to provide his or her release in the livestock, the lienholder will have to begin statutory lien sale proceedings to satisfy the claim [see *Civ. Code* § 3080.02].

[2] FORM

Livestock Service Lienholder's Proposal to Accept Livestock in Satisfaction of Claim

_____ [name of livestock owner]
 _____ [address]
 _____ [city, state, zip code]

Dear _____ [name of party] :

The purpose of this letter is to inform you that the undersigned lienholder, in seeking satisfaction of the claim described below, proposes to retain certain livestock pursuant to *Civil Code Section 3080.21*. Under a contract for services as described below, \$_____ is still due and owing for services rendered is still due and owing. *Civil Code Section 3080.01* provides the undersigned with a lien on the livestock in the [his or her] possession for the satisfaction of this sum. The claim on which this lien arose is for the following livestock services rendered on or about _____ [date]: _____ [specify services provided, e.g., veterinary care and daily feeding as provided for in the contract entered into between yourself and the undersigned on _____ (date)].

If you are unable or unwilling to promptly pay the amount due, the undersigned proposes to retain and legally own the following livestock still in _____ [his or her] possession: [describe livestock proposed to be retained]. To indicate your acceptance of this proposal, execute and return the enclosed release of interest in the enclosed envelope. On receipt of your release [add, if appropriate: and the releases of all interested parties,] the debt will be canceled and the matter closed.

If you [add, if appropriate: or any interested party,] object to this proposal, you have 21 days to indicate this objection in writing. If you [add, if appropriate: or any interested party,] do object, and fail to make payment within that time, the undersigned will proceed to satisfy the lien under the statutory lien sale procedures. [Add, if appropriate: You will be promptly notified of the receipt of any interested parties' objection to this proposal]. If you fail to respond to this proposal and fail to execute a release of your interest in the livestock, the undersigned will begin statutory lien sale proceedings.

Dated: _____

_____ [name of lienholder]
 _____ [signature]
 _____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral OverviewReal Property LawNonmortgage LiensGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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32-102A California Legal Forms--Transaction Guide § 102A.263

§ 102A.263 Notice to Interested Parties of Proposal to Retain Livestock

[1] Comment--Use of Form

This form is a notice to interested parties of a lienholder's proposal to retain livestock in satisfaction of a claim for money owed for the provision of livestock services. Under the Livestock Service Lien Law [*see Civ. Code §§ 3080-3080.22*], a lienholder may propose to retain livestock in satisfaction of a claim for the provision of livestock services [*see Civ. Code § 3080.21*]. If such a proposal is made, the lienholder must also give notice of the proposal to all "interested parties" [*Civ. Code § 3080.21*]. "Interested parties" are those persons who have a lien on or security interest in the livestock and who have a financing statement on file with the California Secretary of State covering the livestock [*see Civ. Code § 3080.17(a)*].

This form should be accompanied by a copy of the proposal, a release of interest, and a preaddressed return envelope [*see §§ 102A.262* (proposal), 102A.264 (release)]. The interested party should be directed to promptly notify the lienholder of his or her objection to the proposal, or, by use of the enclosed release of interest, indicate his or her approval [*see Civ. Code §§ 3080.20* (release), 3080.21 (proposal)].

For further discussion of the proposal to retain livestock, see § 102A.262. For further discussion of the release of interest in livestock, see § 102A.264.

[2] FORM

Notice to Interested Parties of Proposal to Retain Livestock

[name of interested person]

[address]

[city, state, zip code]

Dear _____ [name of party] :

The purpose of this notice is to inform you that the undersigned lienholder, in seeking satisfaction of the claim described below, has proposed to retain certain livestock pursuant to *Civil Code Section 3080.21*. Under a contract for services entered into between _____ [*name of livestock owner*] and the undersigned on _____ [*date*], \$_____ is still owing for services rendered. *Civil Code Section 3080.01* provides the undersigned with a lien on the livestock in the undersigned's possession for the satisfaction of this sum.

You are being notified of this proposal because it appears you claim a lien or security interest in the specified livestock and have a financing statement on file with the Secretary of State. You have 21 days to object to this proposal in writing. If you do object within that time, the undersigned will proceed to satisfy the lien under the statutory lien sale procedures.

If you do not object, please execute the enclosed release of interest and return it in the envelope provided.

Dated: _____

_____ [*name of lienholder*]

_____ [*signature*]

_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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32-102A California Legal Forms--Transaction Guide § 102A.264

§ 102A.264 Release of Interest in Livestock Subject to Lien

[1] Comment

[a] Use of Form

This form is a release of interest that may be used by an owner of livestock subject to a lien under the Livestock Service Lien Law [see *Civ. Code* §§ 3080-3080.22]. The form may also be used by persons having an interest in the livestock [see *Civ. Code* § 3080.17(a) (interested persons); see also § 102A.263[1]]. For discussion of the Livestock Service Lien Law in general, see § 102A.262.

[b] Release of Interest

The owner of livestock or any other person claiming an interest in livestock may release an interest in the livestock at any time after the lien has arisen. The release must be in writing and must be dated when signed. A copy of the release must be given to the person releasing the interest at the time it is signed [*Civ. Code* § 3080.20(a)].

A release of interest must contain all of the following information in simple, nontechnical language [*Civ. Code* § 3080.20(b)]:

- A description of the livestock covered by the release and the releasing party's interest in the livestock.
- A statement of the amount of the lien to which the livestock is subject.
- A statement that the releasing party has a legal right to a hearing in court before any lien sale of the livestock.
- A statement by the releasing party that it is giving the lienholder permission to sell the livestock.

- A statement of the extent to which the releasing party gives up any interest it may have in the livestock or in the sale proceeds of the livestock.
- To the extent that the release is not given in full satisfaction of the lienholder's claim or claims against the releasing party, a statement by the releasing party that it is aware that the lienholder may still have a claim against it after the release has been executed.

After the livestock owner's release of interest in the livestock, the lienholder may proceed to sell all or any portion of the livestock under the statutory procedure [*Civ. Code § 3080.02(b)(3)*; see *Civ. Code § 3080.16* (manner of sale of livestock; proceeds)]. For discussion and forms covering the statutory sale procedure, see *California Forms of Pleading and Practice*, Ch. 24, *Animals: Liens* (Matthew Bender).

[2] FORM

Release of Interest in Livestock Subject to Lien

RELEASE OF INTEREST IN LIVESTOCK SUBJECT TO LIEN

Pursuant to the Livestock Service Lien Law, _____ [*name of releasing party*] releases all of _____ [*his or her or its*] interest in the livestock described below. In the event the livestock is subsequently sold, this release _____ [*if releasing party is livestock owner/debtor: applies to the proceeds of the sale to the extent of the lien described below or, if releasing party is another interested party: does not apply to the proceeds of sale and* _____ (*name of releasing party*) will maintain an interest of the same priority in these proceeds].

In addition, _____ [*name of releasing party*] gives _____ [*name of lienholder*] permission to sell the livestock described below.

This release covers the following livestock: [*specifically describe livestock*], which are _____ [*if releasing party is livestock owner/debtor: owned by* _____ (*name of owner/debtor*) or, *if releasing party is another other interested party: subject to a security interest perfected under a financing statement on file with the California Secretary of State*].

This livestock is subject to a lien under the Livestock Service Lien Law in the amount of \$ _____ in favor of _____ [*name of lienholder*].

_____ [*name of releasing party*] acknowledges that _____ [*he or she or it*] has a legal right to a hearing in court before any sale of the livestock to satisfy the lien referred to above, and expressly waives any right to such a hearing.

[*Include the following only if release is executed by debtor/owner (see Civ. Code § 3080.20(b)(6)):*]

This release is given in [full or partial] satisfaction of the claim of _____ [*name of lienholder*] against _____ [*name of debtor*] for the sum of \$ _____ on account of [*briefly describe transaction giving rise to debt*]. [*If release is given in partial satisfaction of debt, add: _____ (name of debtor) acknowledges that _____ (he or she or it) is aware that _____ (name of lienholder) may still have a claim against _____ (him or her or it) after this release has been executed.*]

[*Continue with the following:*]

Dated: _____

_____ *[name of releasing party]*

_____ *[signature]*

_____ *[typed name]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsReleasesGovernmentsAgriculture & FoodGeneral OverviewReal Property
LawNonmortgage LiensGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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32-102A California Legal Forms--Transaction Guide § 102A.265

§ 102A.265 Notice of Assignment of Livestock Service Lien

[1] Comment

[a] Use of Form

This form is a notice of the assignment of a livestock service lien. It may be used by a lienholder to notify an owner of livestock subject to a livestock service lien, or to notify any other interested persons who are entitled to notice, that the lienholder has assigned the livestock service lien [see [b], *below*]. For forms that may be adapted to effectuate a valid assignment of a livestock lien and discussion of assignments in general, see Ch. 76, *Assignments of Rights and Obligations* .

For a general discussion of the Livestock Service Lien Law [see *Civ. Code* §§ 3080-3080.22], see § 102A.262[1]. For discussion and forms covering the court-supervised proceedings that are necessary to conduct a lien sale for the satisfaction of a livestock service lien, see California Forms of Pleading and Practice, Ch. 24, *Animals: Liens* (Matthew Bender).

For discussion and a form covering breeders' liens, see § 102A.260. For discussion and a form involving the lien available to a person selling or furnishing livestock to a meatpacker, see § 102A.261.

[b] Assignment of Livestock Service Lien

The Livestock Service Lien Law governs liens on livestock [see *Civ. Code* §§ 3080-3080.22]. These possessory liens are available to persons providing livestock services to secure payment for those services [see *Civ. Code* § 3080.01]. A livestock servicer has a general lien on the livestock in his or her possession to secure the performance of all obligations of the livestock owner to the livestock servicer for both (1) the provision of livestock services to the livestock in the livestock servicer's possession and (2) the provision of livestock services to other livestock for which livestock services were provided in connection with or as part of the same livestock service transaction, if those livestock services were provided in the 12 months immediately preceding the date on which the lien arose [*Civ. Code* § 3080.01].

A livestock service lien may be assigned by written instrument accompanied by the transfer of possession of the livestock. On assignment of the lien, the lienholder must give written notice of the assignment to the legal owner and "other interested persons" [Civ. Code § 3080.22]. "Other interested persons" means any person claiming a lien on or security interest in the livestock who had on file with the California Secretary of State on the date the lien arose a financing statement covering the livestock for which livestock services were provided [see Civ. Code § 3080.17(a)]. The notice must be delivered either by personal delivery or by registered or certified mail and must include the name and address of the assignee [Civ. Code § 3080.22].

[2] FORM

Notice of Assignment of Livestock Service Lien

_____ [name of livestock owner or interested person]

_____ [address]

_____ [city, state, zip code]

Dear _____ [name of party] :

This letter is to inform you that the undersigned lienholder has assigned _____ [his or her] lien arising from the following livestock services provided on or about _____ [date]: [describe services].

The party to whom this assignment has been made is: [name of assignee]. [His or Her] address is: _____ [assignee's address].

Dated: _____

_____ [name of lienholder]

_____ [signature]

_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Performance Assignment General Overview Governments Agriculture & Food General Overview Real Property Law Nonmortgage Liens General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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32-102A California Legal Forms--Transaction Guide § 102A.266

§ 102A.266 Notice of Claim of Dairy Cattle, Poultry, or Fish Supply Lien

[1] Comment

[a] Use of Form

This form is a standard form UCC-1 financing statement that has been partially filled in to add the special language needed when Form UCC-1 is used to file a notice of claim of a dairy cattle supply lien [*see Food & Agric. Code § 57401 et seq.*] or a poultry or fish supply lien [*see Food & Agric. Code § 57501 et seq.*]. A person who provides feed or materials to aid the raising or maintaining of dairy cattle has a lien on the proceeds of the milk or milk products produced from the cattle [*Food & Agric. Code § 57402; see Food & Agric. Code § 57401 (definitions)*]. One who provides feed or materials to aid the raising or maintaining of poultry or fish, or for the production of eggs, has a lien on the proceeds of the sale of the eggs, poultry, fish, or other products derived from the eggs, poultry, or fish [*Food & Agric. Code § 57510; see Food & Agric. Code §§ 57501-57507 (definitions)*].

The lien secures payment of the reasonable or agreed charges for the feed or materials provided, and of the costs of enforcing the lien. However, the amount of the charges secured by the lien cannot exceed an amount equal to the reasonable or agreed charges for feed or materials provided within a 45-day period [*Food & Agric. Code §§ 57402, 57510*].

To perfect the lien and make it effective, the lien claimant must file a notice of claim of lien on Form UCC-1 with the Secretary of State [*Food & Agric. Code §§ 57405(d), 57512, 57516; see Com. Code § 9521 (standard form)*]. For detailed discussion of the content and use of Form UCC-1, see *Ch. 42, Secured Transactions*, § 42.211.

ELECTRONIC FORMS NOTE

ELECTRONIC FORMS NOTE: Blank electronic copies of Form UCC-1 that may be printed out and filled in for filing can be obtained at the official website of the California Secretary of State, Business Programs Division. The current link to the Secretary of State's UCC forms may be accessed via links from the UCC information page which is located at <http://www.ss.ca.gov/business/ucc/ucc.htm>. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651,

ext. 405, or emailing us at cal.custquest@lexis.com and requesting an electronic copy of CLF Form 42.211. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will require Adobe Acrobat Reader version 3.0 or higher.

Only two providers of feed or materials can have an enforceable lien at any time [*Food & Agric. Code* §§ 57402, 57510]. Moreover, no more than two poultry and fish supply liens and agricultural chemical and seed liens [*see* § 102A.267] are enforceable against any one lien debtor, even if filed by different claimants [*Food & Agric. Code* § 57700].

[b] Contents of Notice of Claim of Lien

The notice of claim of lien must contain all of the following information [*Food & Agric. Code* §§ 57405(b), 57514]:

- The name and address of the lien claimant.
- The name and address of the lien debtor.
- The location of the dairy or property to which the food and materials were provided.
- A statement that the lien claimant has a dairy cattle supply lien pursuant to *Food & Agric. Code* § 57402 or a poultry or fish supply lien pursuant to *Food & Agric. Code* § 57510.

The standard form UCC-1 may be modified to identify the lien claimant either as a lien claimant or as a secured party. In addition, the third and fourth items in the preceding list should be inserted, substantially as set forth by statute, into the space in the standard form that is provided for the description of the collateral [*Food & Agric. Code* §§ 57405(d)(1), (3), 57516(a), (c)]. This information has been inserted into Item 4 of this form. For information on copies of UCC-1 and an illustration of the Official instructions accompanying the form, see *Ch. 42, Secured Transactions*, § 42.211.

The form must be signed by the lien claimant, or by someone authorized to sign documents of a similar kind on behalf of the claimant, but need not be signed by the lien debtor [*Food & Agric. Code* §§ 57405(c), (d)(2), 57516(b), 57515].

[c] Filing Procedures

The notice of claim must be filed and indexed in the same manner as a UCC-1 financing statement [*Food & Agric. Code* § 57405(e); *see Com. Code* § 9519 (duties of filing office)]. For discussion of filing procedures and fees, see *Ch. 42, Secured Transactions*, § 42.211[1].

When the Secretary of State's office receives a notice of claim of lien, it files, indexes, and marks the notice in the same manner as financing statements are filed, indexed, and marked [*Food & Agric. Code* §§ 57405(e), 57517; *see Com. Code* § 9403]. Notices of claim of lien are identified as financing statements for these purposes [*Food & Agric. Code* §§ 57405(g), 57519; *see Com. Code* § 9519 (numbering, maintaining, indexing records)].

Within 10 days of the date this notice is filed with the office of the Secretary of State, the lien claimant must provide written notice of the claim of lien to the lien debtor [*Food & Agric. Code* §§ 57405(f), 57518]. Sending the "debtor copy" of the quadruplicate form is sufficient to meet this requirement.

[d] Priority of Lien

A dairy cattle supply lien or a poultry or fish supply lien has priority in accordance with the time the notice of claim of

lien is filed. The lien has the same priority as a security interest perfected by the filing of a financing statement as of the date the notice of claim of lien was filed [*Food & Agric. Code* §§ 57406, 57525]. For coverage of the priority of financing statements in general, see Ch. 42, *Secured Transactions* .

[e] Duration of Filing

The notice of claim of lien remains in effect, and no new notice of claim of lien is needed to maintain the lien, as long as the person who provides feed or materials either (1) remains unpaid for amounts secured by the lien, or (2) continues to provide feed or materials on a regular basis to the lien debtor [*Food & Agric. Code* §§ 57403(b), 57511(b)]. "On a regular basis" means that no more than 30 days may elapse between deliveries [*Food & Agric. Code* §§ 57403(b), 57511(b)].

[f] Assignment of Lien

Dairy cattle supply liens are assignable or transferable by the holder of the lien, with full rights of enforcement. The lienholder must file a statement of assignment or transfer with the office of the Secretary of State in the same manner as is required for the assignment of any other security interest under the Commercial Code [*Food & Agric. Code* §§ 57411, 57540; see *Com. Code* § 9514 (effective period for filed financing statement)]. For further discussion and a form for assigning and transferring security interests, see Ch. 42, *Secured Transactions* .

[g] Enforcement of Lien

The lien claimant must provide written notice to secured creditors at least 30 days before enforcing a claim of lien [*Food & Agric. Code* §§ 57412, 57535]. "Secured creditors" of dairy cattle supply liens are creditors having a security interest in dairy cattle, milk, milk products, or the proceeds of any of these items, as of the date the notice of claim of lien is filed with the Secretary of State [*Food & Agric. Code* § 57412]. Similarly, "secured creditors" of poultry and fish supply liens are creditors with a perfected security interest in poultry, eggs, poultry products, fish, fish products, or the proceeds of any of these items, as of the date the notice of claim of lien is filed with the Secretary of State [*Food & Agric. Code* § 57535].

The lien claimant can foreclose a lien only in an action to recover the reasonable or agreed charges due for feed and materials provided [*Food & Agric. Code* §§ 57413, 57536; see *Code Civ. Proc.* § 680.010 *et seq.* (enforcement of judgments)].

[h] Termination of Lien

When a lien claimant receives payment for amounts secured by the lien and the lien claimant has not been providing feed or materials for a period of 30 consecutive days, the lien claimant must, on written demand by the lien debtor, send the debtor a statement indicating that he or she no longer claims a security interest under the financing statement [*Food & Agric. Code* §§ 57414(a), 57537(a); see Ch. 42, *Secured Transactions* (termination statement)]. The financing statement must be identified by date, names of parties, and file number. If the lienholder fails to send the requested termination statement within 10 days after a proper demand, the lienholder is liable to the lien debtor for all actual damages suffered by reason of the failure, and for a penalty if the failure is in bad faith [*Food & Agric. Code* §§ 57414(a), 57537(a)].

The lien debtor must also file a copy of the termination statement with the office of the Secretary of State [*Food & Agric. Code* §§ 57407, 57541; see *Com. Code* § 9513 (termination statement)]. The filing officer must mark the termination statement with the date and time of filing, and must index the statement under the name of the lien debtor and the file number of the original lien [*Food & Agric. Code* §§ 57414(b), 57537(b)].

[i] Public Access to Lien Information

For a fee, a member of the public may obtain a certificate of the existence on file of a lien and any notice of claim of lien naming a particular debtor. The certificate gives the date and time of filing of each notice, and the names and addresses of each lienholder [*Food & Agric. Code* §§ 57408, 57530; *see Com. Code* § 9525 (*fee*)]. In addition, a member of the public may obtain a copy of any notice of claim of a dairy cattle supply lien or of a poultry and fish supply lien that has been filed, including notices affecting those notices [*Food & Agric. Code* §§ 57409, 57531; *see Com. Code* § 9525 (*fee*)].

[j] Application of Uniform Commercial Code

Except to the extent specifically set forth by statute, dairy cattle, poultry, or fish supply liens are subject to Division 9 of the Commercial Code on secured transactions [*Food & Agric. Code* §§ 57407, 57541; *see Com. Code* § 9101 *et seq.*]. For further coverage of that topic, see Ch. 42, *Secured Transactions* .

[2] FORM

Notice of Claim of Dairy Cattle, Poultry, or Fish Supply Lien

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral OverviewGovernmentsAgriculture & FoodPoultry ProductsReal Property
LawNonmortgage LiensGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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32-102A California Legal Forms--Transaction Guide § 102A.267

§ 102A.267 Notice of Agricultural Chemical or Seed Lien

[1] Comment

[a] Use of Form

This form is a notice to a lien debtor of an agricultural chemical or agricultural seed lien [see *Food & Agric. Code* §§ 57551-57595]. A person who provides an "agricultural chemical" or "agricultural seed" and who complies with statutory requirements has a lien on the proceeds of the crop for reasonable or agreed charges and for the costs of enforcing the lien [*Food & Agric. Code* § 57561(b); see *Food & Agric. Code* §§ 57551-57555 (definitions)]. The supplier is not entitled to establish the lien unless he or she first sends this written notice, by certified mail, to the lien debtor [*Food & Agric. Code* § 57561(a)].

To perfect the lien and make it effective, the lien claimant must file a separate notice of claim of lien with the Secretary of State [*Food & Agric. Code* § 57563]. For a form for a notice of claim of lien, and a discussion of additional procedures related to the filing of that notice and termination of the lien, see § 102A.268.

[b] Attachment of Lien

An agricultural chemical lien attaches to the proceeds of the crops that existed, at the time the chemical was applied, on the land where the agricultural chemical was applied [*Food & Agric. Code* § 57561(c)(1)]. If crops are not planted, the lien attaches to the proceeds of the next production crop on that land following the last date on which the agricultural chemical was applied [*Food & Agric. Code* § 57561(c)(2)]. If agricultural seed was supplied, the lien attaches to the proceeds from the crops produced from the agricultural seed [*Food & Agric. Code* § 57561(c)(3)].

The amount of charges secured by the lien cannot exceed an amount equal to the reasonable or agreed charges for agricultural chemicals furnished within a 60-day period or for agricultural seed furnished within a 45-day period [*Food & Agric. Code* § 57561(d)].

[c] Contents of Notice to Lien Debtor

The written notice sent by the lienholder to the lien debtor must include all of the following [*Food & Agric. Code* § 57561(a)]:

- A statement that the payment of the reasonable or agreed charges is more than 30 days overdue (this requirement does not apply to deliveries and related labor made subsequent to overdue deliveries).
- A statement of the amount of reasonable or agreed charges that are overdue.
- A statement that the lien debtor may either allow the lien to be filed, enter into a consensual security interest in the proceeds pursuant to the Commercial Code [*see* Ch. 42, *Secured Transactions*], or pay the reasonable or agreed charges that are overdue.
- A statement notifying the lien debtor, in 10-point type or larger, that he or she has 10 days from receipt of the notice to select an alternative, notify the lien claimant of the alternative selected, and satisfy all the requirements of the selected alternative. The statement must also notify the lien debtor that if he or she fails to comply with these requirements, the lien claimant may file a notice of claim of lien with the Secretary of State at any time after the 10 days have passed.

[2] FORM

Notice of Agricultural Chemical or Seed Lien

_____[*name of lien debtor*]
 _____[*street address*]
 _____[*city, state, zip*]

NOTICE OF LIEN

You are hereby notified, pursuant to *Food and Agricultural Code Section 57561*, that the payment of the [reasonable or agreed] charges for [agricultural chemical or agricultural seed] supplied by _____[*name of lien claimant*] is more than 30 days overdue. The amount of the charges that are overdue is \$_____. If you do not pay this amount, _____[*name of lien claimant*] may claim a lien on the proceeds of your crop.

You may do any one of the following: (1) allow the lien on the proceeds of your crop to be filed; (2) enter into a consensual security interest in the proceeds of your crop pursuant to the Commercial Code; or (3) pay the charges that are overdue.

You have 10 days from receipt of this notice to select one of the alternatives listed in the preceding paragraph, notify _____[*name of lien claimant*] of the alternative selected, and satisfy all the requirements of the selected alternative. If you fail to comply with these requirements, _____[*name of lien claimant*] may file a notice of claim of lien with the Secretary of State at any time after the 10 days have passed.
 Dated: _____

_____[*name of lien claimant*]
 _____[*signature*]
 _____[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral OverviewReal Property LawNonmortgage LiensGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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32-102A California Legal Forms--Transaction Guide § 102A.268

§ 102A.268 Notice of Claim of Agricultural Chemical or Seed Lien

[1] Comment

[a] Use of Form

This form is a standard form UCC-1 financing statement that has been partially filled in to add the special language needed when form UCC-1 is used to file a notice of claim of an agricultural chemical or agricultural seed lien. A person who provides an "agricultural chemical" or "agricultural seed" and who complies with statutory requirements has a lien on the proceeds of the crop for reasonable or agreed charges and for the costs of enforcing the lien [*Food & Agric. Code § 57561(b)*; see *Food & Agric. Code §§ 57551-57555* (definitions)]. To perfect the lien and make it effective, the lien claimant must file a notice of claim of lien on Form UCC-1 with the Secretary of State [*Food & Agric. Code § 57563*; see *Food & Agric. Code § 57567* (form of notice)]; see also *Com. Code § 9521* (form)]. For detailed discussion of the content and use of form UCC-1, see *Ch. 42, Secured Transactions, § 42.211*.

ELECTRONIC FORMS NOTE

ELECTRONIC FORMS NOTE: Blank electronic copies of Form UCC-1 that may be filled in and printed out for filing can be obtained at the official website of the California Secretary of State, Business Programs Division. The current link to the Secretary of State's UCC forms may be accessed via links from the UCC information page which is located at <http://www.ss.ca.gov/business/ucc/ucc.htm>. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or emailing us at cal.custquest@lexis.com and requesting an electronic copy of CLF Form 42.211. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will require Adobe Acrobat Reader version 3.0 or higher.

The lien claimant is not entitled to file a notice of claim of lien unless he or she first sends a written notice, by certified mail, to the lien debtor as required by statute [*Food & Agric. Code § 57561(a)*]. For a form for that notice, see § 102A.267.

A lien claimant may not file a notice of claim of lien on the proceeds of crops for agricultural seeds or agricultural chemicals, and for labor furnished by the lien claimant, if an investigation of a dispute between the lien claimant and the lien debtor is pending before the state Director of Agriculture [*Food & Agric. Code* § 57564; see *Food & Agric. Code* §§ 52332, 57564.5 (methods and procedures for settlement of disputes)].

No more than two agricultural chemical and seed liens and poultry and fish supply liens [see § 102A.266] are enforceable against any one lien debtor, even if filed by different claimants [*Food & Agric. Code* § 57700].

[b] Contents of Notice of Claim of Lien

The notice of claim of lien must contain all of the following information [*Food & Agric. Code* § 57565; see *Food & Agric. Code* § 57567 (form of notice)]:

- (1) The name and address of the lien claimant.
- (2) The name and address of the lien debtor.
- (3) The location of the property to which the agricultural chemicals and labor or agricultural seeds and labor were provided.
- (4) A statement that the payment of the reasonable or agreed charges is more than 30 days overdue.
- (5) The amount of the reasonable or agreed charges that are overdue.
- (6) A statement, signed under penalty of perjury, that the lien claimant sent the required notice to the lien debtor [see § 102A.267], that more than ten days have elapsed since the notice was received by the lien debtor, and that the lien debtor has not complied with statutory requirements [see *Food & Agric. Code* § 57561(a); see also § 102A.267[1][c] (contents of notice to lien debtor)].
- (7) A statement that the lien claimant has an agricultural chemical and agricultural seed lien pursuant to *Food & Agric. Code* § 57561.

The standard Form UCC-1 may be modified to identify the lien claimant either as a lien claimant or as a secured party. In addition, items (3) through (7), *above*, should be inserted into the standard form, in the space provided for the description of the collateral [*Food & Agric. Code* § 57567(a), (c)]. Those items have been inserted into Item 4 of this form. For information on copies of UCC-1 and an illustration of the official instructions accompanying the form, see *Ch. 42, Secured Transactions*, § 42.211.

The form must be signed by the lien claimant, or by someone authorized to sign documents of a similar kind on behalf of the claimant, but need not be signed by the lien debtor [*Food & Agric. Code* §§ 57566, 57567(b)].

When filing the form with the Secretary of State, the lien claimant must attach a separate statement, signed under penalty of perjury, that the lien claimant sent the required notice to the lien debtor, that more than ten days have elapsed since the notice was received by the lien debtor, and that the lien debtor has not complied with statutory requirements set forth in the notice [*Food & Agric. Code* §§ 57565(f), 57567(d); see *Food & Agric. Code* § 57561(a); see also § 102A.267 (notice to lien debtor)]. A declaration satisfying these requirements has been added to Item 4 of this form.

[c] Filing Procedures

The notice of claim must be filed, indexed, and marked in the office of the Secretary of State in the same manner a

UCC-1 financing statement [*Food & Agric. Code* § 57568; see *Com. Code* § 9519 (numbering, maintaining, indexing records)]. For discussion of filing procedures and fees, see *Ch. 42, Secured Transactions*, § 42.211[1].

When the Secretary of State's office receives a notice of claim of lien, it files, indexes, and marks the notice in the same manner as financing statements are filed, indexed, and marked [*Food & Agric. Code* § 57568; see *Com. Code* § 9519 (numbering, maintaining, indexing records)]. Notices of claim of lien are identified as financing statements for these purposes [*Food & Agric. Code* § 57570].

Within 10 days of the date this notice is filed with the office of the Secretary of State, the lien claimant must provide written notice of the claim of lien to the lien debtor [*Food & Agric. Code* § 57569]. Sending the "debtor copy" of the quadruplicate form is sufficient to meet this requirement.

[d] Priority of Lien

An agricultural chemical or agricultural seed lien has priority in accordance with the time the notice of claim of lien is filed with the Secretary of State. The lien has the same priority as a security interest perfected by the filing of a financing statement as of that date. However, the lien does not have priority over labor claims for wages and salaries for personal services that are provided by any employee to any lien debtor in connection with the production of agricultural products, the proceeds of which are subject to the lien [*Food & Agric. Code* § 57575]. For coverage of the priority of financing statements in general, see *Ch. 42, Secured Transactions* .

[e] Duration of Filing

The notice of claim of lien remains in effect, and no new notice is required to maintain the lien, as long as the person providing the agricultural chemicals, seeds, or labor either remains unpaid for the amounts secured by the lien or continues to provide the materials or labor on a regular basis to the lien debtor [*Food & Agric. Code* § 57562]. "On a regular basis" means that no more than 45 days may elapse between applications, deliveries, or preparations [*Food & Agric. Code* § 57562].

[f] Assignment of Lien

An agricultural chemical or agricultural seed lien is assignable or transferable by the holder of the lien, with full rights of enforcement. The lienholder must file a statement of assignment or transfer with the office of the Secretary of State in the same manner as is required for the assignment of any other security interest under the Commercial Code [*Food & Agric. Code* § 57590; see *Com. Code* § 9514 (assignment of secured party's power to authorize amendment)]. For further discussion and a form for assigning and transferring security interests, see *Ch. 42, Secured Transactions* .

[g] Enforcement of Lien

A lien claimant must provide written notice to secured creditors at least 30 days before enforcing a claim of lien. "Secured creditors" for this purpose means any entity named as a secured party in a financing statement that is filed with regard to the debtor, if the statement covers (1) crops subject to the lien, (2) crops growing or grown on the land where the agricultural chemical or seed was provided or applied, (3) the next production crops to be grown on the land where the agricultural chemical or seed was provided or applied, (4) farm products, or (5) accounts [*Food & Agric. Code* § 57585].

The lien claimant can foreclose a lien only in an action to recover the reasonable or agreed charges due [*Food & Agric. Code* § 57586; see *Code Civ. Proc.* § 680.010 *et seq.* (enforcement of judgments)].

[h] Termination of Lien

When the lien claimant receives payment for the total amounts secured by the lien, and the lien claimant has not furnished agricultural chemicals or seeds for a period of 45 consecutive days, the lien claimant must send the lien debtor a statement that the claimant no longer claims a security interest under the notice of claim of lien [*Food & Agric. Code* § 57587(a); see Ch. 42, *Secured Transactions* (form for termination statement)]. The termination statement must identify the lien by date, names of parties, and file number. Failure by the lien claimant to send the lien debtor the termination statement within 10 days allows the debtor a claim for damages suffered by reason of the failure, plus a penalty if bad faith is shown [*Food & Agric. Code* § 57587(a)].

The lien debtor must also file a copy of the termination statement with the office of the Secretary of State [*Food & Agric. Code* § 57591; see *Com. Code* § 9513 (termination statement)]. The filing officer must mark the termination statement with the date and time of filing, and must index the statement under the name of the lien debtor and the file number of the original lien [*Food & Agric. Code* § 57587(b)].

[i] Public Access to Lien Information

For a fee, a member of the public may obtain a certificate of the existence on file of a lien and any notice of claim of lien naming a particular debtor. The certificate gives the date and time of filing of each notice, and the names and addresses of each lienholder [*Food & Agric. Code* § 57581; see *Com. Code* § 9525 (fee)]. In addition, a member of the public may obtain a copy of any notice of an agricultural chemical or seed lien that has been filed, including notices affecting those notices [*Food & Agric. Code* § 57582; see *Com. Code* § 9525 (fee)].

[j] Application of Uniform Commercial Code

Except to the extent specifically set forth by statute, agricultural chemical and seed liens are subject to Division 9 of the Commercial Code on secured transactions [*Food & Agric. Code* § 57591; see *Com. Code* § 9101 et seq.]. For further coverage of that topic, see Ch. 42, *Secured Transactions* .

[2] FORM

Notice of Claim of Agricultural Chemical or Seed Lien

[Click here to view image.](#)

DECLARATION

I, _____[*name of lien claimant*], certify under penalty of perjury (1) that I sent the notice required by *Food and Agricultural Code Section 57561(a)* to the lien debtor on _____[*date*], (2) that more than 10 days have elapsed since the notice was received by the lien debtor, and (3) that the lien debtor has not complied with statutory requirements set forth in the notice.

Dated: _____

_____ [*signature of lien claimant*]

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral OverviewReal Property LawNonmortgage LiensGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Agricultural Liens

32-102A California Legal Forms--Transaction Guide § 102A.269

§ 102A.269 Notice of Harvester's Lien [Form DLSE-1]

[1] Comment

[a] Use of Form

This form [Form DLSE-1], available from the Division of Labor Standards Enforcement, is the wage claim form that must be filed by a harvester to secure a harvester's lien beyond the statutory 45-day lien period [see [d], *below*].

ELECTRONIC FORMS NOTE:

Blank electronic copies of this form that may be filled in and printed out for filing can be obtained at the official website of the Division of Labor Standards Enforcement, under the topic "How To File A Wage Claim." The current link (mid-2002) to the Division's website is <http://www.dir.ca.gov/dlse/dlse.html>. You may also obtain a copy of this form via email by contacting Matthew Bender & Co. at (800) 424-0651, ext. 405, or emailing us at cal.custquest@lexis.com and requesting an electronic copy of CLF Form 102A.269. Please be sure to include your email address along with your request and we will provide the form via return email. To view and print these forms, your computer system will require Adobe Acrobat Reader version 3.0 or higher.

Any employee who performs the work of harvesting or transporting harvested crops or farm products that are owned and grown or produced by a limited partnership has a lien on any and all of the severed crops or severed farm products or proceeds from their sale for the value of the labor done, up to a maximum of earnings for two weeks [*Civ. Code* § 3061.5(a); see *Food & Agric. Code* § 55403 ("farm products" defined); *Corp. Code* § 15501 ("limited partnership" defined)(repealed January 1, 2010; now see *Corp. Code* § 15901.02(q))]. The lien attaches whether the work was performed at the instance of the owner who is the grower or producer of the crops or farm products, or that of a subordinate or contractor working under the owner's authority, directly or indirectly, as contractor or otherwise. Every contractor, subcontractor, or other person having charge of the harvesting or transporting of the severed crops or farm products will be held to be the agent of the owner for these purposes [*Civ. Code* § 3061.5(a)].

A harvester's lien attaches from the date that work begins and is a preferred lien, prior in dignity to all other liens,

claims, or encumbrances [Civ. Code § 3061.5(b)]. However, a buyer in the ordinary course of business takes free of any security interest created by the lien, notwithstanding the fact that the lien is perfected and the buyer knows of its existence [Civ. Code § 3061.5(e); see Com. Code § 1201(b)(9) ("buyer in ordinary course of business" defined)].

[b] Limitations on Harvesters' Liens

The liability of severed crops, severed farm products, or the proceeds from their sale subject to a harvester's lien is limited to the lesser of actual proved claims or 25 percent of the fair market value of the severed crops or farm products, or 25 percent of the proceeds after their sale [Civ. Code § 3061.5(c)]. In addition, the lien is limited to the value of labor done up to a maximum of two weeks' earnings [Civ. Code § 3061.5(a)]. With those two exceptions, a harvester's lien may not be limited as to amount by any contract price agreed on between an owner who is the grower or producer of the severed crops or farm products and any contractor [Civ. Code § 3061.5(b)].

In any case, the several liens cannot exceed in amount the reasonable value of the labor done, nor the price agreed on for the labor between the claimant and his or her employer. If the claimant was employed by a subcontractor or contractor, the lien does not extend to any labor not contemplated by or reasonably necessary to the execution of the original contract between the contractor and the owner, provided that the claimant had actual notice, before performing the labor, of the contract or any modifications to it [Civ. Code § 3061.5(b)].

[c] Effect of Owner's Bond for Payment of Wages

A harvester has no lien if the owner who is the grower or producer of the severed crops or farm products otherwise subject to the lien gives a bond, executed by an admitted surety insurer, to the Labor Commissioner before the harvest and for 45 days after its completion. The owner may give the bond directly to the Labor Commissioner, or may require a person or entity hired or used to furnish labor in connection with harvesting or transporting the severed crops to provide the bond. The bond must be in an amount and form acceptable to the Labor Commissioner, and must be conditioned on the payment of all wages found to be due and unpaid in connection with the work performed by the employee [Civ. Code § 3061.5(d)].

[d] Enforcement of Lien

A harvester's lien continues in force for 45 days from the time the claimant ceases to perform the work for which the lien is claimed. After the 45-day period, the lien expires unless the claimant, or his or her assigns or successors in interest, files a claim (this form) with the Labor Commissioner or brings suit to foreclose the lien. The filing of a claim or suit continues the lien in force until the claim or suit is finally determined and closed [Civ. Code § 3061.6(a)].

On the filing of a claim with the Labor Commissioner, the Labor Commissioner, if the owner who is the grower or producer has failed to satisfy the bond provisions [see [c], above], will determine whether or not the owner of the severed crops, severed farm products, or their proceeds is capable of satisfying the claim. The Labor Commissioner may take into account the potential liability faced by the owner of the crops, farm products, or proceeds. If the Labor Commissioner determines that a lien is necessary to protect the claimants' interest, the Labor Commissioner will file the lien on the severed crop, the severed farm products, or their proceeds, and will notify in writing the owner and all persons who have filed financing statements on the crop, farm product, or proceeds pursuant to the Commercial Code [Civ. Code § 3061.6(b)].

The plaintiff in a lien foreclosure suit may have the severed crops or severed farm products or their proceeds attached [see Civ. Code § 3061.6(c); see also Code Civ. Proc. § 488.010 et seq. (attachment procedure)].

Any number of persons claiming harvester's liens may join in the same action. If separate actions are commenced, a court may consolidate them. If there is a deficiency of proceeds on judgment to pay all claims, the proceeds are divided

pro rata, regardless of the order of claim or suit [*Civ. Code* § 3061.6(d)]. The filing of a harvester's lien does not prevent a person to whom a debt is owed for work done from maintaining a personal action against the person liable, either in connection with the lien suit or in a separate action. However, any money collected on a separate judgment is credited on the amount of the lien in an action to enforce the lien [*Civ. Code* § 3061.6(e)].

Special procedures apply to liens attached to perishable goods [*see Civ. Code* § 3061.6(f); *see also Code Civ. Proc.* §§ 485.010, 485.530 (procedure and affidavit when great or irreparable harm will result from delay)].

[2] FORM

Notice of Harvester's Lien [Form DLSE-1]

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Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral OverviewReal Property LawNonmortgage LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide §§ 102A.270-102A.279

[Reserved]

§§ 102A.270[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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 C. Vessel Liens
 1. General Forms

32-102A California Legal Forms--Transaction Guide § 102A.280

§ 102A.280 Statement of Facts for Vessel Lien Under Boater's Lien Law [DMV Form REG 256]

[1] Comment

[a] Use of Form

This form is a DMV Statement of Facts [DMV Form REG 256]. It is available from any DMV office or may be downloaded from the DMV website located at www.dmv.ca.gov. Sections J (Statement of Facts) and K (Applicant's Signature) should be completed.

For a valid vessel lien, a written statement of the lien that specifies the charges for services or storage rendered and states that the vessel is subject to sale pursuant to the Boater's Lien Law must be sent to the registered owner of the vessel [*Harb. & Nav. Code § 502(a)*; see [b], below]. This form may be used to notify the vessel owner of the lien and may be submitted as a supporting document, along with other lien sale documents, to the DMV.

[b] Boater's Lien Law In General

Liens on vessels are governed by the Boater's Lien Law [see *Harb. & Nav. Code §§ 500-509*]. For the purposes of the law, "vessel" means every type of watercraft, other than a seaplane or floating home, used or capable of being used as a means of transportation on the water and that is required to be registered. The term also includes any trailer used in connection with the vessel that the lienholder possesses at the time the lien arises. It does not include any vessel that has a valid marine document issued by the United States or its agencies [*Harb. & Nav. Code § 501(e)*; see *Harb. & Nav. Code § 501.5* (effect of other laws)]. Liens on vessels required to be registered by the federal government are governed by federal law and are beyond the scope of this chapter [see *46 U.S.C. §§ 31341-31343*; see also Ch. 102D, *Registration and Transfer of Vehicles, Vessels, and Aircraft*]. Boats that are left in a leased boat slip in a marina after the lessor has obtained an unlawful detainer judgment against the lessee of the slip must be disposed of under the Boater's Lien Law [*Harb. & Nav. Code §§ 500-509*] since that law provides the exclusive means of enforcing possessory vessel liens [*Mariners Bay Co. v. Department of Motor Vehicles* (1991) 229 Cal. App. 3d 808, 815, 280 Cal. Rptr. 292] .

[c] Creation of Lien

Every person has a possessory lien for compensation to which he or she is legally entitled for services rendered to or storage provided for any vessel subject to registration by the DMV [*Harb. & Nav. Code* § 502(a); see *Veh. Code* §§ 9850-9880 (registration of undocumented vessels)]. However, before a lien arises for compensation for repair services, a repairer must comply with statutory provisions governing work authorization, price estimates, and work invoice contents [*Harb. & Nav. Code* § 502(a); see *Harb. & Nav. Code* §§ 410-418 (requirements)]. The lien arises at the time a written statement of lien is sent to the registered owner of the vessel specifying the charges for services or storage rendered and also stating that the vessel is subject to sale pursuant to the Boater's Lien Law [*Harb. & Nav. Code* § 502(a)].

[d] Consent Requirement

If the service or storage giving rise to a claim is ordered by a person other than the legal owner as shown on the vessel's registration certificate, the portion of a lien based on that claim that exceeds \$1,500 is invalid unless the legal owner consents to the excess [see *Harb. & Nav. Code* § 502(b)]. For further discussion of the consent requirement and a form for obtaining consent, see § 102A.281.

[2] FORM**Statement of Facts for Vessel Lien Under Boater's Lien Law [DMV Form REG 256]**

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:
[Admiralty Law](#)[Maritime Liens](#)[General Overview](#)



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DIVISION VII: PERSONAL TRANSACTIONS
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1. General Forms

32-102A California Legal Forms--Transaction Guide § 102A.281

§ 102A.281 Request for Consent to Vessel Services or Storage in Excess of \$1,500

[1] Comment

[a] Use of Form

This form is a request for consent to vessel services or storage exceeding \$1,500 in value. It should be used by a lien claimant to notify the legal and registered owners of a vessel of the order for services or storage of the vessel in an amount exceeding \$1,500, if the services or storage is ordered by someone other than the legal owner [*see Harb. & Nav. Code § 502(b)*]. For further discussion of the Boater's Lien Law [*Harb. & Nav. Code §§ 500-509*], see § 102A.280[1][b].

[b] Consent Requirement

If the service or storage giving rise to a claim is ordered by a person other than the legal owner (as shown on the vessel's registration certificate), the portion of the lien based on a claim that exceeds \$1,500 is invalid unless the legal owner consents to the excess. The legal owner may limit his or consent to a specified dollar amount or period of time [*Harb. & Nav. Code § 502(b)*].

A lien claimant must give both the registered and the legal owners of the vessel a written notice before exceeding the specified maximum amount (or \$1,500 if none is specified). The notice must contain all of the following [*Harb. & Nav. Code § 502(b)*]:

- A description of the storage or services provided.
- The vessel's description and registration number.
- The names of the registered owners.

● The dollar amount or rate of the charges for the storage or services [*see Harb. & Nav. Code § 502(c)*] (actual amount may exceed estimate by 10 percent and lien claim will remain valid).

● A statement in boldface type that, with respect to storage charges, the legal owner's consent will be presumed unless he or she notifies the lien claimant within 15 days of the receipt of the consent request that he or she declines to consent to the storage [*see also Harb. & Nav. Code § 502(d)*].

In addition, the lien claimant must notify the legal owner, by certified mail, that the vessel is subject to sale pursuant to the Boater's Lien Law and that the lien claimed exceeds \$1,500 [*Harb. & Nav. Code § 502(b)*].

In all cases, consent is presumed for the 30-day period immediately following the giving of the request for consent notice [*Harb. & Nav. Code § 502(d)*].

If the legal owner declines consent, he or she may remove the vessel from the lien claimant only on satisfying the lien [*Harb. & Nav. Code § 502(e)*].

[2] FORM

Request for Consent to Vessel Services or Storage in Excess of \$1,500

_____ [*name of legal owner*]

_____ [*street address*]

_____ [*city, state, zip*]

AUTHORIZATION OF _____ [REPAIRS or STORAGE]

This is to notify you that _____ [*name*] has requested us to [*specify nature of work or services, e.g., overhaul the engine of or store*] a [*specify make, model, year, and hull number of vessel*], of which you are the record legal owner, at an established cost of \$ _____. Before we can [*begin work on or store*] the vessel described above, we need your signed authorization. Please sign as indicated below and return one copy of this notice to us.

[*If authorization is for storage of vessel, add the following statement in bold face type:*]

With respect to storage charges, your consent will be presumed unless you notify us within 15 days of the receipt of this consent request that you decline to consent to the storage.

[*Continue with the following:*]

Dated: _____

_____ [*name of service or storage provider*]

_____ [*signature*]

_____ [*typed name*]

Authorization

I, _____ [*name of legal owner*], consent to the above-described [repairs or storage].

Dated: _____

_____ [*signature of legal owner*]

_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawPractice & ProcedureGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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C. Vessel Liens
1. General Forms

32-102A California Legal Forms--Transaction Guide § 102A.282

§ 102A.282 Release of Interest in Vessel by Registered and Legal Owners [DMV Form BOAT 153]

[1] Comment

[a] Use of Form

This form is a DMV form [DMV Form BOAT 153] for the release of a registered or legal owner's interest in a vessel subject to a lien. It is generated by the DMV when a request for lien sale has been denied because the registered or legal owner of a vessel (or other party with an interest) executes and timely files a DMV Declaration of Opposition form [see §§ 102A.291, 102.301]. By signing the Release of Interest after a lien has arisen on a vessel of any value, both the registered and the legal owners release all of their interest in the vessel and give the lienholder permission to proceed with the lien sale.

The lienholder does not need to obtain authorization from the DMV to conduct a lien sale if a Release of Interest has been executed by both the registered and the legal owners of the vessel subject to the lien. In order to transfer the registration of a vessel subject to a lien sale, the buyer of the vessel must submit the Release of Interest, or a copy, along with the Application for Registration of Vessel Sold at Lien Sale to the DMV [see *Harb. & Nav. Code § 505(c)*].

For discussion of vessel lien sales in general, see § 102A.280[1]. For further discussion of the transfer and registration of vessels in transactions not involving lien sales, see Ch. 102D, *Registration and Transfer of Vehicles, Vessels, and Aircraft*.

[b] Release of Interest

A registered or legal owner of a vessel in the possession of a lienholder may release any interest in the vessel after the lien has arisen. The release must be dated when signed and a copy must be given to the person releasing the interest at the time of signing [*Harb. & Nav. Code § 505(a)*]. The release must be in at least 12-point type and must contain all of the following information [*Harb. & Nav. Code § 505(b)*]:

- The vessel's description, including make, identification number, and the state of registration, to the extent available.
- The names and addresses of both the registered and the legal owners, to the extent available.
- A statement of the amount of the lien and the facts giving rise to the lien.
- A statement that the person releasing the interest understands that (1) he or she has a legal right to a court hearing before any lien sale of the vessel, and (2) he or she is giving up the right to appear to contest the claim of the lienholder.
- A statement that (1) the person releasing the interest gives up any interest he or she may have in the vessel, and (2) he or she is giving the lienholder permission to sell the vessel.

[2] FORM**Release of Interest in Vessel by Registered and Legal Owners [DMV Form BOAT 153]**

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawShippingRegulations & StatutesLicensing & RegistrationContracts LawTypes of ContractsReleases



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32-102A California Legal Forms--Transaction Guide §§ 102A.283-102A.289

[Reserved]

§§ 102A.283[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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2. Vessels Valued at Greater Than \$1,500

32-102A California Legal Forms--Transaction Guide § 102A.290

§ 102A.290 Application for Lien Sale Authorization and Lienholder's Certification [DMV Form BOAT 152]

[1] Comment

[a] Use of Form

This form is the official DMV form used by a lienholder to initiate a lien sale of a vessel valued at over \$1,500. It is available from any DMV office or may be downloaded from the DMV website located at www.dmv.ca.gov. If the vessel is valued at \$1,500 or less, the lienholder does not need DMV authorization [*see Harb. & Nav. Code § 504*; see also §§ 102A.300, 102A.301]. In addition, DMV authorization for the sale is not required if the lienholder has obtained a release of interest from both the registered and the legal owners [*see Harb. & Nav. Code § 505*; see also § 102A.282].

[b] Lien Sales of Vessels Valued Over \$1,500

[i] In General

If the value of a vessel subject to a lien is determined to exceed \$1,500, the lienholder must apply to the DMV for the issuance of an authorization to conduct a lien sale. The application must be executed under penalty of perjury and must contain specified information [*Harb. & Nav. Code § 503(a)*; see [ii], below]. The lienholder must submit the completed application to the DMV with the appropriate filing fee. The lienholder may recover the filing fee if a lien sale is conducted or if the vessel is redeemed [*Harb. & Nav. Code § 503(a)*].

[ii] Contents of Application

The application to conduct a lien sale must contain all of the following information [*Harb. & Nav. Code § 503(a)*]:

- The vessel's description, including the make, hull identification number, and state of registration, to the extent available.

- The names and addresses of both the registered and the legal owners of the vessel, if ascertainable from the registration certificate within the vessel, and the name and address of any person who the lienholder knows (or reasonably should know) claims a proprietary interest in the vessel.

- A statement of the amount of the lien and the facts concerning the claim that give rise to the lien. This statement must include, as a separate item, an estimate of any additional storage costs accruing pending the lien sale.

[iii] DMV Processing

Within 15 days after receipt of the application to conduct a lien sale of the vessel, the DMV must contact the vessel registry agency of another state if the vessel bears indicia of registration in that state [*Harb. & Nav. Code § 503(b)(1)*]. Additionally, the DMV must send by mail to both the registered and the legal owners of the vessel, and to any other person named in the application, a Warning Notice of Lien Sale, a copy of the application, and a return envelope preaddressed to the DMV [*Harb. & Nav. Code § 503(b)(2)*; see § 102A.291].

Within the same 15-day period, the DMV must apply a vessel registration stop order or title transfer stop order to the vessel subject to the lien [*Harb. & Nav. Code § 503(b)(3)*], and must notify the applicant of any outstanding property tax lien on the vessel of which the DMV has been notified pursuant to *Rev. & Tax. Code § 3205(b)*, identifying the county in which any outstanding lien is held [*Harb. & Nav. Code § 503(b)(4)*]. For discussion of the registration and transfer of vessels, see Ch. 102D, *Registration and Transfer of Vehicles, Vessels, and Aircraft* .

[iv] Declaration of Opposition

The person receiving the DMV notice of a pending lien sale may file a Declaration of Opposition if he or she desires a court hearing [see *Harb. & Nav. Code § 503(c)(3)*; see also [iii], above]. The proper return of the Declaration of Opposition will require the lienholder to obtain a judgment or the declarant's release before conducting a lien sale [see *Harb. & Nav. Code § 503(c)(4)*]. For further discussion and a form for the declaration, see § 102A.291.

[v] Notice From Lienholder

On receipt of the DMV's authorization to conduct a lien sale, the lienholder must comply with certain notice requirements [see *Harb. & Nav. Code § 503(f)*]. At least 10 days but not more than 30 days before the lien sale (not counting the day of the sale), the lienholder must give notice of the sale by advertising once in a newspaper of general circulation published in the county in which the vessel is located. If there is no newspaper published in the county, notice must be given by posting a Notice of Pending Lien Sale [see § 102A.292] in three of the most public places in the area in which the vessel is located and at the place where the vessel is to be sold for 10 consecutive days before and including the day of the sale [*Harb. & Nav. Code § 503(f)(1)*].

The lienholder must also send a Notice of Pending Lien Sale form 20 days before the day of the sale (not counting the day of the sale) to specified parties [see *Harb. & Nav. Code § 503(f)(2)*; see also § 102A.292].

[vi] Conduct of Lien Sale

Prior to the commencement of the lien sale, the vessel must be made available for inspection at a location easily accessible to the public for at least one hour before the sale. Furthermore, the vessel must be made available at the time and date specified on the notice of sale [*Harb. & Nav. Code § 506*].

The lien sale must be conducted in a commercially reasonable manner [*Harb. & Nav. Code § 506*]. The statute, however, does not specify what constitutes "commercially reasonable." Sealed bids will not be accepted at the lien sale [*Harb. & Nav. Code § 506*].

[c] Disposition of Lien Sale Proceeds**[i] In General**

The proceeds of a vessel lien sale must be disposed of in a specified manner [*see Harb. & Nav. Code § 507.5*]. The lienholder must receive the amount necessary to discharge the lien and the actual cost of selling the vessel. The actual cost of sale includes any fees charged by the DMV, publication fees, postage, and service of notices, whether incurred as a result of sale or the owner's redemption [*Harb. & Nav. Code § 507.5(a)*; *see* [iii], *below*]. The cost of selling is the actual cost, not to exceed \$100 for a vessel without a trailer and \$125 for vessels with a trailer, excluding DMV charges [*Harb. & Nav. Code § 507.5(a)*; *see also* [iii], *below*]. The balance, if any, must be forwarded to the DMV within 15 days of the sale [*Harb. & Nav. Code § 507.5(b)*]. Within 30 days of the date of sale, the DMV must send notice of the receipt of the funds, if the amount exceeds \$10, to the legal and registered owners of the vessel [*Harb. & Nav. Code § 507.5(b)*].

[ii] Claims Against Proceeds by Parties Other Than Lienholder

Any person claiming an interest in a vessel sold at a lien sale may file a claim with the DMV for any portion of the funds from the lien sale that the DMV received. If the DMV determines that the claimant is entitled to a portion of the funds, it will pay that amount. However, the amount paid may not exceed the balance amount received by the DMV. The DMV may not honor any claim unless the claim has been filed within three years of the date the funds were received [*Harb. & Nav. Code § 507.5(c)*].

At the end of each fiscal year, the DMV must deposit in the Harbors and Watercraft Revolving Fund all funds held by it for which no claim was filed within the three-year period [*Harb. & Nav. Code § 507.5(c)*].

[iii] Redemption of Vessel

Within 10 days after the lien sale of any vessel, the legal or registered owner may redeem the vessel on payment of the amount of the lien, all costs and expenses of the lien, and interest, based on the legal rate of interest from the due date of the amount owed until repayment. If the vessel is not redeemed, all lien sale documents required by the DMV must be completed and delivered to the buyer [*Harb. & Nav. Code § 506.5*; *see* § 102A.293].

[2] FORM**Application for Lien Sale Authorization and Lienholder's Certification [DMV Form BOAT 152]**

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty Law
Maritime Liens
General Overview
Admiralty Law
Shipping Regulations & Statutes
Licensing & Registration



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2. Vessels Valued at Greater Than \$1,500

32-102A California Legal Forms--Transaction Guide § 102A.291

§ 102A.291 DMV Notice of Application to Hold Lien Sale, With Declaration of Opposition Attached

[1] Comment

[a] Use of Form

This form is a sample of the form letter sent by the DMV to notify the registered and legal owners (and other interested persons) that an application to hold a lien sale on a vessel has been filed. The form includes a Declaration of Opposition, which must be completed by the recipient of the notice and filed to contest the lien sale [*see [c], below; see also Harb. & Nav. Code § 503(b)(2)*]. This form letter is a sample supplied by the DMV and is reproduced for illustrative purposes only.

After a lienholder has applied to the DMV for authorization to conduct a lien sale of a vessel valued in excess of \$1,500 [*see § 102A.290*], the DMV will send this form letter to both the registered and the legal owners of the vessel subject to the lien and other persons listed in the application [*see [b], below*].

For further discussion of the lien sale process for vessels valued in excess of \$1,500, *see § 102A.290*. For discussion and forms governing the lien sales of vessels valued at \$1,500 or less, *see §§ 102A.300 and 102A.301*.

[b] Notice of Lien Sale by DMV

On receipt of an application to conduct a vessel lien sale, the DMV must notify both the registered and the legal owners of the vessel and any other person whose name and address is listed in the application [*Harb. & Nav. Code § 503(b)(2)*]. The notice must state that [*Harb. & Nav. Code § 503(c)*]:

- An application has been made with the DMV to conduct a lien sale and the DMV has placed a vessel registration stop order or title transfer stop order on the vessel;
- The person notified has a right to a court hearing;

- If a court hearing is desired, a signed Declaration of Opposition form must be returned to the DMV within 15 days of the date on which the notice was mailed;
- If the Declaration of Opposition form is signed and returned to the DMV, the lienholder will be allowed to sell the vessel only if he or she obtains a favorable court judgment or the declarant's release [*see also Harb. & Nav. Code § 505; § 102A.282*];
- If a court action is filed, the declarant must be notified of the lawsuit at the address shown on the Declaration of Opposition form and may appear to contest the claim; and
- The person may be liable for court costs if a judgment is entered in favor of the lienholder.

For an overview of the procedure governing lien sales of vessels valued at over \$1,500, see § 102A.140.

[c] Submitting Declaration of Opposition

If both the registered and the legal owners (and other interested persons) wish to contest a vessel lien sale, they must complete the Declaration of Opposition and return it to the DMV within 15 days after the DMV mailed it to them [*Harb. & Nav. Code § 503(c)(3)*]. If the DMV receives the Declaration of Opposition within this 15-day period, it will notify the lienholder within 16 days that he or she may not proceed with the lien sale [*Harb. & Nav. Code § 503(d)*]. The lienholder must then file an action in court within 60 days after the receipt of this notice. A lien sale cannot be conducted unless judgment is subsequently entered in favor of the lienholder or the declarant subsequently releases his or her interest in the vessel [*Harb. & Nav. Code § 503(d); see § 102A.282*]. If the lienholder files suit and serves process on the declarant by certified mail at the address shown on the Declaration of Opposition and the mail is returned unclaimed, the DMV must promptly authorize the sale [*Harb. & Nav. Code § 503(e)*].

[2] FORM

DMV Notice of Application to Hold Lien Sale, With Declaration of Opposition Attached

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Nonmortgage Liens General Overview Transportation Law Private Vehicles General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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 C. Vessel Liens
 2. Vessels Valued at Greater Than \$1,500

32-102A California Legal Forms--Transaction Guide § 102A.292

§ 102A.292 Notice of Pending Lien Sale [DMV Form BOAT 166]

[1] Comment

[a] Use of Form

This form is a DMV Notice of Pending Lien Sale. Many commonly used forms are available at any DMV office or may be downloaded from the DMV website located at www.dmv.ca.gov. However, most of the lien sale forms are *not* available online, and many are not available at local DMV offices. This form is available by mail from the DMV Lien Sale Unit, P.O. Box 932317, Sacramento, CA 94323 by calling the Unit at (916) 657-7617. Forms are also available from the DMV Material Management, Forms Order Desk, 4201 Sierra Point Drive, Suite 112, Sacramento, CA 95834 by faxing the request to (916) 928-7900. The fax should include: the title of the form, the form number, the quantity desired (a six month supply is recommended), a contact name and telephone number, and a shipping address, which must be a physical address. If forms are being requested for an organization, the request should be on the organization's letterhead. Questions should be directed to (916) 657-6560.

If the value of a vessel subject to a lien exceeds \$1,500, the lienholder must use this form to give the written notice required by *Harb. & Nav. Code § 503(f)(2)*. For discussion of lien sales of vessels valued at over \$1,500, see §§ *102A.140* and *102A.290[1]*.

[b] Sending Notice of Pending Lien Sale

After the lienholder obtains authorization from the DMV to conduct a lien sale of a vessel valued at more than \$1,500, he or she must send this notice, at least 20 days before the date of the sale (not counting the day of sale), to the legal and registered owners of the vessel if the vessel is registered in California, to the DMV in Sacramento, and all other persons known to have an interest in the vessel. The notice must be sent by mail, with return receipt requested [*Harb. & Nav. Code § 503(f)(2)*].

After the DMV receives the notice of pending lien sale, it must mark its records and notify any person having a

proprietary interest in the vessel that there is a pending lien sale and that title will not be transferred until the lien is satisfied or released [*Harb. & Nav. Code* § 503(g)].

[2] FORM

Notice of Pending Lien Sale [DMV Form BOAT 166]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawShippingRegulations & StatutesLicensing & RegistrationReal Property LawNonmortgage LiensGeneral OverviewTransportation LawPrivate VehiclesGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.293

§ 102A.293 Certificate of Lien Sale for Vessel or Vessel with Trailers Valued Over \$1,500 [DMV Form BOAT 178]

[1] Comment--Use of Form

This form is the DMV Certificate of Lien Sale for Vessel or Vessel with Trailers Valued Over \$1500. It is available from any DMV office or may be downloaded from the DMV website located at www.dmv.ca.gov. The form is used to report the completion of a lien sale of a vessel of a vessel and trailer combination valued over \$1500. A vessel record (printout) from the DMV and/or authorization for a lien sale must be submitted with this certification [see www.dmv.ca.gov/forms/boat/boat178.htm].

After the sale, the lienholder must keep the vessel in his or her possession for a 10-day redemption period. During that 10-day period, the legal or registered owner may redeem the vessel on payment of the amount of the lien, all costs and expenses of the lien, and interest, based on the legal rate of interest from the due date of the amount owed until repayment [*Harb. & Nav. Code § 506.5*].

For discussion of authority to conduct a lien sale, see § 102A.140. For discussion of the notice of a pending lien sale, see § 102A.292. For coverage of publication of the sale, see 102A.290[1][b][v]. For discussion of disposition of lien sale proceeds, see § 102A.290[1][c].

[2] FORM

Certificate of Lien Sale for Vessel or Vessel with Trailers Valued Over \$1,500 [DMV Form BOAT 178]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawMaritime LiensGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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2. Vessels Valued at Greater Than \$1,500

32-102A California Legal Forms--Transaction Guide §§ 102A.294-102A.299

[Reserved]

§§ 102A.294[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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3. Vessels Valued at \$1,500 or Less

32-102A California Legal Forms--Transaction Guide § 102A.300

§ 102A.300 Lienholder's Certification and Notice of Pending Lien Sale [DMV Form BOAT 156]

[1] Comment

[a] Use of Form

This form is the official DMV form for a lienholder's certification and notice of a pending lien sale of a vessel valued at \$1,500 or less. Many commonly used forms are available at any DMV office or may be downloaded from the DMV website located at www.dmv.ca.gov. However, most of the lien sale forms are *not* available online, and many are not available at local DMV offices. This form is available by mail from the DMV Lien Sale Unit, P.O. Box 932317, Sacramento, CA 94323 by calling the Unit at (916) 657-7617. Forms are also available from the DMV Material Management, Forms Order Desk, 4201 Sierra Point Drive, Suite 112, Sacramento, CA 95834 by faxing the request to (916) 928-7900. The fax should include the title of the form, the form number, the quantity desired (a six month supply is recommended), a contact name and telephone number, and a shipping address, which must be a physical address. If forms are being requested for an organization, the request should be on the organization's letterhead. Questions should be directed to (916) 657-6560.

For discussion and forms covering lien sales of vessels valued at greater than \$1,500, see §§ 102A.290-102A.293.

[b] Procedure for Lien Sales of Vessels Valued at \$1,500 or Less

A lienholder begins the lien sale of a vessel valued at \$1,500 or less by applying to the DMV for the names and addresses of both the registered and the legal owners of record [*see Harb. & Nav. Code § 504(a)*]. On receipt of the names and addresses, the lienholder must immediately send a completed Notice of Pending Lien Sale form, a blank Declaration of Opposition [*see § 102A.301*], and a return envelope preaddressed to the DMV to both the registered and the legal owners of the vessel, to any other person known to have a proprietary interest in the vessel, and to the DMV. The forms must be sent by mail, return receipt requested [*Harb. & Nav. Code § 504(b)*].

On the DMV's receipt of the notice of pending lien sale, it must mark its records and notify any person having a

proprietary interest in the vessel that there is a pending lien sale and that title will not be transferred until the lien is satisfied or released [*Harb. & Nav. Code § 504(c)*].

[c] Required Contents of Notice of Pending Lien Sale

All Notice of Pending Lien Sale forms sent to persons having an interest in the vessel must be signed under penalty of perjury and must contain all of the following information [*Harb. & Nav. Code § 504(d)*]:

- The vessel's description, including make, identification number, and state of registration, to the extent available.
- The specific date, exact time, and place of sale, which must not be less than 35 days nor more than 60 days from the date of mailing.
- The names and addresses of both the registered and the legal owners of the vessel, and the name and address of any other person known to have an interest in the vessel.
- A statement of the amount of the lien and the facts concerning the claim that gives rise to the lien. This statement must include, as a separate item, an estimate of any additional storage costs accruing pending the lien sale.
- A statement that the person notified has a right to a court hearing.
- A statement that if a court hearing is desired, a signed Declaration of Opposition form must be returned to the DMV within 15 days of the mailing of the Notice of Pending Lien Sale form [*see [d], below*].
- A statement that if the Declaration of Opposition form is signed and returned to the DMV, the lienholder will be allowed to sell the vessel only if he or she obtains a court judgment or the declarant's release [*see Harb. & Nav. Code § 505; see also § 102A.282*].
- A statement that if a court action is filed, the declarant must be notified of the lawsuit at the address shown on the Declaration of Opposition form and may appear to contest the claim.
- A statement that the person may be liable for court costs if a judgment is entered in favor of the lienholder.

[d] Declaration of Opposition

The person receiving the Notice of Pending Lien Sale may file a Declaration of Opposition if he or she desires a court hearing [*see Harb. & Nav. Code § 504(d)(4)(C)*]. The proper return of the Declaration of Opposition will require the lienholder to obtain a court judgment or the declarant's release before conducting a lien sale [*see Harb. & Nav. Code § 504(d)(4)(D)*]. For further discussion and a form for the Declaration of Opposition, see § 102A.301.

[e] Conduct of Lien Sale

Before the lien sale begins, the vessel must be made available for inspection at a location easily accessible to the public for at least one hour before the sale. Further, the vessel must be made available at the time and date specified on the notice of sale [*Harb. & Nav. Code § 506*].

The lien sale must be conducted in a commercially reasonable manner [*Harb. & Nav. Code* § 506]. The statute, however, does not specify what constitutes "commercially reasonable." Sealed bids will not be accepted at the lien sale [*Harb. & Nav. Code* § 506].

For discussion of the disposition of vessel lien sale proceeds, see § 102A.290[1][c]. For discussion of the redemption of the vessel, see § 102A.290[1][c][iii].

[2] FORM

Lienholder's Certification and Notice of Pending Lien Sale [DMV Form BOAT 156]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawMaritime LiensGeneral OverviewAdmiralty LawShippingRegulations & StatutesLicensing & Registration



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3. Vessels Valued at \$1,500 or Less

32-102A California Legal Forms--Transaction Guide § 102A.301

§ 102A.301 Declaration of Opposition [DMV Form BOAT 158]

[1] Comment

[a] Use of Form

This form is the official DMV Declaration of Opposition. Many commonly used forms are available at any DMV office or may be downloaded from the DMV website located at www.dmv.ca.gov. However, most of the lien sale forms are *not* available online, and many are not available at local DMV offices. This form is available by mail from the DMV Lien Sale Unit, P.O. Box 932317, Sacramento, CA 94323 by calling the Unit at (916) 657-7617. Forms are also available from the DMV Material Management, Forms Order Desk, 4201 Sierra Point Drive, Suite 112, Sacramento, CA 95834 by faxing the request to (916) 928-7900. The fax should include the title of the form, the form number, the quantity desired (a six month supply is recommended), a contact name and telephone number, and a shipping address, which must be a physical address. If forms are being requested for an organization, the request should be on the organization's letterhead. Questions should be directed to (916) 657-6560.

A blank Declaration of Opposition must be served on both the registered and the legal owners, and any known persons having an interest in the vessel, at the same time as the Notice of Pending Lien Sale [*see Harb. & Nav. Code § 504(b); see also § 102A.300*]. It must be filed by owners or other interested persons who want to contest the lien sale of a vessel valued at \$1,500 or less [*see Harb. & Nav. Code § 504(d); see [b], below*]. For discussion of lien sales of vessels valued at \$1,500 or less, see § 102A.300. For discussion and forms involving the lien sales of vessels valued at greater than \$1,500, see §§ 102A.290-102A.293.

[b] Submitting Declaration of Opposition

If either the registered or the legal owners (or other persons) wish to contest a vessel lien sale, they must complete the Declaration of Opposition and return it to the DMV within 15 days after the Notice of Pending Lien Sale was mailed to them [*Harb. & Nav. Code § 504(d)(4)(C); see § 102A.300*]. If the DMV receives the Declaration of Opposition within this 15-day period, it will notify the lienholder within 16 days that he or she may not proceed with the lien sale unless

the lienholder obtains a court judgment or the declarant's release [*Harb. & Nav. Code § 504(e)*; see *Harb. & Nav. Code § 505*; see also § 102A.282]. The lienholder must file a court action within 20 days after the receipt of this notice [*Harb. & Nav. Code § 504(e)*]. If the Declaration of Opposition is not executed and returned within the prescribed 20-day period, the lienholder may proceed with the lien sale [*Harb. & Nav. Code § 504(f)*].

[2] FORM

Declaration of Opposition [DMV Form BOAT 158]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide §§ 102A.302-102A.309

[Reserved]

§§ 102A.302[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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 4. Assignments

32-102A California Legal Forms--Transaction Guide § 102A.310

§ 102A.310 Assignment of Lien for Services on or Storage of a Vessel**[1] Comment****[a] Use of Form**

This form is an assignment of a lien for services on or storage of a vessel. It may be used by a lienholder to assign his or her lien for service or storage charges on a particular vessel. Such liens are expressly assignable [*see Harb. & Nav. Code § 508; see also [b], below*]. For discussion of assignments in general, see Ch. 76, *Assignments of Rights and Obligations*. For discussion of vessel liens in general, see § 102A.280[1][b]. For discussion and a form for notice of the assignment of the lien for services or storage, see § 102A.311.

[b] Assignments of Vessel Liens

Liens for repairs, labor, supplies, or materials, or for the storage or safekeeping of a vessel, may be assigned by written instrument. However, the assignment must be accompanied by the transfer of possession of the vessel. In addition, the lienholder must give written notice of the assignment, including the name and address of the person to whom the lien is assigned, to both the registered and the legal owners of the vessel, either by personal delivery or by certified mail [*Harb. & Nav. Code § 508*].

[2] FORM**Assignment of Lien for Services on or Storage of a Vessel**

ASSIGNMENT OF CLAIM AND LIEN FOR _____ [SERVICE or STORAGE] CHARGES ON VESSEL

For value received, the undersigned assigns to [name of assignee] all _____ [his or her or its] right, title, and interest in and to _____ [his or her or its] claim in the amount of \$ _____,

together with the lien arising under *Harbors and Navigation Code Section 502* for [specify service performed, or the storage] of [identify vessel by make, hull identification number, and any other appropriate information] at [place where service was performed or vessel stored] on _____[date or dates of service or storage].

Dated: _____

_____ [name of lienholder]

_____ [signature]

_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawMaritime LiensGeneral OverviewAdmiralty LawPractice & ProcedureGeneral OverviewContracts
LawPerformanceAssignmentGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.311

§ 102A.311 Notice of Assignment of Lien for Services on or Storage of Vessel**[1] Comment--Use of Form**

This form is for use in notifying the owner of a vessel that the lien for repair or storage charges has been assigned. Notice is required to effectuate a valid assignment of a vessel lien [*Harb. & Nav. Code § 508*]. For discussion of assignments in general, see Ch. 76, *Assignments of Rights and Obligations* . For discussion of vessel liens in general, see § 102A.280[1][b]. For discussion and a form for the assignment of a vessel lien, see § 102A.310.

[2] FORM**Notice of Assignment of Lien for Services on or Storage of Vessel**

_____[*name of registered or legal owner*]
 _____[*street address*]
 _____[*city, state, zip*]

NOTICE OF ASSIGNMENT OF LIEN

You are hereby notified pursuant to *Harbors and Navigation Code Section 508* that the undersigned on [*date of assignment*] assigned all _____[*his or her or its*] right, title, and interest in and to the claim and lien on [*description of vessel*] for [*services performed or storage charges*] in the amount of \$_____ on _____[*specify date or dates of service or storage*]. The claim and lien described above have been assigned to [*name of assignee*] of [*address of assignee*], and all further matters with regard to the subject vessel or lien on the vessel should be referred to the assignee.

Dated: _____

_____[*name of lienholder*]

_____ [signature]
_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawMaritime LiensGeneral OverviewAdmiralty LawPractice & ProcedureGeneral OverviewContracts
LawPerformanceAssignmentGeneral Overview



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32-102A California Legal Forms--Transaction Guide §§ 102A.312-102A.319

[Reserved]

§§ 102A.312[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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D. Liens for Services Performed on Personal Property

32-102A California Legal Forms--Transaction Guide § 102A.320

§ 102A.320 Notice of Intention to Commence Work and to Claim Lien

[1] Comment

[a] Use of Form

This form is a notice of intent to begin any of several specified kinds of work, service, care, or safekeeping in connection with personal property, and to claim a statutory lien for any amounts that may become due as a result [*see Civ. Code § 3051; see also [b], below*]. If a person entitled to the lien performs one of the specified functions at the request of someone other than the holder of legal title to the personal property, the portion of the lien in excess of \$300 for work, services, or care, or in excess of \$200 for safekeeping, is invalid unless the lienholder gives written notice to the legal title holder before commencing the work, service, care, or safekeeping. The notice must be personally served on the holder of legal title or delivered by registered letter addressed to the title holder, if known [*Civ. Code § 3051a*].

For an alternative notice and procedure that may be used when the lien does not exceed \$150 [*see Civ. Code § 3052b*], see § 102A.322.

[b] Persons Entitled to Lien

A person lawfully in possession of personal property who renders any service to the owner of the property for the protection, improvement, safekeeping, or carriage of the property has a special lien on that property, dependent on possession, for the compensation, if any, that is due from the owner for that service. In addition, one who makes, alters, or repairs personal property at the request of the owner or legal possessor of the property has a lien for the reasonable charges for the balance due for work done and material furnished, and may retain possession of the property until the charges are paid [*Civ. Code § 3051*].

Foundry proprietors and persons conducting a foundry business have a lien, dependent on possession, on all patterns in their hands belonging to a customer, for the balance due them from the customer for foundry work. Plastic fabricators and persons conducting a plastic fabricating business have a lien dependent on possession on all patterns and molds in their hands belonging to a customer for the balance due them from the customer for plastic fabrication work [*Civ. Code*

§ 3051].

Laundry proprietors, drycleaning establishment proprietors, and persons conducting a laundry or drycleaning business have a general lien, dependent on possession, on all personal property in their hands belonging to a customer for the balance due them from the customer for laundry or drycleaning work. This lien is not conferred in favor of wholesale drycleaners on materials received from drycleaning proprietors or persons conducting drycleaning establishments [Civ. Code § 3051].

Veterinary proprietors and veterinary surgeons have a lien dependent on possession for their compensation in caring for, boarding, feeding, and medical treatment of animals [Civ. Code § 3051; see *Jakubaitis v. Fischer* (1995) 33 Cal. App. 4th 1601, 1605-1606, 40 Cal. Rptr. 2d 39 (Civ. Code § 3051, not Civ. Code § 3080 (general livestock lien statute), governed billing dispute between veterinary hospital and owners of horse that had received veterinary services; court reasoned that legislature's omission of veterinary care from Civ. Code § 3080 indicated its intention to retain Civ. Code § 3051 as governing scheme for veterinary surgeons and veterinary proprietors in possession while creating new statutory scheme for other livestock servicers)].

[c] Property Not Subject to Lien

These lien provisions do not apply to the following types of personal property [Civ. Code § 3051]:

- Vessels [see Harb. & Nav. Code § 21 (definition); see also §§ 102A.280-102A.311 (vessel lien forms)].
- Vehicles subject to registration under the Vehicle Code [see Veh. Code § 670 (definition); see also § 102A.200-102A.251 (vehicle liens)].
- Manufactured homes, whether or not subject to registration under the Health and Safety Code [see Health & Safety Code § 18007 (definition)].
- Mobilehomes, whether or not subject to registration under the Health and Safety Code [see Health & Safety Code § 18008 (definition)].
- Commercial modulars (also referred to as "commercial coaches"), whether or not subject to registration under the Health and Safety Code [see Health & Safety Code § 18001.8 (definition)].

[d] Enforcement by Sale

If the lienholder is not paid the amount due within 10 days after the amount has become due, the lienholder may sell at public auction the property that is the subject of the lien, or as much of it as is necessary to satisfy the lien and the costs of sale [Civ. Code § 3052]. For a notice of sale to satisfy a lien for services performed on personal property, see § 102A.321. For a notice of sale of property at public auction, see California Forms of Pleading and Practice, Ch. 342, *Liens and Wage Preferences* (Matthew Bender).

[2] FORM

Notice of Intention to Commence Work and to Claim Lien

_____[name of holder of legal title to property]
 _____[street address]
 _____[city, state, zip]

NOTICE OF INTENTION TO BEGIN WORK AND TO CLAIM LIEN

You are hereby notified, pursuant to *Civil Code Section 3051a*, that the undersigned intends to perform certain services on personal property owned by you. Specifically, on _____ [date], the undersigned will begin to [describe work] on the following property: [describe]. That work was requested by _____ [you or name of other person requesting work] on _____ [date].

You are further notified that, if the undersigned is not paid the amount due for the above work within ten (10) days after that amount becomes due, the undersigned will claim a lien on the personal property described above for the unpaid amount. To enforce such a lien, the undersigned may retain possession of the property until paid. The approximate charge for the work is \$_____.

If you object to the performance of the work described above, please contact the undersigned at _____ [address and telephone number] before _____ [date work is scheduled to begin].

Dated: _____

_____ [name of lien claimant]

_____ [signature]

_____ [typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty Law Shipping Regulations & Statutes Licensing & Registration Real Property Law Nonmortgage Liens General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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D. Liens for Services Performed on Personal Property

32-102A California Legal Forms--Transaction Guide § 102A.321

§ 102A.321 Notice of Sale to Satisfy Lien

[1] Comment

[a] Use of Form

This form is a notice of sale of personal property to satisfy a lien for services performed on personal property [see *Civ. Code § 3051*; see also *§ 102A.320*]. If a person entitled to a lien under *Civ. Code § 3051* is not paid the amount due, and for which the lien is given, within 10 days after that amount becomes due, the lienholder may sell the property to which the lien applies at public auction [*Civ. Code § 3052*].

[b] Time and Manner of Notice

The lienholder must give notice of the sale by publication or by posting. Published notice must be given at least 10 but not more than 20 days before the sale by advertising in a newspaper published in the county in which the property is situated. If no newspaper is published in that county, notice must be given by posting the notice in three of the most public places in the town and at the place where the property is to be sold for 10 days before the date of sale [*Civ. Code § 3052*].

[c] Proceeds of Sale

The lienholder may sell the property or as much of it as is necessary to satisfy the lien and costs of sale. The proceeds of the sale must first be applied to the discharge of the lien and the cost of keeping and selling the property. The remainder, if any, must be paid over to the legal owner of the property [*Civ. Code § 3052*].

[d] Right of Redemption

Within 20 days after the sale, the legal owner may redeem property sold to satisfy the lien by paying (1) the amount of the lien, (2) all costs and expenses of sale, and (3) interest on the foregoing amounts at a rate of 12 percent from the due date, or the date when the costs and expenses were advanced, until the repayment [*Civ. Code § 3052*].

[e] Serviced Products of Nominal Value

This lien sale procedure is inapplicable to service dealers registered with the Bureau of Electronic and Appliance Repair [see *Bus. & Prof. Code* §§ 9800-9874; see also *Bus. & Prof. Code* § 9801(f) ("service dealer" defined)] if the dealer reasonably believes that the serviced product is of nominal value [*Civ. Code* § 3052.5(a)]. For discussion of service dealer's liens, see § 102A.324[1].

[2] FORM**Notice of Sale to Satisfy Lien**

NOTICE OF SALE TO SATISFY LIEN

You are hereby notified, pursuant to *Civil Code Section 3052*, that _____ [name of lienholder] will sell [describe property], of which you are the legal owner, at a public auction on _____ [date], at [time], at [place].

The sale is to satisfy a lien in the amount of \$_____ for [describe work, service, care, or safekeeping]. This amount became due on _____ [date], and has remained unpaid for more than 10 days after becoming due.

Dated: _____

_____ [name of lienholder]

_____ [signature]

_____ [typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsPersonal PropertyReal Property LawNonmortgage LiensGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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32-102A California Legal Forms--Transaction Guide § 102A.322

§ 102A.322 Summary of Statutory Lien Sale Procedure for Charges Not Exceeding \$150, and Owner's Declaration

[1] Comment

[a] Use of Form

This form consists of (1) a summary of the lien sale provisions of *Civ. Code § 3052b*, and (2) a declaration by the property owner that he or she has read and understands the summary. The lien sale procedure in *Civ. Code § 3052b* is an alternative to the procedure set forth in *Civ. Code § 3052* for the enforcement of liens on personal property [see § 102A.321[1]], and may be used when the lien is for charges that do not exceed \$150 [*Civ. Code § 3052b(a)*; see [b], *below*]. The lienholder must provide the property owner with this type of notice of sale at the time of entering into the transaction from which the lien may arise [*Civ. Code § 3052b(a)(1), (2)*; see [b], *below*].

In addition to providing this notice, the lienholder must make related disclosures by taking all of the following steps:

- Posting, at the time of the transaction from which the lien may arise, a notice that informs the public of the substance of *Civ. Code § 3052b* [see § 102A.323].
- Notifying the owner when the work is completed [see *Civ. Code § 3052b(b)*; see also [c], *below*].
- Notifying the owner that the property will be sold to satisfy the lien unless all charges are paid [see *Civ. Code § 3052b(d)*; see also [c], *below*].

Further, if the property is sold to satisfy the lien, the sale must comply with numerous requirements imposed by *Civ. Code § 3052b* [see [b]-[h], *below*].

[b] When Procedure May Be Used

This notice and procedure may be used when:

- A lienholder has a lien for services performed on personal property [*see Civ. Code § 3051* (description of these liens); *see also § 102A.320*]; and
- The lien is for charges that do not exceed \$150, exclusive of additional charges and interest authorized by *Civ. Code § 3052b* [*Civ. Code § 3052b(a)*].

To employ this procedure, the lienholder must have done all of the following [*see Civ. Code § 3052b(a)*]:

- Provided the property owner with an accurate written summary of the lien provisions of *Civ. Code § 3052b* (this form).
- Obtained the property owner's address and telephone number, together with a written declaration signed by the property owner stating that the property owner has read and understands the summary provided in accordance *Civ. Code § 3052b(a)(1)* [*see P above*], at the time of entering into the transaction from which the lien arose. (This form includes the required declaration and blanks for the owner's address and telephone number. Two copies of this form should be given to the owner, so that he or she can sign one copy and return it to the lienholder, and retain the second copy.)
- Posted, at the time of the transaction from which the lien arose, a notice that fully and fairly informs the public of the substance of *Civ. Code § 3052b* [*see § 102A.323*]. The notice must be posted in a location clearly visible to the public in the lienholder's business premises.

[c] Subsequent Notices to Property Owner

A lienholder using this procedure must notify the owner of the property subject to the lien, by first class mail, of the completion of the work for which the lien is claimed [*Civ. Code § 3052b(b)*]. Further, not less than 30 days following the notice of completion of work, the lienholder must notify the property owner by first class mail that the property will be sold to satisfy the lien unless the charges are paid within 30 days following the mailing of the notice [*Civ. Code § 3052b(d)*].

[d] Storage Fees

If a property owner who has actually received a notice of completion of work [*see Civ. Code § 3052b(b)*] fails to pay the charges for which the lien is claimed for 30 days following receipt of the notice, the lienholder may charge \$2 per day for storing the property subject to the lien. These charges also will be secured by the lien [*Civ. Code § 3052b(c)*].

[e] Sale of Property

The lienholder may sell the property subject to the lien at a public or bona fide private sale if all of the following have occurred [*Civ. Code § 3052b(e)*]:

- The lienholder has provided a notice of completion of work and a notice of sale [*see [c], above*].
- Not less than 30 days have elapsed since the mailing of the notice of sale.
- The property owner has not fully paid the original charges for which the lien is claimed plus any additional storage charges [*see [d], above*].

The lienholder may sell the property to satisfy the sum of the following: original charges; storage fees; all costs and

expenses of the sale; and interest at the rate of 12 percent per annum from 30 days following receipt of the notice of completion of work or the date the obligations, costs, expenses, and interest were advanced, until repayment [*Civ. Code* § 3052b(e)].

[f] Right of Redemption

The property owner may redeem the property within 20 days following the sale, on payment of all charges, costs, expenses, and interest [*Civ. Code* § 3052b(f)].

[g] Proceeds of Sale

The proceeds of the sale must first be applied to the discharge of the lien, the costs of sale, and interest. Any remainder is paid to the former owner of the property [*Civ. Code* § 3052b(g)].

[h] Serviced Products of Nominal Value

This lien sale procedure is inapplicable to service dealers registered with the Bureau of Electronic and Appliance Repair [see *Bus. & Prof. Code* §§ 9800-9874; see also *Bus. & Prof. Code* § 9801(f) ("service dealer" defined)] if the dealer reasonably believes that the serviced product is of nominal value [*Civ. Code* § 3052.5(a)]. For discussion of service dealer's liens, see § 102A.324.

[2] FORM

Summary of Statutory Lien Sale Procedure for Charges Not Exceeding \$150, and Owner's Declaration

SUMMARY OF STATUTORY LIEN PROVISIONS

This notice is being provided to you at the time that you and the undersigned are entering into the following transaction: [describe underlying transaction from which lien may arise]. The undersigned is providing you with this notice because _____ [he or she or it] wishes to preserve the right to use the lien sale procedure set forth in *Civil Code* Section 3052b. That procedure may be used to enforce a lien for services on personal property, when the lien covers charges that do not exceed \$150, exclusive of additional charges and interest authorized by Section 3052b. Under Section 3052b, the undersigned must do the following:

- (1) Provide you with this written summary of the lien provisions of *Civil Code* Section 3052b.
- (2) Obtain your address and telephone number, together with a written declaration signed by you stating that you have read and understand this summary, at the time of entering into the transaction from which the lien may arise.
- (3) Post, at the time of the transaction from which the lien may arise, a notice that fully and fairly informs the public of the substance of *Civil Code* Section 3052b. The undersigned must post this notice in a location clearly visible to the public in the business premises of the undersigned.
- (4) Notify you by first class mail of the completion of the work for which the lien is claimed.
- (5) Not less than 30 days following the notice of completion of the work, notify you by first class mail that the property will be sold to satisfy the lien unless the charges are paid within 30 days following the mailing of the notice.

If you actually receive the notice of completion of work from us and fail to pay the charges for which the lien is claimed for 30 days following receipt of the notice, the undersigned may charge \$2 per day for storing the property subject to the lien. Those charges will also be secured by the lien.

The undersigned may sell the property subject to the lien at a public or bona fide private sale if all of the following have occurred:

- (1) The undersigned has complied with all the above notice provisions.
- (2) Not less than 30 days have elapsed since the mailing of the notice of sale.
- (3) You have not fully paid the original charges for which the lien is claimed plus any additional storage charges.

The undersigned may sell the property to satisfy the sum of the following: the original charges; storage fees; all costs and expenses of the sale; and interest at the rate of 12 percent per annum from 30 days following your receipt of the notice of completion of work or the date the obligations, costs, expenses, and interest were advanced, until repayment.

You may redeem the property within 20 days following the sale, on payment of all charges, costs, expenses, and interest.

The proceeds of the sale will first be applied to the discharge of the lien, the costs of sale, and interest. The remainder, if any, will be paid to you.

_____ *[name of lienholder]*
 _____ *[signature]*
 _____ *[typed name and title]*

DECLARATION

I, _____ *[name of property owner]*, declare that _____ *[name of lienholder]* provided me with the above SUMMARY OF STATUTORY LIEN REQUIREMENTS at the time we entered into the following transaction: *[describe]*. I further declare that I have read and understand that summary.

Dated: _____

_____ *[signature]*
 _____ *[name of owner]*
 _____ *[address]*
 _____ *[city, state, zip]*
 _____ *[telephone number]*

Legal Topics:

For related research and practice materials, see the following legal topics:
 Real Property Law Nonmortgage Liens General Overview



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32-102A California Legal Forms--Transaction Guide § 102A.323

§ 102A.323 Posted Summary of Statutory Lien Sale Procedure for Charges Not Exceeding \$150

[1] Comment

[a] Use of Form

This form is a summary of the lien sale provisions of *Civ. Code § 3052b*. This type of notice must be posted in the lienholder's business premises if the lienholder wishes to preserve the right to use the alternative lien sale procedure of *Civ. Code § 3052b* [see § 102A.322[1]].

[b] Notice Requirements

The notice must [*Civ. Code § 3052b(a)(3)*]:

- Fully and fairly inform the public of the substance of *Civ. Code § 3052b*;
- Be posted in a location clearly visible to the public in the lienholder's business premises; and
- Be in place at the time the lienholder enters into the transaction from which the lien may arise.

For additional coverage of *Civ. Code § 3052b*, see § 102A.322[1].

[2] FORM

Posted Summary of Statutory Lien sale Procedure for Charges Not Exceeding \$150

NOTICE OF RIGHT TO SATISFY LIEN BY SALE OF PROPERTY

Any property left for service with this establishment may be sold at a lien sale, after proper notice, if the charges for the service are not paid and do not exceed \$150. Before such a sale may be conducted, the undersigned must satisfy the

following requirements:

- (1) Provide the property owner with an accurate written summary of the lien provisions of *Civil Code Section 3052b*.
- (2) Obtain the address and telephone number of the property owner, together with a written declaration signed by the property owner stating that he or she has read and understands the summary, at the time of entering into the underlying transaction from which the lien may arise.
- (3) Post, at the time of the transaction from which the lien may arise, this notice that fully and fairly informs the public of the substance of *Civil Code Section 3052b*. The undersigned must post this notice in a location clearly visible to the public in the business premises of the undersigned.
- (4) Notify the property owner by first class mail of the completion of the work for which the lien is claimed.
- (5) Not less than 30 days following the notice of completion of the work, notify the property owner by first class mail that the property will be sold to satisfy the lien unless the charges are paid within 30 days following the mailing of the notice.

If the property owner actually receives the notice of completion from the undersigned and fails to pay the charges for which the lien is claimed for 30 days following receipt of the notice, the undersigned may charge \$2 per day for storing the property subject to the lien. Those charges will also be secured by the lien.

The undersigned may sell the property subject to the lien at a public or bona fide private sale if all of the following have occurred:

- (1) The undersigned has complied with all the above notice provisions.
- (2) Not less than 30 days have elapsed since the mailing of the notice of sale.
- (3) The property owner has not fully paid the original charges for which the lien is claimed plus any additional storage charges.

The undersigned may sell the property to satisfy the sum of the following: the original charges; storage fees; all costs and expenses of the sale; and interest at the rate of 12 percent per annum from 30 days following the property owner's receipt of the notice of completion of work or the date the obligations, costs, expenses, and interest were advanced, until repayment. The proceeds of the sale will first be applied to the discharge of the lien, the costs of sale, and interest. The remainder, if any, will be paid to the property owner. The property owner may redeem the property within 20 days following the sale, on payment of all charges, costs, expenses, and interest.

_____ [name of business]
 _____ [signature]
 _____ [typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-102A California Legal Forms--Transaction Guide § 102A.324

§ 102A.324 Notice of Service Dealer's Intent to Dispose of Serviced Product of Nominal Value

[1] Comment

[a] Use of Form

This form consists of three alternative versions of the notice a service dealer must use to inform the owner of a product serviced by the dealer that the dealer intends to dispose of the product if the owner does not claim it within a certain period [for discussion of the uses of these alternative notices, *see* [d], *below*]. A service dealer registered with the Bureau of Electronic and Appliance Repair [*see Bus. & Prof. Code* §§ 9800-9874; *see also Bus. & Prof. Code* § 9801(f) ("service dealer" defined)] may sell or dispose of serviced products against which the dealer has acquired a lien [*see Civ. Code* § 3051; *see also* § 102A.320[1]] if the dealer reasonably believes the product to be of nominal value [*Civ. Code* § 3052.5(a); *see* [c], *below*].

[b] "Owner" Defined

For these purposes, "owner" means the person or agent who authorizes the original service or repair, or who delivers the product to the service dealer [*Civ. Code* § 3052.5(c)].

[c] "Nominal Value" Defined

A serviced product is of nominal value if (1) it is not readily salable for more than the legitimate charges against it, and (2) either the original retail value was under \$200 and the product is over three years old, or the original retail value was over \$200 and the product is over six years old. A service dealer may use any available materials or information, including industry publications, code dates, sales records, or receipts, to assist in determining value and age of the serviced product [*Civ. Code* § 3052.5(a)].

[d] Manner of Notice

The service dealer must give the product owner notice by one of three statutory methods before disposing of the product

[see *Civ. Code* § 3052.5(b)]. Under the first method of notice [see first alternative in [2], *below*], the dealer must mail a statutory notice to the owner of the property, by certified mail, return receipt requested, following completion of the work on the serviced product. The dealer may dispose of the product 90 days after the date of deliverance evidenced by the signature in the returned receipt [*Civ. Code* § 3052.5(b)(1)].

Under the second method of notice [see second alternative in [2], *below*], the dealer may publish public notice of the intended sale in a newspaper of general circulation. The notice must contain (1) a description of the serviced product, (2) the name of the owner of the serviced product, (3) the time by which the product may be redeemed, and (4) the place where the property may be redeemed [*Civ. Code* § 3052.5(b)(2)]. The notice must be published a minimum of five times. The dealer may dispose of the product 90 days after the last date of publication [*Civ. Code* § 3052.5(b)(2)].

Under the third method of notice [see third alternative in [2], *below*], the dealer may provide the owner of the product with a copy of a statutory notice on receipt of the product to be serviced. The notice must be written in at least 10-point bold type, and must be signed, addressed, and dated by the owner of the product. A copy must be retained by both the owner and the service dealer. At the completion of service, the service dealer must send by first-class mail a completed copy of the notice to the owner at the address given on the notice form. The serviced product may be disposed of 90 days after the date of mailing [*Civ. Code* § 3052.5(b)(3)].

[2] FORM

Notice of Service Dealer's Intent to Dispose of Serviced Product of Nominal Value

[First alternative]

DATE BROUGHT IN _____

DATE MAILED _____

DATE PRODUCT TO BE SOLD IF NOT CLAIMED _____ NOTICE: YOUR PRODUCT HAS BEEN DETERMINED BY THIS SERVICE DEALER TO BE ONE WHICH WAS EITHER ORIGINALLY SOLD FOR LESS THAN \$200 AND IS NOW OVER THREE YEARS OLD OR ONE WHICH WAS ORIGINALLY SOLD FOR MORE THAN \$200 AND WHICH IS NOW OVER SIX YEARS OLD AND THE CHARGES FOR SERVICING YOUR PRODUCT WILL EXCEED ITS CURRENT VALUE. UNDER CALIFORNIA CIVIL CODE SECTION 3052.5(a) IF YOU OR YOUR AGENT FAIL TO CLAIM YOUR PRODUCT WITHIN 90 DAYS AFTER THE DEALER MAILS A COPY OF THIS NOTICE TO YOU IT MAY BE SOLD OR OTHERWISE DISPOSED OF BY HIM OR HER.

[OR]

[Second alternative:]

NOTICE OF INTENDED SALE

This public notice of intended sale is provided by _____ [name of service dealer], a service dealer registered with the Bureau of Electronic and Appliance Repair. The notice relates to the following product: _____ [describe]. The owner of that product is _____ [name]. The undersigned service dealer has determined that the product either (1) was originally sold for less than \$200 and is now over three years old, or (2) was originally sold for more than \$200 and is now over six years old. The undersigned has further determined that the charges for servicing that product will exceed its current value. The product may be redeemed by the owner on or

before _____[time] on _____[date] at _____[place where property may be redeemed]. Under *California Civil Code Section 3052.5(a)*, the dealer may sell or otherwise dispose of the product if it is not redeemed within 90 days after the last date of publication of this notice.

[OR]

[Third alternative:]

DATE BROUGHT IN _____

DATE MAILED _____

DATE PRODUCT TO BE SOLD IF NOT CLAIMED _____ **NOTICE: YOUR PRODUCT HAS BEEN DETERMINED BY THIS SERVICE DEALER TO BE ONE WHICH WAS EITHER ORIGINALLY SOLD FOR LESS THAN \$200 AND IS NOW OVER THREE YEARS OLD OR ONE WHICH WAS ORIGINALLY SOLD FOR MORE THAN \$200 AND WHICH IS NOW OVER SIX YEARS OLD AND THE CHARGES FOR SERVICING YOUR PRODUCT WILL EXCEED ITS CURRENT VALUE. UNDER CALIFORNIA CIVIL CODE SECTION 3052.5(a) IF YOU OR YOUR AGENT FAIL TO CLAIM YOUR PRODUCT WITHIN 90 DAYS AFTER THE DEALER MAELS A COPY OF THIS NOTICE TO YOU IT MAY BE SOLD OR OTHERWISE DISPOSED OF BY HIM OR HER.**

PRINT YOUR NAME AND MAILING ADDRESS WHERE NOTICE MAY BE SENT TO YOU IN THE SPACE PROVIDED BELOW AND SIGN WHERE INDICATED TO SHOW THAT YOU HAVE READ THIS NOTICE.

(Print Name) _____

(Street Address) _____

(City, State, ZIP Code) _____

IF YOU DO NOT AGREE WITH THE ABOVE DETERMINED VALUE OF YOUR ITEM, DO NOT SIGN THIS DOCUMENT.

Signature: _____

(Owner or Agent)

Legal Topics:

For related research and practice materials, see the following legal topics:

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32-102A California Legal Forms--Transaction Guide § 102A.325

§ 102A.325 Notice of Lien on Articles of Clothing or Household Goods

[1] Comment

[a] Use of Form

This form is a notice of lien sale of certain articles of clothing or household goods that have been deposited with a cleaning or renovating establishment. It may be given if (1) the articles or goods have been left with the establishment longer than 90 days, or (2) the articles or goods have been placed in storage and applicable charges have not been paid for at least 12 months [*see Civ. Code § 3066(a), (b); see also [b], below*]. This form should be used to give the owner notice that the articles or goods have remained beyond the statutory period, and that the establishment intends to sell them [*see Civ. Code § 3066(a), (b); see also [d], below*].

To take advantage of these sale provisions, the establishment must also post a statutory notice in its office relating to the power of sale [*Civ. Code § 3066(e)*]. For the statutory notice, see § 102A.326.

[b] Grounds for Sale

Any garments, clothing, wearing apparel, or household goods remaining in the possession of a person, firm, partnership, or corporation, on which cleaning, pressing, glazing, washing, altering, or repairing has been performed, or on which materials or supplies have been used or furnished, for a period of 90 days or more after the completion of the work, may be sold to pay the reasonable or agreed charges and costs of notifying the owner or owners [*Civ. Code § 3066(a)*].

All garments, clothing, wearing apparel, or household goods that have been placed in storage, or that have been placed in storage by agreement after the performance of cleaning or repair services [*see Civ. Code § 3066(a)*], and that remain in the possession of a person, firm, partnership, or corporation without the reasonable or agreed charges having been paid for 12 months, may be sold to pay the charges [*Civ. Code § 3066(b)*].

[c] Storage and Warehouses Excepted

These sale provisions do not apply to property that is to be placed in storage after cleaning, pressing, glazing, washing, altering, or repairing is performed [*Civ. Code* § 3066(a); see [b], *above*]. In addition, these provisions do not apply to persons, firms, partnerships, or corporations operating as warehouses or warehousemen [*Civ. Code* § 3066(b); see *Com. Code* § 7102(a)(13) ("warehouse" defined)].

[d] Manner of Notice

Before the articles or goods can be sold, the establishment must notify the owner of the articles or goods of the time and place of sale [*see Civ. Code* § 3066(ac)]. The notice must be given at least 30 days before the date of sale by posting or mailing a registered letter that is addressed to the owner at the address given to the establishment at the time of the delivery of the articles or goods. A return address must be marked on the envelope. The cost of posting or mailing the letter may be added to the charges. If the owner's address is unknown, notice may be given by posting the notice of sale for 30 days at a prominent place in the receiving office of the establishment required to give notice [*Civ. Code* § 3066(c)].

[e] Proceeds of Sale

From the proceeds of sale, the establishment to whom the charges are payable must deduct the charges due plus the cost of notifying the owner, and must hold the overplus, if any, subject to the order of the owner. The establishment must immediately mail to the owner at his or her address, if known, a notice of the sale and of the amount of the overplus, if any, due the owner. At any time within 12 months, on demand by the owner, the establishment must pay the sums or overplus to the owner [*Civ. Code* § 3066(d)].

[2] FORM

Notice of Lien on Articles of Clothing or Household Goods

_____[name of owner]
 _____[street address]
 _____[city, state, zip code]

NOTICE OF SALE OF _____ [ARTICLES OF CLOTHING or HOUSEHOLD GOODS]

You are hereby notified, pursuant to *Civil Code* Section 3066, that _____[name of establishment] will sell at public auction _____[describe articles of clothing or household goods to be sold] owned by _____[owner's name]. This sale will be conducted to satisfy a lien for services rendered and not paid for since _____[date, which must be at least 90 days from date of this notice if articles or goods haven't been stored, or at least 12 months from date of this notice if articles or goods have been stored]. The sale will be held on _____[date of sale at least 30 days after mailing notice], at [time]_____, at [place]_____.
 Dated: _____

_____[name of cleaning establishment]
 _____[signature]
 _____[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-102A California Legal Forms--Transaction Guide § 102A.326

§ 102A.326 Posted Notice of Lien on Garments, Clothing, Wearing Apparel, or Household Goods

[1] Comment--Use of Form

This form is a statutory notice of power of sale to be posted in establishments that clean or renovate garments, clothing, wearing apparel, or household goods. All persons, firms, partnerships, or corporations wishing to take advantage of the power of sale of garments, clothing, wearing apparel, or household goods provided by *Civ. Code § 3066* must keep this notice posted in a prominent place in their receiving office or offices at all times [*Civ. Code § 3066(e)*]. For discussion of the power of sale and a related notice of sale, see § 102A.325.

[2] FORM

Posted Notice of Lien on Garments, Clothing, Wearing Apparel, or Household Goods

All articles cleaned, pressed, glazed, laundered, washed, altered or repaired and not called for in 90 days shall be sold to pay charges.

All articles stored by agreement and charges not having been paid for 12 months will be sold to pay charges.

Legal Topics:

For related research and practice materials, see the following legal topics:

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32-102A California Legal Forms--Transaction Guide § 102A.327

§ 102A.327 Notice of Jeweler's Lien

[1] Comment

[a] Use of Form

This form is a notice for the sale of a watch, clock, or jewelry to satisfy a jeweler's lien for work performed on the article. Every person, firm, or corporation performing work on a watch, clock, or jewelry for a price has a lien on the article for the amount due for work plus the value or agreed price, if any, of all materials furnished in connection with the work. If any account for work done or materials furnished remains unpaid for one year after completing the work, the lienholder may, after 30 days' notice [see [b], *below*], sell the article at public or bona fide private sale to satisfy the account [*Civ. Code § 3052a*].

The lienholder may waive this lien and sue on the amount due [*Civ. Code § 3052a*].

[b] Notice Requirements

To take advantage of the jeweler's lien, the lienholder must first provide written notice to the owner of the property. The notice must precede the sale by 30 days, and must specify the amount due and inform the owner that payment within 30 days will entitle him or her to redeem the property. The notice may be served by registered mail with return receipt requested or sent to the owner's last known address. If the owner or the address is unknown, the notice may be posted in two public places in the town or city where the property is located [*Civ. Code § 3052a*].

[c] Proceeds of Sale

The proceeds of the sale must first be applied to the expenses of the sale. Next, the indebtedness secured by the lien must be liquidated. Finally, any remaining proceeds must be paid to the owner [*Civ. Code § 3052a*].

[2] FORM

Notice of Jeweler's Lien

[name of owner]

[street address]

[city, state, zip code]

NOTICE OF LIEN SALE

You are hereby notified, pursuant to *Civil Code Section 3052a*, that _____ [name of lienholder] will sell [description of article], of which you are the owner, at auction on _____ [date], at [time], at [place].

The [description of article] will be sold to satisfy a lien in the amount of \$_____ for work done or materials used on _____ [date of work]. That amount has remained unpaid for one year. You may redeem your property by paying the amount due, \$_____, within 30 days from the date of this notice.
Dated: _____

[name of jeweler]

[signature]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:
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[Reserved]

§§ 102A.328[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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E. Miscellaneous Liens

32-102A California Legal Forms--Transaction Guide § 102A.340

§ 102A.340 Notice to Shipper of Carrier's Lien

[1] Comment--Use of Form

This form is a notice to a shipper of a carrier's lien. A carrier has a lien on freight in its possession for the following: the total amount owed the carrier by the shipper for freightage; charges for services; and advances due on freight previously delivered on the shipper's promise to pay the freightage, charges, and advances [*Civ. Code § 3051.5(a)*; see *Civ. Code § 3051.5(b)(2)* (lien does not apply to perishable goods)].

The lien will not arise, however, unless the carrier has provided the shipper with written notification (this form) that failure to pay billed charges may result in a lien on future shipments, including the cost of storage and appropriate security for the subsequent shipment held due to the carrier's lien [*Civ. Code § 3051.5(b)(1)*]. Consequently, this form should be presented to the shipper at the time the carrier and the shipper enter into the underlying agreement.

For further discussion of the carrier's lien and a notice of a sale to satisfy a carrier's lien [see *Civ. Code § 3051.5(d)*], see § 102A.341.

[2] FORM

Notice to Shipper of Carrier's Lien

NOTICE

This notice is to inform you that a failure to pay billed charges may result in a carrier's lien on future shipments, including the cost of storage and appropriate security held pursuant to the lien.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensGeneral Overview



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32-102A California Legal Forms--Transaction Guide § 102A.341

§ 102A.341 Notice of Sale to Satisfy Carrier's Lien

[1] Comment

[a] Use of Form

This form is a notice of a sale to satisfy a carrier's lien [for a description of a carrier's lien, *see* § 102A.340[1]]. At least 10 days before any sale of the property subject to the lien, the lienholder must notify the shipper, the consignee of the property, and each secured party having a perfected security interest in the property of the date, time, and place of the intended sale (this form). The notice must include the name of the shipper, the name of the consignee, and a description of the property to be sold [*Civ. Code* § 3051.5(d)].

In addition to providing this notice, the lienholder must have provided the shipper with a notice regarding carrier's liens [*see Civ. Code* § 3051.5(b)(1); *see also* § 102A.340]. The lienholder must also take the following steps:

- Except as otherwise provided in *Civ. Code* § 3051.5, comply with the notice and sale provisions of *Civ. Code* § 3052, which normally govern the enforcement of a lien for services performed on personal property [*Civ. Code* § 3051.5(c); *see* [b], *below*].
- Satisfy minimum bid requirements, to the extent applicable [*see Civ. Code* § 3051.5(e); *see also* [d], *below*].
- Apply the proceeds in the order specified by statute [*see Civ. Code* § 3051.5(e); *see also* [e], *below*].

[b] Lien Sale Notice Requirements

A person entitled to a carrier's lien who is not paid the amount secured by the lien within 10 days after the amount becomes due may sell the property to which the lien applies at public auction [*Civ. Code* § 3051.5(c); *see Civ. Code* § 3052 (enforcement by sale); *see also* § 102A.321 (lien sale procedure)]. The lienholder must give notice of the sale by publication or by posting. Published notice must be given at least 10 but not more than 20 days before the sale by

advertising in a newspaper published in the county in which the property is situated. If no newspaper is published in that county, notice must be given by posting the notice in three of the most public places in the town and at the place where the property is to be sold for 10 days before the date of sale [*Civ. Code* § 3052].

[c] Timing of Sale

A sale of property subject to a carrier's lien may not take place for at least 35 days from the date that possession of the property is delivered to the carrier. This 35-day period and the notice period provided by *Civ. Code* § 3052 [see [b], above] may run concurrently [*Civ. Code* § 3051.5(d)].

[d] Perfected Security Interests and Minimum Bid

Any perfected security interest in the property is prior to a carrier's lien. Property cannot be sold if the amount bid is not at least equal to the total amount of all outstanding obligations secured by a perfected security interest in the property. If the minimum bid required for the sale is not received, the lienholder must promptly release the property to the legal owner on payment of the current amount for freightage, charges for services, and advances due for shipment of that property, not including amounts due on freight previously delivered [*Civ. Code* § 3051.5(e)].

[e] Application of Proceeds

The proceeds of the sale of property must be applied in the following order [*Civ. Code* § 3051.5(e)]:

- First, to secured parties having a perfected security interest, in the amounts to which they are respectively entitled.
- Second, to the discharge of the carrier's lien, the costs of storage, appropriate security, and the sale.
- The remainder, if any, to the legal owner of the property.

If the lienholder violates any of the procedures regarding distribution of the property or proceeds, he or she is liable to any secured party for all damages sustained by the secured party as a result of the violation, plus all expenses reasonably and necessarily incurred in the enforcement of the secured party's rights, including reasonable attorneys' fees and costs of suit [*Civ. Code* § 3051.5(e)].

[f] Right of Redemption

Within 20 days after the sale of property in which there are no perfected security interests [see *Civ. Code* § 3051.5(e)], the legal owner may redeem property sold to satisfy the lien by paying (1) the amount of the lien, (2) all costs and expenses of sale, and (3) interest on the foregoing amounts at a rate of 12 percent from the due date, or the date when the costs and expenses were advanced, until the repayment [*Civ. Code* §§ 3051.5(c), 3052].

[g] Shipper's Liability

A shipper is liable to the consignee for any damage that results from the failure of the property to reach the consignee as scheduled due to the carrier's proper exercise of its lien rights [*Civ. Code* § 3051.5(f); see *Com. Code* § 2713 (measure of damages)].

[2] FORM

Notice of Sale to Satisfy Carrier's Lien

[name of shipper, consignee, or secured party]

_____ [address]

_____ [city, state, zip code]

NOTICE OF SALE OF PROPERTY

You are hereby notified, pursuant to *Civil Code Section 3051.5*, that certain property owned by you is to be sold at public auction. The following is a description of the property: [specify]. This sale will be held to satisfy a lien in the amount of \$[amount due] held by _____ [name of lienholder] for the nonpayment of charges for [describe charges, e.g., cost of freightage]. Proceeds of the sale will also be used to pay the costs of storage, security, and the sale itself.

The sale will be held on _____ [date at least 35 days after property was delivered to carrier and at least 10 but not more than 20 days after date of notice], at [location of sale], unless you pay the total charges due before the date of sale.

This notice of sale has also been sent to [list shipper, consignees, and secured parties, as appropriate].

Dated: _____

_____ [name of carrier]

_____ [signature]

_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty Law Maritime Liens General Overview Real Property Law Nonmortgage Liens General Overview



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32-102A California Legal Forms--Transaction Guide § 102A.342

§ 102A.342 Preliminary Notice of Self-Service Storage Facility Lien

[1] Comment

[a] Use of Form

This form is a preliminary notice of a lien held by a self-service storage facility on personal property located in the facility. The owner of the facility may send this statutory form to the "occupant" of a space in the facility if any part of the rent or charges due from the occupant remains unpaid for 14 consecutive days [*Bus. & Prof. Code § 21703*; see *Bus. & Prof. Code § 21701(c)* ("occupant" defined)]. If the occupant does not comply with the requirements described in the notice, the owner may eventually terminate the occupant's right to use the space, impose a lien on the property stored in the space, and sell the property to satisfy the lien [see *Bus. & Prof. Code § 21705*; see also [c]-[d], *below*; see also § 102A.343 (notice of lien sale)].

The notice must be sent by certified mail, postage prepaid, or by regular first-class mail if the owner obtains a certificate of mailing indicating the date the notice was mailed [*Bus. & Prof. Code § 21703*]. Although certified mail is more expensive, it may be more advantageous to the owner to use this method because the owner's right to remove property from the space accrues more quickly when certified mail is used [see *Bus. & Prof. Code § 21705(a), (b)*, discussed in [d], *below*].

For discussion of the alternative procedures that must be followed for the enforcement of a self-service storage facility lien on a vehicle or vessel subject to registration or identification under the Vehicle Code, see [e], *below*.

[b] Grounds for Lien

Under the California Self-Service Storage Facility Act [see *Bus. & Prof. Code §§ 21700-21716*], the owner of a self-service storage facility and his or her heirs, executors, administrators, successors, and assigns have a lien on all personal property located at the self-service storage facility for rent, labor, late-payment fee, or other charges, present or future, incurred pursuant to the rental agreement. The lien is also for expenses necessary for the preservation, sale, or disposition of the stored personal property [*Bus. & Prof. Code § 21702*; see *Bus. & Prof. Code § 21701* (definitions)].

[c] Contents of Preliminary Notice

When any part of the rent or other charges due from an occupant remains unpaid for 14 consecutive days, the owner may terminate the right of the occupant to use the storage space at a self-service storage facility by sending a notice (this form) to the occupant's last known address and to the alternative address in the rental agreement [*Bus. & Prof. Code* § 21703; *see Bus. & Prof. Code* § 21712(b) (alternate address)].

The notice must contain all of the following:

- An itemized statement of the owner's claim showing the sums due at the time of the notice and the date the sums became due [*Bus. & Prof. Code* § 21703(a)].
- A statement that the occupant's right to use the storage space will terminate on a specified date (not less than 14 days after the mailing of the notice) unless all sums due are paid by the occupant before the specified date [*Bus. & Prof. Code* § 21703(b)].
- A notice that the occupant may be denied access to the storage space after the termination date if the sums are not paid, and that an owner's lien may be imposed [*Bus. & Prof. Code* § 21703(c)].
- The name, street address, and telephone number of the owner, or his or her designated agent, whom the occupant may contact to respond to the notice [*Bus. & Prof. Code* § 21703(d)].

This form, which is in substantially the form prescribed by *Bus. & Prof. Code* § 21704, satisfies all of these requirements [*see Bus. & Prof. Code* §§ 21703, 21704].

[d] Notice of Lien Sale

If a preliminary lien notice [*see Bus. & Prof. Code* § 21703] has been sent, and the total sum due has not been paid as of the date specified in the preliminary lien notice as the termination date, a lien attaches as of that date [*Bus. & Prof. Code* § 21705(a), (b)]. The owner may then enter the space and deny the occupant access to it [*Bus. & Prof. Code* § 21705(a)(1), (2), (b)]. If the preliminary lien notice was sent by certified mail and the total sum due was not paid as of the termination date, the owner may also remove any property found in the space to a place of safe keeping [*Bus. & Prof. Code* § 21705(a)(3)]. If the preliminary lien notice was sent by regular first class mail with a certificate of mailing, the owner still may enter the space and deny the occupant access to it if the total sum due has not been paid as of the termination date, but may not remove the occupant's property until at least 14 days after the termination date, during which time the occupant may regain full use of the space by paying the full lien amount [*Bus. & Prof. Code* § 21705(b)]. In either case, the owner must then send to the occupant's last known address and to the alternate address in the rental agreement [*see Bus. & Prof. Code* § 21712(b)] a notice of lien sale and a blank declaration in opposition to the lien sale [*Bus. & Prof. Code* § 21705(c)]. For discussion of the lien sale process, a notice of lien sale form, and a declaration form, *see* § 102A.343.

[e] Vehicle and Vessel Liens

A lien on a vehicle or vessel subject to registration or identification under the Vehicle Code that has attached and is set forth in the documents of title to the vehicle or vessel has priority over these self-service storage facility liens [*Bus. & Prof. Code* § 21702.5(a)]. Any self-service storage facility lien on a vehicle or vessel subject to registration or identification under the Vehicle Code will be enforced under *Civ. Code* § 3071 for vehicles [*see* § 102A.220; *see also Civ. Code* §§ 3067-3074 (liens on vehicles)] or under *Harb. & Nav. Code* § 503 for vessels [*Bus. & Prof. Code* § 21702.5(b); *see* § 102A.290; *see also Harb. & Nav. Code* §§ 500-509 (liens on vessels)].

A self-service storage facility lien on a vehicle or vessel subject to registration or identification under the Vehicle Code does not include charges of rent, labor, or other services incurred pursuant to the rental agreement, accruing more than 60 days after the date the self-service storage facility lien attaches [*see Bus. & Prof. Code § 21705*], and before application is made for authorization to conduct the lien sale pursuant to *Civ. Code § 3071* or *Harb. & Nav. Code § 503* [*Bus. & Prof. Code § 21702.5(c)*]. Proceeds from a lien sale must be disposed of in accordance with *Civ. Code § 3073* for vehicles or *Harb. & Nav. Code § 507.5* for vessels [*Bus. & Prof. Code § 21702.5(d)*].

[2] FORM

Preliminary Notice of Self-Service Storage Facility Lien

PRELIMINARY LIEN NOTICE

To: [occupant]

_____ [address]

_____ [state]

You owe and have not paid rent and/or other charges for the use of storage [space number] at _____ [name and address of storage facility].

These charges total \$[amount] and have been due for more than 14 days. They are itemized as follows:

Due Date

Description Amount

Total: \$ _____

If this sum is not paid in full before _____ [date at least 14 days from mailing] your right to use the storage space will terminate, you will be denied access, and an owner's lien on any stored property will be imposed.

You may pay this sum and may contact the owner at

_____ [name]

_____ [address]

_____ [state]

_____ [telephone]

_____ [date]

_____ [owner's signature]

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Nonmortgage Liens General Overview



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32-102A California Legal Forms--Transaction Guide § 102A.343

§ 102A.343 Notice of Self-Service Storage Facility Lien Sale and Declaration in Opposition to Lien Sale

[1] Comment

[a] Use of Form

This form is a notice of lien sale that must be sent by the owner of a self-service storage facility to the occupant of a storage space before a lien sale can be held for nonpayment of sums due. This form also contains the statutory declaration in opposition to lien sale, which the owner must provide to the occupant with the notice of lien sale. Before sending this form, the owner must have sent a preliminary notice of the lien [*see Bus. & Prof. Code §§ 21703, 21705; see also § 102A.342*].

[b] Attachment of Lien

If a preliminary lien notice [*see Bus. & Prof. Code § 21703; see also § 102A.342*] has been sent, and the total sum due has not been paid as of the date specified in the preliminary lien notice as the termination date, a lien attaches as of that date [*Bus. & Prof. Code § 21705(a), (b)*]. The owner may then enter the space and deny the occupant access to it [*Bus. & Prof. Code § 21705(a)(1), (2), (b)*]. If the preliminary lien notice was sent by certified mail and the total sum due was not paid as of the termination date, the owner may also remove any property found in the space to a place of safe keeping [*Bus. & Prof. Code § 21705(a)(3)*]. If the preliminary lien notice was sent by regular first class mail with a certificate of mailing, the owner still may enter the space and deny the occupant access to it if the total sum due has not been paid as of the termination date, but may not remove the occupant's property until at least 14 days after the termination date, during which time the occupant may regain full use of the space by paying the full lien amount [*Bus. & Prof. Code § 21705(b)*].

[c] Contents of Notice of Lien Sale

After attachment of the lien, the owner must send to the occupant's last known address and to the alternate address in the rental agreement form [*see Bus. & Prof. Code § 21712(b)*], by certified mail, postage prepaid, a notice of lien sale and a blank declaration in opposition to the lien sale [*Bus. & Prof. Code § 21705(c)*].

The notice of lien sale must state all of the following [*Bus. & Prof. Code* § 21705(c)(1)]:

- That the occupant's right to use the storage space has terminated and that the occupant no longer has access to the stored property.
- That the stored property is subject to a lien, and the amount of the lien.
- That the property will be sold to satisfy the lien after a specified date that is not less than 14 days from the date of mailing the notice, unless the amount of the lien is paid or the occupant executes, under penalty of perjury, a declaration in opposition to the lien sale, and returns the declaration by certified mail. If the preliminary lien notice was sent by regular mail with a certificate of mailing, the notice of lien sale must include a statement that the occupant may regain full use of the space by paying the full lien amount prior to the date specified as the termination date.
- That any excess proceeds of the sale over the lien amount and costs of sale will be retained by the owner and may be reclaimed by the occupant, or claimed by another person, at any time for a period of one year from the sale, and that after that time the proceeds will escheat to the county.

[d] Declaration in Opposition to Lien Sale

The owner of the self-service storage facility must include with the notice of lien sale a blank declaration in opposition to the lien sale [*Bus. & Prof. Code* § 21705(c)(2)]. If a declaration in opposition to the lien sale, executed under penalty of perjury, is not received before the date of sale set forth in the notice of lien sale, the owner may sell the property [*Bus. & Prof. Code* § 21706].

If a declaration in opposition to the lien sale is received before the date set forth in the notice of lien sale, the owner may enforce the lien by filing a verified complaint and selling the property after judgment in the owner's favor [*see Bus. & Prof. Code* § 21710]. For a complaint to enforce a self-service storage facility lien, see *California Forms of Pleading and Practice*, Ch. 517, *Self-Service Storage Facilities* (Matthew Bender).

[e] Advertisement of Lien Sale

After the expiration of the time given in the notice of lien sale, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation published in the judicial district where the sale is to be held. If there is no newspaper of general circulation published in the judicial district where the sale is to be held, the advertisement must be posted at least ten days before the sale in not fewer than six conspicuous places in the neighborhood of the proposed sale. The advertisement must include (1) a general description of the goods, (2) the name of the person on whose account they are being stored, (3) the space number of the occupant, and (4) the name and location of the storage facility [*Bus. & Prof. Code* § 21707(a)].

[f] Security Interests

Any person who has a perfected security interest [*see Com. Code* §§ 9308-9314] may claim any personal property subject to the security interest and subject to a self-service storage facility lien by paying the total amount due for storage of the property, as specified on the preliminary lien notice. Payment may be accepted only if no declaration of opposition to the lien sale is executed and returned by the occupant. On payment of the total amount due, the owner must deliver possession of the particular property subject to the security interest to the person who paid the total amount due. The owner is not liable to any person for any action taken concerning security interests if he or she has fully complied with the requirements relating to preliminary notice, notice of lien sale, and declaration in opposition to lien

sale [*Bus. & Prof. Code § 21708; see Bus. & Prof. Code §§ 21704 (preliminary lien notice), 21705 (notice of lien sale and declaration in opposition to lien sale)*].

[g] Pre-Sale Redemption

Prior to the lien sale, any person claiming a right to the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred for particular actions taken pursuant to the self-service storage facility lien. If this occurs, the goods must not be sold, but must be retained by the owner in a safe place pending a court order directing a particular disposition of the property [*Bus. & Prof. Code § 21709*].

[h] Manner of Lien Sale

The sale must be conducted in a commercially reasonable manner. After deducting the amount of the lien and costs of sale, the owner must retain any excess proceeds of the sale on the occupant's behalf. The occupant, or any other person having a court order or other judicial process against the property, may claim the excess proceeds, or a portion sufficient to satisfy the particular claim, at any time within one year of the date of sale. Thereafter, the owner must pay any remaining excess proceeds to the treasury of the county in which the sale was held [*Bus. & Prof. Code § 21707(b)*].

[i] Rights of Good Faith Purchaser

A purchaser in good faith of goods sold to enforce a lien or a judgment entered on the lien in favor of the owner of goods stored at a self-service storage facility takes the goods free of any rights of persons against whom the lien was claimed, despite noncompliance by the owner of the storage facility with the lien procedure requirements [*Bus. & Prof. Code § 21711*].

[2] FORM

Notice of Self-Service Storage Facility Lien Sale and Declaration in Opposition to Lien Sale

[name of occupant]

[street address]

[city, state, zip code]

[name of alternate addressee]

[street address]

[city, state, zip code]

NOTICE OF LIEN SALE

You are hereby notified, pursuant to *Business and Professions Code Section 21705*, that your right to use your storage space at _____ [name of facility] has terminated and that you no longer have access to the stored property. The stored property is subject to a lien in the amount of \$_____.

The property will be sold to satisfy the lien after _____ [date not less than 14 days from date of mailing of notice] unless the amount of the lien is paid or you execute and return by certified mail the DECLARATION IN OPPOSITION TO LIEN SALE set forth at the end of this notice. [If preliminary lien notice was sent by regular mail, with certificate of mailing [see [1][c], above], add: You may regain full use of the space by paying the full lien amount prior to the date specified in the preceding sentence.]

Any excess proceeds of the sale over the lien amount and costs of sale will be retained by _____ [name of owner of facility] and may be reclaimed by you or may be claimed by another person at any time for a period of one

year from the sale. After that, the proceeds will escheat to the county.

Dated: _____

_____ [name of facility]

_____ [signature]

_____ [typed name and title]

DECLARATION IN OPPOSITION TO LIEN SALE

I, _____ [name of occupant] have received the notice of lien sale of the property stored at [location and space number].

I oppose the lien sale of the property. My address is: _____ [address, city, state, zip].

I understand that the lienholder may file an action in court against me, and if a judgment is given in his or her favor, I may be liable for the court costs. I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was signed by me on _____ [date] at [place].

_____ [signature of occupant]

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Nonmortgage Liens General Overview



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32-102A California Legal Forms--Transaction Guide § 102A.344

§ 102A.344 Notice to Potentially Liable Party of Hospital Lien on Damages Recovered by Injured Person

[1] Comment

[a] Use of Form

This form is a notice informing potentially liable parties and their insurers that a hospital lien exists on damages recovered from them by an injured person, and that they should pay the damages to the hospital rather than to the injured person. Hospitals should send this form to all known potentially liable parties and their liability insurance carriers to give them notice that the hospital is claiming compensation for the reasonable and necessary charges of the hospital or any hospital-affiliated health facility [see *Health & Safety Code § 1250*] for treatment, care, and maintenance of the injured person [Civ. Code §§ 3045.1, 3045.3].

[b] Nature of Hospital Lien

Every person, partnership, association, corporation, public entity, or other institution or body maintaining a hospital licensed under the laws of California that furnishes emergency and ongoing medical or other services to any person injured because of an accident or wrongful act outside the scope of workers' compensation laws [see *Lab. Code §§ 3201 et seq.*, *6100 et seq.*] has a lien on damages if the injured person asserts or maintains a claim against another for damages because of his or her injuries. The lien is on damages recovered, or to be recovered, by the injured person or by his or her heirs or personal representative in case of death, for the amount of the reasonable and necessary charges of the hospital or any hospital-affiliated health facility [see *Health & Safety Code § 1250*] for the treatment, care, and maintenance of the person [Civ. Code § 3045.1]. The lien applies whether damages are recovered, or are to be recovered, by judgment, settlement, or compromise [Civ. Code § 3045.2].

In *Parnell v. Adventist Health System/West* [*Parnell v. Adventist Health System/West* (2005) 35 Cal. 4th 595, 26 Cal. Rptr. 3d 569, 109 P.3d 69] , a hospital received payment from a patient and his health insurer and agreed to accept that payment as "payment in full" for its services. Nonetheless, after the patient brought a tort claim against the driver causing his accident, the hospital filed a notice of lien under the Hospital Lien Act (HLA) [Civ. Code § 3045.1 et seq.] against any settlement or judgement in the tort action, seeking to recover the difference between the "actual" cost of the

medical services provided and the negotiated amount received by the hospital under its provider agreement. The California Supreme Court held that a lien under the HLA requires the existence of an underlying debt owed by the patient to the hospital and that, absent such a debt, no lien may attach [*Parnell v. Adventist Health System/West* (2005) 35 Cal. 4th 595, 598, 26 Cal. Rptr. 3d 569, 109 P.3d 69 (disapproving *Swanson v. St. John's Regional Medical Center* (2002) 97 Cal. App. 4th 245, 118 Cal. Rptr. 2d 325)].

The HLA does not state that a hospital lien takes priority over competing liens. On the contrary, the HLA expressly recognizes that other liens may take priority; it provides that any entity which makes payment to the injured person must first pay the hospital as much of its reasonable costs as can be satisfied out of 50 percent of the proceeds of a judgment or settlement "after paying any prior liens" [Civ. Code § 3045.4]. By failing to afford hospital liens first priority and by expressly acknowledging that other liens may take priority over hospital liens, the Legislature expressed its intent to apply the time-based priority (that is, the lien first-in-time has priority) set forth in Civ. Code § 2897 to liens arising under the HLA [*County of San Bernardino v. Calderon* (2007) 148 Cal. App. 4th 1103, 1113, 56 Cal. Rptr. 3d 333] .

A hospital lien does not apply to any claim or cause of action against a common carrier subject to the jurisdiction of the Public Utilities Commission or the Interstate Commerce Commission (now the Surface Transportation Board)[Civ. Code § 3045.6].

[c] Who Must Receive Notice

For the lien to be effective, a written notice of the lien (this form) must be delivered or sent by registered mail, return receipt requested and postage prepaid, to each person, firm, or corporation known to the hospital and alleged to be liable to the injured person for the injuries sustained. The notice must be delivered or mailed before the payment of any moneys to the injured person or his or her attorney or legal representative as compensation for the injuries [Civ. Code § 3045.3]. The Legislature intended that a lien under the Hospital Lien Act [Civ. Code § 3045.1 et seq.] comes into existence on the giving of the notice provided for in Civ. Code § 3045.3 [*County of San Bernardino v. Calderon* (2007) 148 Cal. App. 4th 1103, 1109, 56 Cal. Rptr. 3d 333] .

In addition, a copy of the notice must be delivered or sent by registered mail, return receipt requested and postage prepaid, to any insurance carrier known to the hospital that has insured the person, firm, or corporation alleged to be liable to the injured person against the liability. The person, firm, or corporation alleged to be liable to the injured person must, on request of the hospital, disclose to the hospital the name of its liability insurance carrier [Civ. Code § 3045.3].

The class of persons who are "alleged to be liable to the injured person for the injuries received" [Civ. Code § 3045.3] would not include the injured person's insurer that provided uninsured-motorist coverage (including underinsured-motorist coverage), even though the insurer could resist a claim under such coverage by asserting any defense that the tortfeasor could assert. The possibility that the uninsured-motorist insurer could stand in the tortfeasor's place for the limited purpose of resisting a claim by its own insured cannot make the Hospital Lien Act applicable to that insurer, as though the claim for uninsured-motorist benefits were equivalent to a claim for damages against the tortfeasor. For the same reason, that insurer is not in the class of "insurance carrier[s that have] ... insured the person, firm, or corporation alleged to be liable to the injured person against the liability" [Civ. Code § 3045.3]. A notice delivered or mailed to that insurer would be ineffectual under the Act, since the hospital can have no lien on the injured person's uninsured-motorist benefits [*Weston Reid, LLC v. American Ins. Group, Inc.* (2009) 174 Cal. App. 4th 940, 949-950, 94 Cal. Rptr. 3d 748] .

[d] Contents of Notice

The notice to the allegedly liable parties and liability insurance carriers must contain all of the following [Civ. Code §

3045.3]:

- The name and address of the injured person.
- The date of the accident.
- The name and location of the hospital.
- The amount claimed as reasonable and necessary charges.
- The name of each person, firm, or corporation known to the hospital and alleged to be liable to the injured person for the injuries received.

[e] Liability for Payment of Lien Claim

After receipt of a notice of a hospital lien, any person, firm, corporation, or insurance carrier making any payment to the injured person or to his or her attorney, heirs, or legal representative for the injuries sustained, without paying to the hospital the amount of its lien, or as much of the lien amount as can be satisfied out of 50 percent of the money due under a final judgment, compromise, or settlement agreement after paying any prior lien, is liable to the hospital for the amount of its lien [Civ. Code § 3045.4]. If a hospital is paid at the time the judgment, compromise, or settlement is disbursed, it is entitled to receive as much of its lien as can be satisfied out of 50 percent of the recovery [Civ. Code §§ 3045.2, 3045.4]. Even if the hospital is not paid at the time the patient's recovery against the third person's insurer is disbursed, however, the insurer or other payer remains liable to the hospital for only that amount, not the full amount of the lien [*Mercy Hosp. v. Farmers* (1997) 15 Cal. 4th 213, 223, 61 Cal. Rptr. 2d 638, 932 P.2d 210] . Further, because Civ. Code § 3045.4 provides that the third party "shall be liable to the [health care provider] for the amount of its lien claimed in the notice which the hospital was entitled to receive as payment for the medical care and services rendered to the injured person," the amount that a hospital is entitled to receive as payment necessarily turns on any agreement it has with the injured person or the injured person's insurer [*Nishihama v. City & County of San Francisco* (2001) 93 Cal. App. 4th 298, 307-308, 112 Cal. Rptr. 2d 861 (hospital's lien rights did not extend beyond amount it agreed to receive from insurance company as payment in full for services provided to plaintiff; therefore, hospital had no lien rights in the damages awarded to plaintiff); accord *McMeans v. Scripps Health, Inc.* (2002) 100 Cal. App. 4th 507, 515-516, 123 Cal. Rptr. 2d 143 (citing *Nishihama*)].

Within one year after the date of payment to the injured person or to his or her heirs, attorney, or legal representative, the hospital may enforce its lien by filing an action against anyone making the payment, and to whom the required notice was given [Civ. Code § 3045.5].

[2] FORM

Notice to Potentially Liable Party of Hospital Lien on Damages Recovered by Injured Person

Notice to Potentially Liable Party of Hospital Lien on Damages Recovered by Injured Person

_____[name of liable party or liability insurance carrier]
 _____[street address]
 _____[city, state, zip]

NOTICE OF LIEN

You are hereby notified, pursuant to *Civil Code Section 3045.3*, that _____[name and address of

hospital] claims a lien for emergency and ongoing medical or other services furnished to _____ [*name of injured person*] of _____ [*address of injured person*] for injuries received in [an accident or *specify wrongful act*] occurring on _____ [*date of accident*].

The amount of the reasonable and necessary charges for services rendered by the hospital [*if services were also rendered by hospital-affiliated health facility, add: and by* _____ (*name of affiliated facility*), the hospital's affiliated health facility] in connection with the above-named person's injuries, and to be paid to _____ [*name of hospital*] is \$_____.

The following is a list of all persons, firms, or corporations known to us and alleged to be liable to the injured person for the injuries received: [*list of potentially liable parties*].

Dated: _____

_____ [*name of hospital*]
_____ [*signature*]
_____ [*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102A PERSONAL PROPERTY LIENS
PART IV. FORMS
E. Miscellaneous Liens

32-102A California Legal Forms--Transaction Guide § 102A.345

§ 102A.345 Notice to Customer by Bank or Savings and Loan Association of Exercise of Setoff Against Customer's Account

[1] Comment

[a] Use of Form

This form is a notice of setoff that a bank or savings and loan association must send to a customer if a setoff against the customer's deposit account is exercised to satisfy the financial institution's lien. The form contains a response form that the bank or savings and loan association must include to allow the customer to challenge the setoff [*see Civ. Code § 3054(a); Fin. Code §§ 864 (banks), 6660 (savings and loan associations)*].

[b] Grounds for Lien

A bank or savings and loan association has a general lien, dependent on possession, on all property in its hands belonging to a customer, for the balance due the bank or savings and loan association from the customer in the course of business [*Civ. Code § 3054(a)*]. The exercise of a lien on deposit accounts must comply with setoff requirements [*Civ. Code § 3054(b); see Fin. Code §§ 864 (banks), 6660 (savings and loan associations)*].

[c] Distinction Between Banker's Lien and Right of Setoff

The so-called "banker's lien" on the depositor's account or funds [*see Civ. Code § 3054*] is not a lien in the strict technical sense, because the bank is the owner of the funds and the debtor of the depositor, and cannot have a lien on its own property. The right of the bank to charge the depositor's fund with matured indebtedness is, rather, a right of setoff, based on general principles of equity [*Kruger v. Wells Fargo Bank (1974) 11 Cal. 3d 352, 357, 113 Cal. Rptr. 449, 521 P.2d 441*] .

[d] Limitations on Use of Setoff

The bank's right of setoff is limited by statute in the case of certain consumer obligations. Specifically, a bank or

savings and loan association is limited in exercising any setoff for a debt claimed to be owed to the institution by a customer in that the setoff cannot result in an aggregate balance of less than \$1,000 for all demand deposit accounts maintained by a customer with the institution [*Fin. Code §§ 864(b), 6660(b)*]. *Fin. Code § 864* defines a "debt" for this purpose as an interest-bearing obligation or an obligation which by its terms is payable in installments, which has not been reduced to judgment, arising from an extension of credit to a natural person primarily for personal, family, or household purposes [*see Fin. Code § 864(a)(2)*].

With respect to a credit card, an "extension of credit" occurs when the bank issues the card and it is at that point that the determination is made whether the credit is primarily for personal, family, or household purposes. For example, in a case in which a bank exercised a right of setoff for amounts due on a business credit card which had been used for personal expenditures, a California appellate court held that since the primary purpose of a business card was commercial, the bank could setoff the debts incurred in its use without compliance with *Fin. Code § 864(b)* [*Martin v. Wells Fargo Bank (2001) 91 Cal. App. 4th 489, 499-500, 110 Cal. Rptr. 2d 653* (stating that cardholder may not apply for and receive business credit card, but then use it for personal purposes and expect to receive consumer protection)]. In addition, certain types of accounts are exempt from the right of setoff [*Fin. Code §§ 864(c)(3), 6660(c)(3)*; *see Code Civ. Proc. § 703.010 et seq.*].

These limitations do not apply to a deposit account, other than a demand deposit account, in which the bank or savings and loan association has a security interest expressed by a written contract as collateral for the debt owing to the institution by the customer [*Fin. Code §§ 864(e), 6660(e)*]. In addition, these limitations do not apply when a customer has previously authorized the bank or savings and loan association in writing to periodically debit an account as the agreed method of payment of the debt [*Fin. Code §§ 864(f), 6660(f)*].

[e] Notice Requirements

A bank or savings and loan association must give a customer notice of the exercise of a right to setoff against the customer's deposit account not later than the day following the exercise. The notice must be delivered to the customer personally or sent by first-class mail, postage prepaid, to the address of the customer as shown on the records of the institution. The notice must be in at least 10-point type, and must contain all of the following [*Fin. Code §§ 864(c), 6660(c)*]:

- A statement indicating that the bank or savings and loan association has set off all or a portion of the debt against the customer's deposit account, identifying the account, and giving the respective balances before and after the setoff.
- A statement identifying the debt set off against the account and giving the respective balances due before and after the setoff.
- A statement that if the customer claims that the debt has been paid or is not now owing, or that the funds in the deposit account are expressly exempt [*see Code Civ. Proc. § 703.010 et seq.*] and are listed in the notice, the customer may execute and return the notice to the bank or savings and loan association by mail at the address shown or in person to the branch where the account is maintained not later than 20 days after the date of mailing or personal delivery.
- A statement indicating (1) that if the notice is executed and returned, the bank or savings and loan association may file an action in court to collect the debt, (2) that if a lawsuit is filed, the customer will be notified and have an opportunity to appear and defend, and (3) that if the bank is successful, the customer will be liable for court costs and attorneys' fees, if the debt provides for them.
- A response form in at least 10-point type, substantially in the form specified by statute and included

in the following form. If the response form executed by the customer is received by the bank or savings and loan association not later than 20 days after the date of mailing or personal delivery of the written notice, the amount of setoff for any debt claimed to be owed to the institution and any service charges resulting from the setoff must be reversed and the amount must be credited to the customer's deposit account. For banks, this credit must occur not later than the end of the business day following receipt of the executed response form [*Fin. Code § 864(d)*]. For savings and loan associations, the credit must occur not later than the end of the third business day following receipt of the executed response form [*Fin. Code § 6660(d)*].

Fin. Code §§ 864 and 6660 do not specify what happens if the bank or savings and loan association fails to send the above notice, or if notice is not given within the one-day period specified by statute.

[2] FORM

Notice to Customer by Bank or Savings and Loan Association of Exercise of Setoff Against Customer's Account

Notice to Customer by Bank or Savings and Loan Association of Exercise of Setoff Against Customer's Account

_____ [*name of customer*]
 _____ [*street address*]
 _____ [*city, state, zip*]

NOTICE OF SETOFF

You are hereby notified, pursuant to Financial Code Section [*for bank: 864 or, for savings and loan: 6660*], that _____ [*name of bank or savings and loan association*] has set off a debt or a portion of a debt against your [*specify customer's account type and account number*] at [*specify branch*] branch.

The balance in the account before the setoff was \$ _____ and the balance after the setoff was \$ _____.

The debt set off against your account was [*describe debt, including type, account number, and amount*], with a balance of \$ _____ before the setoff and a \$ _____ balance after the setoff.

If you claim that the debt has been paid or is not now owing, or that the funds in the [*deposit*] account consist of moneys expressly exempt under *Code of Civil Procedure Section 703.010 et seq.* and are listed in the CUSTOMER RESPONSE FORM set forth below, you may complete that response form and return it to the [*bank or savings and loan association*] not later than 20 days after the date of mailing or personal delivery of this notice, by (1) mailing the response form to the [*bank or savings and loan association*] at _____ [*address*], or (2) by delivering the response form in person to the branch of the [*bank or savings and loan association*] where your account is maintained.

If the notice is executed and returned, the [*bank or savings and loan association*] may file an action in court to collect the debt. If a lawsuit is filed, you will be notified and have an opportunity to appear and defend. [*Add if desired: If the _____ (bank or savings and loan association) is successful in the lawsuit, you will be liable for court costs and attorneys' fees.*]

CUSTOMER RESPONSE FORM

The debt described in the Notice of Setoff received from the [bank or savings and loan association] is _____ is not _____ my debt or the debt of another person in whose name the account is maintained.

I claim that the debt:

_____ has been paid.

_____ is not now owing.

_____ is not subject to setoff because the money in the account is:

_____ Paid earnings (*Code Civ. Proc. § 704.070*).

_____ Proceeds from execution sale of or insurance for loss of a motor vehicle (*Code Civ. Proc. § 704.010*).

_____ Proceeds from execution sale of household furnishings or other personal effects (*Code Civ. Proc. § 704.020*).

_____ Relocation benefits (*Code Civ. Proc. § 704.180*).

_____ Life insurance proceeds (*Code Civ. Proc. § 704.100*).

_____ Disability and health insurance benefits (*Code Civ. Proc. § 704.130*).

_____ Workers' compensation benefits (*Code Civ. Proc. § 704.160*).

_____ Unemployment or strike benefits (*Code Civ. Proc. § 704.120*).

_____ Retirement benefits including, but not limited to, social security benefits (*Code Civ. Proc. §§ 704.080, 704.110, 704.115*).

_____ Public assistance benefits including welfare payments and supplemental security income (SSI) or charitable aid (*Code Civ. Proc. § 704.170*).

_____ Proceeds from sale of or insurance for damage or destruction of a dwelling (*Code Civ. Proc. §§ 704.720, 704.960*).

_____ Proceeds from execution sale of or insurance for loss of tools of a trade (*Code Civ. Proc. § 704.060*).

_____ Award of damages for personal injury (*Code Civ. Proc. § 704.140*) or wrongful death (*Code Civ. Proc. § 704.150*).

_____ Financial aid paid by an institution of higher education to a student for expenses while attending school (*Code Civ. Proc. § 704.190*).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[*EITHER, for bank:*]

Date: _____

[*OR, for savings and loan association:*]

Executed at _____ [*city or county*], California on _____ [*date*].

[*Continue as follows:*]

Signed: _____ [*customer*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Bankers Liens & Rights of Setoff Bankers Liens Real Property Law Nonmortgage Liens General Overview



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CHAPTER 102B PAWNBROKERS, FINANCE LENDERS, AND SECONDHAND GOODS DEALERS

32-102B California Legal Forms--Transaction Guide 102B.syn

§ 102B.syn Synopsis to Chapter 102B: PAWNBROKERS, FINANCE LENDERS, AND SECONDHAND GOODS DEALERS

§ 102B.01 California Sources

[1] Constitution

[2] Statutes

[3] Regulations

[4] Attorney General Opinions

§ 102B.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 102B.03-102B.04 [Reserved]

§ 102B.05 [Reserved]

§ 102B.06 Annotations

§ 102B.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 102B.08-102B.09 [Reserved]

§ 102B.10 Definitions

§ 102B.11 Governing Law

§ 102B.12 Entities Exempt From Pawnbroker Law

§ 102B.13 Licensing of Pawnbrokers

[1] Requirement of License

[2] Application for License

§ 102B.14 Regulation of Charges

[1] Exemption for Loans of \$2,500 or More

[2] Permissible Charges for Short-Term Loans

[a] Maximum Charges

[b] Posting Requirement

[3] Permissible Charges for Loans With Terms Exceeding 90 Days

[a] Maximum Charges

[b] Posting Requirement

[4] Handling and Storage Charges

[5] Other Permitted Charges

§ 102B.15 Requirement of Written Contract

§ 102B.16 Reports and Records

[1] Recordkeeping Requirements

[a] Report of Acquisition of Property

[b] Pawn Book

[2] Inspection of Records, Accounts, and Property

§ 102B.17 Stolen Property

§ 102B.18 Prohibited Acts

§§ 102B.19-102B.29 [Reserved]

§ 102B.30 Definition of Finance Lender

§ 102B.31 Governing Law

§ 102B.32 Exemptions From Finance Lenders Law

[1] Exempt Entities

[2] Exempt Transactions

§ 102B.33 Licensing Requirements

[1] Issuance

[2] Display

[3] Prohibition of Transfer and Assignment

§ 102B.34 Regulation of Consumer Loans

[1] Definition of Consumer Loans

[2] Exemption for Consumer Loans of \$2,500 or More

[3] Provisions Inapplicable to Consumer Loans of \$5,000 or More

[4] Provisions Inapplicable to Consumer Loans of \$10,000 or More

[5] Determining Bona Fide Principal Amount of Consumer Loans

§ 102B.35 Regulation of Commercial Loans

[1] Definition of Commercial Loans

[2] Provisions Inapplicable to Commercial Loans of \$5,000 or More

[3] Determining Bona Fide Principal Amount of Commercial Loans

§ 102B.36 Regulation of Charges

[1] Permissible Loan Charges and Terms

[a] Definition of Charges

[b] Exclusions for Loans Under \$5,000

[c] Maximum Charges for Loans Under \$2,500

[d] Maximum Terms for Consumer Loans Under \$5,000

[2] Restrictions on Loans to Refinance Retail Installment Contracts

[3] Display of Schedule of Charges

§ 102B.37 Records and Reports

[1] Books, Accounts, and Records

[2] Annual and Special Reports

§§ 102B.38-102B.49 [Reserved]

§ 102B.50 Definitions

[1] Secondhand Dealer

[2] Tangible Personal Property

§ 102B.51 Governing Law

§ 102B.52 Exemptions

§ 102B.53 Licensing and Reporting Requirements

[1] Licensing Requirements

[2] Reporting Requirements

[3] Recordkeeping Requirements

§ 102B.54 Holding Period

§§ 102B.55-102B.99 [Reserved]

§ 102B.100 Facts for Pawnbroker and Finance Lender Transactions

[1] Facts Regarding Borrower

Scope

[2] Facts Regarding Lender

Scope

[3] Facts Regarding Personal Property Collateral

Scope

§ 102B.101 Facts Regarding Secondhand Dealer Transactions

[1] Facts Regarding Dealer

Scope

[2] Facts Regarding Secondhand Goods Being Sold

Scope

§ 102B.102 Documents

Scope

§§ 102B.103-102B.109 [Reserved]

§ 102B.110 Transactions Involving Pawnbrokers

Scope

§ 102B.111 Transactions Involving Finance Lenders

Scope

§ 102B.112 Transactions Involving Secondhand Goods Dealers

Scope

§§ 102B.113-102B.119 [Reserved]

§ 102B.120 Transactions Involving Pawnbrokers

Scope

§ 102B.121 Transactions Involving Finance Lenders

Scope

§ 102B.122 Reports Regarding Acquisitions by Secondhand Dealers

Scope

§§ 102B.123-102B.199 [Reserved]

§ 102B.200 Pawnbroker Loan Agreement

[1] Comment

[a] Use of Form

[b] Content Requirements

[c] Borrower's Right of Redemption

[i] Four-Month Redemption Period

[ii] Storage of Pawned Property Off Premises

[iii] Notice Requirement

[iv] Effect of Failure to Redeem

[2] FORM

Pawnbroker Loan Agreement

§ 102B.201 Notice of Termination of Loan Period and 10-Day Extension of Redemption Right

[1] Comment

[a] Use of Form

[b] Notice Requirements

[c] Preparation Fee

[2] FORM

Notice of Termination of Loan Period and 10-Day Extension of Redemption Right

§ 102B.202 Pawnbroker's Report of Acquisition of Tangible Personal Property

[1] Comment

[a] Use of Form

[b] Reporting Requirements

[2] FORM

Pawnbroker's Report of Acquisition of Tangible Personal Property

§§ 102B.203-102B.209 [Reserved]

§ 102B.210 Loan Statement Given by Finance Lender

[1] Comment

[a] Use of Form

[b] Content Requirements

[c] Finance Lender's Responsibilities

[i] Statement Concerning Participation of Broker

[ii] Advance Payments and Receipts for Payments

[iii] Lender's Duties on Repayment by Borrower

[2] FORM

Loan Statement Given by Finance Lender

§ 102B.211 Borrower's Statement of Broker Involvement

[1] Comment

[a] Use of Form

[b] Requirement of Statement

[2] FORM

Borrower's Statement of Broker Involvement

§ 102B.212 Loan Statement Given by Broker

[1] Comment

[a] Use of Form

[b] Content Requirements

[c] Additional Responsibilities of Broker

[i] Broker Identification Statement

[ii] Receipt for Payment

[iii] Finance Lender Compliance

[2] FORM

Loan Statement Given by Broker

§ 102B.213 Finance Lender's Statement of Name, Address, and License Number of Lender and Broker

[1] Comment--Use of Form

[2] FORM

Finance Lender's Statement of Name, Address, and License Number of Lender and Broker

§ 102B.214 Broker's Statement of Name, Address, and License Number of Finance Lender and Broker

[1] Comment--Use of Form

[2] FORM

Broker's Statement of Name, Address, and License Number of Finance Lender and Broker

§ 102B.215 Notice That Borrower's Home Is Security for Loan to Refinance Retail Installment Contract

[1] Comment

[a] Use of Form

[b] Notice Requirements

[i] When Notice Is Required

[ii] Placement and Appearance of Notice

[c] Requirements for Loans Refinancing Retail Installment Contracts

[i] Conditions for Making Loan

[ii] Effect of Unruh Act

[2] FORM

Notice That Borrower's Home Is Security for Loan to Refinance Retail Installment Contract

§ 102B.216 Notice of Balloon Payment in Loan to Refinance Retail Installment Contract Secured by Borrower's Principal Residence

[1] Comment

[a] Use of Form

[b] Rights of Borrower on Default

[2] FORM

Notice of Balloon Payment in Loan to Refinance Retail Installment Contract Secured by Borrower's Principal Residence

§§ 102B.217-102B.219 [Reserved]

§ 102B.220 Report of Acquisition of Secondhand Goods [Form JUS 123]

[1] Comment

[a] Use of Form

[b] Reporting Requirement

[c] Content Requirements

[d] Civil Liability for Removal or Alteration of Manufacturer Identification

[2] FORM

Report of Acquisition of Secondhand Goods



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CHAPTER 102B PAWNBROKERS, FINANCE LENDERS, AND SECONDHAND GOODS DEALERS

32-102B California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers personal property transactions involving pawnbrokers, finance lenders, and secondhand goods dealers. The Legal Background covers the general uses of these transactions and the laws and regulations governing them. Required determinations and procedures are detailed in the Transaction Guide. The forms include forms and comments illustrating agreements, reports, and disclosure documents that comply with applicable laws and regulations.

Pledges of personal property as security for loans of money or goods are regulated by Division 9 of the Commercial Code when pawnbrokers or finance lenders are not involved in the transaction. Division 9 of the Commercial Code is covered in this chapter only to the extent that provisions of pawnbroker and finance lender agreements are regulated by the Code. For coverage of Division 9 of the Commercial Code, including pledges and related forms, see Ch. 42, *Secured Transactions* .

For discussion of commercial loans, see Ch. 43, *Commercial Loans* . For discussion of consumer installment loans, see Ch. 45, *Consumer Installment Loans and Credit Sales* .



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PART I. RESEARCH GUIDE
A. Primary Sources

32-102B California Legal Forms--Transaction Guide § 102B.01

§ 102B.01 California Sources

[1] Constitution

Usury. *Cal. Const.*, art. XV, § 1.

[2] Statutes

Secondhand goods. *Bus. & Prof. Code* § 21500 *et seq.*

Secured transactions. *Com. Code* § 9101 *et seq.*

Pawnbrokers. *Fin. Code* § 21000 *et seq.*

Finance lenders. *Fin. Code* § 22000 *et seq.*

[3] Regulations

Finance lenders (formerly personal property brokers). *10 Cal. Code Reg.* § 1404 *et seq.*

[4] Attorney General Opinions

Pawnbroker-stolen property. *59 Ops. Cal. Atty. Gen.* 195 (1976) .

Financial Code definition of "charges" and maximum permissible charges. *58 Ops. Cal. Atty. Gen.* 148 (1975) .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSecured TransactionsGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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PART I. RESEARCH GUIDE
A. Primary Sources

32-102B California Legal Forms--Transaction Guide § 102B.02

§ 102B.02 Federal Sources

[1] Statutes

Annual rate on advances to member banks by Federal Reserve Bank. *12 U.S.C. § 347.*

[2] Regulations

Regulation Z (Truth in Lending Law). *12 C.F.R. § 226.1 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawFederal Reserve SystemExtension of Credit



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A. Primary Sources

32-102B California Legal Forms--Transaction Guide §§ 102B.03-102B.04

[Reserved]

§§ 102B.03[Reserved]



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PART I. RESEARCH GUIDE
B. Secondary Sources

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[Reserved]

§ 102B.05[Reserved]



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32-102B California Legal Forms--Transaction Guide § 102B.06

§ 102B.06 Annotations

Annot., Failure of Moneylender or Creditor Engaged in Business of Making Loans to Procure License or Permits as Affecting Validity or Enforceability of Contract, 29 A.L.R.4th 884 (1984) .

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesGeneral Overview



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B. Secondary Sources

32-102B California Legal Forms--Transaction Guide § 102B.07

§ 102B.07 Text References

[1] Matthew Bender Sources

California Legal Forms (Matthew Bender).

Ch. 42, *Secured Transactions* .

Ch. 43, *Commercial Loans* .

Ch. 45, *Consumer Installment Loans and Credit Sales* .

California Forms of Pleading and Practice, Ch. 568, *Usury* (Matthew Bender).

Secured Transactions Under the Uniform Commercial Code (Matthew Bender).

Forms and Procedures Under the UCC (Matthew Bender).

Article Rev9, *Secured Transactions* (revised UCC Division 9, effective July 1, 2001 in California).

Article 9, *Secured Transactions* (former UCC Division 9).

Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 6, *Credit and Finance* (Matthew Bender).

[2] Additional Text References

Witkin, Summary of California Law, vol. 1, *Contracts*; vol. 4, *Secured Transactions in Personal Property*; vol. 13, *Personal Property* (10th ed. 2005).

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)General Overview



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32-102B California Legal Forms--Transaction Guide §§ 102B.08-102B.09

[Reserved]

§§ 102B.08[Reserved]



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PART II. LEGAL BACKGROUND
A. Pawnbrokers

32-102B California Legal Forms--Transaction Guide § 102B.10

§ 102B.10 Definitions

A "pawnbroker" is any person engaged in the business of receiving goods, including motor vehicles, in pledge as security for a loan [*Fin. Code § 21000*]. The phrase "receiving goods as security for a loan" does not include a good faith purchase of goods [*Fin. Code § 21000.7*]. The term "pledged property" means property held as security for a loan, the title to which remains with the party pledging the property and has not passed to the pawnbroker as provided for under the Pawnbroker Law [*Fin. Code § 21002(a)*; see *Fin. Code § 21201*]. "Vested property" is property the title to which has been transferred from the party pledging the property to the pawnbroker under the Pawnbroker Law [*Fin. Code § 21002(b)*; see *Fin. Code § 21201*].

Because a person making a pledge of goods is usually the person seeking a loan secured by that pledge, the terms "pledgor" and "borrower" are used interchangeably in these materials covering pawnbrokers.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsTitle, Creditors & Good Faith PurchasersGeneral Overview



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32-102B California Legal Forms--Transaction Guide § 102B.11

§ 102B.11 Governing Law

Transactions in which property is offered as security for a loan are generally regulated by the provisions of Division 9 of the Commercial Code [*Com. Code § 9109(a)(1)*; see *Com. Code § 9101 et seq.*]. However, pawnbroker transactions are governed specifically by the provisions of the Pawnbroker Law [see *Fin. Code § 21000 et seq.*]. In the event of any conflict between the Code and the provisions of the Pawnbroker Law, the latter will prevail [*Com. Code § 9201(b)*; see *Fin. Code § 21000 et seq.*].

The California Constitution regulates pawnbrokers to the extent that they are constitutionally permitted to charge usurious rates of interest [*Cal. Const., art. XV, § 1*; see *Agapitov v. Lerner (2003) 108 Cal. App. 4th 830, 832, 133 Cal. Rptr. 2d 837* (Cal. Const., art. XV exempts only pawn transactions made within scope of pawnbroker license from provisions against usury)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)General OverviewCommercial Law (UCC)General Provisions (Article 1)Application & ConstructionChoice of LawGeneral OverviewCommercial Law (UCC)Investment Securities (Article 8)General Overview



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32-102B California Legal Forms--Transaction Guide § 102B.12

§ 102B.12 Entities Exempt From Pawnbroker Law

The following entities are exempt from the Pawnbroker Law's provisions [*Fin. Code § 21050*]:

- Corporations organized for the purpose of securing credit from federal farm credit banks [*see 12 U.S.C. §§ 2011, 2071, 2091; see also Ch. 48, Agricultural Financing*].
- Any nonprofit cooperative corporation or association with or without capital stock, organized or existing under California laws governing agricultural cooperatives [*see Food & Agric. Code § 54001 et seq.; see also Ch. 14A, Agricultural Nonprofit Cooperative Associations*].
- Any person, corporation, association, syndicate, joint stock company, or partnership engaged exclusively in the business of marketing agricultural, horticultural, viticultural, dairy, livestock, poultry, or bee products on a cooperative, nonprofit basis [*see also Ch. 14A, Agricultural Nonprofit Cooperative Associations* ; Ch. 49, *Agricultural Contracts*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)General Overview



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32-102B California Legal Forms--Transaction Guide § 102B.13

§ 102B.13 Licensing of Pawnbrokers

[1] Requirement of License

Pawnbrokers must be licensed as pawnbrokers in order to engage in that business [*see Fin. Code § 21300(a)*]. The holder of a pawnbroker license is not required to also hold a secondhand dealer's license [*see Bus. & Prof. Code § 21641, 21642*] in order to engage in any transaction that would otherwise require the secondhand dealer's license. However, other than this license exception, a pawnbroker is subject to all other statutory requirements governing a secondhand dealer [*Fin. Code § 21306; see § 102B.50 et seq.*].

[2] Application for License

Subject to ultimate jurisdiction of the Department of Justice, the local chief of police, sheriff, or police commission must accept and process original and renewal license applications [*see Fin. Code §§ 21300(a), 21301(a)*]. A conviction for an attempt to receive stolen property or any other offense involving stolen property precludes original issuance of a license and may also result in forfeiture of a license [*see Fin. Code §§ 21300(a), (b), 21301(b)(4)*].

All applications for a license and license renewal must be on forms prescribed and provided by the Department of Justice [*Fin. Code § 21300(a)*]. As a condition of the original license issuance and license renewal, the applicant must file a pawnbroker's two-year nonrevokable surety bond [*see Fin. Code § 21303(a)*]. In order to be issued an original license, an applicant must also file a financial statement confirming the applicant has the minimum dollar amount of liquid assets required by statute [*see Fin. Code § 21304(a)*]. Persons holding a secondhand dealer's license and actively engaged as a pawnbroker on January 1, 1994 (effective date of licensure requirements) are exempt from the financial statement and liquid assets requirement [*see Fin. Code § 21304(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)General OverviewGovernmentsState & Territorial GovernmentsLicenses



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32-102B California Legal Forms--Transaction Guide § 102B.14

§ 102B.14 Regulation of Charges

[1] Exemption for Loans of \$2,500 or More

Loans made for principal amounts of \$2,500 or more are exempt from the statutory limits for rates and charges if made in good faith and not for the purpose of evading the provisions of the Pawnbroker Law [*Fin. Code § 21051(a)*].

In determining whether a loan is a loan of a good faith principal amount of \$2,500 or more, the same principles apply as those applicable to consumer loans by finance lenders [*Fin. Code § 21051(b)*; see former *Fin. Code § 22054*, now *Fin. Code § 22251*; see also *§ 102B.110*]. These principles focus on determining whether the terms of the loan's repayment indicate an artificial inflation of the loan amount [see *Fin. Code § 22251*].

[2] Permissible Charges for Short-Term Loans

[a] Maximum Charges

Maximum charges for loans made for periods of 90 days or less are regulated by statute [*Fin. Code § 21200.5*]. The maximum permissible charge for loans for periods of not more than 30 days and for amounts less than \$15 is \$1 [*Fin. Code § 21000.5(a)*]. The maximum permissible charges for loans for periods of 90 days or less are as follows [*Fin. Code § 21000.5(b)-(v)*]:

Amount of Loan	Maximum Charge
\$15-\$19.99	\$3.00
\$20-\$24.99	\$4.00
\$25-\$39.99	\$5.00
\$40-\$49.99	\$6.00
\$50-\$64.99	\$7.50
\$65-\$74.99	\$8.50
\$75-\$99.99	\$10.00

\$100-\$124.99	\$12.50
\$125-\$149.99	\$13.50
\$150-\$224.99	\$15.00
\$225-\$324.99	\$20.00
\$325-\$449.99	\$25.00
\$450-\$599.99	\$35.00
\$600-\$799.99	\$45.00
\$800-\$999.99	\$55.00
\$1,000-\$1,199.99	\$75.00
\$1,200-\$1,499.99	\$85.00
\$1,500-\$1,799.99	\$100.00
\$1,800-\$2,099.99	\$120.00
\$2,100-\$2,499.99	\$140.00

In addition to the above charges, a pawnbroker may charge a loan setup fee for each loan [*see Fin. Code § 21200.1*; [5], *below*].

If a loan for a period of 90 days or less is extended or renewed, the maximum charges permitted under *Fin. Code § 21200* apply [*Fin. Code § 21200.5(v)*; *see* [3], *below*].

[b] Posting Requirement

A schedule of maximum permissible charges must be posted in a place clearly visible to the general public [*Fin. Code § 21200.5*]. Additionally, the posted schedule of charges must contain a notice informing the borrower that if he or she desires, the pawnbroker will send a notice of termination of the redemption period by registered or certified mail with return receipt requested, upon prepayment of the mailing costs [*Fin. Code § 21201*; *see § 102B.200[1][c][ii]*].

[3] Permissible Charges for Loans With Terms Exceeding 90 Days

[a] Maximum Charges

Maximum charges for pawnbroker loans for terms in excess of 90 days are also regulated by statute [*see Fin. Code § 21200*]. Charges for the first 90 days of any loan made pursuant to the written contract required by *Fin. Code § 21201* must be determined by applying the schedule of charges contained in *Fin. Code § 21200.5* [*Fin. Code § 21201.4*; *see* [a], *above*; *see also § 102B.200* (standard written contract)]. Charges for any period of time following the first 90 days of the loan must be determined by applying the schedule of maximum compensation contained in *Fin. Code § 21200* [*Fin. Code § 21201.4*].

Those maximum charges are as follows [*Fin. Code § 21200(a)*]:

- 2.5 percent per month on that portion of the unpaid principal balance of any loan not in excess of \$225;
- 2 percent per month on the unpaid principal balance in excess of \$225 but not in excess of \$900;

- 1.5 percent per month on that part of the unpaid principal balance in excess of \$900 but not in excess of \$1,650; and
- 1 percent per month on any unpaid principal balance in excess of \$1,650.

A pawnbroker may charge \$3 a month on any loan when the permitted monthly charge would otherwise be less than that minimum charge [*Fin. Code § 21200(a)(5)*], and one month's interest for any part of the month in which pawned property is redeemed [*Fin. Code § 21200(b)*].

[b] Posting Requirement

A schedule of the maximum permissible charges for long-term loans must be posted in a place clearly visible to the general public [*Fin. Code § 21200.7*].

[4] Handling and Storage Charges

In addition to other allowed charges, at the time property is redeemed, a pawnbroker may collect a handling and storage charge for certain articles pawned. Regardless of the duration of the loan, the maximum amount that the pawnbroker may charge for handling and storage is as follows [*Fin. Code § 21200.6(a)*]:

- \$5 for any article that cannot be contained within one cubic foot;
- \$10 for any article that cannot be contained within three cubic feet; and
- \$20 for any article that cannot be contained within six cubic feet.
- \$1 for each additional cubic foot, in excess of six cubic feet.

No storage charge is permitted for any article that can be contained within one cubic foot [*Fin. Code § 21200.6(b)*].

For these purposes, cubic feet must be determined by multiplying an article's width (at its greatest width) by its depth (at its greatest depth) by its height (at its greatest height) [*Fin. Code § 21200.6(c)*].

[5] Other Permitted Charges

In addition to other allowed charges, a pawnbroker may charge a loan setup fee not to exceed five dollars or two percent, whichever is greater. However, the maximum loan set up fee may not exceed ten dollars [*Fin. Code § 21200.1*]. A pawnbroker may also charge a processing fee of \$4 for each firearm pawned [*Fin. Code § 21200.8*].

Whenever a pledgor (or his or her assignee) loses a pawn ticket, the pawnbroker may also charge a fee for the following services: verifying the identification of the claimant, fingerprinting the claimant, and having the claimant execute a declaration under penalty of perjury. The amount of the fee may not exceed \$10 [*Fin. Code § 21201.1*].

If a pledgor fails to redeem any pawned item during the statutory four-month loan period, obliging the pawnbroker to mail a notice of termination as required by statute [*see Fin. Code § 21201; see also § 102B.201*], the pawnbroker may charge a fee of up to \$3 for services and costs pertaining to the preparation of the notice. This fee may be imposed in addition to other allowed charges [*Fin. Code § 21201.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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32-102B California Legal Forms--Transaction Guide § 102B.15

§ 102B.15 Requirement of Written Contract

The pawnbroker must provide a written contract to the borrower at the time the goods are pawned. The contract must contain disclosures regarding the terms of the loan and the borrower's right to redeem the property during the redemption period [*see Fin. Code § 21201*]. For further discussion and a form for a pawnbroker loan agreement, see § 102B.200.

Legal Topics:

For related research and practice materials, see the following legal topics:

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32-102B California Legal Forms--Transaction Guide § 102B.16

§ 102B.16 Reports and Records

[1] Recordkeeping Requirements

[a] Report of Acquisition of Property

Pawnbrokers must file a report, daily or on the first working day after receipt or purchase, of the description of all property received in pledge or purchased as tangible personal property [*Fin. Code § 21208; see Bus. & Prof. Code § 21627* ("tangible personal property" defined)]. The report must be filed on an official form [*Fin. Code § 21208*]. For further discussion and a form for the report, see § 102B.202.

[b] Pawn Book

The pawnbroker must keep a "pawn book" showing the date of each transaction, its duration, the amount of the loan, the rate of interest or charges, a reasonably accurate description of the goods pledged, and the name and address of the pledgor [*Fin. Code § 21202*]. The pawnbroker must give the pledgor a written copy of the pawn book entry [*Fin. Code § 21202*]; this information is usually provided on the reverse side of the loan agreement.

[2] Inspection of Records, Accounts, and Property

Pawnbrokers must produce their records of loans, accounts of all sales of vested property, and all pledged property for inspection by (1) any officer holding a warrant authorizing him or her to search for personal property, (2) any peace officer or employee designated by the chief of police or sheriff, or (3) any officer holding a court order directing him or her to examine the records, accounts of sales, or pledged property [*Fin. Code § 21206*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-102B California Legal Forms--Transaction Guide § 102B.17

§ 102B.17 Stolen Property

A peace officer may take from the pawnbroker property that is alleged to be stolen. Whenever such property is taken, the peace officer must give the pawnbroker a receipt for the property containing a description of the property, the reason for its seizure, and the names of the pawnbroker and officer [*Fin. Code § 21206.7*].

Once taken from the pawnbroker, any property alleged to be stolen or embezzled may be given to a person claiming rightful ownership on compliance with the following statutory requirements [*see Fin. Code § 21206.8(a)*]. If a person makes a claim of ownership, the person having custody of the property must notify the pawnbroker [*Fin. Code § 21206.8(b)(1)*; *see, e.g., Zeltser v. City of Oakland (9th Cir. 2003) 325 F.3d 1141, 1144-1145* (custodian city failed to provide pawnbroker with opportunity to be heard before releasing seized property to competing claimant, thus depriving pawnbroker of due process)]. Unless the pawnbroker makes a claim of ownership within 10 days of receipt of this notice, the property may be disposed of as provided by law [*Fin. Code § 21206.8(b)(2)*]. Before the property is disposed of, the peace officer must notify the pawnbroker of the disposal as required under *Penal Code § 1411* [*Fin. Code § 21206.8(c)*; *see Penal Code § 1411* (notice to property owner and holder of security interest of manner of recovering unclaimed property)]. The property may not be disposed of until three months after the notice has been given [*Fin. Code § 21206.8(c)*].

The pawnbroker will not be liable to any person for any property seized from the pawnbroker due to his or her inability to return the property because of the seizure [*Fin. Code § 21206.8(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)General Overview



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32-102B California Legal Forms--Transaction Guide § 102B.18

§ 102B.18 Prohibited Acts

Pawnbrokers must not promise any seller of tangible personal property that the seller may repurchase the property sold to the pawnbroker [*Fin. Code § 21200.9*]. In addition, pawnbrokers must not receive anything in pledge from any person who is a minor [*Fin. Code § 21207*; see *Fam. Code § 6500* (minors are all persons under 18 years of age)]. Furthermore, a pawnbroker must not sell any article of pledged property until he or she has become vested with title to that property as provided for under *Fin. Code § 21201* [*Fin. Code § 21201*; see § 102B.200[1][c]]. The unauthorized sale of pledged property is a misdemeanor [*Fin. Code § 21201*; see *Fin. Code § 21209* (misdemeanors)].

Pawnbrokers may not set rates and charges for nonexempt loans that exceed the maximum amounts set by statute [see *Fin. Code §§ 21200, 21200.5, 21201.4*; see also § 102B.14[2]].

The violation of any provision of the Pawnbroker Law under circumstances in which a person knows or should have known that a violation was being committed is a misdemeanor [*Fin. Code § 21209*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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[Reserved]

§§ 102B.19[Reserved]



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32-102B California Legal Forms--Transaction Guide § 102B.30

§ 102B.30 Definition of Finance Lender

"Finance lenders" (known under former law as "personal property brokers" [*see former Fin. Code § 22000 et seq.*], "consumer finance lenders" [*see former Fin. Code § 24000 et seq.*], and "commercial finance lenders" [*see former Fin. Code § 26000 et seq.*]), are persons or entities engaged in the business of making consumer or commercial loans, including lending money secured by personal property collateral, the use and possession of which is retained by the borrower rather than being given to the finance lender. The term also includes persons or entities who take liens on, assignments of, or powers of attorney relative to wages or other income as security for loans as described above [*Fin. Code § 22009*]. A "broker" for purposes of this law is one who engages in the business of negotiating or performing acts in connection with loans made by finance lenders [*Fin. Code § 22004*]. Unless indicated otherwise, a reference in this chapter to a "finance lender" includes a "broker."

Legal Topics:

For related research and practice materials, see the following legal topics:

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32-102B California Legal Forms--Transaction Guide § 102B.31

§ 102B.31 Governing Law

Secured transactions are generally regulated by the provisions of Division 9 of the Commercial Code [*Com. Code §§ 9101, 9109; see Com. Code § 9101 et seq.*]. However, finance lender transactions are governed specifically by the provisions of the Finance Lenders Law [*see Fin. Code § 22000 et seq.*]. In the event of any conflict between the Code and the provisions of the Finance Lenders Law, the latter will prevail [*Com. Code § 9201*].

Finance lenders must be licensed by the Corporations Commissioner [*Fin. Code § 22100(a); see § 102B.33*]. Their duties in connection with the making of loans are specified by statute and administrative regulations [*see Fin. Code §§ 22337, 22338; 10 Cal. Code Reg. § 1404 et seq.* (regulations promulgated under similar former law); *see also Fin. Code § 22150* (granting Commissioner of Corporations authority to promulgate implementing regulations)].

The Finance Lenders Law applies to consumer loans [*see Fin. Code § 22200 et seq.; see also § 102B.34*] as well as to commercial loans [*see Fin. Code § 22500 et seq.; see also § 102B.35*].

The requirements of the Finance Lenders Law are matters of fundamental public policy which cannot be waived by way of agreement between the parties. Specifically, the Finance Lenders Law may not be circumvented by a choice-of-law provision, by which another state's law is chosen, in a loan agreement of the kind that law regulates. In determining whether such a provision should be enforced in California, a court will consider which state, in the circumstances presented, would suffer greater impairment of its policies if the other state's law were applied [*Brack v. Omni Loan Co., Ltd.* (2008) 164 Cal. App. 4th 1312, 1326, 1329, 80 Cal. Rptr. 3d 275 (choice of Nevada law, in consumer-loan contract of adhesion, was not enforceable)].

Finance lenders are excepted from the usury provisions of the California Constitution, subject to the power of the Legislature to regulate interest rates and charges [*Cal. Const., art. XV, § 1*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)General OverviewCommercial Law (UCC)Secured Transactions
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§ 102B.32 Exemptions From Finance Lenders Law

[1] Exempt Entities

The Finance Lenders Law does not apply to banks, trust companies, savings and loan associations, insurance premium finance agencies, industrial loan companies, credit unions, small business investment companies, California business and industrial development corporations, or licensed pawnbrokers [*Fin. Code § 22050(a)*]. The Law also does not apply to broker-dealers licensed under the Corporate Securities Law of 1968 [*Fin. Code § 22050(d)*; *see Corp. Code § 25211*], to colleges or universities making student loans [*Fin. Code § 22050(c)*], to a check casher who holds a valid permit issued pursuant to *Civ. Code § 1789.37*, or to a person holding a valid deferred deposit transaction license pursuant to *Fin. Code § 23005*, when acting under the authority of that permit [*Fin. Code § 22050(b)*], to any person who makes no more than one loan in a 12-month period as long as that loan is a commercial loan as defined in *Fin. Code § 22502* [*Fin. Code § 22050(e)*], or to any public corporation [*see Gov. Code § 67510* (definition)], any public entity other than the state [*see Gov. Code § 811.2* (definition)], or any agency of one of these entities, when making any loan as long as the entity or its agent complies with all applicable federal and state laws and regulations [*Fin. Code § 22050(f)*].

The following entities also are exempt from the Law's provisions [*Fin. Code § 22051*]:

- Any nonprofit cooperative association organized under California laws governing agricultural cooperatives that loans or advances money in connection with its activities under those laws [*see Food & Agric. Code § 54001 et seq.*; *see also Ch. 14A, Agricultural Nonprofit Cooperative Associations*].
- Any corporation, association, syndicate, joint stock company, or partnership engaged exclusively in the business of marketing agricultural, horticultural, viticultural, dairy, livestock, poultry, or bee products on a cooperative nonprofit basis that loans or advances money to its members or in connection with its activities [*see Ch. 14A, Agricultural Nonprofit Cooperative Associations* ; *Ch.48, Agricultural Financing*].
- Any corporation that secures money or credit from any federal intermediate credit bank organized

under the Agricultural Credits Act of 1923 [*see 12 U.S.C. §§ 2011, 2071, 2091*] and that loans or advances that money or credit [*see Ch. 48, Agricultural Financing*].

- Any California small business development corporation [*see Corp. Code § 14000 et seq.*].

In addition, the Law does not apply to the California Infrastructure and Economic Development Bank, to any program authorized under the California Small Business Financial Development Corporation Law [*Corp. Code § 14000 et seq.*], or to the California Integrated Waste Management Board [*Fin. Code § 22056*], or to any licensed cemetery broker [*Fin. Code § 22058; see Bus. & Prof. Code § 9600 et seq.*].

In claiming any exemption under the Law, the burden of proving the exemption is on the person claiming it [*Fin. Code § 22053*].

[2] Exempt Transactions

The Finance Lenders Law does not apply to any loan of credit made by a person not licensed under that Law pursuant to a plan having all of the following characteristics [*Fin. Code § 22052*]:

- Credit cards are issued pursuant to a written application and to the plan, and (1) the issuing organization can acquire obligations that its members in good standing incur with persons with whom the organization has entered into written agreements setting forth the plan, and the obligations are incurred pursuant to those agreements; or (2) the issuing organization can extend credit to its members.
- The fee for the credit cards is designed to cover the administrative costs of the plan and is imposed on the issuance of the card and on annual renewal dates thereafter.
- Any charges, discounts, or fees resulting from the acquisition of the charges is paid to the issuing organization by the persons, corporations, or associations with whom the organization has entered into written agreements.

The Law is inapplicable to bona fide conditional contracts of sale involving the disposition of personal property when those agreements are not used for the purpose of evading the Finance Lenders Law [*Fin. Code § 22054*], and to premium financing as defined in *Corp. Code § 18563* [*Fin. Code § 22055*].

In addition, the Law does not apply to any loan made or arranged by a licensed real estate broker and secured by a lien on real property, or to any licensed real estate broker when making such a loan. A licensed real estate broker may make a loan secured by a lien on real property for sale to a finance lender, or may arrange for such a loan to be made by a finance lender, without obtaining a license as a finance lender [*Fin. Code § 22057*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-102B California Legal Forms--Transaction Guide § 102B.33

§ 102B.33 Licensing Requirements

[1] Issuance

All persons engaged in the business of a finance lender must obtain a license from the Commissioner of Corporations [*Fin. Code § 22100(a)*]. On submission of an application for a license, financial statements, and the appropriate fee [*see Fin. Code §§ 22101-22104* (application requirements)], the Commissioner will investigate the applicant and related persons to determine fitness for licensure. If the Commissioner determines that the applicant has satisfied requirements for licensure and finds no facts constituting reasons for denial, the Commissioner will issue and deliver a license to the applicant [*Fin. Code § 22105*; *see Fin. Code § 22106* (license contents)].

[2] Display

The license, and any currently effective order approving the use of a name other than the one on the license, must be conspicuously posted in the place of business authorized by the license [*Fin. Code § 22151(a)*; *see Fin. Code §§ 22155, 22250(a), 22550* (restrictions on use of different name for consumer loans under \$10,000, and commercial loans under \$5,000)].

A finance lender may not place a loan advertisement that is disseminated primarily in California unless the license under which the loan would be made or arranged is disclosed in (1) the printed text of the advertisement, or (2) the oral text of a radio or television advertisement [*Fin. Code § 22162*].

[3] Prohibition of Transfer and Assignment

The license is not transferable or assignable. Further, if the license is issued to a general partnership or a limited partnership, the death, withdrawal, or admission of a partner, general partner, or limited partner does not effect a transfer or assignment of the license unless the death, withdrawal, or admission dissolves the partnership to which the license was issued [*Fin. Code § 22151(b)*].

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For related research and practice materials, see the following legal topics:

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32-102B California Legal Forms--Transaction Guide § 102B.34

§ 102B.34 Regulation of Consumer Loans

[1] Definition of Consumer Loans

The Finance Lenders Law applies to consumer loans [*see Fin. Code §§ 22200-22467*] as well as to commercial loans [*see Fin. Code §§ 22500-22650; see also § 102B.35*]. Under that Law, a "consumer loan" is a loan that either is unsecured or is secured by real or personal property or both, the proceeds of which are intended by the borrower for use primarily for personal, family, or household purposes. However, nothing in this definition authorizes the taking of real property as security, unless the loan is for a bona fide principal amount of \$5,000 or more [*Fin. Code §§ 22203, 22330; see Fin. Code § 22251(c)*] ("bona fide principal amount" defined for purposes of determining whether loan amount exceeds regulatory ceiling)]. In addition, the term consumer loan includes a loan of a principal amount of less than \$5,000, the proceeds of which are intended by the borrower for use primarily for *other than* personal, family, or household purposes [*Fin. Code § 22204(a)*].

For the purposes of determining whether a loan is a consumer loan, the lender may rely on any written statement of intended purposes signed by the borrower. The statement may be a separate signed statement, or may be contained in a loan application or other document signed by the borrower. The lender is not required to ascertain that the proceeds of the loan are used in accordance with the statement [*Fin. Code §§ 22203, 22204(a)*].

[2] Exemption for Consumer Loans of \$2,500 or More

Loans of \$2,500 or more are exempt from the statutory restrictions on the maximum charges that may be collected from a borrower [*see Fin. Code §§ 22303, 22304*], if this regulatory ceiling provision is not used for the purpose of evading the requirements of the Finance Lenders Law [*Fin. Code §§ 22251, 22303, 22304*]. For discussion of those restrictions, see § 102B.36[1].

[3] Provisions Inapplicable to Consumer Loans of \$5,000 or More

Loans made for bona fide principal amounts of \$5,000 or more, and duly licensed finance lenders in connection with those loans, are exempt from the following provisions of the Finance Lenders Law if the exemption is not used for the

purpose of evading that Law [*Fin. Code* § 22250(b)]:

- Certain restrictions on charges made on loans [*see Fin. Code* §§ 22201, 22202, 22300, 22305, 22306, 22307(a), 22309, 22320.5, 22322, 22323, 22325, 22326, 22327, 22334, 22400, 22751; *see also* § 102B.36[1]].
- Restrictions governing loans made outside of California [*see Fin. Code* §§ 22322, 22323].

[4] Provisions Inapplicable to Consumer Loans of \$10,000 or More

In addition to the provisions listed above, the following provisions of the Finance Lenders Law do not apply to loans of bona fide principal amounts of \$10,000 or more, or to duly licensed finance lenders in connection with those loans, if the exemption is not used for the purpose of evading that law [*Fin. Code* § 22250(a)]:

- Restrictions on the place at which a licensee conducts business or the name under which the business is conducted [*see Fin. Code* §§ 22154, 22155].
- Additional restrictions on computation of charges made on loans [*see Fin. Code* § 22307].
- Conditions under which insurance on property offered as security will not be deemed to be a collateral sale, purchase, or agreement [*see Fin. Code* §§ 22313, 22314, 22315; *see also Fin. Code* §§ 22201, 22311, 22312], and requirements relating to credit disability insurance [*see Fin. Code* § 22315].
- Requirement that all interest and loan charges be forfeited for violation of the Law [*see Fin. Code* § 22752].

[5] Determining Bona Fide Principal Amount of Consumer Loans

Statutory principles apply to determine the amount of a consumer loan and whether regulatory ceilings are being used for the purpose of evading the requirements of the Finance Lenders Law. A loan is not deemed to be a loan of the required bona fide principal amount, and evasion will be the deemed purpose, if the following occur [*Fin. Code* § 22251(a); *see Fin. Code* § 22251(c) ("bona fide principal amount" defined for purposes of determining whether loan amount exceeds regulatory ceiling)]:

- A borrower applies for a loan in a bona fide principal amount less than the amount specified;
- A loan greater than that amount is made without adequate economic reason for the increase; and
- By prearrangement or understanding between the parties a substantial payment is to be made to reduce the bona fide principal to a level below the amount specified within a short time after the loan is made (other than by reason of a requirement that the loan be paid in substantially equal periodic installments).

If a loan made by a licensed finance lender is in a bona fide principal amount equal to or exceeding the specified amount, the fact that the transaction is in the form of a sale of accounts, chattel paper, goods, or instruments, or a lease of goods, or in the form of an advance on the purchase price of any of those, does not affect the loan or the bona fides of the amount of the loan, and does not indicate evasion [*Fin. Code* § 22251(b)].

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§ 102B.35 Regulation of Commercial Loans

[1] Definition of Commercial Loans

The Finance Lenders Law applies to commercial loans [see *Fin. Code* §§ 22500-22650] as well as to consumer loans [see *Fin. Code* §§ 22200-22467; see also § 102B.34]. Under that law, a "commercial loan" is a loan of a principal amount of \$5,000 or more, or any loan under an open-end credit program, whether secured by either real or personal property or both, or unsecured, the proceeds of which are intended by the borrower for use primarily for other than personal, family, or household purposes [*Fin. Code* § 22502].

For the purposes of determining whether a loan is a commercial loan, the lender may rely on any written statement of intended purposes signed by the borrower. The statement may be a separate signed statement, or may be contained in a loan application or other document signed by the borrower. The lender is not required to ascertain that the proceeds of the loan are used in accordance with the statement [*Fin. Code* § 22502].

[2] Provisions Inapplicable to Commercial Loans of \$5,000 or More

Commercial loans made for bona fide principal amounts of \$5,000 or more, and duly licensed finance lenders in connection with those loans, are exempt from the following provisions of the Finance Lenders Law if the exemption is not used for the purpose of evading that law [*Fin. Code* § 22550]:

- Restrictions on the place at which a licensee conducts business or the name under which the business is conducted [see *Fin. Code* §§ 22152, 22154, 22155].
- Disclosure requirements imposed by the commissioner regarding rates of charge [see *Fin. Code* §§ 22163, 22164].

[3] Determining Bona Fide Principal Amount of Commercial Loans

Statutory principles apply when determining the bona fide principal amount of a commercial loan. A loan is not deemed

to be a loan of \$5,000 or more if (1) a borrower applies for a loan in a bona fide principal amount less than \$5,000, (2) the finance lender makes a loan greater than that amount to the borrower without adequate economic reason for the increase, and (3) by prearrangement or understanding between the parties a substantial payment is to be made to reduce the bona fide principal to a level below \$5,000 within a short time after the loan is made (other than by reason of a requirement that the loan be paid in substantially equal periodic installments) [*Fin. Code* § 22551(a), (d); see *Fin. Code* § 22551(e) ("bona fide principal amount" defined for purposes of determining whether loan amount exceeds regulatory ceiling)].

A subsequent advance of money of less than a bona fide principal amount of \$5,000 pursuant to a revolving, open-end, or similar agreement between a borrower and a licensed finance lender that gives the borrower the right to draw on all or any part of the line of credit is deemed to be a loan of a bona fide principal amount of \$5,000 or more if the line of credit is a bona fide principal amount of \$5,000 or more and the initial advance was a bona fide principal amount of \$5,000 or more. Similarly, a subsequent advance of money of less than a bona fide principal amount of \$5,000 pursuant to a loan agreement providing for the making of advances to the borrower from time to time up to an aggregate maximum amount that gives the borrower the right to draw all or any part of the total amount is deemed to be a loan of a bona fide principal amount of \$5,000 or more if the aggregate maximum amount is a bona fide principal amount of \$5,000 or more and the initial advance was a bona fide principal amount of \$5,000 or more. These rules apply even if the actual unpaid balance after the subsequent advance or at any other time is less than a bona fide principal amount of \$5,000 [*Fin. Code* § 22551(b), (d)].

If a loan made by a licensed finance lender is in a bona fide principal amount equal to or exceeding \$5,000, the fact that the transaction is in the form of a sale of accounts, chattel paper, goods, or instruments, or a lease of goods, or in the form of an advance on the purchase price of any of those, does not affect the bona fides of the amount of the loan [*Fin. Code* § 22551(c), (d)].

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§ 102B.36 Regulation of Charges

[1] Permissible Loan Charges and Terms

[a] Definition of Charges

Finance lenders are subject to statutory restrictions on the amounts they charge for making loans. "Charges" include the aggregate interest, fees, bonuses, commissions, brokerage, discounts, expenses, and other forms of costs charged, contracted for, or received by a finance lender or any other person in connection with the investigating, arranging, negotiating, procuring, guaranteeing, making, servicing, collecting, and enforcing of a loan or forbearance of money, credit, goods, or things in action, or any other service rendered [*Fin. Code §§ 22200* (consumer loans), 22500 (commercial loans)]. As applied to consumer loans of less than \$5,000 [*Fin. Code § 22250(b)*], "charges" also includes any profit or advantage contracted for, received, collected, or obtained by a finance lender, by collateral sale, purchase, or agreement, in connection with the loan (including profits or advantages relating to the negotiating, arranging, or making of the loan) [*Fin. Code § 22201*].

For additional provisions regulating charges, fees, and interest on loans, see *Fin. Code §§ 22300-22341* (loan regulations), 22400-22402 (charges on scheduled balances), and 22450-22467 (open-end loan programs).

[b] Exclusions for Loans Under \$5,000

For consumer loans under \$5,000 [*Fin. Code § 22250(b)*], "charges" do not include the following [*Fin. Code § 22202*]:

- Commissions received by licensed insurance brokers or agents in connection with credit insurance written as provided in *Fin. Code § 22313*;
- Amounts paid to holders of possessory liens to release motor vehicles held to secure loans subject to the Finance Lenders Law [*see Civ. Code § 3068(c)* (maximum amounts)];
- Court costs, excluding attorneys' fees, incurred in a lawsuit and recovered against a borrower who

defaults on a loan;

- Fees paid to a finance lender for the privilege of participating in an open-end credit program, if the fees are to cover administrative costs and are imposed on the execution of the open-end loan agreement and on subsequent annual renewal dates or anniversary dates [*see Fin. Code §§ 22450-22467, 22650* (open-end credit programs)];
- Amounts (not exceeding 6 percent of the loan proceeds) received by a finance lender from a seller from whom a borrower obtains money, goods, labor, or services on credit in connection with a transaction under an open-end credit program, when these amounts (a) are paid or deducted from the loan proceeds paid to the seller at the borrower's direction and (b) are an obligation of the seller to the finance lender for the privilege of allowing the seller to participate in the finance lender's open-end credit program;
- Actual and necessary fees of \$500 or less paid in connection with the repossession of a motor vehicle to licensed repossession agencies, if the finance lender complies with certain notice and other requirements [*see Fin. Code §§ 22328, 22329*], and actual fees (not exceeding the statutory maximum) paid to the finance lender in connection with receipt and filing of a report of repossession [*see Gov. Code §§ 26751, 41612*]; and
- Money paid to, and commissions and benefits received by, a finance lender for the sale of goods, services, or insurance, whether or not the sale is in connection with a loan, if (1) the buyer acknowledges in a separately signed authorization that this compensation is optional, and (2) the sale takes place in the finance lender's place of business pursuant to written authorization of the Corporations Commissioner [*see Fin. Code §§ 22154, 22250(a), 22550*].

[c] Maximum Charges for Loans Under \$2,500

Charges for loans of less than \$2,500 made by finance lenders must not exceed the sum of the following amounts [*Fin. Code § 22303*]:

- 2.5 percent per month of the unpaid principal balance up to and including \$225;
- 2 percent per month of the unpaid principal balance above \$225 and not greater than \$900;
- 1.5 percent per month of the unpaid principal balance above \$900 and not greater than \$1,650; and
- 1 percent of the remainder of the unpaid balance greater than \$1,650.

As an alternative for loans of less than \$2,500, a finance lender may contract for and receive charges of the greater of (1) 1.6 percent per month on the unpaid principal [*Fin. Code § 22304(a)*], or (2) five-sixths of 1 percent per month plus one-twelfth of the prevailing annual rate on advances to member banks established by the Federal Reserve Bank of San Francisco [*Fin. Code § 22304(b)*; *see 12 U.S.C. § 347*].

In addition to these charges, a finance lender may contract for and receive an administrative fee with respect to a loan of a bona fide principal amount of no more than \$2,500 at a rate of 5 percent of the principal amount of the loan (exclusive of the administrative fee), or \$50, whichever is less. The fee is fully earned immediately on making the loan [*Fin. Code § 22305*; *see Fin. Code § 22251(c)* ("bona fide principal amount" defined)].

No administrative fee may be contracted for or received in connection with the refinancing of a loan unless at least one

year has elapsed since the receipt of a previous administrative fee paid by the borrower. Only one administrative fee may be contracted for and received until the loan has been repaid in full [*Fin. Code* § 22305].

[d] Maximum Terms for Consumer Loans Under \$5,000

In addition to the restrictions on amounts charged for loans, finance lenders must, with certain exceptions, comply with limits on maximum loan terms for consumer loans under \$5,000 [*see Fin. Code* §§ 22334, 22250(b)].

[2] Restrictions on Loans to Refinance Retail Installment Contracts

A licensed finance lender may not make a loan to refinance a retail installment contract held by it (or its affiliates or subsidiaries) that is subject to the Unruh Act [*see Civ. Code* § 1801 *et seq.*] without complying with all conditions required by statute [*see Fin. Code* § 22341(a)]. If those conditions are met, the loan is governed by the Finance Lenders Law, not by the Unruh Act [*Fin. Code* § 22341(b)].

[3] Display of Schedule of Charges

For consumer loans of less than \$5,000 [*Fin. Code* § 22250(b)], the finance lender must display prominently in the lender's place of business a full, accurate schedule of the charges to be made, including the method of computing those charges. The schedule is subject to the approval of the Commissioner of Corporations [*Fin. Code* § 22325].

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§ 102B.37 Records and Reports

[1] Books, Accounts, and Records

Finance lenders must keep and use books, accounts, and records that will enable the Commissioner to determine if they are complying with the Finance Lenders Law and its implementing regulations [*Fin. Code § 22156; see also 10 Cal. Code Reg. §§ 1425-1427* (regulations promulgated under similar provisions of former law)]. These records, including any cards used in a card system, must be preserved for at least three years after making the final entry on any loan recorded in them [*Fin. Code § 22157*]. Although the retained records need not be the originals, any information requested by the Commissioner must be capable of being produced within 48 hours, excluding weekends and holidays [*Fin. Code § 22158; see Gov. Code §§ 6700, 6701* (Saturdays, Sundays, and holidays)].

[2] Annual and Special Reports

Each finance lender must file an annual report with the Commissioner on or before March 15. The report must include relevant information reasonably required by the Commissioner regarding the business and operations during the preceding calendar year for each licensed place of business. These reports are made available for public inspection [*Fin. Code § 22159(a); see also 10 Cal. Code Reg. §§ 1430, 1430.5* (regulations promulgated under similar provisions of former law)]. Further, the Commissioner may require other special reports [*Fin. Code § 22159(b); see 10 Cal. Code Reg. § 1431* (regulation promulgated under similar provisions of former law)].

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[Reserved]

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32-102B California Legal Forms--Transaction Guide § 102B.50

§ 102B.50 Definitions

[1] Secondhand Dealer

A "secondhand dealer" is any person, copartnership, firm, or corporation whose business includes buying, selling, trading, taking in pawn, accepting for sale on consignment, accepting for auctioning, or auctioning secondhand tangible personal property [Bus. & Prof. Code § 21626(a)]. As used in this chapter, the term includes persons dealing in watches, builders' tools, and junk, unless otherwise stated. The term does not include:

- Coin dealers [Bus. & Prof. Code § 21626(a); see Bus. & Prof. Code § 21626(b) ("coin dealers" defined)].
- Participants at gun shows or events [see 27 C.F.R. § 478.100 (definition)] who are not gun show traders [see Penal Code § 12070(b)(5) (definition)] and are not required to be licensed by Penal Code § 12071, if they are acting in compliance with Penal Code § 12072(d) [Bus. & Prof. Code § 21626(a)].
- Persons performing auctioneer services for a fee or salary [Bus. & Prof. Code § 21626.5(a)].
- A person whose business is limited to the reconditioning and selling of major household appliances, provided the following three conditions are satisfied [Bus. & Prof. Code § 21626.5(b)]:
 - The person does not trade, take in pawn, accept for drop-off, accept as a trade-in, accept for sale on consignment, accept for auction, sell at auction, or buy, except in bulk, the appliances.
 - The person does not perform repair services for appliance owners unless the appliance was purchased from that person.
 - The person has never been convicted of the crime of attempting to receive or

receiving stolen property or any other theft-related crime.

[2] Tangible Personal Property

"Tangible personal property" includes but is not limited to the following [*Bus. & Prof. Code § 21627(a), (b)*]:

- All secondhand tangible personal property that bears a serial number or personalized initials or inscription or that, at the time it is acquired by the secondhand dealer, bears evidence of having had a serial number or personalized initials or inscription.
- All new or used tangible personal property, including motor vehicles, received in pledge as security for a loan by a pawnbroker [*see § 102B.10 et seq. (pawnbrokers)*].
- All tangible personal property that bears a serial number or personalized initials or inscription or that, at the time it is purchased by the secondhand dealer or pawnbroker, bears evidence of having had a serial number or personalized initials or inscription.
- All personal property commonly sold by secondhand dealers that is found statistically to constitute a significant class of stolen goods. The Attorney General must supply a list of these items of personal property to local law enforcement agencies.

For purposes of the statutory reporting requirements, "business machines" are included in the definition of tangible personal property [*see Bus. & Prof. Code § 21628.5 ("business machines" defined); see also § 102B.53*].

The term "tangible personal property" does not include any new goods or merchandise purchased by a secondhand dealer from a bona fide manufacturer, distributor, or wholesaler of new goods or merchandise [*Bus. & Prof. Code § 21627(c)*]. Further, it does not include coins, monetized bullion, or commercial grade ingots of gold, silver, or other precious metals [*see Bus. & Prof. Code § 21627(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 102B.51 Governing Law

The resale of tangible personal property by secondhand dealers, including watch sellers and junk dealers, is regulated by statute [*see Bus. & Prof. Code §§ 21500-21653*]. Statutes of general application govern the activities of all persons dealing in secondhand goods and impose, among other things, licensing and reporting requirements [*see Bus. & Prof. Code §§ 21625-21647; see also § 102B.53*]. Additional statutes regulate the resale of secondhand watches, builders' tools, and junk [*see Bus. & Prof. Code §§ 21500-21609*].

The Legislature enacted these laws regulating secondhand dealers for the following purposes: (1) to curtail the dissemination of stolen property; (2) to facilitate the recovery of stolen property by means of a uniform, statewide program of regulation of secondhand dealers; (3) to require the uniform statewide reporting of the acquisition of tangible personal property by secondhand dealers, so that those reports could be correlated with other reports by law enforcement agencies and could aid in the tracing and recovery of stolen property; and (4) to aid the State Board of Equalization in detecting possible sales tax evasions [*Bus. & Prof. Code § 21625*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 102B.52 Exemptions

The reporting and other statutory requirements applicable to secondhand dealers do not apply to the following tangible personal property [*Bus. & Prof. Code § 21629*]:

- Property acquired from another secondhand dealer, provided the other dealer (1) completes and signs, under penalty of perjury, an interdealer transfer form or an itemized bill of sale describing the property and stating that he or she has previously submitted a report or reports as required by *Bus. & Prof. Code § 21628* [*see § 102B.53*], and (2) delivers a copy of the transfer form or bill of sale to the acquiring dealer at the time of transfer. Interdealer transfer forms may be obtained from the Department of Justice or local police or sheriff's departments.
- Property acquired in connection with a nonjudicial sale, transfer, assignment for the benefit of creditors, consignment of the assets or stock of a business for specified purposes (including voluntary dissolutions or liquidations), or a nonjudicial sale or transfer from an owner of all or a substantial part of the owner's household or personal property [*see Bus. & Prof. Code § 21629(b)*].
- Property acquired at a public sale.
- Property acquired from a governmental entity.
- Property reported by a secondhand dealer to a governmental entity as an acquisition or purchase, or as destroyed or otherwise disposed of, as required by law.
- Property acquired by certain specified persons and entities who buy, sell, or trade precious metals [*see Bus. & Prof. Code § 21629(f)*].

These exceptions do not apply to secondhand watches, builders' tools, or junk, which are subject to additional statutes that do not fall within the exceptions [*see Bus. & Prof. Code § 21629; see also Bus. & Prof. Code §§ 21500-21509*].

(watches), 21550-21556 (builders' tools), 21600-21609 (junk)].

Legal Topics:

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§ 102B.53 Licensing and Reporting Requirements

[1] Licensing Requirements

All secondhand dealers must apply for and receive a license to engage in that business [see *Bus. & Prof. Code* §§ 21640-21642] from the chief of police, sheriff, or police commissioner of the appropriate local jurisdiction [see *Bus. & Prof. Code* § 21641]. Thereafter, the license must be renewed every other year [see *Bus. & Prof. Code* § 21642(a)].

Any person who is required to be licensed as a secondhand dealer may not publicly advertise any matter relating to the business for which the license is required without including the license number [*Bus. & Prof. Code* § 21636.6].

[2] Reporting Requirements

Every secondhand dealer (or coin dealer) must report the purchase, taking in trade, taking in pawn, acceptance for sale on consignment, or acceptance for auctioning of all tangible personal property purchased by the dealer. This report must be made daily, or on the first working day after receipt or purchase, to the chief of police or sheriff in the dealer's jurisdiction [see *Bus. & Prof. Code* §§ 21628, 21628.5, 21630; § 102B.220]. Transaction reports are not required to be submitted to the local law enforcement agency if the report of an acquisition of the same property from the same customer has been submitted within the preceding 12 months, unless submission of the reports is specifically requested in writing by the local licensing authority [*Bus. & Prof. Code* § 21628.1].

Firearms are excepted from the reporting requirement of *Bus. & Prof. Code* § 21628 [*Bus. & Prof. Code* § 21628(l); 2009 Stats. Ch. 335, § 2; see *Bus. & Prof. Code* § 21828(k) (licensed firearms dealer is not exempt from *Penal Code* § 12071 reporting requirements)]. However, effective July 1, 2010, every secondhand dealer must, on the day of the transaction, electronically report to the Department of Justice, each firearm purchased, taken in trade, taken in pawn, accepted for sale on consignment, or accepted for auctioning [*Bus. & Prof. Code* § 21628.1(b), (e)]. The Department of Justice prescribes the reporting format [*Bus. & Prof. Code* § 21628.2(b)].

Similar reporting requirements apply to any personal property that is found in the shop of a secondhand dealer, pawnbroker, or coin dealer doing business under a secondhand dealer's license [see *Bus. & Prof. Code* § 21631].

Additional statutes govern reports for acquisitions and sales of builders' tools [*see Bus. & Prof. Code §§ 21551-21555* (register for recording information)].

[3] Recordkeeping Requirements

Secondhand dealers must keep records of the receipt of certain types of secondhand goods and must make the records available for inspection [*see Bus. & Prof. Code §§ 21502-21504* (watches), 21551, 21552 (builders' tools), 21605-21607 (junk), 21628.2 (firearms)]. For coverage of these reporting requirements, see § 102B.122.

Legal Topics:

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32-102B California Legal Forms--Transaction Guide § 102B.54

§ 102B.54 Holding Period

Every secondhand dealer and coin dealer must retain possession of all tangible personal property reported under *Bus. & Prof. Code* §§ 21628, 21629, and 21630 (tangible personal property), and beginning July 1, 2010, *Bus. & Prof. Code* § 21628.2 (firearms), for a period of 30 days. The holding period commences on the date of the report of the acquisition of the property [*Bus. & Prof. Code* § 21636(a); see *Bus. & Prof. Code* §§ 21628-21631; see also §§ 102B.53[2], 102B.220 (report)]. The chief of police or the sheriff or the Department of Justice may authorize the earlier disposition of the property, provided the dealer reports the sale to that official [*Bus. & Prof. Code* § 21636(a); see *Malish v. City of San Diego* (2000) 84 Cal. App. 4th 725, 737, 101 Cal. Rptr. 2d 18 (provisions of local ordinance setting forth holding requirements "other than" those set forth in *Bus. & Prof. Code* § 21636 were expressly prohibited by *Bus. & Prof. Code* §§ 21637, 21638)].

During the holding period, the dealer must produce the property for inspection by any peace officer or employee designated by the chief of police or sheriff or the Department of Justice [*Bus. & Prof. Code* § 21636(b)]. Property subject to inspection, and any property held in pawn, that is stored off the business premises of the licensee, on request for inspection, must be produced at the licensee's business premises within one business day of the request [*Bus. & Prof. Code* § 21636(c)]. Any person who conducts business as a secondhand dealer at gun shows or events [see 27 C.F.R. § 478.100 (definition)] outside the jurisdiction that issued the secondhand dealer license [see *Bus. & Prof. Code* § 21641(d) (secondhand dealer license)] may be required to submit for inspection [see *Bus. & Prof. Code* § 21636(b) (inspection requirements)], at a location specified by the local law enforcement agency, any firearm acquired at the gun show or event within 48 hours of the request for inspection by the local law enforcement agency in the jurisdiction where the show or event was conducted [*Bus. & Prof. Code* § 21636(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewGovernmentsState & Territorial GovernmentsLicenses



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102B PAWNBROKERS, FINANCE LENDERS, AND SECONDHAND GOODS DEALERS
PART II. LEGAL BACKGROUND
C. Secondhand Dealers

32-102B California Legal Forms--Transaction Guide §§ 102B.55-102B.99

[Reserved]

§§ 102B.55[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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32-102B California Legal Forms--Transaction Guide § 102B.100

§ 102B.100 Facts for Pawnbroker and Finance Lender Transactions

[1] Facts Regarding Borrower

1. Name and address of borrower.
2. Legal status of borrower:
 - a. Individual.
 - b. Partnership.
 - c. Corporation.
3. Type of business, if any, borrower operates.
4. If married, name and address of spouse.

NOTE:

Encumbrances upon community personal property require the consent of both spouses [*Fam. Code § 1100(c)*]; *see* Ch. 108, *Antenuptial Agreements*].

5. Name, address, and telephone number of counsel representing borrower, if any.

[2] Facts Regarding Lender

1. Name and address of lender.
2. Business activity of lender.
3. Legal status of lender:

NOTE:

Certain entities are exempt from regulation under the Pawnbroker Law [*see Fin. Code § 21050; see also § 102B.110, P 3*] and the Finance Lenders Law [*see Fin. Code §§ 22050, 22051; see also § 102B.111, P 3*].

- a. Individual.
 - b. Partnership.
 - c. Corporation.
4. Name, address, and telephone number of counsel representing lender, if any.

[3] Facts Regarding Personal Property Collateral

1. Description of property sufficient to identify that property.
2. Location of property.
3. Estimated value of property.
4. Exact name of person holding title to property.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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32-102B California Legal Forms--Transaction Guide § 102B.101

§ 102B.101 Facts Regarding Secondhand Dealer Transactions

[1] Facts Regarding Dealer

1. Name and address of dealer.
2. Business status of dealer:
 - a. General secondhand goods dealer [*see Bus. & Prof. Code § 21626(a)*].
 - b. Junk dealer [*see Bus. & Prof. Code § 21601*].
 - c. Coin dealer [*see Bus. & Prof. Code § 21626(b)*].
 - d. Business machine dealer [*see Bus. & Prof. Code § 21628.5*].
3. Legal status of dealer:
 - a. Individual.
 - b. Partnership.
 - c. Corporation.
4. Name, address, and telephone number of counsel representing dealer, if any.

[2] Facts Regarding Secondhand Goods Being Sold

1. Type of goods.
2. Name and address of party delivering goods to dealer.
3. Name and address of party holding title to goods.
4. Description of goods, including:
 - a. Brand name.
 - b. Model and serial number.
 - c. Color.
 - d. Other identifying characteristics.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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32-102B California Legal Forms--Transaction Guide § 102B.102

§ 102B.102 Documents

1. Instruments showing title to property proposed as collateral or for sale as secondhand property.
2. Security instruments covering proposed collateral or secondhand property.
3. Other instruments evidencing encumbrance of proposed collateral or secondhand property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsGeneral Overview



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32-102B California Legal Forms--Transaction Guide §§ 102B.103-102B.109

[Reserved]

§§ 102B.103[Reserved]



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32-102B California Legal Forms--Transaction Guide § 102B.110

§ 102B.110 Transactions Involving Pawnbrokers

1. Determine whether borrower has sufficient age and mental capacity to enter into contract with pawnbroker [see *Civ. Code* §§ 1556, 1557; see also Ch. 75, *Formation of Contracts and Standard Contractual Provisions* ; Ch. 100B, *Contracts and Employment of Minors*].

NOTE:

Pawnbrokers must not receive anything in pledge from a minor [*Fin. Code* § 21207; see *Fam. Code* § 6500 (minor is any person under 18 years of age)].

2. If borrower is married, determine whether his or her spouse's consent is required to encumber property [see *Fam. Code* § 1100(c)].

NOTE:

Unless both spouses consent, a spouse may not encumber community personal property used as a family dwelling, or the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children [*Fam. Code* § 1100(c)].

3. Determine whether party acting as pawnbroker is exempt from regulation under Pawnbroker Law as one of following [see *Fin. Code* § 21050]:

a. Corporation organized for purpose of securing credit from federal farm credit banks [see 12 U.S.C. §§ 2011, 2071, 2091; see also Ch. 48, *Agricultural Financing*];

b. Any nonprofit cooperative corporation or association with or without capital stock, organized or existing under California laws governing agricultural cooperatives [see *Food & Agric. Code* § 54001 et seq.; Ch. 14A, *Agricultural Nonprofit Cooperative Associations*]; or

c. Any person, corporation, association, syndicate, joint stock company, or partnership engaged exclusively in business of marketing agricultural, horticultural, viticultural, dairy, livestock, poultry, and bee products on cooperative, nonprofit basis [*see also* Ch. 14A, *Agricultural Nonprofit Cooperative Associations* ; Ch. 49, *Agricultural Contracts*].

4. Determine bona fide principal amount of loan, using following principles:

NOTE:

If the bona fide principal amount of a loan is \$2,500 or more, the transaction is exempt from limits on maximum charges [*Fin. Code* § 21051(a); *see Fin. Code* §§ 21200, 21200.5, 21201.4; *see also* § 102B.14[1]]. The amount of the loan must be determined using the following statutory principles to determine good faith, that is, whether exemption is sought for the purpose of evading the provisions of the Pawnbroker Law. These principles are the same as those applicable to consumer loans by finance lenders [*Fin. Code* § 21051(b) (citing former *Fin. Code* § 22054, now *Fin. Code* § 22251)].

a. Bona fide condition is not met if [*Fin. Code* § 22251(a); *see Fin. Code* § 22251(c) ("bona fide principal amount" defined for purposes of determining whether loan amount exceeds regulatory ceiling)]:

(1) Borrower applies for loan of bona fide principal amount less than amount specified by statute;

(2) Finance lender makes loan of bona fide principal amount equal to statutory amount or more to borrower without adequate economic reason for increase in size of loan; and

(3) By prearrangement or understanding between borrower and finance lender, borrower is to make substantial payment on loan to reduce bona fide principal amount to less than statutory amount within short time after making of loan, unless payment is made pursuant to requirement that loan be paid in substantially equal periodic installments.

b. Bona fide condition is met if loan is made in principal bona fide amount of amount specified by statute or more, and transaction is in form of [*Fin. Code* § 22251(b)]:

(1) Sale of accounts, chattel paper, goods, or instruments; or

(2) Lease of goods; or

(3) Advance on purchase price of sale or lease described in (a) or (b), above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview



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32-102B California Legal Forms--Transaction Guide § 102B.111

§ 102B.111 Transactions Involving Finance Lenders

1. Determine whether borrower has sufficient age and mental capacity to enter into contract with finance lender [*see Civ. Code §§ 1556, 1557; see also Ch. 75, Formation of Contracts and Standard Contractual Provisions ; Ch. 100, Control, Custody, and Support of Minors*].
2. If borrower is married, determine whether his or her spouse's consent is required to encumber property [*see Fam. Code § 1100(c)*].

NOTE:

Unless both spouses consent, a spouse may not encumber community personal property used as a family dwelling, the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children [*Fam. Code § 1100(c)*].

3. Determine whether lender is exempt from regulation under Finance Lenders Law as one of following:

NOTE:

In claiming any exemption under the Law, the burden of proving the exemption is on the person claiming it [*Fin. Code § 22053*].

a. Persons doing business under laws relating to any of following [*Fin. Code § 22050(a)*]:

- (1) Banks.
- (2) Trust companies.
- (3) Savings and loan associations.

- (4) Insurance premium finance agencies.
 - (5) Credit unions.
 - (6) Small business investment companies.
 - (7) California business and industrial development corporations.
 - (8) Licensed pawnbrokers.
- b. Licensed securities broker-dealer [*Fin. Code § 22050(d)*; *Corp. Code § 25211*];
- c. College or university making student loans [*Fin. Code § 22050(c)*];
- d. Check casher holding valid permit issued pursuant to *Civ. Code § 1789.37*, or to person holding valid deferred deposit transaction license pursuant to *Fin. Code § 23005*, when acting under authority of that permit [*Fin. Code § 22050(b)*];
- e. Any person who makes no more than one loan in any 12-month period as long as that loan is a commercial loan as defined in *Fin. Code § 22502* [*Fin. Code § 22050(e)*].
- f. Any public corporation [*see Gov. Code § 67510* (definition)], any public entity other than the state [*see Gov. Code § 811.2* (definition)], or any agency of one of these entities, when making any loan so long as the entity or its agent complies with all applicable federal and state laws and regulations [*Fin. Code § 22050(f)*].
- g. Any nonprofit cooperative association organized under California laws governing agricultural cooperatives, that loans or advances money in connection with its activities under those laws [*Fin. Code § 22051(a)*; *see Food & Agric. Code § 54001 et seq.*; *see also Ch. 14A, Agricultural Nonprofit Cooperative Associations*];
- h. Any corporation, association, syndicate, joint stock company, or partnership engaged exclusively in the business of marketing agricultural, horticultural, viticultural, dairy, livestock, poultry, or bee products on cooperative, nonprofit basis, that loans or advances money to its members or in connection with those activities [*Fin. Code § 22051(b)*; *see Ch. 14A, Agricultural Nonprofit Cooperative Associations*; *Ch. 49, Agricultural Contracts*];
- i. Any corporation securing money or credit from federal farm credit banks that loans or advances that money or credit [*Fin. Code § 22051(c)*; *see 12 U.S.C. §§ 2011, 2071, 2091*; *see also Ch. 48, Agricultural Financing*]; or
- j. Any California small business development corporation [*Fin. Code § 22051(d)*; *see Corp. Code § 14000 et seq.*].
- k. The California Infrastructure and Economic Development Bank [*Fin. Code § 22056*].
- l. The California Integrated Waste Management Board [*Fin. Code § 22056*].
- m. Licensed cemetery brokers [*Fin. Code § 22058*; *see Bus. & Prof. Code § 9600 et seq.*].

4. Determine whether transaction is exempt from regulation under Finance Lenders Law as one of following:

- a. Certain loans of credit by unlicensed persons involving credit cards [*see Fin. Code § 22052; see § 102B.32[2]*].
- b. Bona fide conditional sale contracts involving disposition of personal property [*Fin. Code § 22054*].
- c. Premium financing [*Fin. Code § 22052; see Fin. Code § 18563* (definition)].
- d. Any loan made or arranged by licensed real estate broker and secured by lien on real property, or any licensed real estate broker when making such a loan [*Fin. Code § 22057*].

NOTE:

A licensed real estate broker may make a loan secured by a lien on real property for sale to a finance lender, or may arrange for such a loan to be made by a finance lender, without obtaining a license as a finance lender [*Fin. Code § 22057*].

5. Ascertain nature of loan:

- a. Determine whether loan proceeds are intended by borrower for use primarily for personal, family, or household purposes.

NOTE:

If the borrower intends to use the loan proceeds primarily for personal, family, or household purposes, the loan is classified as a consumer loan [*Fin. Code § 22203*]. That term also includes loans of less than \$5,000 that are intended for other than personal, family, or household purposes [*Fin. Code § 22204(a)*]. Commercial loans are loans of \$5,000 or more, and loans under an open-end credit program, that are intended for other than personal, family, or household purposes [*Fin. Code § 22502(a)*]. The lender may rely on any written statement of intended purposes signed by the borrower in determining the purpose of the loan [*Fin. Code §§ 22203, 22204(a), 22502*].

- b. Determine bona fide principal amount of loan, using following principles:

NOTE:

The bona fide principal amount of a loan determines the provisions of the Finance Lenders Law that govern the transaction and the lender [*see Fin. Code §§ 22250, 22303, 22304, 22550; see Fin. Code §§ 22251(c), 22551(e)* ("bona fide principal amount" defined for purposes of determining whether loan amount exceeds regulatory ceiling)].

(1) Bona fide condition is not met if [*Fin. Code §§ 22251(a)* (consumer loans), 22551(a) (commercial loans)]:

(a) Borrower applies for loan of bona fide principal amount less than amount specified by statute;

(b) Finance lender makes loan of bona fide principal amount equal to statutory amount or more to borrower without adequate economic reason for increase in size of loan; and

(c) By prearrangement or understanding between borrower and finance lender, borrower is to make substantial payment on loan to reduce bona fide principal amount to less than statutory amount within short time after making of loan, unless payment is made pursuant to requirement that loan be paid in substantially equal periodic installments.

(2) Bona fide condition is met if loan is made in bona fide principal amount of amount specified by statute or more, and transaction is in form of [*Fin. Code* §§ 22251(b) (consumer loans), 22551(c) (commercial loans)]:

(a) Sale of accounts, chattel paper, goods, or instruments; or

(b) Lease of goods; or

(c) Advance on purchase price of sale or lease described in P (a) or (b), *above*.

NOTE:

A subsequent advance under a revolving or open-end loan agreement permitting the borrower to draw against the line of credit, or under a loan agreement permitting advances up to an aggregate maximum, is deemed to be a loan of a bona fide principal amount of the statutory amount or more if the line of credit or aggregate maximum is the a bona fide principal amount of statutory amount or more and the initial advance was a bona fide principal amount of the statutory amount or more, even though the actual unpaid balance after the advance or at any other time is less than a bona fide principal amount of the statutory amount [*Fin. Code* § 22551(b)].

6. If loan is to refinance retail installment contract subject to Unruh Act [*see Civ. Code* § 1801 *et seq.*] that is held by finance lender or its subsidiaries or affiliates, determine whether following conditions are met [*Fin. Code* § 22341(a)]:

NOTE:

A finance lender may not make such a loan unless all these conditions are met [*Fin. Code* § 22341(a)]. If all conditions are met, the loan is subject to the provisions of the Finance Lenders Law and not to those of the Unruh Act [*Fin. Code* § 22341(b)].

a. Buyer must have been making required installment payments for at least 90 days.

b. Contract must have term of at least 180 days and must not provide for any scheduled installment that is more than twice amount of any other scheduled installment.

c. Loan must provide for additional proceeds other than for insurance in an amount not less than the outstanding principal balance, and must provide for payment of contract in full.

d. If security interest is in real property that is principal residence of borrower:

(1) Loan must have principal amount of \$5,000 or more, and

(2) Additional disclosure statement must be included with loan statement [*see Fin. Code* § 22338(a); *see also* §§ 102B.210 (loan statement), 102B.215 (additional disclosure statement)].

e. Finance lender must not sell or attempt to sell any goods or services to borrower, other than credit insurance [see *Fin. Code § 22314* (definition)] required to protect security interest, until loan has been in effect for at least 30 days.

NOTE:

The amount of insurance required by the lender must not exceed the lesser of the principal amount of the loan or the replacement value of the security as determined by the insurer [*Fin. Code § 22341*].

f. If finance lender is assignee of retail installment contract, it must continue to be subject under loan to all equities and defenses of borrower against seller arising out of sale, notwithstanding agreement to contrary.

g. Loan must not provide for any scheduled installment more than twice amount of any other scheduled installment.

NOTE:

This requirement does not apply to open-end loans [*Fin. Code § 22341(d)*] or to loans of \$10,000 or more [*Fin. Code § 22341(a)(6)*].

h. If loan of \$10,000 or more provides for any scheduled installment more than twice amount of any other scheduled installment, loan must contain required balloon payment disclosure statement [see § 102B.216].

NOTE:

This requirement does not apply to open-end loans [*Fin. Code § 22341(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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32-102B California Legal Forms--Transaction Guide § 102B.112

§ 102B.112 Transactions Involving Secondhand Goods Dealers

1. Determine whether dealer in secondhand goods is regulated by statute.

a. Person is engaged in business of selling secondhand watches [*see Bus. & Prof. Code §§ 21500(a), 21501*].

b. Person is engaged in selling of secondhand builders' tools [*see Bus. & Prof. Code §§ 21550, 21551*].

c. Person is engaged in buying, selling, and dealing in junk [*see Bus. & Prof. Code §§ 21600, 21601*].

d. Person is engaged in buying, selling, trading, taking in pawn, accepting for sale on consignment, accepting for auctioning, or auctioning secondhand tangible personal property [*see Bus. & Prof. Code § 21626*].

NOTE:

Persons and companies performing auctioneer services for a fee or salary are not regulated under the statutes governing secondhand dealers, but rather under a separate statutory scheme [*Bus. & Prof. Code § 21626.5; see Civ. Code § 1812.600 et seq.*]. Participants at gun shows or events [*see 27 C.F.R. § 478.100* (definition)] who are not gun show traders [*see Penal Code § 12070(b)(5)* (definition)] and are not required to be licensed by *Penal Code § 12071* also are specifically excluded from the statutory definition of secondhand dealers, if they are acting in compliance with *Penal Code § 12072(d)* [*Bus. & Prof. Code § 21626(a)*]. Coin dealers [*see Bus. & Prof. Code § 21626(b)* (definition)] are also specifically excluded from this definition [*Bus. & Prof. Code § 21626(a)*], but are generally governed by the same statutes that govern secondhand dealers [*see, e.g., Bus. &*

Prof. Code § 21628 (coin dealers subject to reporting requirements)]. A person whose business is limited to the reconditioning and selling of major household appliances are excluded from the statutory definition of secondhand dealers, provided specified conditions are satisfied [*Bus. & Prof. Code § 21626.5(b)*; *see § 102B.50[1]*].

2. Determine whether secondhand tangible personal property (other than watches, builders' tools, or junk) is exempt from regulation [*Bus. & Prof. Code § 21629*].

NOTE:

Although watches, builders' tools, and junk come within the definition of secondhand tangible personal property, the exemption discussed here only applies to goods solely governed under *Bus. & Prof. Code § 21625 et seq.* [*see Bus. & Prof. Code § 21629*]. Additional statutes require the reporting and recordkeeping duties for these goods [*see, e.g., Bus. & Prof. Code § 21503*].

a. Property was acquired from another secondhand dealer [*see Bus. & Prof. Code § 21629(a)*; *see also § 102B.52*];

b. Property was acquired at nonjudicial sale, transfer, assignment, assignment for benefit of creditors, consignment of assets or stock of business for specified purposes, or nonjudicial sale or transfer from owner of all or substantial part of owner's household or personal property [*see Bus. & Prof. Code § 21629(b)*; *see also § 102B.52*];

c. Property was acquired at public sale;

d. Property was acquired from governmental entity;

e. Property was reported by secondhand dealer as an acquisition or a purchase or has been reported as destroyed or otherwise disposed of to governmental entity by law; or

f. Property was acquired by certain specified persons and entities who buy, sell, or trade precious metals [*see Bus. & Prof. Code § 21629(f)*].

3. Determine whether party seeking to transact business with secondhand goods dealer is of sufficient age.

NOTE:

Secondhand goods dealers may not transact business with minors if the transaction must be reported under *Bus. & Prof. Code § 21628*, or beginning July 1, 2010, *Bus. & Prof. Code § 21628.2* [*Bus. & Prof. Code § 21643*; *see Fam. Code § 6500*; *see also § 102B.220[1][b]* (reporting requirements)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewContracts LawSales of GoodsGeneral Overview



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[Reserved]

§§ 102B.113[Reserved]



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32-102B California Legal Forms--Transaction Guide § 102B.120

§ 102B.120 Transactions Involving Pawnbrokers

1. Confirm that pawnbroker is in compliance with pawnbroker licensing requirements [*see Fin. Code § 21300 et seq.; see also § 102B.13[1]*].
2. Ensure that pawnbroker posts schedule of charges in place clearly visible to general public [*see Fin. Code §§ 21200, 21200.5; see § 102B.14[2][b], [3][b]*].

NOTE:

Pawnbrokers must place notices on their posted schedules of charges informing their borrowers that they may, upon prepayment of mailing costs, require that the notice of termination of the loan period [*see P 6, below*] be sent by registered or certified mail with return receipt requested [*Fin. Code § 21201*].

3. Draft loan contract, including [*Fin. Code §§ 21201, 21201.3(a), 21201.4*]:

NOTE:

Every loan made by a pawnbroker for which goods are received as collateral must be evidenced by a written agreement [*Fin. Code § 21201; see § 102B.200*].

- a. Four-month loan period.
- b. Date on which loan is due and payable.
- c. Notice informing borrower of his or her right to redeem pledge during redemption period.

d. Notice informing borrower whether item or items pledged are to be stored at business premises of pawnbroker.

e. Adjacent to required provision of P d, *above*, disclaimer that states: "We must return your property within two business days if your property is stored off premises."

f. Rates and charges that do not exceed those set by statute [*see Fin. Code §§ 21200, 21200.5, 21201.4; § 102B.14[2]*].

4. Ensure that pawnbroker makes proper record in pawn book, indicating [*Fin. Code § 21202*]:

NOTE:

A written copy of this record must be furnished to the borrower [*Fin. Code § 21202*]. This generally constitutes the "pawn ticket" and appears on the reverse side of the pawn agreement [*see § 102B.16[1][b]*].

a. Date of transaction.

b. Duration.

c. Amount.

d. Rate of interest or charges.

e. Reasonably accurate description of goods pledged.

f. Name and address of borrower.

5. Advise pawnbroker to file report of personal property received on official form [*Fin. Code § 21208; see § 102B.202*]:

NOTE:

Failure to comply with this requirement is a misdemeanor [*Fin. Code § 21209*].

a. By mail.

b. Directed to:

(1) Police chief executive of city (or his or her designee), if property is received within territorial limits of an incorporated city; or

(2) County sheriff (or his or her designee), if property is received outside territorial limits of incorporated city.

c. Either:

(1) On daily basis; or

(2) On first working day after receipt or purchase of property.

6. Advise pawnbroker to notify borrower of termination of loan period within 30 days after its expiration, if property has not been redeemed and parties have not agreed to extend period [*Fin. Code § 21201; see § 102B.201*]:

NOTE:

If a pawnbroker fails to provide notice to a borrower of the expiration of the loan period within 30 days of the expiration date, he or she may not charge any interest on the loan from the day after the expiration of the 30-day period [*Fin. Code § 21201*].

a. State that:

(1) Original loan/redemption period has terminated.

(2) Redemption period is extended for 10 days from date notice was mailed.

b. Send notice:

(1) By means for which verification of mailing or delivery of notification can be provided; or

(2) If buyer has prepaid mailing costs and requested that any notice of termination be sent by registered or certified mail with return receipt requested, by requested method [*Fin. Code § 21201*].

(3) To last known address of borrower [*Fin. Code § 21201*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview



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32-102B California Legal Forms--Transaction Guide § 102B.121

§ 102B.121 Transactions Involving Finance Lenders

1. Assure compliance with license requirements for finance lender [*see Fin. Code §§ 22100, 22151; see also § 102B.53[1]*].
2. Assure compliance with requirement for posting of schedule of maximum charges in place of business [*see Fin. Code § 22325; see also § 102B.14[2][b], [3][b]*].

NOTE:

This requirement applies only to consumer loans under \$5,000, unless the regulatory ceiling is used to evade the requirements of the Finance Lenders Law [*Fin. Code § 22250(b)*].

3. Draft or review loan contract.

NOTE:

For discussion and forms for loan agreements for transactions involving consumers, see Ch. 45, ***Consumer Installment Loans and Credit Sales*** . For discussion and forms of commercial loan agreements, see Ch. 43, ***Commercial Loans*** .

4. Draft or review security agreements covering collateral pledged for loan.

NOTE:

For discussion and forms for security agreements in general, see Ch. 42, ***Secured Transactions*** . For a refinance loan of a retail installment contract in which the borrower's residence is pledged as security, special requirements apply [*Fin. Code § 22341(a)*]; ***see § 102B.215***].

5. Draft or review statement of loan [*see Fin. Code §§ 22337(a)* (finance lender), 22338(a) (broker)].

NOTE:

For discussion of the contents of the statement and a form of the statement required for a licensed finance lender, see § 102B.210. For discussion of the statement contents and a form for the statement required for a licensed broker, see § 102B.212.

6. Draft or review statement of participation of third party as broker in making of loan [*see Fin. Code § 22337(b)*].

NOTE:

For discussion of the required statement by the borrower regarding the participation of a broker in the making of the loan, see § 102B.211.

7. Assure proper execution and delivery of loan instruments.

8. At time finance lender or broker first requires or accepts any fee or signed instrument, assure delivery to potential borrower of statement showing in clear and distinct terms name, address, and license number of finance lender and broker, if any [*Fin. Code §§ 22337(f)* (finance lender), 22338(e) (broker)].

9. Assure proper recordkeeping and reporting of loans [*see Fin. Code §§ 22156-22159; 10 Cal. Code Reg. §§ 1425-1427* (regulations promulgated under former law); *see also § 102B.53[2], [3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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32-102B California Legal Forms--Transaction Guide § 102B.122

§ 102B.122 Reports Regarding Acquisitions by Secondhand Dealers

NOTE:

Coin dealers [*see Bus. & Prof. Code § 21626(b)* (definition)] as well as secondhand dealers are subject to the reporting requirements discussed in this section [*Bus. & Prof. Code § 21628; see Bus. & Prof. Code § 21628.1* (exceptions)].

1. Ensure proper record of transaction involving acquisition of property.

a. For secondhand watches, include [*see Bus. & Prof. Code § 21503*]:

NOTE:

This record must be maintained and made available for inspection by the district attorney or his or her representative for three years from the date of the transaction [*Bus. & Prof. Code § 21504*].

(1) Name and address of buyer;

(2) Date of sale to buyer;

(3) Name of watch or maker; and

(4) Serial number of watch, or any other distinguishing numbers or identification marks.

b. For secondhand builders' tools, include [*see Bus. & Prof. Code § 21551*]:

NOTE:

This information must be kept on a register [*Bus. & Prof. Code § 21551*].

- (1) Place, date, and hour of acquisition of tools;
- (2) Name, address, and description of person delivering, selling, or pledging tools to dealer;
- (3) Description of tools, including numbers, letters, names, and identification marks; and
- (4) Name and address of person buying tools.

c. For junk, include [*see Bus. & Prof. Code § 21606*]:

NOTE:

A junk dealer or recycler must report the information listed below to the chief of police or sheriff on request and on a monthly basis [*Bus. & Prof. Code § 21606(c)(1)*]. The chief of police or sheriff may also request weekly reports for no more than a 2-month period (unless the request is renewed), if there is an ongoing investigation of the junk dealer or recycler concerning possible criminal activity [*Bus. & Prof. Code § 21606(c)(2)*]. This information must be maintained at least two years from the date of the final entry of any purchase or sale of the junk [*Bus. & Prof. Code § 21607; see also Bus. & Prof. Code § 21606.5* (inspection of records)].

- (1) Place and date of each sale or purchase made by dealer.
- (2) Name, driver's license number, state of issuance of driver's license.
- (3) For any motor vehicle used to transport junk to dealer's place of business:
 - (a) License number.
 - (b) State of issuance of license.
- (4) Name and address of person buying or otherwise receiving junk.
- (5) License number of vehicle in which junk is removed from dealer's premises.
- (6) Description of junk sold or disposed of.
- (7) Statement indicating:
 - (a) That seller of junk is its owner; or
 - (b) Name of person from whom junk was obtained.

d. For secondhand tangible personal property, including business machines, include required information [*see Bus. & Prof. Code §§ 21628, 21628.5*].

NOTE:

For the required contents of this record, see § 102B.220[1][c].

e. For firearms, effective July 1, 2010, include information prescribed by Department of Justice [*see Bus. & Prof. Code § 21628.2(b), (e)*].

2. Ensure filing of report of acquisition of secondhand goods with proper authority:

a. For builders' tools, file copy of register daily, except on legal holidays, with chief of police or other similar officer in local jurisdiction [*Bus. & Prof. Code § 21553*].

NOTE:

The register required by *Bus. & Prof. Code § 21551* is a record of the place, date, hour, names and addresses of the parties involved, and descriptions of the builders' tools acquired or sold in the transaction [*see Bus. & Prof. Code § 21551*]. Many local law enforcement agencies will accept the filing of the official form set out in § 102B.220 in lieu of a filing of a copy of the register.

b. For secondhand tangible personal property [*see Bus. & Prof. Code § 21630; see also § 102B.220*]:

NOTE:

The dealer must use the official report form [*Bus. & Prof. Code § 21628; see § 102B.220*]. The acquisition reports must be submitted daily, or on the first working day after the receipt or purchase of the property [*Bus. & Prof. Code § 21628*]. Each submission must be made as noted below, using existing forms and procedures, until the Department of Justice and local law enforcement agencies develop a standard format for electronic reporting [*Bus. & Prof. Code § 21630; see Bus. & Prof. Code § 21628(j)(1)*].

(1) If property is received within territorial limits of an incorporated city, submit report to police chief executive of city or his or her designee.

(2) If property is received outside territorial limits of incorporated city, submit report to county sheriff or his or her designee.

c. For firearms, effective July 1, 2010, electronically report to Department of Justice, in a format prescribed by Department [*see Bus. & Prof. Code § 21628.2(b), (e)*].

NOTE:

The report must be made on the day of the transaction [*see Bus. & Prof. Code § 21628.2(b), (e)* (operative July 1, 2010)]. The secondhand dealer also must retain a copy of the report submitted to the Department of Justice and make it available for inspection by the Department, any peace officer, or any local law enforcement employee who is authorized by *Penal Code 12071* to inspect a firearms transaction record [*Bus. & Prof. Code § 21628.2(b), (e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral Overview



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32-102B California Legal Forms--Transaction Guide §§ 102B.123-102B.199

[Reserved]

§§ 102B.123[Reserved]



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PART IV. FORMS
A. Pawnbroker Transactions

32-102B California Legal Forms--Transaction Guide § 102B.200

§ 102B.200 Pawnbroker Loan Agreement

[1] Comment

[a] Use of Form

This form is a standard agreement between a borrower and a pawnbroker. It constitutes the written contract between the parties that the pawnbroker is required to furnish to the borrower [*see Fin. Code § 21201*] and includes information relating to the period of the loan, the date when it is due and payable, and the pledgor's right to redeem the pledge.

Because this agreement takes the form of a secured transaction, it is governed by Division 9 of the Commercial Code [*see Com. Code § 9101 et seq.*]. The provisions of Division 9 apply to pawnbroker transactions to the extent they do not conflict with the provisions of the Pawnbroker Law [*Com. Code § 9201(b)*; *see Fin. Code § 21000 et seq.* (Pawnbroker Law)]. For further discussion of the Commercial Code and secured transactions, see Ch. 42, *Secured Transactions*.

[b] Content Requirements

The loan contract must provide a four-month loan period and must state the loan period and the date on which the loan is due and payable. Further, it must clearly inform the borrower of his or her right to redeem the pledge during the loan period [*Fin. Code § 21201*; *see [c], below*].

The loan contract must contain a separate notice prescribed by statute that advises the borrower of his or her right of redemption. The notice must appear, as in the form below, immediately above the space for the borrower's signature. It must be in at least 8-point bold face type and circumscribed by a box [*see Fin. Code § 21201*]. In addition, the contract must contain a provision in 8-point type stating whether the item or items pledged are to be stored at the business premises of the pawnbroker and adjacent to this provision, a disclaimer that states: "We must return your property within two business days if your property is stored off premises" [*Fin. Code § 21201.3(a)*; *see Fin. Code § 21201.3(c)* (signage requirement if property is stored at location other than pawnshop)].

Charges for the first 90 days of any loan made pursuant to the written contract required by *Fin. Code § 21201* must be

determined by applying the schedule of charges contained in *Fin. Code § 21200.5* [*Fin. Code § 21201.4*; see § 102B.14[2][a] (maximum permissible charges for short term loans)]. Charges for any period of time following the first 90 days of the loan must be determined by applying the schedule of maximum compensation contained in *Fin. Code § 21200* [*Fin. Code § 21201.4*; see § 102B.14[2][b] (maximum permissible charges for loans with terms exceeding 90 days)].

[c] Borrower's Right of Redemption

[i] Four-Month Redemption Period

The pawnbroker must retain the pledged property for a period of four months from the date on which the loan begins. During that period the borrower may redeem the property on repayment of the loan and charges [*Fin. Code § 21201*].

[ii] Storage of Pawns Property Off Premises

If the borrower and the pawnbroker agree in writing that the pawned property may be stored off premises, following the request to redeem the loan, the pawnbroker must return the pledged property to the consumer the next calendar day when both the pawnbroker's store and the storage facility are open, not to exceed two business days [*Fin. Code § 21201*].

[iii] Notice Requirement

If the borrower does not redeem the property within the four-month loan period and the parties do not otherwise agree in writing to extend the loan period, the pawnbroker, within 30 days of the expiration of the loan period, must notify the borrower at his or her last known address of the termination of the loan period. The notice must be sent by a means for which verification of mailing or delivery of the notification can be provided by the pawnbroker. It must state that the redemption period is being extended for 10 days from the mailing of the notice [*Fin. Code § 21201*; see § 102B.201]. If the pawnbroker fails to notify the borrower within 30 days of the expiration of the loan period, the pawnbroker must not charge interest from the day after the expiration of that period [*Fin. Code § 21201*].

However, the pawnbroker must include, on his or her posted schedule of charges, a notice informing borrowers that on prepayment of mailing costs, they may require the pawnbroker to send the notice of termination of the loan period by registered or certified mail with return receipt requested [*Fin. Code § 21201*; see § 102B.14[2][b], [3][b] (posted schedule of charges)].

[iv] Effect of Failure to Redeem

If the property is not redeemed within the additional 10-day period, the pawnbroker becomes vested with all right, title, and interest in the property. All other laws relating to foreclosures of pledges are not applicable to pledges in which the title transfers in accordance with the procedure under Pawnbroker Law. The pawnbroker must not sell any pledged article until he or she has become vested with the title to that property. Violation of this rule is a misdemeanor [*Fin. Code § 21201*; see *Fin. Code § 21209*; see also § 102B.18].

[2] FORM

Pawnbroker Loan Agreement

PAWNBROKER PLEDGE AGREEMENT

In consideration for the loan made on _____ [date], for the sum of \$ _____,
 _____ [name of borrower] ("Pledgor") pledges the property described in this Pledge Agreement to

_____ [name of pawnbroker] ("Pledgee") as security for that loan, together with compensation for Pledgee and charges in connection with that loan. Pledgor promises to repay the loan, compensation, and charges as provided under this Agreement on or before _____ [specify date four months from date loan begins], the Due Date. The period of time beginning on _____ [same commencement date of loan first used above] and ending on _____ [date four months after loan commencement date] (the "Due Date"), is referred to in this Agreement as the Loan Period.

Property Pledged

1. The personal property described below is pledged to Pledgee as security for the loan: *[give accurate description of property including manufacturer, model, serial number, color, and other distinguishing characteristics]*.

Storage of Pledged Property

2. *[Add the following in 8-point type]* The property pledged under this Agreement *[will or will not]* be stored at the business premises of Pledgee.

[The following disclosure must appear in at least 8-point type, adjacent to the provision specifying whether items will be stored at the pawnbroker's business premises (Fin. Code § 21201.3(a):]

We must return your property within two business days if your property is stored off premises.

[Continue with the following:]

Compensation

3. The rate of Pledgee's compensation shall be *[for loan with a bona fide principal amount of less than \$2,500: the maximum permitted under Financial Code Sections 21200.5 and 21200 or, for loan with a bona fide principal amount of \$2,500 or more, specify rate and manner in which calculated]*. If the loan is paid in full in less than one month, one month's interest shall be charged. Charges, including any handling and storage charges, shall be the maximum permitted under the Pawnbroker Law, which is set forth in *Financial Code Sections 21000 through 21209*.

Redemption

4. By paying the full amount of the loan and all applicable accrued charges on or before the Due Date of the loan, Pledgor may redeem the property pledged under this Agreement. If any pledged property is not redeemed during the Loan Period, and Pledgor and Pledgee have not mutually agreed in writing to extend the Loan Period, Pledgee shall notify Pledgor of the termination of the Loan Period by a means for which verification of mailing or delivery of the notification can be provided by the Pledgee, addressed to the last known address of Pledgor. If Pledgor has prepaid mailing costs and requested that any notice of termination be sent by registered or certified mail with return receipt requested, notification will be the requested method, sent to the last known address of Pledgor. Further, Pledgee shall extend Pledgor's right of redemption for a period of 10 days from the date of mailing the notice. If the pledged article is not redeemed within that 10-day period, Pledgee shall become vested with all right, title, and interest of Pledgor, or _____ *[his or her]* assigns, to the pledged property, to hold and dispose of as

_____ [his or her] own property subject to the provisions of the California Pawnbroker Law.

Representations, Warranties, and Waivers

5. Pledgor represents and warrants that _____ [he or she] is the owner or agent of the owner of the pledged property, that it is free and clear of all liens and encumbrances, and that _____ [he or she] is legally authorized to pledge this property. Pledgee shall not be liable for loss or damage to the pledged property resulting from burglary, theft, robbery, fire, water, acts of God, or civil disturbance. Pledgee represents that no insurance is carried for the above perils, in favor of or for the benefit of Pledgor. If Pledgor's representation and warranty regarding clear title is false, Pledgee may, at _____ [his or her] option, pay liens or charges due or to become due on or against pledged property, and the amount paid shall be added to the loan secured by this Agreement. This contract and the pledged property may be assigned by Pledgee without notice to Pledgor.

Repayment

6. On payment of the loan, compensation, and charges and presentation of Pledgor's copy of this Pledge Agreement to Pledgee, or _____ [his or her] assigns, Pledgee shall deliver the pledged property to Pledgor or _____ [his or her] agent, or, if Pledgor's copy of the Pledge Agreement bears the guaranteed endorsement of Pledgor, to its bearer.

Executed on _____ [date].

[The following notice must be in at least 8-point boldface type and be circumscribed by a box and must appear immediately above the space for the borrower's signature (Fin. Code § 21201):]

You may redeem the property you have pledged at any time until the close of business on _____ [due date specified above in agreement or insert date four months from date loan begins]. To redeem, you must pay the amount of the loan and the applicable charges that have accrued through the date on which you redeem.

PLEDGOR

_____ [signature of pledgor]

[typed name]

PLEDGEE

_____ [signature of pledgee]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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32-102B California Legal Forms--Transaction Guide § 102B.201

§ 102B.201 Notice of Termination of Loan Period and 10-Day Extension of Redemption Right

[1] Comment

[a] Use of Form

This notice may be used by a pawnbroker to notify a pledgor/borrower that the four-month loan period has expired and that the pawnbroker is extending for 10 days (from the date the notice is mailed) the pledgor's right to redeem pledged personal property [see *Fin. Code § 21201*]. If the property is not redeemed during the extended redemption period, all right, title, and interest in the pledged property vests in the pawnbroker [*Fin. Code § 21201*].

[b] Notice Requirements

If any pledged property is not redeemed during the original four-month loan period, and the borrower and pawnbroker do not agree in writing to extend the loan period, the pawnbroker must give the borrower written notice that the loan period has terminated and that the borrower's right of redemption is being extended for a 10-day period. If the pawnbroker fails to notify the borrower within 30 days after expiration of the loan period, the pawnbroker may not charge interest from the day after expiration of the 30-day period [*Fin. Code § 21201*].

The notice must be sent a means for which verification of mailing or delivery of the notification can be provided by the pawnbroker. Alternatively, if the borrower has prepaid mailing costs and requested that any notice of termination of the loan period be sent by registered or certified mail with return receipt requested [see *Fin. Code § 21200.5*], the pawnbroker must send the notice by the requested method [*Fin. Code § 21201*]. In any event, the notice must be sent to the last known address of the pledgor [*Fin. Code § 21201*].

[c] Preparation Fee

The pawnbroker may charge a fee of up to \$2 for services and costs pertaining to the preparation of the notice, in addition to any other allowed charges [*Fin. Code § 21201.2*].

[2] FORM**Notice of Termination of Loan Period and 10-Day Extension of Redemption Right****NOTICE OF TERMINATION OF LOAN PERIOD**

TO: _____ [name of pledgor]
 _____ [street address]
 _____ [city, state, zip]

YOU ARE HEREBY NOTIFIED that the Loan Period during which you were required to repay your loan in full in order to redeem the personal property pledged to the undersigned as security for a loan dated _____, has terminated. HOWEVER, YOUR RIGHT TO REDEEM THE PROPERTY IS EXTENDED FOR A PERIOD OF 10 DAYS FROM THE DATE THIS NOTICE IS MAILED. If you do not redeem the property by paying your loan in full, plus all accrued interest and charges, on or before _____ [date 10 days after date notice was mailed], all right, title, and interest in the pledged property vests in the undersigned.

[The following statement must be included in the 10-day notice (Fin. Code § 21201):]

If the tenth day falls on a day when the pawnshop is closed, the time period is extended to the next day that the pawnshop is open.

[Continue with the following:]

Dated: _____

_____ [name of pledgee]
 _____ [signature]
 _____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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32-102B California Legal Forms--Transaction Guide § 102B.202

§ 102B.202 Pawnbroker's Report of Acquisition of Tangible Personal Property

[1] Comment

[a] Use of Form

This form is a report of the acquisition of tangible personal property by a pawnbroker. A pawnbroker [see *Fin. Code § 21000*(definition)] is required to report the receipt or purchase of tangible personal property [*Fin. Code § 21208*; see *Bus. & Prof. Code § 21627* ("tangible personal property" defined)]. This is the official form provided by the Department of Justice for this purpose [see *Fin. Code § 21208*].

Copies of this form may be obtained from local police and sheriff's departments or from the Department of Justice [see *Fin. Code § 21208*].

[b] Reporting Requirements

Every pawnbroker must report daily, or on the first working day after receipt or purchase, all descriptions of all property received in pledge or purchased as tangible personal property, in whatever quantity received [*Fin. Code § 21208*; see *Bus. & Prof. Code § 21627* (tangible personal property)]. This includes property purchased as tangible personal property at wholesale, tangible personal property taken in trade, or tangible personal property taken in for sale or possessed on consignment for sale [*Fin. Code § 21208*]. The failure to comply with the reporting requirements is a misdemeanor [*Fin. Code § 21209*].

If the property is received within the territorial limits of an incorporated city, the report must be submitted to the police chief executive of the city or his or her designee. If the property is received outside the territorial limits of an incorporated city, the report must be submitted to the county sheriff or his or her designee [*Fin. Code § 21208*]. Reports should be filed by mail, unless the pawnbroker and the officer authorized to receive the report agree to the contrary [*Fin. Code § 21208*].

[2] FORM

Pawnbroker's Report of Acquisition of Tangible Personal Property

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Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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32-102B California Legal Forms--Transaction Guide §§ 102B.203-102B.209

[Reserved]

§§ 102B.203[Reserved]



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PART IV. FORMS
B. Finance Lender Transactions

32-102B California Legal Forms--Transaction Guide § 102B.210

§ 102B.210 Loan Statement Given by Finance Lender

[1] Comment

[a] Use of Form

This form is an example of the type of loan statement that a finance lender must deliver to a borrower when the transaction is subject to the Finance Lenders Law [see *Fin. Code* § 22337(a)]. It is normally accompanied by a loan agreement, a security agreement, and any other documents supporting the loan transaction. The finance lender must also provide the borrower with a statement regarding the involvement (if any) of a broker in the transaction [see *Fin. Code* § 22337(b); see also § 102B.211]. If a licensed broker [see *Fin. Code* § 22004 (definition)] has negotiated or performed any other act as a broker in connection with the loan transaction, the broker must provide a separate loan statement [*Fin. Code* § 22338(a); see § 102B.212].

Personal property loan agreements do not significantly differ from other forms of consumer and commercial loan agreements, and therefore are not repeated in this chapter. For discussion and forms of loan agreements for consumer installment sales, see Volume 9, Chapter 45, *Consumer Installment Loans and Credit Sales*. For discussion and forms of commercial loans, see Volume 9, Chapter 43, *Commercial Loans*.

Generally, a loan made by a finance lender is accompanied by a security agreement covering the collateral or goods purchased with the loan proceeds. For discussion and forms of secured transactions, see Volume 9, Chapter 42, *Secured Transactions*.

[b] Content Requirements

A finance lender must deliver to the borrower, at the time the loan is made, a statement showing in clear and distinct terms the name, address, and license number of the finance lender, and of any broker involved in the transaction. The statement must also show the date, amount, and maturity of the loan contract, how and when it is repayable, the nature of any security for the loan, and the agreed rate of charge or the annual percentage rate pursuant to Regulation Z of the federal Truth in Lending Law [*Fin. Code* § 22337(a); see 12 C.F.R. § 226.1 et seq. (Regulation Z); see also Ch. 45,

Consumer Installment Loans and Credit Sales].

If the loan refinances a retail installment contract subject to the Unruh Act [*Civ. Code § 1801 et seq.*] that is held by the finance lender (or its affiliates or subsidiaries), and if that refinance loan takes a security interest in the borrower's principal residence, the loan must have a principal amount of \$5,000 or more, and the loan statement must contain a special statutory notice that warns the borrower of the consequences of his or her default under the refinance loan [*Fin. Code § 22341(a)(3)*]. That notice is set out separately as § 102B.215, but must be incorporated into the following form under the circumstances described above.

Additionally, the statement must contain the following [*10 Cal. Code Reg. § 1454(a)* (referring to former *Fin. Code §§ 22473, 24473*)]:

- (1) The name and address of the borrower;
- (2) A statement of the actual amount of cash received and retained by the borrower and a statement of any funds (other than any "excess charges") paid to third persons pursuant to the borrower's written instructions [*see Fin. Code §§ 22306, 22250(b)* (prohibition of "excess charges" for consumer loans under \$5,000)];
- (3) A statement of any fees, charges, costs, insurance premiums, or other sums paid or to be paid on behalf of the borrower at the time the loan is made. If the loan is secured by real property and the loan proceeds were distributed to an escrow holder, a copy of the escrow holder's closing statement satisfies this requirement;
- (4) A statement that the borrower will have the right to make payments in advance, in any amount, on any loan contract, at any time [*see Fin. Code § 22337(c)*; *see also* [c][ii], *below*];
- (5) A statement, in 12-point boldface capital letters, advising the borrower to contact the Department of Corporations for information [*see 10 Cal. Code Reg. § 1454(a)(5)*];
- (6) A statement indicating that the loan is made pursuant to the Finance Lenders Law.

Only items (1), (5), and (6), above, apply to open-end loan agreements [*10 Cal. Code Reg. § 1454(b)*].

[c] Finance Lender's Responsibilities**[i] Statement Concerning Participation of Broker**

A finance lender must obtain a signed statement from the borrower indicating whether any person has performed any act as a broker in connection with the making of the loan. If the borrower indicates that a broker or other person did participate, then the finance lender must obtain a full statement of all sums paid or payable to the broker or the other person [*Fin. Code § 22337(b)*]. For further discussion and a form of that statement, see § 102B.211.

[ii] Advance Payments and Receipts for Payments

A finance lender must allow a borrower to make advance payments in any amount on any loan contract at any time. The finance lender may apply the payment first to any agreed prepayment penalty, then to all charges due, including charges at the agreed rate or rates up to the date of payment. For consumer loans of under \$2,500, the charge must not exceed the statutory maximum [*Fin. Code § 22337(c)*; *see Fin. Code §§ 22303, 22304*(maximum charges)].

The finance lender must also give a receipt for any cash payment on any loan account to the person making the payment or the person requesting the receipt at the time the payment is made. The receipt must be plain and complete, showing

the total amount received and identifying the loan contract to which the payment is applied [*Fin. Code* § 22337(d)].

At the time a finance lender first requires or accepts any fee or any signed instrument from a potential borrower, the finance lender must deliver or cause to be delivered a statement to the potential borrower (or to any one of them) showing in clear and distinct terms the name, address, and license number of the finance lender and of the broker, if any [*Fin. Code* § 22337(f); see § 102B.213].

[iii] Lender's Duties on Repayment by Borrower

On repayment of any loan in full, the finance lender must do all of the following [*Fin. Code* § 22337(e)]:

- Release all security held for that loan.
- Endorse and return any certificate of ownership.
- Cancel or plainly mark "paid" the instrument evidencing the debt, and return it to the borrower or person making the final payment.

The finance lender need not return a document if [*Fin. Code* § 22337(e)]:

- It is a part of the court record in any action;
- It was delivered to a third person for the purpose of carrying out its terms; or
- It is a security agreement that secures any other indebtedness of a borrower to the finance lender.

If the finance lender has taken a trust deed on real property as security for a loan that has subsequently been paid in full, the lender must deliver a duly executed request for reconveyance to the trustor or trustee for the purpose of recording a reconveyance [*Fin. Code* § 22337(e)].

A termination statement, given by the finance lender to the borrower pursuant to *Com. Code* §§ 9512 and 9513, constitutes a release of security when a financing statement has been filed pursuant to the Commercial Code [*Fin. Code* § 22337(e); see *Com. Code* § 9501; see also *Ch. 42, Secured Transactions*, §§ 42.211 (financing statement), 42.214 (termination statement)].

[2] FORM

Loan Statement Given by Finance Lender

LOAN STATEMENT

BORROWER: The following information is provided to you pursuant to the California Finance Lenders Law [*Fin. Code* § 22000 *et seq.*] and its implementing regulations [*10 Cal. Code Reg.* § 1404 *et seq.*], which govern the Lender's activities.

Finance Lender Information

1. _____ [*name of finance lender*] ("Lender")
 _____ [*address*]
 License Number: [*license number*]

[Include the following and renumber remaining paragraphs if broker is involved in making of loan:]

Broker Information

2. _____ [name of broker]
_____ [address]
License Number: [license number]

[Continue with the following:]

Borrower Information

2. Borrower: _____ [name of borrower] ("Borrower")
Residence: _____ [address]

Loan Information

3. (a) Date of making of loan: _____.
(b) Amount of loan: \$ _____.
(c) Maturity of loan: _____ months.
(d) Payable in _____ installments of \$ _____ on a [monthly or other] basis.
(e) Nature of security for loan: [describe collateral].
(f) Annual percentage rate (the cost of your loan as a yearly rate): _____ percent.
(g) Finance charge (the dollar amount the loan will cost you, excluding additional fees listed below): \$ _____.

Receipt and Distribution of Loan Funds

4. Of the total loan amount indicated in Paragraph (3)(b), \$ _____ was received by Borrower in cash.
_____ [Add if applicable: Pursuant to Borrower's written instructions, \$ _____ was
paid to _____ (a third party or third parties)].

Additional Fees

5. The following additional fees have been paid by, or on behalf of, Borrower:
- (a) \$ _____ for loan costs.
 - (b) \$ _____ for credit insurance premiums.
 - (c) \$ _____ for [specify nature of any charges].

Advance Payments

6. Borrower has the right to make payments in advance and in any amount at any time.

Further Information

[The following statement must be printed in not less than 12-point bold face capital letters]:

7. FOR INFORMATION CONTACT THE DEPARTMENT OF CORPORATIONS, STATE OF CALIFORNIA.

Executed on _____ *[date]*.

LENDER

_____ *[signature of finance lender]*
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102B PAWNBROKERS, FINANCE LENDERS, AND SECONDHAND GOODS DEALERS
PART IV. FORMS
B. Finance Lender Transactions

32-102B California Legal Forms--Transaction Guide § 102B.211

§ 102B.211 Borrower's Statement of Broker Involvement

[1] Comment

[a] Use of Form

This form is a statement that a finance lender may provide to a borrower to permit the borrower to indicate whether or not a broker was involved in the loan transaction. This type of borrower's statement must be used when the loan transaction is subject to the Finance Lenders Law [*see Fin. Code § 22000 et seq.*]. Under the Law, a "broker" is a person engaged in the business of negotiating or performing acts in connection with loans made by finance lenders [*Fin. Code § 22004*].

[b] Requirement of Statement

A finance lender must obtain a signed statement from the borrower indicating whether any person has performed any act as a broker in connection with the making of the loan [*Fin. Code § 22337(b)*]. The statute does not specify when this statement must be obtained, but it is advisable to obtain the statement at the same time as any other loan documents are executed by the borrower. If the borrower indicates that a broker or some other person did participate, the finance lender must obtain a full statement of all sums paid or payable to the broker or other person [*Fin. Code § 22337(b)*].

The finance lender must keep these statements for three years from and after the date the loan has been paid in full, matured according to its terms, or charged off [*Fin. Code § 22337(b)*].

[2] FORM

Borrower's Statement of Broker Involvement

BORROWER'S STATEMENT OF BROKER PARTICIPATION

This statement is made pursuant to *Section 22337(b) of the California Financial Code*, and relates to the loan made by

_____ [name of lender] to the undersigned Borrower on _____ [date] in the amount of \$ _____. The Borrower states that _____ [no person performed any act or _____ (name) ("Broker") acted or _____ (name and title of non-broker) performed one or more acts] as a broker in connection with the making of the loan.

[Add the following if broker or other person participated:]

The following sums [have been paid or are payable] to _____ [name of person participating as broker] in connection with this loan transaction:

(a) \$ _____ [state amount] for [reason for payment].

(b) \$ _____ [state amount] for [reason for payment].

No other sums have been paid or are payable in connection with this loan transaction

Executed on _____ [date].

BORROWER

_____ [signature of borrower]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesGeneral Overview



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PART IV. FORMS
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32-102B California Legal Forms--Transaction Guide § 102B.212

§ 102B.212 Loan Statement Given by Broker

[1] Comment

[a] Use of Form

This form is an example of the loan statement that must be given by a broker licensed under the Finance Lenders Law to a borrower when the broker has negotiated or performed any act in connection with a loan made by a licensed finance lender [*see Fin. Code §§ 22004* ("broker" defined), 22338(a) (statement requirement)]. For a similar loan statement that a finance lender must prepare and deliver to the borrower, see § 102B.210 [*see Fin Code § 22337(a)*].

At the time of the final negotiation or loan arrangement by a licensed broker, the broker must deliver a loan statement to the borrower, or if more than one borrower, to any one of them [*Fin. Code § 22338(a)*]. The broker must also deliver a copy of the statement to the finance lender [*Fin. Code § 22338(b)*].

[b] Content Requirements

The statement must show, in clear and distinct terms, the name, address, and license number of the broker and of the finance lender. The statement must also show the date, the amount, and the terms of the agreement with the broker, and all amounts paid or to be paid to the broker and to any other person other than the finance lender [*Fin. Code § 22338(a)*].

If the loan refinances a retail installment contract subject to the Unruh Act [*Civ. Code § 1801 et seq.*] that is held by the broker (or its affiliates or subsidiaries), and if that refinance loan takes a security interest in the borrower's principal residence, the loan must have a principal amount of \$5,000 or more, and the loan statement must contain a special statutory notice that warns the borrower of the consequences of his or her default under the refinance loan [*Fin. Code § 22341(a)(3)*]. That notice is set out separately as § 102B.215, but should be included in the following form under the circumstances described above.

Additionally, the statement must contain the following [*10 Cal. Code Reg. § 1454(a)*] (referring to former *Fin. Code §§*

22473, 24473)]:

- (1) The name and address of the borrower;
- (2) A statement of the actual amount of cash received and retained by the borrower and a statement of any funds (other than any "excess charges") paid to third persons pursuant to the borrower's written instructions [*see Fin. Code §§ 22306, 22250(b)*] (prohibition of "excess charges" for consumer loans under \$5,000);
- (3) A statement of any fees, charges, costs, insurance premiums, or other sums paid or to be paid on behalf of the borrower at the time the loan is made. If the loan is secured by real property and the loan proceeds were distributed to an escrow holder, a copy of the escrow holder's closing statement satisfies this requirement;
- (4) A statement that the borrower will have the right to make payments in advance, in any amount, on any loan contract, at any time [*see Fin. Code § 22337(c)*];
- (5) A statement, in 12-point boldface capital letters, advising the borrower to contact the Department of Corporations for information [*see 10 Cal. Code Reg. § 1454(a)(5)*];
- (6) A statement indicating that the loan is made pursuant to the Finance Lenders Law.

Only items (1), (5), and (6), above, apply to open-end loan agreements [*10 Cal. Code Reg. § 1454(b)*].

[c] Additional Responsibilities of Broker

[i] Broker Identification Statement

At time the broker first requires or accepts any signed instrument, or the payment of any fee, from a potential borrower or borrowers, the broker must deliver a statement to the potential borrower or borrowers showing in clear and distinct terms the broker's name, address, and license number [*Fin. Code § 22338(e)*; *see § 102B.214*].

[ii] Receipt for Payment

The broker must also deliver to the person making any payment that is given to and retained by the broker a plain and complete receipt for each payment made. Each receipt must be delivered at the time the payment is made, and must show the total amount received and identify the brokerage agreement and loan contract on which the payment is applied. If the payment is made by a person other than the finance lender, a copy of the receipt must be delivered to the finance lender [*Fin. Code § 22338(c)*].

[iii] Finance Lender Compliance

The broker must ensure that the finance lender complies with the provisions of *Financial Code Section 22337(e)* (governing repayments of loans) when the borrower pays the loan in full [*Fin. Code § 22338(d)*; *see § 102B.210[c][iii]*].

[2] FORM

Loan Statement Given by Broker

LOAN STATEMENT

BORROWER: The following information is provided to you pursuant to the California Finance Lenders Law [*Fin.*

Code §§ 22000-22780] and its implementing regulations [10 Cal. Code Reg. §§ 1404-1570], which govern the Lender's activities.

Broker Information

1. _____ [name of broker] ("Broker")
 _____ [address]
 License Number: [license number]

Finance Lender Information

2. _____ [name of finance lender]
 _____ [address]
 License Number: [license number]

Borrower Information

3. Borrower: _____ [name of borrower] ("Borrower")
 Residence: _____ [address]

Loan Information

4. (a) Date of making of loan: _____.
 (b) Amount of loan: \$ _____.
 (c) Maturity of loan: _____ months.
 (d) Payable in _____ installments of \$ _____ on a [monthly or other] basis.
 (e) Nature of security for loan: [describe collateral].
 (f) Annual percentage rate (the cost of your loan as a yearly rate): _____ percent.
 (g) Finance charge (the dollar amount the loan will cost you, excluding additional fees listed below): \$ _____.

Receipt and Distribution of Loan Funds

5. Of the total loan amount indicated in Paragraph (4)(b), \$ _____ was received by Borrower in cash.
 _____ [Add if applicable: Pursuant to Borrower's written instructions, \$ _____ was paid to _____ (a third party or third parties)].

Additional Fees

6. The following additional fees have been paid by, or on behalf of, Borrower:
 (a) \$ _____ for loan costs.
 (b) \$ _____ for credit insurance premiums.
 (c) \$ _____ for [specify nature of any charges].

Advance Payments

7. Borrower has the right to make payments in advance and in any amount at any time.

Further Information

[The following statement must be printed in not less than 12-point bold face capital letters]:

8. FOR INFORMATION CONTACT THE DEPARTMENT OF CORPORATIONS, STATE OF CALIFORNIA.

Executed on _____[*date*].

BROKER

_____[*signature of broker*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewContracts LawSales of GoodsGeneral OverviewContracts LawTypes of
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DIVISION VII: PERSONAL TRANSACTIONS
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 PART IV. FORMS
 B. Finance Lender Transactions

32-102B California Legal Forms--Transaction Guide § 102B.213

§ 102B.213 Finance Lender's Statement of Name, Address, and License Number of Lender and Broker**[1] Comment--Use of Form**

This form is a disclosure statement, to be delivered to a potential borrower, showing the name, address, and license number of the finance lender with whom the potential borrower is negotiating. The finance lender is required to deliver the statement, or cause it to be delivered, to the potential borrower when the lender first requires or accepts any signed instrument or fee. If there are two or more potential borrowers, the finance lender must deliver the statement to any one of them. If a broker is involved in the transaction, the statement must also include the broker's name, address, and license number [*Fin. Code § 22337(f); see § 102B.214* (similar form for broker disclosure statement)].

In addition to providing the information required by statute, this form serves as a receipt for the instrument or fees received by the finance lender. The finance lender should retain a copy of the statement, signed by the potential borrower, for at least three years after making the final entry on the finance loan [*Fin. Code § 22157*].

[2] FORM**Finance Lender's Statement of Name, Address, and License Number of Lender and Broker**

STATEMENT OF NAME, ADDRESS, AND LICENSE NUMBER OF FINANCE LENDER
 [add if lender is involved with transaction: AND BROKER]

Received from _____ [name of potential borrower] by _____ [name of finance lender], of _____ [complete address], finance lender license number _____, on the date shown below:

[describe signed instrument or fee received].

[If broker is participating, add: The broker involved with this matter is _____ (name of broker), of _____ (address of broker), broker's license number _____.]

_____ Dated:

_____ [*signature of finance lender*]
[*typed name*]

I acknowledge receipt of a copy of this statement.

_____ [*signature of potential borrower*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawBank ActivitiesGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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 B. Finance Lender Transactions

32-102B California Legal Forms--Transaction Guide § 102B.214

§ 102B.214 Broker's Statement of Name, Address, and License Number of Finance Lender and Broker**[1] Comment--Use of Form**

This form is a disclosure statement, to be delivered to a potential borrower, showing the name, address, and license number of the broker and finance lender with whom the potential borrower is negotiating. The broker is required to deliver the statement to the potential borrower or borrowers when the broker first requires or accepts any signed instrument or fee [*Fin. Code* § 22338(e); see § 102B.213 (similar form applicable to finance lenders)].

Note that statutory requirements for brokers differs slightly from those applicable to finance lenders. The broker disclosure requirement omits the language permitting the licensee to "cause" the statement to be delivered to the borrower, and requires delivery to the "borrower or borrowers," rather than to "any one" of the borrowers if there are more than one [*compare Fin. Code* §§ 22337(f) (finance lenders), 22338(e) (brokers)].

In addition to providing the information required by statute, this form serves as a receipt for the instrument or fees received by the broker. The broker should retain a copy of the statement, signed by the potential borrower, for at least three years after making the final entry on the finance loan [*Fin. Code* § 22157].

[2] FORM**Broker's Statement of Name, Address, and License Number of Finance Lender and Broker**

STATEMENT OF NAME, ADDRESS, AND LICENSE NUMBER OF BROKER AND FINANCE LENDER

Received from _____ [*name of potential borrower*] by _____ [*name of broker*], of _____ [*complete address*], broker license number _____, on the date shown below:

[*describe signed instrument or fee received*].

The finance lender involved with this matter is: _____ [*name of finance lender*], of

_____[*address of finance lender*], finance lender's license number _____.
_____. Dated:

_____[*signature of broker*]
[*typed name*]

I acknowledge receipt of a copy of this statement.

_____[*signature of potential borrower*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesGeneral Overview



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B. Finance Lender Transactions

32-102B California Legal Forms--Transaction Guide § 102B.215

§ 102B.215 Notice That Borrower's Home Is Security for Loan to Refinance Retail Installment Contract

[1] Comment

[a] Use of Form

This form is a notice that must be given to a borrower when a licensee under the Finance Lenders Law makes a loan to refinance a retail installment contract subject to the Unruh Act [*see Civ. Code § 1801 et seq.*] that is held by the licensee (or its affiliates or subsidiaries), if the licensee acquires a security interest in the borrower's principal residence under the refinance loan [*Fin. Code § 22341(a)(3)*].

For a provision that must be included in the loan documents for a refinance loan to disclose a balloon payment, see § 102B.216.

[b] Notice Requirements

[i] When Notice Is Required

For a refinance loan of this type, the licensee may not take a security interest in real property that is the principal residence of the borrower unless the loan has a principal amount of at least \$5,000, and the statutory notice set forth below is given to the borrower [*Fin. Code § 22341(a)(3)*]. Additionally, any loan made by a finance lender to refinance a retail installment contract subject to the Unruh Act and held by the finance lender (or its affiliates or subsidiaries), whether or not the loan is secured by the borrower's personal residence, may be made by the lender only if certain conditions are satisfied [*see Fin. Code § 22341(a)*; *see also* [c], *below*].

[ii] Placement and Appearance of Notice

The statutory notice reproduced below must be incorporated into the loan statement that a broker is required to give to a borrower at the time the final negotiation or arrangement is made [*Fin. Code § 22341(a)(3)*; *see Fin. Code § 22338(a)* (broker's loan statement); *see also* § 102B.212]. Although the statute does not specifically require inclusion of this

notice in the finance lender's loan statement [*see Fin. Code § 22337(a)* (finance lender's loan statement); *see also § 102B.210*], the language of the balance of the statute (making it applicable to all licensees) would seem to make its requirements applicable to finance lenders when making refinance loans of the kind described [*see Fin. Code § 22341(a)(3)*].

The notice must be printed in not less than 14-point bold type, must be set apart from the rest of the statement by a border, and must appear directly above a signature block that must be signed by the borrower. It must also must be written in the same language, for example, Spanish, as used in the borrower's loan documents. A security interest in the borrower's principal residence as described above that is taken without this required prior notice and without the borrower's signature, is void and unenforceable [*Fin. Code § 22341(a)(3)*].

[c] Requirements for Loans Refinancing Retail Installment Contracts

[i] Conditions for Making Loan

A licensed finance lender may not make a loan to refinance a retail installment contract subject to the Unruh Act [*Civ. Code § 1801 et seq.*] that is held by the lender (or its subsidiaries or affiliates) unless all of the following conditions are met [*Fin. Code § 22341(a)*]:

- (1) The buyer must have been making installment payments required by the retail installment contract for a period of at least 90 days, and the contract must have a term of least 180 days and must not provide for any scheduled installment that is more than twice the amount of any other scheduled installment;
- (2) The loan must provide for additional proceeds (other than for insurance) in an amount that is at least equal to the outstanding principal balance of the retail installment contract, and must provide for payment in full of the retail installment contract;
- (3) If the security interest is in real property that is the principal residence of the borrower, the loan must have a principal amount of at least \$5,000, and the required statutory notice must be given to the borrower [*see [b], above*];
- (4) The finance lender must not sell, attempt to sell, or agree to sell, any goods or services to the borrower (other than credit insurance [*see Fin. Code § 22314*] and insurance required by the finance lender to protect its security interest) until the loan has been in effect for at least 30 days. The amount of insurance required by the finance lender to protect its security interest must not exceed the lesser of the principal amount of the loan and the replacement value of the security as determined by the insurer;
- (5) A finance lender that is an assignee of the retail installment contract must continue to be subject under the loan to all equities and defenses of the borrower against the seller arising out of the sale, notwithstanding an agreement to the contrary;
- (6) If the loan has a principal amount of less than \$10,000, it must not provide for any scheduled installment that is more than twice the amount of any other scheduled installment [*but see Fin. Code § 22341(d)*] (requirement does not apply to open-end loans);
- (7) If the loan has a principal amount of \$10,000 or more and provides for any scheduled installment that is more than twice the amount of any other scheduled installment, it must contain a provision prescribed by statute disclosing the balloon payment. If the borrower defaults in the payment of any balloon payment, the borrower must be given an absolute right to obtain a new payment schedule; installment amounts under the new schedule must not be substantially greater than the average of preceding installments unless agreed to by the buyer [*see § 102B.216; but see Fin. Code § 22341(d)* (requirement does not apply to open-end loans)].

[ii] Effect of Unruh Act

A refinance loan made pursuant to the requirements outlined above is subject to the Finance Lenders Law and not to the Unruh Act [*Fin. Code § 22341(b)*; *see Civ. Code § 1801 et seq.*]. However, the validity of the underlying retail installment contract under the Unruh Act may affect enforceability of the refinance loan. Under the Unruh Act, a contract for goods may not provide for a security interest in real property if the primary goods sold are not to be attached to the real property [*Civ. Code § 1804.3(b)*]. This type of invalid security interest may not serve as consideration in whole or in part for a loan that refinances the underlying retail installment contract, notwithstanding any agreement to the contrary [*Fin. Code § 22341(e)*].

[2] FORM**Notice That Borrower's Home Is Security for Loan to Refinance Retail Installment Contract**

[If loan documents are in any language other than English, this notice must be written in that same other language. Also, the notice must be printed in at least 14-point bold type, must be set apart from the rest of the loan statement by a border, and must appear directly above a signature block to be signed by the borrower.]

WARNING TO BORROWER: IF YOU ACCEPT THIS LOAN, YOU WILL BE PUTTING UP YOUR HOME AS SECURITY. THIS MEANS THAT YOUR HOME COULD BE SOLD WITHOUT YOUR PERMISSION AND WITHOUT ANY COURT ACTION IF YOU MISS ANY PAYMENT AS REQUIRED BY THIS LOAN.

BORROWER

_____ [*signature of borrower*]
 [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Bank Activities General Overview Contracts Law Types of Contracts Installment Contracts



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DIVISION VII: PERSONAL TRANSACTIONS
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32-102B California Legal Forms--Transaction Guide § 102B.216

§ 102B.216 Notice of Balloon Payment in Loan to Refinance Retail Installment Contract Secured by Borrower's Principal Residence

[1] Comment

[a] Use of Form

This form is a notice of a balloon payment in a loan with a principal amount of \$10,000 or more made by a finance lender to refinance a retail installment contract subject to the Unruh Act [*Civ. Code § 1801 et seq.*] if the loan is held by the lender (or its subsidiaries or affiliates). For purposes of this requirement, a refinance loan has a "balloon payment" if it requires any scheduled installment payment that is more than twice the amount of any other scheduled installment [*Fin. Code § 22341(a)(7)*]. If the principal balance of the loan is less than \$10,000, the loan cannot require a balloon payment [*Fin. Code § 22341(a)(6)*]. These requirements do not apply to open-end loans [*Fin. Code § 22341(d)*].

Refinance loans by a finance lender of retail installment contracts held by the broker (or its subsidiaries or affiliates) cannot be made at all unless several conditions are satisfied [*see Fin. Code § 22341(a)*; *see § 102B.215[1][c]*].

[b] Rights of Borrower on Default

If the borrower defaults in the payment of any balloon payment, he or she must be given an absolute right to obtain a new payment schedule. The provision below advises the borrower of this right. Unless agreed to by the borrower, the installment amounts under the new schedule may not be substantially greater than the average of the preceding installments [*Fin. Code § 22341(a)(7)*].

[2] FORM

Notice of Balloon Payment in Loan to Refinance Retail Installment Contract Secured by Borrower's Principal Residence

The payment schedule contained in this loan requires that you make a balloon payment of \$[*amount of balloon payment*

], which is a payment of more than double the amount of the regular payments. You have an absolute right to obtain a new payment schedule if you default in the payment of any balloon payment.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsInstallment ContractsReal Property LawFinancingGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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32-102B California Legal Forms--Transaction Guide §§ 102B.217-102B.219

[Reserved]

§§ 102B.217[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102B PAWNBROKERS, FINANCE LENDERS, AND SECONDHAND GOODS DEALERS
PART IV. FORMS
C. Secondhand Dealer Transactions

32-102B California Legal Forms--Transaction Guide § 102B.220

§ 102B.220 Report of Acquisition of Secondhand Goods [Form JUS 123]

[1] Comment

[a] Use of Form

This form is the official form (California Department of Justice Form JUS 123) used to report the receipt or purchase of secondhand tangible personal property [see *Bus. & Prof. Code* § 21627(a), (b)] by a secondhand dealer [see *Bus. & Prof. Code* § 21626 ("secondhand dealer" defined)], or by a coin dealer [see *Bus. & Prof. Code* § 21626(b) (definition)]. The form is available from local police and sheriff's departments and from the Department of Justice [see *Bus. & Prof. Code* § 21633]. Particular jurisdictions may use slightly different forms [*Bus. & Prof. Code* § 21638; see *Miller v. Murphy* (1983) 143 Cal. App. 3d 337, 340-342, 191 Cal. Rptr. 740 (local governments free to require additional information in reports); but see *Malish v. City of San Diego* (2000) 84 Cal. App. 4th 725, 734-736, 101 Cal. Rptr. 2d 18 (requirements of local ordinance, which were "other than" identification and reporting requirements set forth in *Bus. & Prof. Code* § 21628 and related reporting statutes, were expressly prohibited by *Bus. & Prof. Code* §§ 21637, 21638)]. Pawnbrokers must also use this form to report their receipt of pledged property [see *Fin. Code* § 21208; see also § 102B.200].

Secondhand dealers trading in builders' tools are required to submit a true and complete copy of their register of transactions each day [see *Bus. & Prof. Code* §§ 21551, 21553]. Notwithstanding that requirement, many local jurisdictions will accept this report in lieu of a copy of the register.

[b] Reporting Requirement

Every secondhand dealer and every coin dealer must report daily, or on the first working day after receipt or purchase, all tangible personal property that the dealer has purchased, taken in trade or pawn, accepted for sale on consignment, or accepted for auctioning [*Bus. & Prof. Code* § 21628; see *Bus. & Prof. Code* § 21627 ("tangible personal property" defined); see also § 102B.50[2]], unless the property is exempt from this requirement [see *Bus. & Prof. Code* § 21629; see also § 102B.52]. Coin dealers engaging in fewer than 10 transactions per week in which dealer has purchased, taken in trade or in pawn, accepted for sale or consignment, or accepted for auctioning tangible personal property also must

report the required information [*Bus. & Prof. Code* § 21628(j)(3)]. The failure to do so is a misdemeanor [*Bus. & Prof. Code* § 21645]. However, notwithstanding the reporting requirements of *Bus. and Prof. Code* § 21628, transaction reports are not required to be submitted to the local law enforcement agency if the report of an acquisition of the same property from the same customer has been submitted within the preceding 12 months, except when submission of a report is specifically requested in writing by the local licensing authority [*Bus. & Prof. Code* § 21628.1].

Firearms are excepted from the reporting requirement of *Bus. & Prof. Code* § 21628 [*Bus. & Prof. Code* § 21628(l); 2009 Stats. Ch. 335, § 2; *see Bus. & Prof. Code* § 21828(k) (licensed firearms dealer is not exempt from reporting requirements of *Penal Code* § 12071)]. However, effective July 1, 2010, every secondhand dealer must, on the day of the transaction, electronically report to the Department of Justice, each firearm purchased, taken in trade, taken in pawn, accepted for sale on consignment, or accepted for auctioning [*Bus. & Prof. Code* § 21628.1(b), (e)]. The Department of Justice prescribes the reporting format [*Bus. & Prof. Code* § 21628.2(b)].

If the property is received within the territorial limits of an incorporated city, the dealer must submit the original and one copy of the form (which is prepared in triplicate) to the police chief executive of the city or his or her designee. If the property is received outside the territorial limits of an incorporated city, the submission must be made to the county sheriff or his or her designee [*Bus. & Prof. Code* § 21630]. Dealers must use existing forms and procedures until the Department of Justice and local law enforcement agencies develop a standard format for electronic reporting [*Bus. & Prof. Code* § 21628(j)(2); *see Bus. & Prof. Code* § 21628(j)(1) (electronic reporting to be developed by Department of Justice and local law enforcement agencies)]. The secondhand dealer must retain the third copy of the report in his or her place of business for three years [*Bus. & Prof. Code* § 21633].

[c] Content Requirements

The report must be legible, prepared in English, and completed to the extent applicable. It must also include all of the following [*Bus. & Prof. Code* § 21628]:

- The name and current address of the intended seller or pledgor of the property.
- The identification of the intended seller or pledgor [*see Bus. & Prof. Code* § 21628(b) (acceptable identification)].
- A complete and reasonably accurate description of serialized property, including the serial number and other identifying marks or symbols, owner-applied numbers, manufacturer's named brand, and model name or number.
- A complete and reasonably accurate description of nonserialized property, including size, color, material, manufacturer's pattern name (when known), owner-applied numbers and personalized inscriptions, and other identifying marks or symbols.
- A certification by the intended seller or pledgor that he or she is the owner of the property or has the authority of the owner to sell or pledge the property.
- A certification by the intended seller or pledgor that to his or her knowledge and belief the information is true and complete.
- A legible fingerprint taken from the intended seller or pledgor, as prescribed by the Department of Justice.

[d] Civil Liability for Removal or Alteration of Manufacturer Identification

A person who, with intent to defraud, sells or disposes of a mechanical or electrical device, appliance, contrivance, material, piece or apparatus, or equipment, from which the manufacturer's nameplate, serial number, or any other distinguishing number or identification mark has been removed, defaced, covered, altered, or destroyed, is liable to the manufacturer for the sum of \$500 per transaction, and to the purchaser for treble the actual damages sustained by the purchaser. This prohibition does not apply if the changes or alterations have been customarily made or done as an established practice in the ordinary and regular conduct of business by the original manufacturer, or his or her duly appointed direct representative, or under specific authorization from the original manufacturer [*Civ. Code* § 1710.1].

[2] FORM**Report of Acquisition of Secondhand Goods**

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102C LOST AND UNCLAIMED PROPERTY

32-102C California Legal Forms--Transaction Guide 102C.syn

§ 102C.syn Synopsis to Chapter 102C: LOST AND UNCLAIMED PROPERTY

§ 102C.01 California Sources

[1] California Statutes

[2] California Regulations

[3] California Attorney General Opinions

§§ 102C.02-102C.04 [Reserved]

§ 102C.05 Law Reviews

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§ 102C.07 Text References

[1] Matthew Bender Sources

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§ 102C.10 Applicable Laws

§ 102C.11 Found Personal Property

[1] Applicability of Civ. Code § 2080 et seq.

[a] In General; What Constitutes "Lost" or "Unclaimed" Property

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§ 102C.12 Estrays

[1] In General

[2] Rights and Responsibilities of Taker-Up

[3] Department's Attempts to Locate Owner

[4] Sale of Animal

§ 102C.13 Containers, Supplies, and Equipment Bearing Brand Name

§ 102C.14 Explosives

§ 102C.15 Unclaimed Goods Received by Common Carriers, Commission Merchants, Innkeepers, and Warehouse operators

§ 102C.16 Property Left With Hospital

§ 102C.17 Unclaimed Property in Possession of Receiver

§ 102C.18 Unclaimed Property Law

[1] In General

[2] Definitions

[a] "Business Association"

[b] "Banking Organization"

[c] "Escheat" and "Permanent Escheat"

[d] "Financial Organization"

[e] "Life Insurance Corporation"

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[3] Property Subject to Unclaimed Property Law

- [a] Deposits and Accounts With Banking Organizations
- [b] Deposits, Accounts, and Other Interests in Financial Organizations
- [c] Traveler's Checks
- [d] Written Instruments Owed by Banking or Financial Organization
- [e] Money Orders
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- [g] Wages or Salaries
- [h] Contents of Safe Deposit Boxes
- [i] Funds Owing Under Life Insurance Policies or Annuities
- [j] Property Distributable on Demutualization of Insurance Company
- [k] Dividends and Distributions on Shares, Bonds, or Other Securities
- [l] Intangible Interests in Business Associations
- [m] Property Distributable on Dissolution or Liquidation of Business
- [n] Property Held by Fiduciary
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- [p] Refunds Ordered by Court
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- [r] Employee Benefit Plan Distributions
- [s] Proposition 103 Insurance Rebates

[4] Property Exempt From Unclaimed Property Law

[5] Additional Conditions for Escheat of Intangible Property

[6] Additional Conditions for Escheat of Sums Payable on Money Orders, Traveler's Checks, and Similar Instruments

[7] Attempts to Locate Owner Prior to Escheat of Property

- [a] Notice to Owner Required

[b] Times for Mailing Notices

[c] Contents of Notice

[8] Report and Delivery of Property to Controller

[9] Holder's Right to Pay Owner and Seek Reimbursement

[10] Owner's Claim Against Controller

[11] Escheat Period Not Alterable

§§ 102C.19-102C.99 [Reserved]

§ 102C.100 Facts: Finder of Lost Property or Animal

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§ 102C.101 Facts: Holder of Unclaimed Property

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§ 102C.102 Facts: Receiver

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§ 102C.103 Facts: Holder of Property Subject to Escheat Under Unclaimed Property Law

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§ 102C.104 Documents Concerning Lost or Unclaimed Property

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§ 102C.105 Documents Concerning Property Subject to Escheat Under Unclaimed Property Law

Scope

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§ 102C.110 Determinations for Finder of Lost Property or Animal

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§ 102C.111 Determinations for Holder of Unclaimed Property.

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§ 102C.112 Determinations for Holder of Property Subject to Escheat Under Unclaimed Property Law

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§§ 102C.113-102C.119 [Reserved]

§ 102C.120 Disposal of Domestic Animal or Other Found Property

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§ 102C.121 Disposal of Estray

Scope

§ 102C.122 Disposal of Goods, Merchandise, or Other Property Received by Common Carrier, Commission Merchant, Innkeeper, or Warehouse Operator for Transportation or Safekeeping

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§ 102C.123 Disposal of Property Left With Hospital

Scope

§ 102C.124 Disposal of Funds in Hands of Receiver

Scope

§§ 102C.125-102C.129 [Reserved]

§ 102C.130 Notice Requirements for Holders of Property About to Escheat

Scope

§ 102C.131 Reporting Requirements

Scope

§ 102C.132 Payment and Delivery Requirements

Scope

§ 102C.133 Retention of Records

Scope

§§ 102C.134-102C.139 [Reserved]

§ 102C.140 Filing Claim

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§ 102C.141 Filing Suit

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§ 102C.150 Assuming Ownership of Found Animal

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§ 102C.151 Handling Claims Made After Disposal of Unclaimed Property

Scope

§ 102C.152 Handling Claims Made After Payment or Delivery of Escheated Property to Controller

Scope

§ 102C.153 Seeking Recovery or Reimbursement After Payment or Delivery of Escheated Property to Owner

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§§ 102C.154-102C.199 [Reserved]

§ 102C.200 Notice to Owner by Finder of Lost Property [Civ. Code § 2080]

[1] Comment

[a] Use of Form

[b] Obligation of Finder of Property

[2] FORM

Notice to Owner by Finder of Lost Property [Civ. Code § 2080]

§ 102C.201 Declaration by Finder of Lost Property Valued at \$100 or More [Civ. Code § 2080.1(a)]

[1] Comment

[a] Use of Form

[b] Effect of Declaration

[c] Finder's Claim to Property Not Claimed by Owner

[2] FORM

Declaration by Finder of Lost Property Valued at \$100 or More [Civ. Code § 2080.1(a)]

§ 102C.202 Notice to Director of Food and Agriculture of Taking Up of Estray [Food & Agric. Code § 17042]

[1] Comment

[a] Use of Form

[b] Form and Contents of Notice

[c] Rights and Responsibilities of Taker-Up; Persons Entitled to Take Up Estrays

[d] Duty to Care for and Report Estray After Taking Up

[e] Entitlement to Payment for Caring for Estray

[f] Purchase of Animal

[2] FORM

Notice to Director of Food and Agriculture of Taking Up of Estray [Food & Agric. Code § 17042]

§§ 102C.203-102C.209 [Reserved]

§ 102C.210 Notice of Sale of Goods, Merchandise, or Other Property Received by Common Carrier, Commission Merchant, Innkeeper, or Warehouse Operator [Civ. Code § 2081.1]

[1] Comment

[a] Use of Form

[b] Proceeds of Sale

[2] FORM

Notice of Sale of Goods, Merchandise, or Other Property Received by Common Carrier, Commission Merchant, Innkeeper, or Warehouse Operator [Civ. Code § 2081.1]

§ 102C.211 Demand for Proceeds of Sale of Goods, Merchandise, or Other Property Received by Common Carrier, Commission Merchant, Innkeeper, or Warehouse Operator [Civ. Code § 2081.2]

[1] Comment--Use of Form

[2] FORM

Demand for Proceeds of Sale of Goods, Merchandise, or Other Property Received by Common Carrier, Commission Merchant, Innkeeper, or Warehouse operator [Civ. Code § 2081.2]

§ 102C.212 Notice to Owner of Sale of Unclaimed Personal Property Left With Hospital [Civ. Code § 1862.5]

[1] Comment--Use of Form

[2] FORM

Notice to Owner of Sale of Unclaimed Personal Property Left With Hospital [Civ. Code § 1862.5]

§ 102C.213 Request for Proceeds of Sale of Personal Property Left With Hospital [Civ. Code § 1862.5]

[1] Comment

[a] Use of Form

[b] Failure to Claim Proceeds

[2] FORM

Request for Proceeds of Sale of Personal Property Left With Hospital [Civ. Code § 1862.5]

§ 102C.214 Notice of Unclaimed Funds Held by Receiver [Code Civ. Proc. § 570]

[1] Comment

[a] Use of Form

[b] Disposal of Funds Unclaimed at End of Notice Period

[2] FORM

Notice of Unclaimed Funds Held by Receiver [Code Civ. Proc. § 570]

§§ 102C.215-102C.219 [Reserved]

§ 102C.220 Notice to Owner by Holder of Property Soon to Escheat [Code Civ. Proc. §§ 1513.5, 1516(b), 1520(b)]

[1] Comment

[a] Use of Form

[b] Timing of Notice

[c] Form and Contents of Notice

[2] FORM

Notice to Owner by Holder of Property Soon to Escheat [Code Civ. Proc. §§ 1513.5, 1516(b), 1520(b)]

§ 102C.221 Annual Report of Unclaimed Personal Property [Code Civ. Proc. § 1530]

[1] Comment

[a] Use of Form

[b] Filing Formats

[c] Time of Filing

[d] Fees and Charges

[e] Interest and Dividends

[f] Payment or Delivery of Reported Property

[g] Penalties and Interest

[h] Enforcement Actions

[i] Inapplicability of Statute of Limitations

[2] FORM

Annual Report of Unclaimed Personal Property [Code Civ. Proc. § 1530]

§ 102C.222 Claim Form for Property Held by State Controller [Code Civ. Proc. § 1540]

[1] Comment

[a] Use of Form

[b] Persons Entitled to Make Claims

[c] Accompanying Documents

[d] Processing of Claims

[2] FORM

Claim Form for Property Held by State Controller [Code Civ. Proc. § 1540]

§ 102C.223 Holder's Claim for Reimbursement for Payment to Owner [Code Civ. Proc. § 1560]

[1] Comment

[a] Use of Form

[b] Holder's Right to Reimbursement

[2] FORM

Holder's Claim for Reimbursement for Payment to Owner [Code Civ. Proc. § 1560]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102C LOST AND UNCLAIMED PROPERTY

32-102C California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter discusses the rights and obligations of finders and holders of lost or unclaimed personal property, including stray animals. It includes forms and instructions for reporting found property to its owner and to the appropriate public officials, giving notice of sale by public auction of unclaimed property, and claiming the proceeds of unclaimed property sold at public auction.

Transactions to enforce liens on unclaimed property are covered in Ch. 102A, *Personal Property Liens* . Forms and procedures used by museums that are in possession of unclaimed property originally loaned to the museum [see *Civ. Code* § 1899 *et seq.*] are covered in Ch. 102E, *Sales and Loans of Artwork* . For discussion of the disposition of property left in the possession of landlords by paying guests or tenants [see *Civ. Code* § 1980 *et seq.*], see Ch. 35B, *Modification and Termination of Leases* .



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32-102C California Legal Forms--Transaction Guide § 102C.01

§ 102C.01 California Sources

[1] California Statutes

Return of lost containers, supplies, and equipment bearing a registered brand name. *Bus. & Prof. Code § 14425 et seq.*; *see also Food & Agric. Code § 34561* (dairy equipment).

Lost property. *Civ. Code § 2080 et seq.*

Unclaimed property left with common carrier, innkeeper, or warehouse operator. *Civ. Code § 2081 et seq.*

Fees of officers in sales of unclaimed property. *Civ. Code § 2082.*

Unclaimed property.

In general. *Code Civ. Proc. § 1300 et seq.*

Unclaimed property fund. *Code Civ. Proc. § 1310 et seq.*

Payments of claims from fund. *Code Civ. Proc. § 1335 et seq.*

Management of unclaimed property. *Code Civ. Proc. § 1360 et seq.*

Escheat proceedings. *Code Civ. Proc. § 1410 et seq.*

Disposition of unclaimed property. *Code Civ. Proc. § 1440 et seq.*

Unclaimed property law. *Code Civ. Proc. § 1500 et seq.*

Unclaimed property in federal custody. *Code Civ. Proc. § 1600 et seq.*

Stray animals. *Food & Agric. Code § 17001 et seq.*

Report of lost or stolen explosives. *Health & Safety Code § 12086.*

Lost public property issued to National Guard enlisted personnel. *Mil. & Vet. Code §§ 414-416.*

Appropriation of lost property by finder is theft. *Penal Code § 485.*

Unclaimed firearms in possession of governmental officer. *Penal Code § 12032.*

Unclaimed property found in regional park district. *Pub. Res. Code § 5561.5.*

Unclaimed property in possession of California Highway Patrol. *Veh. Code §§ 2414, 2415.*

Parked and abandoned vehicles. *Veh. Code § 22650 et seq.*

[2] California Regulations

Unclaimed Property Law.

In General. 2 *Cal. Code Reg. § 1150 et seq.*

Discontinuance of interest and dividends on inactive interests (accounts) must be based on contracts or statute. 2 *Cal. Code Reg. §§ 1170, 1171.*

Electronic Payment Programs. 2 *Cal. Code Reg. § 1155.100 et seq.*

Reporting. 2 *Cal. Code Reg. §§ 1161, 1165, 1170-1174.*

[3] California Attorney General Opinions

Controller's Waiver of Penalty Is Unconstitutional Gift of Public Funds. 70 *Ops. Cal. Atty. Gen.* 233 (1996) .

Unclaimed Property Law and Unclaimed Property Distributions. 58 *Ops. Cal. Atty. Gen.* 60 (1975) .

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law
Intestacy
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§§ 102C.02[Reserved]



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B. Secondary Sources

32-102C California Legal Forms--Transaction Guide § 102C.05

§ 102C.05 Law Reviews

Howell, *Finder's Keepers: Did the State Break the Law When it Seized Unclaimed Assets*, 22 *Cal. Law.* 15 (2002).

Ramasastri, *State Escheat Statutes and Possible Treatment of Stored Values, Electronic Currency, and Other New Payment Mechanisms*, 57 *Bus. Law.* 475 (2001).

Aprill, *Inadvertence and the Internal Revenue Code: Federal Tax Consequences of State Unclaimed Property Laws*, 62 *U. Pitt. L. Rev.* 123 (2000).

Comment, *Animal Law in California*, 12 *Pepperdine L. Rev.* 567 (1985).

Legal Topics:

For related research and practice materials, see the following legal topics:

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32-102C California Legal Forms--Transaction Guide § 102C.06

§ 102C.06 Annotations

Annot., Liability for Loss of Hat, Coat, or Other Property Deposited by Customer in Place of Business, 54 A.L.R.5th 393 (1997) .

Annot., Liability of Warehouseman or Other Bailee for Loss of Goods Stored at Other Than Agreed-on Place, 76 A.L.R.4th 883 (1990) .

Annot., Validity, Construction, and Application of Lost or Abandoned Goods Statutes, 23 A.L.R.4th 1025 (1983) .

Annot., Rights of One Who Acquires Lost or Stolen Traveler's Checks, 42 A.L.R.3rd 846 (1972) .

Legal Topics:

For related research and practice materials, see the following legal topics:

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32-102C California Legal Forms--Transaction Guide § 102C.07

§ 102C.07 Text References

[1] Matthew Bender Sources

California Legal Forms (Matthew Bender).

Ch. 35B, *Modification and Termination of Leases* .

Ch. 42, *Secured Transactions* .

Ch. 54, *Shipment of Property* .

Ch. 86, *Agreements for Professional Services* , §§ 86.124, 86.243 (auctioneers).

Ch. 102, *Bailments* .

Ch. 102A, *Personal Property Liens*.

Ch. 102D, *Registration and Transfer of Vehicles, Vessels, and Aircraft* .

Ch. 102E, *Sales and Loans of Artwork* .

CALIFORNIA FORMS OF PLEADING AND PRACTICE (Matthew Bender).

Ch. 252, *Escheat (Unclaimed Property)* .

Ch. 355, *Lost and Unclaimed Property* .

Ch. 356, *Lost Papers* .

Ch. 486, *Receivers* .

[2] Additional Text References

Witkin, Summary of California Law, vol. 13, *Personal Property*, §§ 36-45, 117-120 (10th ed. 2005).

Escheat & Abandoned Property Laws (American Society for Corporate Secretaries, 1999).

Legal Topics:

For related research and practice materials, see the following legal topics:

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32-102C California Legal Forms--Transaction Guide § 102C.08

§ 102C.08 Pamphlets

Guidelines for Claiming Unclaimed Property (California State Controller's Office) (available online).

Reporting Instructions for Holders of Unclaimed Property (California State Controller's Office) (available online).

Unclaimed Property Laws and Regulations (California State Controller's Office) (available online).

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 102C.09[Reserved]



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PART II. LEGAL BACKGROUND

32-102C California Legal Forms--Transaction Guide § 102C.10

§ 102C.10 Applicable Laws

Several sets of statutes govern lost and unclaimed property. The statutes governing the following are covered in this chapter:

- The rights and obligations of finders of lost and unclaimed personal property in general and the related duties of local officials are governed by *Civ. Code § 2080 et seq.*, discussed in § 102C.11, with related forms in §§ 102C.200 and 102C.201.
- The taking up and disposal of stray farm animals is covered in *Food & Agric. Code § 17001 et seq.*, discussed in § 102C.12, with a form for reporting a found animal to the Director of the Department of Food and Agriculture in § 102C.202.
- The disposal of unclaimed goods received by common carriers, commission merchants, innkeepers, and warehouse operators is covered in *Civ. Code § 2081 et seq.* and discussed in § 102C.15, with forms for notice of sale of those goods by the holder [see § 102C.210], and an owner's demand for proceeds [see § 102C.211].
- The handling of unclaimed property in the possession of hospitals, is governed by *Civ. Code § 1862.5*, discussed in § 102C.16, with a form notice from the hospital to the owner to claim the property in § 102C.212, and an owner's letter claiming the proceeds in § 102C.213.
- The handling of unclaimed property in the possession of a receiver, which must be transferred before the receiver can be discharged [see *Code Civ. Proc. § 570*], is discussed in § 102C.17, with a form for notice to be published before the receiver can report to the court in § 102C.214. For detailed discussion of receivers' duties, and related forms, See *California Forms Of Pleading And Practice*, Ch. 486, *Receivers* (Matthew Bender).
- The reporting and delivery of money and certain other items of personal property held by banks, insurance companies, and other businesses to the state controller is covered by the Unclaimed Property

Law, found in *Code Civ. Proc. § 1500 et seq.*, is discussed in § 102C.18, with related forms in § 102C.220 et seq.

Other statutes governing lost and unclaimed property are listed in the Research Guide, § 102C.01[1].

Return or sale of property intentionally abandoned by tenants and guests is governed by *Civ. Code § 1980 et seq.*, and addressed in Ch 35B, *Modification and Termination of Leases*.

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 102C.11 Found Personal Property

[1] Applicability of Civ. Code § 2080 et seq.

[a] In General; What Constitutes "Lost" or "Unclaimed" Property

Civ. Code § 2080 et seq. govern the handling of lost and unclaimed items of personal property by finders [see [2], *below*], and the disposition of that property by local officials [see [3], *below*]. Those provisions do not include definitions or guidelines for determining whether an item of property is "lost" or "unclaimed" for purposes of coverage under the statutes.

In one of the only reported cases interpreting these statutes, the court stated that the term "lost" is used in its "ordinary legal sense" in the statutes and has no special meaning [*People v. Stay (1971) 19 Cal. App. 3d 166, 172, 96 Cal. Rptr. 651*] . This case involved a person who was convicted of grand theft for gathering shopping carts from areas adjacent to supermarkets and offering to sell them back to the supermarkets for a "finder's fee" that was much higher than the rate normally charged by cart retrieval companies. In support of its finding that the carts gathered by the defendant had not been "lost" by the supermarkets within the meaning of *Civ. Code § 2080*, the court noted that the supermarkets were aware of the removal of the carts from their premises, the reason for the removal, the general identities of the persons removing the carts, and the approximate location of the carts [*People v. Stay (1971) 19 Cal. App. 3d 166, 174, 96 Cal. Rptr. 651*] .

A related statute defines "reasonable belief" (that property is lost) as actual knowledge or belief a prudent person would have without making an investigation (including any investigation of public records), except that if the finder has specific information indicating that an investigation would more probably than not reveal pertinent information and the cost of an investigation would be reasonable in relation to the probable value of the personal property involved, "reasonable belief" includes the actual knowledge or belief a prudent person would have if an investigation were made [see *Civ. Code § 1980(d)* (in context of property left after tenancy); see also §§ 102C.110 P 1(c), 102C.111, P 1(c) (transaction guide)].

[b] Inapplicability to Abandoned Property

The Civil Code provisions governing lost and unclaimed property do not apply to property that has been intentionally abandoned by its owner [*Civ. Code* § 2080.7]. The primary elements of abandonment are [*Stephens v. Mansfield* (1858) 11 Cal. 363, 366 ; *Peal v. Gulf Red Cedar Co.* (1936) 15 Cal. App. 2d 196, 199, 59 P.2d 183] :

- An intention to voluntarily relinquish possession; and
- An external act by which that intention is carried into effect.

Abandoned property, if not subject to escheat to the state of California [*see Code Civ. Proc.* § 1300 *et seq.*], becomes the property of the first person to exert dominion and control over it [*Richardson v. McNulty* (1864) 24 Cal. 339, 345] . Because a person who appropriates found property to his or her own use without making reasonable and just efforts to find the owner and restore the property to him or her may be charged with theft [*Penal Code* § 485], finders should follow the statutory procedures for disposition of lost property unless the nature of the property or the circumstances of finding it make it clear that the property has been abandoned.

[2] Obligations of Finder

A person who finds money, goods, things in action, or other personal property, or saves any domestic animal from harm, neglect, drowning, or starvation, is not bound to take charge of it, unless that person is otherwise required to do so by contract or law. However, a finder who does take charge of a lost item takes on the rights and responsibilities of a depositary for hire, and must exercise at least ordinary care to preserve the item [*Civ. Code* §§ 1852, 2080; *see Civ. Code* § 1851 *et seq.*; *see also* Ch. 102, *Bailments*]. A finder who takes possession of any money, goods, things in action, or other personal property, or saves any domestic animal from harm, neglect, drowning, or starvation, also must notify the owner, if known, within a reasonable time, and make restitution without any compensation other than a reasonable charge for saving and taking care of the property. In the case of a live domestic animal, the finder must provide for humane treatment of the animal. [*Civ. Code* § 2080].

If the property is worth \$100 or more and its owner is unknown to the finder or does not claim the property on being notified by the finder of its location, the finder must turn the property over to the police within a reasonable time. If the property was found in a city, it must be turned over to the city's police department. If it was found outside of city limits, it must be turned over to the appropriate county sheriff's department. On turning the property over to the police, the finder must make an affidavit (or declaration) [*see Code Civ. Proc.* § 2015.5] setting forth certain information concerning the finding of the property [*Civ. Code* § 2080.1(a); for a form for this declaration, *see* § 102C.201].

A person who finds lost property under circumstances that give him or her knowledge of or means of inquiry as to the true owner, and who appropriates the property to his or her own use or the use of another without first making reasonable and just efforts to find the owner and restore the property to him or her, is guilty of theft [*Penal Code* § 485].

[3] Disposition of Property by Police or Sheriff's Department

On receiving found property, the police or sheriff's department must notify the owner of the property, if the owner's identity is reasonably ascertainable, that the property has been found and where it may be claimed [*Civ. Code* § 2080.1(b)]. If the owner appears within 90 days after receipt of the property by the police or sheriff's department and proves his or her ownership of the property, the police or sheriff's department must restore the property to the owner [*Civ. Code* § 2080.2]. The police or sheriff's department may condition the return of the property on the owner's payment of a reasonable charge to defray costs of storage and care of the property [*Civ. Code* § 2080.1(b), 2080.2].

If the owner does not appear and prove his or her ownership of the property within 90 days following receipt of the property by the police or sheriff's department, and the reported value of the property is \$250 or more [*see* § 102C.120, P 2(b)(4) NOTE], the police or sheriff's department must publish a notice concerning the property in a newspaper of

general circulation at least once. If no owner appears and proves his or her ownership of the property within seven days following the first publication of the notice, the finder may obtain title to the property by reimbursing the city or county whose police or sheriff's department published the notice for the cost of publication. Property found by an employee of any public agency in the course of his or her employment may not be claimed by the finder in this manner, but must be sold at public auction. The successful bidder must reimburse the city or county whose police or sheriff's department published the notice for the cost of publication [*Civ. Code* § 2080.3(a)].

If the reported value of the property is less than \$250 and the finder is not an employee of a public agency who found the property in the course of his or her employment, title to the property will vest in the finder after 90 days have elapsed since the receipt of the property by the police or sheriff's department if an owner does not appear and prove his or her ownership of the property. If the property was found by an employee of any public agency in the course of his or her employment, it must be sold at public auction after the 90 days have elapsed [*Civ. Code* § 2080.3(b)].

Under limited circumstances, a police or sheriff's department may dispose of items of public property by a public auction, conducted in the manner and on the notice of sale of personal property under execution, without waiting 90 days after the receipt of the property. This "quick sale" procedure may be used only if all of the following conditions have been satisfied [*Civ. Code* § 2080.5]:

- The property is of a type that is commonly the subject of sale;
- The owner cannot be found with reasonable diligence or, being found, refuses to pay the lawful charges for care and storage of the property [*see Civ. Code* §§ 2080, 2080.1]; and
- The property is in danger of perishing or losing the greater part of its value, or the lawful charges for care and storage of the property amount to two thirds of its value.

[4] Tax Consequences for Finder

Found property, or "treasure trove," is considered gross income to the extent of its value in United States currency. It is taxable during the taxable year in which it is reduced to the finder's undisputed possession [*Treas. Reg.* § 1.61-14(a)]. For example, money found by a taxpayer inside a used piano purchased seven years earlier was taxable in the year the money was found, rather than the year the piano came into the finder's possession [*Cesarini v. United States* (6th Cir. [N.D. Ohio] 1970) 428 F.2d 812, 813-814] .

[5] Local Ordinances and Agency Regulations

The legislative body of any city, city and county, or county may alter the statutory procedures for handling unclaimed property [*see* [2] and [3], *above*] by enacting an ordinance providing for the care, restitution, sale, or destruction of unclaimed property in the possession of its police or sheriff's department. The ordinance must provide (1) that unclaimed property be held by the police or sheriff's department for a period of at least three months, and (2) that property unclaimed after that period of time be sold at public auction to the highest bidder, with notice of the sale being given by the chief of police or the sheriff at least five days before the sale by one-time publication in a newspaper of general circulation in the county. Alternatively, the ordinance may provide for the transfer of property unclaimed after 90 days to the local government purchasing and stores agency or other similar agency for sale to the public at public auction [*Civ. Code* § 2080.4].

If the ordinance provides for transfer of unclaimed property to a county purchasing agent, the property may be sold as provided by provisions of the Government Code dealing with the sale of surplus personal property [*see Gov. Code* § 25500 *et seq.*]. Property that is transferred to the local government purchasing and stores agency or other similar agency pursuant to a local ordinance may not be redeemed by the owner or other persons entitled to possession. If the local

government purchasing and stores agency or other similar agency determines that any unclaimed property delivered to it is needed for a public use, it may retain the property instead of selling it at public auction [*Civ. Code* § 2080.4].

Any public agency [*see Civ. Code* § 2080.6(b) (definition)] may elect to be governed by the statutory provisions governing disposal of lost property [*Civ. Code* § 2080 *et seq.*] with respect to property found or saved in its area of jurisdiction, or may adopt reasonable regulations for the care, restitution, sale, or destruction of unclaimed property in its possession [*Civ. Code* § 2080.6(a)]. The Regents of the University of California and the Trustees of the California State University are likewise permitted to adopt resolutions or regulations for the care, restitution, sale, or destruction of unclaimed, lost, or abandoned property in the possession of the Regents, the University of California Police Department, or any state university [*Civ. Code* §§ 2080.8, 2080.9]. The requirements for regulations adopted by public agencies, the Regents, or the Trustees are similar to those governing the adoption of local ordinances concerning the disposition of unclaimed property [*Civ. Code* §§ 2080.6(a), 2080.8, 2080.9].

[6] Property in Temporary Possession of Public Agency

When a public agency obtains possession of personal property from a person for temporary safekeeping, the agency must do all of the following [*Civ. Code* § 2080.10(a); *see Civ. Code* § 2080.10(d) (defining "public agency"); *see also* Stats. 1998, ch. 540, Legislative Counsel's Digest (to address situation involving possession of property taken from arrested defendant)]:

- Take responsibility for the storage, documentation, and disposition of the property.
- Provide the person from whom the property was taken with a receipt and instructions for the retrieval of the property, either by giving them to the person from whom the property was taken at the time the public agency obtains the property or by immediately mailing them to that person by first-class mail.
- If the public agency has knowledge that the person from whom the property was taken is not the owner, the agency must make reasonable efforts to identify the owner. If the owner is identified, the public agency must send the owner, by first-class mail, a receipt and instructions for the retrieval of the property.

The receipt and instructions must notify the person from whom the property was taken that the property must be claimed within 60 days after the public agency obtains possession or the property will be disposed of in accordance with the disposal provisions of *Civ. Code* § 2080 *et seq.* Within 60 days, that person may do one of the following [*Civ. Code* § 2080.10(b)]:

- Retrieve the property.
- Authorize, in writing, another person to retrieve the property.
- Notify the public agency in writing that he or she is unable to retrieve the property, because he or she is in custody, and request the public agency to hold the property. If a person notifies the public agency that he or she is unable to retrieve the property within 60 days, or have an authorized person retrieve the property, the public agency must hold the property for not longer than 10 additional months.

The public agency is not be liable for damages caused by any official action performed with due care regarding the disposition of personal property pursuant to this section and the disposal provisions of *Civ. Code* § 2080 *et seq.* [*Civ. Code* § 2080.10(c)].

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§ 102C.12 Estrays

[1] In General

An "estrays" is any impounded or seized bovine animal, horse, mule, sheep, swine, or burro whose owner is unknown or cannot be located [*Food & Agric. Code § 17001.5*]. The term does not include domestic pets such as cats and dogs, which are covered by the Civil Code provisions concerning lost and unclaimed personal property [*see Civ. Code § 2080*, discussed in § 102C.11, *above*; *Food & Agric. Code § 17003*]. Estrays may be "taken up" [*see Food & Agric. Code § 17001*] by persons who find them on their property, inspectors employed by the Department of Food and Agriculture, or the secretary of Food and Agriculture, and must be disposed of according to the procedure set forth in the Food and Agricultural Code [*Food & Agric. Code §§ 17002, 17004, 17041*; *see Food & Agric. Code § 50* ("director" and "secretary" both mean secretary of Food and Agriculture); *see also Food & Agric. Code § 17001 et seq.*].

[2] Rights and Responsibilities of Taker-Up

Any person who finds an estray domestic animal on premises that he or she owns, or on premises to which he or she has the right of possession of, or on any highway adjacent to those premises, may take up the animal and have a lien for all expenses incurred in taking up, keeping, and caring for it [*Food & Agric. Code § 17041*]. A person who does these things is called a "taker-up" [*Food & Agric. Code § 17001*]. The landowner or person in rightful possession of the land may also sue the animal's owner for damage to the land or crops caused by the animal. As an alternative to taking up the animal, the landowner or person in rightful possession of the land may use reasonable force to drive the animal off the property. The use of more force than is reasonably necessary to drive the animal off the property will be considered excessive and unjustified, and may expose the landowner or rightful possessor to liability for injury to the animal [*People v. Dunn (1974) 39 Cal. App. 3d 418, 421, 114 Cal. Rptr. 164*]. The right to take up estrays does not apply in counties or parts of counties identified by state statute or county ordinance as devoted chiefly to grazing [*see Food & Agric. Code §§ 17121 et seq.*], unless the premises on which the animal is found and taken up are entirely enclosed with a good and substantial fence [*Food & Agric. Code § 17122*; *see Food & Agric. Code § 17121* ("lawful fence")].

A taker-up of an estray must confine the estray in a secure place [*Food & Agric. Code § 17042*] and use reasonable care to preserve it from injury [*Food & Agric. Code § 17043*]. A taker-up who complies with these and the other applicable statutory requirements will not be liable if the estray dies or escapes at any time while being held by the taker-up [*Food*

& *Agric. Code § 17043*]. It is unlawful for any person to remove any animal from the possession of a taker-up, except as provided by statute [*Food & Agric. Code § 17045*].

Immediately after taking up an estray, the taker-up must file a notice of the taking up with the secretary of Food and Agriculture. The notice must contain the following [*Food & Agric. Code §§ 35, 17042*; for a form for this notice, see § 102C.202]:

- A description of the animal.
- Any marks and brands on the animal.
- The animal's probable value.
- A statement of the date and place where it was taken up and confined.

On demand of an authorized inspector employed by the Department of Food and Agriculture, the taker-up must deliver the animal to the inspector [*Food & Agric. Code § 17061*].

On sale of the animal or return of the animal to its owner, the taker-up is entitled to collect a per day payment for keeping and caring for the animal [*Food & Agric. Code §§ 17041, 17044, 17069, 17095*]. The amount due is determined according to the prevailing rates charged by commercial enterprises that feed livestock on a custom basis [*Food & Agric. Code § 17095*].

[3] Department's Attempts to Locate Owner

Once an estray is seized or otherwise in the possession of an inspector, if the animal is branded the director of the Department of Food and Agriculture must cause a search to be made of the brand records to ascertain its owner [*Food & Agric. Code § 17063*]. If the animal's brands or marks are recorded, the director must immediately notify the person in whose name the brands or marks are recorded that the animal has been found. The notification must be made by letter [*Food & Agric. Code § 17064*; see *Food & Agric. Code § 50* ("director" and "secretary" both mean secretary of Food and Agriculture)].

If the owner is not found, and the estimated value of the animal exceeds \$225, the director must cause a notice of the taking up of the animal, and its intended sale, to be posted for a period of 14 days on a bulletin board in each office of the Bureau of Livestock Identification. In addition, the director has discretion to distribute the notice to the county department of agriculture and to all sales yards in California that deal in the same type of animal as the animal that is taken up. [*Food & Agric. Code § 17065(a), (b)*]. If the estimated value of the animal is less than \$225, the notice need only be posted for five days in each office of the Bureau of Livestock Identification [*Food & Agric. Code § 17066*]. The notice must describe the weight, sex, breed, color, marks, and brands, if any, of the animal. It must also state the time and place of its proposed sale [*Food & Agric. Code § 17067*]. In addition to posting the notice, the director must publish periodically a list of the animals for which notice was given pursuant to *Food & Agric. Code § 17065*, including the brands and descriptions of branded animals and descriptions of unbranded animals turned over to the department. This notice is required to be published in the classified section of a livestock industry publication that is in general circulation throughout California [*Food & Agric. Code § 17065*].

A person claiming ownership in the animal, at any time before the expiration of 14 days after the first posting of notice, may file his or her proofs of ownership with the director. The director will then hear and determine the claim of ownership [*Food & Agric. Code § 17068*]. If ownership is proved to the satisfaction of the director, the animal will be turned over to the owner on payment by the owner of all expenses incurred in the handling of the animal [*Food & Agric. Code § 17069*; see *Food & Agric. Code §§ 17044, 17095* (expenses due taker-up and secretary)].

[4] Sale of Animal

If the animal's owner does not come forward and offer satisfactory proof of ownership within the applicable notice period (14 days for animals valued at \$225 or more, or 5 days for animals valued at less than \$225), or fails or refuses to pay the expenses incurred in keeping the animal, the director will sell the animal at a public sale [*Food & Agric. Code* §§ 17066, 17092; see *Food & Agric. Code* § 17094 (sale of carcass)]. In lieu of a public sale, the director may sell the animal at a private sale at a price not less than the appraised value of the animal. The appraisal must be made by a board of three qualified stockmen; one chosen by the director, one by the taker-up, and one by the first two [*Food & Agric. Code* § 17093]. The sale, whether public or private, will convey a good and valid title to the purchaser, and the former owner of the animal will be barred from all right to recover it [*Food & Agric. Code* § 17092].

The proceeds from the sale must be paid into the Department of Food and Agriculture Fund. The expenses of holding, advertising, and selling the animal, any payment due the taker-up, and any other incidental expenses incurred in connection with the animal, are paid from this fund [*Food & Agric. Code* § 17095]. Any person who proves to the director's satisfaction his or her ownership of the animal sold, within one year following the sale, is entitled to the net proceeds of the sale [*Food & Agric. Code* § 17096].

If an animal in the possession of an inspector is in a condition that requires immediate disposal, the director may dispose of it immediately and without satisfying the notice and sale requirements discussed above [*Food & Agric. Code* § 17091].

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32-102C California Legal Forms--Transaction Guide § 102C.13

§ 102C.13 Containers, Supplies, and Equipment Bearing Brand Name

Special provisions of the Business and Professions Code govern the return of lost containers, supplies, and equipment bearing a brand name registered with the Secretary of State to their rightful owners [*Bus. & Prof. Code § 14425 et seq.*]. Containers, supplies, and equipment subject to these provisions bear the words "Registered in California" or the abbreviation "Reg.Cal." as a part of their brand [*Bus. & Prof. Code § 14429*].

Every person who finds or receives any containers, supplies, or equipment bearing a registered brand, in the regular course of business or in any other manner, has a duty to make a diligent effort to find the owner and return them to the owner [*Bus. & Prof. Code § 14434*; see *Food & Agric. Code § 34561* (similar provision applicable to branded dairy equipment)]. It is unlawful for an unauthorized person [see *Bus. & Prof. Code § 14430(a)* (authorized persons)] to (among other things) possess a container bearing a brand or to sell, buy, give, take, or otherwise traffic in any container, equipment, or supplies bearing a brand [*Bus. & Prof. Code § 14430(b)(1), (3)*]. A person who violates these provisions may be subject to criminal penalties [*Bus. & Prof. Code § 14436*], as well as an action by the registrant for civil penalties [*Bus. & Prof. Code § 14438*].

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32-102C California Legal Forms--Transaction Guide § 102C.14

§ 102C.14 Explosives

Any loss or theft of explosives, whether from a storage magazine, a vehicle in which they are being transported, a site on which they are being used, or any other location, must be reported immediately to the local police or county sheriff by the person having control of the explosives. The police or sheriff must immediately transmit a report of the incident to the State Bureau of Criminal Identification and Investigation in Sacramento [*Health & Safety Code § 12086*].

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32-102C California Legal Forms--Transaction Guide § 102C.15

§ 102C.15 Unclaimed Goods Received by Common Carriers, Commission Merchants, Innkeepers, and Warehouse operators

A railroad or express company or other common carrier, commission merchant, innkeeper, or warehouse operator may hold or store with a responsible person goods, merchandise, or other property received for transportation or safekeeping and not delivered to the owner, consignee, or other authorized person, until the freight and all just and reasonable charges are paid [*Civ. Code § 2081*]. The responsibility of the carrier, merchant, innkeeper, or warehouse operator toward the property ceases when the property is placed in storage. The person with whom the property is stored is not liable for loss or damage to the property unless the loss or damage results from his or her negligence or want of proper care [*Civ. Code § 2081.4*].

If no person calls for the property and pays the freight and charges due on it within 60 days after its receipt by the carrier, merchant, innkeeper, or warehouse operator, the carrier, merchant, innkeeper, or warehouse operator may sell the property, or as much of it as will pay the freight and charges due, to the highest bidder at public auction [*Civ. Code § 2081.1*]. Commission merchants or warehouse operators who receive produce, merchandise, or other property on consignment and make advances on it, either to the owner or for freight and charges, may likewise sell the property at public auction if the advances are not paid within 60 days after the date made [*Civ. Code § 2081.5*]. In either case, prior notice of the sale must be given in the customary manner for sales of goods by auction at the place the goods are held or sold [*Civ. Code § 2081.1*; for a notice of sale, see § 102C.210]. If any surplus remains after paying the freight, storage, sale expenses, and other reasonable charges, the surplus must be paid over to the owner of the property on his or her demand if the demand is made within 60 days after the sale [*Civ. Code § 2081.2*; see *Civ. Code § 2081.3*; for a form for a demand for proceeds of sale, see § 102C.211]. If the owner or owner's agent does not demand the surplus from the sale within 60 days after the sale, the surplus must be paid into the county treasury, subject to the order of the owner [*Civ. Code § 2081.3*].

The obligations of carriers set forth under *Civ. Code § 2114 et seq.* are not applicable to the transactions discussed above concerning unclaimed property [*Civ. Code § 2081.6*]. For discussion of *Civ. Code § 2114 et seq.* and other obligations of carriers, see Ch. 54, *Shipment of Property*. For discussion of other rights and obligations of warehouse operators, see Ch 54A, *Storage of Goods*. Innkeepers' and other liens are addressed in Ch. 102A, *Personal Property Liens*. Bailment of personal property other than household goods, and the availability of liens against this property, are

considered in Ch. 102, *Bailments* .

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsState & Territorial GovernmentsGeneral OverviewGovernmentsState & Territorial
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32-102C California Legal Forms--Transaction Guide § 102C.16

§ 102C.16 Property Left With Hospital

Any item of personal property found in or deposited with any licensed hospital that remains unclaimed for a period of 180 days following the departure of its owner from the hospital may be sold by the hospital at public auction. At least four weeks prior to the sale, the hospital must give written notice of the sale to the last known owner of the property. The notice may be sent to the last known owner by regular mail, postage prepaid, at his or her last known address. It must contain all of the following [*Civ. Code § 1862.5*; for a form for this notice, see § 102C.212]:

- A description of each item of property to be sold.
- The name of the last known owner.
- The name of the hospital.
- The time and place of the sale

The proceeds of the sale may be applied to the charges for storage of the property, if any, the reasonable expenses of the sale, and all sums due the hospital from the last known owner of the property. The remaining balance, if any, may be claimed by the rightful owner of the property or his or her legal representative within one week following the sale. If not claimed within that period, the balance must be paid into the treasury of the county in which the hospital is located. If the owner or his or her legal representative does not claim the property from the treasury within one year, it must be paid into the general fund of the county [*Civ. Code § 1862.5*].

If the hospital complies with the procedures set out above, it will be exonerated from any liability for the property sold [*Civ. Code § 1862.5*].

Legal Topics:

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§ 102C.17 Unclaimed Property in Possession of Receiver

A receiver who is in possession of any funds belonging to a person whose whereabouts are unknown to the receiver must follow a specific statutory procedure to dispose of the funds prior to being discharged as a receiver. First, he or she must publish a notice, in one or more newspapers published in the county, at least once a week for four consecutive weeks. The notice must set forth the name of the owner of the funds, the owner's last known place of residence or post office address, and the amount of the unclaimed funds. All costs and expenses connected with the advertising of the notice are payable out of the unclaimed funds [*Code Civ. Proc.* § 570].

If all or any part of the funds remain unclaimed 30 days after the date of the last publication of the notice, the receiver must report this fact to the court. On order of the court, all the funds must be paid into the State Treasury, accompanied by a copy of the order. The order must set forth the same information required to appear in the notice [*Code Civ. Proc.* § 570; *see* California Forms of Pleading and Practice, Ch. 486, *Receivers* (Matthew Bender)]. Funds that have been paid into the State Treasury pursuant to this procedure may be claimed as provided by *Code Civ. Proc.* § 1500 *et seq.* [*Code Civ. Proc.* § 570; *see* §§ 102C.18[10], 102C.22; *see also* California Forms of Pleading and Practice, Ch. 252, *Escheat (Unclaimed Property)* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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32-102C California Legal Forms--Transaction Guide § 102C.18

§ 102C.18 Unclaimed Property Law

[1] In General

Under the Unclaimed Property Law [*Code Civ. Proc. § 1500 et seq.*], specified property held or owing by business associations escheats to the state [*Code Civ. Proc. § 1510 et seq.*; see [3], *below*]. Business associations must report and deliver to the controller property subject to escheat under the Unclaimed Property Law [*Code Civ. Proc. §§ 1530, 1532; see [8], below; see also §§ 102C.220, 102C.221*]. Unlike other property that escheats to the state, property received by the state under the Unclaimed Property Law does not permanently escheat [*Code Civ. Proc. § 1501.5(a); see Code Civ. Proc. §§ 1430, 1431*]. The Unclaimed Property Law is not a permanent or "true" escheat statute [*Code Civ. Proc. § 1501.5*]. Instead, the state assumes custody of the property [*Code Civ. Proc. § 1560(a)*], sells and otherwise disposes of it as appropriate [*Code Civ. Proc. §§ 1563, 1565*], and deposits all funds received, including the proceeds of sale, into the "Abandoned Property" account of the unclaimed property fund [*Code Civ. Proc. § 1564(a)*]. All money in this account is continuously appropriated to the Controller for expenditure in carrying out and enforcing the Unclaimed Property Law, including the payment of claims, appraisals, and the like [*Code Civ. Proc. § 1564(b)*].

The dual objectives of the Unclaimed Property Law are to protect unknown owners by locating them and restoring their property to them and to give the state, rather than the holders of the unclaimed property, the benefit of its use [*Harris v. Westly (2004) 116 Cal. App. 4th 214, 219, 10 Cal. Rptr. 3d 343* ; *Douglas Aircraft Co. v. Cranston (1962) 58 Cal. 2d 462, 463, 24 Cal. Rptr. 851, 374 P.2d 819* ; see also California Forms of Pleading and Practice, Ch. 252, *Escheat (Unclaimed Property)*] (Matthew Bender)].

[2] Definitions

[a] "Business Association"

For purposes of the Unclaimed Property Law, "business association" means any private corporation, joint stock company, business trust, partnership, or any association for business purposes of two or more individuals, whether or not for profit, including, but not limited to, banking organizations, financial organizations, life insurance corporations, and utilities [*Code Civ. Proc. § 1501(c)*].

[b] "Banking Organization"

For purposes of the Unclaimed Property Law, "banking organization" means any national or state bank, trust company, banking company, land bank, savings bank, safe deposit company, private banker, or any similar organization [*Code Civ. Proc. § 1501(b)*].

[c] "Escheat" and "Permanent Escheat"

"Escheat" is the vesting in the state of title to property when either the owner or the owner's whereabouts are unknown or the known owner has refused to accept the property. Property may escheat to the state either by judicial determination or by operation of law, subject to the right of claimants to appear and claim all or a portion of the escheated property [*Code Civ. Proc. § 1300(c)*].

"Permanent escheat" is the absolute vesting in the state of title to property when either the owner or the owner's whereabouts are unknown or the known owner has refused to accept the property, pursuant to a judicial determination in accordance with *Code Civ. Proc. § 1410* or by operation of law. Permanent escheat bars all claims to the property by the former owner or his or her successors [*Code Civ. Proc. § 1300(d)*].

[d] "Financial Organization"

For purposes of the Unclaimed Property Law, "financial organization" means any federal or state savings and loan association, building and loan association, credit union, investment company, or any similar organization [*Code Civ. Proc. § 1501(d)*].

[e] "Life Insurance Corporation"

For purposes of the Unclaimed Property Law, "life insurance corporation" means any association or corporation transacting the business of insurance on or pertaining to human lives, including (but not limited to) endowments and annuities [*Code Civ. Proc. § 1501(f)*].

[f] "Unclaimed Property"

For purposes of the general statutory scheme governing the escheat of property (*Code Civ. Proc. § 1300 et seq.*), "unclaimed property" is any of the following [*Code Civ. Proc. § 1300(b)*]:

- Property that is unclaimed, abandoned, escheated, permanently escheated, or distributed to the state.
- Property that will become unclaimed, abandoned, escheated, permanently escheated, or distributed to the state under any provision of law.
- Property, the possession of which the state is or will become entitled, if the property is not claimed by the person entitled to possession within the time allowed by law, whether or not there has been a judicial determination that the property is unclaimed, abandoned, escheated, permanently escheated, or distributed to the state.

[3] Property Subject to Unclaimed Property Law**[a] Deposits and Accounts With Banking Organizations**

Property that escheats to the state under the Unclaimed Property Law includes demand, savings, and matured time deposits, and accounts subject to a negotiable order of withdrawal (NOW), made with a banking organization, together

with any interest or dividends on those deposits or accounts, but excluding from demand deposits and accounts subject to a negotiable order of withdrawal only, any reasonable service charges for inactivity that may lawfully be withheld and that do not (if made in California) exceed those set forth in schedules filed by the banking organization from time to time with the Controller, when the owner, for more than three years has not done any of the following [*Code Civ. Proc.* § 1513(a)(1)(A), (b); see also *Code Civ. Proc.* § 1522 (charges not permitted unless holder would also have imposed charge if owner claimed property prior to escheat)]:

- Increased or decreased the amount of the deposit, cashed an interest check, or presented the passbook or other similar evidence of the deposit for the crediting of interest.
- Corresponded electronically or in writing with the banking organization concerning the deposit.
- Otherwise indicated an interest in the deposit as evidenced by a memorandum or other record on file with the banking organization.

Escheat of funds held in individual retirement accounts or under retirement plans for self-employed individuals or similar accounts or plans established pursuant to the internal revenue laws of the United States or California, are not governed by *Code Civ. Proc.* § 1513(a)(1), but by *Code Civ. Proc.* § 1513(a)(6), discussed in [f], below.

A deposit or account will not escheat to the state if, within the previous three years, the owner owned another deposit or account with the banking organization, or the owner has owned an individual retirement account or funds held by the banking organization under a retirement plan for self-employed individuals or a similar account or plan established as provided in *Code Civ. Proc.* § 1513(a)(6), and with respect to that deposit, account, or plan, the owner conducted one of the above listed activities with respect to the other deposit or account and the banking organization communicated electronically or in writing with the owner, at the address to which communications regarding that deposit or account are regularly sent, regarding the deposit or account otherwise subject to escheat. For these purposes, "communications" refers to account statements or statements of interest paid for federal and state income tax purposes [*Code Civ. Proc.* § 1513(a)(1)(B)].

The banking organization may not discontinue any interest or dividends on any savings deposit because of the inactivity contemplated by *Code Civ. Proc.* § 1513 [*Code Civ. Proc.* § 1513(a)(1)(C)].

[b] Deposits, Accounts, and Other Interests in Financial Organizations

Property that escheats to the state under the Unclaimed Property Law includes demand, savings, and matured time deposits, matured investment certificates, accounts subject to a negotiable order of withdrawal, and other interests in a financial organization or deposits made with a financial organization, and any interest or dividends on those deposits or other interests, excluding, from demand deposits and accounts subject to a negotiable order of withdrawal only, any reasonable service charges imposed for inactivity that may lawfully be withheld and that do not (when made in California) exceed those set forth in schedules filed by the financial organization from time to time with the Controller, when the owner has not done any of the following for more than three years [*Code Civ. Proc.* § 1513(a)(2)(A), (b); see also *Code Civ. Proc.* § 1522 (charges not permitted unless holder would also have imposed charge if owner claimed property prior to escheat)]:

- Increased or decreased the amount of the funds or deposit, cashed an interest check, or presented an appropriate record for the crediting of interest or dividends.
- Corresponded electronically or in writing with the financial organization concerning the funds or deposit.

- Otherwise indicated an interest in the funds or deposit as evidenced by a memorandum or other record on file with the financial organization.

Escheat of funds held in individual retirement accounts or under retirement plans for self-employed individuals or similar accounts or plans established pursuant to the internal revenue laws of the United States or California, are not governed by *Code Civ. Proc. § 1513(a)(2)(A)*, but by *Code Civ. Proc. § 1513(a)(6)*, discussed in [f], below].

A deposit or account will not escheat to the state if, within the previous three years, the owner owned another deposit or account with the financial organization, or the owner has owned an individual retirement account or funds held by the financial organization under a retirement plan for self-employed individuals or a similar account or plan established as provided in *Code Civ. Proc. § 1513(a)(6)*, and with respect to that deposit, account, or plan, the owner conducted one of the above listed activities with respect to the other deposit or account, and the financial organization communicated electronically or in writing with the owner, at the address to which communications regarding that deposit or account are regularly sent, regarding the deposit or account otherwise subject to escheat [*Code Civ. Proc. § 1513(a)(2)(B)*]. For these purposes, "communications" refers to account statements or statements of interest paid for federal and state income tax purposes [*Code Civ. Proc. § 1513(a)(2)(B)*].

A financial organization may not discontinue any interest or dividends on any funds paid toward purchase of shares or other interest, or on any deposit, because of the inactivity contemplated by *Code Civ. Proc. § 1513* [*Code Civ. Proc. § 1513(a)(2)(C)*].

[c] Traveler's Checks

Property that escheats to the state under the Unclaimed Property Law includes any sum payable on traveler's checks issued by a business association that has been outstanding for more than 15 years from the date of its issuance, when the owner for more than 15 years has neither corresponded with the business organization concerning it nor otherwise indicated an interest in it as evidenced by a memorandum or other record on file with the association [*Code Civ. Proc. § 1513(a)(3)*].

[d] Written Instruments Owed by Banking or Financial Organization

Property that escheats to the state under the Unclaimed Property Law includes any sum payable on any other written instrument on which a banking or financial organization is directly liable, including, but not limited to, drafts or certified checks, that has been outstanding for more than three years from the date it was payable or from the date of its issuance if payable on demand, when the owner for more than three years has neither corresponded electronically or in writing with the banking or financial organization concerning it nor otherwise indicated an interest as evidenced by a memorandum or other record on file with the banking or financial organization [*Code Civ. Proc. § 1513(a)(4)*]. The three-year period became effective January 1, 2004 [*see Stats 2003, ch. 304, § 1*]; prior to that date, these written instruments had a five-year escheat period.

[e] Money Orders

Property that escheats to the state under the Unclaimed Property Law includes any sum payable on a money order issued by a business association (including a banking or financial organization) that has been outstanding for more than seven years from the date it was payable, or from the date of its issuance if payable on demand, excluding any reasonable service charges that may lawfully be withheld and that do not, when made in California, exceed those set forth in schedules filed by the business association from time to time with the Controller, when the owner for more than seven years has neither corresponded electronically or in writing with the business association concerning it nor otherwise indicated an interest as evidenced by a memorandum or other record on file with the business association [*Code Civ. Proc. § 1513(a)(5)*]. A "reasonable service charge" under *Code Civ. Proc. § 1513(a)(5)* means one that does

all of the following [*Code Civ. Proc.* § 1513(a)(5)]:

- Is uniformly applied to all of the issuer's money orders.
- Is clearly disclosed to the purchaser at the time of purchase, and the recipient of the money order.
- Does not begin to accrue until three years after issuance, and stops when the value of the money order escheats.
- Is permitted by the contract between the purchaser and the issuer.
- Does not exceed \$0.25 per month, or an aggregate total of \$21.

[f] Individual Retirement Accounts

Property that escheats to the state under the Unclaimed Property Law includes any funds held by a business association in an individual retirement account or under a retirement plan for self-employed individuals, or a similar account or plan established pursuant to the internal revenue laws of the United States or California, when the owner for more than three years after the funds become payable or distributable has not done any of the following [*Code Civ. Proc.* § 1513(a)(6)(A)]:

- Increased or decreased the principal.
- Accepted payment of principal or income.
- Corresponded in writing concerning the property or otherwise indicated an interest.

Funds held by a business association in an individual retirement account or under a similar retirement plan for self-employed individuals or a similar account established under U.S. or California law, will not escheat to the state if, within the previous three years, the owner has owned another such account or plan with the business association, and the owner has conducted one of the activities listed above and the business association has communicated electronically or in writing with the owner [*Code Civ. Proc.* § 1513 (a)(6)(B)].

For these purposes, funds become payable or distributable when distribution of all or a part of the funds becomes mandatory under the terms of the account or plan [*Code Civ. Proc.* § 1513(a)(6)(C)].

[g] Wages or Salaries

Property that escheats to the state under the Unclaimed Property Law includes any wages or salaries that have remained unclaimed by the owner for more than one year after the wages or salaries become payable [*Code Civ. Proc.* § 1513(a)(7)].

[h] Contents of Safe Deposit Boxes

Property that escheats to the state under the Unclaimed Property Law includes the contents of safe deposit boxes or other safekeeping repositories held in California by a business association if unclaimed by the owner for more than three years from the later of (1) the date on which the lease or rental period expired, or (2) the expiration date of any agreement under which the box was furnished free of cost [*Code Civ. Proc.* § 1514; see *Code Civ. Proc.* § 1514 (notice and escheatment procedures for safe deposit boxes)].

[i] Funds Owning Under Life Insurance Policies or Annuities

Property that escheats to the state under the Unclaimed Property Law includes funds held or owing by a life insurance corporation under a life or endowment insurance policy or annuity contract that has matured or terminated, if unclaimed and unpaid for more than three years after becoming due and payable [*Code Civ. Proc. § 1515(a)*], regardless of whether the policy or contract has been surrendered as required [*Code Civ. Proc. § 1515(d)*; see *Code Civ. Proc. § 1515(c)* ("matured" defined)].

[j] Property Distributable on Demutualization of Insurance Company

Property that escheats to the state under the Unclaimed Property Law includes property distributable in the course of a demutualization or related reorganization of an insurance company. Property distributable in the course of a demutualization or related reorganization of an insurance company is deemed abandoned at the following times in the following ways [*Code Civ. Proc. § 1515.5*]:

- On the date of the demutualization or reorganization, if the instruments or statements reflecting the distribution are not mailed to the owner because the address on the books and records for the holder is known to be incorrect.
- Two years after the date of the demutualization or reorganization, if instruments or statements reflecting the distribution are mailed to the owner, returned by the post office as undeliverable, and the owner has neither communicated in writing with the holder or its agent regarding the property or otherwise communicated with the holder or its agent regarding the property as evidenced by a memorandum or other record on file with the holder or its agent.
- Three years after the date of the demutualization or reorganization, if instruments or statements reflecting the distribution are mailed to the owner, not returned by the post office as undeliverable, and the owner has neither communicated in writing with the holder or its agent regarding the property or otherwise communicated with the holder or its agent regarding the property as evidenced by a memorandum or other record on file with the holder or its agent.

[k] Dividends and Distributions on Shares, Bonds, or Other Securities

Property that escheats to the state under the Unclaimed Property Law includes dividends, profits, distributions, interest, payments on principal, or other sums held or owing by a business association for or to a shareholder, certificate holder, member, bondholder, or other security holder, or a participating patron of a cooperative, who has not claimed them or corresponded in writing with the business association concerning them within three years after the date prescribed for payment or delivery [*Code Civ. Proc. § 1516(a)*]. Additional conditions for the escheat of these types of intangibles are set forth in *Code Civ. Proc. § 1510*, discussed in [5], below [*Code Civ. Proc. § 1516(a)*].

[l] Intangible Interests in Business Associations

Property that escheats to the state under the Unclaimed Property Law includes intangible interests in business associations as evidenced by stock or membership records when (1) the interest is owned by a person who for more than three years has neither claimed a dividend, profit, distribution, interest, payment on principal, or other sum nor corresponded in writing with the association concerning the interest or otherwise indicated an interest as evidenced by a memorandum or other record on file with the association, and (2) the association does not know the location of the owner at the end of the three-year period [*Code Civ. Proc. § 1516(b)*]. Additional conditions for the escheat of these types of intangibles are set forth in *Code Civ. Proc. § 1510*, discussed in [5], below [*Code Civ. Proc. § 1516(b)*]. Dividends or other distributions held for or owing to a person escheat as of the time the stock or other security to which they attach escheats [*Code Civ. Proc. § 1516(c)*].

[m] Property Distributable on Dissolution or Liquidation of Business

Property that escheats to the state under the Unclaimed Property Law includes tangible personal property located in California and, subject to *Code Civ. Proc. § 1510*, discussed in [5], *below*, intangible personal property that is distributable in the course of a voluntary or involuntary dissolution or liquidation of a business association, including a dissolution or liquidation of an insurer or other person under *Ins. Code § 1010 et seq.*, that is unclaimed by the owner within six months after the date of final distribution or liquidation [*Code Civ. Proc. § 1517*].

[n] Property Held by Fiduciary

Property that escheats to the state under the Unclaimed Property Law includes tangible personal property located in California, and, subject to *Code Civ. Proc. § 1510* [see [5] *below*], intangible personal property held in a fiduciary capacity [see *Code Civ. Proc. § 1518(c)*] for the benefit of another person, and any income or increment on the property, when for three years after the property becomes payable or distributable, the owner has not done any of the following [*Code Civ. Proc. § 1518(a)*; see *Code Civ. Proc. § 1518(b)* (when individual retirement account or similar account is considered payable or distributable)]:

- Increased or decreased the principal.
- Accepted payment of principal or income.
- Corresponded in writing concerning the property, or otherwise expressed an interest as evidenced by a memorandum or other record on file with the fiduciary.

[o] Property Held by Governmental Unit

Property that escheats to the state under the Unclaimed Property Law includes tangible personal property located in California, and, subject to *Code Civ. Proc. § 1510* [see [5] *below*], intangible personal property held for the owner by a government or governmental subdivision or agency that has remained unclaimed by its owner for more than three years [*Code Civ. Proc. § 1519*].

[p] Refunds Ordered by Court

Property that escheats to the state under the Unclaimed Property Law includes sums held by a business association that have been ordered to be refunded by a court or an administrative agency (including, but not limited to, the Public Utilities Commission) that have remained unclaimed by the owner for more than one year after becoming payable in accordance with the final determination or order providing for the refund, whether or not the final determination or order requires any person entitled to a refund to make a claim for it [*Code Civ. Proc. § 1519.5*]. Additional conditions for the escheat of property ordered refunded are set forth in *Code Civ. Proc. § 1510*, discussed in [5], *below* [*Code Civ. Proc. § 1519.5*].

[q] Other Property Held in Ordinary Course of Business

Property that escheats to the state under the Unclaimed Property Law includes tangible personal property located in California and, subject to *Code Civ. Proc. § 1510* [see [5] *below*], intangible personal property (other than that described in [a]-[o], *above*, and [r] and [6], *below*), including any income or increment on the property and deducting any lawful charges [see *Code Civ. Proc. § 1520(d)* (definition of "lawful charge"); see also *Code Civ. Proc. § 1522* (charges not permitted unless also assessed in event that owner claims property prior to escheat)], that is held or owing in the ordinary course of the holder's business and has remained unclaimed by the owner for more than three years after it became payable or distributable [*Code Civ. Proc. § 1520(a)*].

Code Civ. Proc. § 1520 does not apply to gift certificates (which includes gift cards) subject to *Civ. Code § 1749.45 et seq.*, which generally prohibits issuance of gift certificates with expiration dates, except those for use with multiple sellers of goods or services. However, *Code Civ. Proc. § 1520* does apply to any gift certificate that has an expiration date and that is given in exchange for money or any other thing of value [*Code Civ. Proc. § 1520.5*].

[r] Employee Benefit Plan Distributions

Property that escheats to the state under the Unclaimed Property Law includes employee benefit plan distributions and any income or increments on those distributions when the owner has not, within three years after the funds have become payable or distributable, accepted the distribution, corresponded in writing concerning the distribution, or otherwise indicated an interest as evidenced by a memorandum or other record on file with the fiduciary [*see Code Civ. Proc. § 1521(a)* ("fiduciary" defined)] of the trust or custodial fund or administrator [*see Code Civ. Proc. § 1521(a)* ("administrator" defined)] of the plan under which the trust or fund is established [*Code Civ. Proc. § 1521*; *see Code Civ. Proc. § 1521(b)* (exception for plans containing forfeiture provisions)]. Additional conditions for the escheat of employee benefit plan distributions are set forth in *Code Civ. Proc. § 1510*, discussed in [5], *below* [*Code Civ. Proc. § 1521(a)*].

[s] Proposition 103 Insurance Rebates

Property that escheats to the state under the Unclaimed Property Law includes insurance rebates ordered or negotiated pursuant to Proposition 103 [*see Ins. Code § 1861.01*], if an insurer, after a good faith effort, determined that the policyholder entitled to the rebate could not be located, as specified [*see Code Civ. Proc. § 1523(a)*].

[4] Property Exempt From Unclaimed Property Law

The Unclaimed Property Law [*Code Civ. Proc. § 1500 et seq.*] does not apply to any of the following property:

- Property in the official custody of a municipal utility district [*Code Civ. Proc. § 1502(a)(1)*].
- Property in the official custody of a local agency if the property may be transferred to the general fund of the agency pursuant to *Gov. Code § 50050 et seq.* [*Code Civ. Proc. § 1502(a)(2)*].
- Any property in the official custody of a court if the property may be transferred to the Trial Court Operations Fund under *Gov. Code § 68084.1* [*Code Civ. Proc. § 1502(a)(3)*].
- Any types of property received by the state pursuant to *Code Civ. Proc. §§ 1300-1476* [*Code Civ. Proc. § 1502(b)*].
- Unclaimed funds held by a life insurance corporation that is organized or admitted as a domestic fraternal benefit society under *shins. Code § 10970 et seq.*, as long as the funds are used for scholarship funds, exclusive of administration costs [*Code Civ. Proc. § 1528*].

[5] Additional Conditions for Escheat of Intangible Property

Unless otherwise provided by California statute, the items of intangible personal property described under [3], *above*, escheat only if one of the following is true [*Code Civ. Proc. § 1510*]:

- The apparent owner's last known address, as shown on the records of the holder, is in California.
- No address of the apparent owner appears on the records of the holder and either (1) the last known address of the apparent owner is in California, (2) the holder is domiciled in California and has not

previously paid the property to the state of the apparent owner's last known address, or (3) the holder is a government or governmental subdivision or agency of California and has not previously paid the property to the state of the apparent owner's last known address.

- The apparent owner's last known address, as shown on the holder's records, is in a state that does not provide by law for the escheat of the property and the holder is either domiciled in California or a government or governmental subdivision or agency of California.

- The apparent owner's last known address, as shown on the holder's records, is in a foreign nation and the holder is either domiciled in California or a government or governmental subdivision or agency of California.

[6] Additional Conditions for Escheat of Sums Payable on Money Orders, Traveler's Checks, and Similar Instruments

Sums payable on money orders, traveler's checks, or other similar written instruments (other than third-party bank checks) on which a business association is directly liable escheat only if the conditions described under [3][c]-[e], above, and at least one of the following conditions below, are satisfied [*Code Civ. Proc. § 1511(a)*]:

- The books and records of the business association show that the money order, traveler's check, or other instrument was purchased in California.

- The business association has its principal place of business in California, and its books and records do not show the state in which the money order, traveler's check, or other instrument was purchased.

- The business association has its principal place of business in California, its books and records show the state in which the money order, traveler's check, or other instrument was purchased, and the laws of the state of purchase do not provide for the escheat of the sum payable on the instrument.

[7] Attempts to Locate Owner Prior to Escheat of Property

[a] Notice to Owner Required

Every person or entity that holds unclaimed property in its business and has an address for the apparent owner must make reasonable efforts to notify the apparent owner of the fact that the property is about to escheat. Three statutes govern the notification requirements:

- Notices required to be provided by banking and financial organizations [*see Code Civ. Proc. § 1501(b), (d)* (definitions)] with respect to deposits, account shares, or other interests in a banking or financial organization [*see Code Civ. Proc. § 1513(a)(1), (a)(2)*, discussed in [3][a], [b], above] are governed by *Code Civ. Proc. § 1513.5* and only apply to accounts, deposits and other interests valued \$50 or more [*Code Civ. Proc. § 1513.5(c)*] and only when the holder's own records do not indicate that the last known address of the apparent owner is inaccurate [*Code Civ. Proc. § 1513.5(a)*]. A banking or financial organization may impose a service charge on the deposit (or other interest) for this notice in an amount not exceeding the greater of the administrative cost of the mailing or \$2 [*Code Civ. Proc. § 1513.5(b)*].

- Notices required to be provided by business associations [*see Code Civ. Proc. § 1501(c)* (definition)] with respect to stock and membership interests in that business association [*see Code Civ. Proc. § 1516(b)*, discussed in [3][1], above] are governed by *Code Civ. Proc. § 1516(d)*. *Code Civ. Proc. §*

1516(d) does not include an exemption for interests valued at \$50, nor does it authorize a charge for the notification.

- Notices by all other holders with respect to all other interests held by their businesses and valued at \$50 or more are governed by *Code Civ. Proc. § 1520(b)*, which also limits the requirement to situations in which the holder's records do not disclose the apparent owner's last known address to be inaccurate [*Code Civ. Proc. § 1520(b)*]. *Code Civ. Proc. § 1520(b)* does not authorize the holder to charge the interest for the notification.

[b] Times for Mailing Notices

The holder must mail, or, if the owner has consented to electronic notice, send electronically, the notice to the apparent owner not less than six nor more than 12 months before the time the property becomes reportable to the controller [*Code Civ. Proc. §§ 1513.5(a), 1516(d), 1520(b)*; see *Code Civ. Proc. § 1532(a)* (property to be delivered to controller no sooner than seven months and no later than seven months and 15 days after the final date of filing report)]. In the case of deposits and related interests that escheat under *Code Civ. Proc. § 1513(a)(1), (a)(2)*, the notice may also be mailed not less than two years nor more than two and one half years after the date of last activity by, or communication with, the owner concerning the property as shown on the record of the financial organization [*Code Civ. Proc. § 1513.5(a)(1)*].

[c] Contents of Notice

The notice must contain a heading at the top that reads "THE STATE OF CALIFORNIA REQUIRES US TO NOTIFY YOU THAT YOUR UNCLAIMED PROPERTY MAY BE TRANSFERRED TO THE STATE IF YOU DO NOT CONTACT US", and must specify the following [*Code Civ. Proc. §§ 1513.5(a), 1516(d), 1520(b)*]:

- The time when the property will escheat and the effects of escheat, including the necessity for filing a claim for the return of the property.
- That since the date of last activity, or for the last two years, there has been no customer activity on the deposit, account, shares, or other interest.
- The identify the deposit, account, shares, or other interest by number or identifier.
- That the deposit, account, shares, or other interest is in danger of escheating to the state.
- That the California Unclaimed Property Law requires banks, banking organizations, and financial organization to transfer funds of a deposit, account, shares, or other interest if it has been inactive for three years.

All but the first item listed above must be printed in bold or in a font that is at least two points larger than the rest of the notice.

The notice must also include a form by which the owner may confirm the owner's current address. If that form is filled out, signed by the owner, and returned to the holder, it must be deemed that the account, or other device in which the owner's property is being held, remains currently active and recommences the escheat period [*Code Civ. Proc. §§ 1513.5(b), 1516(b), 1520(b)*]. In lieu of returning the form, the business association may provide a telephone number or other electronic means to enable the owner to contact the association [*Code Civ. Proc. §§ 1513.5(b), 1516(d), 1520(b)*]. With such contact, the business association must be deemed to know the location of the owner. The business association may also impose a service charge, not to exceed two dollars (\$2) [*Code Civ. Proc. §§ 1513.5(b), 1516(d), 1520(b)*].

Additionally, the holder may give additional notice at any time between the date of last activity by, or communication with, the owner and the date the holder transfers the deposit, shares, or other interest to the controller [*Code Civ. Proc.* §§ 1513.5(b), 1516(d), 1520(b)]. The statute requires this form be "as prescribed by the controller," but the controller has not issued a standard form for this purpose, nor prescribed any additional requirements for this form. The controller's office has indicated that guidelines may be issued at some future time. For a form that may be used for giving the notice, see § 102C.220[2].

[8] Report and Delivery of Property to Controller

Any person holding funds or other property escheated to the state under the Unclaimed Property Law [see [3], *above*] must report the escheat of that property to the state controller [*Code Civ. Proc.* § 1530(a); see *Code Civ. Proc.* §§ 1501(h) ("person" means any individual, business association, government or governmental subdivision or agency, group of two or more persons having a joint or common interest, or any other legal or commercial entity acting in its own right or in a representative or fiduciary capacity), 1576 (criminal penalties for failure to file reports)]. These reports must include specified information and must be made on forms provided by the controller [*Code Civ. Proc.* § 1530(b); see § 102C.221]. The reports must be filed yearly. A life insurance corporation, including those reporting insurance corporation demutualization proceeds subject to *Code Civ. Proc.* § 1515.5, must file its report for a particular year before May 1 of the next year. All other organizations must file their reports before November 1 for the 12-month period ending on the previous June 30th or for the most recently-ended fiscal year [*Code Civ. Proc.* § 1530(d)]. The controller may postpone the reporting date on his or her motion or on written request by any person required to file a report [*Code Civ. Proc.* § 1530(d)]. Failure to timely file the reports also results in a 12 percent per annum penalty on the property or value thereof from the date the property should have been reported or paid or delivered [*Code Civ. Proc.* § 1577], although there is an amnesty for any escheated property paid or delivered to Controller on or before December 31, 2002 [*Code Civ. Proc.* § 1577.5]. If a holder pays or delivers unclaimed property in a timely manner, but files a report that is not in substantial compliance with the requirements of *Code Civ. Proc.* § 1530, the interest payable must not exceed ten thousand dollars (\$10,000) [*Code Civ. Proc.* § 1577]. The holder shall not be subject to any interest payment if the holder's failure to report substantial compliance with the requirements of *Code Civ. Proc.* § 1530 is due to reasonable cause [*Code Civ. Proc.* § 1577].

Except for contents of safe deposit boxes or other safekeeping repositories held by business associations [*Code Civ. Proc.* § 1532.1; see *Code Civ. Proc.* § 1514], property reported pursuant to *Code Civ. Proc.* § 1530 must be paid or delivered to the state controller at the same time the report is filed [*Code Civ. Proc.* § 1532(a); *Code Civ. Proc.* §§ 1533 (controller's right to refuse tangible personal property), 1576(b) (criminal penalties for failure to pay or deliver escheated property); see also § 102C.221]. A payment of unclaimed cash of at least \$20,000 must be made by electronic funds transfer [*Code Civ. Proc.* § 1532(a); see *Code Civ. Proc.* § 1532(f) (when payment deemed complete); *Code Civ. Proc.* § 1532(h) (procedure)]. The controller may postpone the date for payment or delivery of the property, and the date for any report required by *Code Civ. Proc.* § 1532(b) upon his or her own motion or upon written request by any person required to pay or deliver the property or file a report [*Code Civ. Proc.* § 1532(a)]. Contents of safe deposit boxes or other safekeeping repositories held by business associations must be paid or delivered to the controller at the earlier of (1) the time when the holder is requested to pay or deliver the property by the controller, or (2) within one year after the final date for filing the report required by *Code Civ. Proc.* § 1530(d) [*Code Civ. Proc.* § 1532.1]. Any person who pays or delivers escheated property to the controller as required by the Unclaimed Property Law and who, prior to escheat, if the person's records contain an address for the apparent owner, which the holder's records do not disclose to be inaccurate, has made reasonable efforts to notice the owner by mail or, if the owner has consented to electronic notice, electronically, in substantial compliance with *Code Civ. Proc.* §§ 1513.5, 1514, 1516, and 1520, that the owner's property, deposit, account, shares, or other interest will escheat to the state, is relieved of all liability, to the extent of the value of the property, for any claim that exists at the time of the payment or delivery of that property, or that later arises or is made, in respect to the property [*Code Civ. Proc.* § 1560(a); see *Code Civ. Proc.* § 1561(a) (controller's obligation to defend holder against claims for escheated property)].

[9] Holder's Right to Pay Owner and Seek Reimbursement

A holder who has paid money to the controller pursuant to the Unclaimed Property Law may make payment to any person appearing to the holder to be entitled to the money. When the holder files proof with the controller that the payment was made and that the payee was entitled to the payment, the controller must reimburse the holder without deducting any fee or other charges. If reimbursement is sought for payment made on a negotiable instrument (including a traveler's check or money order), the holder is entitled to reimbursement if payment was made to a person who appeared to the holder to be entitled to payment [*Code Civ. Proc. § 1560(b)*]. The holder may obtain reimbursement even if he or she makes a payment to a person whose claim to the property is barred because of the expiration of any applicable time period for filing a claim [*Code Civ. Proc. § 1560(c)*; see *Code Civ. Proc. § 1570*, discussed in [11], below].

A holder may reclaim property turned over to the controller (including a certificate of any interest in a business association) without paying any fee or other charges, if the property is still in the controller's possession and the holder files with the controller proof that the owner has claimed the property from the holder. The controller, in his or her discretion, may accept an affidavit from the holder stating the facts that entitle the holder to reimbursement as sufficient proof that the owner has claimed the property [*Code Civ. Proc. § 1560(d)*]. A holder who has mistakenly paid or delivered to the controller property that has not escheated to the state may also retrieve the property, without charge, if the controller has not disposed of it [*Code Civ. Proc. § 1561(b)*; see *Code Civ. Proc. §§ 1563, 1565* (disposal of property by controller); see also *Harris v. Westly* (2004) 116 Cal. App. 4th 214, 219-222, 10 Cal. Rptr. 3d 343 (notice and sale provisions of Unclaimed Property Law did not require controller to notify apparent owners of escheated stock before selling that stock; sale of unclaimed securities without notice did not violate owners' due process rights)].

[10] Owner's Claim Against Controller

Any person, excluding another state [see *Code Civ. Proc. § 1542* (claims by other states)], who claims an interest in property paid or delivered to the state controller pursuant to the Unclaimed Property Law may file a claim to the property or the net proceeds from its sale. The claim must be on a form prescribed by the controller and must be verified by the claimant [*Code Civ. Proc. § 1540(a)*; see § 102C.222]. The controller must consider each claim within 180 days after it is filed and may hold a hearing and receive evidence concerning a claim. The controller must give written notice to the claimant if he or she denies the claim in whole or in part [*Code Civ. Proc. § 1540(b)*].

Any person aggrieved by a decision of the controller or whose claim is not decided within 180 days after its filing may commence an action to establish his or her claim in the superior court in any county or city and county in which the attorney general maintains an office. The action must be brought within 90 days after the controller's decision, or within 270 days after the filing of the claim if the controller fails to make a decision [*Code Civ. Proc. § 1541*; for a complaint, see California Forms of Pleading and Practice, Ch. 252, *Escheat (Unclaimed Property)*, § 252.93 (Matthew Bender)].

Once payment or delivery of money or other property has been made to any claimant under the provisions of the Unclaimed Property Law, no suit may be maintained by any other claimant against the state or any officer or employee of the state for or on account of the property [*Code Civ. Proc. § 1566(a)*]. Furthermore, no suit may be maintained by any person against the state or any of its officers or employees for or on account of any transaction entered into by the State Controller pursuant to the Unclaimed Property Law [*Code Civ. Proc. § 1566(b)*; see, e.g., *Fong v. Westly* (2004) 117 Cal. App. 4th 841, 851-853, 12 Cal. Rptr. 3d 76 (Controller held immune from any damages caused by alleged violations of UPL's notice requirements to holders of shares of stock that escheated to state, which ultimately obtained their sole remedy of shares' proceeds plus interest)].

[11] Escheat Period Not Alterable

No statute of limitations or court order specifying the time within which an action or proceeding may be commenced or

enforced to obtain payment of money or recovery of property from a holder will prevent the escheat of property otherwise escheatable [*Code Civ. Proc.* § 1570].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Intestacy Escheat Real Property Law Ownership & Transfer Death & Incapacity Escheat



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DIVISION VII: PERSONAL TRANSACTIONS
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PART II. LEGAL BACKGROUND

32-102C California Legal Forms--Transaction Guide §§ 102C.19-102C.99

[Reserved]

§§ 102C.19[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

32-102C California Legal Forms--Transaction Guide § 102C.100

§ 102C.100 Facts: Finder of Lost Property or Animal

1. Name, address, and telephone number of finder.
2. Name, address, and telephone number of owner, if known.
3. Any facts suggesting possible identity of owner, if owner unknown.
4. Description of property, including its condition.

NOTE:

The condition of the property is relevant because property that is in bad repair or otherwise appears to have been lost long ago, or abandoned, is unlikely to be claimed by an owner. If no owner claims the property, the finder may not be reimbursed for his or her expenses incurred in connection with the property.

5. Date and time property was found.
6. Place property was found and, if applicable, circumstances under which property was "saved."

NOTE:

The statute governing the rights and responsibilities of finders of lost property specifically covers a person who saves a domestic animal from harm, neglect, starvation, or drowning [*Civ. Code § 2080*].

7. Estimated value of property, and basis for estimate.
8. Whether finder is aware of any advertised reward for return of property.

9. Address of place property is being held, stored, or cared for.
10. Expenses incurred by finder to save, store, board, feed, and/or otherwise care for property.
11. Steps already taken by finder to locate owner.
12. Any facts indicating that property was abandoned rather than lost [*see* § 102C.11[1]].
13. Additional facts concerning found or saved domestic animal:
 - a. Type of animal.
 - b. Description of animal, including any marks, brands, tags, or other distinguishing features.
 - c. Whether animal is apparently healthy or requires immediate medical treatment or other special care.
14. Additional facts concerning estray:

NOTE:

An "estray" is any impounded or seized bovine, horse, mule, sheep, swine, or burro whose owner is unknown or cannot be located [*Food & Agric. Code* § 17001.5]. The term does not include domestic pets such as cats and dogs, which are covered by the Civil Code provisions concerning lost and unclaimed personal property [*see* *Civ. Code* § 2080; *see also* P 13, *above*]. The right to take up [*see* *Food & Agric. Code* § 17001] an estray and have a lien for the expenses of taking up, keeping, and caring for it applies only if the estray is found on premises that the finder owns or to which the finder has the right of possession, or on any highway adjacent to those premises [*Food & Agric. Code* § 17041].

- a. Type of animal (e.g., bovine, horse, mule, sheep, swine, or burro).
- b. Description of animal, including any marks, brands, tags, or other distinguishing features.
- c. Whether animal is apparently healthy or requires immediate medical treatment or other special care [*see* *Food & Agric. Code* § 17091 (procedure for immediate disposal by director of Food and Agriculture); *see also* § 102C.12[4]].
- d. Identity of owner or person entitled to possession of property on or adjacent to which animal was found, if other than finder.

NOTE:

The Bureau of Livestock Identification in the Department of Food and Agriculture regularly publishes livestock bulletins listing both missing and found livestock on its website at www.cdfa.ca.gov/ahfss/li/index.htm. The main phone number for the Bureau of Livestock Identification is (916) 654-0889. Inquiries can also be made to the local brand inspector [*see* *Food & Agric. Code* §§ 483, 20010].

- e. Nature and cost of repair of any damages caused by animal to finder's land, crops, or property.
- f. Whether premises on which animal was found and taken up are entirely enclosed with good and substantial fence [*see Food & Agric. Code § 17121 et seq.; Food & Agric. Code § 17121* ("lawful fence"); *see also § 102C.110*, P 3(a)(2) (special requirements governing estrays found in counties devoted chiefly to grazing)].
- g. Whether finder is interested in purchasing animal in event owner cannot be found.

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodPets & Service AnimalsGovernmentsLocal GovernmentsGeneral
OverviewGovernmentsState & Territorial GovernmentsGeneral Overview



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32-102C California Legal Forms--Transaction Guide § 102C.101

§ 102C.101 Facts: Holder of Unclaimed Property

1. Name, address, and telephone number of holder.
2. Nature of holder's business and/or premises where property was left.
 - a. Residential rental.

NOTE:

Forms and procedures applicable to the disposition of property left in the possession of landlords or innkeepers by tenants or paying guests [*see Civ. Code § 1980 et seq.*] are covered in Ch. 35B, ***Modification and Termination of Leases*** .

- b. Motel or hotel [*see Civ. Code § 1980 et seq.; see also Ch. 35B, Modification and Termination of Leases*].
 - c. Hospital.
 - d. Warehouse.
 - e. Railroad or express company or other common carrier.
 - f. Commission merchant.
 - g. Other.
3. For carrier, warehouse operator, or commission merchant:

- a. Date property received.
- b. Name and address of person who was to collect property.
- c. Whether property was received on consignment and, if so:
 - (1) Whether any advances were made by holder and, if so:
 - (2) Amount advanced.
- 4. For other holders:
 - a. Name and last known address and telephone number of owner, if known.
 - b. Date owner or possessor departed place at which property was left.
- 5. Description of property.
- 6. Estimated value of property and basis for estimate.
- 7. Address of place property is being held, stored, or cared for.
- 8. Address of place property may be claimed, if different from above.
- 9. Steps already taken by holder to locate owner.
- 10. Preparations, if any, already made by holder to dispose of property by public auction or otherwise.
- 11. Costs incurred by holder in connection with property.
 - a. Freight costs.
 - b. Storage costs.
 - c. Advertising costs or other costs related to sale of property.
 - d. Other.
- 12. Sums, if any, due to holder from last known owner.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesGeneral Overview



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32-102C California Legal Forms--Transaction Guide § 102C.102

§ 102C.102 Facts: Receiver

1. Name, address, and phone number of receiver.
2. Nature of receivership and type and/or amount of property and/or money involved.
3. Court that appointed receiver and title and number of action.
4. Names of all known owners and amounts due each.
5. Last known address of each known owner.
6. Whether receiver has published notice concerning unclaimed property or otherwise attempted to locate owners, and dates of each publication or other activity [*see Code Civ. Proc. § 570* (specifics of publication requirement)].
7. Whether receiver has reported lack of response to publication to court and, if so, date of report.
8. Whether court order to pay property over to State Treasury has issued and, if so, date of order.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Remedies Receiverships Receivers Appointments



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32-102C California Legal Forms--Transaction Guide § 102C.103

§ 102C.103 Facts: Holder of Property Subject to Escheat Under Unclaimed Property Law

1. Facts concerning holder:

- a. Full business name.
- b. Federal employer identification number.
- c. Complete address and telephone number.
- d. Whether address is that of holder's main office or branch office.
- e. Office number.
- f. Name, title, and telephone number and title of the person who will actually prepare, or will be directly responsible for preparing, the report [*see 2 Cal. Code Reg. § 1174(e)*] and delivering the escheated property.
- g. If report will be prepared by agent, agent's name, title, and address [*see 2 Cal. Code Reg. § 1174(d)*].
- h. Type of organization [*see 2 Cal. Code Reg. § 1174(a)*]:
 - (1) State or federal bank.
 - (2) State or federal credit union.
 - (3) State or federal savings and loan.

- (4) State or federal loan company.
- (5) Corporation.
- (6) Insurance corporation (determine kind of insurance).
- (7) Department store.
- (8) Credit bureau.
- (9) Utility.
- (10) Partnership.
- (11) Limited liability company.
- (11) Other.

i. For corporate holder [*see 2 Cal. Code Reg. § 1174(b)*]:

- (1) State of incorporation.
- (2) Date of incorporation.
- (3) State in which corporation has its principal place of business.
- (4) Name and state of incorporation of parent corporation, if any.
- (5) Whether report filed by parent, subsidiary, or other.

j. If holder has changed name or is successor to previous holder, previous name of holder or name and address of previous holder.

k. Date that organization filing report commenced operations [*see 2 Cal. Code Reg. § 1174(c)*].

NOTE:

2 Cal. Code Reg. § 1174(c) states that the report must specify the date that the organization filing the report commenced operations. However, the report forms prepared by the controller do not include a space for this information.

2. Facts concerning property:

NOTE:

The facts listed in items (a) through (g), **below**, should be obtained for each item of property to be reported that is valued at \$50 or more. Items of property valued under \$50 may be reported in aggregate [*Code Civ. Proc. § 1530(b)(1), (4)*].

a. Full name, social security number (if known) [*see 2 Cal. Code Reg. § 1174(f)*], and last known

address of each owner of property valued at \$50 or more [see *Code Civ. Proc.* § 1530(b)(4) (items of value under \$50 each may be reported in aggregate)].

NOTE:

If a person other than the insured or annuitant is entitled to funds held by a life insurance corporation, and that person's address is not known to the corporation or is not definite and certain from the corporation's records what person is entitled to the funds, it is presumed that last known address of the person entitled to the funds is the same as the last known address of the insured or annuitant according to corporation's records. This is a presumption affecting the burden of proof [*Code Civ. Proc.* § 1515(b)].

b. Account number and other identifying number, if any [see *Code Civ. Proc.* § 1530(b)(4) (intangible personal property)].

c. Classification of property.

- (1) Demand deposit.
- (2) Savings.
- (3) Wages.
- (4) Royalties.
- (5) Money orders.
- (6) Traveler's checks.
- (7) Dividends.
- (8) Policy proceeds.
- (9) Premium refunds.
- (10) Cash in lieu of fractional shares.
- (11) Bonds.
- (12) Cash held for redemption of shares.
- (13) Other [see § 102C.18[3]].

e. Total amount due, including interest or other earned increment [see *Code Civ. Proc.* §§ 1530(a), (b), 1522; see 2 *Cal. Code Reg.* §§ 1170, 1171 (discontinuance must be based on statute or contract); see also § 102C.221[1][e]].

f. Total lawful charges [see *Code Civ. Proc.* §§ 1513(a)(1), (a)(2), 1522; 2 *Cal. Code Reg.* §§ 1160, 1161, 1165; see also § 102C.221[1][d]].

g. If property is shares of stock or interest or dividends due on shares [*Code Civ. Proc.* § 1530(b)(4); see

Code Civ. Proc. § 1532(d) (duplicate certificate will have to be issued to effect transfer to controller or securities may be registered in uncertificated form in name of controller); § 102C.132, PP 3, 4(d) (procedural guide]:

- (1) Name of issuing company.
- (2) Number and type of original shares issued and shares reported.
- (3) Number of stock certificate or other interest, if any.

h. In the case of the contents of a safe deposit box or other safekeeping repository and in the case of other tangible property, a description of the property and the place where it is held and may be inspected by the controller, along with any amounts owing to the holder for unpaid rent or storage charges and for the cost of opening the safe deposit box or other safekeeping repository, if any, in which the property was contained [*see Code Civ. Proc. § 1530(b)(3)* (contents of report)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Intestacy Escheat Real Property Law Ownership & Transfer Death & Incapacity Escheat



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32-102C California Legal Forms--Transaction Guide § 102C.104

§ 102C.104 Documents Concerning Lost or Unclaimed Property

1. Receipts for expenses incurred by finder or holder in caring for property.
2. Copies of letters or notices sent to owner, or to other persons for purpose of locating owner.
3. Copies of any posters, newspaper ads, or other notices used by finder, law enforcement agency, or other person to attempt to locate owner.
4. Copy of any advertisement offering reward to finder.
5. Copy of affidavit, declaration, notice, or other document signed by finder on turning property over to police, Department of Food and Agriculture, or other authority.
6. Appraisal or other documents supporting finder's estimate of value of property.
7. If holder is commission merchant or warehouse operator, copy of any consignment agreement entered into by holder concerning property.
8. If holder is receiver:
 - a. Copy of court order appointing receiver.
 - b. Copies of any other court orders concerning receiver's handling and disposition of property.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Receiverships Receivers Appointments Governments Local Governments General
Overview Governments State & Territorial Governments General Overview



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32-102C California Legal Forms--Transaction Guide § 102C.105

§ 102C.105 Documents Concerning Property Subject to Escheat Under Unclaimed Property Law

1. Holder's records for each item of property to be reported [*see § 102C.112, P 1*].
2. Copies of any correspondence sent to or received from owner.
3. Copies of any previously-filed reports concerning subject property.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Intestacy Escheat Real Property Law Ownership & Transfer Death & Incapacity Escheat



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32-102C California Legal Forms--Transaction Guide §§ 102C.106-102C.109

[Reserved]

§§ 102C.106[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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PART III. TRANSACTION GUIDE
B. Preliminary Determinations

32-102C California Legal Forms--Transaction Guide § 102C.110

§ 102C.110 Determinations for Finder of Lost Property or Animal

1. Determine which statutory scheme governs disposition of property:

a. For lost domestic animals, *Civ. Code § 2080 et seq.* [*Civ. Code § 2080; see § 102C.11[1]*].

b. For estrays, *Food & Agric. Code § 17001 et seq.* [*see § 102C.12[1]*].

NOTE:

An estray is any impounded or seized bovine animal, horse, mule, sheep, swine, or burro whose owner is unknown or cannot be located [*Food & Agric. Code § 17001.5*].

c. For property remaining on rental premises after tenancy has terminated and tenant has vacated premises, when circumstances suggest that property has been lost, *Civ. Code § 2080 et seq.* [*see Civ. Code §§ 1981, 1982*].

NOTE:

Personal property which a landlord reasonably believes to have been lost is to be disposed of pursuant to *Civ. Code § 2080 et seq.* [*Civ. Code § 1982(a)*]. "Reasonable belief" means the actual knowledge or belief a prudent person would have without making an investigation (including any investigation of public records), except that if the landlord has specific information indicating that an investigation would more probably than not reveal pertinent information and the cost of an investigation would be reasonable in relation to the probable value of the personal property involved, "reasonable belief" includes the actual knowledge or belief a prudent person would have if an investigation were made [*Civ. Code § 1980(d)*]. However, if the appropriate police or sheriff's department refuses to accept property, the landlord may dispose of the property pursuant to *Civ. Code § 1980 et seq.* [*Civ. Code § 1982(b)*], discussed in Ch. 35B, ***Modification and Termination of Leases***.

d. For other lost property, *Civ. Code § 2080 et seq.* [*Civ. Code § 2080*].

2. Determine approximate value of property, if actual value is unknown.

3. If lost property is estray:

a. Determine if finder has right to take up estray and have lien for expenses connected with taking up [*Food & Agric. Code § 17041*]:

NOTE:

In general, any person who finds any estray domestic animal upon the finder's premises, or on premises to which the finder has the right of possession, or on any highway which is adjacent to those premises, may take up the animal and have a lien for all expenses which are incurred in taking up, keeping, and caring for it [*Food & Agric. Code § 17041*].

(1) Does finder own or have right of possession of premises where estray is found; or

(2) If estray is found on highway, does finder own or have right of possession of adjacent premises?

(3) If estray was found on premises located in county or part of county identified by state statute or county ordinance as devoted to grazing [*see Food & Agric. Code § 17121 et seq.* (grazing areas and fence laws)], are those premises entirely enclosed with a good and substantial fence [*Food & Agric. Code § 17122*]?

NOTE:

In any county or part of a county devoted chiefly to grazing and so declared under *Food & Agric. Code § 17121 et seq.*, the finder does not have the right to take up any estray animal found upon the finder's premises, and does not have a lien for expenses, unless the premises are entirely enclosed with a good and substantial fence [*Food & Agric. Code § 17122*]. A lawful fence for these purposes is any fence which is good, strong, substantial, and sufficient to prevent the ingress and egress of livestock. No wire fence is a good and substantial fence within the meaning of this article unless it has three tightly stretched barbed wires securely fastened to posts of reasonable strength, firmly set in the ground not more than one rod apart, and one of those wires is at least four feet above the surface of the ground. Any kind of wire or other fence of height, strength and capacity equal to or greater than such a the wire fence is a good and substantial fence for these purposes, as are cattle guards of such width, depth, rail spacing, and construction as will effectively turn livestock [*Food & Agric. Code § 17122*]

b. Determine prevailing rates charged by commercial enterprises that feed livestock on custom basis in area where estray was found [*see Food & Agric. Code § 17095*].

c. Determine which local agency or official should be notified of taking up of estray [*Food & Agric. Code § 17042; see also § 102C.202*].

NOTE:

The statute requires that notice be filed with the secretary of Food and Agriculture [*Food & Agric. Code*

§ 17042]. In practice, estrays are handled on the county level by the brand inspector or other local authorities. To determine who should be notified of the taking up of an estray in a particular county, contact the Bureau of Livestock Identification at (916) 654-0889, the local brand inspector, or a local slaughterhouse or feedyard.

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodPets & Service AnimalsGovernmentsLocal GovernmentsGeneral
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32-102C California Legal Forms--Transaction Guide § 102C.111

§ 102C.111 Determinations for Holder of Unclaimed Property.

1. Determine which statutory scheme governs disposition of property:

a. For goods, merchandise, or other property received by railroad or express company, other common carrier, commission merchant, innkeeper, or Warehouse operator for transportation or safekeeping, *Civ. Code § 2081 et seq.* [*Civ. Code § 2081; see § 102C.15 (discussion)*].

b. For property left in hospital, *Civ. Code § 1862.5* [*see § 102C.16 (discussion)*].

c. For property left on premises of landlord or innkeeper by former tenant or paying guest under circumstances that do *not* indicate property was lost, *Civ. Code § 1980 et seq.* [*Civ. Code § 1982(a); see § 102C.110 P 1(c)*], covered in Ch. 35B, *Modification and Termination of Leases* .

NOTE:

Civ. Code § 1980 et seq. is an optional procedure [*Civ. Code § 1981(a)*]. That procedure may not be used in the case of lost property, which should be handled in accordance with *Civ. Code § 2080 et seq.*, unless the appropriate police or sheriff's department refuses to accept the lost property [*Civ. Code § 1982*]. The procedure also is inapplicable when *Civ. Code §§ 1862.5, 2080.8, 2080.9, or 2081 to 2081.6* applies [*Civ. Code § 1981(b)*].

d. For property in possession of museum to which it was loaned under expired loan agreement, *Civ. Code § 1899 et seq.* [*see Ch. 102E, Sales and Loans of Artwork*].

e. For property in possession of receiver, *Code Civ. Proc. § 570*.

2. Determine approximate value of property, if actual value is unknown.

3. Determine how holder is required to announce intention to dispose of property by public auction:

a. For goods, merchandise, or other property received by railroad or express company, other common carrier, commission merchant, innkeeper, or warehouse operator for transportation or safekeeping, by customary manner of giving notice of sale of goods by public auction at place in which goods are held or stored [*Civ. Code* § 2081.1; see § 102C.210[2] (form)].

b. For property left in hospital, by written notice of sale sent by regular mail, postage prepaid, to last known owner at his or her last known address [*Civ. Code* § 1862.5; see § 102C.212[2] (form)].

c. For property in possession of receiver, by notice published at least once weekly for four consecutive weeks in one or more newspapers published in county [*Code Civ. Proc.* § 570; see § 102C.214[2] (form)].

4. For goods, merchandise, or other property received by railroad or express company, other common carrier, commission merchant, innkeeper, or warehouse operator for transportation or safekeeping, determine customary manner of giving notice of sale of goods by public auction at place in which goods are held or stored [*Civ. Code* § 2081.1].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102C LOST AND UNCLAIMED PROPERTY
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

32-102C California Legal Forms--Transaction Guide § 102C.112

§ 102C.112 Determinations for Holder of Property Subject to Escheat Under Unclaimed Property Law

1. Determine whether property is subject to escheat.

a. Is property of type subject to escheat [*see Code Civ. Proc. § 1510 et seq.; see also § 102C.18[3] and [4]*]?

b. Have conditions for escheat concerning passage of time and inactivity of owner been met?

NOTE:

The escheat periods noted below expire six months **before** the last date on which the holder is required to give the notices discussed in P 2, **below**, and in §§ 102C.18[7] and 102C.130 [*see Code Civ. Proc. §§ 1513.5, 1516(d), 1520(b)*]. Thus, holders should be advised to track inactivity well before the actual expiration of the escheat period.

(1) For demand, savings, and matured time deposits, matured investment certificates, and accounts subject to negotiable order of withdrawal (NOW), made with banking or financial organization, and other interests in or deposits made with financial organization, have more than three years elapsed since owner has done any of following [*Code Civ. Proc. § 1513(a)(1), (a)(2); see § 102C.18[3][a], [b]*]?

(a) Increased or decreased amount of deposit.

(b) Cashed an interest check.

(c) Presented passbook or other appropriate record for crediting of interest.

(d) Corresponded electronically or in writing with holder concerning funds or deposit.

(e) Otherwise indicated interest in deposit as evidenced by memorandum or other record on file with holder.

(f) Conducted one of above listed activities with respect to another deposit or account at same banking or financial organization, or an individual retirement account or funds held by the financial organization under a retirement plan for self-employed individuals or a similar account or plan, and received electronic or written communications from banking or financial organization regarding the other deposit or account.

(2) For sums payable on traveler's checks issued by business association and outstanding for more than 15 years from date of issuance, have more than 15 years elapsed since owner has done either of following [*Code Civ. Proc. § 1513(a)(3); see § 102C.18[3][c]*]?

(a) Corresponded with holder concerning traveler's checks.

(b) Otherwise indicated interest in traveler's checks as evidenced by memorandum or other record on file with holder.

(3) For sums payable on any other written instrument on which banking or financial organization is directly liable and that have been outstanding for more than three years from date payable (or date of issuance if payable on demand), have more than three years elapsed since owner has done either of following [*Code Civ. Proc. § 1513(a)(4); see § 102C.18[3][d]*]:

NOTE:

These "other written instruments" include, but are not limited to, drafts and certified checks [*Code Civ. Proc. § 1513(a)(4)*]. Prior to January 1, 2004, these written instruments were subject to a five-year escheat period [*see Stats 2003, ch. 304, § 1*].

(a) Corresponded electronically or in writing with holder concerning sums.

(b) Otherwise indicated interest in sums as evidenced by memorandum or other record on file with banking or financial organization.

(4) For sums payable on money orders issued by business association (including a banking or financial organization) and outstanding for more than seven years from date payable (or date of issuance if payable on demand), have more than seven years elapsed since owner has done either of following [*Code Civ. Proc. § 1513(a)(5); see § 102C.18[3][e]*].

(a) Corresponded electronically or in writing with holder concerning sums; or

(b) Otherwise indicated interest in sums as evidenced by memorandum or other record on file with banking or financial organization?

(5) For funds held by business association in individual retirement accounts or under retirement plans for self-employed individuals, or similar accounts or plans established pursuant to state or federal internal revenue laws, have more than three years elapsed since funds become payable or distributable without owner doing any of following [*Code Civ. Proc. § 1513(a)(6); see § 102C.18[3][f]*]?

NOTE:

Funds held in these plans become payable or distributable only when distribution of all or a part of the funds becomes mandatory under the terms of the account or plan [*Code Civ. Proc. § 1513(a)(6)*].

(a) Increasing or decreasing principal.

(b) Accepting payment of principal or income.

(c) Corresponding with holder in writing concerning property.

(d) Otherwise indicating interest in property.

(e) owner has owned another such account or plan with the business association, and the owner has conducted one of the activities listed above.

(6) For wages and salaries, has owner failed to claim them for more than one year after the wages or salaries become payable [*Code Civ. Proc. § 1513(a)(7)*; see § 102C.18[3][g]; Stats 2003, ch. 304, § 1]?

(7) For contents of safe deposit boxes or other safekeeping repositories, has owner failed to claim contents within three years after later of following [*Code Civ. Proc. § 1514*; see § 102C.18[3][h]]?

(a) Expiration date of lease or rental period.

(b) Expiration date of agreement under which box was furnished free of cost.

(8) For funds held or owing by life insurance corporation under life or endowment insurance policy or annuity contract that has matured or terminated, has owner failed to claim and receive payment within three years after it became due and payable [*Code Civ. Proc. § 1515(a), (d)*; see *Code Civ. Proc. § 1515(c)* ("matured" defined); § 102C.18[3][i]]?

NOTE:

This time limit applies regardless of whether or not the policy or contract has been surrendered as required [*Code Civ. Proc. § 1515(a), (d)*].

(9) For sums owing on demutualization of insurance companies, see § 102C.18[3][j] [*Code Civ. Proc. § 1515.5*].

(10) For dividends, profits, distributions, interest, payments on principal, and other sums held or owing by business association for or to shareholder, certificate holder, member, bondholder, other security holder, or participating patron of cooperative, have three years elapsed since date prescribed for payment or delivery without owner either of following [*Code Civ. Proc. § 1516(a)*; see § 102C.18[3][k]]?

(a) Claiming property; or

(b) Corresponding in writing with holder concerning property?

(11) For intangible interests in business associations as evidenced by stock or membership records, have three years elapsed since owner has done any of following [*Code Civ. Proc. § 1516(b)*; see § 102C.18[3][l]]:

NOTE:

The property described above will only escheat under the conditions described if the holder does not

know the location of the owner at the end of the three-year period [*Code Civ. Proc.* § 1516(b)].

(a) Claimed dividend, profit, distribution, interest, payment on principal, or other sum.

(b) Corresponded in writing with holder concerning interest.

(c) Otherwise indicated interest in property as evidenced by memorandum or other record on file with holder.

(12) For intangible personal property subject to escheat [*see Code Civ. Proc.* § 1510] and tangible personal property located in California that is distributable in course of business association's voluntary or involuntary dissolution or liquidation, has owner failed to claim property within six months after final distribution or liquidation date [*Code Civ. Proc.* § 1517; *see* § 102C.18[3][m]]?

NOTE:

Property distributable in course of dissolution or liquidation of an insurer in accordance with *Ins. Code* § 1010 *et seq.*, that is unclaimed by the owner after six months of the date of final distribution, is transferred to the Department of Insurance, with any proceeds of sale of property and other funds to be deposited in the Insurance Fund [*Code Civ. Proc.* § 1517(b)].

(13) For intangible personal property subject to escheat [*see Code Civ. Proc.* § 1510] and tangible personal property located in California that is held in a fiduciary capacity [*see Code Civ. Proc.* § 1518(c)] for benefit of another person, have three years elapsed since property became payable or distributable [*see Code Civ. Proc.* § 1518(b)] without owner having done [*Code Civ. Proc.* § 1518(a); *see* § 102C.18[3][n]]?

(a) Increased or decreased principal amount.

(b) Accepted payment of principal or income.

(c) Corresponded in writing concerning property or otherwise expressed interest in property, as evidenced by memorandum or other record on file with fiduciary.

(14) For intangible personal property subject to escheat [*see Code Civ. Proc.* § 1510] and tangible personal property located in California that is held for owner by government or governmental subdivision or agency, has owner failed to claim property for more than three years [*Code Civ. Proc.* § 1519; *see* § 102C.18[3][o]]?

(15) For employee benefit plan distributions, have three years elapsed after funds became payable or distributable without owner having done any of following [*Code Civ. Proc.* § 1521(a); *see* § 102C.18[3][r]]?

(a) Accepted distribution.

(b) Corresponded in writing concerning distribution or otherwise indicated interest as evidenced by memorandum or other record on file with fiduciary [*see Code Civ. Proc.* § 1521(a) (definition)] of trust or custodial fund or administrator?

(16) For sums held by business association that have been ordered to be refunded by court or administrative agency, has owner failed to claim refund within one year after it has become payable in accordance with final determination or order [*Code Civ. Proc.* § 1519.5; *see* § 102C.18[3][p]]?

NOTE:

This time limit applies whether or not the final determination or order requires any person entitled to a refund to make a claim for it [*Code Civ. Proc. § 1519.5*].

(17) For other tangible and intangible property held or owing in ordinary course of holder's business, has owner failed to claim property within three years after it became payable or distributable [*Code Civ. Proc. § 1520*; see § 102C.18[3][q]]?

2. Determine whether and when holder must give notice of impending escheat to last known owner.

NOTE:

For a procedural checklist regarding the notice, see § 102C.130. For a form for giving notice, see § 102C.220[2].

a. For deposits, account, shares, and other interests in banking or financial organizations valued at \$50 or more [see *Code Civ. Proc. § 1513(a), (b)*] notice must be given not less than six nor more than 12 months before the time the account, deposit, shares, or other interest becomes reportable, if address that holder has for apparent owner, is not (according to holder's records) inaccurate [*Code Civ. Proc. § 1513.5*]; see P 1(b)(1), *above*, and P 4(b), *below*.

b. For property intangible interests in business associations as evidenced by stock or membership records [see *Code Civ. Proc. § 1516(b)*], business association must make reasonable efforts to notify owner by mail, or, if the owner has consented to electronic notice, send electronically, not less than 6 nor more than 12 months before time when interest in business association becomes reportable [*Code Civ. Proc. § 1516(d)*]; see P 1(b)(11), *above*, and P 4, *below*].

c. For all other property that is held or owing in the ordinary course of the holder's business and is valued at \$50 or more, if holder has an address for apparent owner, which holder's records do not disclose to be inaccurate, holder must notify owner not less than six nor more than 12 months before time when property becomes transferable to controller [*Code Civ. Proc. § 1520(b)*; see *Code Civ. Proc. § 1532(a)*] (property to be delivered to controller no sooner than seven months and no later than seven months and 15 days after the final date of filing report); see also P 1(b), *above*, and P 5, *below*].

3. Determine which reporting form must be filed.

NOTE:

If the form titles do not clearly indicate which form to use for a specific type of property, contact the Reporting Unit of the State Controller's office at (916) 323-2845.

a. Holder Face Sheet (UFS-1) [see § 102C.221[2]], for reporting particulars of holder.

b. Holder Detail Sheet for Cash Only or Safe Deposit Property (UDS-1A).

NOTE:

If a headquarters office is filing separate reports for one or more branches, each branch must file a separate detail sheet.

c. Holder Detail Sheet for Stock Property, with or without cash (UDS-1). If a headquarters office is

filing separate reports for one or more branches, each branch must file a separate detail sheet.

d. Securities Summary (SS-1) must be filed whenever securities are reported.

e. Authorization agreement for electronic funds transfer (SCO EFT-1), if total cash remittance will exceed \$20,000 [*Code Civ. Proc. § 1532(a)*].

4. Determine filing deadline:

NOTE:

The controller may postpone the reporting date on his or her motion or on written request by any person required to file a report [*Code Civ. Proc. § 1530(d)*].

a. For reports made by life insurance corporations, and all reports of insurance corporation demutualization proceeds [*see Code Civ. Proc. § 1515.5*], April 30 of year following year for which report is filed [*Code Civ. Proc. § 1530(d)*].

NOTE:

The initial report for demutualization proceeds [*see Stats 2003, ch. 304, § 2*] must be filed on or before May 1, 2004, with respect to conditions in effect on December 31, 2003 [*Code Civ. Proc. § 1530(d)*].

b. For all other reports, October 31 for either [*Code Civ. Proc. § 1530(d)*]:

(1) Twelve-month period ending on June 30 of same year; or

(2) Most recently-ended fiscal year.

5. Determine payment or delivery deadline:

a. For contents of safe deposit boxes or other safekeeping repositories held in California by business associations, payment must be made at earlier of following times [*Code Civ. Proc. § 1532.1; see Code Civ. Proc. § 1514*]:

(1) When payment or delivery is requested by controller; or

(2) Within one year after final date for filing report [*see Code Civ. Proc. § 1530(d); see also P 4(b), above*].

b. For all other property, payment or delivery must be made no sooner than seven months and no later than seven months and 15 days after the final date of filing report [*Code Civ. Proc. § 1532(a)*].

c. If a person establishes his or her right to receive property specified in the report to the satisfaction of the holder before that property has been delivered to the Controller, or it appears that, for any other reasons, the property may not be subject to escheat, the holder shall not pay or deliver the property to the Controller but must file a report with the Controller containing information pertaining to the property not subject to escheat [*Prob. Code § 1532 (b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Intestacy Escheat Real Property Law Ownership & Transfer Death & Incapacity Escheat



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DIVISION VII: PERSONAL TRANSACTIONS
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32-102C California Legal Forms--Transaction Guide §§ 102C.113-102C.119

[Reserved]

§§ 102C.113[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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C. Procedural Guide for Disposal of Lost or Unclaimed Property

32-102C California Legal Forms--Transaction Guide § 102C.120

§ 102C.120 Disposal of Domestic Animal or Other Found Property

NOTE:

See § 102C.110, P 1 to determine whether the provisions of *Civ. Code § 2080 et seq.* govern the disposition of a particular item of property.

1. If owner is known [*Civ. Code § 2080*]:

a. Within reasonable time:

(1) Inform owner of finding of property [*see § 102C.200[2]* (form)].

NOTE:

The statute does not specify that the owner must be informed in writing that the property has been found. However, a finder who takes charge of lost property acquires the responsibilities of a depositary for hire [*Civ. Code § 2080; see Civ. Code § 1851 et seq.*, discussed in Ch. 102, **Bailments**], and a finder who appropriates found property to his or her own use without making reasonable and just efforts to find the owner and restore the property to the owner may be charged with theft [*Penal Code § 485*]. Thus, the use of a written notice is advisable in order to protect the finder.

(2) Collect reasonable finder's charge for saving and caring for property, if any, from owner.

(3) Return property to owner.

b. Retain copy of letter or notice given to owner for finder's records.

c. If owner does not claim property within reasonable time and property is worth \$100 or more, proceed as discussed

under P 2, *below*.

2. If owner is unknown or has not claimed property, and property is worth \$100 or more:

a. Within reasonable time, turn property over to [Civ. Code § 2080.1(a)]:

(1) City police department, if property was found within city or city and county; or

(2) County sheriff's department, if property was found outside city limits.

b. If police or sheriff's department does not provide finder with form covering information required by statute [see Civ. Code § 2080.1(a)], prepare, have applicant sign, and deliver to police or sheriff's department, along with property, an affidavit (or declaration) [see Code Civ. Proc. § 2015.5] that includes following information [see § 102C.201[2] (form)]:

(1) When and where finder found or saved property [Civ. Code § 2080.1(a)].

(2) Description of property [Civ. Code § 2080.1(a)].

(3) If property was saved [Civ. Code § 2080.1(a)].

(a) How and from what it was saved.

(b) Whether owner is known to finder.

(c) Statement that finder has not secreted, withheld, or disposed of any part of property.

(4) Value of property.

NOTE:

Although the statute does not require the affidavit or declaration to include a statement of the property's value, a subsequent statute governing the finder's right to the property [Civ. Code § 2080.3; **see** P d, **below**] refers to the "reported value" of the property. It is unclear from the statute whether the finder, the police, or some other source is to provide the "reported value." However, because the procedures for handling the property and the finder's right to reclaim it are determined according to its "reported value" [Civ. Code § 2080.3], the finder may wish to establish this figure at the time the property is turned over to the police or sheriff's department.

c. Retain copy of affidavit or declaration for finder's records.

d. If finder wishes to claim property in event owner does not come forward:

NOTE:

The finder may not claim the property if he or she is an employee of a public agency who found the property in the course of his or her employment [Civ. Code § 2080.3].

(1) Request that police or sheriff's department to which property was delivered notify finder if "quick sale" of property is planned [Civ. Code § 2080.5; *see* § 102C.11[3]] and give finder opportunity to claim or bid on property.

NOTE:

Civ. Code § 2080.5 does not set forth the finder's right to claim the property in a quick sale situation. The policy followed in this situation may vary among individual police and sheriff's departments.

(2) If reported value of property is less than \$250 [see P b(4) NOTE, *above*], instruct finder to claim property from police or sheriff's department when 90 days have elapsed since finder's delivery of property to department [see *Civ. Code § 2080.3(b)*] (title to property not claimed by its owner within 90 days after finder delivers it to police or sheriff's department vests in finder [*Civ. Code § 2080.3(b)*]).

(3) If reported value of property is \$250 or more [see NOTE at P b(4), *above*] and 90 days have elapsed since finder delivered property to police or sheriff's department [*Civ. Code § 2080.3(a)*]:

(a) Ascertain that police or sheriff's department has published notice of property at least once in newspaper of general circulation; and

(b) If owner does not claim property within seven days following first publication of notice, instruct finder to pay police or sheriff's department cost of publication and claim property.

NOTE:

If the owner does not claim the property within seven days after the first publication of notice by the police or sheriff's department, title to the property will vest in the finder on his or her payment of the cost of publication, unless the property was found or saved by an employee of any public agency in the course of his or her employment, in which case it will be sold by public auction [*Civ. Code § 2080.3(a)*].

3. If owner is unknown, circumstances of finding of property give no knowledge or means of inquiry as to owner's identity, and property is valued at less than \$100, instruct finder to take the following steps:

NOTE:

Although the Civil Code provisions governing lost property do not require a finder who is unaware of the owner's identity to turn property valued at less than \$100 over to the police [see *Civ. Code §§ 2080, 2080.1*], the finder should protect himself or herself from a possible theft charge [see *Penal Code § 485*] by contacting the police or sheriff's department concerning any found property not obviously abandoned by its owner [see § 102C.11[1]] prior to appropriating it for his or her own use or otherwise disposing of it.

a. Contact police or sheriff's department, as applicable [see P 2(a), *above*] to determine whether property should be turned in; and

b. If police or sheriff's department refuses to accept property, keep or dispose of property as he or she desires.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsAgriculture & FoodGeneral Overview



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C. Procedural Guide for Disposal of Lost or Unclaimed Property

32-102C California Legal Forms--Transaction Guide § 102C.121

§ 102C.121 Disposal of Estray

1. Ascertain that animal is confined in secure place [*Food & Agric. Code § 17042*] and that reasonable care has been taken to preserve it from injury [*Food & Agric. Code § 17043*].
2. Immediately after taking up of animal, provide appropriate local authority with notice including [*Food & Agric. Code § 17042*; see § 102C.110, P 3(c); see also § 102C.202[2] (form)]:

NOTE:

Although the wording of the statute suggests that written notice is required [*see Food & Agric. Code § 17042*], some offices take reports over the phone.

- a. Description of animal.
 - b. Animal's marks or brands, if any.
 - c. Probable value of animal.
 - d. Statement of date and place animal was taken up and confined.
3. Deliver animal to inspector for Department of Food and Agriculture on demand [*Food & Agric. Code § 17061*].
 4. If taker-up wishes to purchase animal from Department of Food and Agriculture in event owner is not located, contact Department for information concerning date and other particulars of sale.

NOTE:

An animal valued at \$225 or more may be sold by the Department after 14 days have elapsed since the first posting of notice concerning the animal [*Food & Agric. Code* § 17092]. An animal valued at less than \$225 may be sold five days after posting notice [*Food & Agric. Code* § 17066]. An animal in a condition that requires immediate disposal may be sold or otherwise disposed of without notice or a waiting period [*Food & Agric. Code* § 17091].

5. Following sale or other disposition of animal by Department, request payment for keeping and care of animal [*Food & Agric. Code* § 17095].

NOTE:

A taker-up is entitled to a per-day payment, based on the prevailing rates charged by commercial enterprises that feed livestock on a custom basis, for the keeping and care of an estray [*Food & Agric. Code* § 17095]. To determine the procedure for collecting payment, contact the authority to whom notice concerning the estray was delivered [*see* § 102C.110, P 3(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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DIVISION VII: PERSONAL TRANSACTIONS
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C. Procedural Guide for Disposal of Lost or Unclaimed Property

32-102C California Legal Forms--Transaction Guide § 102C.122

§ 102C.122 Disposal of Goods, Merchandise, or Other Property Received by Common Carrier, Commission Merchant, Innkeeper, or Warehouse Operator for Transportation or Safekeeping

NOTE:

The procedure described in PP 1-3, ***below***, may also be used by a commission merchant or warehouse operator who receives property on consignment and makes advances on it, either to the owner or for freight and charges, if the advances are not paid within 60 days from the date made [*Civ. Code § 2081.5*].

1. Instruct holder to do one of following [*Civ. Code § 2081*]:

- a. Hold property; or
- b. Store property with some reasonable person.

NOTE:

After storage of the property, the responsibility of the holder ceases. The person with whom the property is stored is not liable for loss or damage except that resulting from his or her negligence or want of proper care [*Civ. Code § 2081.4*].

2. Instruct holder to release property to owner, consignee, or other authorized person on payment of freight and just and reasonable charges within 60 days after holder's receipt of property [*Civ. Code §§ 2081, 2081.1*].

3. If no person calls for property and pays freight and charges within 60 days after its receipt by holder:

- a. Give notice of sale of property by public auction, in manner customary at place property is held or stored [*Civ. Code § 2081.1; see § 102C.210[2] (form)*].

- b. Retain copy of notice for holder's records.
- c. Hold public auction and sell property, or as much of it as will pay freight and charges, to highest bidder [*Civ. Code § 2081.1*].
- d. After sale, instruct holder to take the following steps:
 - (1) Retain any surplus from sale remaining after payment of freight, storage, expenses of sale, and other reasonable charges for 60 days following sale [*Civ. Code § 2081.2*].
 - (2) Pay surplus over to owner of property or owner's agent on demand at any time within 60 days after sale [*Civ. Code § 2081.2*; see *Civ. Code § 2081.3*; see also § 102C.211[2] (form for demand)].
 - (3) If owner or agent fails to demand surplus within 60 days after sale, pay surplus into county treasury [*Civ. Code § 2081.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsGeneral OverviewReal Property LawGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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C. Procedural Guide for Disposal of Lost or Unclaimed Property

32-102C California Legal Forms--Transaction Guide § 102C.123

§ 102C.123 Disposal of Property Left With Hospital

1. Instruct holder to keep or store property for 180 days following departure of owner or possessor from hospital [*Civ. Code § 1862.5*].
2. If property is not claimed within 180 days, send notice containing following information to last known owner at last known address, by regular mail, postage prepaid [*Civ. Code § 1862.5; see § 102C.212[2]* (form)]:
 - a. Description of each item of property to be sold.
 - b. Name of last known owner.
 - c. Name of hospital.
 - d. Time and place of sale of property by public auction.
3. Retain copy of notice for hospital's records.
4. If owner does not claim property within four weeks after written notice is given, sell property at public auction [*Civ. Code § 1862.5*].
5. Dispose of proceeds of sale as follows [*Civ. Code § 1862.5*]:
 - a. Retain following amounts:
 - (1) Charges for storage, if any.

NOTE:

Civ. Code § 1862.5 does not specify whether the hospital may charge storage fees in connection with an item claimed within 180 days after the owner's departure from the hospital or between the time of notice and the time of sale.

(2) Reasonable expenses of sale.

(3) All sums due hospital from last known owner of property.

b. Deliver remaining balance, if any, to rightful owner or his or her legal representative on demand made within one week after sale [*see § 102C.213[2]* (form for demand)].

c. If remaining balance is not claimed within one week after sale, pay balance into general fund of county in which hospital is located.

d. Instruct hospital that has substantially complied with statutory requirements for disposal of unclaimed property that it is thereby exonerated from any liability for property sold [*Civ. Code § 1862.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102C LOST AND UNCLAIMED PROPERTY
PART III. TRANSACTION GUIDE

C. Procedural Guide for Disposal of Lost or Unclaimed Property

32-102C California Legal Forms--Transaction Guide § 102C.124

§ 102C.124 Disposal of Funds in Hands of Receiver

NOTE:

For forms and instructions governing the appointment of receivers and the duties of receivers generally, see California Forms of Pleading and Practice, Ch. 486, **Receivers** (Matthew Bender).

1. Draft notice concerning unclaimed funds, including following information [*Code Civ. Proc.* § 570; see § 102C.214[2] (form)]:

- a. Name of owner of unclaimed funds.
- b. Owner's last known place of residence or post office address.
- c. Amount of unclaimed funds.

2. Arrange for publication of notice in at least one newspaper published in county at least once weekly for four consecutive weeks [*Code Civ. Proc.* § 570].

NOTE:

The newspaper will need an additional copy of the notice for its proof of publication [*see* P 4, **below**]. Counsel may wish to time the publication so that the report [*see* P 5, **below**] may be made as part of the motion for request for discharge [*see Cal. Rules of Court, Rule 3.1184*] and the order mentioned in P 6, **below**, can be part of the order for discharge.

3. Retain copy of notice for receiver's records.

4. Request that newspaper execute proof of publication and file proof with clerk of court overseeing receivership [*see*

Code Civ. Proc. §§ 2010, 2011, 2015.5].

5. If owner does not claim funds within 30 days after date of last publication, report this fact to court overseeing receivership [*Code Civ. Proc.* § 570].

6. On order of court, pay funds into State Treasury accompanied with copy of order [*Code Civ. Proc.* § 570].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversDuties



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32-102C California Legal Forms--Transaction Guide §§ 102C.125-102C.129

[Reserved]

§§ 102C.125[Reserved]



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D. Procedural Guide for Reporting and Delivering Escheated Property

32-102C California Legal Forms--Transaction Guide § 102C.130

§ 102C.130 Notice Requirements for Holders of Property About to Escheat

NOTE:

There are three provisions of the Unclaimed Property Law [*Code Civ. Proc. § 1500 et seq.*] governing notices holders are required to give to apparent owners before their property is reported and turned over to the controller: *Code Civ. Proc. §§ 1513.5, 1516(d), and 1520(b)*. Although they are substantially similar, they are discussed separately in PP 1, 2, and 3, **below** [*see also § 102C.18[7]*].

1. For banking or financial institution:

a. Instruct banking or financial institution to prepare and mail to, or, if the owner has consented to electronic notice, send electronically, apparent owner notice, containing information listed in (b)-(d) **below**, not less than two years nor more than two and one-half years after date of last activity by or communication with apparent owner concerning account, deposit, shares, or other interest, or alternatively, not less than six nor more than 12 months before the time the account, deposit, shares, or other interest becomes reportable to the controller, if all of following apply:

(1) Property is subject to escheat pursuant to *Code Civ. Proc. § 1513(a)(1) or (a)(2)* [*Code Civ. Proc. § 1513.5(a); see § 102C.18[3][a] and [b]*];

(2) Holder has address for apparent owner of property and holder's records do not disclose address to be inaccurate [*Code Civ. Proc. § 1513.5(a)*]; and

(3) Deposit, account, shares, or other interests is in amount of \$50 or more [*Code Civ. Proc. § 1513.5(c)*].

b. Include following information in notice [*Code Civ. Proc. § 1513.5(b)*]; for form, *see § 102C.220[2]*:

(1) A heading that reads "THE STATE OF CALIFORNIA REQUIRES US TO NOTIFY YOU THAT YOUR UNCLAIMED PROPERTY MAY BE TRANSFERRED TO THE STATE IF YOU DO NOT CONTACT US";

(2) Time that deposit, account, shares, or other interest will escheat; and

(3) Effects of escheat, including necessity for filing claim for return of deposit, account, shares, or other interest.

c. In bold or in a font that is at least two points larger than rest of notice, do all of following [*Code Civ. Proc. § 1513.5(b)*]:

(1) Specify that since date of last activity, or for the last two years, there has been no customer activity on deposit, account, shares, or other interest.

(2) Identify deposit, account, shares, or other interest by number or identifier.

(3) Indicate that deposit, account, shares, or other interest is in danger of escheating to the state.

(4) Specify that California Unclaimed Property Law requires banks, banking organizations, and financial organization to transfer funds of a deposit, account, shares, or other interest if it has been inactive for three years.

d. Include with notice a form by which owner may declare intention to maintain deposit, account, shares, or other interest [*Code Civ. Proc. § 1513.5(b)*].

NOTE:

Code Civ. Proc. § 1513.5(b) states that this form must be "as prescribed by the Controller." However, the Controller has not created an official form for this notice, or prescribed any requirements for this form. The Controller's office has indicated that guidelines may be issued at some future time. If the owner fills out, signs, and returns this form to the holder, the property will not escheat [*Code Civ. Proc. § 1513.5(b)*; *see Code Civ. Proc. § 1513(a)(1)(B), (a)(2)(B)*].

NOTE:

In lieu of returning the form, the business association may provide a telephone number or other electronic means to enable the owner to contact the association [*Code Civ. Proc. §§ 1513.5(b), 1516(d), 1520(b)*]. With such contact, the business association must be deemed to know the location of the owner. The business association may also impose a service charge, not to exceed two dollars (\$2) [*Code Civ. Proc. §§ 1513.5(b), 1516(d), 1520(b)*]. Additionally, the holder may give additional notice at any time between the date of last activity by, or communication with, the owner and the date the holder transfers the deposit, shares, or other interest to the controller [*Code Civ. Proc. §§ 1513.5(b), 1516(d), 1520(b)*].

e. Deduct service charge from deposit, account, shares, or other interest, in amount not exceeding lesser of [*Code Civ. Proc. § 1513.5(b)*]:

(1) Two dollars; or

(2) Administrative cost of mailing notice.

2. For business associations:

a. Instruct business association that holds property subject to escheat pursuant to *Code Civ. Proc. § 1516(b)*, i.e., intangible interests evidenced by its stock records or membership records [see § 102C.18[3][I]], to prepare and mail, or, if the owner has consent to electronic notice, send electronically, to apparent owner notice, containing information listed in (b)-(d) below, not less than six nor more than 12 months before the time the interest becomes reportable to the controller [*Code Civ. Proc. § 1516(d)*].

b. Draft notice that owner's interest will escheat to state and specify *Code Civ. Proc. § 1516(d)*; for form, see § 102C.220[2]:

(1) A heading that reads "THE STATE OF CALIFORNIA REQUIRES US TO NOTIFY YOU THAT YOUR UNCLAIMED PROPERTY MAY BE TRANSFERRED TO THE STATE IF YOU DO NOT CONTACT US"; that interest will escheat.

(2) Time that interest will escheat.

(3) Effects of escheat and necessity of filing a claim for return of interest.

c. In bold or in a font that is at least two points larger than the rest of the notice, do all of following [*Code Civ. Proc. § 1516(d)*]:

(1) Specify that since date of last activity, or for the last two years, there has been no customer activity on deposit, account, shares, or other interest.

(2) Identify deposit, account, shares, or other interest by number or identifier.

(3) Indicate that deposit, account, shares, or other interest is in danger of escheating to state.

(4) Specify that California Unclaimed Property Law requires banks, banking organizations, and financial organization to transfer funds of a deposit, account, shares, or other interest if it has been inactive for three years.

d. Include in or with notice a form by which owner may confirm owner's current address [*Code Civ. Proc. § 1516(d)*].

NOTE:

Code Civ. Proc. § 1516(d) states that this form must be "as prescribed by the Controller." However, the Controller has not created an official form for this notice, or prescribed any requirements for this form. The Controller's office has indicated that guidelines may be issued at some future time. If the form is filled out, signed by the owner, and returned to the holder, it is deemed that the business association knows the location of the owner [*Code Civ. Proc. § 1516(d)*].

d. Include in or with notice a form by which owner may confirm owner's current address [*Code Civ. Proc. § 1516(d)*].

NOTE:

In lieu of returning the form, the business association may provide a telephone number or other electronic means to enable the owner to contact the association [*Code Civ. Proc. §§ 1513.5(b), 1516(d)*].

1520(b)]. With such contact, the business association must be deemed to know the location of the owner. The business association may also impose a service charge, not to exceed two dollars (\$2) [*Code Civ. Proc. §§ 1513.5(b), 1516(d), 1520(b)*]. Additionally, the holder may give additional notice at any time between the date of last activity by, or communication with, the owner and the date the holder transfers the deposit, shares, or other interest to the controller [*Code Civ. Proc. §§ 1513.5(b), 1516(d), 1520(b)*].

3. For other businesses:

a. Instruct business that holds property subject to escheat other than in accordance with *Code Civ. Proc. § 1513(a)* or *(b)* or *1516(d)* to prepare and mail, or, if the owner has consented to electronic notice, send electronically, to apparent owner notice, containing information listed in (b)-(d), *below*, not less than six nor more than 12 months before the time the interest becomes transferrable to the controller [*Code Civ. Proc. § 1520(b)*], if both of the following apply:

(1) Holder has address for apparent owner of property and holder's records do not disclose address to be inaccurate; and

(2) Interest is valued at \$50 or more.

b. Draft notice that owner's interest will escheat to state and specify [*Code Civ. Proc. § 1520(b)*]; for form, see § 102C.220[2]:

(1) A heading that reads "THE STATE OF CALIFORNIA REQUIRES US TO NOTIFY YOU THAT YOUR UNCLAIMED PROPERTY MAY BE TRANSFERRED TO THE STATE IF YOU DO NOT CONTACT US";

(2) Time that interest will escheat.

(3) Effects of escheat and necessity of filing a claim for return of interest.

c. In bold or in a font that is at least two points larger than the rest of the notice, do all of following [*Code Civ. Proc. § 1520(b)*]:

(1) Specify that since date of last activity, or for the last two years, there has been no customer activity on deposit, account, shares, or other interest.

(2) Identify deposit, account, shares, or other interest by number or identifier.

(3) Indicate that deposit, account, shares, or other interest is in danger of escheating to state.

(4) Specify that California Unclaimed Property Law requires banks, banking organizations, and financial organization to transfer funds of a deposit, account, shares, or other interest if it has been inactive for three years.

d. Include in or with notice a form by which owner may confirm owner's current address [*Code Civ. Proc. § 1520(b)*].

NOTE:

Code Civ. Proc. § 1520(b) states that this form must be "as prescribed by the Controller." However, the

Controller has not created an official form for this notice, or prescribed any requirements for this form. The Controller's office has indicated that guidelines may be issued at some future time. For a sample form meeting the statutory requirements, see § 102C.220[2]. If the form is filled out, signed by the owner, and returned to the holder, it is deemed that the account, or other device in which the owner's property is being held, remains currently active and recommences the escheat period [*Code Civ. Proc.* § 1520(b)].

NOTE:

In lieu of returning the form, the business association may provide a telephone number or other electronic means to enable the owner to contact the association [*Code Civ. Proc.* §§ 1513.5(b), 1516(d), 1520(b)]. With such contact, the business association must be deemed to know the location of the owner. The business association may also impose a service charge, not to exceed two dollars (\$2) [*Code Civ. Proc.* §§ 1513.5(b), 1516(d), 1520(b)]. Additionally, the holder may give additional notice at any time between the date of last activity by, or communication with, the owner and the date the holder transfers the deposit, shares, or other interest to the controller [*Code Civ. Proc.* §§ 1513.5(b), 1516(d), 1520(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Intestacy Escheat Real Property Law Ownership & Transfer Death & Incapacity Escheat



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32-102C California Legal Forms--Transaction Guide § 102C.131

§ 102C.131 Reporting Requirements

NOTE:

Every person holding funds or other property escheated to the state under the Unclaimed Property Law must file an annual report concerning that property with the state controller [*Code Civ. Proc. § 1530(a)*]. For purposes of this requirement, "person" means any individual, business association, government or governmental subdivision or agency, two or more persons having a joint or common interest, or any other legal or commercial entity acting in its own right or in a representative or fiduciary capacity [*Code Civ. Proc. § 1501(h)*].

1. Complete appropriate report form [*see Code Civ. Proc. § 1530(b)*]; 2 *Cal. Code Reg. §§ 1161, 1165, 1170, 1174* (required contents of form); *see also § 102C.112* (transaction guide) and § 102C.221 (forms and discussion)].

NOTE:

2 *Cal. Code Reg. § 1174(c)* states that the report must specify the date that the organization filing the report commenced operations. However, the report forms prepared by the controller do not include a space for this information.

2. Have form signed, dated, and verified by appropriate person [*Code Civ. Proc. § 1530(e)*]:

- a. Individual, if holder is individual.
- b. Partner, if holder is partnership.
- c. Officer, if holder is unincorporated association or private corporation.

- d. Chief fiscal officer (or other authorized employee), if holder is public corporation.
- 3. Make copy of form for holder's records [*see 2 Cal. Code Reg. § 1175; see also § 102C.133* (records retention transaction guide)].
- 4. Mail report to state controller, at address shown on report form, before the following dates [*Code Civ. Proc. § 1530(d)*]:
 - a. May 1 for life insurance corporations and reports of insurance corporation demutualization proceeds.
 - b. November 1 for all other holders.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Intestacy Escheat Real Property Law Ownership & Transfer Death & Incapacity Escheat



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32-102C California Legal Forms--Transaction Guide § 102C.132

§ 102C.132 Payment and Delivery Requirements

NOTE:

Property is payable or required to be delivered no sooner than seven months and no later than seven months and 15 days after the final date of filing report [*Code Civ. Proc. § 1532(a)*; **see** §§ 102C.112, P 5 (transaction guide), 102C.221[1][f] (discussion)].

1. If holder has \$20,000 or more in unclaimed cash to pay, or otherwise prefers to make payment by electronic fund transfer [*see* 2 *Cal. Code Reg. § 1155.150(b)*], complete and submit controller's form for authorization agreement for electronic funds transfer (SCO EFT-1) [*Code Civ. Proc. § 1532(a)*].

NOTE:

The form referred to above is available from the controller's office or website, which is located at www.sco.ca.gov/col/ucp/forms/index.shtml [**see** § 102C.221[1][f]-[g]].

2. If holder has less than \$20,000 in unclaimed cash to pay, and will not be paying by electronic fund transfer, instruct holder to prepare check payable to the controller.

3. If property delivered is stock record or membership record evidencing intangible interest in business association, prepare duplicate certificate or register securities in uncertificated form in name of controller [*Code Civ. Proc. § 1532(d)*; *see Code Civ. Proc. § 1516(b)*].

NOTE:

On delivering the duplicate certificate or providing evidence of the registration of the securities in uncertificated form to the controller, the holder and any transfer agent, registrar, or other person acting for or on behalf of the holder in executing or delivering the duplicate certificate is relieved of all liability of every kind to any person, including,

but not limited to, any person acquiring the original certificate or the duplicate certificate, for any losses or damages resulting from the issuance and delivery to the controller of the duplicate certificate or the registration of the uncertificated securities to the controller [*Code Civ. Proc. § 1532(d)*]. A person cannot be a holder referenced in this statute, and thus entitled to immunity, unless the person has complied with other applicable provisions of the Unclaimed Property Law, particularly *Code Civ. Proc. § 1516(b)* [*Azure Ltd. v. I-Flow Corp.* (2009) 46 Cal. 4th 1323, 96 Cal. Rptr. 3d 501, 2009 Cal. LEXIS 6027, at *11-*16] .

4. Deliver property no sooner than seven months and no later than seven months and 15 days after the final date of filing report [*Code Civ. Proc. § 1532(a)*]:

NOTE:

Amounts remitted must include interest or dividends ordinarily earned on escheated demand, savings, or matured time deposits, matured investment certificates, and accounts subject to negotiable order of withdrawal (NOW) made with banking or financial organizations, and other interests in or deposits made with financial organizations unless a statute or a valid, enforceable contract authorizes discontinuance of interest and dividends during periods of owner inactivity [2 Cal. Code Reg. § 1170; *see Code Civ. Proc. § 1513(a)(1), (a)(2), 1562*].

a. If payment amounts to less than \$20,000 and holder will not be paying by electronic fund transfer, make payment by check [*see Code Civ. Proc. § 1530*].

NOTE:

The holder should keep a copy of the check for the holder's records and attach another copy of the check to the controller's official Form UFS-1 (face sheet for reporting unclaimed property) [*see § 102C.221[2]*].

b. If payment amounts to \$20,000 or more, make payment by electronic funds transfer, in accordance with state Controller's regulations [*Code Civ. Proc. § 1532(a)*; *see Code Civ. Proc. § 1532(f)* (when payment deemed complete); *Code Civ. Proc. § 1532(h)* (procedure)].

NOTE:

The holder should keep a copy of the electronic transfer receipt for the holder's records and attach another copy of the check to the controller's official Form UFS-1 [*see § 102C.221[2]*].

c. If escheated property consists of contents of safe deposit box or other safekeeping repository held in California by business association, provide an inventory of the contents [*see discussion in § 102C.221[1][f]*] and deliver property to controller at earlier of following times:

NOTE:

As a practical matter, the controller generally will not call for delivery of safe deposit box contents until the inventories have been reviewed. By statute, the property must be delivered to the controller, at the address shown on the report form, at the earlier of the times listed below [*Code Civ. Proc. § 1532.1*; *see Code Civ. Proc. § 1514*; *see also Code Civ. Proc. § 1530(b)(3)* (contents of report)]:

- (1) When payment or delivery is requested by controller; or
 - (2) Within one year from final date for filing report [*see Code Civ. Proc. § 1530(d)*].
- d. Duplicate stock certificate, if applicable [*Code Civ. Proc. § 1532; see P 3, above*].
- e. Any intangible property must be paid or delivered to controller's office in Sacramento or to another location designated by the controller [*see Code Civ. Proc. § 1532(e)*].
- f. Unless otherwise agreed by the controller and the holder, tangible personal property should be delivered to controller at place where it is held [*see Code Civ. Proc. § 1532(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsGeneral OverviewReal Property LawGeneral Overview



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§ 102C.133 Retention of Records

1. Instruct holder to retain following documents for period of seven years after property is reported [2 *Cal. Code Reg. § 1175*]:

- a. All records pertaining to property that is reported to controller or would have been reported except for deduction of charges [see § 102C.223[1][a] (copy of original Unclaimed Property Face Sheet (UFS-1) [see § 102C.221[2]] must accompany claim for reimbursement)]; and
- b. Records of all traveler's checks, money orders, and other similar written instruments (other than third-party bank checks) on which holder is directly liable that holder sells or provides to others in California [*Code Civ. Proc. § 1581(a)*; see *Code Civ. Proc. § 1581(c)* (civil penalty for failure to comply)].

2. If holder wishes to destroy records prior to expiration of seven-year period, obtain written consent of controller [2 *Cal. Code Reg. § 1175*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsGeneral OverviewReal Property LawGeneral Overview



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[Reserved]

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E. Procedural Guide for Claiming Property Deposited With Controller Pursuant to Unclaimed Property Law

32-102C California Legal Forms--Transaction Guide § 102C.140

§ 102C.140 Filing Claim

1. Prior to filing claim form, contact holder to ascertain that property has in fact escheated and been paid or delivered to controller.

NOTE:

This step is not necessary if the owner has learned of the escheat of his or her property, and that the controller has received the property, through a notice published by the controller in a newspaper [*see Code Civ. Proc. § 1531*]. Although required by law, the controller's failure to publish the notice does not prevent the controller from selling the property [*Harris v. Westly (2004) 116 Cal. App. 4th 214, 220-221, 10 Cal. Rptr. 3d 343*], nor does it deprive the controller of immunity [*Harris v. Westly (2004) 116 Cal. App. 4th 214, 224, 10 Cal. Rptr. 3d 343*]. The controller's failure to publish the notice does not amount to an unconstitutional taking [*Harris v. Westly (2004) 116 Cal. App. 4th 214, 223, 10 Cal. Rptr. 3d 343*].

2. To obtain claim form and affirmation form [*see § 102C.222* (discussion and form)], write or telephone the state controller's office, or search for property on the controller's website, which is located at scoweb.sco.ca.gov.

NOTE:

Any person, excluding another state [*see Code Civ. Proc. § 1542* (claims by other states)], who claims an interest in property paid or delivered to the state controller pursuant to the Unclaimed Property Law may file a claim to the property or the net proceeds from its sale [*Code Civ. Proc. § 1540(a)*]. The controller may hold a hearing and receive evidence on any claim, must consider each claim within 180 days after it is filed, and must give written notice to the claimant if he or she denies the claim in whole or in part [*Code Civ. Proc. § 1540(b)*]. "Owner" means the person who had legal right to the

property prior to its escheat, his or her heirs, his or her legal representative, or a public administrator acting under *Prob. Code* §§ 7660 and 7661 [*Code Civ. Proc.* § 1540(d)].

3. File claim form by one of the following methods [*Code Civ. Proc.* § 1540(a); see § 102C.222 (form and discussion)]:

- a. Complete, sign, and verify claim form and affirmation form, and file with controller's office; or
- b. Complete the form online.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferDeath & IncapacityEscheat



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32-102C California Legal Forms--Transaction Guide § 102C.141

§ 102C.141 Filing Suit

1. If controller does not decide claim within 180 days of filing, commence superior court action to establish claim in any county or city and county in which branch office of attorney general is maintained, within 270 days after filing of claim [*Code Civ. Proc. § 1541*; see California Forms of Pleading and Practice, Ch. 252, *Escheat (Unclaimed Property)* (Matthew Bender), § 252.93 (discussion and form for complaint)].

2. If claimant is aggrieved by controller's decision, commence superior court action to establish claim in any county or city and county in which branch office of attorney general is maintained within 90 days after controller's decision [*Code Civ. Proc. § 1541*; see California Forms of Pleading and Practice, Ch. 252, *Escheat (Unclaimed Property)* (Matthew Bender), § 252.93 (discussion and form for complaint)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Real Property Law Ownership & Transfer Death & Incapacity Escheat



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32-102C California Legal Forms--Transaction Guide §§ 102C.142-102C.149

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§§ 102C.142[Reserved]



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F. Related and Subsequent Procedures

32-102C California Legal Forms--Transaction Guide § 102C.150

§ 102C.150 Assuming Ownership of Found Animal

1. Instruct finder who redeems found animal or purchases found animal through auction sale to:
 - a. Obtain any necessary license or registration certificate for animal; and
 - b. See that animal receives all health certificates, shots, etc., required by law.
2. Ascertain that place and arrangements for keeping animal comply with applicable state and local health codes and local zoning ordinances.

Legal Topics:

For related research and practice materials, see the following legal topics:

GovernmentsAgriculture & FoodGeneral Overview



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32-102C California Legal Forms--Transaction Guide § 102C.151

§ 102C.151 Handling Claims Made After Disposal of Unclaimed Property

1. Instruct finder of lost property who has redeemed property from police or sheriff's department following expiration of time allowed for owner to claim property [*see § 102C.11[3]*] that finder has no obligation to return property to owner if owner later appears [*see Civ. Code § 2080.3*].
2. If claim is made for property after it has been paid into State Treasury [*see Code Civ. Proc. § 570* (property unclaimed from receiver)], have receiver instruct claimant to contact Unclaimed Property Division of State Treasury to claim property [*see Code Civ. Proc. §§ 1350-1352*].

NOTE:

Generally, property not claimed from the State Treasury within five years after being deposited with the Treasury escheats to the state and may not then be claimed by its previous owner [*Code Civ. Proc. § 1351*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawGeneral Overview



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32-102C California Legal Forms--Transaction Guide § 102C.152

§ 102C.152 Handling Claims Made After Payment or Delivery of Escheated Property to Controller

1. For any payment made by holder to payee, instruct holder to obtain proof that [*Code Civ. Proc. § 1560(b), (d); see § 102C.223[1]* (discussion)]:

- a. Payment was made; and
- b. Payee was entitled to payment at time payment was made.

NOTE:

The holder may obtain reimbursement even if he or she made a payment to a person whose claim to the property was barred because of the expiration of any applicable time period for filing a claim [*Code Civ. Proc. § 1560(c); see Code Civ. Proc. § 1570*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Intestacy Escheat Real Property Law Ownership & Transfer Death & Incapacity Escheat



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102C LOST AND UNCLAIMED PROPERTY
PART III. TRANSACTION GUIDE
F. Related and Subsequent Procedures

32-102C California Legal Forms--Transaction Guide § 102C.153

§ 102C.153 Seeking Recovery or Reimbursement After Payment or Delivery of Escheated Property to Owner

1. If holder has paid owner [see § 102C.152, above], instruct holder to file reimbursement claim with controller proving both of the following [*Code Civ. Proc. § 1560(b)*; see § 102C.223 (discussion and form)]:

- a. That the payment was made
- b. That the payee was entitled to the payment

NOTE:

When a holder seeks reimbursement for payment of a negotiable instrument (including a travelers' check or money order), the holder must prove that the instrument was duly presented to the holder and that the holder paid a person who appeared to the holder to be entitled to payment [*Code Civ. Proc. § 1560(c)*].

2. In case of mistaken payment or delivery of property to controller, instruct holder to file reimbursement claim with controller [*Code Civ. Proc. § 1561(b)*; see § 102C.223 (discussion and form)].

NOTE:

Property mistakenly paid or delivered to the controller may be retrieved without charge unless the controller has already disposed of the property [*Code Civ. Proc. § 1561(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Intestacy Escheat Real Property Law Ownership & Transfer Death & Incapacity Escheat



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32-102C California Legal Forms--Transaction Guide §§ 102C.154-102C.199

[Reserved]

§§ 102C.154[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102C LOST AND UNCLAIMED PROPERTY
PART IV. FORMS
A. Lost Property

32-102C California Legal Forms--Transaction Guide § 102C.200

§ 102C.200 Notice to Owner by Finder of Lost Property [Civ. Code § 2080]

[1] Comment

[a] Use of Form

This form is a letter addressed to the owner of a domestic animal or other personal property by the finder of the property. It describes the property, the circumstances under which it was found or saved, the time when and place where it may be reclaimed, and any charges incurred by the finder. A person who finds a lost domestic animal or other lost personal property and believes that he or she knows the identity of its owner should promptly mail this letter to the owner of the property and retain a copy of the letter for his or her records [see *Civ. Code § 2080*].

If the finder of a domestic animal or other personal property with a value of \$100 or more does not know who the owner is, the property should be turned over to the local police or sheriff's department [*Civ. Code § 2080.1(a)*; see §§ 102C.120, PP 2, 3 (procedural guide), 102C.201 (form)]. If a found animal is not a domestic animal but a bovine animal, horse, mule, sheep, swine, or burro whose owner is unknown or cannot be located, the finder should contact the main office of the Bureau of Livestock Identification at (916) 654-0889, to determine the appropriate brand inspector or local agency or official to which a report should be made [see *Food & Agric. Code § 17042*; see also §§ 102C.12, 102C.110, 102C.202].

[b] Obligation of Finder of Property

The finder of a lost domestic animal or other item of personal property is not bound to take charge of it. However, a finder who takes charge of a lost item takes on the rights and responsibilities of a depositary for hire and must exercise at least ordinary care to preserve the property [*Civ. Code §§ 1852, 2080*; see *Civ. Code § 1851 et seq.*; see also Ch. 102, *Bailments*]. In addition, a person who finds lost property under circumstances that give him or her knowledge of or means of inquiry as to the true owner, and who appropriates the property to his or her own use or the use of another without first making reasonable and just efforts to find the owner and restore the property to him or her, is guilty of theft [*Penal Code § 485*]. A finder who takes possession of any money, goods, things in action, or other personal property, or saves any domestic animal from harm, neglect, drowning, or starvation, must within a reasonable time notify the owner,

if known, and make restitution without any compensation other than a reasonable charge for saving and taking care of the property. One who takes possession of a live domestic animal must provide for humane treatment of the animal [Civ. Code § 2080].

There is no requirement that the notification to the owner be made in writing [see Civ. Code § 2080]. However, a finder who takes charge of lost property acquires affirmative duties towards the owner and may be subject to criminal penalties for failure to perform those duties [Civ. Code § 2080; Penal Code § 485]; thus, written notice should be provided in order to protect the finder.

If the property is worth \$100 or more and its owner is unknown to the finder or does not claim the property, the finder must turn the property over to the local police or sheriff's department within a reasonable time. When the finder turns the property over to the police or sheriff's department, the finder or saver must make an affidavit (or declaration) [see Code Civ. Proc. § 2015.5] particularly describing the property and stating where and when he or she found or saved it [Civ. Code § 2080.1(a); see § 102C.201[2] (form)]. Although the Civil Code provisions governing lost property do not require a finder who is unaware of the owner's identity to turn property valued at less than \$100 over to the police [see Civ. Code §§ 2080, 2080.1], the finder should protect himself or herself from a possible theft charge [see Penal Code § 485] by contacting the police or sheriff's department concerning any found property not obviously abandoned by its owner [see § 102C.11[1]] prior to appropriating it for his or her own use or otherwise disposing of it.

[2] FORM

Notice to Owner by Finder of Lost Property [Civ. Code § 2080]

_____[date]
 _____[name of owner]
 _____[street address or post office box number]
 _____[city, state, zip code]

Dear _____:

You are hereby notified that on _____[date], at [place property was found or saved], the following property believed to belong to you was [found or saved from _____ (harm or neglect or drowning or starvation) or describe circumstances under which property was found or saved] by _____[name of finder or saver]:

[describe property].

This property is being held for you [or has been placed in storage for you] at _____[address]. You may claim the property at this address between the hours of _____ and [on any weekday] on or before _____[date], by presenting proof of ownership [add if appropriate: and paying a reasonable charge for (saving and) caring for the property (, in the amount of \$_____), as provided by Civil Code Section 2080].

If you do not claim the property [add if appropriate: and pay the reasonable charge described above] on or before _____[date], it will be disposed of as provided by law.

Sincerely,

_____[signature of finder or attorney]
 [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawGeneral Overview



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CHAPTER 102C LOST AND UNCLAIMED PROPERTY
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32-102C California Legal Forms--Transaction Guide § 102C.201

§ 102C.201 Declaration by Finder of Lost Property Valued at \$100 or More [Civ. Code § 2080.1(a)]

[1] Comment

[a] Use of Form

This form is a declaration by a finder or saver of an item of lost personal property concerning the property and the circumstances under which it was found or saved. If a person finds or saves an item of personal property valued at \$100 or more and does not know the owner's identity, he or she must, within a reasonable period of time, turn the property over to the police department of the city or city and county in which the property was found or saved. If the property was not found or saved in a city, it must be turned over to the sheriff's department in the county in which it was found or saved. Found or saved property also must be turned over to the police or sheriff's department within a reasonable time if the finder or saver has contacted the owner and the owner has not claimed the property [*Civ. Code § 2080.1(a)*; see *Civ. Code § 2080* (applies to money, goods, things in action, other personal property, and domestic animals saved from harm, neglect, drowning, or starvation)].

When the finder or saver turns the property over to the police or sheriff's department, he or she must make an affidavit (or declaration) [see [b], *below*] particularly describing the property and stating where and when he or she found or saved it. If the property was saved, the affidavit or declaration must also state all of the following [*Civ. Code § 2080.1(a)*]:

- From what and how it was saved.
- Whether the owner is known to the saver.
- That the saver has not secreted, withheld, or disposed of any part of the property.

The statute does not require the instrument to include a statement of the property's value. However, the procedure for handling the property and the finder's right to claim it are determined by the "reported value" of the property [*Civ. Code § 2080.3*]. For this reason, the finder may wish to establish this figure at the time the property is turned over to the

police or sheriff's department. This form includes a statement of the finder's estimate of the value of the property. A copy of the appraisal, advertisement, or other document on which the finder's estimate is based may be attached to the form.

Most police departments take found property reports on a standard form prepared by the department rather than a form prepared by the finder. However, if the standard form does not include the information required or suggested by statute, as discussed above, the finder may wish to attach this form or request that the additional information be added to the standard form.

[b] Effect of Declaration

Although *Civ. Code* § 2080.1 requires the owner to make an affidavit [*Civ. Code* § 2080.1(a)], *Code Civ. Proc.* § 2015.5 permits the use of a declaration in lieu of any affidavit required by law. This form uses the declaration option because a declaration, unlike an affidavit, need not be made before an authorized officer [see *Code Civ. Proc.* §§ 2003 ("affidavit" is a written declaration under oath), 2012 (affidavit may be taken before any officer authorized to administer oaths)].

A declaration must be in writing and must be signed by the declarant. Further, the declaration must recite that the information contained in the declaration is true under penalty of perjury. The declaration must also (1) state the date and place of execution, if it is executed within California, or (2) state the date of execution and that it is a declaration under the laws of the state of California, if it is executed within or outside California [*Code Civ. Proc.* § 2015.5; see *Code Civ. Proc.* § 2015.5(a), (b) (model declarations)].

[c] Finder's Claim to Property Not Claimed by Owner

When the police or sheriff's department receives the found property, it must notify the owner of the property, if his or her identity is reasonably ascertainable, that the property has been found and where it can be claimed. The department must allow at least 90 days from the date it received the property for the owner to claim it and pay a reasonable charge, if any, to defray costs of storage and care [*Civ. Code* §§ 2080.1(b), 2080.2; see *Civ. Code* §§ 2080.4 (ordinance for sale after three months), 2080.5 ("quick sale" provisions)]. If the owner does not appear within 90 days following receipt of the property by the police or sheriff's department, the department may dispose of the property. If the reported value of the property is \$250 or more, the department must publish a notice concerning the property in a newspaper of general circulation at least once and must turn the property over to the finder if (1) the owner does not appear and prove his or her ownership of the property within seven days following the first publication of the notice, and (2) the finder reimburses the city or county whose police or sheriff's department published the notice for the cost of publication. Title to the property will vest in the finder on his or her payment of the publication costs [*Civ. Code* § 2080.3(a)]. If the reported value of the property is less than \$250, title to the property will vest in the finder after 90 days have elapsed since the receipt of the property by the police or sheriff's department and the owner has not appeared and proven his or her ownership of the property [*Civ. Code* § 2080.3(b)]. Property found by an employee of any public agency in the course of his or her employment may not be claimed by the finder and must be sold by the police or sheriff's department at public auction [*Civ. Code* § 2080.3].

For further discussion of the procedures for disposal of found property by police and sheriff's departments, see § 102C.11[3] and [5].

[2] FORM

Declaration by Finder of Lost Property Valued at \$100 or More [Civ. Code § 2080.1(a)]

To:

_____ [Police or Sheriff's] Department
 _____ [City or County] of _____
 State of California
 _____ [address]
 _____ [city, state, zip]

I, _____ [name of finder or saver], declare as follows:

On _____ [date], at approximately [time] at [place property was found or saved], I [found or saved] the following item(s) of personal property: [describe property].

[Optional:]

I believe that the value of this property is \$[as illustrated by the attached appraisal or advertisement or describe and attach other evidence of property's value].

[If property was saved, add the following three paragraphs:]

I saved this property from [harm or neglect or drowning or starving or give other explanation] by [describe manner in which property was saved].

The owner of this property is _____ [not known to me or known to me as _____ (name of owner), of _____ (address of owner, if known), and was notified by me of my _____ (finding or saving) of the property pursuant to Civil Code Section 2080, but has not claimed the property from me].

I have not secreted, withheld, or disposed of any part of this property.

[Continue with the following:]

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Executed on _____ [date], at _____, California.

_____ [signature of finder or saver]
 [typed name]
 _____ [address and phone number]

[If appropriate, attach appraisal, advertisement, or other document showing value of property]

Legal Topics:

For related research and practice materials, see the following legal topics:
 Real Property LawGeneral Overview



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32-102C California Legal Forms--Transaction Guide § 102C.202

§ 102C.202 Notice to Director of Food and Agriculture of Taking Up of Estray [Food & Agric. Code § 17042]

[1] Comment

[a] Use of Form

This form is a notice to be given to the secretary of Food and Agriculture by a person who finds and takes up any bovine animal, horse, mule, sheep, swine, or burro whose owner is unknown or cannot be located [*see Food & Agric. Code § 50* ("director" and "secretary" both mean secretary of Food and Agriculture)]. Such an animal is known as an "estrays" [*Food & Agric. Code § 17001.5*]. A "taker-up" [*see Food & Agric. Code § 17001.5*] who finds an estray on his or her property and confines it must immediately file a notice of the taking up.

The statute requires that the notice be filed with the director of Food and Agriculture [*Food & Agric. Code § 17042*]. However, in actual practice, county brand inspectors or other local authorities receive reports and handle estrays. To determine who should be notified of the taking up of an estray in a particular county, and how the notification should be made [*see [b], below*], contact the Bureau of Livestock Identification in the Department of Food and Agriculture at 916-654-0889 or a local brand inspector, slaughterhouse, or feedyard. The Bureau of Livestock Identification regularly publishes livestock bulletins listing both missing and found livestock on its website at www.cdffa.ca.gov/ahfss/li/index.html, which list the person to contact with respect to each lost animal.

The Food and Agriculture Code provisions concerning estrays do not govern finders of domestic pets such as cats and dogs [*see Civ. Code § 2080; Food & Agric. Code § 17001.5*]. The procedural requirements for finders of lost domestic pets are set forth by *Civ. Code § 2080 et seq.*, which are discussed in § 102C.11. For forms relating to *Civ. Code § 2080 et seq.*, see §§ 102C.200 and 102C.201.

[b] Form and Contents of Notice

The statute does not specify whether the notice of taking up must be made in writing [*see Food & Agric. Code § 17042*]. Some counties take reports concerning estrays over the telephone. The notice of taking up must contain all of the following [*Food & Agric. Code § 17042*]:

- A description of the animal.
- The animal's marks or brands, if any.
- The probable value of the animal.
- A statement of date and place animal was taken up and confined.

[c] Rights and Responsibilities of Taker-Up; Persons Entitled to Take Up Estrays

Any person who finds an estray domestic animal on premises that he or she owns or to which he or she has the right of possession, or on any highway adjacent to those premises, may take up the animal and have a lien for all expenses incurred in taking up, keeping, and caring for it [*Food & Agric. Code § 17041*]. A person who does these things is called a "taker-up" [*Food & Agric. Code § 17001*]. The landowner or person in rightful possession of the land may also sue the animal's owner for damage to the land or crops caused by the animal.

As an alternative to taking up the animal, the landowner or person in rightful possession of the land may use reasonable force to drive the animal off the property. The use of more force than is reasonably necessary to drive the animal off the property will be considered excessive and unjustified, and may expose the landowner or rightful possessor to liability for injury to the animal [*People v. Dunn (1974) 39 Cal. App. 3d 418, 421, 114 Cal. Rptr. 164*].

The right to take up estrays does not apply in counties or parts of counties identified by state statute or county ordinance as devoted chiefly to grazing [*see Food & Agric. Code § 17121 et seq.*], unless the premises on which the animal is found and taken up are entirely enclosed with a good and substantial fence [*Food & Agric. Code § 17122; see Food & Agric. Code § 17121* ("lawful fence")].

[d] Duty to Care for and Report Estray After Taking Up

A taker-up of an estray must (1) confine the estray in a secure place, (2) use reasonable care to preserve it from injury, and (3) file a notice of the taking up with the appropriate local representative of the director of Food and Agriculture [*see [a], above*] immediately after the animal is taken up [*Food & Agric. Code §§ 17042, 17043*]. On demand of an authorized inspector employed by the Department of Food and Agriculture, the taker-up must deliver the animal to the inspector [*Food & Agric. Code § 17061*]. A taker-up who complies with these and the other requirements set forth by statute will not be liable if the estray dies or escapes at any time while being held by the taker-up [*Food & Agric. Code § 17043*].

[e] Entitlement to Payment for Caring for Estray

When the Department of Food and Agriculture sales the animal or returns of the animal to its owner [*see § 102C.12[3], [4]*], the taker-up is entitled to collect a per-day payment for the keeping and care of the animal [*Food & Agric. Code §§ 17041, 17044, 17069, 17095*]. The amount due is determined according to the prevailing rates charged by commercial enterprises that feed livestock on a custom basis [*Food & Agric. Code § 17095*].

[f] Purchase of Animal

If the Department of Food and Agriculture cannot locate the owner of an estray, or the owner refuses to pay the expenses incurred in caring for the animal, it will sell the animal at a public or private sale [*Food & Agric. Code §§ 17066, 17092, 17093; see § 102C.121, P 4 NOTE*]. If the taker-up wishes to purchase the animal, he or she should discuss this possibility with the inspector or other Department representative to whom he or she delivers the animal, and ask to be notified if the animal is to be sold.

[2] FORM**Notice to Director of Food and Agriculture of Taking Up of Estray [Food & Agric. Code § 17042]**

TO: Director of Food and Agriculture
State of California

NOTICE OF TAKING UP OF ESTRAY

You are hereby notified pursuant to *Food and Agricultural Code Section 17042* that the animal described below has been taken up as an estray by the undersigned:

1. The animal is a _____[*cow or bull or ox or horse or mule or sheep or swine or burro*].
2. The animal bears the following marks and/or brands: _____.
3. The probable value of the animal is: \$_____.
4. The animal was taken up on _____[*date*], at [*address or other appropriate description of location where animal is confined*].

_____ Dated:

_____ [*signature of taker-up*]

[*typed name*]

[*address and phone number*]

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsAgriculture & FoodGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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32-102C California Legal Forms--Transaction Guide §§ 102C.203-102C.209

[Reserved]

§§ 102C.203[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Unclaimed Property

32-102C California Legal Forms--Transaction Guide § 102C.210

§ 102C.210 Notice of Sale of Goods, Merchandise, or Other Property Received by Common Carrier, Commission Merchant, Innkeeper, or Warehouse Operator [Civ. Code § 2081.1]

[1] Comment

[a] Use of Form

This form is a notice of the public sale of unclaimed goods, merchandise, or other items of personal property in the possession of a common carrier, commission merchant, innkeeper, or warehouse operator. Goods, merchandise, or other property received for transportation or safekeeping by a railroad or express company or other common carrier, a commission merchant, an innkeeper, or a warehouse operator may be sold to the highest bidder at public auction if no person calls for the property and pays the freight and charges due on it within 60 days after its receipt by the carrier, commission merchant, innkeeper, or warehouse operator [Civ. Code § 2081.1; see Civ. Code §§ 2081, 2081.4 (responsibility for storing property until claimed or sold); see also § 102C.15]. In addition, produce, merchandise, or other property received on consignment by commission merchants or warehouse operators who make advances on the property, either to the owner or for freight and charges, may be sold to the highest bidder at public auction if the advances are not paid within 60 days after the date made [Civ. Code § 2081.5]. In either case, prior notice of the sale must be given in the customary manner for sales of goods by auction at the place in which the goods are held or sold [Civ. Code § 2081.1]. Thus, the notice provided by this form may be published in a trade paper or other newspaper, posted in a public place, and/or mailed to potentially interested persons, according to what is customary in the place the goods are held or to be sold.

This form includes all the information generally required for notices of public sales. Additional information may be included as dictated by local custom.

[b] Proceeds of Sale

Following the sale of the goods by public auction, any surplus remaining after payment of all freight, storage, sale expenses, and other reasonable charges must be paid over to the owner of the property on the owner's demand made within 60 days after the sale [Civ. Code § 2081.2; see § 102C.211[2] (form for demand)]. If the owner or the owner's

agent does not demand the surplus from the sale within 60 days after the sale, the surplus must be paid into the county treasury, subject to the order of the owner [*Civ. Code § 2081.3*].

[2] FORM

Notice of Sale of Goods, Merchandise, or Other Property Received by Common Carrier, Commission Merchant, Innkeeper, or Warehouse Operator [*Civ. Code § 2081.1*]

NOTICE OF SALE OF UNCLAIMED PROPERTY AT PUBLIC AUCTION

NOTICE IS HEREBY GIVEN pursuant to *Civil Code Section 2081.1* that the [goods or merchandise or produce or property or other description] described below will be sold at public auction on _____[*date*] at [*time*] at [*address or other appropriate description of location*] to the highest bidder [for cash] to satisfy unpaid [freight and storage and commission or describe other charges] due to _____[*name of carrier, commission merchant, innkeeper, or warehouse operator*]:

Description of Property	Last Known Owner or Consignee
_____	_____
_____	_____

The property described above is stored at [*address or other appropriate description of location*], where it may be viewed between [*time*] and [*time*] [on any weekday].

_____ Dated:

_____ [*name of carrier, commission merchant, innkeeper, or warehouse operator*]

By _____ [*signature*]

[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Unclaimed Property

32-102C California Legal Forms--Transaction Guide § 102C.211

§ 102C.211 Demand for Proceeds of Sale of Goods, Merchandise, or Other Property Received by Common Carrier, Commission Merchant, Innkeeper, or Warehouse Operator [Civ. Code § 2081.2]

[1] Comment--Use of Form

This form is a letter from the owner (or the owner's agent) of property sold at public auction by a common carrier, commission merchant, innkeeper, or warehouse operator demanding the proceeds of the sale.

When a common carrier, commission merchant, innkeeper, or warehouse operator sells goods, merchandise, or other personal property that it has received for safekeeping or transportation and held for 60 days without the owner, consignee, or other authorized person claiming it and paying any charges due on it, it must turn over any surplus remaining after payment of freight, storage, and sale expenses and other reasonable charges to the owner of the property or the owner's agent on demand [Civ. Code § 2081.2; see Civ. Code § 2081.3]. The demand must be made within 60 days after the sale [Civ. Code § 2081.2].

There is no requirement that the demand be made in writing. However, a writing will provide proof of the demand and of the fact that it was made within 60 days after the sale.

If the owner of the property or the owner's agent does not demand payment within 60 days after the sale, the carrier, commission merchant, innkeeper, or warehouse operator must pay the surplus remaining after deduction of all reasonable charges into the county treasury [Civ. Code § 2081.3].

This form provides for the attachment to the letter of a document proving ownership of the subject property. The owner is not required by the statute to include proof of ownership with his or her demand, and this portion of the letter may be deleted if there is no question of ownership.

[2] FORM

Demand for Proceeds of Sale of Goods, Merchandise, or Other Property Received by Common Carrier, Commission Merchant, Innkeeper, or Warehouse operator [Civ. Code § 2081.2]

_____[*date*]
_____[*name of carrier, commission merchant, innkeeper, or warehouse operator*]
_____[*street address or post office box number*]
_____[*city, state, zip code*]

Dear _____:

The undersigned owner of the [*describe property sold at public auction*] sold by you at public auction on _____ [*date*] at [*address or other appropriate description of location*], hereby demands payment of the proceeds of the sale, less reasonable expenses for freight, storage, and sale and any other reasonable charges, pursuant to *Civil Code Section 2081.2*. Payment may be made to _____ [*name of owner*], at _____ [*address*].

[Please find attached to this letter proof of ownership of the subject property, in the form of _____ (*describe document*).]

Please include with payment your receipt showing the price at which the property was sold, and an itemized statement of charges deducted from the proceeds of the sale.

Sincerely,

_____ [*name of owner*]

By _____ [*signature*]

[*typed name and title*]

[*Attach copy of document showing proof of ownership*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsGeneral Overview



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B. Unclaimed Property

32-102C California Legal Forms--Transaction Guide § 102C.212

§ 102C.212 Notice to Owner of Sale of Unclaimed Personal Property Left With Hospital [Civ. Code § 1862.5]

[1] Comment--Use of Form

This form is a notice to the owner of personal property left with a hospital that the hospital is going to sell the property at public auction if it is not claimed by the owner prior to the sale date. Any item of personal property found or deposited with any licensed hospital that remains unclaimed for a period of 180 days following the departure of its owner from the hospital may be sold by the hospital at public auction. At least four weeks prior to the sale, the hospital must give written notice of the sale to the last known owner of the property. The notice must contain all of the following [Civ. Code § 1862.5]:

- A description of each item of property to be sold.
- The name of the last known owner.
- The name of the hospital.
- The time and place of the auction sale.

The notice may be sent by regular mail, postage prepaid, to the last known owner of the property at his or her last known address [Civ. Code § 1862.5].

If the property is not claimed by its owner prior to the sale date, the hospital may sell it at public auction and retain out of the proceeds any charges for storage, reasonable expenses of the sale, and all sums due the hospital from the last known owner of the property [Civ. Code § 1862.5]. The remaining balance, if any, may be claimed by the owner of the property or his or her legal representative within one week following the sale [see § 102C.213[2] (form)]. If not claimed within that time, the balance must be paid into the treasury of the county in which the hospital is located. If the owner or his or her legal representative does not claim the property from the treasury within one year, it will be paid into the general fund of the county [Civ. Code § 1862.5].

The statute does not specify whether the hospital may charge storage fees in connection with an item claimed within 180 days after the owner's departure from the hospital or between the time of notice and the time of sale, or whether the hospital may condition return of an item on the owner's payment of any sums owed the hospital. This form specifies that the owner may claim the property prior to the sale date by paying the storage fees.

A hospital that substantially complies with the procedure described above for disposing of unclaimed property will be exonerated from any liability for property sold pursuant to this procedure [*Civ. Code* § 1862.5].

[2] FORM

Notice to Owner of Sale of Unclaimed Personal Property Left With Hospital [*Civ. Code* § 1862.5]

_____ [date]

_____ [name of last known owner]

_____ [street address or post office box number]

_____ [city, state, zip code]

NOTICE OF SALE OF UNCLAIMED PROPERTY LEFT WITH HOSPITAL

You are hereby notified, pursuant to *Civil Code Section 1862.5*, that you are the last known owner of the following articles of personal property, which were left with _____ [name of hospital] and have remained unclaimed for more than 180 days:

[describe each item of property to be sold].

You are further notified that the foregoing property will be sold to the highest bidder [for cash] at public auction on _____ [date] at [time] at [place] if not claimed on or before _____ [date one day before sale].

The property described above may be claimed by you, or by a person presenting either proof of ownership or proof of authorization to act for the owner of the property, at _____ [address], between the hours of _____ and [on any weekday], on payment of storage fees in the amount of \$_____.

Following the sale, any proceeds of the sale remaining after payment of storage charges, other reasonable fees, and any charges owed by you to _____ [name of hospital] may be claimed by you, or by a person presenting either proof of ownership or proof of authorization to act for the owner of the property, at _____ [address]. Your claim must be made on or before _____ [date one week after sale].

_____ Dated:

_____ [name of hospital]

By _____ [signature]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsGeneral OverviewHealthcare LawBusiness Administration & OrganizationGeneral
Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102C LOST AND UNCLAIMED PROPERTY
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B. Unclaimed Property

32-102C California Legal Forms--Transaction Guide § 102C.213

§ 102C.213 Request for Proceeds of Sale of Personal Property Left With Hospital [Civ. Code § 1862.5]

[1] Comment

[a] Use of Form

This form is a letter from the owner of personal property left with a hospital and sold at public auction by the hospital, or the owner's legal representative, claiming the proceeds of the sale. When a hospital sells unclaimed personal property left with it at public auction [*see § 102C.212*], it must pay the proceeds of the sale to the owner of the property or his or her legal representative if the owner or representative claims the proceeds within one week following the sale [*Civ. Code § 1862.5*]. The hospital may deduct storage charges, the reasonable expenses of the sale, and all sums due the hospital from the last known owner of the property from the amount paid to the owner or his or her representative [*Civ. Code § 1862.5*].

There is no requirement that the claim be made in writing. However, a writing will provide proof of the claim and of the fact that it was made within one week after the sale.

This form contains an optional provision providing for the attachment of evidence of the agent's authority.

[b] Failure to Claim Proceeds

If the owner of the property (or the owner's legal representative) does not claim the proceeds of the sale within one week after the sale, the hospital must pay the proceeds into the treasury of the county in which the hospital is located. If the owner or his or her legal representative does not claim the property from the county treasury within one year after its deposit, it will be paid into the general fund of the county [*Civ. Code § 1862.5*].

[2] FORM

Request for Proceeds of Sale of Personal Property Left With Hospital [Civ. Code § 1862.5]

_____[*date*]
 To: _____[*name of hospital*]
 _____[*street address or post office box number*]
 _____[*city, state, zip code*]

The undersigned is the [legal representative of _____ (*name of owner*), the] owner of the [*describe property sold at public auction*] sold by you at public auction on _____[*date*] at _____[*address*]. The undersigned hereby claims the proceeds of that sale pursuant to *Section 1862.5 of the Civil Code*. Payment may be delivered to the following address: _____[*address*].

Please include with the payment your receipt showing the price at which the property was sold, and an itemized statement of any charges deducted from the proceeds of the sale.

[*If letter is sent by owner's legal representative, include the following:*]

Please find attached to this letter proof of the undersigned's authority to act as legal representative for _____[*name of owner*].

[*Continue with the following:*]

Sincerely,
 _____[*signature of owner or legal representative*]
 _____[*typed name*]

[*If appropriate, attach copy of document showing legal representative's authority to act for owner.*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsGeneral OverviewContracts LawTypes of ContractsPersonal PropertyHealthcare LawBusiness Administration & OrganizationGeneral Overview



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B. Unclaimed Property

32-102C California Legal Forms--Transaction Guide § 102C.214

§ 102C.214 Notice of Unclaimed Funds Held by Receiver [Code Civ. Proc. § 570]

[1] Comment

[a] Use of Form

This form is a notice concerning unclaimed funds held by a receiver, to be published by a receiver. Prior to being discharged by the court, a receiver who is in possession of any funds belonging to a person whose whereabouts are unknown to him or her must publish a notice concerning the funds in one or more newspapers published in the county where the receivership is pending. The notice must be published at least once a week for four consecutive weeks. It must set forth all of the following [*Code Civ. Proc. § 570*]:

- The name of the owner of the funds.
- The owner's last known place of residence or post office address.
- The amount of the unclaimed funds.

All costs and expenses connected with the advertising of the notice are payable out of the unclaimed funds [*Code Civ. Proc. § 570*].

Counsel will need to supply the newspaper with an additional copy of the notice for its proof of publication [*see Code Civ. Proc. §§ 2010, 2011, 2015.5*], which must be filed with the clerk of the court in which the receivership is pending if the funds are not claimed prior to the time the receiver seeks to be discharged.

[b] Disposal of Funds Unclaimed at End of Notice Period

If the funds, or any part of them, remain unclaimed 30 days after the date of the last publication of the notice, the receiver must report this fact to the court [*Code Civ. Proc. § 570*]. On order of the court, all the funds must be paid into the State Treasury, accompanied by a copy of the order. The order must set forth the same information required to

appear in the notice [*Code Civ. Proc.* § 570].

Counsel may wish to time the publication so that the report can be made as part of the receiver's motion for discharge [see *Cal. Rules of Court, Rule 3.1184*] and the order directing payment of the unclaimed funds can be part of the order for discharge. For both a separate order directing payment of unclaimed funds to the State Treasury and an order for discharge, see *California Forms of Pleading and Practice, Receivers*, §§ 486.154, 486.159 (Matthew Bender).

Funds that have been paid into the State Treasury pursuant to this procedure may be claimed as provided by *Code Civ. Proc.* § 1500 *et seq.* [*Code Civ. Proc.* § 570].

[2] FORM

Notice of Unclaimed Funds Held by Receiver [*Code Civ. Proc.* § 570]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff, vs. _____ [name],	)	NO: _____
Defendant	)	NOTICE OF UNCLAIMED
	)	FUNDS HELD BY RECEIVER
	)	

NOTICE IS HEREBY GIVEN pursuant to *Code of Civil Procedure Section 570* that _____ [name of receiver], court-appointed receiver in the above-titled action, has taken possession of funds in the amount of \$_____ belonging to _____ [name of owner], whose last known address is _____ and whose present whereabouts are unknown to the receiver.

The funds may be claimed by contacting the receiver at _____ [address]. If the funds are not claimed within 30 days after _____ [date of last publication of notice], they will be paid into the State Treasury on order of the Court.

_____ Dated:

_____ [signature of receiver]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:
 Civil Procedure Remedies Receiverships General Overview



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32-102C California Legal Forms--Transaction Guide §§ 102C.215-102C.219

[Reserved]

§§ 102C.215[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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C. Property Subject to Unclaimed Property Law

32-102C California Legal Forms--Transaction Guide § 102C.220

§ 102C.220 Notice to Owner by Holder of Property Soon to Escheat [Code Civ. Proc. §§ 1513.5, 1516(b), 1520(b)]

[1] Comment

[a] Use of Form

This is a notice for use by a person or entity that holds property in its business, which property is subject to escheat [see §§ 102C.18[7], 102C.130], to provide the apparent owner with the following:

- Notice of impending escheat as required by *Code Civ. Proc.* §§ 1513.5(a), 1516(d), and 1520(b), and
- An opportunity to communicate with the holder in a way that is deemed "activity" sufficient to prevent escheat.

Three statutes govern this notice, depending on the type of property involved:

- Notices regarding deposits, account shares, or other interests in a banking or financial organization are described in *Code Civ. Proc.* § 1513.5.
- Notices with respect to stock and memberships in business associations are described in *Code Civ. Proc.* § 1516(d).
- Notice with regard to other property held in by a business are described in *Code Civ. Proc.* § 1520(b).

Although those statutes refer to a notice "as prescribed by the controller," the controller has not in fact issued a form for this notice or prescribed precise language that the notice must contain. The controller's office has indicated that guidelines may be issued at some future time.

The holder must make reasonable efforts to notify the owner by mail, or, if the owner has consented to electronic notice,

send electronically, that the property will escheat to the state [*Code Civ. Proc.* §§ 1513.5(a), 1516(d), 1520(b)]. In the case of property subject to escheat under *Code Civ. Proc.* §§ 1513.5(a), (b), and 1520(a), the notice must be given when the banking or financial organization or other business entity has in its records an address for the apparent owner and nothing indicates that the address is inaccurate *Code Civ. Proc.* §§ 1513.5(a), 1520(b)].

[b] Timing of Notice

The notice must be mailed not less than six months nor more than 12 months before the time when the property will escheat to the state [*Code Civ. Proc.* §§ 1513.5(a), 1516(d), 1520(b)]. Alternatively, in the case of banking or financial organizations, for property subject to escheat under *Code Civ. Proc.* § 1513(a)(1), (a)(2), the notice may be mailed not less than two years nor more than two and one half years after the date of last activity by, or communication with, the owner concerning the property as shown on the record of the financial organization [*Code Civ. Proc.* § 1513.5(a)(1); see § 102C.18[7][b]].

[c] Form and Contents of Notice

The notice must specify when the property will escheat to the state and inform the owner of the need for filing a claim to recover the property once the property has escheated to the state [*Code Civ. Proc.* §§ 1513.5(a), 1516(d), 1520(b); see first paragraph of Form]. The form must also include a heading that reads "**THE STATE OF CALIFORNIA REQUIRES US TO NOTIFY YOU THAT YOUR UNCLAIMED PROPERTY MAY BE TRANSFERRED TO THE STATE IF YOU DO NOT CONTACT US**" [*Code Civ. Proc.* §§ 1513.5(b), 1516(d), 1520(b)]. The notice must also do the following, either in bold or a font that is at least two points larger than the rest of the notice [*Code Civ. Proc.* §§ 1513.5(a), 1516(d), 1520(b)]:

- Specify that since the date of last activity, or for the last two years, there has been no customer activity on the deposit, account, shares, or other interest.
- Identify the deposit, account, shares, or other interest by number or identifier.
- Indicate that the deposit, account, shares, or other interest is in danger of escheating to the state.
- Specify that the California Unclaimed Property Law requires banks, banking organizations, and financial organization to transfer funds of a deposit, account, shares, or other interest if it has been inactive for three years.

The notice must also include a form by which the owner may confirm the owner's current address. If that form is filled out, signed by the owner, and returned to the holder, it will be deemed that the account, or other device in which the owner's property is being held, remains currently active and recommences the escheat period [*Code Civ. Proc.* §§ 1513.5(b), 1516(b), 1520(b)]. In lieu of returning the form, the business association may provide a telephone number or other electronic means to enable the owner to contact the association [*Code Civ. Proc.* §§ 1513.5(b), 1516(d), 1520(b)]. With such contact, the business association must be deemed to know the location of the owner. The business association may also impose a service charge, not to exceed two dollars (\$2) [*Code Civ. Proc.* §§ 1513.5(b), 1516(d), 1520(b)]. Additionally, the holder may give additional notice at any time between the date of last activity by, or communication with, the owner and the date the holder transfers the deposit, shares, or other interest to the controller [*Code Civ. Proc.* §§ 1513.5(b), 1516(d), 1520(b)]. The statute requires this form be "as prescribed by the controller," but the controller has not issued a standard form for this purpose, nor prescribed any additional requirements for this form. The controller's office has indicated that guidelines may be issued at some future time.

[2] FORM

Notice to Owner by Holder of Property Soon to Escheat [Code Civ. Proc. §§ 1513.5, 1516(b), 1520(b)]

THE STATE OF CALIFORNIA REQUIRES US TO NOTIFY YOU THAT YOUR UNCLAIMED PROPERTY MAY BE TRANSFERRED TO THE STATE IF YOU DO NOT CONTACT US

_____[date]
 _____[name of holder]
 _____[address of holder]
 _____[city, state, zip code]
 To: _____[name of owner]
 _____[street address or post office box number]
 _____[city, state, zip code]

Re: Notice of Impending Escheat of [describe property, e.g., Account # 23522]

Dear _____:

You are hereby notified that on _____[date], your [describe, e.g., account, number 23522] [with or in or issued by] _____[name of banking or financial organization or business association] will escheat to the state of California for lack of any activity within the last [number, e.g., 3] years. Unless you communicate with us before that date, we will be required by law to forward the [describe interest, e.g., account] to the State of California and it will be necessary for you to file a claim with the state in order to claim that [describe interest, e.g., account].

■ _____ [Since _____ (date of last activity) or **For the last two years**], there has been no activity on [or communication with us about] your _____ [describe and identify interest, e.g., **Account # 2522**].

■ **The** _____ [describe interest, e.g., account] **is in danger of escheating to the state.**

■ **California's Unclaimed Property Law requires banks, banking organizations, financial organizations, and business associations to transfer funds of a deposit, account, shares, or other interest if it has been inactive for three years.**

If you wish to continue to maintain the [describe interest, e.g., account] and assure that we will not be required to turn it over to the State of California, please complete the form at the bottom of this notice, including your current address, and return it [no later than _____ (date of escheat)] to us _____ [at the address above or in the return envelope provided]. Alternatively, you may contact us by telephone at _____ [telephone number] or by e-mail at _____ [e-mail].

 [Detach and return this portion]

To: _____[Name of holder]
 _____[street address or post office box number]
 _____[city, state, zip code]

Re: [describe and identify interest, e.g., Account # 23522]

I wish to continue to maintain the above-referenced [account or interest or shares or describe other interest]. My current

address is _____.

Signature of Owner

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Intestacy Escheat Real Property Law Ownership & Transfer Death & Incapacity Escheat



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C. Property Subject to Unclaimed Property Law

32-102C California Legal Forms--Transaction Guide § 102C.221

§ 102C.221 Annual Report of Unclaimed Personal Property [Code Civ. Proc. § 1530]

[1] Comment

[a] Use of Form

The four forms reproduced in [2], *below*, are the components of the official paper report of unclaimed personal property that must be filed annually with the state controller [*see Code Civ. Proc. § 1530*]. These components are:

- Holder Face Sheet (UFS-1), for reporting particulars of holder. A copy of the electronic transfer receipt or check should be attached to the UFS-1 form [*see [f], below*].
- Holder Detail Sheet for Cash Only or Safe Deposit Property (UDS-1A). If a headquarters office is filing separate reports for one or more branches, each branch must file a separate detail sheet. A copy of each safe-deposit box inventory must be attached to the detail sheet [*see [f], below*].
- Holder Detail Sheet for Stock Property, with or without cash (UDS-1). If a headquarters office is filing separate reports for one or more branches, each branch must file a separate detail sheet.
- Securities Summary (SS-1), which must be filed whenever securities are reported.

Only holders reporting less than 50 accounts may use the paper reports [*see [b], below*]. Every person [*see Code Civ. Proc. § 1501(h)*] (definition), *below*] in possession of personal property subject to escheat under the Unclaimed Property Law [*Code Civ. Proc. § 1500 et seq.*; *see § 102C.18[3], [4]*] must file an annual report concerning that property with the controller, on a form provided by the controller [*Code Civ. Proc. § 1530(a), (d)*]. The required contents of the report are set forth by statute and regulation [*Code Civ. Proc. § 1530(b)*; 2 *Cal. Code Reg. §§ 1161, 1165, 1170, 1174*; *see § 102C.103* (transaction guide)]. Holders who do not have any property that is reportable under the Unclaimed Property Law must report this fact on written request of the controller [2 *Cal. Code Reg. § 1173*].

Copies of the forms and the official instructions for their completion may be obtained by contacting the Reporting Unit

of the controller's office at (916) 323-2845. They can also be obtained from the controller's website at www.sco.ca.gov/col/ucp/forms/index.shtml [see also [b], below]. The controller's office also provides a 50-page booklet of reporting instructions, which is available from the controller's office and also be obtained from the website at www.cos.ca.gov/col/ucp/holder/index.shtml. A copy of the electronic transfer receipt or check should be attached to the UFS-1 form [see [f], below].

For purposes of the reporting requirement, a "person" is any individual, business association, government or governmental subdivision or agency, two or more persons having a joint or common interest, or any other legal or commercial entity, whether that person is acting in his or her own right or in a representative or fiduciary capacity [see *Code Civ. Proc.* § 1501(h)].

[b] Filing Formats

Only holders reporting less than 50 accounts may use the paper reports, and those must be typed, not handwritten. All holders reporting unclaimed property involving 50 owners or more must submit their annual reports using the state controller's magnetic media format, or the diskette reporting program, both of which can be downloaded from the controller's website at www.sco.ca.gov/col/ucp/holder/index.shtml. Reports submitted on papers that contain 50 accounts or more will be returned to the holder, and the holder may be subject to penalties [see *Code Civ. Proc.* § 1576(a) (penalties)].

[c] Time of Filing

Life insurance corporations' reports, and all reports of insurance corporation demutualization proceeds [see *Code Civ. Proc.* § 1515.5], for the preceding year must be filed before May 1 [*Code Civ. Proc.* § 1530(d); see Stats 2003, ch. 304, § 2 (initial report for demutualization proceeds must be filed on or before May 1, 2004)]. All other organizations must file their reports before November 1 for the 12-month period ending on the previous June 30 or the most recently ended fiscal year [*Code Civ. Proc.* § 1530(d)]. The controller may postpone the reporting date on the controller's own motion or on written request by any person required to file a report [*Code Civ. Proc.* § 1530(d)].

[d] Fees and Charges

If charges are deducted from reported property [see § 102C.18(3)], the holder must include or attach all of the following information as part of the report [2 *Cal. Code Reg.* § 1161(a)-(c)]:

- The citation of the statute or a copy of the contract authorizing the charges;
- The value or amount of each item of property, before deduction of any charges; and
- The amount of charges deducted from each item and the date or dates of the deductions.

The controller may require additional information or documentation after reviewing the report, to substantiate the deductions [2 *Cal. Code Reg.* § 1161(d)].

Additional requirements apply to property in the form of savings or matured time deposits, matured investment certificates, accounts subject to negotiable order of withdrawal (NOW) made with banking or financial organizations, and other interests in, or deposits other than demand deposits made with, financial organizations [see *Code Civ. Proc.* § 1513(a)(1), (a)(2)] from which deductions are made. Reports concerning these types of property must also include the following [2 *Cal. Code Reg.* § 1165(a), (b)]:

- An estimate of the gross amount of income earned from use or investment of the property during the

period of inactivity.

- A description and itemization of all costs that were directly incurred for purposes of maintaining and safeguarding the property during the period of inactivity and that would not have been incurred except for the inactivity.

The controller may require additional information or documentation after reviewing the report, to substantiate the deductions [2 *Cal. Code Reg. § 1165(c)*].

Charges may not be deducted from property unless expressly permitted by the Unclaimed Property Law and authorized by a statute other than the Unclaimed Property Law, or by a valid, enforceable contract [*Code Civ. Proc. § 1522*; 2 *Cal. Code Reg. § 1160*]. Even when specifically permitted by the Unclaimed Property Law, charges may not be excluded, withheld, or deducted unless, under the holder's policy or procedure, they would have been excluded, withheld, or deducted if the property had been claimed by the owner prior to being reported or remitted to the controller [*Code Civ. Proc. § 1522*].

Property removed from a safe deposit box or other safekeeping repository will be received by the controller subject to any valid lien of the holder for rent and other charges. These charges will be paid to the holder out of the proceeds remaining from the controller's disposition of the property, after the controller has deducted his or her selling cost [*Code Civ. Proc. § 1560(a)*].

[e] Interest and Dividends

If payment of interest or dividends on property subject to *Code Civ. Proc. § 1513(a)(1), (a)(2)* is discontinued at any time during the period of owner inactivity preceding escheat, the holder must include or attach one of the following as part of its report [2 *Cal. Code Reg. § 1170*]:

- A copy of the valid, enforceable contract that authorizes the discontinuance of payment of interest or dividends.
- A citation to the statute that authorizes the discontinuance of payment of interest or dividends.

This requirement applies to payment of interest or dividends on demand, savings, or matured time deposits, matured investment certificates, accounts subject to negotiable order of withdrawal (NOW) held by banking or financial organizations, and other interests in or deposits other than demand deposits made with financial organizations [*see Code Civ. Proc. § 1513(a)(1), (a)(2)*]. A contract or statute will not be considered as authorizing discontinuance of payment of interest or dividends if payment would not have been discontinued, or would otherwise have accrued to the benefit of the owner, in the event the property had been claimed by the owner prior to being reported or remitted to the state controller [2 *Cal. Code Reg. § 1171*].

[f] Payment or Delivery of Reported Property

Except for contents of safe deposit boxes and other safekeeping repositories held in California by business associations, all escheated property reported to the controller pursuant to the Unclaimed Property Law must be paid or delivered to the controller no sooner than seven months and no later than seven months and 15 days after the final date of filing report [*Code Civ. Proc. §§ 1532(a), 1532.1*; *see Code Civ. Proc. § 1514*; *see also Code Civ. Proc. §§ 1532(d)* (procedure for transfer and delivery of certificated securities)]. The controller may postpone the date for payment or delivery of the property, and the date for any report required by *Code Civ. Proc. § 1532(b)* upon his or her own motion or upon written request by any person required to pay or deliver the property or file a report [*Code Civ. Proc. § 1532(a)*]. A holder making a payment of unclaimed cash in an amount of \$20,000 or more must do so by electronic

funds transfer [*Code Civ. Proc.* § 1532(a), (f)-(h); 2 *Cal. Code Reg.* § 1155.100 et seq.]. Payment by electronic funds transfer of amounts less than \$20,000 is acceptable but not required [see 2 *Cal. Code Reg.* § 1155.150(b)]. A copy of the electronic transfer receipt or check should be attached to the UFS-1 form [see [a], above, and [2], below].

Payment of any intangible property is to be made to the controller's office in Sacramento or at another location designated by the controller by regulation. Unless otherwise agreed by the controller and the holder, tangible personal property is to be delivered to the controller at the place where it is held [*Code Civ. Proc.* § 1532(e)]. Contents of safe deposit boxes and other safekeeping repositories held in California by business associations must be paid or delivered to the controller at the earlier of the following dates [*Code Civ. Proc.* § 1532.1; see *Code Civ. Proc.* §§ 1514, 1530(d)]:

- The time when the holder is requested to pay or deliver the property by the controller.
- Within one year after the final date for filing the report.

As a practical matter, the controller will not call for delivery of safe-deposit box contents until the inventories have been reviewed. Each holder is to list the contents of each safe-deposit box on an inventory sheet (for example, money, jewelry, tableware, stock certificates, bonds, deeds, and wills). The holder must mark each inventory sheet to correspond with the owner's name and identifying number and/or safe-deposit box number. One copy of the inventory sheet is to be attached to the detail sheet for each account reported. Legible reproductions of inventories already prepared are acceptable [*Reporting Instructions for Holders of Unclaimed Property* (California State Controller's Office, 9/03), at p. 19].

The controller, in his or her discretion, may determine that it is not in the interest of the state to take custody of the any tangible personal property and refuse payment or delivery of it. If he or she does so, the controller must notify the holder in writing, within 120 days from receipt of the annual report concerning the property [*Code Civ. Proc.* § 1533; see *Code Civ. Proc.* § 1530; § 102C.221 (report)].

[g] Penalties and Interest

Any person [see *Code Civ. Proc.* § 1501(h) (definition)] who willfully fails to render any report or perform other duties (including use of the prescribed report format [see *Code Civ. Proc.* § 1530]), required by the Unclaimed Property Law will be punished by a daily fine for each day the report is withheld or the duty is not performed [*Code Civ. Proc.* § 1576(a)]. An additional daily penalty applies against any person who willfully refuses to pay or deliver escheated property [*Code Civ. Proc.* § 1576(b)]. However, no person is considered to have willfully failed to report, pay, or deliver escheated property unless he or she has failed to respond within a reasonable time after notification, by certified mail by the controller's office, of his or her failure to act [*Code Civ. Proc.* § 1576(c)].

In addition to penalties, a person who fails to timely report, pay, or deliver unclaimed property to the controller, unless that failure is due to reasonable cause, must pay the controller interest at the rate of 12 percent per annum on that property, or its value, from the date the property should have been reported, paid, or delivered [*Code Civ. Proc.* § 1577]. If specified conditions are met, that interest will not be imposed on any escheated property required to be reported on or before November 1, 1999, and paid or delivered to the controller on or before December 31, 2002 [*Code Civ. Proc.* § 1577.5]. *Code Civ. Proc.* § 1577.5 is retroactive, but cannot be applied to property delivered to the controller before its enactment [*Westly v. U.S. Bancorp* (2003) 114 *Cal. App. 4th* 577, 582, 585, 7 *Cal. Rptr. 3d* 838 ; see Stats. 2000, Ch. 267 (enrolled August 30, 2000)].

In addition to other penalties, a 2 percent civil penalty is charged on amounts that should have been paid electronically but were not. The holder may be relieved of this penalty if he or she can show that the failure to make payment by an appropriate electronic funds transfer was due to reasonable cause and circumstances beyond the holder's control, and occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect *Code Civ. Proc.* § 1532(g);

2 Cal Code Reg. § 1155.200].

[h] Enforcement Actions

The controller may at reasonable times and on reasonable notice examine the records of any person [*see Code Civ. Proc. § 1501(h)* (definition)] if the controller has reason to believe the person has failed to report property required to be reported under the Unclaimed Property Law [*Code Civ. Proc. § 1571(a)*; *see Code Civ. Proc. §§ 1571(b)* (persons authorized to conduct examinations), 1572(a)(1) (actions to compel holder to permit examination)]. The controller may also bring an action in a court of appropriate jurisdiction, including a federal court or another state's court [*see Code Civ. Proc. § 1572(c)*], for a judicial determination that particular property is subject to escheat under the Unclaimed Property Law, or to enforce the delivery of escheated property to the controller [*Code Civ. Proc. § 1572(a)(2), (3)*; *see Code Civ. Proc. §§ 1572(b)* (jurisdictional requirements), 1574 (actions to enforce unclaimed property laws of other states), 1575 (actions by other states to enforce California law)].

[i] Inapplicability of Statute of Limitations

Statutes of limitations for commencing or enforcing actions or proceedings to obtain payment of claims for money or recovery of property from a holder do not affect the escheat of money or property, the duty to file a report required by the Unclaimed Property Law [*Code Civ. Proc. § 1500 et seq.*], or the duty to file reports relating to unclaimed property, or the duty to pay or deliver escheated property to the controller [*Code Civ. Proc. § 1570*].

[2] FORM

Annual Report of Unclaimed Personal Property [Code Civ. Proc. § 1530]

Holder Face Sheet for Reporting UCP, UFS-1

[Click here to view image.](#)

Securities Summary, SS-1

[Click here to view image.](#)

Owner Detail Sheet for Stock Property, UDS-1

[Click here to view image.](#)

Owner Detail Sheet for Cash Only or Safe Deposit Property, UDS-1A

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102C LOST AND UNCLAIMED PROPERTY
PART IV. FORMS

C. Property Subject to Unclaimed Property Law

32-102C California Legal Forms--Transaction Guide § 102C.222

§ 102C.222 Claim Form for Property Held by State Controller [Code Civ. Proc. § 1540]

[1] Comment

[a] Use of Form

This form is a sample copy of the official affirmation form to be used to claim property that has been delivered to the state controller under the Unclaimed Property Law [see *Code Civ. Proc. § 1500 et seq.*]. The conditions for escheat of various types of property differ [see § 102C.18[3] (discussion); § 102C.112 (transaction guide)], but generally require customer/owner inactivity and lack of contact for three to five years before they are transferrable to the state [but see *Code Civ. Proc. § 1513(a)(7)* (wages and salaries escheat if unclaimed after one year from date they become payable)]. One is only entitled to recover the property, if it is still in the controller's possession, or the value of the property at the time it escheats. No interest on claims approved after July 1, 2003 [*Code Civ. Proc. § 1540(c)*; see Stats. 2003, ch. 228, § 57; [d], *below*], and no appreciation or tax benefits, are recoverable. Even if the controller did not publish the notice required by *Code Civ. Proc. § 1531*, the controller has authority to sell securities; allowing the state to sell securities or other property and returning to the owner only the proceeds does not amount to an unconstitutional taking [*Harris v. Westly* (2004) 116 Cal. App. 4th 214, 223, 10 Cal. Rptr. 3d 343] .

To obtain a claim form, a person who believes that property belonging to him or her has been deposited with the controller pursuant to the Unclaimed Property Law must contact the Division of Unclaimed Property within the controller's office. The Division of Unclaimed Property may be contacted by calling (800) 992-4647 (California residents) or (916) 323-2827 (out-of-state and foreign residents) or by writing to:

State Controller,
Division of Unclaimed Property
300 Capitol Mall
Sacramento, CA 95814.

A search for property can be made on the controller's website at scoweb.sco.ca.gov. When property is found in the name

of the person inquiring, the person inquiring will be given an ID number, which must be used to complete the claim process. The controller will prepare and mail to the claimant, or the computer will generate for the claimant to print out, a letter describing the property, giving the claim ID number, the type and amount of the property, and requiring an affirmation by the claimant that he or she is the sole owner of the claim and the sole person entitled to receive the property described in the claim. In addition, an affirmation form like the one reproduced below will be sent by the controller's office or can be filled out online, or printed, completed, and returned to the controller by mail.

The claimant must complete and verify the claim form [*Code Civ. Proc. § 1540(a)*] and return it to the controller at the following address:

Division of Collections
Bureau of Unclaimed Property
PO Box 942850
Sacramento, CA 94250-5873.

The controller requires that the claim form be notarized if the claim amount is over \$1,000 or the property is related to stock or mutual funds. The controller also requires that the claimant submit with the claim form proof of identity and proof of ownership of the claimed property (such as an original check, stock certificate, savings passbook, safe deposit box keys, insurance policy, verification of address as shown, and so on), as listed in [c], *below*, and on pages two through four of the affirmation form. Any documents submitted should be originals, if available.

[b] Persons Entitled to Make Claims

Any person, excluding another state, who claims an interest in property paid or delivered to the controller pursuant to the Unclaimed Property Law may file a claim to the property or to the net proceeds from its sale with the controller [*Code Civ. Proc. § 1540(a)*; see *Code Civ. Proc. § 1542* (claims by states)]. For this purpose, "person" means any individual, business association, government or governmental subdivision or agency, two or more persons having a joint or common interest, or any other legal or commercial entity, including those acting in a representative or fiduciary capacity [*Code Civ. Proc. § 1501(h)*]. A person will be considered the "owner" of property held by the controller pursuant to the Unclaimed Property Law, and thus entitled to claim the property, if any of the following are true [*Code Civ. Proc. § 1540(d)*]:

- The person had a legal right to the property prior to its escheat.
- The person is the heir or legal representative of the person who had a legal right to the property prior to its escheat.
- The person is a public administrator acting under *Prob. Code §§ 7660 and 7661*.

The claim portion of this form includes an affirmation by the claimant that he or she is the owner of the claim and the person entitled to receive the property described in the claim.

[c] Accompanying Documents

The following documents must be submitted with the claim:

- A copy of a photo identification (driver's license, state identification card, or passport) for each claimant.

- A copy of each claimant's social security card or any other document showing the claimant's social security number (e.g., federal or state income tax return or pay stub).
- The original passbook, check, stock certificate, or instrument.

If the original passbook, check, stock certificate, or instrument is lost, stolen, or has been destroyed, the claimant will have to show proof that her or she once resided at the address shown on the controller's records as the address of the apparent owner at the time the holder transferred the property to the controller. Utility bills, tax bills, or bank statements will suffice. If the claimant cannot provide one of the foregoing types of address verification, the claimant must provide some document (correspondence, statement, or similar document) associating the claimant (or if the claimant is an heir, the deceased owner) with the business or financial institution that transferred the property to the controller.

A claimant who is the heir of a deceased owner also must submit the death certificate of the deceased owner and one of the following:

- A copy of currently certified letters, dated within six months prior to the date of the submission of the claim, appointing the executor or administrator of the decedent's estate and the estate tax identification number.
- A complete copy of the court ordered distribution of the decedent's estate.
- If the distribution of the decedent's estate was not ordered by a court, a complete copy of the decedent's will and/or trust agreement and a completed controller's form 13101.
- If no will or trust agreement is available, a completed declaration under *Prob. Code § 13101* and the controller's table of heirship form, both of which are available from the controller's office and on the controller's website at www.sco.ca.gov.

[d] Processing of Claims

The controller must consider each claim filed by a person claiming ownership of property held by the controller under the Unclaimed Property Law within 180 days after the claim is filed, and may hold a hearing and receive evidence concerning any claim [*Code Civ. Proc. § 1540(b)*]. The controller is not required to pay interest on a claim paid after July 1, 2003 [*Code Civ. Proc. § 1540(c)*; see Stats. 2003, ch. 228, § 57].

The controller must give written notice to the claimant if the claim is denied in whole or in part [*Code Civ. Proc. § 1540(b)*]. Any person aggrieved by a decision of the controller or whose claim is not decided within 180 days after it is filed may bring an action to establish his or her claim in the superior court in any county or city and county in which the attorney general maintains an office. The action must be brought within 90 days after the controller's decision, or within 270 days after the filing of the claim if the controller fails to make a decision [*Code Civ. Proc. § 1541*; for a complaint form, see California Forms of Pleading and Practice, Ch. 252, *Escheat (Unclaimed Property)*, § 252.93].

Once payment or delivery of money or other property has been made to any claimant under the provisions of the Unclaimed Property Law, no suit may be maintained by any other claimant against the state or any officer or employee of the state for or on account of the property [*Code Civ. Proc. § 1566(a)*]. Furthermore, no suit may be maintained by any person against the state or any of its officers or employees for or on account of any transaction entered into by the State Controller pursuant to the Unclaimed Property Law [*Code Civ. Proc. § 1566(b)*; see, e.g., *Fong v. Westly* (2004) 117 Cal. App. 4th 841, 851-853, 12 Cal. Rptr. 3d 76 (Controller held immune from any damages caused by alleged violations of UPL's notice requirements to holders of shares of stock that escheated to state, which ultimately obtained their sole remedy of shares' proceeds plus interest)].

[2] FORM

Claim Form for Property Held by State Controller [Code Civ. Proc. § 1540]

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Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawGeneral Overview



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32-102C California Legal Forms--Transaction Guide § 102C.223

§ 102C.223 Holder's Claim for Reimbursement for Payment to Owner [Code Civ. Proc. § 1560]

[1] Comment

[a] Use of Form

This form is a reproduction of the controller's official Holder's Claim for Reimbursement (HCR-1) form. It may be obtained by calling the controller's office at 916-323-2845 or from the controller's website at www.sco.ca.gov.

The form must be typed; handwritten and faxed forms will not be accepted. The form must contain an original signature. Reimbursement requests for accounts over \$1,000 and all requests for reimbursement of stocks must be notarized. Either the form or an accompanying letter of authorization on the holder's letterhead must give the names of each individual authorized to request property from the state controller's office. The controller's form does this in the form of an affirmation just above the place for notarization. The holder must also attach the following to the request for reimbursement [*Code Civ. Proc. § 1560(b)*]; see [b], *below*]:

- A copy of the original Unclaimed Property Face Sheet (UFS-1) (reproduced at § 102C.221[2]).
- Proof of payment (except in the case of overpayment).
- Proof that payee was entitled to payment.
- For negotiable instruments, proof that instrument was duly presented to holder by a person who appeared to the holder to be entitled to payment.

If the holder has delivered personal property to the controller, he or she may reclaim the property from the controller if it is still in the controller's possession, without payment of a fee or any other charges, on filing proof that the owner has claimed the property from the holder [*Code Civ. Proc. § 1560(d)*].

The holder is not entitled to interest on sums reimbursed [*Code Civ. Proc. § 1560(c)*].

[b] Holder's Right to Reimbursement

A holder who makes payment to the owner or another claimant of escheated moneys after paying or delivering the property to the controller may obtain reimbursement from the controller by filing proof that the payment was made and that the payee was entitled to the payment. If the holder seeks reimbursement for payment of a negotiable instrument (including a check, money order, cashier's check, or travelers check), the holder must include proof that the instrument was duly presented to the holder and payment was made to the person who appeared to be entitled to the payment [*Code Civ. Proc. § 1560(b)*].

A system generated document showing re-activation of an account is acceptable proof of payment. The holder may obtain reimbursement even if he or she did either of the following:

- Made a payment to a person whose claim to the property is barred because of the expiration of any applicable time period for filing a claim [*Code Civ. Proc. § 1560(c)*; see *Code Civ. Proc. § 1570*; discussed in § 102C.221[1][i]].
- Made a mistake in paying or delivering to the controller property that had not escheated to the state [*Code Civ. Proc. § 1561(b)*; see *Code Civ. Proc. §§ 1563, 1565* (disposal of property by controller)].

[2] FORM**Holder's Claim for Reimbursement for Payment to Owner [Code Civ. Proc. § 1560]**

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawGeneral Overview



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CHAPTER 102D REGISTRATION AND TRANSFER OF VEHICLES, VESSELS, AND AIRCRAFT

32-102D California Legal Forms--Transaction Guide 102D.syn

§ 102D.syn Synopsis to Chapter 102D: REGISTRATION AND TRANSFER OF VEHICLES, VESSELS, AND AIRCRAFT

§ 102D.01 California Sources

[1] Statutes

[2] Regulations

§ 102D.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 102D.03-102D.04 [Reserved]

§ 102D.05 Text References

§§ 102D.06-102D.09 [Reserved]

§ 102D.10 Registration of Vehicles With DMV

[1] In General

[2] Transfer of Ownership

§ 102D.11 Registration of Undocumented Vessels With DMV

[1] In General

[2] Transfer of Vessel

§ 102D.12 Documentation of Vessels by Coast Guard

- [1] Overview and Definitions
- [2] Vessels Subject to Documentation
- [3] Issuance of Certificate of Documentation
- [4] Requirement for Replacement, Exchange, Deletion, or Cancellation of Certificate
 - [a] Replacement
 - [b] Exchange
 - [c] Deletion
 - [d] Cancellation

§ 102D.13 Recording and Filing Instruments Affecting Title to Documented Vessel

§ 102D.14 Registration of Aircraft

- [1] Necessity and Eligibility
- [2] Submission of Application Materials by Owner
- [3] Temporary Authority to Operate Aircraft
- [4] Effective Date and Effect of Registration
- [5] Termination of Registration
- [6] Suspension or Revocation
- [7] Dealers' Aircraft Registration Certificate

§ 102D.15 Recording of Aircraft Titles and Security Documents of Registered Aircraft

- [1] Recordable Conveyance Instruments
- [2] Effect of Recording
- [3] Procedure

§§ 102D.16-102D.99 [Reserved]

§ 102D.100 Vehicles

Scope

§ 102D.101 Undocumented Vessels

Scope

§ 102D.102 Documented Vessels

Scope

§ 102D.103 Aircraft

Scope

§§ 102D.104-102D.109 [Reserved]

Scope

§ 102D.110 Registration

Scope

§ 102D.111 Transfer

Scope

§§ 102D.112-102D.119 [Reserved]

§ 102D.120 Registration

Scope

§ 102D.121 Transfer

Scope

§ 102D.122 Purchase or Sale

Scope

§§ 102D.123-102D.129 [Reserved]

§ 102D.130 Documentation of Vessels

Scope

§ 102D.131 Filing and Recording of Instruments Affecting Documented Vessels

Scope

§§ 102D.132-102D.139 [Reserved]

§ 102D.140 Registration of Aircraft

Scope

§ 102D.141 Recording Conveyances Affecting Title

Scope

§§ 102D.142-102D.149 [Reserved]

Scope

§ 102D.150 Renewal of Certificate of Documentation

Scope

§ 102D.151 Replacement of Certificate of Documentation

Scope

§ 102D.152 Exchange of Certificate of Documentation

Scope

§ 102D.153 Deletion of Certificate of Documentation

Scope

§ 102D.154 Cancellation of Certificate

Scope

§§ 102D.155-102D.199 [Reserved]

§ 102D.200 Application for Title or Registration [DMV Form Reg. 343]

[1] Comment

[a] Use of Form

[b] Definitions

[c] Application for Original Registration

[i] Vehicles Other Than Motorcycles

[ii] Motorcycles

[d] Preparation of Form

[e] Certificate of Compliance

[2] FORM

Application for Title or Registration [DMV Form Reg. 343]

§ 102D.201 Vehicle/Vessel Transfer Form (Bill of Sale, Odometer Disclosure, Power of Attorney) [DMV Form Reg. 262]

[1] Comment--Use of Form

[2] FORM

Vehicle/Vessel Transfer Form (Bill of Sale, Odometer Disclosure, Power of Attorney) [DMV Form Reg. 262]

§ 102D.202 Notice of Release of Liability [DMV Form Reg. 138]

[1] Comment

[a] Use of Form

[b] Notice Requirements for Vehicles

[c] Notice Requirements for Vessels

[d] Liability for Subsequent Acts--Vehicles

[e] Liability for Subsequent Acts--Vessels

[2] FORM

Notice of Release of Liability [DMV Form Reg. 138]

§§ 102D.203-102D.209 [Reserved]

§ 102D.210 Application for Registration Number, Certificate of Ownership, and Certificate of Number of Undocumented Vessel [DMV Form Boat 101]

[1] Comment

[a] Use of Form

[b] Definitions

[c] Certificate of Ownership

[d] Initial Application for Certificate of Number

[i] In General

[ii] Proof of Ownership

[iii] Submission of Form and Issuance of Certificates

[e] Change of Ownership

[2] FORM

Application for Registration Number, Certificate of Ownership, and Certificate of Number of Undocumented Vessel
[DMV Form Boat 101]

§ 102D.211 Vessel Purchase Agreement

[1] Comment

[a] Use of Form

[b] Additional Considerations

[c] Removal of Hull Identification Number

[2] FORM

Vessel Purchase Agreement

§§ 102D.212-102D.219 [Reserved]

§ 102D.220 Application for Initial Issue, Exchange, or Replacement of Certificate of Documentation;
Redocumentation [CG-1258]

[1] Comment

[a] Use of Form

[b] Eligibility for Documentation

[c] Official Instructions

[d] Contents of Application for Documentation

[i] Vessel Name

[ii] Official Number

[iii] Managing Owner's Name and Tax Identification Number

[iv] Managing Owner's Address

[v] Hailing Port

[vi] Citizenship Requirements

[vii] Endorsements

[viii] Primary Service

[ix] Purpose of Application

[x] Certification

[e] Required Attachments to Application

[f] Where to File Application

[g] Restriction on Withdrawal of Application

[h] Certificate of Documentation

[i] Issuance and Types of Endorsements

[ii] Period of Validity and Renewal

[i] Exchange of Certificate

[i] When Certificate Must Be Exchanged

[ii] Exchange Procedure

[iii] Effect of Outstanding Mortgage

[j] Replacement of Certificate

[k] Deletion

[i] Causes

[ii] Redocumentation

[l] Cancellation

[2] FORM

Application for Initial Issue, Exchange, or Replacement of Certificate of Documentation; Redocumentation
[CG-1258]

§ 102D.221 Bill of Sale of Vessel [CG-1340]

[1] Comment

[a] Use of Form

[b] Eligibility for Filing and Recording

[c] Required Contents

[i] Vessel Identification

[ii] Identification and Signatures of Parties

[iii] Date and Acknowledgment

[d] Procedural Requirements

[2] FORM

Bill of Sale of Vessel [CG-1340]

§§ 102D.222-102D.229 [Reserved]

§ 102D.230 Aircraft Registration Application [AC Form 8050-1]

[1] Form

[a] Use of Form

[b] Eligibility for Registration

[c] Application Procedure

[i] Registration by Owner

[ii] Preparation

[iii] Submission of Application Materials to FAA

[iv] Temporary Authority to Operate Aircraft

[d] Change of Address

[e] Identification Number

[f] Signature

[g] Certificate of Aircraft Registration

[h] Termination of Registration

[i] In General

[ii] Suspension and Revocation

[i] Inspection of Registration

[2] FORM

Aircraft Registration Application [AC Form 8050-1]

§ 102D.231 Bill of Sale of Aircraft [AC Form 8050-2]

[1] Comment

[a] Use of Form

[b] Preparation of Form

[c] Required Submissions With Form

[d] Recording of Form

[i] In General

[ii] Effect of Recording

[iii] Required Contents and Format

[iv] Execution

[v] Recording Procedure

[2] FORM

Bill of Sale of Aircraft [AC Form 8050-2]

§ 102D.232 Certificate of Repossession of Encumbered Aircraft [AC Form 8050-4]

[1] Comment

[a] Use of Form

[b] Registration Following Repossession

[2] FORM

Certificate of Repossession of Encumbered Aircraft [AC Form 8050-4]

§ 102D.233 Notice of Recording and Release of Conveyance Securing Obligation on Aircraft [AC Form 8050-41]

[1] Comment

[a] Use of Form

[b] Notice of Recordation of Conveyance

[c] Release

[2] FORM

Notice of Recording and Release of Conveyance Securing Obligation on Aircraft [AC Form 8050-41]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102D REGISTRATION AND TRANSFER OF VEHICLES, VESSELS, AND AIRCRAFT

32-102D California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers the registration and transfer of vehicles, vessels, and aircraft. It examines in detail the registration of vehicles and undocumented vessels with the Department of Motor Vehicles, the documentation of vessels weighing at least five tons by the Coast Guard, and the registration of aircraft with the Federal Aviation Administration. The chapter also discusses the renewal and termination of registration, and the transfer of a registered or documented vehicle, vessel, or aircraft. Finally, it covers the recording of instruments affecting the title to a documented vessel or registered aircraft. Forms include many of the official registration and transfer forms for vehicles, vessels, and aircraft, as well as a contract for the sale of a vessel.

For coverage of the registration or sales of mobilehomes or floating homes, see Ch. 39, *Mobilehome Parks*, and Ch. 40, *Mobilehomes*. For discussion of bills of sale in general, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code*. For discussion of security interests under the Uniform Commercial Code, see Ch. 42, *Secured Transactions*.

This chapter does not specifically cover retitling of vehicles, vessels, or aircraft on death or in connection with the creation of a living trust. For coverage of the retitling of assets on the owner's death, see California Probate Practice (Matthew Bender). For discussion of the transfer of assets to a living trust, see Ch. 73, *Funding a Revocable Trust*.



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A. Primary Sources

32-102D California Legal Forms--Transaction Guide § 102D.01

§ 102D.01 California Sources

[1] Statutes

Vehicular air pollution control. *Health & Safety Code § 43000 et seq.*

Registration of vehicles. *Veh. Code § 4000 et seq.*

Registration requirement. *Veh. Code § 4000.*

Vehicles subject to registration. *Veh. Code §§ 4000-4022.*

Original registration. *Veh. Code §§ 4150-4166.*

Renewal of registration. *Veh. Code §§ 4600-4610.*

Registration of fleet vehicles. *Veh. Code §§ 5301-5309.*

Transfers of title or interest in vehicle. *Veh. Code § 5600 et seq.*

Transfers through wholesale auctions. *Veh. Code §§ 6100-6105.*

Encumbrances on vehicles. *Veh. Code §§ 6300-6303.*

Registration fees. *Veh. Code §§ 9250-9271.*

Registration and transfer of vessels. *Veh. Code § 9840 et seq.*

Private party vehicle markets. *Veh. Code §§ 12101-12104.*

[2] Regulations

Registration of vessels by Department of Motor Vehicles. *13 Cal. Code Reg. §§ 190.00-192.00.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawShippingRegulations & StatutesLicensing & RegistrationTransportation LawPrivate VehiclesVehicle
RegistrationGeneral OverviewTransportation LawWater TransportationLicensing & Registration



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§ 102D.02 Federal Sources

[1] Statutes

Documentation of vessels. *46 U.S.C. § 12101 et seq.*

Definitions. *46 U.S.C. §§ 101-116, 2101, 12101.*

Vessels requiring documentation. *46 U.S.C. § 12102.*

Vessels eligible for documentation. *46 U.S.C. § 12103.*

Applications for documentation. *46 U.S.C. § 12104.*

Issuance of documentation. *46 U.S.C. § 12105.*

Endorsements and special documentation *46 U.S.C. §§ 12111-12114.*

Registration and Recordation of Aircraft. *49 U.S.C. §§ 44101-44112.*

Registration requirements. *49 U.S.C. §§ 44101, 44102.*

Registration of aircraft engines, propellers, and appliances. *49 U.S.C. § 44104(1).*

Dealers' certificates. *49 U.S.C. § 44104(2).*

Recordation of conveyances, leases, and security instruments in registered aircraft. *49 U.S.C. § 44107.*

[2] Regulations

Aircraft registration. *14 C.F.R. §§ 47.1-47.71.*

General provisions. *14 C.F.R. §§ 47.1-47.19.*

Certificates of aircraft registration. *14 C.F.R. §§ 47.31-47.51.*

Dealers' aircraft registration certificates. *14 C.F.R. §§ 47.61-47.71.*

Recordation of aircraft conveyances. *14 C.F.R. §§ 49.1-49.55.*

Documentation of vessels. *46 C.F.R. § 67.1 et seq.*

Vessels eligible for documentation. *46 C.F.R. § 67.5.*

Vessels requiring documentation. *46 C.F.R. § 67.7.*

Vessels excluded or exempt from documentation. *46 C.F.R. § 67.9.*

Form for documentation and endorsements. *46 C.F.R. §§ 67.15-67.23.*

Application for documentation; exchange, replacement, or return. *46 C.F.R. §§ 67.141-67.151.*

Filing and recording of documents relating to vessels. *46 C.F.R. § 67.200 et seq.*

Instruments eligible for filing and recording. *46 C.F.R. § 67.200.*

Restrictions. *46 C.F.R. § 67.203.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawShippingRegulations & StatutesGeneral OverviewTransportation LawPrivate VehiclesVehicle
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§§ 102D.03[Reserved]



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B. Secondary Sources

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§ 102D.05 Text References

California Legal Forms (Matthew Bender)
Ch. 42, *Secured Transactions* .
Ch. 47, *Automotive Financing and Vehicle Leasing* .
Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .
Ch. 53, *Personal Property Leasing* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)General Overview



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[Reserved]

§§ 102D.06[Reserved]



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§ 102D.10 Registration of Vehicles With DMV

[1] In General

No person may drive or move a motor vehicle, or leave it standing on a highway or in an off-street public parking facility, unless the vehicle is registered and the appropriate fees paid under the Vehicle Code [see *Veh. Code* §§ 9250-9271], or registered under the permanent trailer identification program [*Veh. Code* § 4000(a)(1); see *Veh. Code* § 5014.1(a) (types of trailers to be assigned permanent trailer identification certificate and plate)]. For these purposes, "vehicle" means a device by which any person or property may be propelled, moved, or drawn upon a highway. This definition does not include a device moved exclusively by human power or used exclusively on stationary rails or tracks [*Veh. Code* § 670]. Virtually all types of automobiles, trucks, trailers, motorcycles, and mobilehomes fall within this definition. Although a "motor vehicle" is a vehicle that is self-propelled, a self-propelled wheelchair, motorize tricycle, or motorized quadricycle is not a "motor vehicle," if operated by a person who, by reason of physical disability, is otherwise unable to move about as a pedestrian [*Veh. Code* § 415(a), (b)]. For purposes of the New Motor Vehicle Board and related statutes [see *Veh. Code* § 3000 et seq.], "motor vehicle" also includes a recreational vehicle [see *Health & Safety Code* § 18010(a) (definition)], but does not include a camper truck or park trailer [*Veh. Code* § 415(c)].

An application for the original or renewal registration of a vehicle must consist of an official application form [*Veh. Code* §§ 4150 (vehicle other than motorcycle), 4150.2 (motorcycle); see § 102D.200[2], a certificate of compliance with smog laws [*Veh. Code* § 4000.1(a), (d)], and the appropriate fees [see *Veh. Code* § 9250; see also *Veh. Code* §§ 9250-9271]. The owner of a registered vehicle must apply to renew the registration before midnight of the date of its expiration [*Veh. Code* § 4602].

[2] Transfer of Ownership

A transfer of the title to, or any interest in, a vehicle registered under the Vehicle Code will not be effective until the parties to the transaction provide the DMV with the required documentation. In most cases, this documentation consists of the certificate of ownership. The transferor must sign the certificate and deliver it to the transferee, who must deliver or mail it to the DMV [*Veh. Code* § 5600(a)]. If the certificate is not available, the transferor must file an application for duplicate certificate with the DMV [*Veh. Code* §§ 5752, 5911].

Within five calendar days of the transfer and delivery of the vehicle to the transferee, the transferor must file an official notice of release of liability (or specified alternative materials) with the DMV [*see Veh. Code §§ 5900, 5901; see also § 102D.202*]. Thereafter, the transferor will be relieved of civil or criminal liability for the parking, abandoning, or operation of the vehicle by another person [*Veh. Code § 5602*].

For a procedural guide to the transfer process, see § 102D.111.

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCommercial VehiclesLicensing & RegistrationTransportation LawPrivate VehiclesVehicle
RegistrationGeneral Overview



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32-102D California Legal Forms--Transaction Guide § 102D.11

§ 102D.11 Registration of Undocumented Vessels With DMV

[1] In General

Every undocumented vessel operated on the waters of California must currently be numbered in accordance with the provisions of the Vehicle Code, federal law, or the laws of another state [*Veh. Code § 9850*]. For these purposes, an "undocumented vessel" is any vessel that is not required to have, and does not have, a valid marine document issued by the Coast Guard [*see Veh. Code § 9840(g)*]. To determine whether or not a particular vessel falls within this definition of undocumented vessel, see § 102D.101. For discussion of the documentation of vessels by the Coast Guard, see § 102D.12.

Under the Vehicle Code, an application for a registration number for an undocumented vessel must be filed with the DMV [*see Veh. Code § 9853; see also § 102D.210[2]* (form)]. If the DMV approves the application, it will issue a certificate of number to the owner [*see Veh. Code § 9840(b)* ("owner" defined)] and a certificate of ownership to the legal owner [*Veh. Code § 9853.1; see Veh. Code § 9840(c)* ("legal owner" defined)]. If there is no legal owner, the DMV will issue both certificates to the owner [*Veh. Code § 9853.1*]. The owner must paint or permanently attach the number on each side of the forward half of the vessel in the required manner [*Veh. Code § 9853.2; 13 Cal. Code Reg. § 190.00*] and renew the certificate of number before midnight of its expiration date [*Veh. Code § 9860*]. All certificates of number expire on December 31 of every odd-numbered year [*Veh. Code § 9861*]. The owner must also affix a registration sticker to the vessel if one is issued by the DMV [*see Veh. Code § 9853.4(b); 13 Cal. Code Reg. § 190.01*].

[2] Transfer of Vessel

A transfer of the title to, or any interest in, an undocumented vessel numbered under the Vehicle Code will not be effective unless the parties to the transaction pay any delinquent property taxes on the vessel, and follow the statutory transfer procedure [*see Veh. Code § 9900*]. Under the standard procedure, the transferor must endorse the certificate of ownership and deliver it to the transferee [*Veh. Code § 9900(a)*]. The transferee must set forth his or her address on the certificate, sign it, and submit it, along with other required documents and fees, to the DMV within 10 days [*Veh. Code §§ 9855, 9900, 9901, 9907, 9908*]. For more detailed coverage of this procedure and of related requirements, see § 102D.121.

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawShipping Regulations & StatutesLicensing & RegistrationTransportation LawWater
TransportationLicensing & Registration



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32-102D California Legal Forms--Transaction Guide § 102D.12

§ 102D.12 Documentation of Vessels by Coast Guard

[1] Overview and Definitions

Federal documentation is required for the operation of vessels in certain trades, serves as evidence of vessel nationality, and permits vessels to be subject to preferred mortgages [46 C.F.R. § 67.1]. For these purposes, "vessel" includes every description of watercraft or other contrivance used or capable of being used as a means of transportation on water, but the definition does not include aircraft [46 C.F.R. § 67.3]. A "documented vessel" is a vessel which is the subject of a valid Certificate of Documentation [46 U.S.C. § 106; 46 C.F.R. § 67.3]. Coast Guard officials called documentation officers process and approve applications for documentation [46 C.F.R. § 67.3].

[2] Vessels Subject to Documentation

Certificates of documentation are issued only to vessels that are wholly owned by United States citizens [46 U.S.C. § 12103(a)(1), (b); 46 C.F.R. § 67.5; *see* 46 U.S.C. § 104 ("citizen of the United States" defined); *see also* 46 C.F.R. §§ 67.30-67.47 (citizenship requirements for vessel documentation)] and that meet several criteria. As a general rule, vessels of five or more net tons that engage in the fisheries [*see* 46 U.S.C. § 108; 46 C.F.R. § 67.3 ("fisheries" defined)], on the navigable waters of the United States or in the Exclusive Economic Zone or coastwise trade must be documented [46 U.S.C. § 12102; 46 C.F.R. § 67.7; *see* 46 C.F.R. § 67.9(c) (exemption for non-self propelled vessels under certain circumstances); *see also* 46 C.F.R. § 67.3 ("Exclusive Economic Zone" defined)]. Other vessels that satisfy these weight and ownership requirements are eligible for documentation [*see* 46 U.S.C. § 12103(a)]. This group includes vessels used exclusively for recreational purposes [46 C.F.R. § 67.5]. Owners of pleasure vessels have the option of having their vessels documented by the Coast Guard or registered with the DMV [*see* 46 U.S.C. § 12106(a); *see also* § 102D.11[1]]. Finally, although the Coast Guard regulations group vessels used in foreign trade with vessels used exclusively for pleasure, thus suggesting that federal documentation is optional [*see* 46 C.F.R. §§ 67.5, 67.17(b)], the Coast Guard has indicated that vessels used in foreign trade must be documented before they may be operated in waters that fall within the jurisdiction of the Coast Guard. For further discussion of vessels that are subject to or exempt from the federal documentation requirements, *see* § 102D.102.

[3] Issuance of Certificate of Documentation

If the Coast Guard approves an application for documentation, it will issue a Certificate of Documentation [see Coast Guard Form CG-1270]. The certificate, or temporary certificate, will be issued with one or more of the following endorsements: registry (for foreign trade or trade with U.S. possessions), coastwise, fishery, or recreational [46 C.F.R. § 67.15; 46 U.S.C. § 12105(a); see 46 C.F.R. §§ 67.17, 67.19, 67.21, 67.23 (entitlements under various endorsements)]. When a vessel possesses a Certificate of Documentation bearing more than one endorsement, the actual use of the vessel will determine the endorsement under which it is operating [46 C.F.R. § 67.15 (Note)].

Each endorsement on a certificate is valid for one year. The owner must apply for renewal of each endorsement on the certificate before the expiration of that year [46 C.F.R. § 67.163; see 46 C.F.R. § 67.165(a) (option for deposit in lieu of renewal of endorsement for vessels exempt from requirement for documentation under 46 C.F.R. § 67.9(c)); see also [2], above].

[4] Requirement for Replacement, Exchange, Deletion, or Cancellation of Certificate

[a] Replacement

A Certificate of Documentation must be replaced when lost, mutilated, or wrongfully withheld from the vessel owner [46 C.F.R. § 67.169(a)]. When application for replacement is required because the certificate has been mutilated, the existing certificate must be physically given up to the National Vessel Documentation Center [46 C.F.R. § 67.169(b)]. On compliance with the applicable requirements, the Coast Guard will issue a new certificate [see 46 C.F.R. § 67.141 (application procedure); see also § 102D.130].

[b] Exchange

A Certificate of Documentation, together with any endorsements, becomes invalid and must be exchanged when any of the following events occurs [46 C.F.R. § 67.167(b); see 46 C.F.R. § 67.161 (exceptions)]:

- A change in the ownership of the vessel.
- A change by addition, deletion, or substitution of the general partners of a partnership that has obtained a registry or recreational endorsement.
- A change in the state of incorporation of the corporate owner of the vessel.
- A change in the name of the vessel.
- A change in the hailing port of the vessel.
- When the vessel is placed under the command of a person who is not a United States citizen.

A Certificate of Documentation, together with any of its endorsements, also becomes invalid immediately if the vessel is not at sea, or on the vessel's next arrival in port anywhere in the world, on the occurrence of any of the following events [46 C.F.R. § 67.167(c); see 46 C.F.R. §§ 67.161, 67.167(f) (exceptions)]:

- A change in the vessel's gross or net tonnage or its dimensions.
- A change by addition or substitution of restrictions imposed on the vessel.
- A change in the legal name of any owner.

- A change by addition, deletion, or substitution of the vessel's endorsements.
- The discovery of a substantive or clerical error by the issuing documentation officer.
- When a self-propelled vessel becomes a non-self-propelled vessel, and vice versa.
- When any beneficiary with an enforceable interest in a trust arrangement changes by addition or substitution, or the trustee of a trust arrangement owning a vessel changes by addition, substitution, or deletion.
- When a tenant by the entirety owning any part of the vessel dies.

Although a Certificate of Documentation and any endorsements remain valid, the owner must apply for exchange of the certificate on an election to designate a new managing owner of the vessel [46 C.F.R. § 67.167(d); *see* 46 C.F.R. § 67.113 (managing owner designation)] and may apply for exchange of the certificate if the restrictions imposed on the vessel change by deletion, or if the vessel attains a special entitlement [46 C.F.R. § 67.167(e); *see* 46 C.F.R. § 67.130 *et seq.* (forfeited, wrecked, or captured vessels)].

To apply for exchange of the certificate, the vessel owner must send or deliver the certificate to the National Vessel Documentation Center and follow the appropriate procedures [46 C.F.R. § 67.167(a); *see* 46 C.F.R. § 67.141 (application procedure); *see also* § 102D.130].

[c] Deletion

A Certificate of Documentation, together with any endorsements on that certificate, is invalid and the vessel is subject to deletion from the roll of documented vessels in the following situations [46 C.F.R. § 67.171(a); *but see* 46 C.F.R. § 67.161 (limited exceptions)]:

- The vessel is placed under foreign flag.
- The vessel is transferred in whole or in part to a non-citizen.
- Any owner of the vessel ceases to be a citizen within the meaning of the regulations governing documentation [*see* 46 C.F.R. §§ 67.30-67.47].
- The owner no longer elects to document the vessel.
- The vessel is no longer at least five net tons.
- The vessel ceases to be capable of transportation by water.
- The owner fails to exchange the certificate as required by the regulations [*see* [b], *above*].
- The owner fails to maintain the markings required by the regulations [*see* 46 C.F.R. §§ 67.120-67.125 (marking requirements for vessel documentation)].
- The endorsements on the certificate have been revoked because the vessel owner is the subject of an outstanding civil penalty assessed by the Coast Guard.
- The owner fails either to renew the endorsements [*see* 46 C.F.R. § 67.163] or to comply with

provisions governing deposit of the certificate [*see* 46 C.F.R. § 67.165].

If a cause for deletion arises, the vessel owner must send or deliver the original certificate to the National Vessel Documentation Center, together with a statement setting forth the reason or reasons deletion is required [46 C.F.R. § 67.171(b); *see* 46 C.F.R. § 67.171(c) (additional requirements when certificate has been deleted because vessel has been placed under foreign flag or has been sold in whole or in part to non-citizen)]. A vessel may be redocumented following a deletion of its certificate if the reason for the deletion no longer exists [*see* §§ 102D.153, 102D.220[2]].

On compliance with the applicable requirements, a certificate evidencing deletion from documentation will be issued on request of the vessel owner to the National Vessel Documentation Center [46 C.F.R. § 67.171(d)].

[d] Cancellation

A Certificate of Documentation, together with any endorsements, is invalid and subject to cancellation on a determination by the Director of the National Vessel Documentation Center that the certificate was improperly issued for any reason [46 C.F.R. § 67.173]. On notification, the owner must send or deliver the certificate to a documentation officer at the National Vessel Documentation Center [46 C.F.R. § 67.173]. The vessel owner may submit an application for exchange to correct the error giving rise to cancellation [46 C.F.R. § 67.173; *see* 46 C.F.R. § 67.141 (application procedure); *see also* § 102D.130]. If the vessel for which the certificate was canceled was previously documented, it remains documented under the previous Certificate of Documentation, unless deleted from the roll of actively documented vessels [46 C.F.R. § 67.173; *see* 46 C.F.R. § 67.171 (deletion); *see also* [c], *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawShippingRegulations & StatutesLicensing & RegistrationTransportation LawWater
TransportationGeneral Overview



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32-102D California Legal Forms--Transaction Guide § 102D.13

§ 102D.13 Recording and Filing Instruments Affecting Title to Documented Vessel

Several types of instruments may be filed and recorded with the National Vessel Documentation Center if they affect a vessel that has a valid Certificate of Documentation or is the subject of an application for documentation which has been submitted to the National Documentation Center and is in substantial compliance with the applicable regulations [see 46 C.F.R. § 67.203 (restrictions on filing and recording)]. These documents include a bill of sale [see § 102D.221], a gift deed, mortgages and assignments, preferred mortgages and assignments, interlender agreements affecting mortgages and preferred mortgages, and notices of claim of lien [see 46 C.F.R. § 67.200]. The eligible documents must be filed and recorded to be valid against any person other than (1) the grantor, mortgagor, or assignor; (2) the heir or devisee of the grantor, mortgagor, or assignor; or (3) a person having actual notice of the instrument [46 U.S.C. § 31321(a)(1)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawShipping Regulations & StatutesLicensing & RegistrationTransportation LawWater
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32-102D California Legal Forms--Transaction Guide § 102D.14

§ 102D.14 Registration of Aircraft

[1] Necessity and Eligibility

An aircraft (other than an aircraft of the United States Armed Forces) must be registered with the Federal Aviation Administration (FAA) before it is operated within the United States, if it is eligible for registration [49 U.S.C. § 44101(a); see 49 U.S.C. § 44101(b); 14 C.F.R. § 47.3(a) (eligibility for registration); see also 49 U.S.C. § 44104(1) (aircraft engines, propellers, and appliances may also be registered); but see 14 C.F.R. § 47.31(c) (temporary authority to operate unregistered aircraft); [3], below]. An aircraft is eligible for registration if it satisfies any of the following conditions [49 U.S.C. § 44102(a)]:

- It is not registered under the laws of any foreign country and is owned by a United States citizen, or a lawfully admitted permanent resident; or
- It is not registered under the laws of any foreign country, is owned by a corporation (other than a corporation that is a United States citizen) lawfully organized and doing business under the laws of the United States or any state, and is based and primarily used in the United States; or
- It is owned by the federal government; a state, territory, or possession of the United States, or a political subdivision of any of these; or the District of Columbia.

[2] Submission of Application Materials by Owner

An aircraft may be registered only by and in the legal name of its owner [14 C.F.R. § 47.5(b); see 49 U.S.C. § 44103(a)(1) (registration of aircraft in general); see also 14 C.F.R. § 47.5(d) ("owner" defined)]. An owner-applicant must submit an official Aircraft Registration Application [see § 102D.230], evidence of ownership [see 14 C.F.R. §§ 47.11, 47.33, 47.35, 47.37], and the application fee [see 14 C.F.R. § 47.17] to the FAA Aircraft Registry [14 C.F.R. § 47.31(a); see 14 C.F.R. § 47.19 (addresses of Registry)]. For a step-by-step guide to this application process, see § 102D.140.

[3] Temporary Authority to Operate Aircraft

The Aircraft Registration Application is printed in triplicate. The owner must send two of the copies to the Registry, and must carry the pink copy in the aircraft as temporary authority to operate the aircraft without registration [14 C.F.R. §§ 47.3(b)(2), 47.31(b)]. This temporary authority is valid until the date the applicant receives a Certificate of Aircraft Registration or until the date the FAA denies the application but in no case for more than 90 days after the date the applicant signs the application. If the FAA does not take final action within that 90-day period, it will issue a letter of extension that permits the owner to continue to operate the aircraft without registration while the pink copy is carried in the aircraft [14 C.F.R. § 47.31(b)].

[4] Effective Date and Effect of Registration

An aircraft is registered on the date and at the time the FAA Aircraft Registry receives the required application materials [14 C.F.R. § 47.39(a); see 14 C.F.R. §§ 47.33 (aircraft not previously registered anywhere), 47.35 (aircraft last previously registered in United States); but see 14 C.F.R. §§ 47.37, 47.39(b) (special requirements applicable to aircraft last registered in foreign country)]. The Administrator of the FAA will issue a Certificate of Aircraft Registration to the owner [49 U.S.C. § 44103(a)(1)(B); see 14 C.F.R. § 47.31(a) (application); see 14 C.F.R. § 47.31(b) (reasons to reject application)]. The certificate is conclusive evidence of nationality for international purposes but not in any proceeding under the laws of the United States. Registration is not evidence of ownership of the aircraft in any proceeding in which ownership by a particular person is, or may be, at issue [49 U.S.C. § 44103(c)]. The FAA does not issue a certificate of ownership or endorse any information with respect to ownership on a Certificate of Aircraft Registration. Instead, the FAA issues a Certificate of Aircraft Registration to the person who appears to be the owner of the aircraft on the basis of the evidence of ownership submitted with the Application for Aircraft Registration or recorded at the FAA Aircraft Registry [14 C.F.R. § 47.5(c); see § 102D.15[1]].

[5] Termination of Registration

A Certificate of Aircraft Registration is effective, unless suspended or revoked [see [6], below], until one of the following events occurs [14 C.F.R. § 47.41(a); see 14 C.F.R. § 47.41(a)(8), (9) (special requirements governing termination when owner is a corporation or registration is in name of a trustee)]:

- The aircraft is registered under the laws of a foreign country;
- The registration is cancelled at the written request of the holder of the certificate;
- The aircraft is totally destroyed or scrapped;
- The ownership of the aircraft is transferred;
- The holder of the certificate loses his or her United States citizenship, or loses his or her resident alien status without becoming a United States resident; or
- Thirty days have elapsed since the death of the holder of the certificate.

The Certificate of Aircraft Registration must be returned to the FAA Aircraft Registry, with the reverse side completed, on termination of registration [14 C.F.R. § 47.41(b)]. In most cases, the holder of the certificate must return it [see 47 C.F.R. § 47.41(b)(1)-(3)].

[6] Suspension or Revocation

The Administrator of the FAA may suspend or revoke a Certificate of Aircraft Registration when the aircraft no longer

meets the requirements for registration [49 U.S.C. § 44105]. The Administrator will revoke a certificate if the Administrator determines that the owner of the registered aircraft knowingly permitted the use of the aircraft to carry out or facilitate an activity that is punishable by death or by imprisonment for a term exceeding one year under a state or federal law relating to a controlled substance (except a law relating to simple possession of a controlled substance) [49 U.S.C. § 44106(b)(1); see 49 U.S.C. § 44106(b)(2) (when owner who is not an individual is deemed to have knowingly permitted proscribed activity); see also 49 U.S.C. § 44106(c), (d) (applicable notice, hearing, and appeal requirements)]. However, the Administrator may not revoke a Certificate of Registration on this basis if the holder of the certificate is acquitted of all charges related to a controlled substance in an indictment or information arising from the activity [49 U.S.C. § 44106(e)(1); see 49 U.S.C. § 44106(e)(2) (reissuance of certificate to person following revocation)].

[7] Dealers' Aircraft Registration Certificate

The FAA issues Dealers' Aircraft Registration Certificates [see AC Form 8050-6] to aircraft manufacturers and dealers as an alternative to the Certificate of Aircraft Registration [14 C.F.R. § 47.61(b)]. The Dealers' Certificate is valid only in connection with required flight testing of aircraft or flights that are necessary for, or incident to, the sale of the aircraft [14 C.F.R. § 47.69(c); see 14 C.F.R. § 47.69(a), (b) (additional limitations on use); see also 14 C.F.R. § 47.61(a) (purposes of Dealers' Certificate)]. It authorizes the use of aircraft within the United States by the owner of the aircraft to whom the certificate was issued, the holder's agent or employee, and prospective buyers [14 C.F.R. § 47.69(a); see 14 C.F.R. § 47.69(b) (limited exception to requirement that certificate be used within United States)]. However, a prospective buyer may operate an aircraft for demonstration purposes only and must be under the direct supervision of the holder of the Dealers' Certificate or the holder's agent [14 C.F.R. § 47.69].

To be eligible for a Dealers' Certificate, a person must have an established place of business in the United States, must be substantially engaged in manufacturing or selling aircraft, and must be a citizen of the United States [14 C.F.R. § 47.65; see 49 U.S.C. § 40102(a)(15) ("citizen of the United States" defined)]. The application process involves the submission of an official application [see AC Form 8050-5] and the application fee [14 C.F.R. § 47.63; see 14 C.F.R. § 47.17 (*fee*)]. Further, before using a certificate as authorization for the operation of a particular aircraft, a holder who is a dealer (as opposed to a manufacturer) must provide the FAA Aircraft Registry with satisfactory evidence of the ownership of the aircraft. An Aircraft Bill of Sale or its equivalent may be used as this evidence [14 C.F.R. § 47.67].

A Dealer's Certificate is an alternative to the Certificate of Registration [14 C.F.R. § 47.61(b); see 14 C.F.R. §§ 47.31-47.51 (certificates of registration)]. A dealer may obtain one or more Dealers' Certificates in addition to its original certificate and may use any certificate for any aircraft the dealer owns [14 C.F.R. § 47.61(b)]. The certificate expires one year after its issuance, and additional certificates expire on the date the original certificate expires [14 C.F.R. § 47.71(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation Law Air Transportation Registration



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32-102D California Legal Forms--Transaction Guide § 102D.15

§ 102D.15 Recording of Aircraft Titles and Security Documents of Registered Aircraft

[1] Recordable Conveyance Instruments

Any conveyance affecting title to or any interest in registered civil aircraft in the United States (or certain major aircraft components) may be recorded [49 U.S.C. § 44107(a); 14 C.F.R. § 49.1(a); *see* 14 C.F.R. § 49.31(a) (nonexclusive list of recordable conveyances)]. The following may also be recorded: conveyances used as evidence of ownership during the registration process under 14 C.F.R. § 47.11 [*see* 14 C.F.R. § 49.17(b)]; and releases, cancellations, discharges, and satisfactions of recordable conveyances [49 U.S.C. § 44107(a)(3); 14 C.F.R. § 49.31(b)]. For a list of documents eligible for recording, *see* § 102D.103.

[2] Effect of Recording

Until a conveyance, lease, or instrument executed for security purposes is filed for recording with the FAA Aircraft Registry, the instrument is valid only against the person making the conveyance, lease, or instruments, that person's heirs, and a person having actual notice of the conveyance, lease, or instrument [49 U.S.C. § 44108(a)]. The recording of a conveyance is not a decision by the FAA that the instrument does in fact affect title to, or an interest in, the aircraft or other property covered by the instrument [14 C.F.R. § 49.17(c)].

[3] Procedure

To be eligible for recording, a conveyance must contain specified information regarding the aircraft [*see* 14 C.F.R. § 49.33(b)] and comply with regulatory execution requirements [14 C.F.R. § 49.13(a), (b), (d); *see* 14 C.F.R. § 47.13(b)-(f) (applying to conveyance made by persons doing business under trade name, or by agent, corporation, partnership, coowner, or unincorporated association)]. Although the conveyance need not be acknowledged under the FAA regulations, the laws of the place of delivery of the conveyance determine when it must be acknowledged in order to be valid for purposes of that place [14 C.F.R. § 49.13(c); *see International Atlas Services, Inc. v. Twentieth Century Aircraft Co.* (1967) 251 Cal. App. 2d 434, 440, 59 Cal. Rptr. 495 (federal government has fully occupied field of recordation of interests in aircraft and of rights derived from recordation); *Pope v. National Aero Finance Co.* (1965) 236 Cal. App. 2d 722, 732, 46 Cal. Rptr. 233, *cert. denied*, 389 U.S. 1038 (1968) (recording and registration of documents affecting title of aircraft are governed by federal statute rather than by state laws)]. The conveyance must be

mailed or delivered to the FAA Aircraft Registry [*see 14 C.F.R. § 49.11* (addresses)] along with the recording fee [*see 14 C.F.R. § 49.15(a)*]. The conveyance is filed for recording on the date and at the time it is received by the Registry [*14 C.F.R. § 49.19*]. The FAA will return the original if the person submitting it also provides a true copy [*14 C.F.R. § 49.21*].

For a procedural guide to the recording of aircraft conveyances, see § 102D.141.

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawAir TransportationGeneral OverviewTransportation LawAir TransportationRegistration



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[Reserved]

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PART III. TRANSACTION GUIDE
A. Preliminary Determinations

32-102D California Legal Forms--Transaction Guide § 102D.100

§ 102D.100 Vehicles

1. Does vehicle fall within statutory definition of "vehicle" [*Veh. Code § 670*]?

a. Is it device by which any person or property may be propelled, moved, or drawn on highway?

NOTE:

Virtually all types of automobiles, trucks, trailers, motorcycles, and mobilehomes fall within the statutory definition of "vehicle." A "motor vehicle" is a vehicle that is self-propelled. However, a self-propelled wheelchair, motorized tricycle, or motorized quadricycle, when operated by a person who, by reason of physical disability, is otherwise unable to move about as a pedestrian is not a "motor vehicle" [*Veh. Code § 415(a), (b)*]. For purposes of New Motor Vehicle Board and related statutes [*see Veh. Code § 3000 et seq.*], "motor vehicle" also includes a recreational vehicle [*see Health & Safety Code § 18010(a)* (definition)], but does not include a camper truck or park trailer [*Veh. Code § 415(c)*].

b. Is it device moved exclusively by human power or used exclusively on stationary rails or tracks?

NOTE:

This type of device is excluded from the statutory definition [*Veh. Code § 670*].

2. Who is "owner" of vehicle [*Veh. Code § 460*]:

a. Person having all incidents of ownership, including legal title of vehicle, whether or not he or she lends, rents, or creates security interest in vehicle;

- b. Person entitled to possession of vehicle as purchaser under security agreement; or
- c. State of California (or any political subdivision) or United States, when entitled to possession and use of vehicle under lease, lease-sale, or rental-purchase agreement for 30 consecutive days or more?

3. Does vehicle have separate "legal owner," that is, is there [*Veh. Code* § 370]:

- a. Person holding security interest in vehicle that is subject to provisions of Uniform Commercial Code; or

NOTE:

For discussion of security interests under the UCC, see Ch. 42, ***Secured Transactions*** .

- b. Lessor under lease, lease-sale, or rental-purchase agreement that grants possession of vehicle to any of following lessees for 30 consecutive days or more:

- (1) State of California;
- (2) Any county, city, district, or political subdivision of California; or
- (3) United States?

4. If vehicle is currently registered, who is registered owner [*see Veh. Code* § 505]?

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCommercial VehiclesGeneral OverviewTransportation LawPrivate VehiclesGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102D REGISTRATION AND TRANSFER OF VEHICLES, VESSELS, AND AIRCRAFT
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32-102D California Legal Forms--Transaction Guide § 102D.101

§ 102D.101 Undocumented Vessels

NOTE:

An undocumented vessel is any vessel that is not required to have and does not have a valid marine document issued by the United States Bureau of Customs or the United States Coast Guard [*Veh. Code § 9840(g)*]. Every undocumented vessel operated on the waters of California must be currently numbered, either in accordance with the provisions of the Vehicle Code, federal law, or the laws of another state [*Veh. Code § 9850*]. This section guides the attorney in determining whether the client's vessel falls within the Vehicle Code definitions of "vessel" and "undocumented vessel" and whether the client's undocumented vessel is exempt from the numbering requirements of the Vehicle Code.

To determine whether or not a particular vessel is subject to federal documentation requirements, see § 102D.102.

1. Does vessel fall within Vehicle Code definition of "vessel?"

a. Is it watercraft used or capable of being used as means of transportation on water [*Veh. Code § 9840(a)*]?

NOTE:

This type of watercraft is considered a vessel, for purposes of the vessel numbering requirements of the Vehicle Code, unless it is one of the exempt vessels described in P b, **below** [*Veh. Code § 9840(a)*].

b. Is vessel one of following, which are exempt from numbering requirements of Vehicle Code?

(1) Seaplane on the water [*Veh. Code § 9840(a)(1)*];

(2) Watercraft specifically designed to operate on permanently fixed course [*Veh. Code* § 9840(a)(2)]; or

NOTE:

The movement of this type of watercraft must be restricted to or guided on the permanently fixed course by means of a mechanical device on a fixed track or arm to which the watercraft is attached or by which the watercraft is controlled, or by means of a mechanical device attached to the watercraft itself [*Veh. Code* § 9840(a)(2)].

(3) Floating structure designed and built to be used as stationary waterborne residential dwelling, provided it [*Veh. Code* § 9840(a)(3)]:

(a) Does not have and is not designed to have mode of power of its own;

(b) Is dependent for utilities on continuous utility linkage to source originating on shore;
and

(c) Has permanent, continuous hookup to shoreside sewage system?

2. Is vessel undocumented vessel, that is, does it lack, and is it not required to have, valid marine document issued by United States Coast Guard [*Veh. Code* § 9840(g)]?

3. If vessel is undocumented, is it exempt from numbering requirements of Vehicle Code because it is one of the following:

a. Already covered by number in full force and effect that has been issued to it pursuant to [*Veh. Code* § 9873(a)]:

(1) Federal law [*see* (2), *above*]; or

(2) Federally approved numbering system of another state.

NOTE:

Such an undocumented vessel will be subject to the numbering requirements of the Vehicle Code if it has changed its state of principal use and has been within California for more than 90 consecutive days [*Veh. Code* § 9873(a)].

b. From foreign county temporarily using waters of California [*Veh. Code* § 9873(b)].

c. Public vessel of [*Veh. Code* § 9873(c)]:

(1) United States;

(2) Another state or subdivision of United States; or

(3) Municipality of another state.

d. Ship's lifeboat [*Veh. Code* § 9873(d)].

- e. Vessel belonging to class of boats specifically exempted by DMV [*Veh. Code § 9873(e)*].

NOTE:

The DMV has created such an exemption for non-motorized, surfboard-like vessels over eight feet in length that (1) are propelled solely by sail and (2) have a mast that the operator must hold upright in order to sail the vessel [*13 Cal. Code Reg. § 191.00*].

- f. Propelled solely by oars or paddles [*Veh. Code § 9873(e)*].
- g. Sailboat under eight feet in length [*Veh. Code § 9873(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawShippingRegulations & StatutesLicensing & Registration



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§ 102D.102 Documented Vessels

NOTE:

For purposes of the laws governing the federal documentation of vessels, "vessel" includes every description of watercraft or other contrivance used or capable of being used as a means of transportation on water, but does not include aircraft [46 C.F.R. § 67.3].

1. Must vessel be documented by Coast Guard; that is, does it meet *all* of the following criteria [see 46 U.S.C. § 12103(a); 46 C.F.R. §§ 67.5, 67.7]:

NOTE:

Federal documentation is required for the operation of vessels in certain trades, serves as evidence of vessel nationality, and permits vessels to be subject to preferred mortgages [46 C.F.R. § 67.1].

a. Wholly owned by United States citizen or citizens [46 C.F.R. § 67.5; 46 U.S.C. § 12103(a)(1), (b); see also 46 C.F.R. §§ 67.30-67.47 (citizenship requirements for vessel documentation)].

b. At least five net tons [46 U.S.C. § 12103(a)(2); 46 C.F.R. § 67.5].

c. Not documented under laws of foreign country [46 U.S.C. § 12103(a)(3)].

d. Used to engage in one of following [46 C.F.R. § 67.7]:

(1) "Fisheries";

NOTE:

For these purposes, "fisheries" includes processing, storing, transporting (except in foreign commerce), planting, cultivating, catching, taking, or harvesting fish, shell fish, marine animals, pearls, shells, or marine vegetation in the navigable waters of the United States or in the Exclusive Economic Zone [46 U.S.C. § 108; 46 C.F.R. § 67.3].

Subject to federal and state laws regulating the fisheries, a fishery endorsement entitles a vessel to engage in the fisheries and to land its catch, wherever caught, in the United States [46 C.F.R. § 67.21(a); *see* 46 U.S.C. § 12113].

(2) [Reserved];

(3) Coastwise trade; or

NOTE:

For these purposes, "coastwise trade" includes the transportation of passengers or merchandise between points in the United States embraced within the coastwise laws [46 C.F.R. § 67.3].

A coastwise endorsement entitles a vessel to employment in the coastwise trade and any other employment for which a registry, or fishery endorsement is not required [46 C.F.R. § 67.19(a); *see* 46 U.S.C. § 12112].

(4) Foreign trade or trade with United States possession [*see* 46 U.S.C. § 12111; 46 C.F.R. § 67.17].

NOTE:

A registry endorsement is available if the vessel is eligible for documentation and if it is to be employed in foreign trade or trade with Guam, American Samoa, Wake, Midway, or Kingman Reef [46 C.F.R. § 67.17(a)]. Although the applicable regulations provides that a vessel used in foreign trade is "eligible" for documentation [*see* 46 C.F.R. §§ 67.5, 67.17(b)], the Coast Guard has indicated that documentation is required for any vessel that is to engage in foreign trade in waters that fall within the jurisdiction of the Coast Guard [*see* P 3, **below** (optional documentation of vessels)].

On application of the owner of a vessel that qualifies for a coastwise endorsement or a fishery endorsement, the National Vessel Documentation Center may issue an endorsement authorizing the vessel to be employed in the coastwise trade or fisheries activities [*see* 46 U.S.C. §§ 12111-12114; 46 C.F.R. §§ 67.19-67.21]. Thus, a vessel that engages in foreign trade pursuant to a registry [*see* 46 C.F.R. § 67.17] may also receive an endorsement to engage in one of the other types of trade described above. In fact, a vessel may not be employed in a trade except a trade covered by the endorsement issued for that vessel [*see* 46 U.S.C. § 12102(a)].

e. One or more of following [*see* 46 C.F.R. §§ 67.19(b) (coastwise endorsement), 67.21(b) (fishery endorsement)]:

(1) Built in United States [46 C.F.R. § 67.19(b)(1) (coastwise trade), 67.21(b)(1) (fisheries); *see* 46 C.F.R. § 67.97].

(2) Wrecked vessel [46 C.F.R. §§ 67.19(b)(4) (coastwise trade), 67.21(b)(4) (fisheries); *see* 46 C.F.R. § 67.133 (special qualifications for documentation of wrecked vessels)].

(3) Forfeited vessel [46 C.F.R. §§ 67.19(b)(2) (coastwise trade), 67.21(b)(2) (fisheries); *see* 46 C.F.R. § 67.131 (special qualifications for documentation of forfeited vessels)].

(4) Captured vessel [46 C.F.R. §§ 67.19(b)(5) (coastwise trade), 67.21(b)(5) (fisheries); *see* 46 C.F.R. § 67.134 (special qualifications for documentation of captured vessels)].

(5) Vessel granted fishery, or coastwise trading privileges by special legislation [46 C.F.R. §§ 67.19(b)(3) (coastwise trade), 67.21(b)(3) (fisheries); *see* 46 C.F.R. § 67.132 (special qualifications for documentation)].

(6) Vessel purchased, chartered, or leased from Secretary of Commerce by persons who are United States citizens [46 C.F.R. § 67.19(c)(6) (coastwise trade); *see* 46 U.S.C. App. § 808].

NOTE:

A vessel otherwise eligible for a fishery endorsement loses that eligibility during any period in which it is owned by a partnership or by a corporation that does not meet the requisite citizenship requirements [46 C.F.R. § 67.21(d)(1), (2); *see* 46 C.F.R. § 67.45 (savings provision); *see also* 46 C.F.R. §§ 67.35(a), 67.39(d) (citizenship requirements)]. Furthermore, with specified exceptions, an otherwise eligible vessel loses that eligibility if it is chartered or leased to an individual who is not a U.S. citizen or to an entity that is not eligible to own a vessel with a fishery endorsement, or, if an instrument or evidence of indebtedness, secured by a mortgage of the vessel, to a trustee eligible to own a vessel with a fishery endorsement is issued, assigned, transferred, or held in trust for a person not eligible to own a vessel with a fishery endorsement [*see* 46 C.F.R. § 67.21(d)(3), (e), (f)].

2. Is vessel exempt from federal documentation requirements because it is any of following:

a. Less than five net tons [46 C.F.R. § 67.9(a)].

b. Not operating on navigable waters of United States or in the fisheries in the Exclusive Economic Zone [46 C.F.R. § 67.9(b)].

NOTE:

This type of vessel may, at the owner's option, be documented, provided it is at least five tons and wholly owned by a citizen or citizens of the United States [46 C.F.R. § 67.9(d); *see* 46 C.F.R. § 67.5 (requirements for documentation)].

c. Non-self-propelled vessel qualified to engage in coastwise trade and used in that trade in one or more of the following [46 C.F.R. § 67.9(c)]:

(1) Within a harbor;

(2) On United States rivers or lakes (excluding Great Lakes); or

(3) On internal waters or canals of any state.

3. Does vessel satisfy all following criteria, making it eligible for documentation [46 U.S.C. § 12103(a); *see* 46 C.F.R. § 67.5]?

- a. Is vessel at least five net tons?
- b. Is vessel wholly owned by one or more United States citizens?
- c. Is vessel not documented under laws of foreign country?
- d. Is vessel not titled in any state [*see 46 U.S.C. § 12106*]?
- e. Is vessel used:

NOTE:

This category of eligible vessels specifically includes, but is not limited to, vessels used for the purposes described below [*46 C.F.R. § 67.5*].

- (1) In foreign trade [*see 46 U.S.C. § 12111; 46 C.F.R. § 67.17*]; or

NOTE:

Although the implementing regulations provide that a vessel used in foreign trade is "eligible" for documentation [*46 C.F.R. § 67.5*], the Coast Guard has indicated that documentation is required for any vessel that is to engage in foreign trade in waters that fall within the jurisdiction of the Coast Guard [*see § 102D.102, P 1d(4)*].

- (2) Exclusively for pleasure [*see 46 U.S.C. § 12114(b); 46 C.F.R. § 67.5*].

NOTE:

A "pleasure license" (referred to in the statutes as a "recreational vessel license") entitles the vessel to pleasure use only [*46 U.S.C. § 12114(b); 46 C.F.R. § 67.23(a)*]. The owner of a vessel used exclusively for pleasure in the waters of California may elect to register the vessel with the Department of Motor Vehicles [*see 46 U.S.C. § 12106(a); see also § 102D.120*] in lieu of applying for documentation with the Coast Guard.

- 4. If vessel is or will be documented, does transaction involve instrument that may be recorded [*see 46 C.F.R. § 67.200; see also 46 U.S.C. § 31321(a)*]?

NOTE:

Only the types of instruments listed below are eligible for filing and recording with the National Documentation Center [*46 C.F.R. § 67.200*]. Further, no instrument will be accepted for filing unless the vessel to which it pertains has a valid Certificate of Documentation or is the subject of an application for initial documentation, exchange of certificate, return to documentation, or deletion from documentation [*46 C.F.R. § 67.203(a)*].

The documents listed below must be filed with the Coast Guard to be valid against any person other than (1) the grantor, mortgagor, or assignor; (2) the heir or devisee of the grantor, mortgagor, or assignor; or (3) a person having actual notice of the document [*see 46 U.S.C. § 31321(a)(1)*].

- a. Bill of sale or similar instrument [*see § 102D.221[2] (form)*].

b. Deeds of gift.

c. Mortgages and assignments, assumptions, supplements, amendments, subordinations, satisfactions, and releases of any of these.

d. Preferred mortgages and assignments, assumptions, supplements, amendments, satisfactions, and releases of any of these.

e. Interlender agreements affecting mortgages, preferred mortgages, and related instruments.

f. Notices of claim of lien and assignments, amendments, subordinations, satisfactions, and releases of those notices.

5. Is any document that is typically eligible for recording [see P 4, *above*] ineligible for recording because:

a. It has been materially altered [see 46 C.F.R. § 67.203(b)].

b. In case of bill of sale (or similar instrument) or gift deed, any vendee or transferee under instrument is not a United States citizen, *unless*:

(1) Maritime Administration has consented to grant to non-citizen under instrument [46 C.F.R. § 67.203(c)];

(2) Instrument conveys interest in vessel that, at time of execution of document, was neither documented nor was last documented under federal regulations [46 C.F.R. § 67.203(d)];

(3) Instrument conveys interest in vessel that has been operated only [46 C.F.R. § 67.203(d)]:

(a) As fishing vessel, fish processing vessel, or fish tender vessel [see 46 U.S.C. § 2101(11a), (11b), (11c) (definitions)];

(b) For recreation; or

(c) Both.

c. In case of mortgage (or assignment, assumption, supplement, amendment, satisfaction, or release of mortgage), mortgagee or assignee is not a United States citizen or trustee, *unless* [46 C.F.R. § 67.203(e)]:

(1) Maritime Administration has consented to grant to noncitizen; or

(2) Instrument conveys interest in vessel that has been operated only:

(a) As fishing vessel, fish processing vessel, or fish tender vessel [see 46 U.S.C. § 2101(11a), (11b), (11c)];

(b) For recreation; or

(c) Both.

d. In case of preferred mortgage (or assignment, assumption, supplement, amendment, satisfaction, or release of preferred mortgage), mortgagee or assignee is not person specified by statute [*see* 46 U.S.C. § 31322(a)(1)(D)], *unless* instrument conveys interest in vessel that has been operated only [46 C.F.R. § 67.203(f)]:

(1) As fishing vessel, fish processing vessel, or fish tender vessel [*see* 46 U.S.C. § 2101(11a), (11b), (11c)];

(2) For recreation; or

(3) Both.

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawShipping Regulations & StatutesLicensing & Registration



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32-102D California Legal Forms--Transaction Guide § 102D.103

§ 102D.103 Aircraft

1. Is aircraft eligible for registration with Federal Aviation Administration (FAA)?

NOTE:

An aircraft that is eligible for registration (other than aircraft of the U.S. Armed Forces) must be registered with the FAA before it may be operated within the United States [49 U.S.C. § 44101(a); *see* 49 U.S.C. § 44101(b) (exceptions); 14 C.F.R. § 47.3(a) (eligibility for registration); *see also* 49 U.S.C. § 44104(1) (aircraft engines, propellers, and appliances may also be registered); *but see* 14 C.F.R. § 47.31(c) (temporary authority to operate unregistered aircraft); § 102D.140]. An aircraft is not eligible for registration unless it falls within one of the two categories of aircraft described in PP a and b, *below* [*see* 49 U.S.C. § 44102(a)].

a. Is aircraft owned by [49 U.S.C. § 44102(a)(2)]:

- (1) Federal government;
- (2) State, territory, or possession of United States;
- (3) District of Columbia; or
- (4) Political subdivision of any of the above.

b. If aircraft does not come within any category specified in P a, *above*, does aircraft satisfy both of following criteria [49 U.S.C. § 44102(a)(1)]?

- (1) Aircraft is owned by one of following:

(a) U.S. citizen [*see 14 C.F.R. §§ 47.2* ("U.S. citizen" defined), 47.7(a)];

(b) Lawfully admitted permanent resident [*see 14 C.F.R. §§ 47.2* ("resident alien" defined), 47.7(b)]; or

(c) Corporation (other than corporation that is United States citizen) lawfully organized under laws of U.S. or any state [*see 14 C.F.R. § 47.9*].

NOTE:

An aircraft owned by this type of corporation is eligible for registration only if it is based and primarily used in the United States [*49 U.S.C. § 44102(a)(1)(C)*].

(2) Aircraft is not registered under laws of any foreign country.

2. Is party seeking registration the owner of aircraft?

NOTE:

An aircraft may be registered only by and in the legal name of its owner [*14 C.F.R. § 47.5(b)*; *see 49 U.S.C. § 44103(a)(1)* (certificate of registration issued to owner)]. For these purposes, "owner" includes a buyer in possession, a bailee, a lessee of an aircraft under a contract of conditional sale, and an assignee under that contract [*14 C.F.R. § 47.5(d)*]. For further discussion, see § 102D.140.

3. Is client eligible for Dealers' Aircraft Registration Certificate?

NOTE:

To be eligible for this certificate, the applicant must satisfy all of the following criteria [*see 14 C.F.R. §§ 47.61-47.71*; *see also § 102D.14[7]*].

a. Is client a dealer or manufacturer [*14 C.F.R. § 47.61(a)*]?

b. Does client have established place of business in United States [*14 C.F.R. § 47.65*]?

c. Is client substantially engaged in manufacturing or selling aircraft [*14 C.F.R. § 47.65*]?

d. Is client citizen of United States [*14 C.F.R. § 47.65*; *see 49 U.S.C. § 40102(a)(15)* ("U.S. citizen" defined)]?

4. What recordable instruments will be used in transaction?

NOTE:

From the time any of the instruments described below is filed for recording, the conveyance will be valid for all persons without further notice, with limited exceptions [*see 49 U.S.C. § 44108(b)*].

a. Conveyances affecting title to, or any interest in, any of following [*14 C.F.R. § 49.1(a)*; *see 49 U.S.C. § 44107(a)*]:

NOTE:

These recordable conveyances include bills of sale; contracts of conditional sale; assignments of an interest under a contract of conditional sale; mortgages; assignments of

a mortgage; leases; equipment trusts; notices of tax lien or other lien; and other instruments affecting title to, or any interest in aircraft [14 C.F.R. § 49.31(a); *see* 14 C.F.R. § 49.17(a) ("conveyance" defined)]. However, a notice of federal tax lien is not recordable under the provisions governing recording of aircraft titles and security documents [14 C.F.R. § 49.1 *et seq.*], because the Internal Revenue Code requires that a federal tax lien be filed elsewhere [14 C.F.R. § 49.17(a)(2); *see* I.R.C. §§ 6321, 6323; *Treas. Reg.* §§ 301.6321-1, 301.6323-1].

(1) Any aircraft registered under 49 U.S.C. §§ 44101-44104;

(2) Any specifically identified:

(a) Aircraft engine rated at 750 or more horsepower; or

(b) Aircraft propeller capable of absorbing 750 or more rated takeoff shaft horsepower;

or

(3) Any aircraft engine, propeller, or appliance maintained by or on behalf of a certificated air carrier for installation or use in aircraft, aircraft engine, or propeller, or any spare part, maintained at designated location for that air carrier [*see* 49 U.S.C. § 44705 (certification)].

b. Conveyances used as evidence of ownership during registration process [14 C.F.R. § 49.17(b); *see* 14 C.F.R. § 47.11 (evidence of ownership; *see also* § 102D.140, PP 2-5)].

c. Releases, cancellations, discharges, and satisfactions of recordable conveyances [49 U.S.C. § 44107(a)(3); 14 C.F.R. § 49.31(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation Law Air Transportation Registration



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[Reserved]

§§ 102D.104[Reserved]



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1. Registration and Transfer of Vehicles

32-1 California Legal Forms--Transaction Guide Scope

Scope

NOTE: For the Vehicle Code definition of "vehicle" [*Veh. Code* § 670], see § 102D.100, P 1.



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DIVISION VII: PERSONAL TRANSACTIONS
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32-102D California Legal Forms--Transaction Guide § 102D.110

§ 102D.110 Registration

1. Complete official application for original registration [*see § 102D.200; Veh. Code § 4150; see also Veh. Code §§ 4150.1* (application for commercial motor vehicle), *4150.2* (application for motorcycle)].

NOTE:

Under *Veh. Code § 4000.6*, a commercial vehicle, singly or in combination, that operates with a declared gross or combined gross vehicle weight that exceeds 10,000 pounds must be registered under *Veh. Code § 9400.1* [*Veh. Code § 4000.6*]; *see Veh. Code § 9400.1* (additional fees for commercial vehicles of 10,001 pounds or more). *Veh. Code § 4000.6* does not apply to pickups or to any commercial vehicle or combination that does not exceed 10,000 pounds gross vehicle weight [*Veh. Code § 4000.6(b)*]; *see Veh. Code § 9400* (applicable fees)].

2. Do one of following in order to comply with vehicle smog laws:

- a. Obtain certificate of compliance (or noncompliance, as appropriate) with smog laws, *unless* one of following applies [*Veh. Code § 4000.1(a), (d)*]; *see also Veh. Code § 4000.1(b)* (different certification requirements apply to new motor vehicles)]:

NOTE:

On initial registration, and on transfer of ownership and registration, of any motor vehicle subject to the registration requirements of the Vehicle Code, the applicant must furnish a valid certificate of compliance, or a certificate of noncompliance, issued by a licensed smog check station and signed by a licensed inspector [*Veh. Code § 4000.1(a)*].

(1) Initial application for transfer is submitted within 90-day validity period of a smog certificate, as specified in *Health & Safety Code § 44015*.

(2) Transferor is parent, grandparent, sibling, child, grandchild, or spouse of transferee.

(3) Motor vehicle registered to sole proprietorship is being transferred to proprietor as owner.

(4) Transfer is between companies whose principal business is leasing motor vehicles, if there has been no change in lessee or operator of motor vehicle or between lessor and person who has been, for at least one year, lessee's operator of motor vehicle.

(5) Transfer is between lessor and lessee of motor vehicle, if there is no change in lessee or operator of motor vehicle.

(6) Motor vehicle was manufactured before the 1976 model-year.

(7) Except for diesel-powered vehicles, transfer of motor vehicle that is four or less model years old.

NOTE:

To support the Vehicle Inspection and Repair Fund, the DMV charges a separate fee to the transferee of a motor vehicle that is not more than four model-years old [*Veh. Code § 4000.1(d)(7)*].

(8) Only change is that additional individual is being added as registered owner of motor vehicle [*see Veh. Code § 4000.1(f)*].

b. If vehicle is exempt from smog certificate requirement for reason outlined in P a(1), *above* (valid certificate was issued in connection with most recent renewal of registration of vehicle in district in which biennial certification is required, and transfer occurring within 60 days after date when renewal of registration was required), have transferor complete and execute DMV-prescribed form stating that no modifications have been made to emissions system [*see Veh. Code § 5751.5*].

NOTE:

Once completed and executed, this form is not submitted to DMV but rather to the transferee at the time the transfer transaction is completed [*Veh. Code § 5751.5(a)*].

3. Submit application, certificate of compliance, and appropriate registration fees [*see Veh. Code § 9250*] to DMV [*Veh. Code §§ 4000.1, 4150*].

4. After DMV issues certificate of ownership ("pink slip") and registration card [*see Veh. Code § 4450*], instruct owner to keep registration card or facsimile copy of it in vehicle, as required [*Veh. Code § 4454(a)*].

NOTE:

The DMV will issue a certificate of ownership to the legal owner and a registration card to the owner. If there is no legal owner, the DMV will issue both documents to the owner [*Veh. Code § 4450; see Veh. Code §§ 370* ("legal owner" defined), *460* ("owner" defined)].

Every owner, on receipt of a registration card, must keep that card or a facsimile copy of it in the vehicle for which the card was issued [*Veh. Code § 4454(a)*]. However, the registration card or a facsimile copy is not required to be kept with the vehicle when the card is necessarily removed to apply for renewal or transfer of the registration or when the vehicle is left unattended [*Veh. Code § 4454(b)*].

5. Instruct owner to renew registration before midnight of its expiration date by [*Veh. Code § 4602*; see *Veh. Code § 4601(a)* (vehicle registration expires at midnight on its expiration date), (b) (renewal of registration may be obtained up to 75 days before expiration of current registration)]:

a. Presenting registration card last issued for vehicle or potential registration card issued by DMV for use at time of renewal; and

b. Paying registration fee [see *Veh. Code § 9250*].

NOTE:

If neither a registration card nor a potential registration card is available, the applicant need not pay the fee normally charged for the preparation of duplicate cards [*Veh. Code § 4602*; see *Veh. Code § 9265*].

On renewing a registration, the DMV will issue a new registration card to the owner [*Veh. Code § 4607*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCommercial VehiclesLicensing & Registration



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32-102D California Legal Forms--Transaction Guide § 102D.111

§ 102D.111 Transfer

NOTE:

The procedural steps set forth in PP 1-4, **below**, apply to voluntary transfers. For coverage of involuntary transfers, see P 5, **below**.

1. If certificate of ownership ("pink slip") is available [*Veh. Code §§ 5600(a), 5902*]:
 - a. Have transferor endorse certificate as follows:
 - (1) If transferor is legal owner, have him or her sign in appropriate space provided on certificate [*Veh. Code § 5750*].
 - (2) If title or interest of registered owner [*see Veh. Code § 505* ("registered owner" defined)] only is being transferred [*Veh. Code § 5751*]:
 - (a) Have registered owner set forth his or her address and signature in appropriate spaces on certificate; and
 - (b) Have legal owner write his or her signature in space provided for new legal owner, thereby indicating that legal owner is to retain his or her legal title and interest.
 - b. Have transferor deliver certificate to transferee.
 - c. Advise transferee to set forth his or her signature and address in appropriate spaces on certificate [*Veh. Code §§ 5750, 5751*].
 - d. Advise transferee to deliver or mail certificate to DMV within 10 days after receipt, together with [*see Veh. Code §*

5902]:

- (1) Official Vehicle Transfer Form (DMV Reg. 262) [*see* § 102D.201[2]].

NOTE:

This form includes a bill of sale, and must accompany the ownership certificate or the application for a duplicate title [*see* § 102D.201[2] (instructions)].

- (2) Required transfer fee and use tax, if any.

NOTE:

Use taxes are due on most transfers between individuals [*see Rev. & Tax. Code* § 6271 *et seq.*].

The materials submitted to the DMV by the transferee will serve as the transferee's application for a transfer of registration [*Veh. Code* § 5600; *Veh. Code* §§ 5905, 5907, 5908 (special requirements governing security interests and dealers)]. On receipt of a properly endorsed certificate of ownership and the required fee, the DMV will reregister the vehicle under its registration number in the name of the new owner and the new legal owner, if any, and will issue a new registration card and certificate of ownership [*Veh. Code* § 6050(a)]. The DMV will not issue a new registration card and certificate of ownership on a vehicle that has been issued a nonrepairable vehicle certificate [*Veh. Code* § 6050(b); *see Veh. Code* § 11515.2 (nonrepairable vehicle certificate)].

2. If certificate of ownership is not available [*Veh. Code* §§ 5752, 5911; *see Veh. Code* § 5600(a)(1), (2) (delivery of documents)]:

- a. Have transferor complete official application for duplicate certificate [*see* DMV Form 227]; and
- b. File application along with [*see Veh. Code* § 5902]:

- (1) Official Vehicle Transfer Form (DMV Reg. 262) [*see* § 102D.201[2]].

NOTE:

This form includes a bill of sale, and must accompany the ownership certificate or the application for a duplicate title [*see* § 102D.201[2] (instructions)].

- (2) Required fees for duplicate certificate of ownership, transfer fee, and use tax, if any.

NOTE:

If the certificate of ownership is lost or otherwise unavailable, the DMV may examine the application and require the filing of certifications or other information to satisfy the DMV that the applicant is entitled to have the vehicle transferred to him or her. It is important that counsel contact the appropriate local office of the DMV to determine what information the office requires in connection with these transfers. After the submission of all required information, the DMV may transfer the registration of the vehicle or register the vehicle under a new registration number, and issue a new certificate of ownership and registration card to the person entitled to them. The DMV will not issue a new certificate of ownership and registration card, however, if it receives notice by registered or certified mail, from the registered owner, recorded lienholder, or a person exempt from recording [*see Veh. Code* § 5906 (dealer)], indicating that the existing ownership certificate is being held for nonpayment of the vehicle [

Veh. Code § 5911].

3. Instruct owner/transferor (or other person in physical possession of vehicle) to provide DMV with official form containing information described below within five calendar days of transfer and delivery of vehicle to transferee [*Veh. Code § 5900(a)*; *see § 102D.201[2]* (form); *see also Veh. Code §§ 4456(b), 5901* (notice requirement applicable to dealer or lessor-retailer)].

NOTE:

An owner who has made a bona fide sale or transfer of a vehicle and has delivered possession of it to a purchaser is relieved of civil or criminal liability for the parking, abandoning, or operation of the vehicle thereafter by another person if [*Veh. Code § 5602*] the owner (1) properly endorses and delivers the certificate of ownership [*see P 1, above*] or (2) delivers or mails to the DMV either (a) the notice as provided in *Veh. Code § 5900* (or, if a dealer or lessor-retailer, the notice required by *Veh. Code § 4456(b)* or *5901*) [*see §§ 102D.201, 102D.202*] or appropriate documents and fees for registration of the vehicle to the new owner pursuant to the sale or transfer [*see P 2, above*].

If the registered owner is not in possession of the vehicle that is sold or transferred, the person in physical possession of the vehicle must give the notice required by *Veh. Code § 5900(a), (b)* (*see PP a-d, below*) [*Veh. Code § 5900(c)*].

a. Date of sale or transfer;

b. Name and address of owner and transferee;

c. Description of vehicle; and

d. Mileage of vehicle, which must be either [*Veh. Code § 5900(b)*; *see 49 U.S.C. § 32705(a)*] (requiring written disclosure of cumulative mileage on vehicle's odometer or disclosure that actual mileage is unknown if transferor knows odometer reading is not accurate):

(1) Actual mileage of vehicle at time of sale or transfer, as indicated on odometer; or

(2) True mileage of vehicle at time of sale or transfer, if owner knows odometer to be incorrect and knows true mileage.

NOTE:

Providing false or inaccurate mileage is not a violation of this requirement unless it is done with the intent to defraud [*Veh. Code § 5900(b)*].

Whenever a person transfers ownership of a vehicle and is required to disclose its mileage, the Department of Motor Vehicles may prescribe a secured form to be used for purposes of the odometer mileage disclosure requirements pursuant to *49 U.S.C. § 32705(a)* [*Veh. Code § 5600(b)*].

4. Furnish DMV with valid certificate of compliance with smog laws, unless transfer is exempt from this requirement [*Veh. Code § 4000.1(a), (b), (d), (f)*; *see § 102D.110, P 2*].

NOTE:

Even if a transferor is exempt from furnishing a smog certificate, he or she may be required to present the transferee with a statement (on a DMV prescribed form) attesting that the vehicle's emissions system has not been modified [*see Veh. Code § 5751.5; see also § 102D.110*, P 2b].

5. If involuntary transfer is involved, instruct new owner or legal owner to apply for transfer of registration by submitting following to DMV [*Veh. Code § 5909(a)*]:

- a. Official application [*see DMV Form 119 (Certificate of Repossession, Security Interest/Conditional Sale Contract)*];
- b. Last certificate of ownership and registration card issued by vehicle, if available; and
- c. Any instruments or documents of authority (or certified copies of the instruments or documents) required by DMV or by law to evidence or effect transfer of title.

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawCommercial VehiclesLicensing & RegistrationTransportation LawPrivate VehiclesVehicle RegistrationGeneral Overview



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32-102D California Legal Forms--Transaction Guide §§ 102D.112-102D.119

[Reserved]

§§ 102D.112[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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2. Registration and Transfer of Undocumented Vessels

32-102D California Legal Forms--Transaction Guide § 102D.120

§ 102D.120 Registration

NOTE:

To determine whether or not an undocumented vessel is subject to the numbering requirements of the Vehicle Code, see § 102D.101. For coverage of the documentation of vessels, see §§ 102D.130-102D.131.

1. Instruct owner [*see Veh. Code § 9840(b)* ("owner" defined)] to complete and sign official application for boat certificate of number [*see Veh. Code § 9853.1*; § 102D.210].

NOTE:

Application to register a vessel may be made at any office of the Department of Motor Vehicles. On receipt of the required information and fees [*see P 2, below*], the DMV will issue a certificate of number and a set of registration stickers. The boat registration number is the number beginning with CF shown on the certificate [*see Cal. Dept. of Motor Vehicles, ABCs of the California Boating Law; see also P 4, below*].

2. File application with DMV, together with:

- a. Application fee [*see Veh. Code § 9855*]; and
- b. Proof of ownership of vessel [*Veh. Code § 9852; see 13 Cal. Code Reg. § 190.02*].

NOTE:

The official application requires the applicant to satisfy this requirement by completing either the certificate of sale or the applicant's statement set forth on the back of the

application [*see* § 102D.210].

3. After DMV issues certificate of number to owner, advise owner to:

NOTE:

On receipt of an acceptable application, the DMV will issue a certificate of ownership to the legal owner [*see Veh. Code* § 9840(c) ("legal owner" defined)] and a certificate of number to the owner [*see Veh. Code* § 9840(b) ("owner" defined)], or the DMV will issue both of these forms to the owner if there is no legal owner [*Veh. Code* § 9853.1]. The DMV may issue a temporary certificate of number that will be valid for 60 days from the date of issuance [*see Veh. Code* § 9858; *13 Cal. Code Reg.* § 190.14].

a. Paint number on (or permanently attach it to) each side of forward half of vessel so that [*Veh. Code* § 9853.2; *13 Cal. Code Reg.* § 190.00]:

NOTE:

Special requirements govern the display of numbers on vessels used by a manufacturer or by a dealer for tests or demonstrations [*see 13 Cal. Code Reg.* § 190.00(b)]; inflatable vessels [*see 13 Cal. Code Reg.* § 190.00(c)]; and vessels on which the number cannot be clearly displayed or properly attached by following the standard display requirements [*see 13 Cal. Code Reg.* § 190.00(c)].

No numerals, letters, or devices other than those used in connection with the state registration number may be placed in the proximity of the state number, and no numerals, letters, or devices that might interfere with the ready identification of the vessel by its state number may be carried on any part of the vessel [*13 Cal. Code Reg.* § 190.00(d)].

(1) It is clearly visible and legible.

(2) It is in plain vertical block characters of not less than three inches in height.

(3) It contrasts with color of the background.

(4) It has spaces or hyphens that are equal to width of a letter other than "I" or a number other than "1" between:

(a) Prefix and number; and

(b) Number and suffix.

NOTE:

The following is an example of this required format: "CF 1234 AB" [*13 Cal. Code Reg.* § 190.00(a)(4)].

(5) Letters and numbers read from left to right.

b. Keep certificate of number available for inspection on vessel whenever vessel is in use [*Veh. Code* § 9853.2; *but see Veh. Code* § 9853.3 (different requirements for leased or rented vessels)].

4. If DMV issues registration sticker [*see Veh. Code* § 9853.4], advise owner to take following steps [*13 Cal. Code Reg.*

§ 190.01]:

a. Securely affix sticker on each side of vessel three inches aft (toward stern) of and directly in line with registration numbers; and

b. Maintain sticker so that it is clearly visible at all times.

5. Instruct owner to renew certificate of number before midnight of expiration date by presenting last certificate of number or potential registration card issued by DMV and renewal fee to DMV [*Veh. Code § 9860(a)*].

NOTE:

All certificates of number expire on December 31 of every odd-numbered year [*Veh. Code § 9861(a)*]. If neither a certificate of number nor a potential registration card is available, the applicant need not pay the fee normally charged for the preparation of duplicate certificates or cards [*Veh. Code § 9860(a)*; *see Veh. Code § 9867 (fee)*].

6. Instruct person whose name appears as owner on certificate of number to notify DMV within 15 days of occurrence of any of following events [*Veh. Code §§ 9864, 9865*; *see 13 Cal. Code Reg. § 190.12* (validity of certificate)]:

a. Change in owner's address; or

b. Wrecking, dismantling, destruction, or abandonment of vessel.

NOTE:

The wrecking, dismantling, destruction, or abandonment of a vessel will terminate the certificate of ownership and certificate of number. Thereafter, the certificates (if available) must be surrendered to the DMV [*Veh. Code § 9864*].

The DMV, on receiving notice of the abandonment of an undocumented vessel or on an official determination that an undocumented vessel has been abandoned, may order the destruction of the vessel at the expiration of 30 days if an investigation by the DMV has disclosed that no owner, legal owner, or lienholder claims an interest in the vessel or if those persons have waived their interests. This statutory authorization must not be construed to deny the legal rights, otherwise provided for by law, of any person claiming an interest in an abandoned vessel if that person notifies the DMV within the applicable time period governing that notice [*Veh. Code § 9864*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawShippingRegulations & StatutesLicensing & Registration



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32-102D California Legal Forms--Transaction Guide § 102D.121

§ 102D.121 Transfer

NOTE:

Most of the following requirements apply to the voluntary transfer of an undocumented vessel that has been numbered under the Vehicle Code [*see Veh. Code § 9900*]. For the definitions of the terms "owner," "legal owner," and "registered owner," see § 102D.210[1][b]. For discussion of involuntary transfers, see P 8, *below*.

1. Ensure that any delinquent property taxes on vessel have been paid [*Veh. Code § 9900*].
2. Take following steps if certificate of ownership ("pink slip") is available:
 - a. Have transferor endorse certificate as follows:
 - (1) If transferor is legal owner, have transferor sign in appropriate space provided on certificate [*Veh. Code § 9907*].
 - (2) If title or interest of registered owner only is being transferred [*Veh. Code § 9908*]:
 - (a) Have registered owner write his or her address and signature in appropriate spaces on certificate; and
 - (b) Have legal owner write his or her signature in space provided for new legal owner, thereby indicating that legal owner is to retain his or her legal title and interest.
 - b. Have transferor deliver certificate to transferee [*Veh. Code § 9900(a)*].
 - c. Advise transferee to sign certificate and set forth his or her signature and address in appropriate spaces on certificate

[*Veh. Code §§ 9907, 9908*].

d. Have transferee deliver or mail the following to DMV within 10 days after receiving certificate from transferor [*Veh. Code §§ 9855, 9900, 9901*]:

- (1) Existing certificate of ownership;
- (2) Official Vessel Transfer Form (DMV Reg. 262) [*see § 102D.201[2]*].

NOTE:

This form includes a bill of sale, and must accompany the ownership certificate or the application for a duplicate title [*see § 102D.201[2]* (Instructions)].

- (3) New application for boat certificate of number [*see § 102D.210[2]*];

NOTE:

The DMV normally will (1) reassign the vessel's number to the new owner and (2) issue a new certificate of ownership and a new certificate of number [*Veh. Code §§ 9855, 9902*]. However, in the case of a transfer of a part interest that does not affect the owner's right to operate the vessel, the DMV will not terminate the certificate of number [*Veh. Code § 9902*].

- (4) Applicable fee [*see Veh. Code §§ 9855, 9901*]; and
- (5) Use taxes, if any [*see Veh. Code § 9928; Rev. & Tax. Code § 6271 et seq.*].

NOTE:

The DMV provides an alternative transfer scheme that requires delivering or mailing appropriate documents directly to the DMV [*Veh. Code § 9900(b)*].

3. If certificate of ownership is unavailable, have transferor [*Veh. Code §§ 9909, 9917*]:

- a. Complete official application for duplicate certificate of ownership [*see DMV Form 227*]; and
- b. Complete official Vessel Transfer Form (DMV Reg. 262) [*see § 102D.201[2]*].

NOTE:

This form includes a bill of sale, and must accompany the ownership certificate or the application for a duplicate title [*see § 102D.201[2]* (Instructions)].

c. File application and transfer form along with fees for duplicate certificate of ownership and transfer [*see Veh. Code §§ 9867, 9867.5* (fees)].

NOTE:

When the certificate is not available, the DMV may receive the application, examine the circumstances of the case, and require the filing of affidavits or other information. If the DMV approves the application, it will transfer the ownership of the vessel and issue a new certificate of ownership and certificate of number [*Veh. Code § 9917; see Veh. Code § 9909*].

4. Advise owner/transferor to provide DMV with following information regarding sale or transfer within five calendar days after delivering possession of vessel [*Veh. Code* § 9911; *see* § 102D.202[2]; *see also Veh. Code* § 9912 (alternative notice requirements applicable to transfers by dealer)]:

NOTE:

An owner of an undocumented vessel who has made a bona fide sale or transfer of an undocumented vessel and has delivered possession of it to the purchaser will be relieved of civil liability for the operation of the vessel thereafter by another person if the owner does either of the following: (1) properly endorses and delivers the certificate [*see* P 2, *above*] or (2) delivers or mails to the DMV either this notice (or if a dealer, the notice required by *Veh. Code* § 9912), or appropriate documents for the transfer of the vessel pursuant to the sale or transfer [*Veh. Code* § 9905].

- a. Date of sale or transfer.
- b. Name and address of owner and of transferee.
- c. Description of the vessel required by appropriate notification form.

5. Have transferor or transferee complete and sign written disclosure statement setting forth [*Veh. Code* § 9903]:

NOTE:

This disclosure ordinarily is made by completing the application for boat certificate of number (DMV Boat 101) [*see* §§ 102D.120; 102D.210[2] (form)].

- a. Date of sale or transfer of ownership of vessel.
- b. Name and address of transferor and of transferee.
- c. Total consideration (valued in money) given for transfer, including any motor or other component part of vessel included in transfer.

6. If legal owner wishes to assign or transfer his or her title or interest in or to undocumented vessel numbered under Vehicle Code, notify him or her of right to do so without obtaining consent of (or affecting interest of) owner [*Veh. Code* § 9906].

7. Instruct person whose name appears as owner on certificate of number to notify DMV within 15 days of occurrence of any of following events [*Veh. Code* §§ 9864, 9865; 13 *Cal. Code Reg.* § 190.12]:

- a. Change in owner's address.
- b. Wrecking, dismantling, destruction, or abandonment of vessel.

NOTE:

The wrecking, dismantling, destruction, or abandonment of a vessel will terminate the certificate of ownership and certificate of number. Thereafter, the certificates (if available) must be surrendered to the DMV [*Veh. Code* § 9864].

The DMV, on receiving notice of the abandonment of an undocumented vessel, or on an

official determination that an undocumented vessel has been abandoned, may order the destruction of the vessel at the expiration of 30 days if an investigation by the DMV has disclosed that no owner, legal owner, or lienholder claims an interest in the vessel, or if those persons have waived their interests. This statutory authorization must not be construed to deny the legal rights, otherwise provided for by law, of any person claiming an interest in an abandoned vessel if that person notifies the DMV within the applicable time period governing that notice [*Veh. Code* § 9864].

8. On involuntary transfer of title to or interest in vessel, advise new owner or legal owner to apply for transfer of ownership by submitting following to DMV [*Veh. Code* § 9915(a)]:

- a. Official application [see DMV Form 119 (Certificate of Repossession, Security Interest/Conditional Sale Contract)].
- b. Last certificate of ownership and certificate of number issued for vessel, if available [see *Veh. Code* § 9917 (procedures when certificate is not available); see also P 3, *above*].
- c. Originals or certified copies of any instruments or documents of authority required by DMV or law to evidence or effect transfer.

NOTE:

If the DMV approves the transfer, it will notify the owner and the legal owner of this decision by mail. The notice will not be required, however, in the case of a repossession involving a secured party. Five days after giving the notice, the DMV will transfer the ownership of the vessel and issue a new certificate of ownership and certificate of number [*Veh. Code* § 9915(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty Law Shipping Regulations & Statutes Licensing & Registration



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32-102D California Legal Forms--Transaction Guide § 102D.122

§ 102D.122 Purchase or Sale

1. Before purchase of vessel (and transfer of ownership [*see § 102D.121*]), advise buyer to have vessel surveyed by licensed marine surveyor.

NOTE:

A survey by a licensed marine surveyor will apprise the buyer of the boat's condition, which may not be apparent from a mere inspection. A haulout and out-of-the-water survey are recommended, so that the precise condition of the vessel may be determined. Traditionally, it is the buyer's responsibility to pay for the haulout and survey. Agents who sell marine insurance generally can provide the names of several licensed marine surveyors.

2. Advise buyer or seller that it is unlawful to buy, sell, offer for sale, receive, or possess any vessel or vessel's component from which the hull identification number has been removed, defaced, altered, or destroyed [*Veh. Code § 9872.1(a)*].

NOTE:

This prohibition does not apply if a hull identification number that has been approved by the DMV is attached to the vessel or component part in lieu of the manufacturer's number [*Veh. Code § 9872.1(a)*].

3. Ensure that any delinquent property taxes on vessel have been paid [*Veh. Code § 9900; see § 102D.121*].

4. Ensure that vessel is being transferred free of all other debts, claims, liens, taxes, and any other kinds of encumbrances [*see § 102D.211[2], P 8; see also § 102D.131* (recording and removing encumbrances

on documented vessels)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawShippingRegulations & StatutesLicensing & RegistrationContracts LawSales of GoodsGeneral
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32-102D California Legal Forms--Transaction Guide §§ 102D.123-102D.129

[Reserved]

§§ 102D.123[Reserved]



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3. Documentation of Vessels and Recording Instruments Affecting Vessels

32-102D California Legal Forms--Transaction Guide § 102D.130

§ 102D.130 Documentation of Vessels

NOTE:

To determine whether or not a vessel is subject to federal documentation requirements, see § 102D.102. For coverage of the renewal, replacement, surrender, and deletion of Certificates of Documentation, see §§ 102D.150-102D.153.

With limited exceptions, this chapter does not discuss applications for documentation of the following types of vessels: captured vessels [*see* 46 C.F.R. § 67.134]; forfeited vessels [*see* 46 C.F.R. § 67.131]; vessels subject to special legislation [*see* 46 C.F.R. § 67.132]; and wrecked vessels [*see* 46 C.F.R. § 67.133].

1. Obtain official application for documentation [*see* 46 C.F.R. § 67.141(a)(1); *see also* § 102D.220[2] (Form CG-1258)].

2. While completing application form, take following steps:

a. Set forth present name of vessel [46 C.F.R. § 67.117(a); *see* § 102D.220[2], P I(A) (Form CG-1258)].

NOTE:

The name of the vessel must be composed of letters of the Latin alphabet or Arabic or Roman numerals [46 C.F.R. § 67.117(b)(1)]. It may not be identical, actually or phonetically, to any word or words used to solicit assistance at sea [46 C.F.R. § 67.117(b)(2)], and may not contain (or be phonetically identical to) obscene, indecent, or profane language, or to racial and ethnic epithets [46 C.F.R. § 67.117(b)(3)]. These

restrictions, however, do not apply to vessels validly documented before January 1, 1994, until the owner elects to change the name of the vessel [46 C.F.R. § 67.117(d)].

b. Insert official number assigned by Coast Guard, for all but initial issue cases [see § 102D.220[2], P I(B) and Instructions (Form CG-1258); see also 46 C.F.R. § 67.111(b)].

c. Set forth managing owner's name and social security or tax identification number [see 46 C.F.R. § 67.113(a), (b); see also § 102D.220[2], P I(C) and Instructions (Form CG-1258)]:

NOTE:

The managing owner of a vessel owned by one person is the owner of the vessel [46 C.F.R. § 67.113(a)]. The managing owner of a vessel owned by more than one person must be one of the owners [46 C.F.R. § 67.113(b)]. The managing owner of a vessel owned in a trust arrangement must be one of the trustees [46 C.F.R. § 67.113(c)]. For vessels owned by a limited liability company (LLC), the name of the LLC should be shown [see § 102D.220[2], Instructions (Form CG-1258)].

The managing owner is the person to whom the Coast Guard will send correspondence and notices [see § 102D.220[2], Instructions (Form CG-1258)]. A social security or tax identification number is required [see § 102D.220[2], Instructions (Form CG-1258)]. A telephone number, although not required, is helpful [see § 102D.220[2], Instructions (Form CG-1258)].

d. Set forth address of managing owner [see § 102D.220[2], P I(D) (Form CG-1258)], as follows [see 46 C.F.R. § 67.113; see also § 102D.220[2], Instructions (Form CG-1258)]:

NOTE:

The person designated as the managing owner must have an address in the United States, unless no owner of the vessel has an address in the United States [46 C.F.R. § 67.113(b)].

(1) For individual, enter any residential address.

NOTE:

If the managing owner's physical (street) address is different from his or her mailing address, show both addresses [see § 102D.220[2], Instructions (Form CG-1258)].

(2) If partnership owns vessel, enter

(a) Address in state under which it is organized; or

(b) Address of its principal place of business.

(3) If corporation owns vessel, enter:

(a) Address for service of process in its state of incorporation; or

(b) Address of its principal place of business.

e. Designate hailing port [see 46 C.F.R. § 67.119(a), (b); see also § 102D.220[2], P I(F) and Instructions (Form CG-1258)].

NOTE:

A vessel's hailing port must be a place in the United States included in the United States Department of Commerce Federal Information Processing Standards Publication 55DC, which sets forth specific rules to determine a vessel's hailing port [*see* 46 C.F.R. § 67.119(b)].

A Certificate of Documentation, together with any of its endorsements, becomes invalid immediately once a designated hailing port changes [*see* § 102D.220[2], Instructions (Form CG-1258)].

f. Check appropriate boxes to show type of entity that owns vessel and certify that owners meet citizenship requirements for that type of entity [*see* § 102D.220[2], P I(G) and Instructions (Form CG-1258); *see also* 46 C.F.R. §§ 67.30-67.45 (citizenship requirements)].

g. Indicate intended use or uses of vessel [46 U.S.C. § 12105(a); 46 C.F.R. § 67.15(b); *see* § 102D.220[2], P I(H) (Form CG-1258)]:

NOTE:

On qualification of an application for documentation, the Secretary of Transportation will issue a Certificate of Documentation, or a temporary Certificate of Documentation, (Coast Guard Form CG-1270). The certificate will be endorsed with one or more of the endorsements listed below [46 U.S.C. § 12105(a); 46 C.F.R. § 67.15(b), (c); *see* § 102D.102 PP 1, 2].

(1) Registry (i.e., foreign trade).

(2) Coastwise trade.

(3) Fishery.

(4) Recreational.

h. Check appropriate box to show vessel's primary type of service [*see* § 102D.220[2], P I(I) and Instructions (Form CG-1258; only one box may be checked)].

i. Check appropriate boxes to show purpose of application [*see* § 102D.220[2], P I(J) and Instructions (Form CG-1258)].

NOTE:

The same application form may be used for initial issue, exchange, or replacement of a Certificate of Documentation, or for redocumentation [*see* § 102D.220[2] (Form CG-1258)].

j. Complete certification, as appropriate [*see* § 102D.220[2], P I(K) and Instructions (Form CG-1258)].

3. File application with National Vessel Documentation Center [46 C.F.R. § 67.141(a)].

NOTE:

The National Vessel Documentation Center is located at 2039 Stonewall Jackson Drive, Falling Waters, WV 25419-2405, telephone (304) 271-2400, fax (304) 271-2415.

4. Submit following with application:

a. Title evidence, if applicable [46 C.F.R. § 67.141(a)(2); *see* 46 C.F.R. § 67.50 (when title evidence is

required); *see also* § 102D.220[1][e]].

b. Mortgagee consent, if applicable [46 C.F.R. § 67.141(a)(3) (Form CG-4593)].

c. Outstanding Certificate of Documentation, if application is for replacement of mutilated document or exchange of documentation.

5. On receipt of certificate, and before operation of vessel, ensure that vessel is marked with official number, name, and hailing port, as required by regulations [46 C.F.R. § 67.141(c); *see* 46 C.F.R. §§ 67.120-67.125 (marking requirements); *see also* § 102D.220[2], Instructions (Form CG-1258)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawShippingRegulations & StatutesLicensing & Registration



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3. Documentation of Vessels and Recording Instruments Affecting Vessels

32-102D California Legal Forms--Transaction Guide § 102D.131

§ 102D.131 Filing and Recording of Instruments Affecting Documented Vessels

NOTE:

For discussion of the types of instruments that are eligible for filing and recordation [*see* 46 C.F.R. § 67.200], *see* § 102D.102, P 4.

The original instrument itself may be presented, but is not required [46 C.F.R. § 67.209]. A copy may be delivered to the National Vessel Documentation Center or may be submitted by fax [46 C.F.R. § 67.219(a); *see* 46 C.F.R. § 67.219(b), (c) (requirements for faxed information)]. A copy also may be transmitted in portable document format (.pdf) [46 C.F.R. § 67.209; *see* 46 C.F.R. § 67.218 (optional filing in.pdf as attachments to e-mail)]. Signatures may be affixed manually or digitally [46 C.F.R. § 67.209]. On receipt of the instrument (either a copy or the original), the instrument may be recorded provided it complies with the requirements of 46 C.F.R. §§ 67.200-67.219 [*see* PP 1-4, **below**].

The address of the National Documentation is 2039 TJ Jackson Drive, Falling Waters, WV 25419-2405; telephone (800) 799-8362, or (304) 271-2400. The fax number is (304) 271-2405, or (304) 271-2415, if paying by credit card. The e-mail address is NVDCWebmaster@NVDC.USCG.MIL.

The filing of an instrument against a vessel in accordance with the filing and recording requirements [*see* 46 C.F.R. §§ 67.231-67.259; *see also* PP 5, 6, **below**] may be terminated, and if recorded, removed from the record of the vessel by [46 C.F.R. § 67.261] the filing of either a court order, affidavit, or Declaration of Forfeiture [*see* 46 C.F.R. § 67.263], or a properly filed satisfaction or release instrument [*see* 46 C.F.R. § 67.265].

The filing requirements discussed in PP 1-4, **below**, apply, as a general rule, to all instruments eligible for recording. For alternative and additional requirements applicable to particular types of instruments, see PP 5-8, **below**.

1. Confirm that instrument contains the following:

a. Sufficient information to identify vessel clearly [46 C.F.R. § 67.205(a)].

b. If vessel has been documented [46 C.F.R. § 67.205(b)]:

(1) Vessel's name and official number; or

(2) Other unique identifier.

c. If vessel has never been documented [46 C.F.R. § 67.205(c)]:

(1) Vessel's hull identification number [see 33 C.F.R. § 181.25]; or

(2) Other descriptive information that clearly identifies vessel, such as [46 C.F.R. § 67.205(c)(2)]:

(a) Length.

(b) Breadth.

(c) Depth.

(d) Year built.

(e) Name of manufacturer.

(f) Any numbers that may have been assigned under federal regulations governing boating safety [see 33 C.F.R. pt. 173].

d. Date of execution [46 C.F.R. § 67.207(a)(1)].

e. Acknowledgment [46 C.F.R. § 67.207(a)(2)].

NOTE:

No Coast Guard officer or employee is authorized to take acknowledgments unless the instrument is executed on behalf of the Federal Government of the United States [46 C.F.R. § 67.207(b)].

2. Ensure that copy of original instrument is signed and acknowledged [see 46 C.F.R. § 67.209].

3. Submit copy of signed, acknowledged instrument [see 46 C.F.R. § 67.209] to the National Documentation Center [46 C.F.R. § 67.213(a)].

NOTE:

The original instrument itself may be presented, but is not required [46 C.F.R. § 67.209]. A copy may be delivered to the National Vessel Documentation Center or transmitted by fax or in portable document format (.pdf) [46 C.F.R. § 67.209; see 46 C.F.R. § 67.218 (optional filing in.pdf as attachments to

e-mail), 46 C.F.R. § 67.219 (optional filing by fax); discussion in NOTE, § 102D.131, P 1].

Signatures may be affixed manually or digitally [46 C.F.R. § 67.209].

The date and time of filing of an instrument is the actual date and time at which the instrument is received by the National Vessel Documentation Center [46 C.F.R. § 67.215(a); *see* 46 C.F.R. § 67.215(b) (filing of substitute instrument)].

All instruments are recorded at the National Vessel Documentation Center [46 C.F.R. § 67.213(b)].

4. If instrument is a bill of sale, gift deed, mortgage, or assignment of mortgage, file citizenship declaration (on official form) along with instrument [46 C.F.R. § 67.211(a); *see* 46 C.F.R. pt. 221 (requirements governing declaration)].

NOTE:

A citizenship declaration is required unless the transaction is exempt from citizenship declaration requirement [*see* 46 C.F.R. § 67.211(c), (d)]. The official declaration forms are available from the National Vessel Documentation Center and from the Vessel Transfer and Disposal Officer (MAR-745.1), Maritime Administration, United States Department of Transportation, Washington, DC 20590 [46 C.F.R. § 67.211(b)].

5. If instrument is a bill of sale or gift deed: [46 C.F.R. § 67.220]:

a. File it in conjunction with [46 C.F.R. § 67.223]:

(1) Application for initial documentation or redocumentation of vessel; or

(2) Change to or deletion of vessel's outstanding Certificate of Documentation.

b. Confirm that it meets requirements of 46 C.F.R. §§ 67.200-67.219 [46 C.F.R. § 67.220(a); *see* PP 1-4, above].

c. Confirm that it is signed by or on behalf of all sellers or donors [46 C.F.R. § 67.220(b)].

d. Confirm that it recites the following [46 C.F.R. § 67.220(c)]:

(1) Name and address of each seller or donor and buyer or donee; and

(2) Interest in vessel held by each seller or donor and buyer or donee.

6. If instrument is mortgage or related instrument:

NOTE:

An Optional Application for Filing (Coast Guard Form CG-5542) may be attached to a mortgage or related instrument. If Form CG-5542 is properly completed with all information required for indexing the instrument and the signatures specified on the form, the instrument to which it is attached will be filed and recorded with no further review [46 C.F.R. § 67.231(c)].

a. Confirm that it meets requirements of 46 C.F.R. §§ 67.200-67.219 [46 C.F.R. § 67.231(a); *see* PP 1-4, above].

b. Confirm that it is signed by or on behalf of each mortgagor [46 C.F.R. § 67.235(a)(1)].

NOTE:

A mortgage or assumption of mortgage is not eligible for filing and recording if the mortgagor did not actually hold legal title to the interest in the vessel being mortgaged at the time of filing of the mortgage or assumption, or if the vessel that the mortgage covers is not documented or is not the subject of an application for documentation [46 C.F.R. § 67.233(a)].

c. Confirm that mortgage recites [46 C.F.R. § 67.235(a)(2)]:

(1) Name and address of each mortgagor and mortgagee.

(2) Interest in vessel held by each mortgagor and mortgagee.

(3) Amount of direct or contingent obligations that is or may become secured by mortgage, excluding interest, expenses, and fees.

NOTE:

This amount may be recited in one or more units of account as agreed to by the parties [46 C.F.R. § 67.235(a)(2)(iii)].

d. Confirm that all of following related instruments satisfy additional regulatory requirements:

NOTE:

In addition to the following regulatory requirements, all instruments supplemental to mortgages must recite information which clearly identifies the mortgage to which the supplemental information is applicable [see 46 C.F.R. § 67.231(b)].

(1) Assignments of mortgages [see 46 C.F.R. § 67.237].

(2) Assumptions of mortgages [see 46 C.F.R. § 67.239].

(3) Amendments of or supplements to mortgages [see 46 C.F.R. § 67.241].

(4) Instrument subordinating mortgages [see 46 C.F.R. § 67.243].

7. If instrument is preferred mortgage:

a. Confirm that it meets requirements of 46 C.F.R. §§ 67.200-67.219 [see 46 C.F.R. § 67.231(a); see also PP 1-4, above].

b. Confirm that mortgage covers whole vessel [46 C.F.R. § 67.235(b)].

NOTE:

A mortgage that secures more than one vessel may, at the option of the parties, provide for separate discharge of the vessels [46 C.F.R. § 67.235(c)].

c. Confirm that mortgagee is one of the following [46 C.F.R. § 67.233(b)]:

- (1) A state.
- (2) United States Government.
- (3) Federally-insured depository institution (unless disapproved by Secretary of Transportation).
- (4) Individual who is United States citizen.
- (5) Person qualifying as United States citizen as defined in 46 U.S.C. App. § 802.
- (6) Person approved by Secretary of Transportation.

NOTE:

A mortgage of a vessel 100 feet or greater in length applying for a fishery endorsement is eligible for filing and recording as a preferred mortgage only if it meets the requirements of 46 C.F.R. pt. 67 [46 C.F.R. § 67.200 *et seq.*] and the requirements of 46 C.F.R. § 356.19 (requirements to hold preferred mortgage on fishing vessel) [46 C.F.R. § 67.233(b)]. However, an instrument conveying an interest in a vessel that has been operated only as a fishing vessel, fish processing vessel, or fish tender vessel [*see* 46 U.S.C. § 2101(11a), (11b), (11c) (definitions)], or a vessel that has been operated only for recreation, or both, is not subject to this restriction [46 C.F.R. § 67.233(c)].

8. If instrument is a notice of claim of lien:

NOTE:

A notice of claim of lien is not entitled to filing and recording unless the vessel against which the lien is claimed is covered by a preferred mortgage filed or recorded with the Secretary of Transportation [*see* 46 C.F.R. § 67.255]. For requirements for assignments of, or amendments to, notices of claim of lien, see 46 C.F.R. §§ 67.257, 67.259.

a. Confirm that it meets requirements of 46 C.F.R. §§ 67.200-67.219 [46 C.F.R. § 67.250(a); *see* PP 1-4, *above*].

b. Confirm that notice is signed by or on behalf of claimant [46 C.F.R. § 67.253(a)].

c. Confirm that it recites [46 C.F.R. § 67.253(b)]:

- (1) Name and address of claimant.
- (2) Nature of lien claimed.
- (3) Date on which lien was established.
- (4) Amount of lien claimed.

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawShippingRegulations & StatutesLicensing & Registration



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[Reserved]

§§ 102D.132[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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4. Registration of Aircraft and Recording Conveyances Affecting Aircraft

32-102D California Legal Forms--Transaction Guide § 102D.140

§ 102D.140 Registration of Aircraft

NOTE:

To determine whether or not an aircraft is eligible for registration with the Federal Aviation Administration (FAA) [*see* 49 U.S.C. § 44102(a); 14 C.F.R. § 47.3(a)], *see* § 102D.103, P 1. Aircraft engines, propellers, and appliances also may be registered [49 U.S.C. § 44104(1)].

The following discussion covers the general registration process, which culminates in the issuance of a Certificate of Aircraft Registration. For discussion of the procedure governing applications for Dealers' Aircraft Registration Certificates, *see* § 102D.14[7].

1. Assist owner in completing Application for Aircraft Registration [*see* 14 C.F.R. §§ 47.5(a), 47.31(a); *see also* § 102D.230].

NOTE:

An aircraft may be registered only by and in the legal name of its owner [14 C.F.R. § 47.5(b); *see* 49 U.S.C. § 44103(a)(1); *see also* 14 C.F.R. § 47.5(d) ("owner" defined); § 102D.103, P 2]. However, registration will not be evidence of ownership of the aircraft in any proceeding in which ownership by a particular person is in issue [49 U.S.C. § 44103(c)(2); 14 C.F.R. § 47.5(c)]. The FAA issues a Certificate of Aircraft Registration to the person who appears to be the owner on the basis of the evidence of ownership submitted with the registration application [*see* 14 C.F.R. § 47.11], or recorded at the FAA Aircraft Registry [*see* § 102D.141]. It does not issue a certificate of ownership or endorse any information with respect to ownership on a Certificate of Aircraft Registration [14 C.F.R. § 47.5(c)].

2. Obtain following evidence of ownership, as appropriate:

NOTE:

If the aircraft has never been registered under the laws of the United States or any foreign country, was last previously registered under United States law, or was last previously registered in a foreign country, somewhat different requirements may govern the evidence of ownership [*see* 14 C.F.R. §§ 47.33-47.37; *see also* PP 3-5, *below*].

a. If applicant is buyer in possession, bailee, or lessee of aircraft under contract of conditional sale, obtain contract of conditional sale [14 C.F.R. § 47.11(a)].

b. If applicant is assignee under contract of conditional sale, obtain [14 C.F.R. § 47.11(a)]:

(1) Contract of conditional sale (unless already recorded at FAA Aircraft Registry).

(2) Assignment from original buyer, bailee, lessee, or prior assignee.

c. If applicant is a reposessor of aircraft, obtain [14 C.F.R. § 47.11(b)]:

(1) Certificate of repossession on FAA Form 8050-4, or its equivalent [*see* § 102D.232].

NOTE:

This certificate must be signed by the applicant and must state that the aircraft was repossessed or otherwise seized under the applicable security agreement and under local law [14 C.F.R. § 47.11(b)(1)].

(2) Security agreement (unless it has been recorded at FAA Aircraft Registry), or certified copy of agreement.

NOTE:

The copy must be imprinted on paper permanent in nature and include dates and signatures. Further, a certificate of the applicant must be attached to the copy. The certificate must state that the copy has been compared with the original and that it is a true copy [14 C.F.R. §§ 47.11(b)(2), 49.21].

(3) Bill of sale that satisfies following requirements, if repossession was through foreclosure proceedings resulting in sale, and that [14 C.F.R. § 47.11(b)(3)]:

(a) Is signed by sheriff, auctioneer, or other authorized person who conducted sale.

(b) States that sale was made under applicable local law.

d. If applicant bought aircraft at judicial sale, or at sale to satisfy lien or charge, obtain bill of sale that contains signature and statement described in P c(3), *above* [14 C.F.R. § 47.11(c)].

e. If title to aircraft has been in controversy and has been determined by a court, obtain certified copy of decision of court [14 C.F.R. § 47.11(d)].

f. If applicant is executor or administrator of estate of deceased former owner of aircraft, obtain certified copy of letters

testamentary or letters of administration appointing applicant executor or administrator [14 C.F.R. § 47.11(e)].

NOTE:

If the application is approved, the Certificate of Aircraft Registration will be issued to the applicant as executor or administrator [14 C.F.R. § 47.11(e)].

g. If applicant bought aircraft from estate of deceased former owner, and executor or administrator has been or is to be appointed, obtain [14 C.F.R. § 47.11(f)]:

- (1) Bill of sale signed for estate by executor or administrator.
- (2) Certified copy of letters testamentary or letters of administration.

h. If applicant bought aircraft from estate of deceased former owner, and no executor or administrator has been or is to be appointed, obtain [14 C.F.R. § 47.11(f)]:

- (1) Bill of sale signed by heir-at-law of deceased former owner.
- (2) Affidavit of that heir-at-law, stating that:
 - (a) No application for appointment of executor or administrator has been made.
 - (b) So far as he or she can determine, no such application will be made.
 - (c) He or she is person entitled to, or having right to dispose of, aircraft under applicable local law.

i. If applicant is guardian of another person's property (including aircraft), obtain certified copy of court order appointing him or her guardian [14 C.F.R. § 47.11(g)].

NOTE:

The Certificate of Aircraft Registration will be issued to the applicant as guardian [14 C.F.R. § 47.11(g)].

j. If applicant is trustee of property that includes the aircraft:

- (1) Obtain either [14 C.F.R. § 47.11(h)]:
 - (a) Certified copy of court order appointing trustee; or
 - (b) Complete and true copy of instrument creating trust.
- (2) If there is more than one trustee, advise cotrustees that each trustee must sign application [14 C.F.R. § 47.11(h)].

NOTE:

The Certificate of Aircraft Registration will be issued to a single applicant as trustee, or to several trustees jointly as cotrustees [14 C.F.R. § 47.11(h)].

3. If aircraft has not been registered previously under 49 U.S.C. §§ 44101-44104, under other law of United States, or

under foreign law, obtain one of following as evidence of ownership:

- a. Bill of sale (official FAA form AC Form 8050-2) [14 C.F.R. § 47.33(a)(2); see § 102D.231].
- b. Equivalent bill of sale [14 C.F.R. § 47.33(a)(2)].
- c. Other evidence of ownership authorized by 14 C.F.R. § 47.11 [14 C.F.R. § 47.33(a)(2); see P 2, above].
- d. If applicant, for good reason, cannot produce any of above forms of evidence of ownership, other evidence satisfactory to Federal Aviation Administrator [14 C.F.R. § 47.33(b)].

NOTE:

This "other evidence" may be an affidavit stating why the applicant cannot produce the required evidence, accompanied by any further evidence that is available to prove the transaction [14 C.F.R. § 47.33(b); see 14 C.F.R. § 47.33(c), (d) (special requirements for amateur-built planes)].

4. If aircraft was last previously registered in United States, obtain following evidence of ownership:

- a. Bill of sale (official FAA form AC Form 8050-2) [14 C.F.R. § 47.35(a); see § 102D.231].
- b. Equivalent conveyance [14 C.F.R. § 47.35(a)].

NOTE:

If the applicant bought the aircraft from the last registered owner, the conveyance must be from that owner to the applicant. If the applicant did not buy the aircraft from the last registered owner, he or she must submit conveyances or other instruments showing consecutive transactions from the last registered owner through each intervening owner to the applicant [14 C.F.R. § 47.35(a)].

- c. Other evidence of ownership [14 C.F.R. § 47.35(a); see 14 C.F.R. § 47.11 (evidence of ownership); see P 2, above].
- d. If, for good reason, applicant cannot produce any of above forms of evidence of ownership, other evidence satisfactory to Federal Aviation Administrator [14 C.F.R. § 47.35(b)].

NOTE:

This "other evidence" may be an affidavit stating why the applicant cannot produce the required evidence, accompanied by whatever further evidence is available to prove the transaction [14 C.F.R. § 47.35(b)].

5. If aircraft was last previously registered under laws of foreign country, obtain following evidence of ownership:

- a. Either of the following [14 C.F.R. § 47.37(a)(2)]:
 - (1) Bill of sale from foreign seller; or
 - (2) Other evidence satisfactory to Federal Aviation Administrator that applicant owns aircraft.

- b. Evidence satisfactory to Federal Aviation Administrator that if country in which aircraft was registered has not ratified certain international conventions and treaties, registration has ended or is invalid and other specified conditions are met [*see 14 C.F.R. § 47.37(a)(3)*].
 - c. Certain other evidence regarding termination of foreign registration [*see 14 C.F.R. § 47.37(a)(3), (b)*].
6. Confirm that every owner signs application and any supporting documentation (as appropriate), that each signature is in ink [*14 C.F.R. § 47.13(a)*], and that following additional execution requirements are satisfied (if applicable):
- a. If one or more persons doing business under a trade name are submitting application, confirm that application is signed by, or on behalf of, each person who shares title to aircraft [*14 C.F.R. § 47.13(b)*].
 - b. If agent submits application on owner's behalf, confirm that agent [*14 C.F.R. § 47.13(c)*]:

- (1) States name of owner on application.

- (2) Signs as agent or attorney-in-fact.

- (3) Submits signed power of attorney or true and certified copy of that power [*see 14 C.F.R. § 49.21* (certification requirements)].

NOTE:

A power of attorney or other evidence of a person's authority to sign for another is valid for these purposes until the earlier of the revocation of this authority or the following: (1) the expiration date stated in the evidence of authority; or (2) if no expiration date is stated, not more than three years after the date it is signed or the grantor (or a corporate officer or other person in a managerial position, in the case of a grantor corporation) certifies in writing that the authority to sign shown on the evidence is still in effect [*14 C.F.R. § 47.13(g)*].

- c. If applicant is a corporation, confirm that [*14 C.F.R. § 47.13(d)*]:

- (1) Authorized person signs application.

- (2) Title of signer's office appears on application.

- (3) Copy of signer's authorization from board of directors, certified as true [*see 14 C.F.R. § 49.21* (certification requirements)] by corporate officer or other person in managerial position in corporation, *unless* [*14 C.F.R. § 47.13(d)(3)*; *see 14 C.F.R. § 47.13(d)(4)* (exceptions)]:

- (a) Signer of application is corporate officer or other person in managerial position, and title of his or her office is stated along with signature; or

- (b) Valid authorization to sign is on file at FAA Aircraft Registry.

- d. If applicant is a partnership, confirm that [*14 C.F.R. § 47.13(e)*]:

- (1) Application states full name of partnership.

(2) Application states name of each general partner.

(3) A general partner signs application.

e. If applicants are co-owners who are not engaged in business as partners, have each person who shares title to aircraft sign application [14 C.F.R. § 47.13(f)].

7. Have applicant place United States identification number ("registration mark") on application, and on any evidence submitted with application [14 C.F.R. § 47.15(a)].

NOTE:

In the case of an aircraft not previously registered anywhere, the applicant must obtain the U.S. identification number from the FAA Aircraft Registry by submitting a written request that (1) describes the aircraft by make, type, model, and serial number [*but see* 14 C.F.R. § 47.33(c) (alternative requirements for amateur-built aircraft)], and (2) states that the aircraft has not previously been registered anywhere. If the aircraft was brought into the United States from a foreign country, the applicant must submit evidence that it has never been registered in a foreign country [14 C.F.R. § 47.15(a)(1)]. Different requirements apply to aircraft that have previously been registered in the U.S. [*see* 14 C.F.R. § 47.15(a)(2)] or in a foreign country [*see* 14 C.F.R. § 47.15(a)(3)].

The identification number requirements discussed above do not apply to an aircraft manufacturer who applies for a group of U.S. identification numbers [*see* 14 C.F.R. § 47.15(c)], a person who applies for a special identification number [*see* 14 C.F.R. § 47.15(d)-(h)], or a holder of a Dealers' Aircraft Registration Certificate who applies for a temporary registration number [14 C.F.R. § 47.15(a); *see* 14 C.F.R. § 47.16 (temporary number)].

8. Submit following application materials to FAA Aircraft Registry [14 C.F.R. § 47.31(a)]:

NOTE:

The application materials must be mailed to the FAA Aircraft Registry, Department of Transportation, P.O. Box 25504, Oklahoma City, OK 73125, or delivered to the Registry at 6425 S. Denning Ave., Oklahoma City, OK 73169 [14 C.F.R. § 47.19].

a. White and green copy of Aircraft Registration Application [*see* P 1, *above*; *see also* § 102D.230[2]].

b. Either of the following:

(1) Original Aircraft Bill of Sale (using form prepared by FAA) [*see* AC Form 8050-2; § 102D.231[2]]; or

(2) Other evidence of ownership authorized by 14 C.F.R. § 47.33, 47.35, or 47.37 [*see* PP 3, 4, and 5, *above*, respectively].

c. Application fee [*see* 14 C.F.R. § 47.17].

9. After applicant submits specified application materials, instruct applicant to carry second (pink) copy of Aircraft Registration Application in aircraft as temporary authority to operate it without registration [14 C.F.R. § 47.31(c)].

NOTE:

This temporary authority is valid until the date the applicant receives the Certificate of Aircraft Registration [~~see~~ AC Form 8050-3], or until the date the FAA denies the application, but in no case for more than 90 days after the date the applicant signs the application [14 C.F.R. § 47.31(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Transportation LawAir TransportationRegistration



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4. Registration of Aircraft and Recording Conveyances Affecting Aircraft

32-102D California Legal Forms--Transaction Guide § 102D.141

§ 102D.141 Recording Conveyances Affecting Title

NOTE:

The following recording requirements apply to the majority of recordable conveyances [*see* § 102D.103, P 4 (list of recordable conveyances)]. Additional or alternative requirements apply to encumbrances against certain aircraft engines and propellers [*see* 14 C.F.R. §§ 49.41-49.45] and to specified air carrier aircraft engines, propellers, appliances, and spare parts [*see* 14 C.F.R. §§ 49.51-49.55].

1. If client wishes to record conveyance affecting title to or interest in aircraft [*see* 49 U.S.C. §§ 44107, 44108; 14 C.F.R. § 49.1(a); *see also* § 102D.103, P 4], verify that instrument complies with following signature and execution requirements [14 C.F.R. § 49.13]:

NOTE:

The Federal Aviation Act provides that a conveyance or instrument must be acknowledged in order to be recorded but grants the Administrator of the Federal Aviation Administration the authority to provide otherwise [49 U.S.C. § 44107(c)]. The Administrator has promulgated a regulation that provides that acknowledgment is not required for purposes of the Act and its implementing regulations, and that the law of the place of conveyance determines when an instrument must be acknowledged in order to be valid for purposes of that place [14 C.F.R. § 49.13(c); *see International Atlas Services, Inc. v. Twentieth Century Aircraft Co.* (1967) 251 Cal. App. 2d 434, 440, 59 Cal. Rptr. 495 (federal government has fully occupied field of recordation of interests in aircraft and of rights derived from recordation); *Pope v. National Aero Finance Co.* (1965) 236 Cal. App. 2d 722, 732, 46 Cal. Rptr. 233, **cert. denied**, 389 U.S. 1038 (1968) (recording and registration of documents affecting title of aircraft are governed by federal statute rather than by state laws)].

a. Each signature must be in ink [14 C.F.R. § 49.13(a)].

b. Conveyance must satisfy special execution requirements (set forth in regulations governing aircraft registration) [see 14 C.F.R. § 47.13(b)-(f); see also § 102D.140, P 6] if it is made by, or on behalf of, any of following [14 C.F.R. § 49.13(b)]:

(1) One or more persons doing business under trade name.

(2) Agent.

NOTE:

A power of attorney or other evidence of a person's authority to sign for another, submitted in connection with the recording of an aircraft conveyance [see 14 C.F.R. §§ 47.13(c), (g), 49.13(b); see also § 102D.140, P 6b], is valid for purposes of the recordation regulations until the earlier of its revocation or the following: (1) the expiration date stated in the evidence of authority; or (2) if no expiration date is stated, not more than three years after the date (a) it is signed or (b) the grantor (or a corporate officer or other person in a managerial position, in the case of a grantor corporation) certifies in writing that the authority to sign shown on the evidence is still in effect [14 C.F.R. § 49.13(d)].

(3) Corporation.

(4) Partnership.

(5) Co-owner.

(6) Unincorporated association.

c. If document is contract of conditional sale, it must be signed by all parties to contract [14 C.F.R. § 49.17(d)(6)].

NOTE:

A "conditional sales contract" means a contract for the sale of an aircraft, aircraft engine, propeller, appliance, or spare part, under which the buyer takes possession of the property but title to the property vests in the buyer at a later time on (1) paying any part of the purchase price; (2) performing another condition; or (3) the happening of a contingency. A contract to bail or lease an aircraft, aircraft engine, propeller, appliance, or spare part, under which the bailee or lessee (1) agrees to pay an amount substantially equal to the value of the property; and (2) is to become, or has the option of becoming, the owner of the property on complying with the contract is also a "conditional sales contract" [see 49 U.S.C. § 40102(a)(18)].

2. If conveyance to be recorded is executed for security purposes or is assignment of that instrument, ensure that it complies with following requirements [14 C.F.R. § 49.17(d)]:

NOTE:

Immediately after a debt secured by a conveyance given for security purposes has been satisfied, or any of the encumbered aircraft has been released from the conveyance, the holder must execute a release and must send it to the FAA Aircraft Registry for recording [14 C.F.R. § 49.17(d)(5); see P 6, **below**].

- a. Debtor must sign security agreement.

NOTE:

If the debtor is not the registered owner of the aircraft, the security agreement must be accompanied by the debtor's Application for Aircraft Registration and evidence of ownership [*see 14 C.F.R. § 47.11; see also § 102D.140*], unless the debtor (1) holds a Dealer's Aircraft Registration Certificate and submits evidence of ownership (if applicable) [*see 14 C.F.R. § 47.67*]; (2) was the owner of the aircraft on the date the security agreement was signed, as shown by documents recorded at the FAA Aircraft Registry; or (3) is the vendor, bailor, or lessor under a contract of conditional sale [*14 C.F.R. § 49.17(d)(1)*].

- b. Name of cosigner must not appear in security agreement as debtor or owner.

NOTE:

If a person other than the registered owner signs the security agreement, that person must show the capacity in which that person signs, such as "cosigner" or "guarantor" [*14 C.F.R. § 49.17(d)(2)*].

- c. If instrument is assignment of interest in security agreement:

(1) Assignor must sign instrument.

(2) Unless it is attached to and is part of original agreement, instrument must describe security agreement in sufficient detail to identify it, including:

(a) Agreement's date.

(b) Names of parties.

(c) Date of FAA recording.

(d) Recorded conveyance number.

- d. If instrument is amendment of or supplement to conveyance executed for security purposes that has been recorded by FAA, instrument must:

(1) Meet requirements for recording original conveyance.

(2) Describe original conveyance in sufficient detail to identify it, including:

(a) Its date;

(b) Names of parties;

(c) Date of FAA recording; and

(d) Recorded conveyance number.

- e. If instrument is contract of conditional sale, all parties must sign it.

3. If dealing with conveyance relating to aircraft ownership or encumbrance against aircraft, confirm that following requirements are satisfied:

NOTE:

The requirements discussed below apply to the recording of the following kinds of conveyances: (1) a bill of sale, contract of conditional sale, assignment of an interest under a contract of conditional sale, mortgage, assignment of mortgage, lease, equipment trust, notice of tax lien or of other lien, or other instrument affecting title to, or any interest in, aircraft; and (2) a release, cancellation, discharge, or satisfaction of any of the above conveyances [14 C.F.R. § 49.31].

a. Document is in form prescribed by, or acceptable to, Federal Aviation Administrator for that kind of conveyance [14 C.F.R. § 49.33(a)].

b. Document describes aircraft by [14 C.F.R. § 49.33(b)]:

(1) All of following:

(a) Make and model.

(b) Manufacturer's serial number.

(c) United States registration number.

(2) Other details that make identification possible.

c. Document is original document or duplicate original, or true copy if neither original nor duplicate original is available [14 C.F.R. § 49.33(c)].

NOTE:

If a copy is submitted, it must be accompanied by a certificate of the person submitting the conveyance, stating that the copy has been compared with the original and that it is a true copy [14 C.F.R. §§ 49.21, 49.33(c)].

d. Document affects aircraft registered under Federal Aviation Act, 49 U.S.C. §§ 44101-44104 [see 14 C.F.R. § 49.33(d); see also § 102D.140].

4. Submit following to FAA Aircraft Registry:

NOTE:

The following materials must be mailed to the FAA Aircraft Registry, Department of Transportation, P.O. Box 25504, Oklahoma City, OK 73125, or delivered to the Registry at 6425 S. Denning Ave., Oklahoma City, OK 73169 [14 C.F.R. § 49.11].

a. Conveyance [14 C.F.R. § 49.11].

b. Recording fee [14 C.F.R. § 49.15(a), (c)].

NOTE:

The fee may be paid by check or money order payable to the FAA [14 C.F.R. § 49.15(c)].

There is no fee for recording a bill of sale that accompanies an application for aircraft registration and the registration fee [14 C.F.R. § 49.15(b)].

c. If seller is not shown on FAA records as owner of aircraft, bills of sale or similar documents showing consecutive transfers from last registered owner through each intervening owner [14 C.F.R. § 49.35].

5. If person submitting conveyance for recording wants FAA to return original [14 C.F.R. § 49.21]:

a. Submit true copy along with original.

NOTE:

The copy must be imprinted on paper that is permanent in nature and must include the relevant dates and signatures. After recording, the FAA will keep the copy and return the original to the applicant. The original will be stamped with the date and time of recording [14 C.F.R. § 49.21].

b. Attach certificate of person submitting conveyance, stating that copy has been compared with original and that it is true copy.

6. Immediately after satisfaction of any debt secured by a conveyance given for security purposes, or release of any of the encumbered aircraft from the conveyance, have holder [14 C.F.R. § 49.17(d)(5)]:

a. Execute release on AC Form 8050-41, Part II--Release [see § 102D.233[2]], provided to holder by FAA when conveyance was recorded by FAA, or on equivalent form.

NOTE:

If the debt is secured by more than one aircraft and all of the collateral is released, the collateral need not be described in detail in the release. However, the original conveyance must be clearly described in enough detail to identify it, including its date, the names of the parties, the date of FAA recording, and the recorded conveyance number [14 C.F.R. § 49.17(d)(5)].

b. Send release to FAA Aircraft Registry for recording.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsGeneral OverviewTransportation LawAir TransportationRegistration



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32-102D California Legal Forms--Transaction Guide §§ 102D.142-102D.149

[Reserved]

§§ 102D.142[Reserved]



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32-C California Legal Forms--Transaction Guide Scope

Scope

NOTE: The procedures covered in this part apply only to documented vessels. For procedural guides to the registration and transfer of those vessels, see §§ 102D.130, 102D.131.



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32-102D California Legal Forms--Transaction Guide § 102D.150

§ 102D.150 Renewal of Certificate of Documentation

1. Submit official application for renewal of certificate [Coast Guard Form CG-1280] to Director, National Vessel Documentation Center, before the expiration of the year in which certificate expires [46 C.F.R. § 67.163(a), (b); see § 102D.220[1][h][ii]].

NOTE:

Unless the Certificate of Documentation has become invalid [see § 102D.220[1][i]], each endorsement on the certificate is valid for one year [46 C.F.R. § 67.163(a)]. The owner must apply for renewal of each endorsement on the certificate before the expiration of that year [46 C.F.R. § 67.163(a)].

The application must be filed with the National Vessel Documentation Center [46 C.F.R. § 67.141(a)], which is located at 2039 Stonewall Jackson Drive, Falling Waters, WV 25419-2405, telephone (304) 271-2400, fax (304) 271-2415.

2. After owner receives renewal decal, instruct owner to affix decal to certificate [46 C.F.R. § 67.163(c)].

NOTE:

On receipt of the renewal application, the National Vessel Documentation Center will forward a renewal decal to the owner [see Coast Guard Form CG-1280-A]. The presence of a current renewal decal on the certificate is evidence that the certificate has been renewed [46 C.F.R. § 67.163(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawShippingRegulations & StatutesLicensing & Registration



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32-102D California Legal Forms--Transaction Guide § 102D.151

§ 102D.151 Replacement of Certificate of Documentation

NOTE:

A Certificate of Documentation must be replaced when lost, mutilated, or wrongfully withheld from the vessel owner [46 C.F.R. § 67.169(a)]. On compliance with the applicable requirements, the Coast Guard will issue a new certificate [see 46 C.F.R. § 67.141 (application procedure)].

1. If certificate is lost or mutilated, advise owner to submit following to National Vessel Documentation Center [46 C.F.R. § 67.169(a); see 46 C.F.R. § 67.141 (application procedure); see also § 102D.130]:

a. Official application for replacement [see § 102D.220[2] (Form CG-1258)].

b. Original Certificate of Documentation (if mutilated) [see 46 C.F.R. § 67.169(b); 46 C.F.R. § 67.141(a)(4)].

2. If owner is alleging that certificate has been wrongfully withheld, instruct owner to [46 C.F.R. § 67.151]:

a. Submit to Director, National Vessel Documentation Center, statement setting forth reasons for that allegation.

b. On finding by Director that certificate is being wrongfully withheld, submit official application for replacement certificate [see § 102D.220[2]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawShippingRegulations & StatutesLicensing & Registration



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32-102D California Legal Forms--Transaction Guide § 102D.152

§ 102D.152 Exchange of Certificate of Documentation

1. Advise owner that certificate, together with any endorsements, becomes invalid and must be exchanged on the occurrence of any of following events [46 C.F.R. § 67.167(b); see 46 C.F.R. § 67.161 (exceptions)]:

- a. Change in ownership of vessel.
- b. Change by addition, deletion, or substitution of general partners of partnership that has obtained registry or recreational endorsement.
- c. Change in state of incorporation of vessel's corporate owner.
- d. Change in vessel's name [see P 4, below].
- e. Change in vessel's hailing port.
- f. When vessel is placed under command of person who is not United States citizen.

2. Advise owner that Certificate of Documentation, together with any of its endorsements, also becomes invalid immediately if vessel is not at sea, or on vessel's next arrival in port anywhere, on occurrence of any of following events [46 C.F.R. § 67.167(c); see 46 C.F.R. §§ 67.161, 67.167(f) (exceptions)]:

- a. Change in vessel's gross or net tonnage or its dimensions.
- b. Change by addition or substitution of restrictions imposed on vessel.

- c. Change in legal name of any owner.
- d. Change by addition, deletion, or substitution of vessel's endorsements.
- e. Discovery of substantive or clerical error by issuing documentation officer.
- f. When self-propelled vessel becomes non-self-propelled vessel, and vice versa.
- g. When any beneficiary with enforceable interest in trust arrangement changes by addition or substitution.
- h. When trustee of trust arrangement owning vessel changes by addition, substitution, or deletion.
- i. When tenant by the entirety owning any part of vessel dies.
- j. For vessel with coastwise endorsement [*see 46 U.S.C. § 12112*], except for vessels with coastwise endorsements in effect before February 4, 2004 [*see P k, below*], when:
 - (1) Demise charter expires or is transferred to another charterer.
 - (2) Citizenship of charterer or sub-charterer changes, so that charterer or sub-charterer is no longer qualified for coastwise endorsement.
 - (3) Neither person that owns vessel, nor that owner's parent, nor any subsidiary of that owner's parent, is primarily engaged in leasing or other financing transactions.
 - (4) More than half of aggregate revenues of at least one of following are derived from operation or management of vessels:
 - (A) Person that owns vessel.
 - (B) Parent of person that owns vessel.
 - (C) Group of which person that owns vessel is member.
 - (5) At least one of following is primarily engaged in operation or management of commercial foreign-flag vessels used for carriage of cargo for parties unrelated to vessel's owner or charterer:
 - (A) Person that owns vessel.
 - (B) Parent of person that owns vessel.
 - (C) Group of which person that owns vessel is member.
- k. For vessel with coastwise endorsement under *46 U.S.C. § 12112* that was in effect before February 4, 2004, when:
 - (1) Demise charter expires or is transferred to another charterer.
 - (2) Citizenship of charterer or sub-charterer changes to extent that charterer or sub-charterer is no longer qualified for coastwise endorsement.

(3) Neither person that owns vessel, nor that owner's parent, nor subsidiary of that owner's parent, is primarily engaged in leasing or other financing transactions.

NOTE:

A certificate issued to a vessel that is the subject of an outstanding mortgage recorded in accordance with the applicable regulations [*see* 46 C.F.R. §§ 67.231-67.245], or predecessor regulations, may not be exchanged for any of the causes enumerated in PP 1 and 2, **above**, with the exception of the discovery of a substantive or clerical error by the issuing documentation officer, without the mortgagee's consent [46 C.F.R. § 67.145(a)]. However, these provisions do not apply to a vessel subject only to mortgage recorded or filed before January 1, 1989, which had not attained preferred status as of that date [46 C.F.R. § 67.145(b)]. Consent of the mortgagee is evidenced by filing a properly completed original Application, Consent, and Approval for Withdrawal of Application for Documentation or Exchange of Certificate of Documentation (Coast Guard Form CG-4593) [46 C.F.R. § 67.145(c)].

3. Advise owner that, although Certificate of Documentation and any endorsements remain valid:

a. Owner must apply for exchange of certificate on election to designate new managing owner of vessel [46 C.F.R. § 67.167(d); *see* 46 C.F.R. § 67.113 (managing owner designation)]; and

b. Owner may apply for exchange of certificate if:

(1) Restrictions imposed on vessel change by deletion.

(2) Vessel attains special entitlement [46 C.F.R. § 67.167(d)(2); *see* 46 C.F.R. §§ 67.130-67.134 (forfeited, wrecked, or captured vessels)].

4. If owner elects to change name of vessel, have owner [46 C.F.R. § 67.117]:

NOTE:

The name of the vessel must be composed of letters of the Latin alphabet or Arabic or Roman numerals [46 C.F.R. § 67.117(b)(1)]. It may not be identical, actually or phonetically, to any word or words used to solicit assistance at sea [46 C.F.R. § 67.117(b)(2)], and may not contain (nor be phonetically identical to) obscene, indecent, or profane language, or to racial and ethnic epithets [46 C.F.R. § 67.117(b)(3)].

a. File official application [*see* § 102D.220[2] (Coast Guard Form CG-1258)].

b. If vessel is subject of outstanding mortgage of record, file original Coast Guard Form CG-4593 evidencing mortgagee consent [*see* 46 C.F.R. § 67.145(a)].

c. On being notified that name change has been approved, mark new name on vessel [*see* 46 C.F.R. § 67.123 (marking requirements)].

5. If owner elects or is required to change hailing port designation, instruct owner to [46 C.F.R. § 67.119; *see* 46 C.F.R. § 67.167(b)(5)]:

a. File official application [*see* § 102D.220[2] (Coast Guard Form CG-1258)].

b. If vessel is subject of outstanding mortgage of record, file original Coast Guard Form CG-4593 evidencing mortgagee consent [*see* 46 C.F.R. § 67.145(a)].

c. On being notified that change has been approved, mark new hailing port on vessel [*see* 46 C.F.R. § 67.123 (marking requirements)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawShippingRegulations & StatutesLicensing & Registration



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32-102D California Legal Forms--Transaction Guide § 102D.153

§ 102D.153 Deletion of Certificate of Documentation

1. Notify owner that certificate, together with any endorsements on that certificate, is invalid and vessel is subject to deletion from roll of documented vessels when [46 C.F.R. § 67.171(a); but see 46 C.F.R. § 67.161 (limited exceptions)]:

- a. Vessel is placed under foreign flag.
- b. Vessel is transferred in whole or in part to non-citizen.
- c. Any owner of vessel ceases to be citizen within meaning of regulations governing documentation [see 46 C.F.R. §§ 67.30-67.47].
- d. Owner no longer elects to document vessel.
- e. Vessel is no longer at least five net tons.
- f. Vessel ceases to be capable of transportation by water.

NOTE:

When a cause of deletion arises for any reason under PP a through f, **above**, the owner must send or deliver the original Certificate of Documentation to the National Vessel Documentation Center, together with a statement setting forth the reasons deletion is required [46 C.F.R. § 67.171(b)].

The National Vessel Documentation Center [46 C.F.R. § 67.141(a)] is located at 2039 Stonewall Jackson Drive, Falling Waters, WV 25419-2405, telephone (304) 271-2400, fax (304) 271-2415.

- g. Owner fails to exchange certificate as required by regulations [*see* § 102D.152].
- h. Owner fails to maintain markings required by regulations [*see* 46 C.F.R. §§ 67.120-67.125 (marking requirements for vessel documentation)].
- i. Endorsements on certificate have been revoked because vessel owner is the subject of outstanding civil penalty assessed by Coast Guard.
- j. Owner fails either to renew endorsements [*see* 46 C.F.R. § 67.163] or to comply with provisions governing deposit of certificate [*see* 46 C.F.R. § 67.165].

NOTE:

For discussion of renewal procedures, *see* § 102D.150.

2. If vessel has been placed under foreign flag or has been sold in whole or in part to non-citizen, instruct owner to send or deliver to National Vessel Documentation Center [46 C.F.R. § 67.171(b), (c)]:

- a. Evidence of sale or transfer, if any;
- b. Evidence that Maritime Administration has consented to transfer or sale; and
- c. Original certificate.
- d. Statement setting forth reasons deletion is required.

3. On occurrence of any other cause for deletion enumerated in PP 1a through 1f, *above*, instruct owner to send or deliver to National Vessel Documentation Center [46 C.F.R. § 67.171(b)]:

- a. Original certificate.
- b. Statement setting forth reasons deletion is required.

NOTE:

A certificate evidencing deletion from United States documentation will be issued on the request of the vessel owner to the National Vessel Documentation Center on compliance with the applicable requirements [46 C.F.R. § 67.171(d)].

4. Advise owner that vessel may be redocumented following deletion of its certificate if reason for deletion no longer exists [*see* § 102D.220[2], P I(J) (CG Form-1258)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawShipping Regulations & StatutesLicensing & Registration



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32-102D California Legal Forms--Transaction Guide § 102D.154

§ 102D.154 Cancellation of Certificate

NOTE:

A Certificate of Documentation, together with any endorsements, is invalid and subject to cancellation on a determination by the Director of the National Vessel Documentation Center that the certificate was improperly issued for any reason [46 C.F.R. § 67.173].

1. On notification of cancellation, advise owner that he or she must send or deliver certificate to documentation officer at National Vessel Documentation Center [46 C.F.R. § 67.173].
2. Advise owner that he or she may submit application for exchange to correct error giving rise to cancellation [46 C.F.R. § 67.173; *see* 46 C.F.R. § 67.141 (application procedure); *see also* §§ 102D.130, 102D.152].

NOTE:

If the vessel for which the certificate was cancelled was previously documented, it remains documented under the previous Certificate of Documentation, unless deleted from the roll of actively documented vessels [46 C.F.R. § 67.173; *see* 46 C.F.R. § 67.171 (deletion); *see also* § 102D.153].

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawShippingRegulations & StatutesLicensing & RegistrationContracts LawRemediesRescission & RedhibitionGeneral Overview



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32-102D California Legal Forms--Transaction Guide §§ 102D.155-102D.199

[Reserved]

§§ 102D.155[Reserved]



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PART IV. FORMS
A. Vehicles

32-102D California Legal Forms--Transaction Guide § 102D.200

§ 102D.200 Application for Title or Registration [DMV Form Reg. 343]

[1] Comment

[a] Use of Form

This form is the official Application for Title or Registration of a motor vehicle. It is for use to obtain a title or California registration for a vehicle that is "off the record," that is, for example, a vehicle that is registered in another state or country, or one which has no title or registration because it was built from a kit, or a vehicle which has been "totaled" by an insurance company and must be retitled and reregistered as a different entity (a "salvaged 1994 Ford Taurus," rather than the original "1994 Ford Taurus"). The form is available from the California Department of Motor Vehicles (DMV). Forms are also available on the DMV website, which is located at www.dmv.ca.gov.

A vehicle [*see* [b], *below*] must be registered and the registration fees paid [*see Veh. Code §§ 9250-9271*], or registered under the permanent trailer identification program, before it can be lawfully driven, moved, or left standing on a highway or in an off-street public parking facility [*Veh. Code § 4000(a)(1)*; *see Veh. Code § 5014.1(a)* (types of trailers to be assigned permanent trailer identification certificate and plate)].

Although this form may also be used as an application for title or registration of an undocumented vessel [*see* [2], *below*], it is designed for use by vehicles. For the application for a certificate of ownership and registration of an undocumented vessel with the DMV, it is preferable to use the Application for Registration Number, Certificate of Ownership, and Certificate of Number of Undocumented Vessels (DMV Form Boat 101). For discussion and a copy of that form, *see § 102D.210*.

[b] Definitions

For purposes of the registration of vehicles with the DMV, the term "vehicle" means a device by which any person or property may be propelled, moved, or drawn on a highway (other than a device moved exclusively by human power or used on stationary rails or tracks) [*Veh. Code § 670*]. A "motor vehicle" is a vehicle that is self-propelled. However, a self-propelled wheelchair, motorized tricycle, or motorized quadricycle, when operated by a person who, by reason of

physical disability, is otherwise unable to move about as a pedestrian, is not a "motor vehicle" [*Veh. Code* § 415(a), (b)]. For purposes of the New Motor Vehicle Board and related statutes [*see Veh. Code* § 3000 *et seq.*], "motor vehicle" also includes a recreational vehicle [*see Health & Safety Code* § 18010(a) (definition)], but does not include a camper truck or park trailer [*Veh. Code* § 415(c)].

The Vehicle Code defines the following types of vehicle owners: "owners," "legal owners," and "registered owners." An "owner" of a vehicle is any of the following [*Veh. Code* § 460]:

- A person having all the incidents of ownership, including the legal title of a vehicle, whether or not he or she lends, rents, or creates a security interest in the vehicle;
- The person entitled to the possession of a vehicle as the purchaser under a security agreement; or
- The State of California, a county, city, district, or political subdivision of the state, or the United States, when entitled to possession and use of a vehicle under a lease, lease-sale, or rental-purchase agreement for 30 consecutive days or more.

A "legal owner" of a vehicle is a person holding a security interest in a vehicle that is subject to the Uniform Commercial Code (UCC) [*see Ch. 42, Secured Transactions* (security interests under the UCC)]. That term also includes a lessor under a lease, lease-sale, or rental-purchase agreement that grants possession of a vehicle to any of following lessees for 30 consecutive days or more: (1) the State of California; (2) any county, city, district, or political subdivision of California; or (3) the United States [*Veh. Code* § 370].

A "registered owner" is the person registered by the DMV as the owner of the vehicle [*Veh. Code* § 505].

[c] Application for Original Registration

[i] Vehicles Other Than Motorcycles

An application for the original registration of a vehicle other than a motorcycle [*see [ii], below*] must be submitted to the DMV by the owner of the vehicle on the application form furnished by the DMV (this form). The application must contain all of the following [*Veh. Code* § 4150]:

- The true, full name, business or residence and mailing address, and driver's license or identification card number, if any, of the owner.
- The true, full name, business or residence and mailing address of the legal owner, if any.
- The name of the county in which the owner resides. (Note that a place for the owner's county of residence is not provided on the revised form in [2], *below*, but may be inserted after the name of the city of residence).
- A description of the vehicle, including the following data insofar as they may exist: the make, model, and type of body; the vehicle identification number or any other identifying number required by the DMV; and the date first sold by a manufacturer, remanufacturer, or dealer to a consumer.
- Any other information reasonably required by the DMV to enable it to determine whether or not the vehicle is lawfully entitled to registration.

[ii] Motorcycles

This form also serves as the official application for the original registration of a motorcycle. The owner of the motorcycle must set forth all of the following information on this form [*Veh. Code § 4150.2*]:

- The true, full name, business or residence and mailing address, and driver's license or identification card number of the owner.
- The true, full name, business or residence and mailing address of the legal owner, if any.
- The name of the county in which the owner resides. (Note that a place for the owner's county of residence is not provided on the revised form in [2], *below*, but may be inserted after the name of the city of residence).
- A description of the motorcycle, including the following data insofar as they exist: the make and type of body; the manufacturer's motor and vehicle identification numbers recorded exactly as they appear on the engine and frame, respectively, and any other identifying number of the motorcycle required by the DMV; and the date first sold by a manufacturer, remanufacturer, or dealer to a consumer.
- Any other information reasonably required by the DMV to enable it to determine whether the vehicle is lawfully entitled to registration.

[d] Preparation of Form

This form is to be complete by the party applying for title or registration. The form is generally submitted with other supporting documents. For example, in the case of an out-of-state vehicle being registered in California for the first time, the DMV requires the out-of-state registration certificate, out-of-state title (if available), evidence of the California Smog Certification, and an odometer mileage certification, as well as the appropriate fee. Information on these requirements is available on the DMV website [*see [a], above*] or by contacting the DMV directly.

[e] Certificate of Compliance

At the time of the initial registration or the transfer of ownership and registration of any motor vehicle subject to the registration requirements of the Vehicle Code, the applicant must furnish a valid certificate of compliance issued by a licensed smog check station and signed by a licensed inspector [*Veh. Code § 4000.1(a)*]. For further discussion, see §§ 102D.110, 102D.111.

[2] FORM

Application for Title or Registration [DMV Form Reg. 343]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesVehicle RegistrationGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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PART IV. FORMS
A. Vehicles

32-102D California Legal Forms--Transaction Guide § 102D.201

§ 102D.201 Vehicle/Vessel Transfer Form (Bill of Sale, Odometer Disclosure, Power of Attorney) [DMV Form Reg. 262]

[1] Comment--Use of Form

This form is a notice to the California Department of Motor Vehicles (DMV) of the sale or transfer of a vehicle or an undocumented vessel. The form includes a bill of sale [Section 2], buyer and seller information [Section 5], an odometer disclosure statement [Section 3], and a power of attorney [Section 4]. This form is not the ownership certificate ("pink slip"), and does not operate as a transfer of ownership. It must accompany the ownership certificate or application for a duplicate certificate [*see* [2], *below* (Instructions)], and is submitted to the DMV by the transferee.

The form is available from the DMV. Forms are also available on the DMV's website at www.dmv.ca.gov.

The bill of sale may be used as the proof of ownership that must be filed along with an application for a vessel registration number [*see* 13 Cal. Code Reg. § 190.02(a); *see also* § 102D.210[1][d][ii]].

For the steps that must be taken to complete a transfer of ownership of a vehicle or undocumented vessel, *see* §§ 102D.111 and 102D.121, respectively.

For a Notice of Release of Liability that the transferor must file, *see* § 102D.202.

[2] FORM

Vehicle/Vessel Transfer Form (Bill of Sale, Odometer Disclosure, Power of Attorney) [DMV Form Reg. 262]

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Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty LawGeneral OverviewContracts LawSales of GoodsGeneral OverviewTransportation LawCommercial
VehiclesGeneral OverviewTransportation LawPrivate VehiclesGeneral Overview



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PART IV. FORMS
A. Vehicles

32-102D California Legal Forms--Transaction Guide § 102D.202

§ 102D.202 Notice of Release of Liability [DMV Form Reg. 138]

[1] Comment

[a] Use of Form

This form is a notice of release of liability to the California Department of Motor Vehicles (DMV) on the sale or transfer of a vehicle or an undocumented vessel.

The form is available from the DMV. Forms are also available on the DMV's website at www.dmv.ca.gov.

[b] Notice Requirements for Vehicles

An owner of a vehicle [*see Veh. Code § 460* ("owner" defined)] registered under the Vehicle Code who sells or transfers his or her title or interest in the vehicle and delivers possession to the purchaser must, within five calendar days of the transfer and delivery, notify the DMV of that sale or transfer. The notice must include the date of the sale or transfer, the name and address of the owner and of the transferee, and a description of the vehicle [*Veh. Code § 5900(a)*; *see Veh. Code § 5901* (similar requirements governing notices by dealers and lessor-retailers)]. The owner must also state the vehicle's odometer reading at the time of sale or transfer. [*Veh. Code § 5900(b)*; *see 49 U.S.C. § 32705(a)* (requiring written disclosure of cumulative mileage on vehicle's odometer or disclosure that actual mileage is unknown if transferor knows odometer reading is not accurate)]. However, if the owner has knowledge that the reading is incorrect, he or she must indicate the true mileage, if known [*Veh. Code § 5900(b)*].

If the registered owner (that is, the person registered by the DMV as the owner of the vehicle) [*Veh. Code § 505*] is not in possession of the vehicle that is being sold or transferred, the person in physical possession of the vehicle must give this notice [*Veh. Code § 5900(c)*].

[c] Notice Requirements for Vessels

An owner of an undocumented vessel numbered under the Vehicle Code [*see Veh. Code § 9850*] who sells or transfers

all or part of his or her title or interest in the vessel and delivers possession of the vessel to another must submit this form to the DMV within five calendar days to notify the DMV of the sale or transfer [*Veh. Code § 9911*]. The notice must give the date of the sale or transfer, the name and address of the owner and of the transferee, and a description of the vessel [*Veh. Code § 9911*; *see Veh. Code § 9912* (requirements governing notice by dealers)].

The transferor or transferee must also complete and sign a written statement that contains specified information regarding the transfer, including a statement of the total consideration (valued in money) given for the transfer [*see Veh. Code § 9903(a)*]. The application for boat registration number [*see § 102D.210*] elicits that information.

[d] Liability for Subsequent Acts--Vehicles

A vehicle owner who has made a bona fide sale or transfer of a vehicle and has delivered possession of the vehicle to the new owner is no longer the owner of the vehicle and may not be subject thereafter to civil or criminal liability for the parking, abandoning, or operation of the vehicle if the selling or transferring owner either (1) properly endorses and delivers the certificate of ownership as provided in the Vehicle Code or (2) delivers to the DMV or places in the United States mail, addressed to the DMV, either the notice contained in this form [*see Veh. Code § 5900* (or if a dealer or lessor-retailer, the notice required by *Veh. Code § 4456(b)* or *5901*); *see also* [2], *below*] or appropriate documents and fees for registration of the vehicle to the new owner pursuant to the sale or transfer [*Veh. Code § 5602*].

[e] Liability for Subsequent Acts--Vessels

An owner of an undocumented vessel who has made a bona fide sale or transfer of the vessel and has delivered possession of the vessel to the purchaser will be relieved of civil liability for the operation of the vessel thereafter by another person if the owner has fulfilled either of the following requirements: (1) properly endorsed and delivered the certificate of ownership or (2) delivered or mailed to the DMV either the notice of sale required by *Veh. Code § 9911* or *9912* using this form or appropriate documents for the transfer of the vessel pursuant to the sale or transfer [*Veh. Code § 9905*].

[2] FORM

Notice of Release of Liability [DMV Form Reg. 138]

[Click here to view image.](#)

[Reverse side of form]

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Legal Topics:

For related research and practice materials, see the following legal topics:
 Contracts LawTypes of ContractsReleasesTransportation LawCommercial VehiclesLicensing &
 RegistrationTransportation LawPrivate VehiclesGeneral Overview



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[Reserved]

§§ 102D.203[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Undocumented Vessels

32-102D California Legal Forms--Transaction Guide § 102D.210

§ 102D.210 Application for Registration Number, Certificate of Ownership, and Certificate of Number of Undocumented Vessel [DMV Form Boat 101]

[1] Comment

[a] Use of Form

This form is an official application for a boat registration number, a certificate of ownership, and certificate of number for an undocumented vessel. This form may be used to obtain the original certificate of ownership [see [c], *below*], the original registration of the vessel [see [d], *below*], or submitted in connection with the transfer of a registered vessel [see [e], *below*].

Although the official Application for Title or Registration [DMV Form Reg. 343] ostensibly may be used for the original title or registration of vessels as well as for vehicles [see § 102D.200[1][a]], the DMV prefers that this form be used for those purposes.

Every undocumented vessel operated on the waters of the State of California must be numbered, either in accordance with the provisions of the Vehicle Code, with federal law, or with the laws of another state [*Veh. Code* § 9850]. The DMV is responsible for numbering vessels under the Vehicle Code [see *Veh. Code* § 9853.1]. For discussion of the federal documentation requirements, see § 102D.220[1].

For more detailed descriptions of the types of vessels that are subject to or exempt from registration with the DMV, see § 102D.101. For a procedural guide to the registration and transfer processes, see §§ 102D.120 and 102D.121, respectively. For a transfer form, including a bill of sale, and a notice of release of liability that may be used for any vehicle or vessel that has been registered with the DMV, see §§ 102D.201 and 102D.202, respectively.

[b] Definitions

An undocumented vessel is any vessel that is not required to and does not have a valid marine document issued by the Bureau of Customs of the United States or its successor, the United States Coast Guard [*Veh. Code* § 9840(g); see *Veh.*

Code § 9840(a) ("vessel" defined)].

Three types of owners are subject to the laws governing the registration of undocumented vessels:

- Owners.
- Legal owners.
- Registered owners.

An "owner" is the person having all the incidents of ownership (including the legal title) of a vessel, whether or not that person lends, rents, or pledges the vessel; the person entitled to the possession of a vessel as the purchaser under a conditional sale contract; or the mortgagor of a vessel. "Owner" does not include a person holding legal title to a vessel under a conditional sales contract, the mortgagee of a vessel, or the renter or lessor of a vessel to the state or to any county, city, district, or political subdivision of the state under a lease, lease-sale, or rental-purchase agreement that grants possession of the vessel to the lessee for a period of at least 30 consecutive days [*Veh. Code § 9840(b)*].

A "legal owner" is the person holding the legal title to a vessel under a conditional sale contract, the mortgagee of a vessel, or the renter or lessor of a vessel to the state, or to any county, city, district, or political subdivision of the state, under a lease, lease-sale, or rental-purchase agreement that grants possession of the vessel to the lessee for a period of at least 30 consecutive days [*Veh. Code § 9840(c)*].

A "registered owner" is the person registered by the DMV as the owner of the vessel [*Veh. Code § 9840(d)*].

[c] Certificate of Ownership

On receipt of the application in approved form [*see [2], below*], the DMV will issue a certificate of ownership to the legal owner [*Veh. Code § 9853.1*]. The certificate of ownership ("pink slip") is evidence of title to the vessel.

[d] Initial Application for Certificate of Number

[i] In General

The owner of a vessel that must be numbered by the State of California must file an initial application in approved form for a number with the DMV [*Veh. Code § 9853.1; see [2], below*]. The official application must set forth the hull identification number and contain the true name and address of the owner and of the legal owner, if any [*see 13 Cal. Code Reg. § 190.10*]. The boat registration number is the number (beginning with CF) shown on the certificates [*see Cal. Dept. of Motor Vehicles, ABCs of the California Boating Law*].

[ii] Proof of Ownership

The applicant must submit proof of ownership of the vessel at the time this application is filed [*see Veh. Code § 9852*]. Proof of ownership may be established by one of the following [*13 Cal. Code Reg. § 190.02*]:

- A bill of sale executed by the seller and showing the name and address of the seller, purchaser, and legal owner (if any); the location and date of sale; and a description of the vessel.
- A certificate of sale executed by the seller under oath and showing the information required to be shown on a bill of sale [*see [2], P 5(A), below*].
- A properly endorsed document indicating title, if the vessel has been numbered and issued a title by

another state.

- If none of the first three options noted *above* is appropriate, an affidavit executed by the applicant and fully setting forth the facts to support the applicant's claim of ownership [see [2], P 5(B), *below*]. Affidavits for materials used in the construction of homemade boats must be supported with bills of sale for major components.

- If a dealer is applying for original registration and lists himself or herself as the owner of the vessel and the vessel is obtained through the dealer's inventory, the dealer must submit a certificate of origin, bill of lading, or invoice describing the vessel.

This form provides for the use of either a certificate of sale or a statement. DMV Form Reg. 262, Vehicle/Vessel Transfer Form (Bill of Sale) [see § 102D.201[2]] may also be used as the proof of ownership that must be filed along with an application for a vessel certificate of number [see 13 Cal. Code Reg. § 190.02; see also § 102D.201[1]].

[iii] Submission of Form and Issuance of Certificates

On receipt of an acceptable application and the required fees, the DMV will issue a certificate of ownership to the legal owner and a certificate of number to the owner. If there is no legal owner, the DMV will issue both of those documents to the owner [Veh. Code § 9853.1]. For discussion of marking and inspection requirements relating to the registration number and the certificate of number [see Veh. Code § 9853.2], see 102D.120.

[e] Change of Ownership

If the title to, or any interest in, an undocumented vessel numbered under the Vehicle Code is being transferred, and the certificate of ownership is available, the transferee must submit the certificate, the applicable fee [see Veh. Code §§ 9855, 9901], and this application form to the DMV [Veh. Code §§ 9855, 9900, 9901]. The parties must pay delinquent property taxes on the vessel [Veh. Code § 9900]. The DMV, on receipt of a properly endorsed certificate of ownership and a new application form and the required fee, will issue a new certificate of ownership and a new certificate of number in the same manner as provided for in the initial issuance of number [Veh. Code § 9902; see [c], [d], *above*]. The same number may be reassigned to the new owner [see Veh. Code § 9902].

If the certificate of ownership is unavailable, the transferee should follow the steps *outlined in § 102D.121, P 3*.

The owner-transferor must also provide the DMV with a written notice of the sale or transfer [see Veh. Code § 9911; see also § 102D.202]. Finally, either the transferor or transferee must complete and sign a written statement that sets forth the following information:

- The date of the sale or other transfer.
- The name and address of the owner and of the transferee.
- The total consideration (valued in money) given for the sale or other transfer, including the consideration for any motor or other component part of the vessel included in the transfer [Veh. Code § 9903(a)].

This form elicits that information [see [2], P 5, *below*].

[2] FORM

Application for Registration Number, Certificate of Ownership, and Certificate of Number of

Undocumented Vessel [DMV Form Boat 101]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawShippingRegulations & StatutesLicensing & Registration



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B. Undocumented Vessels

32-102D California Legal Forms--Transaction Guide § 102D.211

§ 102D.211 Vessel Purchase Agreement

[1] Comment

[a] Use of Form

This form is a contract for the purchase of a vessel. It is for use by the buyer or seller, if the transaction is being handled without a broker. If a brokerage firm has been engaged to sell the boat, the firm will use its own contract.

For a procedural guide to the transfer of undocumented vessels, see § 102D.121. For discussion of the steps involved in registering a undocumented vessel, see § 102D.120. For a procedural guide to the documentation and recording of instruments affecting documented vessels, see §§ 102D.130-102D.131.

[b] Additional Considerations

For both legal and practical reasons, it is essential to ensure that any delinquent property taxes on vessel have been paid [*Veh. Code* § 9900] and that the vessel is being transferred free of all other debts, claims, liens, taxes, and any other kinds of encumbrances [*see* [2], P 8, *below*; *see also* § 102D.131 (recording and removing encumbrances on documented vessels)].

From a practical point of view, the buyer will want to ensure that, before purchase, he or she has the boat surveyed by a licensed marine surveyor. Such a survey usually entails a haulout, since an out-of-water survey ordinarily is required to fully inspect and determine the condition of the vessel. Traditionally, it is the buyer's responsibility to pay for the haulout and survey. Agents who sell marine insurance generally can provide the names of licensed marine surveyors.

[c] Removal of Hull Identification Number

It is unlawful to buy, sell, offer for sale, receive, or possess any vessel or component of a vessel from which the hull identification number has been removed, defaced, altered, or destroyed. This prohibition does not apply if a hull identification number that has been approved by the DMV is attached to the vessel or component part in lieu of the

manufacturer's number [*Veh. Code § 9872.1(a)*].

[2] FORM

Vessel Purchase Agreement

Purchase Agreement

This Agreement is made on _____ [*date*], between _____ [*name of seller*] (Seller), who is the owner of the [*year of manufacture*], [*name of manufacturer or designer*], Yacht or Vessel called _____ [*name*], [*hull identification number*], of an overall length of approximately [*feet*] (Vessel), and _____ [*name of buyer*] (Buyer).

1. The Seller agrees to sell, and the Buyer agrees to buy the Vessel, subject to the terms and conditions contained in this Agreement.

2. The gross purchase price of the Vessel is \$ _____. On the signing of this Agreement by the Buyer, the Buyer will pay a deposit of \$ _____ to the Seller. This deposit will be held in trust or escrow by the Seller, subject to the terms of the Agreement. [*Add if desired: The deposit will be increased to \$ _____ on _____ (date).*]

3. The offer is withdrawn if not accepted by [*time*] p.m., on _____ [*date*].

4. The Seller offers details of the Vessel in good faith but cannot guarantee the accuracy of this information nor warrant the condition of the Vessel. It is agreed that the Buyer will instruct his or her agents or surveyors to investigate all details as to which the Buyer desires validation, including inventory of the Vessel, at the Buyer's own cost.

5. The purchase of the vessel is subject to (a) demonstration of Vessel and equipment by Seller or his or her appointed operators; (b) haulout and surveys; (c) [*add other contingency, as necessary*] to be completed as soon as practical after the execution of this Agreement, at the option and expense of the Buyer.

It is agreed that the Buyer may instruct his or her agents or surveyors to examine the Vessel to ensure that the Vessel and all its equipment meets the Buyer's requirements. The Buyer acknowledges that the surveyor(s) to be selected by him or her will be employed solely by the Buyer. The Seller is not responsible for any errors or omissions of the surveyors, although the Seller may have suggested the name of the surveyor and may have engaged him or her on behalf of the Buyer at the Buyer's request.

Should the Buyer operate the Vessel at any time, the Seller will hold the Buyer harmless, and the Seller's insurance will be primary.

6. The Buyer must give written acceptance or rejection of the Vessel and remove all contingencies by _____ [*date*]. On acceptance of the Vessel by the Buyer and consummation of this transaction, the Buyer agrees that the purchase is on an "AS IS" basis, and no warranty, either express or implied, and no representation as to the condition of the Vessel has been made, or is binding on the Seller. If the Buyer rejects the Vessel, the Seller must return the Buyer's deposit, minus any survey or repair costs, fees, or debts against the Vessel incurred by the Seller. Buyer's acceptance of the Vessel binds the deposit.

7. If, after written acceptance of the Vessel, the Buyer fails to pay the balance of the purchase price and execute all papers that must be executed by him or her for the completion of the purchase, in accordance with the terms of this Agreement, on or before _____ [*date*], the Seller may retain the sum paid as of this date, and the

parties will be relieved of all obligations under the Agreement.

8. The Vessel is being sold and purchased free and clear of debts, claims, liens, taxes and encumbrances of any kind. The Seller warrants that he or she has good and marketable title to the Vessel and the lawful right to sell the Vessel and will deliver all necessary documents for the transfer of title to the Buyer. The actual date of the consummation of the sale will be the date on which the Buyer's total funds have been cleared and collected in negotiable legal tender, and the Buyer has received the documents of title from the Seller, properly executed for transfer and delivery to the Buyer.

9. This Agreement will take effect when signed by the Buyer and the Seller. Although the Vessel may continue to be shown, the Seller agrees not to enter into any other contract for the sale of the Vessel while this Agreement is in effect.

10. On or before the date set forth above for final payment, delivery of the Vessel will be made at [location], together with all gear, machinery, equipment, furnishings, and all other articles belonging to the Vessel. The actual legal closing of the transaction will occur at [location].

11. The risk of loss, damage, storage, supervision, operation, or destruction of the Vessel will be borne by the Seller until this transaction is consummated. In the event that this sale is not consummated due to loss, damage, or destruction of the Vessel, all expenses incurred against the Vessel by the Buyer will be paid from the deposit, and the balance returned to the Buyer, and this Agreement will be null and void.

12. This Agreement is binding on the Seller and on the Buyer and on their spouses, heirs, executors, and assigns as soon as this Agreement is executed by both Seller and Buyer.

13. Should a dispute occur between any parties to this Agreement for any reason, independent binding arbitration to be held in [county] will decide the issues, with [Buyer and Seller dividing the cost of that arbitration equally or the losing party being responsible for the cost of that arbitration].

14. All sales and use taxes imposed on this purchase are the responsibility of the Buyer, and the Buyer agrees to indemnify the Seller for the payment of those taxes. Any duties, taxes, or fees on the Vessel of any country, state, city, regulatory or taxing authority, incurred before or at the closing date of this transaction will be the responsibility of the Seller, and it will be the responsibility of the Seller to obtain validation of any such payment. If permission of any authority is necessary to purchase this Vessel, it will be the responsibility of the Buyer to obtain that permission in advance of closing.

[EITHER]

15. Personal property tax or its equivalent due before closing will be paid and will be the responsibility of the Seller.

[OR]

15. At the option of either party, the personal property tax may be prorated for the taxing year January 1, [year] to December 31, [year]. The Seller is charged for the period from closing back to January 1, [year]. The Buyer is charged for the closing date to December 31, [year]. The estimated tax for computation purposes is \$_____.

[CONTINUE]

16. This Agreement and any succeeding Agreements or Exhibits and Addenda may be executed or approved by

facsimile (fax) transaction. Signatures and material received in this manner are acceptable and binding on both parties, with the exception of the final closing papers, title or recordable documents.

17. if the Buyer fails to complete the purchase, all surveys, analysis, and data rendered will become the property of the [Seller *or* Buyer].

18. The Seller agrees not to remove any items from the Vessel after acceptance of this Agreement except purely personal effects. The only other items removed are those noted as "excluded" and itemized as part of this Agreement.

19. This document and its executed Addenda attached, if any, constitute the entire agreement between the Seller and Buyer. It is agreed that there are no other duties or warranties implied or express.

20. Buyer's payment will be made by cashier's check or wire with 24 to 48 hours to clear.

21. Specifications or Inventory of the Vessel are attached.

22. **[I or WE]** HAVE READ AND UNDERSTOOD ALL THE TERMS AND CONDITIONS CONCERNING THE PURCHASE AND SALE OF THE ABOVE-DESCRIBED VESSEL, AND ACCEPT ALL OF THOSE TERMS.

_____ [date]

SELLER

_____ [Seller's signature]

[typed name]

BUYER

_____ [Buyer's signature]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Admiralty Law Shipping Regulations & Statutes Licensing & Registration Contracts Law Sales of Goods General Overview



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32-102D California Legal Forms--Transaction Guide §§ 102D.212-102D.219

[Reserved]

§§ 102D.212[Reserved]



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102D REGISTRATION AND TRANSFER OF VEHICLES, VESSELS, AND AIRCRAFT
PART IV. FORMS
C. Documented Vessels

32-102D California Legal Forms--Transaction Guide § 102D.220

**§ 102D.220 Application for Initial Issue, Exchange, or Replacement of Certificate of Documentation;
Redocumentation [CG-1258]**

[1] Comment

[a] Use of Form

This form is the official application for the documentation of a vessel by the United States Coast Guard, together with the official instructions for the completion of the form. Documentation is required for the operation of vessels in certain trades, serves as evidence of vessel nationality, and permits vessels to be subject to preferred mortgages [46 C.F.R. § 67.1]. The form also serves as an application for a change in the documented status of a vessel [see [d][ix], *below*].

For registration of vessels that are not subject to the federal documentation laws, see § 102D.210. For a contract for the purchase of a vessel, see § 102D.211.

[b] Eligibility for Documentation

Certificates of documentation are issued only to vessels that are wholly owned by United States citizens [46 U.S.C. § 12103(a)(1), (b); 46 C.F.R. § 67.5; see 46 U.S.C. § 104 ("citizen of the United States" defined); see also 46 C.F.R. §§ 67.30-67.47 (citizenship requirements for vessel documentation)] and that meet specific criteria. As a general rule, vessels of five or more net tons that engage in the fisheries [see 46 U.S.C. § 108; 46 C.F.R. § 67.3 ("fisheries" defined)], on the navigable waters of the United States or in the Exclusive Economic Zone or coastwise trade *must* be documented [46 U.S.C. § 12102; 46 C.F.R. § 67.7; see 46 C.F.R. § 67.9(c) (exception for non-self propelled vessels under certain circumstances); see also 46 C.F.R. § 67.3 ("Exclusive Economic Zone" defined); § 102D.102, PP 1, 2 (definitions)].

Other vessels that satisfy these weight and ownership requirements are eligible for documentation [see 46 U.S.C. § 12103(a)]. This group includes vessels used exclusively for recreational purposes [46 C.F.R. § 67.5]. Owners of pleasure vessels have the option of having their vessels documented by the Coast Guard or registered with the DMV [see § 102D.11[1]].

Finally, although the Coast Guard regulations group vessels used in foreign trade with vessels used exclusively for pleasure, thus suggesting that federal documentation is optional [*see* 46 C.F.R. §§ 67.5, 67.17(b)], the Coast Guard has indicated that vessels used in foreign trade must be documented before they may be operated in waters that fall within the jurisdiction of the Coast Guard. For further discussion of vessels that are subject to or exempt from the federal documentation requirements, *see* § 102D.102.

[c] Official Instructions

Official instructions for the completing this form [*see* Instructions for Completing Form CG-1258] are reproduced immediately following the application. Those instructions are discussed throughout this comment.

[d] Contents of Application for Documentation

[i] Vessel Name

The owner must set forth the present name of vessel on the application [46 C.F.R. § 67.117(a); *see* [2], P I(A), *below*]. The name of the vessel must be composed of letters of the Latin alphabet or Arabic or Roman numerals [46 C.F.R. § 67.117(b)(1)]. It may not be identical, actually or phonetically, to any word or words used to solicit assistance at sea [46 C.F.R. § 67.117(b)(2)], and may not contain (nor be phonetically identical to) obscene, indecent, or profane language, or to racial and ethnic epithets [46 C.F.R. § 67.117(b)(3)]. These restrictions, however, do not apply to vessels validly documented before January 1, 1994, until the owner elects to change the name of the vessel [46 C.F.R. § 67.117(d)]. If applying to change the vessel's name, insert the old vessel name in parenthesis [*see* [2], *below* (Instructions--Form CG-1258)].

[ii] Official Number

The application requires the official number assigned by Coast Guard, for all but initial issue cases [*see* [2], P I(B) and Instructions, *below*; *see also* 46 C.F.R. § 67.111(b)]. If the vessel has been assigned a hull identification number, it should be shown [*see* [2], Instructions, *below*].

[iii] Managing Owner's Name and Tax Identification Number

The application requires the managing owner's name and social security or tax identification number [*see* 46 C.F.R. § 67.113(a), (b); *see also* [2], P I(C)]. A telephone number, although not required, is helpful [*see* [2], Instructions, *below*]. The managing owner is the person to whom the Coast Guard will send correspondence and notices [*see* [2], Instructions, *below*].

The managing owner of a vessel owned by one person is the owner of the vessel [46 C.F.R. § 67.113(a)]. The managing owner of a vessel owned by more than one person must be one of the owners [46 C.F.R. § 67.113(b)]. The managing owner of a vessel owned in a trust arrangement must be one of the trustees [46 C.F.R. § 67.113(c)]. For vessels owned by a limited liability company (LLC), the name of the LLC should be shown [*see* [2], Instructions, *below*].

[iv] Managing Owner's Address

The application requires the address of the managing owner [*see* [2], P I(D), *below*], as follows [*see* 46 C.F.R. § 67.113(d); *see also* [2], Instructions, *below*]:

- For an individual, enter any residential address. If the managing owner's physical (street) address is different from his or her mailing address, show both addresses.
- If partnership owns vessel, enter either the address in the state under which it is organized or the

address of its principal place of business.

- If corporation owns vessel, enter either the address for service of process in its state of incorporation or the address of its principal place of business.

The person designated as the managing owner must have an address in the United States, unless no owner of the vessel has an address in the United States [46 C.F.R. § 67.113(b)].

[v] Hailing Port

The application requires the designation of a hailing port, including the state [see 46 C.F.R. § 67.119(a), (b); see also [2], P I(F) and Instructions, *below*].

A vessel's hailing port must be a place in the United States included in the United States Department of Commerce Federal Information Processing Standards Publication 55DC, which sets forth specific rules to determine a vessel's hailing port [see 46 C.F.R. § 67.119(b)].

A Certificate of Documentation, together with any of its endorsements, becomes invalid immediate once a designated hailing port changes [see [2], Instructions, *below*].

[vi] Citizenship Requirements

The form requires that the appropriate boxes be checked to show the type of entity that owns vessel and certify that the owners meet the citizenship requirements for that type of entity [see [2], P I(G) and Instructions, *below*; see also 46 C.F.R. §§ 67.30-67.45 (citizenship requirements)].

[vii] Endorsements

The application requires indication of the intended use or uses of vessel [46 U.S.C. § 12105(a); 46 C.F.R. § 67.15(b); see [2], P I(H), *below*]:

- Registry (i.e., foreign trade).
- Coastwise trade.
- Fishery.
- Recreational.

On qualification of an application for documentation, the Secretary of Transportation will issue a Certificate of Documentation, or a temporary Certificate of Documentation (Coast Guard Form CG-1270). The certificate will be endorsed with one or more of the endorsements listed above [46 U.S.C. § 12105(a); 46 C.F.R. § 67.15(b), (c); see § 102D.102, PP 1, 2].

[viii] Primary Service

The application requires indication of the vessel's primary service [see [2], P I(I), *below*]. Only one primary service may be indicated [see [2], Instructions, *below*].

[ix] Purpose of Application

The application may be used for the following purposes:

- Exchange of Certificate of Documentation.
- Replacement of lost, wrongfully held, or mutilated certificate.
- Return of documentation following deletion.
- Application for official number and first certificate of documentation.

In the case of an application for an initial Certificate of Documentation, specified information about the vessel, including its date and place of construction, hull material, approximate length, and any previous name, numbers, or foreign registrations, must be provided [see [2], P I(J), *below*].

[x] Certification

The person(s) signing the application (for example, the owner, agent, trustee, general partner, or corporate officer) must certify that they meet the citizenship requirements [see [vi], *above*] and that the vessel has been, or will be, marked in accordance with the Instruction Sheet [see [2], Instructions, *below*; 46 C.F.R. § 67.141(c); see also 46 C.F.R. §§ 67.120-67.125 (marking requirements for vessel documentation)].

[e] Required Attachments to Application

The owner of a vessel applying for documentation must submit the following with the application:

- Title evidence, if applicable [46 C.F.R. § 67.141(a)(2)].
- Mortgagee consent, if applicable [46 C.F.R. § 67.141(a)(3) (Form CG-4593)].
- Outstanding Certificate of Documentation, if application is for replacement of a mutilated document or exchange of documentation [47 C.F.R. § 67.141(a)(4)].

Title evidence is required in the following circumstances [46 C.F.R. § 67.50; see 46 C.F.R. §§ 67.53 (methods of establishing title), 67.57-67.63 (extent of title evidence required in various circumstances)]:

- When application is made for a coastwise endorsement for a vessel that has not been previously qualified for such an endorsement [see 46 C.F.R. § 67.19 ("coastwise" endorsement defined)].
- For initial documentation of a vessel.
- When the ownership of a documented vessel changes in whole or in part.
- When the general partners of a partnership owning a vessel change by addition, deletion, or substitution, without dissolution of the partnership.
- When a vessel that has been deleted from documentation is returned to documentation and there has been an intervening change in ownership.

[f] Where to File Application

The application must be filed with the National Vessel Documentation Center [46 C.F.R. § 67.141(a)], which is located at 2039 Stonewall Jackson Drive, Falling Waters, WV 25419-2405, telephone (304) 271-2400, fax (304) 271-2415.

[g] Restriction on Withdrawal of Application

A vessel owner making application for a Certificate of Documentation may not withdraw that application without mortgagee consent if a mortgage has been filed against the vessel [46 C.F.R. § 67.143]. Consent of the mortgagee is evidenced by filing a properly completed original Application, Consent, and Approval for Withdrawal of Application for Documentation or Exchange of Certificate of Documentation (Coast Guard Form CG-4593) [46 C.F.R. § 67.143].

[h] Certificate of Documentation

[i] Issuance and Types of Endorsements

On approval of an application for documentation (this form), the Secretary of Transportation will issue a Certificate of Documentation or a temporary Certificate of Documentation. The certificate will be endorsed for operation under one or more of the following types of endorsements: registry (for foreign trade); coastwise, fishery, or recreational license [46 C.F.R. § 67.15(b); see 46 U.S.C. § 12105(a); see also [2], P I(H), *below* (applicant must specify intended use(s) of vessel)].

[ii] Period of Validity and Renewal

Unless the Certificate of Documentation has become invalid [see [i], *below*], endorsements on the certificate are valid for one year [46 C.F.R. § 67.163(a)]. The owner of a vessel that is not exempt from the requirement of documentation [see 46 C.F.R. § 67.9 (exemption for non-self propelled vessels under certain circumstances)] must apply for renewal of each endorsement by executing an original Notice of Expiration [see Coast Guard Form CG-1280] or Final Notice After Expiration [see Coast Guard Form CG-1280-B], certifying that the information contained in the Certificate of Documentation and any endorsements remains accurate, and that the certificate has not been lost, mutilated, or wrongfully withheld. The completed form must be forwarded to the National Vessel Documentation Center [46 C.F.R. § 67.163(b)].

The owner must affix the renewal decal to the Certificate of Documentation. The presence of a current renewal decal on the certificate is evidence that the certificate has been renewed [46 C.F.R. § 67.163(c)]. The owner of a vessel that is exempt from the requirements of documentation has the option of applying for renewal of any endorsement as described above, or of placing the Certificate of Documentation on deposit in accordance with 46 C.F.R. § 67.165 [46 C.F.R. § 67.163(a)(1), (2)].

[i] Exchange of Certificate

[i] When Certificate Must Be Exchanged

A Certificate of Documentation, together with any endorsements, becomes invalid and must be exchanged on the occurrence of any of the following events [46 C.F.R. § 67.167(b); see 46 C.F.R. § 67.161 (exceptions)]:

- A change in the ownership of the vessel.
- A change by addition, deletion, or substitution of the general partners of a partnership that has obtained a registry or recreational endorsement.
- A change in the state of incorporation of the corporate owner of the vessel.

- A change in the name of the vessel.
- A change in the hailing port of the vessel.
- When the vessel is placed under the command of a person who is not a United States citizen.

A Certificate of Documentation, together with any of its endorsements, also becomes invalid immediately if the vessel is not at sea, or on the vessel's next arrival in port anywhere in the world on the occurrence of any of the following events [46 C.F.R. § 67.167(c); see 46 C.F.R. §§ 67.161, 67.167(f) (exceptions)]:

- A change in the vessel's gross or net tonnage or its dimensions.
- A change by addition or substitution of restrictions imposed on the vessel.
- A change in the legal name of any owner.
- A change by addition, deletion, or substitution of the vessel's endorsements.
- The discovery of a substantive or clerical error by the issuing documentation officer.
- When a self-propelled vessel becomes non-self-propelled vessel, and vice versa.
- When any beneficiary with an enforceable interest in a trust arrangement changes by addition or substitution, or the trustee of a trust arrangement owning a vessel changes by addition, substitution, or deletion.
- When a tenant by the entirety owning any part of the vessel dies.
- For a vessel with a coastwise endorsement [see 46 U.S.C. § 12112], except for vessels with coastwise endorsements in effect before February 4, 2004, when:
 - The demise charter expires or is transferred to another charterer.
 - The citizenship of the charterer or sub-charterer changes, so that the charterer or sub-charterer is no longer qualified for a coastwise endorsement.
 - Neither the person that owns vessel, nor that owner's parent, nor any subsidiary of that owner's parent, is primarily engaged in leasing or other financing transactions.
 - More than half of the aggregate revenues of at least one of the following are derived from the operation or management of vessels:
 - The person that owns vessel.
 - The parent of the person that owns vessel.
 - The group of which the person that owns vessel is a member.
 - At least one of the following is primarily engaged in the operation or management of commercial foreign-flag vessels used for the carriage of cargo for parties unrelated to the vessel's owner or charterer:

- The person that owns vessel.
 - The parent of the person that owns vessel.
 - The group of which the person that owns vessel is a member.
- For a vessel with a coastwise endorsement under 46 U.S.C. § 12112 that was in effect before February 4, 2004, when:
- The demise charter expires or is transferred to another charterer.
 - The citizenship of the charterer or sub-charterer changes to the extent that the charterer or sub-charterer is no longer qualified for a coastwise endorsement.
 - Neither the person that owns the vessel, nor that owner's parent, nor the subsidiary of that owner's parent, is primarily engaged in leasing or other financing transactions.

Although a Certificate of Documentation and any endorsements remain valid, the owner must apply for exchange of the certificate on an election to designate a new managing owner of the vessel [46 C.F.R. § 67.167(d); *see* 46 C.F.R. § 67.113 (managing owner designation)] and may apply for exchange of the certificate if the restrictions imposed on the vessel change by deletion, or if the vessel attains a special entitlement [46 C.F.R. § 67.167(e); *see* 46 C.F.R. §§ 67.130-67.134 (forfeited, wrecked, or captured vessels)].

[ii] Exchange Procedure

To apply for exchange of the certificate, the vessel owner must send or deliver the certificate to the National Vessel Documentation Center and follow the procedures discussed above [46 C.F.R. § 67.167(a); *see* 46 C.F.R. § 67.141 (application procedure); *see also* [c]-[f], *above*].

If exchange of a certificate is required [*see* [i], *above*], and the vessel is at sea, the owner of the vessel may effect the exchange while the owner is at sea by [46 C.F.R. § 67.149(a)]: complying with the required application procedure [*see* 46 C.F.R. § 67.141 (application procedure); *see also* [c]-[f], *above*] and with any requirements related to an outstanding mortgage [*see* 46 C.F.R. § 67.145; *see also* [iii], *below*].

The new Certificate of Documentation is forwarded for delivery to the vessel's next port of call, that is, to the nearest Coast Guard Marine Safety Office, if the port of call is in the United States, or to the nearest United States Consulate, if the port of call is in a foreign country [46 C.F.R. § 67.149(b)]. The new certificate is delivered only on surrender of the old certificate, which is then forwarded to the National Vessel Documentation Center.

The requirement to mark the vessel with its new name of hailing port [*see* 46 C.F.R. §§ 67.120-67.123], if applicable, is waived until the vessel reaches its first port of call, wherever that may be [46 C.F.R. § 67.149(a) (Note)].

[iii] Effect of Outstanding Mortgage

A certificate issued to a vessel that is the subject of an outstanding mortgage recorded in accordance with the applicable regulations [*see* 46 C.F.R. §§ 67.231-67.235], or predecessor regulations, may not be exchanged for any of the causes enumerated in [i], *above*, with the exception of the discovery of a substantive or clerical error by the issuing documentation officer, without the mortgagee's consent [46 C.F.R. § 67.145(a)]. These provisions do not apply to a vessel subject only to mortgage recorded or filed before January 1, 1989, which had not attained preferred status as of

that date [46 C.F.R. § 67.145(b)]. Consent of the mortgagee is evidenced by filing a properly completed original Application, Consent, and Approval for Withdrawal of Application for Documentation or Exchange of Certificate of Documentation (Coast Guard Form CG-4593) [46 C.F.R. § 67.145(c)].

[j] Replacement of Certificate

A Certificate of Documentation must be replaced when lost, mutilated, or wrongfully withheld from the vessel owner [46 C.F.R. § 67.169(a)]. When application for replacement is required because the certificate has been mutilated, the existing certificate must be physically given up to the National Vessel Documentation Center [46 C.F.R. § 67.169(b); see 46 C.F.R. § 67.141(a)(4)]. On compliance with the applicable requirements, the Coast Guard will issue a new certificate [see 46 C.F.R. § 67.141 (application procedure); see also [c]-[f], above].

[k] Deletion

[i] Causes

A certificate is invalid and is subject to deletion from the roll of documented vessels for a variety of reasons, including the failure of the owner to renew the endorsements on the certificate [see 46 C.F.R. § 171; see also § 102D.12[4][c]]. When a cause for deletion arises, the vessel owner must send or deliver the original certificate to the National Vessel Documentation Center, together with a statement setting for the reason or reasons deletion is required [46 C.F.R. § 67.171(b); see 46 C.F.R. § 67.171(c) (additional requirements when certificate has been deleted because vessel has been placed under foreign flag or has been sold in whole or in part to non-citizen)].

[ii] Redocumentation

A vessel may be redocumented following a deletion of its certificate if the reason for the deletion no longer exists [see [2], P I(J), below]. This form is the official application for redocumentation.

[l] Cancellation

A Certificate of Documentation, together with any endorsements, is invalid and subject to cancellation on a determination by the Director of the National Vessel Documentation Center that the certificate was improperly issued for any reason [46 C.F.R. § 67.173]. On notification, the owner must send or deliver the certificate to a documentation officer at the National Vessel Documentation Center [46 C.F.R. § 67.173]. The vessel owner may submit an application for exchange to correct the error giving rise to cancellation [46 C.F.R. § 67.173; see 46 C.F.R. § 67.141 (application procedure); see also [c]-[f], above]. If the vessel for which the certificate was cancelled was previously documented, it remains documented under the previous Certificate of Documentation, unless deleted from the roll of actively documented vessels [46 C.F.R. § 67.173; see 46 C.F.R. § 67.171 (deletion); see also [k], above].

[2] FORM

Application for Initial Issue, Exchange, or Replacement of Certificate of Documentation; Redocumentation [CG-1258]

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32-102D California Legal Forms--Transaction Guide § 102D.221

§ 102D.221 Bill of Sale of Vessel [CG-1340]

[1] Comment

[a] Use of Form

This form is a bill of sale prepared by the Coast Guard for use in transferring an interest in a vessel that has been issued a Certificate of Documentation or is the subject of an application for documentation [see § 102D.220[1] (documentation)]. The form satisfies the requirements for recording discussed below.

For discussion of bills of sale in general, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

[b] Eligibility for Filing and Recording

A bill of sale (or an instrument in the nature of a bill of sale) is one of the types of instruments that may be filed and recorded with the Coast Guard if it affects a vessel that has a valid Certificate of Documentation, or an application for initial documentation, exchange of certificate, return to documentation, or deletion from documentation which is in substantial compliance with the applicable regulations, submitted to the National Vessel Documentation Center [46 C.F.R. §§ 67.200(a), 67.203(a)]. However, a bill of sale may not be filed and recorded if it bears a material alteration [46 C.F.R. § 67.203(b)]. Further, a bill of sale is not eligible for filing and recording if any vendee or transferee under the instrument is not a United States citizen [46 C.F.R. § 67.203(c); see 46 U.S.C. App. § 802 ("citizen" defined); see also [d], below]. However, this citizenship restriction does not apply in the following situations [46 C.F.R. § 67.203(c), (d)]:

- The Maritime Administration has consented to the grant of a non-citizen under the bill of sale.
- The bill of sale conveys an interest in a vessel which was neither documented nor last documented pursuant to the regulations governing filing and recording or any predecessor regulations at the time the instrument was executed.

- The bill of sale conveys an interest in a vessel that has been operated only as a "fishing vessel," a "fish processing vessel," or a "fish tender vessel" [see 46 U.S.C. § 2101(11a), (11b), (11c) (definitions)], or only for recreation, or both.

[c] Required Contents

[i] Vessel Identification

A bill of sale presented for filing and recording must contain sufficient information to identify the vessel clearly [46 C.F.R. § 67.205(a)]. If the vessel has already been documented, the bill of sale must contain the vessel's name and official number, or other unique identifier [46 C.F.R. § 67.205(b)]. If the vessel has never been documented, it must be identified either by the vessel's hull identification number [see 33 C.F.R. § 181.25 (assignment of identification number)] or other descriptive information that clearly identifies the vessel [46 C.F.R. § 67.205(c)(1), (2)]. This "other descriptive information" may include length, breadth, depth, year of build, name of manufacturer, and any numbers that may have been assigned in accordance with the federal regulations governing boating safety [46 C.F.R. § 67.205(c)(2); see 33 C.F.R. pt. 173 (boating safety)].

[ii] Identification and Signatures of Parties

The bill of sale must set forth (1) the name and address of each seller or donor and each buyer or donee and (2) the interest in the vessel held by each seller or donor and each buyer or donee [46 C.F.R. § 67.220(c)]. Further, it must be signed by or on behalf of every seller or donor [46 C.F.R. § 67.220(b)].

[iii] Date and Acknowledgment

The bill of sale must bear the date of its execution and contain an acknowledgment [46 C.F.R. § 67.207(a)]. No officer or employee of the Coast Guard is authorized to take such an acknowledgment unless the instrument is executed on behalf of the United States government [46 C.F.R. § 67.207(b)].

[d] Procedural Requirements

A bill of sale presented for filing and recording must be filed in conjunction with either an application for initial documentation or redocumentation of the vessel, or a change to or deletion of the vessel's outstanding Certificate of Documentation [46 C.F.R. § 67.223]. Additional regulatory requirements applicable to all or many instruments eligible for filing and recordation govern the following [see 46 C.F.R. § 67.220(a) (applicability of general requirements to bills of sale)]:

- Presentation of copy of signed, acknowledged instrument [see 46 C.F.R. § 67.209].
- Filing of a citizenship declaration [see 46 C.F.R. § 67.211].
- Place of filing and recording [see 46 C.F.R. § 67.213].
- Date and time of filing and recording [see 46 C.F.R. § 67.215].
- Termination of a filing [see 46 C.F.R. § 67.217].
- Optional filing by fax [see 46 C.F.R. § 67.219]. [see 46 C.F.R. § 67.219].
- Optional filing in portable document format (.pdf) as attachments to e-mail [see 46 C.F.R. § 67.218].

For a procedural guide to the satisfaction of these general requirements, see § 102D.131.

[2] FORM

Bill of Sale of Vessel [CG-1340]

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[Reserved]

§§ 102D.222[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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D. Aircraft

32-102D California Legal Forms--Transaction Guide § 102D.230

§ 102D.230 Aircraft Registration Application [AC Form 8050-1]

[1] Form

[a] Use of Form

This form is a reproduction of the official Aircraft Registration Application which must be used to register an aircraft with the Federal Aviation Administration (FAA). An aircraft must be registered with the FAA before it may be operated within the United States [49 U.S.C. § 44101(a); *see* 49 U.S.C. § 44101(b); 14 C.F.R. § 47.3(a) (eligibility for registration); *see also* [b], *below*].

The actual FAA form is in triplicate, with colored copies separated by carbon paper. Thus, the form reproduced here is illustrative only; when an aircraft is registered with the FAA, the actual triplicate form should be obtained from the agency [*see* [c][ii], *below*].

[b] Eligibility for Registration

An aircraft is eligible for registration if it meets any of the following criteria [49 U.S.C. § 44102(a)]:

- It is not registered under the laws of any foreign country and is owned by a United States citizen, or a lawfully admitted permanent resident; or
- It is not registered under the laws of any foreign country, is owned by a corporation (other than a corporation that is a United States citizen) lawfully organized and doing business under the laws of the United States or any state, and is based and primarily used in the United States; or
- It is owned by the federal government; a state, territory, or possession of the United States, or a political subdivision of any of these; or the District of Columbia.

Aircraft engines, propellers, and appliances may also be registered [*see* 49 U.S.C. § 44104(1)]. For further discussion of

eligibility requirements, see § 102D.103.

[c] Application Procedure

[i] Registration by Owner

An aircraft may be registered only by and in the legal name of its owner [14 C.F.R. § 47.5(b); see 49 U.S.C. § 44103(a)(1) (registration of aircraft in general)]. For these purposes, "owner" includes a buyer in possession, a bailee, a lessee of an aircraft under a contract of conditional sale, and the assignee of that person [14 C.F.R. § 47.5(d)]. For further discussion, see § 102D.103, P 2.

[ii] Preparation

The official Aircraft Registration Application is printed in triplicate with white, green, and pink copies. The required information should be typewritten or printed, and the signatures must be in ink [see [f], [2], *below* (aircraft registration information)]. The FAA will reject the application when any form is not completed, or when the name and the signature of the applicant are not the same throughout [14 C.F.R. § 47.31(a)]. Further, the name of the applicant should be identical to the name of the purchaser shown on the applicant's evidence of ownership [see 14 C.F.R. § 47.5(b); see also [2], *below* (aircraft registration information)].

The FAA will also reject applications that do not contain the physical address of the applicant. If a post office box or mail drop address is used for mailing purposes, a physical location or physical address must also be shown on the application [see *FAA Notice, 59 Fed. Reg. 53013 (Oct. 20, 1994)*]. The FAA sends a notice to that effect (not reproduced here, but quoted essentially verbatim in the preceding sentence) along with the application.

[iii] Submission of Application Materials to FAA

An owner-applicant must submit the official application [see [2], *below*], evidence of ownership [see 14 C.F.R. §§ 47.11, 47.33, 47.35, 47.37; see also § 102D.140, PP 2-5], and the application fee [see 14 C.F.R. § 47.17] to the FAA Aircraft Registry [14 C.F.R. § 47.31(a)]. The name of the applicant should be identical to the name of the purchaser shown on the applicant's evidence of ownership [see 14 C.F.R. § 47.5(b); see also [2], *below* (aircraft registration information)].

The application materials must be mailed to the FAA Aircraft Registry, Department of Transportation, Post Office Box 25504, Oklahoma City, OK 73125, or delivered to 6400 South MacArthur Boulevard, Oklahoma City, Oklahoma [14 C.F.R. § 47.19; see [2], *below* (aircraft registration information)]. For a step-by-step guide to the application process, see § 102D.140.

[iv] Temporary Authority to Operate Aircraft

The applicant must carry the pink copy in the aircraft as temporary authority to operate the aircraft without registration [14 C.F.R. §§ 47.3(b)(2), 47.31(c)]. This authority is valid until the date the applicant receives a Certificate of Aircraft Registration [see AC Form 8050-3] or until the date the FAA denies the application but in no case for more than 90 days after the date the applicant signs the application. If the FAA does not issue a certificate or deny the application within that 90-day period, the FAA Aircraft Registry will issue a letter of extension that serves as authority to continue to operate the aircraft without registration. This letter of extension must also be carried in the aircraft [14 C.F.R. § 47.31(b)].

The FAA has issued a legal opinion stating that the possession of the pink copy of the Aircraft Registration Application does not permit the operation of an aircraft outside the territory of the United States prior to receipt of the Certificate of Aircraft Registration. To ease the burden imposed by this prohibition on persons seeking registration of aircraft used in

international operations, located outside the United States, or both, the FAA will telex a copy of the Certificate of Aircraft Registration to the registered owner, on the owner's request, once it has confirmed the information contained in the *Application* [53 Fed. Reg. 50208, 50209 (Dec. 14, 1988)] .

[d] Change of Address

This form may also be used to notify the FAA Aircraft Registry of a registrant's change of address. Any change in the permanent address of an aircraft owner must be reported to the FAA within 30 days of the change. The FAA will then issue a revised Certificate of Aircraft Registration at no charge [14 C.F.R. § 47.45]. If a post office box or mail drop address is used for mailing purposes, the registrant's physical location or physical address must be shown on the application [see [c][ii], *above*].

[e] Identification Number

The applicant must place a United States identification number ("registration mark") on this application and on any evidence submitted with the application [14 C.F.R. § 47.15(a)]. In the case of an aircraft not previously registered anywhere, the applicant must obtain the U.S. identification number from the FAA Aircraft Registry by submitting a written request that (1) describes the aircraft by make, type, model, and serial number [*but see* 14 C.F.R. § 47.33(b) (alternative requirements for amateur-built aircraft)] and (2) states that the aircraft has not previously been registered anywhere. If the aircraft was brought into the United States from a foreign country, the applicant must submit evidence that it has never been registered in a foreign country [14 C.F.R. § 47.15(a)(1)]. Different requirements apply to aircraft that were last previously registered in the U.S. [see 14 C.F.R. § 47.15(a)(2)] or in a foreign country [see 14 C.F.R. § 47.15(a)(3)].

These identification number requirements do not apply to an aircraft manufacturer that applies for a group of U.S. identification numbers [see 14 C.F.R. § 47.15(c)], a person who applies for a special identification number [see 14 C.F.R. § 47.15(d)-(g)], or a holder of a Dealer's Aircraft Registration Certificate who applies for a temporary registration number [14 C.F.R. § 47.15(a); see 14 C.F.R. § 47.16 (temporary number)].

[f] Signature

The owner must sign the application (and supporting documentation, as appropriate) in ink [14 C.F.R. § 47.13(a)]. Additional signature requirements apply in the following situations [see 14 C.F.R. § 47.13(b)-(f); see also § 102D.140, P 6]:

- One or more persons doing business under a trade name submit the application.
- An agent submits the application on behalf of the owner of the aircraft.
- The applicant is a corporation.
- The applicant is a partnership.
- Co-owners who are not engaged in business as partners submit the application.

[g] Certificate of Aircraft Registration

An aircraft is registered on the date and at the time the FAA Aircraft Registry receives the required application materials [14 C.F.R. § 47.39(a); see 14 C.F.R. §§ 47.33, 47.35 (required materials); *but see* 14 C.F.R. §§ 47.37, 47.39(b) (special requirements applicable to aircraft last previously registered in foreign country)]. The Administrator of the FAA will issue a Certificate of Aircraft Registration to the owner [see 49 U.S.C. § 44103(a)(1)(B); see also 14 C.F.R. § 47.31(a)].

For further discussion, see § 102D.14[4].

[h] Termination of Registration

[i] In General

A Certificate of Aircraft Registration issued by the FAA is effective, unless suspended or revoked [see [ii], *below*], until one of the following events occurs [14 C.F.R. § 47.41(a)]:

- The aircraft is registered under the laws of a foreign country;
- The registration is cancelled at the written request of the holder of the certificate;
- The aircraft is totally destroyed or scrapped;
- The ownership of the aircraft is transferred;
- The holder of the certificate loses his or her United States citizenship, or loses his or her resident alien status without becoming a United States resident; or
- Thirty days have elapsed since the death of the holder of the certificate.

If the owner of the aircraft is a corporation that is not a citizen of the United States, the registration terminates when the corporation ceases to be lawfully organized and doing business under the laws of the United States or any state, or at the end of a six-month period [see 14 C.F.R. § 47.9(b) (date from which six-month period is calculated)] during which the aircraft was not based and used primarily in the United States [14 C.F.R. § 47.41(a)(8)]. If the aircraft is registered in the name of a trustee, the registration terminates when the trustee loses United States citizenship, loses resident alien status without becoming a United States citizen, or in any manner ceases to act as the trustee and is not immediately replaced by another who meets the requirements for trustee registrants [14 C.F.R. § 47.41(a)(9); see 14 C.F.R. § 47.7(c) (trustee requirements)].

The Certificate of Aircraft Registration must be returned to the FAA Aircraft Registry, with the reverse side completed, on termination of registration [14 C.F.R. § 47.41(b)]. In most cases, the holder of the certificate must return it [see 47 C.F.R. § 47.41(b)(1)-(3)].

[ii] Suspension and Revocation

The Administrator of the FAA may suspend or revoke a Certificate of Aircraft Registration when the aircraft no longer meets the requirements for registration [49 U.S.C. § 44105]. The Administrator will revoke a certificate if the Administrator determines that the owner of the registered aircraft used or knowingly permitted the use of the aircraft to carry out or facilitate an activity that is punishable by death or by imprisonment for a term exceeding one year under a state or federal law relating to a controlled substance (except a law relating to simple possession of a controlled substance) [49 U.S.C. § 44106(b)(1); see 49 U.S.C. § 44106(b)(2) (when owner who is not an individual is deemed to have knowingly permitted proscribed activity); see also 49 U.S.C. § 44106(c), (d) (applicable notice, hearing, and appeal requirements); 21 U.S.C. § 802(6) ("controlled substance" defined)]. However, the Administrator may not revoke a Certificate of Registration on this basis if the holder of the certificate is acquitted of all charges related to a controlled substance in an indictment or information arising from the activity [49 U.S.C. § 44106(e)(1); see 49 U.S.C. § 44106(e)(2) (reissuance of certificate to person following revocation)].

[i] Inspection of Registration

The operator of an aircraft must make the Certificate of Aircraft Registration available for inspection on the request of any federal, state, or local law enforcement officer [49 U.S.C. § 44103(d)].

[2] FORM

Aircraft Registration Application [AC Form 8050-1]

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For related research and practice materials, see the following legal topics:

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102D REGISTRATION AND TRANSFER OF VEHICLES, VESSELS, AND AIRCRAFT
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32-102D California Legal Forms--Transaction Guide § 102D.231

§ 102D.231 Bill of Sale of Aircraft [AC Form 8050-2]

[1] Comment

[a] Use of Form

This form is a bill of sale for an aircraft. It was prepared by the Federal Aviation Administration (FAA) and is a suggested bill of sale form that meets the recording requirements of aircraft titles and security documents [*see 14 C.F.R. §§ 47.31(a)(2), 47.33(a)(2), 47.35(a), 47.37(a)(2)* (AC Form 8050-2 or equivalent bill of sale acceptable as evidence of ownership); [2], *below* (aircraft bill of sale information); *see also 14 C.F.R. § 49.1 et seq.* (recording requirements)].

For general requirements governing the contents of any document that is to be recorded by the FAA, *see § 102D.141*.

The sale or transfer of an aircraft typically involves the use of one of two types of documents. A bill of sale is ordinarily used if the transaction involves an outright transfer of title to the buyer. If the seller retains title to the aircraft as security for the performance of the purchase agreement, a contract of conditional sale is normally used. For coverage of conditional sale contracts, *see §§ 102D.140, P 2a, b, 102D.141, P 3*.

A bill of sale or contract of conditional sale may be submitted along with an Application for Aircraft Registration as evidence of ownership of the aircraft to be registered [*see 14 C.F.R. §§ 47.11, 47.33, 47.35, 47.37; see also 102D.230[1][c][iii]*]. For a complete list of the other acceptable types of evidence of ownership, *see § 102D.140, PP 2-5*.

[b] Preparation of Form

This form must be prepared in duplicate. The actual form supplied by the FAA is a duplicate form with carbon paper. The official instructions to the form provide that all entries must be typewritten or printed and that the name of the purchaser must be identical to the name of the applicant shown on the application for aircraft registration [*see [2], below* (aircraft bill of sale information)]. If a trade name is shown as the purchaser or seller, the name of the individual owner or co-owners must be included [*see [2], below* (aircraft bill of sale information)]. The original copy of the form should be submitted [*see [2], below*]. The signatures must be in ink [*14 C.F.R. § 49.13(a); see 14 C.F.R. § 49.13(b)-(f)*].

(additional execution requirements); *see also* § 102D.230[1][f]]. If the carbon copy of the form is submitted, it must be signed in ink [see [2], *below*].

[c] Required Submissions With Form

If the aircraft was not purchased from its last registered owner, conveyances completing the chain of ownership from the last registered owner through all intervening owners must be submitted with the bill of sale [14 C.F.R. § 49.35].

[d] Recording of Form

[i] In General

Any conveyance that affects the title to or any interest in registered civil aircraft in the United States (or certain major aircraft components), including a bill of sale [see 14 C.F.R. § 49.31(a)], may be recorded [49 U.S.C. § 44107(a); 14 C.F.R. § 49.1(a); *see* 14 C.F.R. § 49.31 (nonexclusive list of recordable conveyances)]. For a complete list of documents eligible for recording, *see* § 102D.103, P 4.

[ii] Effect of Recording

Until a conveyance, lease, or instrument executed for security purposes is filed for recording with the FAA Aircraft Registry, the instrument is valid only against the person making the conveyance, lease, or instruments, that person's heirs, and a person having actual notice of the conveyance, lease, or instrument [49 U.S.C. § 44108(a)]. The recording of a conveyance is not a decision by the FAA that the instrument does in fact affect title to, or an interest in, the aircraft or other property covered by the instrument [14 C.F.R. § 49.17(c)].

Federal law preempts any state law under which a transfer without a recordable conveyance would be held to be valid against innocent transferees or lienholders who have recorded a transfer [*Philko Aviation, Inc. v. Shackel* (1983) 462 U.S. 406, 409-412, 103 S. Ct. 2476, 76 L. Ed. 2d 678 (construing former 49 U.S.C. § 1403(c))]. To avoid the potentially harsh consequences of these rules, before completing the transaction, a purchaser of an aircraft should either search the FAA's records, or hire a title search company or an attorney to do so, in order to determine whether any conveyances or encumbrances affecting the title to the aircraft have been recorded. The FAA maintains a list of firms engaged in the business of conducting aircraft title searches (AC Form 8050-55) and will provide the list on request.

[iii] Required Contents and Format

A bill of sale cannot be recorded unless it satisfies certain requirements relating to its format and contents. First, it must be in a form prescribed by, or acceptable to, the Federal Aviation Administrator [14 C.F.R. § 49.33(a)]. Second, the bill of sale must be an original document or a duplicate original, or a true copy if neither the original nor a duplicate original is available [14 C.F.R. § 49.33(c)]. Third, the instrument must describe the aircraft by the following information [14 C.F.R. § 49.33(b)]:

- Make and model.
- Manufacturer's serial number.
- United States registration number [see 14 C.F.R. § 49.33(d) (aircraft must be registered)].
- Other details that make identification possible.

A recording fee also must accompany the bill of sale [14 C.F.R. § 49.33(e); *see* 14 C.F.R. § 49.15 (fees charged)].

[iv] Execution

Every signature on a bill of sale or other document that is to be recorded with the FAA must be in ink [14 C.F.R. § 49.13(a)]. Additional execution requirements apply when the instrument is made by, or on behalf of one or more persons doing business under a trade name; an agent; a corporation; a partnership; a co-owner; or an unincorporated association [see 14 C.F.R. § 47.13(b)-(f); see also § 102D.141, P 1].

[v] Recording Procedure

To be recorded, a bill of sale or other conveyance must be either mailed to the FAA Aircraft Registry, Department of Transportation, P.O. Box 25504, Oklahoma City, OK 73125, or delivered to the Registry at 6425 S. Denning Ave., Oklahoma City, OK 73169 [14 C.F.R. § 49.11].

The bill of sale is filed for recordation on the date and at the time it is received by the Registry [14 C.F.R. § 49.19]. If the person submitting the form for recordation wants the original returned to him or her, he or she must submit to the Registry a copy of the original (in addition to the original) and a certification that the copy has been compared with the original and is a true copy. The Registry then records the document, keeps the copy, and returns the original to the applicant. The original is stamped with the date and time of recording [14 C.F.R. § 49.21].

For further discussion of the steps necessary to record various conveyances with the FAA, see § 102D.141.

[2] FORM**Bill of Sale of Aircraft [AC Form 8050-2]**

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32-102D California Legal Forms--Transaction Guide § 102D.232

§ 102D.232 Certificate of Repossession of Encumbered Aircraft [AC Form 8050-4]

[1] Comment

[a] Use of Form

This form is a certificate of repossession of an encumbered aircraft. This certificate (or an equivalent) must accompany an Application for Aircraft Registration [see § 102D.230[2]] when the aircraft has been repossessed or otherwise seized [see [b] below; see also § 102D.140, P 2c]. The form is available from the Federal Aviation Administration (FAA) and meets the FAA's recording requirements [see 14 C.F.R. §§ 49.31, 49.33(a)].

[b] Registration Following Repossession

If an aircraft has been repossessed or seized pursuant to the provisions of a mortgage or a contract of conditional sale, the reposessor must complete this form or an equivalent form that states that the aircraft was repossessed or otherwise seized under the applicable security agreement and under applicable local law [14 C.F.R. § 47.11(b)(1)]. If this form is used, the required information should be either typewritten or printed. All signatures must be in ink [14 C.F.R. § 47.13(a)].

The completed form should be sent to the FAA Aircraft Registry, along with the official Aircraft Registration Application [see § 102D.230[2]] and the appropriate recording and registration fees [14 C.F.R. §§ 47.5(a), 47.11(b)(1), 49.15]. The reposessor-applicant must also submit the original or a certified copy of the security agreement under which the aircraft was repossessed, unless that agreement is already recorded with the FAA Aircraft Registry [14 C.F.R. § 47.11(b)(2); see 14 C.F.R. § 49.21 (certified copies)]. If the repossession was accomplished through foreclosure proceedings resulting in sale, the applicant must also submit a bill of sale that states that the sale was made under applicable local law and is signed by the sheriff, auctioneer, or other authorized person who conducted the sale [14 C.F.R. § 47.11(b)(3); see § 102D.231[1][a], [2]]. The mailing address of the Registry is P.O. Box 25504, Oklahoma City, OK 73125 [14 C.F.R. § 47.19].

[2] FORM

Certificate of Repossession of Encumbered Aircraft [AC Form 8050-4]

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32-102D California Legal Forms--Transaction Guide § 102D.233

§ 102D.233 Notice of Recording and Release of Conveyance Securing Obligation on Aircraft [AC Form 8050-41]

[1] Comment

[a] Use of Form

This form is (1) an acknowledgment that a security conveyance covering an aircraft has been recorded with the Federal Aviation Administration (FAA) Aircraft Registry [see [2], Part I, *below*] and (2) a suggested form of release of the collateral from the terms of the conveyance [see [2], Part II, *below*]. Both of these uses are discussed below.

[b] Notice of Recordation of Conveyance

Until a conveyance, lease, or instrument executed for security purposes is filed for recording with the FAA Aircraft Registry, the instrument is valid only against the person making the conveyance, lease, or instruments, that person's heirs, and a person having actual notice of the conveyance, lease, or instrument [49 U.S.C. § 44108(a); see § 102D.231[1][d]]. Part I of this form acknowledges the recordation of a security conveyance affecting an aircraft. When the conveyance is filed for recording, the Registry completes that part and mails the form to the secured party if that party has provided a mailing address.

[c] Release

Part II of this form is a suggested form of release which should be completed by the secured party and returned to the Registry when the terms of the conveyance have been satisfied. When an obligation secured by an aircraft has been satisfied or any of the encumbered aircraft has been released from the conveyance, the secured party must immediately execute a release [14 C.F.R. § 49.17(d)(5); see 14 C.F.R. § 49.55 (recording of releases)]. If the debt is secured by more than one aircraft and all of the collateral is released, the collateral need not be described in detail in the release. However, the original conveyance must be clearly described in enough detail to identify it [14 C.F.R. § 49.17(d)(5)]. This description must include the date of the conveyance, the names of the parties, the date of FAA recording, and the recorded conveyance number [14 C.F.R. § 49.17(d)(5)]. After completing the release, the secured party must sign it in ink [14 C.F.R. § 49.13(a)] and send it to the Registry for recording [14 C.F.R. § 49.17(d)(5)]. The Registry's mailing

address is P.O. Box 25504, Oklahoma City, OK 73125 [14 C.F.R. § 49.11].

The use of this official FAA form is optional; the secured party may chose to use an equivalent form [see 14 C.F.R. § 49.17(d)(5)].

The form need not be acknowledged, unless required by local law [14 C.F.R. § 49.13(c)]. California law does not require acknowledgment [see *International Atlas Services, Inc. v. Twentieth Century Aircraft Co.* (1967) 251 Cal. App. 2d 434, 440, 59 Cal. Rptr. 495 (federal government has fully occupied field of recordation of interests in aircraft and of rights derived from recordation); *Pope v. National Aero Finance Co.* (1965) 236 Cal. App. 2d 722, 732, 46 Cal. Rptr. 233, cert. denied, 389 U.S. 1038 (1968) (recording and registration of documents affecting title of aircraft are governed by federal statute rather than by state laws)].

There is no fee for recording a release [14 C.F.R. §§ 49.15(b), 49.33(e)].

[2] FORM

Notice of Recording and Release of Conveyance Securing Obligation on Aircraft [AC Form 8050-41]

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102E SALES AND LOANS OF ARTWORK

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§ 102E.syn Synopsis to Chapter 102E: SALES AND LOANS OF ARTWORK

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§ 102E.12 Consignment of Fine Art

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[1] Facts

Scope

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Scope

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Scope

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§ 102E.200 Invoice and Certificate of Authenticity for Sale of Fine Art Multiple

[1] Comment

[a] Use of Form

[b] Required Disclosures

[c] Timing of Disclosure

[d] Liability for False or Inadequate Disclosures

[e] Sale Contract Requirements

[2] FORM

Invoice and Certificate of Authenticity for Sale of Fine Art Multiple

§ 102E.201 Art Dealer's Notice Concerning Disclosure Requirements

[1] Comment--Use of Form

[2] FORM

Art Dealer's Notice Concerning Disclosure Requirements

§ 102E.202 Charitable Organization's Disclaimer of Knowledge of Information

[1] Comment--Use of Form

[2] FORM

Charitable Organization's Disclaimer of Knowledge of Information

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§ 102E.210 Consignment Agreement

[1] Comment

[a] Use of Form

[b] Definitions

[c] Waivers Void

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[2] FORM

Consignment Agreement Between Artist and Art Dealer

§ 102E.211 Provision for Sale of Artwork Based on Appraisal

[1] Comment

[a] Use of Form

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[2] FORM

Provision for Sale of Artwork Based on Appraisal

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§ 102E.220 Agreement for Loan of Artwork to Museum

[1] Comment--Use of Form

[2] FORM

Agreement for Loan of Artwork to Museum

§ 102E.221 Agreement for Loan of Artwork to Museum for Indefinite Term or Longer Than Seven Years

[1] Comment

[a] Use of Form

[b] Conservation or Disposition

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[d] Manner of Notice

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[2] FORM

Agreement for Loan of Artwork to Museum for Indefinite Term or Longer Than Seven Years

§ 102E.222 Notice of Intent to Preserve Interest in Artwork on Loan to Museum

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[a] Use of Form

[b] Contents of Notice

[c] Museum's Responsibilities

[d] Owner's Responsibilities

[e] Procedure for Giving Notice

[2] FORM

Notice of Intent to Preserve Interest in Artwork on Loan to Museum

§ 102E.223 Receipt for Notice of Intent to Preserve Interest in Artwork on Loan to Museum

[1] Comment--Use of Form

[2] FORM

Receipt for Notice of Intent to Preserve Interest in Artwork on Loan to Museum

§ 102E.224 Museum's Rejection of Notice of Intent to Preserve Interest in Artwork

[1] Comment

[a] Use of Form

[b] Museum's Responsibilities

[2] FORM

Museum's Rejection of Notice of Intent to Preserve Interest in Artwork

§ 102E.225 Museum's Notice That Borrowed Artwork Requires Conservation or Disposition

[1] Comment

[a] Use of Form

[b] Conservation or Disposition of Borrowed Artwork Without Lender's Consent

[2] FORM

Museum's Notice That Borrowed Artwork Requires Conservation or Disposition

§ 102E.226 Museum's Notice by Publication That Borrowed Artwork Requires Conservation or Disposition

[1] Comment

[a] Use of Form

[b] Conservation or Disposition Without Lender's Permission

[c] Contract Prohibiting Conservation or Disposition

[d] Museum's Lien and Liability for Injury or Loss

[2] FORM

Museum's Notice by Publication That Borrowed Artwork Requires Conservation or Disposition

§ 102E.227 Museum's Notice That Borrowed Artwork Was Damaged or Lost

[1] Comment--Use of Form

[2] FORM

Museum's Notice That Borrowed Artwork Was Damaged or Lost

§ 102E.228 Museum's Notice by Publication That Borrowed Artwork Was Damaged or Lost

[1] Comment

[a] Use of Form

[b] Limitation of Lender's Action Against Museum

[c] Museum's Duty on Receiving Communication From Lender

[d] Limitation of Lender's Action

[2] FORM

Museum's Notice by Publication That Borrowed Artwork Was Damaged or Lost

§ 102E.229 Museum's Notice to Terminate Loan of Artwork

[1] Comment

[a] Use of Form

[b] Limitation of Lender's Action to Recover Artwork

[2] FORM

Museum's Notice to Terminate Loan of Artwork

§ 102E.230 Museum's Notice of Intent to Report Borrowed Artwork as Unclaimed Property

[1] Comment--Use of Form

[2] FORM

Museum's Notice of Intent to Report Borrowed Artwork as Unclaimed Property

§ 102E.231 Lender's Notice of Change of Address or Change in Ownership of Artwork

[1] Comment--Use of Form

[2] FORM

Lender's Notice of Change of Address or Change in Ownership of Artwork



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32-102E California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter discusses and provides forms for use in sales and loans of works of art, meaning products of the fine arts rather than industrial or mechanical arts or literary arts (including musical composition). This chapter does not relate to machinery, tools, vehicles, musical instruments, or other items of the kind that can be patented, nor does it relate to architecture. However, the works of art dealt with in this chapter include examples of creative endeavor that a museum or gallery of art is likely to display, even if they are products of industrial or mechanical arts (for example, armor, antiques, oriental rugs, ancient vases, and other relics). The chapter contains discussions of the following topics, along with the following forms:

- Consignment of fine art: forms are a consignment agreement for the exhibition and sale of works of fine art and a provision for sale based on appraisal;
- Sales of fine art multiples: forms are an invoice and certificate of authenticity, an art dealer's notice concerning disclosure requirements, and a charitable organization's disclaimer of knowledge of specified information;
- The artist's royalty rights in fine art; and
- Loan of a work of art to a museum, including the rights of the museum and the lender in the work, how a lender can preserve its interest in the work, and the circumstances under which title to an unclaimed work vests in the museum: forms are loan agreements and various notices for use by both the museum and the lender.

For coverage of contracts generally, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* . For coverage of sales of goods generally, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* . Consignment agreements are discussed generally in Ch. 91, *Contracts With Sales Representatives*.

For coverage of gifts of works of art to museums or other institutions, see Ch. 60, *Estate Planning* , Ch. 60A, *Gifts* , and Ch. 67, *Future Interests and Perpetuities* .



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§ 102E.01 California Sources

[1] Statutes

Assignment or transfer of fine art.

Definitions. *Civ. Code §§ 982(d), 997.*

Rights retained or transferred. *Civ. Code § 982(c).*

Royalty rights of artist from resale of fine art; waiver and assignment of rights. *Civ. Code § 986.*

Conveyance of right to reproduce or display.

Definitions. *Civ. Code § 988(a).*

Ownership of work of art is reserved in artist or owner after conveyance of right to reproduce or display work. *Civ. Code § 988(b).*

California Art Preservation Act.

General provisions. *Civ. Code § 987.*

Injunctive relief to restore or preserve fine art work. *Civ. Code § 989(c).*

Consignment of fine art.

Definitions. *Civ. Code §§ 997, 1738.*

General provisions. *Civ. Code § 1738.5 et seq.*

Sales of fine art multiples. *Civ. Code § 1740 et seq.*

Deposits.

In general. *Civ. Code § 1813 et seq.*

Deposits for keeping. *Civ. Code § 1833 et seq.*

Loans.

Loans for use or bailment. *Civ. Code § 1884 et seq.*

Loans of property to museums for long or indefinite term. *Civ. Code § 1899 et seq.*

Statute of limitations for taking, detaining, or injuring goods or chattels. *Code Civ. Proc. § 338.*

Unclaimed Property Law. *Code Civ. Proc. § 1500 et seq.*

Dixon-Zenovich-Maddy California Arts Act of 1975. *Gov. Code § 8750 et seq.*

County museum's authority to buy artwork. *Pub. Res. Code § 5120 et seq.*

[2] Attorney General Opinions

Property tax assessment of works of art on consignment to galleries or dealers. *61 Ops. Cal. Atty. Gen. 84 (1978)* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Subject MatterGeneral OverviewGovernmentsFederal GovernmentGeneral OverviewGovernmentsState & Territorial GovernmentsGeneral Overview



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§ 102E.02 Federal Statutes

Importation or shipment of specimens for museums. *18 U.S.C. § 42.*

Legal Topics:

For related research and practice materials, see the following legal topics:

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B. Secondary Sources

32-102E California Legal Forms--Transaction Guide § 102E.05

§ 102E.05 Law Reviews

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Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Subject MatterGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral Overview



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32-102E California Legal Forms--Transaction Guide § 102E.06

§ 102E.06 Annotations

Annot., Artist's Speech and Due Process Rights in Artistic Production Which Has Been Sold to Another, 93 A.L.R. Fed. 912 (1989) .

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Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 102E.07 Text References

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Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

Ch. 60, *Estate Planning* .

Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

Ch. 91, *Contracts With Sales Representatives* .

Ch. 102C, *Lost and Unclaimed Property* .

CALIFORNIA FORMS OF PLEADING AND PRACTICE (Matthew Bender).

Ch. 57, *Art*.

Ch. 93, *Bailments*.

Ch. 119, *Claim and Delivery*.

Ch. 252, *Escheat (Unclaimed Property)*

Ch. 355, *Lost and Unclaimed Property*.

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Vol. 1, 343, 344.

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Vol. 4, 3651.

Legal Topics:

For related research and practice materials, see the following legal topics:

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32-102E California Legal Forms--Transaction Guide § 102E.10

§ 102E.10 Governing Law

The consignment of fine art [*see Civ. Code §§ 997, 1738(b)* (definition)] is governed by *Civ. Code § 1738 et seq.* [*see § 102E.12*].

Sales of fine art multiples [*see Civ. Code § 1740* (definition)] are governed by *Civ. Code § 1740 et seq.* [*see § 102E.13*].

The right of reproduction after assignment and transfer of fine art [*see Civ. Code §§ 982(d)(1), 997* (definition)] is governed by *Civ. Code § 982(c)* [*see § 102E.14*].

The royalty rights of an artist from the sale of fine art are governed by *Civ. Code § 986* [*see § 102E.16*].

The reservation of ownership after conveyance of the right to reproduce or display a work of art is governed by *Civ. Code § 988* [*see § 102E.15*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 102E.11 Definitions of "Fine Art" and Related Terms

Civil Code definitions of "fine art" vary according to the purpose of the particular statute involved. For example, for purposes of the assignment or transfer of an artist's right (including right of reproduction) in a work, fine art is any work of visual art, including, but not limited to, the following [*Civ. Code § 982(d)(1)*]:

- A drawing, painting, sculpture, mosaic, or photograph.
- A work of calligraphy.
- A work of graphic art (including an etching, lithograph, offset print, silk screen, or a work of graphic art of like nature).
- Crafts (including crafts in clay, textile, fiber, wood, metal, plastic, and like materials).
- Mixed media (including a collage, assemblage, or any combination of the art media listed above).

Other definitions are provided in the following contexts:

- Definitions concerning the royalty rights of an artist from the sale of fine art are contained in *Civ. Code § 986(c)*.
- The definition of fine art for purposes of preservation is contained in *Civ. Code § 987(b)(2)*.
- For purposes of reservation of ownership rights when fine art is reproduced or displayed, the definition of fine art in *Civ. Code § 988(a)(2)* applies.
- Definitions concerning the consignment of fine art are contained in *Civ. Code § 1738(b)*.

- Definitions relating to the sale of fine prints and other fine art multiples are contained in *Civ. Code* § 1740.

In addition, in California, for any purpose, porcelain painting and stained glass artistry are considered fine art [*Civ. Code* § 997].

"Artist" is also variously defined as:

- A person who creates a work of fine art and who, at the time of resale, is a U.S. citizen or a resident of California who has resided in California for a minimum of two years [*Civ. Code* § 986(c)(1)].
- An individual who creates a work of fine art [*Civ. Code* § 987(b)(1)].
- A person who creates a work of fine art or, if that person is deceased, the creator's heir, legatee, or personal representative [*Civ. Code* § 1738(a)].
- The person who created, conceived of, or approved the image contained in or constituting the master used for reproductions [*Civ. Code* § 1740(d); see *Civ. Code* § 1740(c) ("master" means printing plate, stone, block, screen, photographic negative, or mold or other process relating to a sculpture, which contains an image used to produce fine art multiples)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-102E California Legal Forms--Transaction Guide § 102E.12

§ 102E.12 Consignment of Fine Art

[1] Governing Law

The statutes governing consignment of fine art [*Civ. Code § 1738 et seq.*] govern all consignments of fine art in California, except those made under a written contract executed before January 1, 1976 [*see Civ. Code §§ 1738.5, 1738.9*]. These statutes do not apply to contracts executed before that date unless the parties agree by mutual written consent that the statutory provisions apply or the contract is extended or renewed after that date [*Civ. Code § 1738.9*]. The statutes supersede any conflicting or inconsistent provisions of the Commercial Code regarding consignments of fine art [*Civ. Code § 1738.9*].

In addition, no trade custom, practice, or usage will preclude the creation of a consignment as provided by statute [*Civ. Code § 1738.5; see also [3], [4], below*].

[2] Definitions

The statutes governing consignment agreements between artists and art dealers cover agreements concerning fine art only [*see Civ. Code § 1738 et seq.*]. In this context, fine art is a painting, sculpture, drawing, work of graphic art (including an etching, lithograph, offset print, silk screen, or a work of graphic art of like nature), work of calligraphy, or work in mixed media (including a collage, an assemblage, or any combination of the media listed above) [*Civ. Code § 1738(b)*].

The artist is the person who created the work of fine art or, if that person is deceased, his or her heir, legatee, or personal representative [*Civ. Code § 1738(a)*].

An art dealer is a person engaged in the business of selling works of fine art, other than a person exclusively engaged in the business of selling goods at public auction [*Civ. Code § 1738(c)*].

A consignment of fine art is an agreement under which no title to, estate in, or right to possession of the work of fine art, superior to that of the artist, vests in the art dealer, notwithstanding the dealer's power or authority to transfer and

convey to a third person all of the artist's right, title, and interest in the work [*Civ. Code § 1738(e)*].

[3] Delivery Constitutes Consignment

Despite any custom, practice, or usage of the trade to the contrary, when an artist delivers, or causes to be delivered, a work of fine art of the artist's own creation to an art dealer in California for the purpose of exhibition or sale on a commission, fee, or other basis of compensation, the delivery and the dealer's acceptance of the work of fine art constitute a consignment, unless the delivery to the art dealer is pursuant to an outright sale for which the artist receives or has received full compensation for the work of fine art on delivery [*Civ. Code § 1738.5*].

[4] Effect of Consignment

A consignment of a work of fine art results in the following [*Civ. Code § 1738.6*]:

- The art dealer, after accepting delivery of the work of fine art, is an agent of the artist for the purpose of sale or exhibition of the consigned work of fine art within California.
- The work of fine art constitutes property held in trust by the dealer for the benefit of the consignor, and it is not subject to claims by a creditor of the dealer.
- The dealer is liable for loss of, or damage to, the work of fine art.
- The proceeds from the sale of the work of fine art constitute funds held in trust by the dealer for the benefit of the consignor. The proceeds must first be applied to pay any balance due the consignor, unless the consignor expressly agrees otherwise in writing.

[5] Sale of Work

If the art dealer sells the work, the dealer holds the funds in trust for the benefit of the artist. The proceeds of the sale are applied first to any balance owed by the dealer to the artist, unless the artist expressly agrees otherwise in writing [*Civ. Code § 1738.6(d)*].

Further, if an art dealer directly or indirectly buys the work for the dealer's own account, the work remains property held in trust, until the price is paid in full to the artist. If the work is resold to a bona fide buyer before the artist has been paid in full, the proceeds of the resale constitute funds held in trust by the dealer for the benefit of the artist, to the extent necessary to pay the balance due the artist. The trust continues until the fiduciary obligation of the art dealer with respect to the transaction is discharged in full [*Civ. Code § 1738.7*].

[6] Waivers Void

Any provision of a contract or agreement under which the consignor waives any right specified by *Civ. Code § 1738 et seq.* is void [*Civ. Code § 1738.8*].

[7] Dealer's Accounting Responsibilities

On the consignor's written demand, the dealer must provide a true written accounting that includes the description and quantity of any work sold under the consignment agreement, the sale price, and the name and address of the buyer; however, statements need not be provided for cash transactions of less than \$50. Failure to comply with this requirement is a misdemeanor. A dealer who willfully and corruptly makes, or causes to be made, to a consignor a false statement about the quality or quantity of, the price obtained for, or any expenditures made in connection with, any work of art covered by a consignment agreement between the parties is guilty of a misdemeanor [*Penal Code § 536*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 102E.13 Sale and Consignment of Fine Art Multiples

[1] Governing Law

Civ. Code § 1740 et seq. govern the sale of fine art multiples. The law covers not only prints but also photographs, sculpture casts, collages, and similar works of art produced in more than one copy. These are referred to as fine art multiples (or multiples) [see *Civ. Code § 1740(a)*].

[2] Definitions

A fine art multiple is any fine print, positive or negative photograph, sculpture cast, collage, or similar work of art produced in more than one copy. Pages or sheets taken from books and magazines and offered for sale or sold as works of art are included in this definition, but books and magazines are not [*Civ. Code § 1740(a)*]. A fine print (or a print) is a fine art multiple produced by (without limitation) engraving, etching, woodcutting, lithography, and serigraphy, or produced or developed from photographic negatives, or by any combination of these methods [*Civ. Code § 1740(b)*].

An artist is the person who created, conceived of, or approved the image contained in or constituting the printing plate, stone, block, screen, photographic negative, mold, or other process as to a sculpture containing an image, that is used to produce fine art multiples (that is, the master) [*Civ. Code § 1740(c), (d)*].

An art dealer is any individual, partnership, corporation, limited liability company, association, or other entity, however organized, that is in the business of dealing exclusively or nonexclusively in fine art multiples. It also includes anyone who by his or her occupation holds himself or herself out as having knowledge or skill peculiar to these works, or to whom that knowledge or skill may be attributed because of employment of an agent or other intermediary who by his or her occupation holds himself or herself out as having that knowledge or skill. Auctioneers who sell fine art multiples at public auction are considered art dealers, but consignors or principals of auctioneers are not, unless they are otherwise defined or treated as art dealers [*Civ. Code § 1740(g), (k)*].

[3] Sales Subject to Regulation

The provisions governing sales of fine art multiples [*see Civ. Code § 1740 et seq.*] apply to the sale of any fine art multiple when offered for sale or sold at wholesale or retail for \$100 or more, exclusive of any frame [*Civ. Code § 1741*].

[4] Required Disclosure of Information

[a] Disclosure by Art Dealer and Artist

Before sale or consignment of a fine art multiple into or from California, an art dealer must furnish to a buyer or consignee a written certificate of authenticity containing all specific and relevant details and descriptive information required by *Civ. Code § 1744* [*see [d], below; see also § 102E.210 (form)*]. The information must be clearly, specifically, and distinctly addressed to each of the items required by statute, unless the required data is not applicable. The information must be in writing and be given to the buyer or consignee at his or her request, or in any event before a sale or consignment. If a prospective buyer so requests, the information must be transmitted to him or her before the payment or placing of an order for a multiple. If payment is made by a buyer before delivery of a multiple, this information must be supplied at the time of or before delivery [*Civ. Code § 1742(a)*].

With respect to auctions, the required information may be furnished in catalogs or other written materials that are made readily available to consult and buy before the sale. However, a bill of sale, receipt, or invoice describing the transaction must then be provided that refers to the catalog and lot number in which the information was supplied [*Civ. Code § 1742(a)*].

If an artist sells or consigns a fine art multiple of his or her own creation or conception, the artist is also bound to disclose the information required by *Civ. Code § 1744* [*Civ. Code § 1742(e); see [d], below; § 102E.200 (form)*].

[b] Disclosure in Written Materials

An art dealer who solicits a buyer directly by inviting transmittal of payment for a specific multiple, in a catalog, prospectus, or flyer, or other written material or advertisement to be distributed in, into, or from California, must clearly set forth, in close proximity to the place in the material in which the fine art multiple is being described, the descriptive information required by *Civ. Code § 1744* [*Civ. Code § 1742(b); see [d], below*].

The art dealer may, in lieu of setting forth the information required by *Civ. Code § 1744*, supply the information to the buyer before or with the delivery of the fine art multiple [*Civ. Code § 1742(b); see § 102E.200 (form)*].

[c] Public Posting of Information

In each place of business in California in which an art dealer is regularly engaged in selling fine art multiples, the art dealer must post, in a conspicuous place, a sign that in legible format informs the general public that California law provides for the disclosure in writing of certain information concerning prints, photographs, and sculpture casts, and that the information is available to the public and may be requested by a prospective buyer before buying a fine art multiple [*Civ. Code § 1742(c); see § 102E.201 (form)*].

[d] Mandated Information

Except as provided below, the information required to be supplied in a written certificate of authenticity in all transactions for the sale or consignment of fine art multiples includes [*see Civ. Code § 1744(a)*]:

- The artist's name.
- If the artist's name appears on the multiple: a statement whether or not the multiple was signed by the

artist.

- A description of the medium or process.
- A statement concerning certain types of reproduction of an image produced in a different medium for a purpose other than the creation of the multiple.
- If the previous paragraph applies and the multiple is not signed: a statement whether or not the artist authorized or approved in writing the multiple or edition.
- Whether the purported artist was deceased at the time the master was made that produced the multiple.
- Whether the multiple is a "posthumous" multiple, that is, the master was created during the artist's life, but the multiple was produced after the artist's death.
- Whether the multiple was made from a master that produced a prior limited edition, and a statement of the total number of multiples, including proofs, of all other editions produced from that master.
- The year or approximate year the multiple was produced, for multiples produced after 1949.
- Whether the edition is being offered as a limited edition, and, if so, the authorized maximum number of signed or numbered, and unsigned and unnumbered, impressions in the edition, and the authorized maximum number of artist's proofs, publisher's proofs, other proofs, if any, outside of the regular edition, and the total size of the edition.
- Whether the master was destroyed, effaced, altered, defaced, or canceled after the current edition.

These disclosure requirements are discussed in greater detail in § 102E.200[1][b].

In addition to the above information, every certificate of authenticity must contain the following statement: "This is to certify that all information and the statements contained herein are true and correct" [*Civ. Code* § 1740(j)].

More limited information is required for multiples produced during the years 1950 through 1982 [*see Civ. Code* § 1744(c)], in during the years 1900 through 1949 [*see Civ. Code* § 1744(d)], and before 1900 [*see Civ. Code* § 1744(e)].

[e] Exemption for Sale by Charitable Organization

A charitable organization that conducts a sale or auction of fine art multiples is exempt from the disclosure requirements of *Civ. Code* § 1744 if it posts in a conspicuous place, at the site of the sale or auction, a disclaimer of any knowledge of the information specified in the statute, and includes this disclaimer in any catalog distributed by the organization with respect to the sale or auction of fine art multiples. However, an art dealer used or employed by a charitable organization to conduct the sale or auction of fine art multiples is subject to all disclosure requirements regulating the sale of fine art multiples [*Civ. Code* § 1742.6].

[f] Art Dealer's Disclaimer of Knowledge

An art dealer offering fine art multiples by means of a catalog, prospectus, flyer, or other written material or advertisement distributed in, into, or from California, may disclaim knowledge about any relevant detail referred to in *Civ. Code* § 1744. However, the dealer must so state specifically and categorically with regard to each detail disclaimed,

so that the buyer will be able to judge the degree of uniqueness or scarcity of each fine art multiple contained in the edition offered [*Civ. Code* § 1742(d); see *Civ. Code* § 1744.7 (information disclosed is express warranty); [g], *below*].

Describing the edition as an edition of "reproductions" eliminates the need to furnish further informational details, unless the edition was allegedly published in a signed, numbered, or limited edition, or any combination thereof, in which case all of the mandated information must be furnished [*Civ. Code* § 1742(d)].

[g] Disclosure Creates Express Warranty

Whenever an art dealer furnishes the name of an artist pursuant to *Civ. Code* § 1744 for any time period after 1949, and otherwise furnishes information required under the statute for any time period relating to offers, sales, or consignments made to buyers other than art dealers, the information conveyed forms a part of the basis of the bargain and creates an express warranty for the information provided [*Civ. Code* § 1744.7; see *Civ. Code* § 1744(b) (statement of size of limited edition pursuant to *Civ. Code* § 1744(a)(10), discussed in [d], *above*, constitutes express warranty)]. The warranty is not negated or limited by the art dealer's failure to use the words "warrant" or "guarantee," or because the dealer did not have the specific intention or authority to make a warranty, or because any of the required statements represented only the dealer's opinion [*Civ. Code* § 1744.7].

The existence of a basis in fact for information warranted by virtue of *Civ. Code* § 1744.7 will not give rise to a defense in an action to enforce a given warranty. However, with respect to photographs and sculptures produced before 1950, and other fine art multiples produced before 1900, the required information given that relates to (1) the description of the medium or process of production of the multiple, (2) reproduction of an image produced in a different medium, (3) whether the reproduction of the image from a different medium was authorized or approved by the artist, or (4) whether the purported artist was deceased at the time the master was made that produced the multiple, will be sufficient if a reasonable basis in fact existed for the information provided [*Civ. Code* § 1744(a)(3)-(6)]. When information is not supplied relating to any subdivision or paragraph of *Civ. Code* § 1744 because the subdivision or paragraph is not applicable, this constitutes an express warranty that the paragraph is not applicable [*Civ. Code* § 1744.7].

[h] Liability of Consignor, Agent, or Other Seller

An artist or art dealer who consigns a multiple to an art dealer for the purpose of effecting a sale of the multiple does not incur any liability to a buyer if the consignor, as to the consignee, has complied with *Civ. Code* § 1740 *et seq.* [*Civ. Code* § 1744.9(a)].

When an art dealer has agreed to sell a multiple on behalf of a consignor who is not an art dealer, or an artist has not consigned a multiple to an art dealer, but the art dealer has agreed to act as the agent for an artist for the purpose of supplying the information required, the art dealer incurs the liabilities of other art dealers as prescribed by *Civ. Code* § 1740 *et seq.*, as to a buyer [*Civ. Code* § 1744.9(b)].

An art dealer, including a dealer consignee, who offers or sells a fine art multiple in, into, or from California without providing the certificate of authenticity required in *Civ. Code* §§ 1742 and 1744 [see [a]-[g], *above*], is liable to the buyer of the multiple. Liability also occurs if the information provided is mistaken, erroneous, or untrue, except for harmless errors. The buyer may sue to recover the consideration paid for the multiple, together with interest at the legal rate, once the fine art multiple is returned in the condition in which it was received [*Civ. Code* § 1745(a); see *Civ. Code* § 1745(e) (remedy does not preclude suit for damages or exercise of other remedies)].

Willful violations of the disclosure statutes may expose an art dealer to liability for three times the price plus interest [*Civ. Code* § 1745(b)]. Actions to enforce an art dealer's liability must be brought within one year after discovery of the violation, and in no event more than three years after the sale [*Civ. Code* § 1745(c); see *Civ. Code* § 1745(d) (costs and fees to prevailing party); see also *Civ. Code* § 1745(f) (disclaimer of knowledge as defense)]. Injunctive relief and civil

penalties are also available [*see Civ. Code § 1745.5*].

The remedies provided by *Civ. Code §§ 1745 and 1745.5* are not a bar to, nor inconsistent with, a claim for damages or the exercise of additional remedies otherwise available to the buyer [*Civ. Code § 1745(e)*].

If the consignor, agent, or other seller is a merchant [*see Com. Code § 2104(1)* (definition)] with respect to fine art multiples, or if both parties are merchants, then additional remedies under the Commercial Code may be available [*see Com. Code § 2102*].

For detailed discussion of remedies and forms for complaints, see CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 57, Art (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Subject MatterGeneral Overview



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32-102E California Legal Forms--Transaction Guide § 102E.14

§ 102E.14 Right of Reproduction After Assignment and Transfer of Fine Art

When a work of fine art is transferred, whether by sale or on commission, or otherwise, by or on behalf of the artist who created it, or by that artist's heir, legatee, or personal representative, the right of reproduction of that work is reserved to the artist or his or her heir, legatee, or personal representative until it passes into the public domain by act or operation of law, unless that right is expressly transferred by a document in writing. Any such document must refer to the specific right of reproduction and be signed by the owner of the rights conveyed or that person's authorized agent. If the transfer is pursuant to an employment relationship, the right of reproduction is transferred to the employer, unless it is expressly reserved in writing. If the transfer is pursuant to a legacy or inheritance, the right of reproduction is transferred to the legatee or heir, unless it is expressly reserved by will or codicil [*Civ. Code § 982(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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32-102E California Legal Forms--Transaction Guide § 102E.15

§ 102E.15 Reservation of Ownership After Conveyance of Right to Reproduce or Display

Ownership of the physical work of art remains with, and is reserved to, the artist or owner (as relevant) whenever an exclusive or nonexclusive conveyance of any right to reproduce, prepare derivative works based on, distribute copies of, publicly perform, or publicly display a work of art is made by or on behalf of the artist who created it or by or on behalf of the owner at the time of the conveyance. However, the right of ownership may be expressly transferred by an instrument, note, memorandum, or other writing, signed by the artist, owner, or the authorized agent of either [*Civ. Code § 988(b)*; see *Civ. Code § 988(a)* (artist and work of art defined)]. Any ambiguity with respect to the nature or extent of the rights conveyed must be resolved in favor of the reservation of rights by the artist or owner, unless in any given case the federal copyright law provides to the contrary [*Civ. Code § 988(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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32-102E California Legal Forms--Transaction Guide § 102E.16

§ 102E.16 Royalty Rights of Artist

[1] Limitations

The statute creating the artist's right to collect a royalty when his or her work is sold [*see* [2], *below*] applies only to works constituting fine art [*see Civ. Code § 986(a), (d)*]. For this purpose, fine art means an original painting, sculpture, or drawing, or an original work of art in glass [*Civ. Code § 986(c)(2)*].

[2] Royalty Due on Sale; Payment Procedures

With the exceptions discussed below [*see* [3], *below*], artists who are either U.S. citizens or California residents who have resided in California for a minimum of two years are entitled to collect a 5-percent royalty on the price of works of fine art that are sold in California or that are sold by a seller residing in California [*Civ. Code § 986(a), (c)(1)*]. This right may be waived only by a written contract providing for royalties in an amount in excess of 5 percent of the price [*Civ. Code § 986(a)*].

For artists who die after January 1, 1983, the right to collect royalty payments passes to the artist's heirs, legatees, or personal representative, until the 20th anniversary of the artist's death [*Civ. Code § 986(a)(7)*]. An artist may assign the right to collect royalty payments to another individual or entity; however, the assignment will not effect a waiver of the right [*Civ. Code § 986(a)*].

If a work of art is sold at an auction or by a gallery, dealer, broker, museum, or any other person acting as the agent of the seller, that agent must withhold 5 percent of the price, then locate the artist and pay the withheld amount to the artist [*Civ. Code § 986(a)(1)*]. Royalties held for payment to artists by sellers or agents are exempt from the enforcement of money judgments by creditors of the sellers and agents [*Civ. Code § 986(a)(6)*]. If the seller or his or her agent cannot pay the artist within 90 days after the sale, the royalties must be transferred to the California Arts Council [*Civ. Code § 986(a)(2)*]. The council deposits money received in the Special Deposit Fund in the State Treasury, and attempts to locate the artist. If the council does not locate the artist, and the artist does not file a written claim for the money within seven years after the sale, the artist's right to the money terminates, and the money is transferred to the council for use in acquiring fine art pursuant to the Art in Public Buildings program [*Civ. Code § 986(a)(4), (5)*; *see Gov. Code § 15813 et*

seq.].

[3] Exempt Transactions

The right to collect royalties on the sale of fine art does not apply to any of the following transactions [*Civ. Code* § 986(b)]:

- The initial sale of a work when legal title to the work is vested in the artist at the time of the sale.
- The resale of a work for a gross price of less than \$1,000, or the exchange of a work for one or more works of fine art or for a combination of cash, other property, and one or more works of fine art, when the fair market value of the property exchanged is less than \$1,000.
- Resale of a work after the death of the artist if the artist died on or before January 1, 1983.
- Resale of a work for a gross price less than the price paid by the seller.
- Resale of a work by an art dealer to a buyer within 10 years of the initial sale of the work to an art dealer, provided all intervening resales are between art dealers.
- Sale of a work of stained glass artistry when the work has been permanently attached to real property and is sold as part of the real property.

[4] Action for Damages by Artist

If a seller or a seller's agent fails to pay royalties to an artist or transfer funds to the California Arts Council as required by law [*see* [2], *above*], the artist may bring an action for damages against the seller or agent. The period of limitation is three years after the sale or one year after the artist discovers that the sale was made, whichever is longer. The action must be commenced within three years after the date of sale or one year after the artist discovers the sale, whichever is longer. The prevailing party in the action will be entitled to reasonable attorney's fees, in an amount determined by the court [*Civ. Code* § 986(a)(3)]. For discussion, see CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 57, *Art* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

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32-102E California Legal Forms--Transaction Guide § 102E.17

§ 102E.17 Loan of Artwork for Use

The loan of a work of art solely for the borrower's use is a contract by which the lender gives to the borrower the temporary possession and use of the work, and the borrower agrees to return it at a future time, without reward for its use [*see Civ. Code § 1884*]. Title is not transferred to the borrower [*Civ. Code § 1885*].

The borrower may use a borrowed work of art only for purposes that the lender might reasonably anticipate at the time of lending [*see Civ. Code § 1890*] and must not part with it to a third person without the lender's consent [*see Civ. Code § 1891*].

For further discussion of loans of artwork for use or bailment, see CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 57, Art (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-102E California Legal Forms--Transaction Guide § 102E.18

§ 102E.18 Rental or Lease of Artwork

The rental or lease of a work of art (called hiring in the Civil Code) is a contract by which the lessor gives the lessee temporary possession of the work, for reward, and the lessee agrees to return it at a future time [*see Civ. Code § 1925*].

If a work of art is rented for a particular purpose, the lessee must not use it for any other purpose; and if the lessee does, then he or she is liable to the lessor for all damages resulting from the unauthorized use, or the lessor may elect to treat the contract as rescinded [*see Civ. Code § 1930*; *Constantian v. Mercedes-Benz Co. (1936) 5 Cal. 2d 631, 633, 55 P.2d 841* (defendant was liable for loss of rented art objects destroyed by fire while being used in place not contemplated by agreement)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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[Reserved]

§§ 102E.19[Reserved]



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32-102E California Legal Forms--Transaction Guide § 102E.30

§ 102E.30 Governing Law; Legislative Intent

Because of unique circumstances and problems surrounding loans of property to museums for indefinite or long terms, a uniform procedure provides for the preservation of the lender's interest in the property and allows title to unclaimed property to vest in the museum [*see Civ. Code § 1899*]. The procedure is set forth in *Civ. Code § 1899 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-102E California Legal Forms--Transaction Guide § 102E.31

§ 102E.31 Definitions

For purposes of the law governing loans to museums for indefinite terms or long terms [*Civ. Code § 1899 et seq.*], a museum is any institution located in California and operated by a nonprofit corporation or a public agency that is primarily educational, scientific, or aesthetic in purpose and that owns, borrows, or cares for, and studies, archives, or exhibits property [*Civ. Code § 1899.1(a)*]. A loan is a deposit of property with a museum that is not accompanied by a transfer of title [*Civ. Code § 1899.1(c)*]. Property includes all animate and inanimate tangible objects under a museum's care that have intrinsic value to science, history, art, or culture, not including botanical or zoological specimens lent to a museum for scientific-research purposes [*Civ. Code § 1899.1(d)*].

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32-102E California Legal Forms--Transaction Guide § 102E.32

§ 102E.32 General Notice Requirements

When a museum is required to give a lender any notice pursuant to *Civ. Code § 1899 et seq.*, notice is deemed to have been given if the museum mails the notice to the lender at the lender's address and receives proof of receipt within 30 days from the date the notice was mailed. If the museum does not have an address for the lender or does not receive proof of receipt, notice is deemed given if the museum publishes notice at least once a week for three successive weeks in a newspaper of general circulation in both the county in which the museum is located and the county of the lender's address, if any [*Civ. Code § 1899.2(a)*]. For purposes of notice, a museum is located in the county of the branch of the museum to which the loan is made or, in all other instances, is located in the county in which it has its principal place of business [*Civ. Code § 1899.2(c)*].

In addition to any other information required to be included pursuant to *Civ. Code § 1899 et seq.*, all notices given must contain the lender's name, the lender's most recent address as shown on the museum's records [*see Civ. Code § 1899.1(b)*], and the date of the loan. A notice given by the museum must also contain the name, address, and telephone number of the appropriate office or official to be contacted at the museum for information regarding the loan [*Civ. Code § 1899.2(b)*].

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32-102E California Legal Forms--Transaction Guide § 102E.33

§ 102E.33 Notice Required by Museum

[1] Notice of Lender's Rights

If a museum [*see Civ. Code § 1899.1(a)* (definition)] accepts a loan of a work of art for an indefinite term, or for a term in excess of seven years, the museum must inform the lender in writing at the time of the loan of the provisions of *Civ. Code § 1899 et seq.* The form of notice contained in *Civ. Code § 1899.5* or a citation to the governing code sections is sufficient [*Civ. Code § 1899.3(a)* (governing loans of property accepted on or after January 1, 1984); *see § 102E.221* (form)]. Unless the work of art is returned to the claimant, the museum must retain for a period of not less than 25 years the original or an accurate copy of each notice filed by a claimant pursuant to *Civ. Code § 1899.4* [*Civ. Code § 1899.3(b)*; *see § 102E.34*].

[2] Receipt for Notice of Intent to Preserve Interest

On receiving a notice of intent to preserve an interest in the work of art, the museum must provide proof of receipt of the notice by mailing an original receipt or a copy of the receipt portion of the statutory notice form [*see Civ. Code § 1899.5*; § 102E.35] to the lender or other claimant at the address given on the notice within 30 days of receiving the notice [*Civ. Code § 1899.3(c)*; *see § 102E.223* (form)]. Unless the museum returns the work of art to the lender, it must retain for at least 25 years either the original or an accurate copy of each notice of intent to preserve an interest that a lender files [*Civ. Code § 1899.3(b)*].

[3] Notice of Injury to Work of Art

The museum must give a lender prompt notice of any known injury to or loss of the work of art [*Civ. Code § 1899.3(d)*; *see § 102E.227*].

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32-102E California Legal Forms--Transaction Guide § 102E.34

§ 102E.34 Notice Required by Lender

Because museums rarely relocate but, over time, lenders move or die [*see Civ. Code § 1899(e), (f)*], the lender is responsible for notifying the museum promptly in writing of any change of the lender's address or change in ownership of the work of art [*Civ. Code §§ 1899(f), 1899.4(a); see § 102E.231*]. The lender's failure to notify the museum of these changes may result in the lender's loss of rights in the work of art [*Civ. Code § 1899.4(a)*].

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32-102E California Legal Forms--Transaction Guide § 102E.35

§ 102E.35 Notice of Intent to Preserve Interest

The owner of artwork on loan to a museum may also file with the museum a notice of intent to preserve an interest in the artwork [*Civ. Code § 1899.4(b)*; see *Civ. Code §§ 1899.2(b), 1899.5* (general notice requirements; form for notice); § 102E.222 (form)]. However, filing a notice of intent does not validate or make enforceable any claim that would be extinguished under the terms of a written loan agreement or that would otherwise be invalid or unenforceable [*Civ. Code § 1899.4(b)*].

A notice of intent to preserve an interest in artwork on loan to a museum must [*Civ. Code § 1899.5(a)*]:

- Be in writing.
- Contain a description of the artwork adequate to enable the museum to identify it.
- Be accompanied by documentation sufficient to establish the claimant as owner.
- Be signed under penalty of perjury by the claimant or a person authorized to act on behalf of the claimant.

The museum need not retain a notice that does not meet these requirements. However, if the museum does not intend to keep a notice for this reason, it must promptly notify the claimant at the address given on the notice that the notice is ineffective and must specify why it is ineffective. The fact that a museum retains a notice cannot be construed to mean that the museum accepts the sufficiency or accuracy of the notice or that the notice is effective to preserve an interest in artwork on loan to the museum [*Civ. Code § 1899.5(b)*].

A notice of intent to preserve an interest in the artwork that is in substantially the form illustrated in *Civ. Code § 1899.5(c)* and that contains the information and attachments described in the statute satisfies the requirements [*Civ. Code § 1899.5(c)*].

A notice of intent filed in accordance with the law governing loans to museums for an indefinite or long term [*Civ. Code § 1899 et seq.*] is exempt from the disclosure requirements of the California Public Records Act [*Civ. Code § 1899.5(d)*; *see Gov. Code § 6250 et seq.*].

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32-102E California Legal Forms--Transaction Guide § 102E.36

§ 102E.36 Museum's Conservation or Disposal of Borrowed Artwork

[1] Lender's Permission Not Essential

Absent a written loan agreement to the contrary, a museum may apply conservation measures to or dispose of artwork on loan to the museum without the lender's permission, in the following situations:

- The museum may take action if immediate action is required to protect the artwork, or to protect other property in the custody of the museum, or if the artwork has become a hazard to the health and safety of the public or the museum's staff and either (1) the museum is unable to reach the lender at the lender's last address of record in order to agree on a resolution; or (2) the lender will not agree to the protective measures recommended by the museum, but is unwilling or unable to terminate the loan and retrieve the artwork [*Civ. Code § 1899.6(a)(1)*].
- The museum may take action if the lender cannot be contacted in person, provided the museum publishes a notice containing specified information [*see Civ. Code § 1899.7(a)*; § 102E.228 (form)] and there is no response for 120 days [*Civ. Code § 1899.6(a)(2)*].

[2] Museum's Lien on Artwork

If a museum applies conservation measures to or disposes of property, as provided by statute [*see Civ. Code § 1899.6(a)*; [1], *above*], it has a lien on the artwork and the proceeds from any disposition for the costs incurred [*Civ. Code § 1899.6(b)(1)*].

[3] Museum's Immunity From Liability for Injury or Loss

A museum is not liable for injury to or loss of borrowed artwork resulting from conservation measures or disposal if the museum had a reasonable belief at the time the action was taken that the action was necessary to protect the artwork or other property in its custody, or that the artwork constituted a hazard to the health and safety of the public or the museum's staff [*Civ. Code § 1899.6(b)(2)*].

In the case of conservation measures, the museum is not liable if it exercised reasonable care in the choice and application of the measures [*Civ. Code* § 1899.6(b)(2)].

Legal Topics:

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§ 102E.37 Museum's Duty in Case of Injury or Loss of Borrowed Artwork

[1] Notice to Lender

A museum must give the lender prompt notice of any known injury or loss of borrowed artwork [*Civ. Code § 1899.3(d)*]. Except as provided in *Civ. Code § 1899.7(b)* (discussed *below*), if the museum is unable to give the lender notice by mail [*see Civ. Code § 1899.2(a)* (proof of receipt within 30 days is required for effective notice)], the museum must publish a notice as prescribed by statute at least once a week for three successive weeks in a newspaper of general circulation in both the county in which the museum is located and the county of the lender's most recent address as shown in the museum's records [*Civ. Code §§ 1899.2(a), 1899.7(a)*; *see Civ. Code §§ 1899.1(b), 1899.2(b)* (lender's address; additional notice requirements); *see also § 102E.228* (form for notice)].

If, within three years of giving a proper notice by publication, the museum receives a notice concerning the lender's change of address, a change in ownership of the artwork, or the lender's intent to preserve an interest in the artwork [*see Civ. Code § 1899.4*], the museum must promptly inform the lender in writing of the nature of the injury or the fact of the loss and the approximate date of the injury or loss [*Civ. Code § 1899.7(b)*].

For the purposes of the applicable limitation period [*Civ. Code § 1899.8*; *see [2], below*], if the museum mails the information to the lender within 30 days of receipt of the lender's notice, the museum is deemed to have given the lender notice of the injury or loss on the date notice by publication [*see Civ. Code § 1899.7(a)*] was completed [*Civ. Code § 1899.7(b)*].

[2] Limitation Period for Lender's Action

The lender may not bring an action against the museum for damages resulting from injury or loss of artwork more than three years from the date the museum gave the lender notice of the injury or loss, or 10 years from the date of the injury or loss, whichever occurs earlier [*Civ. Code § 1899.8*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawMuseums



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Loan of Artwork to Museum for Indefinite or Long Term

32-102E California Legal Forms--Transaction Guide § 102E.38

§ 102E.38 Termination of Loan by Museum

The museum may give the lender notice of the museum's intent to terminate a loan of artwork for an indefinite term or a loan made after 1983 for a term longer than seven years. The notice must include a statement containing substantially the information set forth in *Civ. Code § 1899.9(a)* [*Civ. Code § 1899.9(a)*; see *Civ. Code § 1899.2(a), (b)* (when notice to lender is given); see also § 102E.229 (form)].

A loan for a specified term becomes a loan for an indefinite term if the artwork remains in the custody of the museum when the specified term expires [*Civ. Code § 1899.9(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawMuseums



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Loan of Artwork to Museum for Indefinite or Long Term

32-102E California Legal Forms--Transaction Guide § 102E.39

§ 102E.39 Lender's Recovery of Artwork From Museum

[1] Limitation of Action

The lender may not bring an action to recover artwork from the museum more than three years from the date the museum gave the lender notice of its intention to terminate the loan [*Civ. Code § 1899.10(a)*; see *Code Civ. Proc. § 338*].

With specified exceptions [*see Civ. Code § 1899.10(e)*; [2], *below*], the lender may not bring an action to recover artwork from the museum more than 25 years after the date of the last written contact between the lender and the museum, as evidenced in the museum's records [*Civ. Code § 1899.10(b)* (effective January 1, 1985)].

The lender will be deemed to have donated the artwork to the museum if the lender fails to file an action to recover the artwork within the applicable limitation period [*Civ. Code § 1899.10(c)*]. A person who buys the artwork from the museum acquires good title to the property if the museum represents that it acquired title pursuant to this statute [*Civ. Code § 1899.10(d)*].

[2] Recovery After Museum Failed to Give Notice

The lender may be entitled to recover the artwork or, if the museum has disposed of it, its reasonable value at the time of disposition plus the legal rate of interest, if the lender proves both (1) that the museum did not notify the lender of the museum's intent to terminate the loan and (2) that the museum received a notice of the lender's intent to preserve an interest in the artwork within the 25 years immediately preceding the date on which the lender's right to recover the artwork otherwise would have expired [*Civ. Code § 1899.10(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawMuseums



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32-102E California Legal Forms--Transaction Guide § 102E.40

§ 102E.40 Application of Unclaimed Property Law

Civ. Code § 1899 et seq. supersede the Unclaimed Property Law [*Civ. Code § 1899.11(a)*; see *Code Civ. Proc. § 1500 et seq.*; see also Ch. 102C, *Lost and Unclaimed Property*]. However, the museum may, at its option, dispose of borrowed artwork under the Unclaimed Property Law, provided the artwork has been unclaimed for more than seven years [*Civ. Code § 1899.11(a)*]. If a museum elects to proceed under the Unclaimed Property Law, it must mail notice to the lender not less than six months or more than 12 months before reporting the artwork to the State Controller for disposition [*Civ. Code § 1899.11(a)*; see *Code Civ. Proc. § 1530*]. For a form for notice, see § 102E.230.

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawMuseums



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32-102E California Legal Forms--Transaction Guide §§ 102E.41-102E.99

[Reserved]

§§ 102E.41[Reserved]



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A. Client Interview--Facts and Documents

32-102E California Legal Forms--Transaction Guide § 102E.100

§ 102E.100 Sale or Consignment of Fine Art Multiples

[1] Facts

1. Name, address, telephone and fax numbers, and e-mail address of artist [*see Civ. Code § 1740(d)* (definition); *see also § 102E.13[2]*].

NOTE:

If the artist does business as an entity, or the artist's estate is involved, obtain this information for that entity.

2. Name, address, telephone and fax numbers, and e-mail address of art dealer [*see Civ. Code § 1740(g)* (definition); *see also § 102E.13[2]*] or other consignee.

3. Name, address, telephone and fax numbers, and e-mail address of buyer, if known.

4. Description of fine art multiple [*see Civ. Code § 1740(a)* (works subject to regulation); *see also § 102E.13[3]*].

5. Whether artist's name appears on fine art multiple and, if so, how it was placed [*see Civ. Code § 1744(a)(1), (2)*]:

- a. Fine art multiple signed by artist.
- b. Master signed by artist.
- c. Fine art multiple or master stamped (or estate stamped) with name.

d. Other.

6. Medium or process used to produce fine art multiple, including, if pertinent, material used in producing fine art multiple [see *Civ. Code* § 1744(a)(3)].

NOTE:

If an established term, in accordance with the trade usage, cannot be used accurately to describe the medium or process, a brief, clear description of the medium or process should be obtained [*Civ. Code* § 1744(a)(3)].

7. If fine art multiple or image on or in master constitutes either of following types of reproduction, description of media and whether artist authorized or approved, in writing, fine art multiple or edition containing fine art multiple [see *Civ. Code* § 1744(a)(4), (5)]:

a. Photomechanical or photographic type of reproduction of image produced in different medium, for purpose other than creation of fine art multiple; or

b. Surmoulage or other form of reproduction of sculpture in case of image produced in different medium, for purpose other than creation of fine art multiple.

8. Whether master or fine art multiple was produced after artist's death [see *Civ. Code* § 1744(a)(6), (7)].

9. Total number of fine art multiples, including proofs, of all other editions produced from master, if fine art multiple was made from either of following [see *Civ. Code* § 1744(a)(8)]:

a. Master that was used to produced prior limited edition; or

b. Master that constitutes or was made from reproduction or surmoulage of prior fine art multiple or master that produced prior limited edition.

10. Year or approximate year of production of [see *Civ. Code* § 1744(a)(9)]:

a. Fine art multiple.

b. Master, if fine art multiple was produced before 1950.

NOTE:

The period may be substituted for the year or approximate year of production of the master [*Civ. Code* § 1744(a)(9)].

11. If edition is being offered as limited edition [see *Civ. Code* § 1744(a)(10)]:

a. Authorized maximum number of signed or numbered impressions, or both, contained in edition.

b. Authorized maximum number of unsigned or unnumbered impressions, or both, contained in edition.

c. Authorized maximum number of artist's, publisher's, or other proofs, if any, outside regular edition.

d. Total size of edition.

12. Whether master was destroyed, effaced, altered, defaced, or canceled after current edition [*see Civ. Code § 1744(a)(11)*].

13. Price at which fine art multiple is to be offered or sold.

14. States from which and into which fine art multiple is to be sold or consigned [*see Civ. Code § 1742(a)*].

15. Whether certificate of authenticity [*see Civ. Code § 1744; see also § 102E.200*] has been provided or other claims or disclosures concerning authenticity of fine art multiple have been made to buyer, offeree, or consignee.

16. If seller is art dealer, whether art dealer plans to distribute in, into, or from California any catalog, prospectus, flyer, or other written material or advertisement that directly solicits buyer of fine art multiple [*see Civ. Code § 1742(b)*].

[2] Documents

1. Seller's or consignor's proof of title to fine art multiple.

2. Appraisal of fine art multiple's value.

NOTE:

For a sample provision for the sale of a work of art based on its appraised value, see § 102E.211.

3. Any previously prepared certificate of authenticity [*see § 102E.200*].

4. Any catalog, prospectus, flyer, or other written material or advertisement directly soliciting buyer of fine art multiple.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsGeneral OverviewContracts LawSecured TransactionsApplication & ConstructionLeases



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A. Client Interview--Facts and Documents

32-102E California Legal Forms--Transaction Guide § 102E.101

§ 102E.101 Consignment of Fine Art to Art Dealer

[1] Facts

1. Name, address, telephone and fax numbers, and e-mail address of artist [*see Civ. Code § 1738(a)* (definition)] or other consignor.

NOTE:

If the artist is deceased, the artist's heir, legatee, or personal representative may be subject to the statutes governing consignment agreements between artists and art dealers [*see Civ. Code § 1738(a)*].

2. Name, address, telephone and fax numbers, and e-mail address of art dealer [*see Civ. Code § 1738(c)* (definition)].

3. Description of work of fine art to which consignment agreement applies [*see Civ. Code § 1738(b)* (consignments regulated by statute); *see also § 102E.111*, P 1].

4. If consigned work has been sold:

a. Sale price.

b. Date of sale.

c. Name, address, telephone and fax numbers, and e-mail address of buyer.

d. Whether sale price has been paid in full.

- e. Whether artist has been paid his or her share of sale proceeds.

[2] Documents

1. Any existing contract between parties, concerning subject work or other works.
2. Sale receipts for any work sold pursuant to consignment.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsGeneral OverviewContracts LawSecured TransactionsApplication & ConstructionLeases



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32-102E California Legal Forms--Transaction Guide § 102E.102

§ 102E.102 Collection of Artist's Royalties

[1] Facts

NOTE:

Some transactions are exempt from the payment of royalties prescribed by statute [*see Civ. Code § 986(b)*; § 102E.16[3]].

1. For artist:

- a. Name, address, telephone and fax numbers, and e-mail address.
- b. Country of citizenship.
- c. If artist is California resident, length of residency.
- d. Whether artist has assigned or intends to assign right to collect royalties to another person [*see Civ. Code § 986(a)*].

2. For seller:

- a. Name, address, telephone and fax numbers, and e-mail address.
- b. State of residence.
- c. Whether seller is art dealer [*see Civ. Code § 986(c)(3)* (definition)].
- d. Whether seller has deposited any royalties due artist with California Arts Council.

3. Description of subject work of fine art [*see Civ. Code § 986(c)(2)* (works to which statute applies)].
4. Date of sale.
5. Sale price.

[2] Documents

1. Artist's assignment of right to collect royalties.
2. Receipt or other documentation of sale of subject work.
3. Contract for sale of work under which artist is to receive royalties in excess of 5 percent of sale price.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsGeneral Overview



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32-102E California Legal Forms--Transaction Guide § 102E.103

§ 102E.103 Loan of Artwork to Museum

[1] Facts

1. For lender:

- a. Name, address, telephone and fax numbers, and e-mail address.
- b. Lender's contemplated ultimate disposition of subject artwork.

2. For museum:

- a. Name, address, and telephone number of:
 - (1) Branch that will receive artwork.
 - (2) Museum's main branch and/or principal place of business, if different.

- b. Name, title, address, and telephone number of office or officer to contact concerning loan.

NOTE:

Although not required by statute, it may be helpful to have the e-mail address of the museum officer handling the loan.

3. Description of subject artwork.

4. Date loan began or will begin.

5. Anticipated term of loan.

6. Terms of museum's standard loan contract.
7. Whether any additional special requirements have been provided or will be necessary, such as:
 - a. Special procedures to preserve artwork or prevent damage to it during term of loan.
 - b. Special requirements concerning manner in which artwork will be exhibited or displayed.
 - c. Special security precautions.
8. Party responsible for insuring artwork and terms of policy.

[2] Documents

1. Lender's proof of ownership of subject artwork.
2. Museum's standard loan contract.
3. Appraisal of artwork's value.
4. Copies of insurance policies covering artwork.

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawMuseums



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32-102E California Legal Forms--Transaction Guide §§ 102E.104-102E.109

[Reserved]

§§ 102E.104[Reserved]



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32-102E California Legal Forms--Transaction Guide § 102E.110

§ 102E.110 Sale or Consignment of Fine Art Multiples

1. Determine whether subject work is fine art multiple covered by disclosure requirements [*see Civ. Code § 1740(a)*; *see also Civ. Code § 1742 et seq.* (disclosure requirements)], namely any of following:

- a. Fine print [*see Civ. Code § 1740(b)* (definition); *see also § 102E.13[2]*].
- b. Positive or negative photograph.
- c. Sculpture cast.
- d. Collage.
- e. Similar artwork produced in more than one copy.
- f. Pages or sheets taken from book or magazine and sold or offered for sale as art objects.

NOTE:

Intact books and magazines are excluded from the definition of fine art multiple [*Civ. Code § 1740(a)*].

2. Determine whether transaction is subject to disclosure requirements because following conditions exist:

a. Sale, consignment, or offer [*see Civ. Code § 1742(b)*] will be made into or from California by any of following [*see Civ. Code § 1742(a), (b), (e)*]:

- (1) Artist [*see Civ. Code § 1740(d)* (definition); *see also § 102E.13[2]*].

(2) Art dealer [*see Civ. Code § 1740(g)* (definition); *see also § 102E.13[2]*].

(3) Auctioneer selling fine art multiple(s) at public auction [*Civ. Code § 1740(g)*].

NOTE:

The disclosure requirements do not apply to any charitable organization that conducts a sale or auction of fine art multiples, as long as the organization posts a disclaimer of any knowledge of the information required to be included in the certificate of authenticity, in a conspicuous place at the site of the sale or auction [*Civ. Code § 1742.6*; ***see § 102E.202***]. The organization must also include this disclaimer in any catalog distributed with respect to the sale or auction. Any art dealer engaged to conduct the sale or auction will be subject to all applicable disclosure requirements [*Civ. Code § 1742.6*].

b. Fine art multiple will be offered or sold for \$100 or more, wholesale or retail, exclusive of any frame [*see Civ. Code § 1741*].

3. If client is art dealer, determine whether dealer has made reasonable inquiries, according to trade custom and usage, concerning information required to be disclosed in certificate of authenticity [*see Civ. Code §§ 1744.7, 1745(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsGeneral OverviewContracts LawSecured TransactionsApplication & ConstructionLeases



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32-102E California Legal Forms--Transaction Guide § 102E.111

§ 102E.111 Consignment of Fine Art to Art Dealer

1. Determine whether subject work of art consists of any of following items covered by statutes governing consignment of fine art [*see Civ. Code § 1738(b)*]:

- a. Painting.
- b. Sculpture.
- c. Drawing.
- d. Work of graphic art, including etching, lithograph, offset print, silk screen, or work of graphic art of like nature.
- e. Work of calligraphy.
- f. Work in mixed media, including collage, assemblage, or any combination of media listed above.

2. Determine whether transaction is covered by statutes governing consignment of fine art because following conditions exist [*see Civ. Code § 1738 et seq.*].

- a. Transaction involves artist's delivery of work of fine art to art dealer for purpose of exhibition, sale, or both, on commission, fee, or other basis of compensation [*see Civ. Code § 1738.5*].
- b. Transaction is entered into in California [*see Civ. Code § 1738.5*].

c. If transaction is pursuant to written contract executed before 1976, parties either [*see Civ. Code § 1738.9*]:

1. Agreed mutually and in writing that statute applies to contract.
2. Extended or renewed contract after 1975.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSecured TransactionsApplication & ConstructionLeases



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32-102E California Legal Forms--Transaction Guide § 102E.112

§ 102E.112 Collection of Artist's Royalties

1. Determine whether subject work of art consists of any of following items covered by statutes governing artists' royalties [*see Civ. Code § 986(a), (c)(2)*]:

- a. Original painting.
- b. Original sculpture.
- c. Original drawing.
- d. Original work of art in glass, other than work permanently attached to real property and sold as part of sale of real property [*see Civ. Code § 986(b)(7)*].

2. Determine whether artist is entitled to royalties because following conditions exist:

- a. At time of sale, artist is either [*see Civ. Code § 986(c)(1)*]:
 - (1) U.S. citizen.
 - (2) Resident of California for minimum of two years.
- b. Seller resides in California or sale will take place in California [*see Civ. Code § 986(a)*].
- c. Gross sale price or fair market value of property exchanged for work will be \$1,000 or more [*see Civ. Code § 986(b)(2), (5)*].
- d. If sale is not initial sale, gross sale price will be at least as much as seller paid for work [*see Civ. Code*

§ 986(b)(4)].

e. If artist is deceased, date of death was after January 1, 1983 [*see Civ. Code* § 986(a)(7), (b)(3)].

f. If sale is resale of work by art dealer [*see Civ. Code* § 986(b)(6)]:

1. Sale will take place more than 10 years after initial sale of work to art dealer.
2. At least one intervening resale occurred during that period to non-art-dealer buyer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright Law
Formalities
General Overview



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32-102E California Legal Forms--Transaction Guide § 102E.113

§ 102E.113 Loan of Artwork to Museum

1. Determine whether intended recipient of artwork qualifies as museum for purposes of statutes governing loan to museum for indefinite or long term, because following conditions exist [*see Civ. Code § 1899.1(a)*; *see also Civ. Code § 1899 et seq.*].

- a. Recipient is institution is located in California.
- b. Institution is operated by either nonprofit corporation or public agency.
- c. Institution's primary purpose is educational, scientific, or aesthetic.
- d. Institution owns, borrows, or cares for property.
- e. Institution studies, archives, or exhibits property?

2. Determine whether transaction qualifies as loan for purposes of *Civ. Code § 1899 et seq.*, because following conditions exist [*see Civ. Code § 1899.1(c)*].

- a. Subject artwork consists of tangible, animate or inanimate object of intrinsic value to science, history, art, or culture, other than botanical or zoological specimens for scientific research purposes.
- b. Lender is depositing it with museum.
- c. Lender will retain title to it.

Legal Topics:

For related research and practice materials, see the following legal topics:

Education LawMuseums



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32-102E California Legal Forms--Transaction Guide §§ 102E.114-102E.119

[Reserved]

§§ 102E.114[Reserved]



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C. Procedural Guide to Sale and Loan of Artwork

32-102E California Legal Forms--Transaction Guide § 102E.120

§ 102E.120 Sale or Consignment of Fine Art Multiples

1. Prepare certificate of authenticity, if required [*see* § 102E.110], containing following information [*see* *Civ. Code* § 1744(a); *see also* § 102E.200 (form)].

a. Artist's name [*Civ. Code* § 1744(a)(1)].

b. If artist's name appears on fine art multiple produced after 1899, statement of source (such as signature or stamp) [*Civ. Code* § 1744(a)(2), (c)-(e)].

c. Description of medium or process and, if pertinent to photographic processes, material used to create fine art multiple [*Civ. Code* § 1744(a)(3)].

NOTE:

If an established term, in accordance with the usage of the trade, cannot be employed accurately to describe the medium or process, a brief, clear description of the medium or process must be provided [*Civ. Code* § 1744(a)(3)].

d. If fine art multiple or image on master is adapted from image produced in different medium, for purpose other than creation of subject fine art multiple, and fine art multiple was produced after 1949 [*see* *Civ. Code* § 1744(a)(4), (5), (d), (e)]:

(1) Description of respective media and means of reproduction used (such as photomechanical means, photography, or surmoulage).

(2) If fine art multiple was produced after January 1, 1983, and is not signed, statement of whether artist authorized or approved, in writing, fine art multiple or edition of which fine art multiple is part.

e. If artist is deceased and fine art multiple was produced after 1949 [*see Civ. Code § 1744(c)-(e)*]:

(1) If applicable, statement that master was made after artist's death [*see Civ. Code § 1744(a)(6)*].

(2) If applicable, statement that master was made during artist's life but fine art multiple was produced after artist's death [*see Civ. Code § 1744(a)(7)*].

f. If fine art multiple was produced before 1950 [*see Civ. Code § 1744(a)(9), (c)-(e)*]:

(1) Year, approximate year, or period when master that produced fine art multiple was made.

(2) Approximate year when fine art multiple was produced.

g. If fine art multiple was produced after 1949:

(1) Year or approximate year of production [*see Civ. Code § 1744(a)(9), (c)-(e)*].

(2) If edition is being offered as limited edition [*see Civ. Code § 1744(a)(10), (c)-(e)*]:

(a) Authorized maximum number of signed and/or numbered impressions in edition.

(b) Authorized maximum number of unsigned and/or unnumbered impressions in edition.

(c) Authorized maximum number of artist's, publisher's, or other proofs, if any, outside regular edition.

(d) Total size of edition.

NOTE:

If the fine art multiple is part of a limited edition printed after January 1, 1983, the statement regarding the edition's size constitutes an express warranty that no additional fine art multiples of the same image have been produced [*Civ. Code § 1744(b)*].

(3) Whether master was destroyed, effaced, altered, defaced, or canceled after current edition [*see Civ. Code § 1744(a)(11), (c)-(e)*].

h. If fine art multiple was produced after January 1, 1983, statement of number of fine art multiples, including proofs, in all other editions produced from master that either [*see Civ. Code § 1744(a)(8), (c)-(e)*]:

(1) Produced prior limited edition.

(2) Constituted or was made from reproduction or surmoulage of earlier fine art multiple or master that produced prior limited edition.

2. Prepare sale contract.

NOTE:

As a general rule, a contract for the sale of goods for \$500 or more is unenforceable unless memorialized by a writing that (1) indicates that a contract was made and (2) bears the signature of the party against whom enforcement is sought, or that party's agent or broker [*Com. Code* § 2201(1); **but see** *Com. Code* § 2201(3), (4) (exceptions)]. For further discussion, see Ch. 52, ***Sales of Goods Under the Uniform Commercial Code***, and Ch. 75, ***Formation of Contracts and Standard Contractual Provisions***.

a. Indicate price term by providing for either:

- (1) Specific price if agreed-on at time contract is executed.
- (2) Appraisal to determine price.
- (3) Determination by third party.

b. Set forth payment terms.

(1) Specify method of payment as, for example:

- (a) Cash.
- (b) Personal check.
- (c) Cashier's check or bank draft.
- (d) Other property.

(2) Specify time of payment, such as:

- (a) Prepayment.
- (b) Deposit with remainder due on delivery.
- (c) Payment in full on delivery.
- (d) Installment payments.

NOTE:

Unless otherwise agreed, payment is due on delivery [*Com. Code* § 2310(a)]. If at least one installment payment is called for after the close of the taxable year in which the transaction occurs, income from the sale generally must be reported on the installment method [*I.R.C.* § 453(a), (b)(1), (d)(1)].

c. Specify rate of interest, if any.

NOTE:

In the case of a sale for more than \$3,000, interest income will be imputed on the amounts of any payments made later than six months from the date of sale when (1) some or all of the payments are due

more than one year from the date of sale, and (2) the sales contract calls for either no interest or very low interest [*see I.R.C. § 483(c)(1), (d)(2)*]. The amount of interest imputed will depend on regulations in effect at the time of the sale [*see I.R.C. § 483(a), (b)(2)*].

d. Specify point in time at which duty to insure subject artwork and risk of loss or injury will pass from seller to buyer [*see Com. Code § 2509* (statutory allocation of risk in absence of parties' agreement)].

3. Execute and deliver certificate of authenticity and invoice or contract to buyer before sale or consignment [*see Civ. Code § 1742(a)*].

NOTE:

The form provided in this chapter combines the certificate and an invoice [*see § 102E.200*].

4. Instruct seller (artist or art dealer) to retain copy of certificate and invoice or contract.

5. For art dealer regularly engaged in sales of fine art multiples [*see Civ. Code § 1742(c)*]:

a. Draft notice [*see § 102E.201*] containing abbreviated version of statutory disclosure requirements [*see Civ. Code § 1744(a)*].

b. Post notice in conspicuous place in each place of business in California where dealer is regularly engaged in such sales.

6. For charitable organization engaged in sale or auction of fine art multiples, when applicable [*see Civ. Code § 1742.6; § 102E.110*]:

a. Draft disclaimer of knowledge regarding information required to be disclosed [*see Civ. Code § 1744(a); see also § 102E.202*].

b. Post disclaimer in conspicuous place at site of sale or auction.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Subject MatterGoodsGeneral OverviewContracts LawSecured TransactionsApplication & ConstructionLeases



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DIVISION VII: PERSONAL TRANSACTIONS
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32-102E California Legal Forms--Transaction Guide § 102E.121

§ 102E.121 Consignment of Fine Art to Art Dealer

1. Prepare consignment agreement to include [*see* § 102E.210]:

NOTE:

The existence of a written, signed consignment agreement is not necessary to invoke the protections afforded to artists by the statutes governing consignment of fine art [*see* *Civ. Code* § 1738.5]. Moreover, any provision of a contract or agreement under which an artist waives any provision contained in the statutes is void [*Civ. Code* § 1738.8].

a. Description of artwork to be consigned [*see* *Civ. Code* § 1738(b) (works covered by consignment statutes); *see also* § 102E.12[2]].

b. Delivery terms:

(1) Party responsible for delivery.

(2) Delivery date.

(3) Place of delivery.

NOTE:

The statutes governing consignments apply only to works delivered to art dealers in California [*Civ. Code* § 1738.5].

c. Purpose of consignment:

(1) Exhibition.

(2) Sale.

(3) Exhibition and sale.

d. Sale terms, if applicable:

(1) Price or minimum price.

(2) Any limitations as to manner of payment.

e. Exhibition terms, if applicable:

(1) Place where work will be exhibited.

(2) Dates of exhibition.

(3) Whether works of other artists will be included in exhibition.

f. Fee or commission provisions:

(1) Amount or percentage of price due to art dealer on sale.

(2) If parties do not want proceeds of sale to be applied first to any balance owed by dealer to artist, express statement to this effect [*see Civ. Code § 1738.6(d)*].

g. Art dealer's obligations:

(1) Statement that dealer is responsible for loss or injury of artwork during commission period [*Civ. Code § 1738.6(c)*].

(2) Statement that artwork is held in trust by dealer for artist during commission period [*Civ. Code § 1738.6(b)*].

NOTE:

After the work is delivered to the art dealer, the dealer becomes an agent of the artist for the purpose of sale or exhibition of the consigned work within California [*Civ. Code § 1738.6(a)*].

h. If agreement is exclusive as to either party or both parties, statement of this fact.

2. Obtain signatures of both parties on agreement and deliver copy of agreement to each party.

3. Arrange for delivery of artwork to art dealer.

4. On sale of artwork, arrange for dealer's payment of:

a. Proceeds of sale to be paid to artist [*see Civ. Code § 1738.6(d)*].

b. Royalties, if applicable [*see Civ. Code § 986; see also § 102E.122*].

5. On consignor's written demand, have consignee provide written accounting for transaction of \$50 or more, setting forth [*Penal Code* § 536a]:

- a. Description and quantity of goods sold.
- b. Sale price.
- c. Name and address of buyer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Secured Transactions Application & Construction Leases



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32-102E California Legal Forms--Transaction Guide § 102E.122

§ 102E.122 Payment of Royalties

1. If representing art dealer in transaction in which royalties are due to artist [*see Civ. Code § 986; see also § 102E.112*], instruct art dealer to pay royalty of 5 percent of price or amount agreed on by parties in writing, whichever is larger, to either:

a. Artist [*Civ. Code § 986(a)(1)*].

b. Artist's heirs, legatees, or personal representative, if artist has been deceased for less than 20 years [*Civ. Code § 986(a)(7)*].

c. California Arts Council, if dealer cannot locate and pay artist or artist's heirs, legatees, or personal representative within 90 days after sale [*Civ. Code § 986(a)(2); see § 102E.16[2]*].

2. If representing artist or artist's heirs, legatees, or personal representative concerning royalties due under *Civ. Code § 986* [*see § 102E.112*], demand payment from art dealer of royalty of 5 percent of price or amount agreed-on by parties in writing, whichever is larger [*Civ. Code § 986(a)*].

NOTE:

The artist's heirs, legatees, or personal representative will be entitled to collect royalties due to the artist if the artist has been deceased for less than 20 years [*Civ. Code § 986(a)(7)*]. If the dealer fails to pay royalties to an artist or transfer funds to the California Arts Council as required by law, the artist may bring an action for damages against the dealer. The action must be commenced within three years after the date of sale or one year after the artist discovers the sale, whichever is longer [*Civ. Code § 986(a)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawGeneral Overview



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32-102E California Legal Forms--Transaction Guide § 102E.123

§ 102E.123 Loan of Artwork to Museum

1. Draft loan agreement [*see* §§ 102E.220, 102E.221].
 - a. Include basic provisions, as applicable, for example:
 - (1) Museum's name, address, and telephone number.
 - (2) Lender's name, address, and telephone number.
 - (3) Owner's name, address, and telephone number, if different from lender.
 - (4) Artist's name, address, and telephone number.
 - (5) Identification and description of artwork.
 - (6) Whether museum may reproduce artwork for publicity or other purposes.
 - (7) Party responsible for insurance coverage.
 - (8) Party responsible for shipping costs.
 - (9) Term of loan.
 - (10) Degree of care required for safekeeping.
 - (11) Conditions of return of artwork.

b. If loan is for indefinite term or term longer than seven years [see *Civ. Code* § 1899.3(a)], cover following matters addressed in *Civ. Code* § 1899 *et seq.* [see, e.g., § 102E.221]:

NOTE:

Although many of these matters are not required to be included in the agreement, it is good practice to include them, so that both parties are on notice of their respective statutory rights and responsibilities with respect to the artwork [*see* § 102E.221].

(1) Injury or loss of artwork [see *Civ. Code* § 1899.3(d); see § 102E.130].

(2) Conservation measures necessary to protect artwork [see *Civ. Code* § 1899.6; see also § 102E.131].

(3) Museum's decision to terminate loan [see *Civ. Code* § 1899.9(a); see also § 102E.133].

(4) Lender's notice of intent to preserve interest [see *Civ. Code* § 1899.5; see also P (4), below].

(5) Disposal of unclaimed artwork [see *Civ. Code* §§ 1899.10, 1899.11; see also § 102E.134].

c. Obtain signatures of lender and appropriate museum officer.

2. Provide copies of signed loan agreement to each party.

3. If representing museum concerning loan for indefinite term or term longer than seven years, do all of following:

a. Draft notice informing lender of provisions of *Civ. Code* § 1899 *et seq.* governing loan to museums for indefinite or long term [see *Civ. Code* § 1899.3(a); see also *Civ. Code* §§ 1899.2(b), 1899.5(c) (additional information required; optional form for notice); § 102E.222].

NOTE:

The museum may fulfill its duty to inform the lender of the provisions of *Civ. Code* § 1899 *et seq.* by providing the lender with either a statutory form of notice [see *Civ. Code* § 1899.5(c)] or a citation to *Civ. Code* § 1899 *et seq.* [*Civ. Code* § 1899.3(a)].

b. Provide notice to lender in person or mail notice to lender at lender's address, return receipt requested [*Civ. Code* § 1899.2(a)].

c. If lender or another claimant returns completed notice of intent to preserve interest in subject artwork:

(1) Mail proof of receipt to lender within 30 days [see *Civ. Code* § 1899.3(c); see also *Civ. Code* § 1899.5(c) (receipt form); §§ 102E.222, 102E.223].

(2) Instruct museum to retain original or copy of notice for at least 25 years [see *Civ. Code* § 1899.3(b)].

d. If notice of intent to preserve interest is defective, promptly notify lender or claimant as follows [see *Civ. Code* § 1899.5(b); see also § 102E.224]:

(1) Mail notice stating that notice of intent to preserve interest is believed to be ineffective, and reasons for belief, to claimant at address given in notice of intent to

preserve interest [*see Civ. Code § 1899.5(b)*; *see also Civ. Code § 1899.2(a), (b)*].

(2) If proof of claimant's receipt of notice is not received within 30 days after mailing, publish notice as follows [*see Civ. Code § 1899.2(a)*]:

(a) At least weekly for three successive weeks.

(b) In newspaper of general circulation in both [*see Civ. Code § 1899.2(c)*]:

(i) County of lender's address.

(ii) County in which branch of museum to which loan was made is located.

NOTE:

The museum need not retain a notice that does not meet the statutory requirements. However, if the museum does not intend to retain a notice because the notice is defective, the museum must promptly notify the claimant at the address given on the notice that it believes the notice is ineffective to preserve an interest, and the reason it is ineffective [*see Civ. Code § 1899.5(b)*; *see also Civ. Code §§ 1899.2(b), 1899.5(a)* (required contents of notice); § 102E.224].

4. If representing lender, do all of following:

a. On receiving notice from museum, prepare notice of intent to preserve interest in subject artwork [*see Civ. Code § 1899.5(a)*; *see also § 102E.222*].

b. Have lender sign form under penalty of perjury [*see Civ. Code § 1899.5(a)*].

c. Send to museum both [*see Civ. Code § 1899.5(a)*]:

(1) Notice.

(2) Proof of ownership of subject artwork.

d. Instruct lender to retain proof of receipt when received from museum [*see Civ. Code § 1899.3(c)*; *see also §§ 102E.222, 102E.223*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Education LawMuseums



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32-102E California Legal Forms--Transaction Guide §§ 102E.124-102E.129

[Reserved]

§§ 102E.124[Reserved]



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D. Related and Subsequent Procedures for Loan of Art to Museum

32-102E California Legal Forms--Transaction Guide § 102E.130

§ 102E.130 Lender's Notice of Change of Address or Change in Ownership of Artwork

1. Draft notice informing museum of either [see *Civ. Code § 1899.4(a)*; see also *Civ. Code § 1899.2(b)* (required contents of notice); § 102E.231]:

- a. Change of lender's address.
- b. Change in ownership of artwork.

2. Mail written notice to museum.

3. Advise lender to retain copy of notice.

NOTE:

The lender must give the museum prompt written notice of any change of address or change in ownership of the artwork. Failure to notify the museum of these changes may result in the owner's loss of rights in the work [*Civ. Code § 1899.4(a)*].

Legal Topics:

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D. Related and Subsequent Procedures for Loan of Art to Museum

32-102E California Legal Forms--Transaction Guide § 102E.131

§ 102E.131 Museum's Conservation or Disposition of Artwork

1. Determine whether loan agreement provides for museum's conservation or disposition of borrowed artwork.

NOTE:

If the loan agreement provides for conservation or disposition, the terms of the loan agreement will govern [*Civ. Code § 1899.6(a)*].

2. Notify lender that subject artwork requires conservation or disposition, by:

- a. Mailing notice to lender's last known address, return receipt requested [*see Civ. Code § 1899.2(a)*; *see also § 102E.225*].

- b. If museum does not have current address for lender, or lender does not respond to notice within 30 days of mailing, publishing notice as follows [*see Civ. Code §§ 1899.2(a)*, *1899.6(a)(2)*, *1899.7(a)*; *see also § 102E.226*]:

- (1) At least weekly for three successive weeks.

- (2) In newspaper of general circulation in both [*see Civ. Code § 1899.2(c)*]:

- (a) County of lender's address.

- (b) County in which branch of museum to which loan was made is located.

3. If lender cannot be contacted in person and does not respond to notice by publication within 120 days, or will not agree to either comply with museum's recommendations or terminate loan and retrieve artwork, proceed with conservation or disposition without lender's permission, but only if immediate action is required to protect one or more

of following [*see Civ. Code § 1899.6(a)*]:

NOTE:

Civ. Code § 1899.6(a)(2) does not state whether the 120-day period begins to run when the notice is first published or after it has been published once a week for three successive weeks. In view of this uncertainty, the better practice would be to wait until 120 days after the end of the publication period before undertaking any conservation measures or disposing of the property. If the conservation or disposition measures are undertaken lawfully, the museum will have a lien on the artwork and on the proceeds from any disposition of the artwork for its conservation or disposition costs [*Civ. Code § 1899.6(b)(1)*]. Moreover, the museum will not be liable for injury or loss of the artwork if it had a reasonable belief at the time it took the action that the action was necessary, and if it exercised reasonable care in the choice and application of conservation measures [*Civ. Code § 1899.6(b)(2)*].

- a. Subject artwork.
- b. Other property in museum's custody.
- c. Health and safety of public.
- d. Health and safety of museum's staff.

Legal Topics:

For related research and practice materials, see the following legal topics:
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D. Related and Subsequent Procedures for Loan of Art to Museum

32-102E California Legal Forms--Transaction Guide § 102E.132

§ 102E.132 Museum's Notice That Artwork Was Injured or Lost

1. If museum has lender's address, take following steps if borrowed artwork is lost or damaged:
 - a. Promptly notify lender of loss or damage, in writing mailed to lender's address, return receipt requested [*see Civ. Code §§ 1899.2(a), 1899.3(d); see also Civ. Code § 1899.2(b)* (required contents of notices); § 102E.227].
 - b. Wait 30 days to receive proof of lender's receipt of notice.
 - c. If lender responds, museum need take no further steps.
2. If museum does not have lender's address or does not receive proof that lender received mailed notice, take following steps:
 - a. Publish notice [*see Civ. Code § 1899.7(a)* (form for notice); *see also § 102E.228*] as follows [*see Civ. Code § 1899.2(a)*]:
 - (1) At least weekly for three successive weeks.
 - (2) In newspapers of general circulation in [*see Civ. Code § 1899.2(c)*]:
 - (a) County of museum's location.
 - (b) County of lender's address, if any.
 - b. If museum receives notice of intent to preserve interest in artwork from lender or other claimant within three years of publishing notice of injury or loss, take following steps [*see Civ. Code § 1899.7(b)*]:

(1) Draft notice [*see Civ. Code § 1899.2(b)* (required contents of notices)] advising claimant in writing of:

(a) Nature of injury or fact of loss.

(b) Approximate date of injury or loss.

(2) Mail notice to claimant within 30 days of receiving claimant's notice.

NOTE:

If the museum mails the information to the claimant within 30 days of receiving the claimant's notice, the three-year limitation period for filing an action against the museum [*see Civ. Code § 1899.8*] runs from the date the notice by publication was completed [*Civ. Code § 1899.7(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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D. Related and Subsequent Procedures for Loan of Art to Museum

32-102E California Legal Forms--Transaction Guide § 102E.133

§ 102E.133 Museum's Notice of Intent to Terminate Loan of Artwork

NOTE:

A lender may not bring an action to recover artwork from a museum more than three years from the date the museum gives the lender notice of its intention to terminate the loan [*Civ. Code § 1899.10(a)*; *see Code Civ. Proc. § 338*]. The lender is deemed to have donated the artwork to the museum if the lender fails to file an action to recover it within that period [*Civ. Code § 1899.10(c)*].

1. Determine whether museum may give notice of intent to terminate loan if either [*see Civ. Code § 1899.9(a)*]:

- a. Loan is for indefinite term.
- b. Loan was made on or after January 1, 1984, for term longer than seven years.

NOTE:

A loan for a specified term becomes a loan for an indefinite term if the artwork remains in the custody of the museum when the specified term expires [*Civ. Code § 1899.9(b)*].

2. If museum has lender's address, take following steps:

- a. Draft notice of intent to terminate loan [*see Civ. Code § 1899.9(a)*] (form for notice); *see also Civ. Code § 1899.2(b)* (required contents of notices); § 102E.229].
- b. Send notice to lender at lender's address, return receipt requested [*see Civ. Code § 1899.2(a)*].

- c. Wait 30 days to receive proof of receipt [*see Civ. Code § 1899.2(a)*].
 - d. If proof of receipt is not received, give notice by publication [*Civ. Code § 1899.2(a)*].
3. If lender cannot be reached by mail, publish notice as follows [*see Civ. Code § 1899.2(a)*]:
- a. At least weekly for three successive weeks.
 - b. In newspapers of general circulation in [*see Civ. Code § 1899.2(c)*]:
 - (1) County of museum's location.
 - (2) County of lender's address, if any.

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-102E California Legal Forms--Transaction Guide § 102E.134

§ 102E.134 Museum's Notice of Intent to Report Unclaimed Artwork to State Controller

1. Determine whether museum must report unclaimed artwork to State Controller for disposition under Unclaimed Property Law.

NOTE:

Civ. Code § 1899 et seq., when applicable, will supersede the Unclaimed Property Law [*Civ. Code § 1899.11(a)*; **see** *Code Civ. Proc. § 1500 et seq.*]. However, the museum may, at its option, report to the State Controller any artwork that has been on loan and unclaimed by the owner for more than seven years, in accordance with the Unclaimed Property Law [*Civ. Code § 1899.11(a)*; **see** *Code Civ. Proc. § 1530* (report of unclaimed property to State Controller); **see also** *Ch. 102C, Lost and Unclaimed Property, § 102C.221*].

2. Between six and 12 months before reporting property to State Controller, take following steps [*see Civ. Code § 1899.11(b)*]:

- a. Draft notice of intent [*see § 102E.230*].
- b. Mail notice to lender at lender's address, return receipt requested [*see Civ. Code § 1899.2(a)*].
- c. Wait 30 days to receive proof of receipt.
- d. If proof of receipt is not received, publish notice as follows [*see Civ. Code § 1899.2(a)*]:
 - (1) At least weekly for three successive weeks.

(2) In newspapers of general circulation in [*see Civ. Code § 1899.2(c)*]:

(a) County of museum's location.

(b) County of lender's address, if any.

3. Report and deliver artwork to State Controller as required by Unclaimed Property Law [*see Civ. Code § 1899.11(a)*; *see also Code Civ. Proc. §§ 1530(a), 1532(a)*; Ch. 102C, *Lost and Unclaimed Property*, § 102C.221].

Legal Topics:

For related research and practice materials, see the following legal topics:

Education LawMuseums



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[Reserved]

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DIVISION VII: PERSONAL TRANSACTIONS
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PART IV. FORMS
A. Sale of Fine Art Multiple

32-102E California Legal Forms--Transaction Guide § 102E.200

§ 102E.200 Invoice and Certificate of Authenticity for Sale of Fine Art Multiple

[1] Comment

[a] Use of Form

This form combines an invoice and a certificate of authenticity; it can be used by either an artist or an art dealer [see *Civ. Code § 1740(d), (g)* (definitions); see also § 102E.13[2]] in documenting the sale of a fine art multiple for \$100 or more, exclusive of any frame [see *Civ. Code § 1741*].

This form includes all of the information that must be disclosed for sales of fine art multiples created after January 1, 1983. More-limited information is required for multiples produced from 1950 to January 1, 1983 [see *Civ. Code § 1744(c)*], from 1900 to 1949 [see *Civ. Code § 1744(d)*], and before 1900 [see *Civ. Code § 1744(e)*]. This form may be modified accordingly.

A fine art multiple is any fine print, positive or negative photograph, sculpture cast, collage, or similar art object produced in more than one copy. Pages or sheets taken from books and magazines and offered for sale or sold as art objects are included in this definition, but intact books and magazines are not [*Civ. Code § 1740(a)*]. A fine print (or a print) is a fine art multiple produced by, but not limited to, engraving, etching, woodcutting, lithography, and serigraphy, or produced or developed from photographic negatives, or by any combination of these methods [*Civ. Code § 1740(b)*].

An artist who sells or consigns a fine art multiple of his or her own creation or conception into or from California must disclose the information required by *Civ. Code § 1744* [*Civ. Code § 1742(e)*; see [b], below]. Art dealers that sell or consign fine art multiples into or from California must also disclose this information [*Civ. Code § 1742(a)*].

A charitable organization that conducts a sale or auction of fine art multiples is exempt from the disclosure requirements of *Civ. Code § 1744* if it posts in a conspicuous place, at the site of the sale or auction, a disclaimer of any knowledge of the information required to be disclosed by *Civ. Code § 1744*, and includes this disclaimer in any catalog distributed by the organization with respect to the sale or auction of fine art multiples. However, an art dealer used or employed by a

charitable organization to conduct the sale or auction of fine art multiples is subject to all disclosure requirements regulating the sale of fine art multiples [*Civ. Code* § 1742.6].

For a consignment agreement between an artist and an art dealer, see § 102E.210[2].

[b] Required Disclosures

The certificate of authenticity provided by an artist or an art dealer to a buyer or consignee must contain the following information [*Civ. Code* §§ 1742(a), (e), 1744]:

- The artist's name.
- If the artist's name appears on the fine art multiple and the fine art multiple was produced after 1899: a statement of the source (such as a signature or stamp) [*see Civ. Code* § 1744(a)(2), (c)-(e)].
- A clear description of the medium or process and, if pertinent to photographic processes, the material used to produce the fine art multiple.
- If the fine art multiple or the image on or in the master [*see Civ. Code* § 1740(c) (definition)] is adapted from an image produced in a different medium, for a purpose other than creation of the subject fine art multiple, and the fine art multiple was produced after 1949: a description of the respective media and means of reproduction used (such as photomechanical means, photography, or surmoulage).
- If the fine art multiple was produced after December 31, 1982, and is not signed, a statement whether the artist authorized or approved, in writing, the fine art multiple or the edition containing the fine art multiple.
- If the fine art multiple was produced after 1949 and was made after the artist's death, or both the master and the fine art multiple were made after the artist's death, a statement of this fact.
- If the fine art multiple was produced after December 31, 1982, a statement of the number of fine art multiples, including proofs [*see Civ. Code* § 1740(i) (definition)], of all other editions produced from a master that produced a prior limited edition [*see Civ. Code* § 1740(h) (definition)] or constituted or was made from a reproduction or surmoulage of an earlier fine art multiple or master that produced a prior limited edition.
- If the fine art multiple was produced after 1949, the year or approximate year of production.
- If the fine art multiple was produced before 1950, the year or approximate year when the master was made and when the fine art multiple was produced.
- If the fine art multiple was produced after 1949, a statement of whether the edition is being offered as a limited edition and, if so, the authorized maximum number of signed and/or numbered, and unsigned and/or unnumbered, impressions [*see Civ. Code* § 1740(f) (definition)] in the edition, and the authorized maximum number of artist's, publisher's, or other proofs, if any, outside the regular edition, and the total size of the edition.
- If the fine art multiple was produced after 1949, a statement of whether the master was destroyed, effaced, altered, defaced, or canceled after the current edition.

If the fine art multiple is part of a limited edition printed after January 1, 1983, the statement regarding the edition's size will constitute an express warranty that no additional fine art multiples of the same image have been produced [*Civ. Code § 1744(b)*].

In addition to the above information, every certificate of authenticity must contain the following statement: "This is to certify that all information and the statements contained herein are true and correct" [*Civ. Code § 1740(j)*].

[c] Timing of Disclosure

The information must be given to the buyer or consignee on request, or in any event before a sale or consignment. If a prospective buyer so requests, the information must be transmitted before the payment or placing of an order for a multiple. If payment is made by a buyer before delivery of a multiple, this information must be supplied at the time of, or before, delivery [*Civ. Code § 1742(a)*].

If the fine art multiple is to be sold by auction, the required information may be furnished in catalogs or other written materials made readily available to consult and buy before the sale. However, a bill of sale, receipt, or invoice describing the transaction must then be provided that refers to the catalog and lot number in which the information was supplied [*Civ. Code § 1742(a)*].

[d] Liability for False or Inadequate Disclosures

Failure to comply with the disclosure requirements, or other violations of the disclosure statutes, may expose an artist or an art dealer to actions for injunctive relief, civil penalties, and civil penalty surcharges [*Civ. Code § 1745.5(a), (c), (d)*; see *Com. Code §§ 2102, 2104, 2105, 2701 et seq.* (additional remedies under UCC); see also Ch. 52, *Sales of Goods Under the Uniform Commercial Code*].

An art dealer will be liable to a buyer of a fine art multiple for the price plus interest if the dealer fails to provide a certificate of authenticity, or provides one containing mistaken, erroneous, or untrue information, other than harmless errors such as typographical mistakes [*Civ. Code § 1745(a)*]. Willful violations of the disclosure statutes may expose an art dealer to liability for three times the price plus interest [*Civ. Code § 1745(b)*].

An artist who consigns a fine art multiple to an art dealer for the purpose of selling that fine art multiple will not be liable to a buyer if the artist has made the required disclosures to the art dealer [*Civ. Code § 1744.9(a)*].

For further discussion, see § 102E.13[4][h] and California Forms of Pleading and Practice, Ch. 57, *Art* (Matthew Bender).

[e] Sale Contract Requirements

As a general rule, a contract for the sale of goods for \$500 or more is unenforceable unless memorialized by a writing that (1) indicates that a contract was made and (2) bears the signature of the party against whom enforcement is sought, or that party's agent or broker [*Com. Code § 2201(1)*; but see *Com. Code § 2201(3), (4)* (exceptions)]. For further discussion, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* , and Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[2] FORM

Invoice and Certificate of Authenticity for Sale of Fine Art Multiple

Invoice

Buyer: _____[*name*]
 Address: _____[*address*]
 Telephone: [*telephone number*]
 E-mail Address: _____[*e-mail address*]

Seller: _____[*name*]
 Address: _____[*address*]
 Telephone: [*telephone number*]
 E-mail Address: _____[*e-mail address*]

Description of Fine Art Multiple: _____
 Price Paid: \$ _____
 Method of Payment: _____

Certificate of Authenticity

1. The artist is _____[*name of artist*]. _____[*If artist was deceased when master was made, add: The artist died in _____(year). The master from which this fine art multiple was made was produced _____(before or after) the artist's death. _____(If master was produced before but fine art multiple was produced after artist's death, add: This fine art multiple is a posthumous multiple.)*]

2. This fine art multiple was produced by [*specify medium or process, e.g., engraving*]. _____[*If pertinent to photographic process, add: The following material was used to produce this fine art multiple _____(specify).*]

[*If applicable, add one of following alternatives:*]

3. This fine art multiple was made from a master that produced a prior limited edition. A total of [*number*] fine art multiples, including proofs, were produced in all other editions from that master.

[OR]

3. This fine art multiple was made from a master that [*constitutes or was made from*] a [*reproduction or surmoulage*] of [*a prior fine art multiple or the master*] that produced a prior limited edition. A total of [*number*] fine art multiples, including proofs, were produced in all other editions from that master.

[CONTINUE]

4. This edition is/is not being offered as a limited edition. _____[*If edition is being offered as limited edition, add: There are _____(number) authorized signed and/or numbered impressions in the edition. There are _____(number) authorized unsigned and/or unnumbered impressions in the edition. There are _____(number) artist's, publisher's, printer's, or other proofs outside the regular edition. The total size of the edition is _____(number).*]

5. The master from which this fine art multiple was produced was/was not [*destroyed or altered or defaced or effaced or*

canceled] after the current edition.

6. The artist's name [appears *or* does not appear] on the fine art multiple by way of [his/her signature *or specify other source of artist's name, e.g., stamp*].

7. This fine art multiple was produced in [approximately] [year]. _____ [If fine art multiple was produced before 1950, add: The master from which this fine art multiple was produced was created in (approximately) _____ (year).]

[If fine art multiple is reproduction print or reproduction photograph, add:]

8. _____ [This fine art multiple *or* The image on the master from which this fine art multiple was produced] constitutes a [photomechanical *or* photographic *or specify other method*] reproduction of an image produced in a different medium for a purpose other than the creation of the fine art multiple. This fine art multiple is [*specify medium, e.g., an engraving*], and the image from which it was taken is [*specify medium, e.g., a lithograph*].
 _____ [If fine art multiple is not signed, add: The artist has/has not authorized or approved
 _____ (this fine art multiple *or* the edition containing this fine art multiple) in writing.]

[If fine art multiple is reproduction sculpture, add:]

8. _____ [This fine art multiple *or* The image in the master from which this fine art multiple was reproduced] constitutes [a surmoulage *or specify other form of reproduction*] reproduction of an image produced in a different medium for a purpose other than the creation of the fine art multiple. This fine art multiple is [*specify medium, e.g., a wooden*] sculpture and the image from which it was taken is [*specify medium, e.g., a marble*] sculpture.
 _____ [If fine art multiple is not signed, add: The artist has/has not authorized or approved
 _____ (this fine art multiple *or* the edition containing this fine art multiple) in writing.]
 _____ Dated:

BUYER

_____ [signature of buyer]

[typed name]

SELLER

_____ [signature of seller]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC) Sales (Article 2) Subject Matter General Overview Contracts Law Sales of Goods General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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A. Sale of Fine Art Multiple

32-102E California Legal Forms--Transaction Guide § 102E.201

§ 102E.201 Art Dealer's Notice Concerning Disclosure Requirements

[1] Comment--Use of Form

This form is a notice that must be posted by an art dealer who is regularly engaged in sales of fine art multiples [*see Civ. Code § 1740(a)* (definition)]. The information contained in this notice must be posted, in a conspicuous place and in a legible format, in each place of business in California in which the art dealer is regularly engaged in sales of fine art multiples [*Civ. Code § 1742(c)*].

For discussion of the disclosure requirements referred to in this form, and a sample disclosure form, called a certificate of authenticity [*see Civ. Code §§ 1742(a), 1744(a)*], see § 102E.200.

For purposes of this requirement, an art dealer is any individual, partnership, corporation, limited liability company, association, or other entity, however organized, that either (1) is in the business of dealing exclusively or nonexclusively in fine art multiples or (2) by occupation holds itself out as having knowledge or skill peculiar to these works, or to whom that knowledge or skill may be attributed because of employing an agent or other intermediary who, by virtue of his or her occupation, holds himself or herself out as having that knowledge or skill [*Civ. Code § 1740(g), (k)*].

[2] FORM

Art Dealer's Notice Concerning Disclosure Requirements

California law provides for the disclosure in writing of certain information concerning prints, photographs, and sculpture casts. This information is available to you, and you may request to receive it prior to purchase.

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Sales (Article 2)Subject MatterGeneral OverviewContracts LawSales of GoodsGeneral Overview



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32-102E California Legal Forms--Transaction Guide § 102E.202

§ 102E.202 Charitable Organization's Disclaimer of Knowledge of Information

[1] Comment--Use of Form

This form is a disclaimer to be used by a charitable organization in connection with the sale or auction of fine art multiples [see *Civ. Code § 1740(a)* (definition)] by the organization.

Art dealers [see *Civ. Code § 1740(g)* (definition)] and artists must provide specified information, in the form of a document called a certificate of authenticity, to consignees and buyers of fine art multiples sold in California for \$100 or more, exclusive of any frame [*Civ. Code §§ 1741, 1742(a), 1744(a)*; see § 102E.200[2] (form)]. However, a charitable organization that conducts a sale or auction of fine art multiples may be exempted from this requirement. To qualify for the exemption, the organization must post, in a conspicuous place at the site of the sale or auction, a disclaimer of any knowledge of the information required to be included in a certificate of authenticity. The disclaimer must also be included in any catalog distributed by the organization with respect to the sale or auction [*Civ. Code § 1742.6*]. (The exemption statute does not define "charitable organization.")

If the charitable organization uses or employs an art dealer to conduct a sale or auction of fine art multiples, the art dealer must comply with the disclosure requirements [*Civ. Code § 1742.6*].

[2] FORM

Charitable Organization's Disclaimer of Knowledge of Information

DISCLAIMER

_____ [name of charitable organization] disclaims any knowledge of the information specified in *California Civil Code Section 1744*, which is required to be disclosed in certain sales of fine art multiples, in relation to its [sale or auction] of fine art multiples [general description, e.g., in the form of photographs and prints] at [location of sale] on _____ [date of sale].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Nonprofit Corporations & Organizations General Overview Commercial Law (UCC) Sales
(Article 2) Subject Matter General Overview Contracts Law Sales of Goods General Overview



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32-102E California Legal Forms--Transaction Guide §§ 102E.203-102E.209

[Reserved]

§§ 102E.203[Reserved]



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B. Consignment of Fine Art

32-102E California Legal Forms--Transaction Guide § 102E.210

§ 102E.210 Consignment Agreement

[1] Comment

[a] Use of Form

This form is a consignment agreement between the creator of a work of fine art (the artist) and a person engaged in the business of selling works of fine art (an art dealer). It may be used also by an heir, legatee, or personal representative of a deceased artist who enters into a consignment agreement with an art dealer [*see Civ. Code § 1738(a)*].

The agreement allows the art dealer to exhibit and sell or to sell the work under specified conditions. It includes payment terms for the dealer's and artist's commissions. (The artist's residual rights in the sale of his or her work, provided by *Civ. Code § 986* are discussed in [e], *below*.) If the art dealer and the artist have agreed that the dealer will exhibit the artist's works without offering them for sale, this agreement can be modified accordingly.

An artist who sells or consigns a fine art multiple of his or her own creation or conception, into or from California, must disclose the information required by *Civ. Code § 1744* in a certificate of authenticity [*see Civ. Code §§ 1740(a), 1742(a), (e), 1744(a)*]. The certificate may be attached to this agreement. For a detailed discussion of the certificate's disclosure requirements and a sample form, see § 102E.200.

For discussion of contracts generally, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[b] Definitions

The statutes governing consignment agreements between artists and art dealers cover agreements concerning fine art only [*see Civ. Code § 1738 et seq.*]. In this context, "fine art" means a painting, sculpture, drawing, work of graphic art (including an etching, lithograph, offset print, silk screen, or a work of graphic art of like nature), work of calligraphy, or work in mixed media (including a collage, an assemblage, or any combination of the media listed above) [*Civ. Code § 1738(b)*].

The artist is the person who created the work of fine art or, if that person is deceased, his or her heir, legatee, or personal representative [*Civ. Code* § 1738(a)]. An art dealer is a person engaged in the business of selling works of fine art, other than a person exclusively engaged in the business of selling goods at public auction [*Civ. Code* § 1738(c)].

A consignment of fine art is an agreement under which no title to, estate in, or right to possession of a work of fine art, superior to that of the artist, vests in the art dealer, notwithstanding the dealer's power or authority to transfer and convey to a third person all of the artist's right, title, and interest in the work [*Civ. Code* § 1738(e)].

[c] Waivers Void

The general purpose of the statutes governing consignment is to protect artists by defining the art dealer's duties toward the artist [*see Civ. Code* §§ 1738.6-1738.8]. Accordingly, any provision of a contract or agreement under which an artist or his or her heir, legatee, or personal representative waives any provision contained in the statutes is void [*Civ. Code* § 1738.8]. Moreover, no trade custom, practice, or usage will preclude the creation of a consignment, as provided by statute [*Civ. Code* § 1738.5; *see Civ. Code* § 1738.6 (results of consignment); *see also* § 102E.12[3], [4] (creation and effect of consignment)].

The Civil Code statutes supersede any conflicting or inconsistent provisions of the Commercial Code regarding consignments of fine art [*Civ. Code* § 1738.9].

For a detailed discussion of the consignment of fine art, see § 102E.12.

[d] Exempt Transactions

The statutes governing consignments do not apply to:

- Delivery of a work of fine art to an art dealer pursuant to an outright sale of the work for which the artist receives or has received full compensation on delivery [*Civ. Code* § 1738.5].
- Consignment of a work of fine art to a person exclusively engaged in the business of selling goods at public auction [*Civ. Code* § 1738(c)].
- Consignment of a work of fine art pursuant to a written contract executed before January 1, 1976, unless (1) the parties agree that the statutes apply, mutually and in writing, or (2) the contract is extended or renewed after January 1, 1976 [*Civ. Code* § 1738.9].

[e] Artist's Royalties

With specified exceptions [*see Civ. Code* § 986(b); § 102E.16[3]], artists who are either U.S. citizens or California residents who have resided in California for a minimum of two years are entitled to collect a 5 percent royalty on the price of works of fine art that are sold in California or that are sold by a seller who resides in California [*Civ. Code* § 986(a), (c)(1); *see Civ. Code* § 986(c)(2) (statute applies only to works constituting fine art)].

This right may be waived only by a written contract providing for royalties in an amount in excess of 5 percent of the price [*Civ. Code* § 986(a)].

For detailed discussion of the artist's royalty rights, including exceptions to the rule, see § 102E.16.

[f] Disclosure Requirements for Fine Art Multiples

An artist who consigns, into or from California, a fine art multiple of his or her creation or conception to an art dealer

must disclose specified information concerning the fine art multiple [*Civ. Code* §§ 1742(a), (e), 1744(a)]. The information is disclosed in a certificate of authenticity [*see Civ. Code* § 1744(a); § 102E.200].

For purposes of the disclosure requirements, a fine art multiple is any fine print, positive or negative photograph, sculpture cast, collage, or similar art object produced in more than one copy. Pages or sheets taken from books and magazines and offered for sale or sold as art objects are included in this definition, but intact books and magazines are not [*Civ. Code* § 1740(a)]. A fine print is a fine art multiple produced by engraving, etching, woodcutting, lithography, or serigraphy, or produced or developed from photographic negatives, or by any combination of these methods [*Civ. Code* § 1740(b)].

For further discussion of disclosure requirement for fine art multiples, see §§ 102E.13, 102E.200.

[2] FORM

Consignment Agreement Between Artist and Art Dealer

ART CONSIGNMENT AGREEMENT

Artist's Name: _____
 Artist's Address: _____
 Artist's Telephone Number: _____
 Artist's E-mail Address: _____

Art Dealer's Name: _____
 Art Dealer's Address: _____
 Art Dealer's Telephone Number: _____
 Art Dealer's E-mail Address: _____

This is an agreement between _____ [*name of artist*] (Artist) and _____ [*name of art dealer*] (Art Dealer).

1. Appointment of Art Dealer as Artist's Agent. The Artist appoints the Art Dealer as agent for the works of art (Artwork) consigned under this agreement for the purpose of [exhibition and sale *or* sale]. The artworks may not be used for any other purpose without the Artist's written consent.

2. Consignment of Art Work to Art Dealer. The Artist consigns to the Art Dealer, and the Art Dealer accepts on consignment, the Artwork listed on the attached Consignment Sheets and on additional Consignment Sheets that may be incorporated into this Agreement if both parties agree to the consignment of other works of art. All Consignment Sheets must be signed by the Artist and a representative of the Art Dealer.

3. Term of Agreement. This contract is valid for one year from the date of signature, and is renewable yearly on the terms and conditions specified in this contract.

4. Commissions, Payment, and Related Matters. The Artwork is accepted by the Art Dealer on a [*percentage, commonly 50 percent*] commission basis, with the Artist's [*percentage, e.g., 50 percent*] to be paid to the Artist. The parties acknowledge that California law provides that (1) proceeds from the sale of the Artwork constitute funds held in trust by the Art Dealer for the benefit of the Artist, and the proceeds must first be applied to pay any balance due the Artist; (2) if the Art Dealer directly or indirectly buys a work received on consignment for the Art Dealer's own account, the work remains trust property until the Art Dealer has paid the price in full to the Artist; and (3) if the work is resold to a bona fide buyer before the artist has been paid in full, the proceeds of the resale constitute funds held in trust by the

Art Dealer for the benefit of the Artist, to the extent necessary to pay the balance due the artist. The parties therefore agree:

(a) The Art Dealer will make every effort to send payment to the Artist for Artwork sold within 30 days following the date of completed sale. If the Art Dealer requires more time for payment, it will contact the Artist and make arrangements. In any event, payment may not be delayed more than

_____ [e.g., 60 or 90] days.

(b) The retail price of the Artwork may not be changed without the consent of the Artist, with the exception of standard dealer discounts, which will be deducted from the Art Dealer's commission.

(c) Title to the Artwork will remain with the Artist until the Artist is paid in full, at which time title will pass directly to the buyer.

(d) The Art Dealer assumes the risk of a buyer's bad credit. All losses because of bad credit will be borne by the Art Dealer.

5. Location of Exhibit or Sale. The Art Dealer will [exhibit and sell or sell] the Artwork at _____ [gallery address].

6. Delivery. The Artist will deliver the Artwork to the address specified in this agreement on or before _____ [date]. The Artist may withdraw the Artwork on demand with a 30-day notice, or other notice deemed reasonable by the Art Dealer. The Artist will pay any postage and shipping.

7. Removal. No Artwork may be removed from the Art Dealer's premises for the purpose of rental or installment sales without the Artist's consent, except as follows:

(a) The Artist agrees that the Artwork may be removed from the Art Dealer's gallery for the purpose of being shown to prospective buyers and may be left on approval at the discretion of the Art Dealer's representative. The responsibility for the Artwork remains with the Art Dealer.

(b) The Artist agrees that the work consigned for solo and group shows may remain at the Art Dealer's gallery [for

_____ weeks] after the show for interested collectors, if requested by the Art Dealer.

8. Safekeeping. The Art Dealer is responsible for the safekeeping of the Artwork while in its custody or in transit arranged by the Art Dealer. The Art Dealer assumes full responsibility for the Artwork if it is lost, stolen or damaged while in its custody or in transit arranged by the Art Dealer. The Art Dealer will not intentionally commit or authorize any physical defacement, mutilation, alteration or destruction of any of the Artwork.

9. Publicity Costs. The Art Dealer will bear the costs of publicity and materials for solo and group shows of selected artists, as determined by the Art Dealer. These costs do not include framing or materials above the standard cost for shows.

10. Copyright. The Artist reserves copyright, including all reproduction rights, to the Artwork.

11. Artwork Not Subject to Claim by Art Dealer's Creditors. The Artwork will be held in trust for the benefit of the Artist and will not be subject to any claim by a creditor of the Art Dealer. In the event of any default by the Art Dealer,

the artist will have all the rights of a secured party under the Uniform Commercial Code.

12. Art Dealer's Accounting Responsibilities. The Art Dealer will provide a written accounting [*frequency, e.g., once a month*], which will include the description and quantity of Artwork sold under this Agreement, the price, and the buyer's name and address.

13. Shows and Sales in Other Galleries. The Artist will not show work in any other gallery in [*California or other named location, e.g., Los Angeles County*], unless the Art Dealer agrees in writing. The Artist agrees to sell works of art outside the Art Dealer's gallery only for the same price as asked within the Art Dealer's gallery.

14. Restoration. Restoration of any Artwork may be undertaken only with the Artist's written permission. In the event of loss or damage that cannot be restored, the Artist will receive 50 percent of the value established on the Consignment Sheet. The Art Dealer will provide the Artist with all relevant information about its insurance coverage if the Artist requests this information.

15. Attorneys' Fees. If any legal action is commenced between the parties concerning the provisions of this contract or the performance of this contract, the party prevailing in that action will be entitled to a reasonable sum for attorneys' fees in addition to any other relief that may be granted. The amount of that sum will be determined by the court in that litigation or in a separate action brought for that purpose.

16. Modification. This contract may be modified only by an agreement in writing signed by the party against whom the modification is sought to be enforced.

17. Entire Agreement. This contract supersedes any and all other agreements, whether oral or in writing, between the parties with respect to the subject of this contract. This contract contains all of the covenants and agreements between the parties with respect to the subject of this contract, and each party acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except the covenants and agreements embodied in this contract. No agreement, statement, or promise not contained in this contract shall be valid or binding on the parties with respect to the subject of this contract.

18. Governing Law. The validity of this contract and each of its terms and provisions, as well as the rights and duties of the parties under this contract, shall be construed pursuant to and in accordance with the law of the State of California.

Executed at _____ [city], California, on _____ [date].

ARTIST

_____ [signature]

[typed name]

ART DEALER

_____ [name]

By: _____ [signature of dealer's representative]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Sales of Goods General Overview Contracts Law Secured Transactions Application & Construction Leases Contracts Law Types of Contracts General Overview



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B. Consignment of Fine Art

32-102E California Legal Forms--Transaction Guide § 102E.211

§ 102E.211 Provision for Sale of Artwork Based on Appraisal

[1] Comment

[a] Use of Form

This form is a provision for the sale of artwork based on appraised value. A fair-market appraisal is sometimes used by parties who want to conduct a sale, but who are either unwilling or unable to agree on a price without the help of a neutral professional authority. This provision should be included, as appropriate, in a contract for sale.

[b] Appraisals In General

Appraisal is a highly specialized business. The best known appraisal societies are the American Society of Appraisers (ASA), and the Appraisers Association of America (AAA). Both associations train, test, and certify appraisers. In addition, both require compliance with ethical rules. Reputable auction houses not only employ qualified appraisers but also can recommend appraisers in areas in which they have no specialist.

Fine art appraisals usually are highly detailed. Appraisal descriptions generally contain the same sort of information that is used to identify a work of art in a loan agreement between a museum and a lender [*see § 102E.220[2]*]. The appraisal description should contain, at a minimum, an item number, a description that is sufficiently detailed to distinguish the work for all other works, notation of any signatures or marks, measurements, weight if pertinent, date, and country of origin. The description should be followed by an individual value for each item, rather than groupings of value.

Factors that determine value in the art market are myriad. They include, but are not limited to, authenticity, condition, rarity, historical importance, fashion (that is, what is currently popular and to what extent fashion is responsible for current market value), medium (durability may be a factor), size (which affects the value of works of art principally in its extremes), subject matter, provenance, and relative quality (for instance, two watercolors by the same artist may be of different quality, or one might reflect what one looks for in the artist, while the subject of the other might have sentimental attraction). The priority of these, and other factors, changes with each work considered. Finally, since all artwork is an emotional commodity, it may be impossible to assign an exact value.

There are many noncommercial art galleries and art museums in California, in addition to countless dealers' galleries, where a work of art may be authenticated or appraised. A comprehensive listing of museums and galleries under the title *The Official Museum Directory (United States and Canada)* is available in many libraries.

[2] FORM

Provision for Sale of Artwork Based on Appraisal

_____. **Price Based on Appraisal.** The Artwork will be offered for sale for its appraised fair market value. If the parties cannot agree on the appraiser, each will select one person, and those two so selected will together name a disinterested person. These three persons will then provide a fair market value appraisal of the Artwork. The estimated value shall reflect the amount that might be realized by at sale, assuming the sale is handled by a gallery or auction house, and shall not reflect commission or mark-up.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSales of GoodsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewEducation LawMuseums



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32-102E California Legal Forms--Transaction Guide §§ 102E.212-102E.219

[Reserved]

§§ 102E.212[Reserved]



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C. Loan Agreements Between Museums and Lenders

32-102E California Legal Forms--Transaction Guide § 102E.220

§ 102E.220 Agreement for Loan of Artwork to Museum

[1] Comment--Use of Form

This form is a contract for the loan of artwork to a museum for a definite period of seven years or less. The form covers publicity, insurance, and shipping of the artwork, and various other matters. It requires the museum to exercise the same degree of care toward the artwork as it does in the safekeeping of its own property and to return the artwork in the condition in which it was received. Absent the lender's written consent, the museum may not apply conservation measures or alter the artwork in any way. Injury or loss is to be reported immediately to the lender. The museum may return the artwork only to the owner, lender, lender's representative, or the personal representative of the owner's or lender's estate. Unless the lender expressly chooses to maintain his or her own insurance, the museum must insure the artwork.

For a form for an agreement for a loan for an indefinite term or a term longer than seven years, see § 102E.221.

[2] FORM

Agreement for Loan of Artwork to Museum

ARTWORK LOAN AGREEMENT

MUSEUM:

Name: _____

Address of Main Office: _____

Telephone Number: _____

E-Mail Address (Main Office): _____

Address and Telephone Number of Museum Branch to Which Loan is Made: _____

E-Mail (Branch): _____

LENDER:

Name: _____
 Address: _____
 Telephone Number: _____
 E-Mail Address: _____
 Address to Which Artwork Should Be Returned: _____
 Exact Form in Which Lender's Name Should Appear for Labels, Publicity, and/or Catalog: _____

OWNER:

Name: _____
 Address: _____
 Telephone Number: _____
 E-Mail Address: _____

ARTIST:

Name: _____
 Year Born: _____
 Year Died: _____
 Address: _____
 Telephone Number: _____
 E-Mail Address: _____
 Title of Artwork: _____
 School or Country: _____
 Medium or Materials and Support: _____

Size: *[for painting, drawing, etc., specify height and width without frame or mat and specify outer dimensions of mat or frame; for sculpture, specify height, width, depth, and approximate weight (without pedestal) and same for pedestal]*

Date of Work: _____ *[if date appears on work, specify where]*

Signature: *[if work is signed, inscribed, or initialed, specify where]*

Framing: *[describe framing if any; specify whether museum may reframe or remat it and may temporarily substitute plastic in place of glass]*

Condition: *[note any existing breaks, tears, scratches, abrasions, paint losses, other loss of integrity, or defects]*

CONDITIONS OF LOAN

1. Term of Loan. This is an agreement between _____ *[lender's name]* (Lender) and _____ *[museum's name]* (Museum) for the loan of the artwork described above (Artwork) to Museum for a period of *[e.g., six months]*, beginning on _____ *[date]*. The Artwork may be displayed or removed from display by Museum at any time during this period, at Museum's sole discretion. The Artwork may not be removed from Museum by Lender during this period, except with Museum's written consent. The Artwork may not be removed from Museum for transfer to another branch of Museum or for storage at a location other than Museum's address as listed above, except with Lender's written consent.

2. Care of Artwork. Museum will exercise the same degree of care with respect to the Artwork as it does in the safekeeping of its own comparable property. It is understood that the Artwork will remain in the same condition as when it was received. Museum will not clean, repair, retouch, or alter the Artwork in any way without Lender's written permission. Injury or loss of the Artwork, whether in transit or on Museum's premises, and regardless of who may be responsible, will be reported to Lender immediately.

3. Return of Artwork. The Artwork will be returned only to Lender or to the owner's authorized agent or representative or, in the event of the owner's or Lender's death, to the authorized legal representative of the owner's or

Lender's estate. Lender must notify Museum of any changes of address of Lender, the owner, or the authorized legal representative to whom correspondence should be sent.

4. Insurance Coverage. (a) Unless Lender expressly elects to maintain its own insurance coverage, Museum will insure the Artwork "wall-to-wall" under its fine arts policy, for the value of \$_____, against all risks of physical loss or damage from any external cause while in transit and while at Museum throughout the period of this loan.

(b) Museum's fine arts policy contains limitations for acts of God and the usual exclusions for loss or damage due to wear and tear, gradual deterioration, moths, vermin, inherent defects, or damage sustained because of and resulting from any repairing, restoring, or retouching process, or such causes as hostile or warlike action in time of peace or war, atomic, nuclear, or radioactive force, reaction, or contamination, insurrection, rebellion, revolution, civil war, usurped power, action taken by governmental authority in hindering, combating, or defending against such an occurrence, seizure or destruction under quarantine or customs regulation, confiscation by order of any governmental or public authority, or risks of contraband or illegal transportation of trade.

(c) If Lender chooses to maintain its own insurance, Museum accepts no responsibility for any error or deficiency in information furnished to or by Lender's insurers, or for any lapses in coverage. In this case, Museum must receive either a certificate of insurance naming Museum as additional insured or a waiver of subrogation executed by Lender.

5. Reproductions by Museum. Museum may obtain or have made, at Museum's expense, photographs of the Artwork, whether black-and-white or color, for catalog reproduction and publicity. Museum may reproduce for sale, make and sell slides and videotapes of, make and sell prints of, and permit the general public to photograph, the Artwork.

6. History and Provenance. Lender shall promptly respond to and comply with, to Museum's satisfaction, any reasonable request by Museum for information concerning provenance (history of ownership), previous exhibitions, published illustrations, references, bibliography entries, and notes on physical condition, pertaining to the Artwork.

7. Delivery to Museum. The Artwork will reach Museum by _____ [date] and be delivered by [means or carrier]. Packing and transportation costs will be borne by [Lender or Museum].

_____ Dated:

MUSEUM

By: _____ [signature of museum's representative]

[typed name and title]

LENDER

_____ [signature]

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Sales of Goods General Overview Contracts Law Types of Contracts General Overview Education Law Museums



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102E SALES AND LOANS OF ARTWORK
PART IV. FORMS

C. Loan Agreements Between Museums and Lenders

32-102E California Legal Forms--Transaction Guide § 102E.221

§ 102E.221 Agreement for Loan of Artwork to Museum for Indefinite Term or Longer Than Seven Years

[1] Comment

[a] Use of Form

This form is a contract for the loan of artwork to a museum for a term in longer than seven years or an indefinite term. Its provisions reflect the requirements of *Civ. Code § 1899 et seq.* The statutes do not specify the form or contents of a long-term loan agreement. Generally, the statutory provisions cover the duty of the lender and the museum to give each other notice of specified events, and the effect of supplying or failing to supply specified notices on the parties' respective rights in the artwork. Incorporating these requirements into the loan agreement puts both parties on notice of their respective statutory rights and obligations with respect to the artwork.

The statutory requirements reflected in this form are discussed in [b]-[e], *below*. For a more comprehensive discussion of the requirements contained in *Civ. Code § 1899 et seq.*, see § 102E.30 et seq.

For a form for the loan of artwork to a museum for a definite period up to seven years, see § 102E.220.

[b] Conservation or Disposition

Unless a written loan agreement provides otherwise, a museum may apply conservation measures to, or dispose of, borrowed artwork, without the lender's permission, but only if [*Civ. Code § 1899.6(a)(1)*]:

- Immediate action is required to protect the artwork, other property in the museum's custody, or the health and safety of the public or the museum's staff.

- The museum is unable to reach the lender at the lender's last address of record [*see Civ. Code §§ 1899.2(a), 1899.6(a)(2)*] (notice requirements); *see also § 102E.36*, or the lender will not agree to the protective measures recommended by the museum, yet is unwilling or unable to terminate the loan and retrieve the artwork.

If a museum takes conservation or disposition action under these conditions, it will have a lien on the artwork and on the proceeds of its disposition, for the costs of conservation or disposition [*Civ. Code* § 1899.6(b)(1)]. Further, the museum will not be liable for injury or loss of the artwork if it acted with a reasonable belief that the conservation or disposition was necessary to protect the artwork, other property in the custody of the museum, or the health and safety of the public or the museum's staff, and if it exercised reasonable care in the choice and application of any conservation measures used [*Civ. Code* § 1899.6(b)(2)].

This form provides that the museum will not apply conservation measures to, or dispose of, the artwork without the lender's written consent, unless immediate action is required, and the museum is unable to obtain the lender's consent. The form also gives the museum a lien and limits its liability as provided by *Civ. Code* § 1899.6(b).

[c] Injury or Loss

The museum must give the lender prompt notice of any known injury or loss of the artwork [*Civ. Code* § 1899.3(d)]. The lender may not bring an action against the museum for damages resulting from injury or loss of the artwork more than three years from the date the museum gave the lender notice of the injury or loss, or 10 years from the date of the injury or loss, whichever occurs earlier [*Civ. Code* § 1899.8].

[d] Manner of Notice

When the museum is required to give the lender any notice pursuant to *Civ. Code* § 1899 *et seq.*, notice is deemed to have been given if the museum mails the notice to the lender at the lender's address, and proof of receipt is received by the museum within 30 days from the date the notice was mailed [*Civ. Code* § 1899.2(a)]. The owner of the artwork is responsible for notifying the museum promptly in writing of any change of address or change in ownership of the artwork [*Civ. Code* § 1899.4(a)].

If the museum does not have an address for the lender, or if proof of receipt is not received by the museum, notice is deemed given if the museum publishes notice at least once a week for three successive weeks in a newspaper of general circulation in both the county in which the museum is located and the county of the lender's address, if any [*Civ. Code* § 1899.2(a)].

[e] Return of Artwork

In this form, the museum agrees to return the artwork to the lender or owner, or the agent of either, provided the lender, owner, or agent has filed a notice of intent to preserve an interest that complies with the statutory requirements [*see* [f], *below*; § 102E.35], either on the expiration of the stated term or on notice by the museum that it intends to terminate the loan. The museum may give the lender notice of the museum's intent to terminate the loan, by mailing or publishing a notice, as discussed in [d], *above*. The form and contents of the notice are prescribed by statute [*see Civ. Code* § 1899.9(a); § 102E.229].

[f] Notice of Intent to Preserve Interest

A notice of intent to preserve an interest in the artwork is used by the lender to keep the museum apprised of the current ownership of the artwork, the current location of the owner, and the fact that the owner claims a continuing interest in the artwork [*see Civ. Code* § 1899.5(a); *see also* § 102E.222 (form for notice)]. A notice of intent to preserve an interest in the artwork must be accompanied by documentation sufficient to establish that the claimant is the owner of the artwork [*Civ. Code* § 1899.5(a)].

When a notice of intent satisfying all of the statutory requirements [*see Civ. Code* § 1899.5(a)] is filed with the museum, the museum must maintain the original or an accurate copy of the notice for at least 25 years [*Civ. Code* §

1899.3(b)]. The museum also must furnish to anyone who files a notice of intent to preserve an interest, a proof of receipt within 30 days of receiving the notice [*Civ. Code* § 1899.3(c); *see* §§ 102E.222, 102E.223].

[g] Treating Artwork as Unclaimed Property

The lender will be deemed to have donated the artwork to the museum if the lender fails to file an action to recover the artwork within either three years from the date the museum gives notice of its intention to terminate the loan [*see* [e], *above*] or 25 years after the date of the last written contact between the lender and the museum [*see Civ. Code* § 1899.10(c)]. Alternatively, the museum may dispose of unclaimed artwork according to the provisions of the Unclaimed Property Law [*Civ. Code* § 1899.11(a); *see Code Civ. Proc.* § 1500 *et seq.*; § 102E.40; *see also* Ch. 102C, *Lost and Unclaimed Property*].

[2] FORM

Agreement for Loan of Artwork to Museum for Indefinite Term or Longer Than Seven Years

ARTWORK LOAN AGREEMENT

MUSEUM:

Name: _____
 Address of Main Office: _____
 Telephone Number: _____
 E-Mail Address (Main Office): _____
 Address and Telephone Number of Museum Branch to Which Loan is Made: _____
 E-Mail (Branch): _____

LENDER:

Name: _____
 Address: _____
 Telephone Number: _____
 E-Mail Address: _____
 Address to Which Artwork Should Be Returned: _____
 Exact Form in Which Lender's Name Should Appear for Labels, Publicity, and/or Catalog: _____

OWNER:

Name: _____
 Address: _____
 Telephone Number: _____
 E-Mail Address: _____

ARTIST:

Name: _____
 Year Born: _____
 Year Died: _____
 Address: _____
 Telephone Number: _____
 E-Mail Address: _____
 Title of Artwork: _____
 School or Country: _____
 Medium or Materials and Support: _____
 Size: [*for painting, drawing, etc., specify height and width without frame or mat and specify outer dimensions of mat or*

frame; for sculpture, specify height, width, depth, and approximate weight (without pedestal) and same for pedestal]

Date of Work: _____ *[if date appears on work, specify where]*

Signature: *[if work is signed, inscribed, or initialed, specify where]*

Framing: *[describe framing if any; specify whether museum may reframe or remat it and may temporarily substitute plastic in place of glass]*

Condition: *[note any existing breaks, tears, scratches, abrasions, paint losses, other loss of integrity, or defects]*

CONDITIONS OF LOAN

1. Term of Loan. This is an agreement between _____ *[lender's name]* (Lender) and _____ *[museum's name]* (Museum) for the loan the artwork described above (Artwork) to Museum for a period of *[specify period longer than seven years or indefinite duration]*, beginning on _____ *[date]*. The Artwork may be displayed or removed from display by Museum at any time during this period, at Museum's sole discretion. _____ *[Specify circumstances under which owner has right to reclaim artwork, e.g., Lender may not remove the Artwork from Museum during this period, except with Museum's written consent or, for a loan of indefinite duration, e.g.: Lender may terminate this loan and remove the Artwork at any time on _____ (specify notice period, e.g., 90 days) written notice to Museum, provided that Lender agrees that the minimum duration of this loan shall be at least _____ years (or other term) from the beginning date specified in this paragraph.]* The Artwork may not be removed from Museum for transfer to another branch of Museum or for storage at a location other than Museum's address as listed above, except with the Lender's written consent.

2. Care of Artwork. Museum will exercise the same degree of care with respect to the Artwork as it does in the safekeeping of its own comparable property. It is understood that the Artwork will remain in the same condition as when it was received. Museum will not clean, repair, retouch, or alter the Artwork in any way without Lender's written permission. Injury or loss of the Artwork, whether in transit or on Museum's premises, and regardless of who may be responsible, will be reported to Lender immediately.

3. Return of Artwork. The Artwork will be returned only to Lender or to the owner's authorized agent or representative or, in the event of the owner's or Lender's death, to the authorized legal representative of the owner's or Lender's estate. Lender must notify Museum of any changes of address of Lender, the owner, or the authorized legal representative to whom correspondence should be sent.

4. Conservation Measures or Disposition of Artwork. Museum agrees that it will not apply conservation measures to, or dispose of, the Artwork without notifying Lender and obtaining Lender's written consent, unless immediate action is required and Museum is unable to obtain Lender's consent. Under these circumstances, Museum will have a lien on the Artwork and on the proceeds of the disposition of the Artwork for the costs incurred. If injury or loss of the Artwork occurs under these circumstances, Museum will not be liable if it reasonably believed that the action taken was necessary, and if it exercised reasonable care in the choice and application of the measures taken.

5. Notice of Loss or Damage. Museum will promptly notify Lender of any injury or loss of the Artwork, whether the injury or loss occurs in transit or on Museum's premises, and regardless of who may be responsible.

6. Manner of Notice. Museum will be deemed to have given notice to Lender as required under this Agreement if it mails the notice to Lender at Lender's address and it receives proof of receipt within 30 days from the date the notice was mailed. If Museum does not have Lender's address, or if it does not receive proof of receipt, it will be deemed to have given notice if it publishes notice at least once a week for three successive weeks in a newspaper of general circulation in both the county in which Museum is located and the county of Lender's address as shown in Museum's records.

7. Lender's Notice of Intent to Preserve Interest in Artwork. If Lender files a notice of intent to preserve an interest in the Artwork, he/she will also supply Museum with documentation sufficient to establish that he/she is the owner of the Artwork. Museum will maintain the original or an accurate copy of the notice for at least 25 years. Museum will mail a proof of receipt of any properly filed notice to Lender at the address given in the notice within 30 days of receiving the notice.

8. Failure to File Action for Recovery. Lender will be deemed to have donated the Artwork to Museum if Lender fails to file an action to recover the property within either three years from the date Museum gives Lender notice of its intention to terminate the loan or 25 years after the date of the last written contact between Lender and Museum. Alternatively, Museum may dispose of the Artwork as unclaimed property according the California Unclaimed Property Law (*Code of Civil Procedure Section 1500 et seq.*).

9. Insurance. (a) Unless Lender expressly elects to maintain its own insurance coverage, Museum will insure the Artwork "wall-to-wall" under its fine arts policy, for the value of \$_____, against all risks of physical loss or damage from any external cause while in transit and while at Museum throughout the period of this loan.

(b) Museum's fine arts policy contains limitations for acts of God and the usual exclusions for loss or damage due to wear and tear, gradual deterioration, moths, vermin, inherent defects, or damage sustained because of and resulting from any repairing, restoring, or retouching process, or such causes as hostile or warlike action in time of peace or war, atomic, nuclear, or radioactive force, reaction, or contamination, insurrection, rebellion, revolution, civil war, usurped power, action taken by governmental authority in hindering, combating, or defending against such an occurrence, seizure or destruction under quarantine or customs regulation, confiscation by order of any governmental or public authority, or risks of contraband or illegal transportation of trade.

(c) If Lender chooses to maintain its own insurance, Museum accepts no responsibility for any error or deficiency in information furnished to or by Lender's insurers, or for any lapses in coverage. In this case, Museum must receive either a certificate of insurance naming Museum as additional insured or a waiver of subrogation executed by Lender.

10. Reproductions by Museum. Museum may obtain or have made, at Museum's expense, photographs of the Artwork, whether black-and-white or color, for catalog reproduction and publicity. Museum may reproduce for sale, make and sell slides and videotapes of, make and sell prints of, and permit the general public to photograph, the Artwork.

11. History and Provenance. Lender shall promptly respond to and comply with, to Museum's satisfaction, any reasonable request by Museum for information concerning provenance (history of ownership), previous exhibitions, published illustrations, references, bibliography entries, and notes on physical condition, pertaining to the Artwork.

12. Delivery to Museum. The Artwork will reach Museum by _____[*date*] and be delivered by [*means or carrier*]. Packing and transportation costs will be borne by [Lender or Museum].

_____ Dated:

MUSEUM

By: _____ [*signature of museum's representative*]
[*typed name and title*]

LENDER

_____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewEducation LawMuseums



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 102E SALES AND LOANS OF ARTWORK
PART IV. FORMS

C. Loan Agreements Between Museums and Lenders

32-102E California Legal Forms--Transaction Guide § 102E.222

§ 102E.222 Notice of Intent to Preserve Interest in Artwork on Loan to Museum

[1] Comment

[a] Use of Form

This form is a notice of intent to preserve an interest in artwork on long-term loan to a museum [*see Civ. Code § 1899.5(a)*]. It contains a notice to the museum of the lender's intent to preserve an interest in the artwork, and a receipt for the notice. The notice in this form satisfies the statutory requirements. (There is an optional statutory form for notice, which the lender may elect to use in lieu of this form [*see Civ. Code § 1899.5(c)*].)

If the museum accepts the loan of artwork for an indefinite term, or for a term longer than seven years, the museum must inform the lender in writing, at the time of the loan, of the provisions of *Civ. Code § 1899 et seq.* [*see Civ. Code § 1899.3(a)*] (governing loans of artwork accepted after 1983); *see also* [c], *below*].

The lender (or any other person who claims ownership of the artwork) may submit the notice of intent to the museum at any time during the loan term [*see* [d], *below*]. On receiving a completed notice of intent to preserve an interest in the artwork, the museum must complete the receipt portion of the notice, or a separate receipt, and send it to the lender (or claimant) [*Civ. Code § 1899.3(c)*; *see* [c], *below*].

[b] Contents of Notice

A notice of intent to preserve an interest in artwork on loan to a museum must [*Civ. Code § 1899.5(a)*]:

- Be in writing.
- Contain a description of the artwork adequate to enable the museum to identify it.
- Be accompanied by documentation sufficient to establish the claimant as owner of the artwork.

- Be signed under penalty of perjury by the claimant or a person authorized to act on behalf of the claimant.

[c] Museum's Responsibilities

The museum, on accepting a loan of artwork for an indefinite term [*see Civ. Code § 1899.9(b)*] or for a term longer than seven years, must inform the lender in writing, at the time of the loan, of the provisions of *Civ. Code § 1899 et seq.* A citation to *Civ. Code § 1899 et seq.* would be sufficient for this purpose [*Civ. Code § 1899.3(a)*].

Within 30 days after receiving a notice of intent to preserve an interest in artwork on loan, the museum must mail either an original receipt or a copy of the receipt portion of the notice contained in this form to the lender or other claimant who filed the notice [*Civ. Code § 1899.3(c)*]. Unless the museum returns the artwork to the claimant, it must retain the original or an accurate copy of each notice filed by a claimant for at least 25 years [*Civ. Code § 1899.3(b)*].

The museum need not retain a notice that does not meet the statutory requirements [*Civ. Code § 1899.5(b)*; *see Civ. Code § 1899.5(a)*; *see also* [b], *above*]. If a museum does not intend to retain a notice for this reason, it must notify the claimant promptly, at the address given on the notice, that it believes the notice is ineffective to preserve an interest and state the reasons for this belief [*Civ. Code § 1899.5(b)*; *see § 102E.224*]. The fact that a museum retains a notice to preserve an interest does not mean that the museum accepts the sufficiency or accuracy of the notice or that the notice is effective to preserve an interest in the artwork [*Civ. Code § 1899.5(b)*].

For further discussion of these requirements, *see § 102E.33*.

[d] Owner's Responsibilities

The owner of artwork on loan to a museum may file with the museum a notice of intent to preserve an interest in the artwork. The filing of the notice does not validate or make enforceable any claim that would be extinguished under the terms of the written loan agreement or that would otherwise be invalid or unenforceable [*Civ. Code § 1899.4(b)*].

The owner of artwork on loan to a museum also must notify the museum promptly in writing of any change of address or change in ownership of the artwork [*see § 102E.231*]. Failure to notify the museum of these changes may result in the owner's loss of rights in the artwork [*Civ. Code § 1899.4(a)*].

For further discussion of these requirements, *see §§ 102E.34, 102E.35*.

[e] Procedure for Giving Notice

When a museum is required to give a lender any notice under *Civ. Code § 1899 et seq.*, notice is deemed to have been given if the museum mails the notice to the lender at the lender's address, and proof of receipt is received by the museum within 30 days from the date the notice was mailed. If the museum does not have an address for the lender, or if proof of receipt is not received by the museum, notice is deemed given if the museum publishes notice at least once a week for three successive weeks in a newspaper of general circulation in both the county in which the museum is located and the county of the lender's address, if any [*Civ. Code § 1899.2(a)*]. For purposes of notice, a museum is located in the county of the branch of the museum to which the loan is made. In all other instances, a museum is located in the county in which it has its principal place of business [*Civ. Code § 1899.2(c)*].

In addition to any other information required by *Civ. Code § 1899 et seq.*, all notices must contain the lender's name, the lender's most recent address as shown on the museum's records [*see Civ. Code § 1899.1(b)*], and the date of the loan. A notice given by the museum must also contain the name, address, and telephone number of the appropriate office or official to be contacted at the museum for information regarding the loan [*Civ. Code § 1899.2(b)*]. Apparently, this

information is not required in a museum's receipt for a notice of intent to preserve an interest in the artwork [see *Civ. Code* § 1899.5(a); see also *Civ. Code* § 1899.5(c) (statutory form for receipt)], and the receipt is not referred to as a notice in the relevant statutes [see *Civ. Code* §§ 1899.3(c), 1899.5]. For an example of a receipt form that contains the information specified in *Civ. Code* § 1899.2(b), see § 102E.223.

[2] FORM

Notice of Intent to Preserve Interest in Artwork on Loan to Museum

TO _____[*name of museum*]: You are hereby notified that the undersigned claims an interest in the artwork described below.

Claimant's Name: _____

Address: _____

Telephone: _____

Description of Artwork: [*unless accurate, legible copy of original loan receipt is attached, give detailed description of artwork, including its nature and general characteristics and museum registration number assigned to it, if known, and attach any documentary evidence establishing loan*]

Date Artwork Was Lent to Museum: _____

Interest in Artwork: [*describe; if claimant is not original lender, describe origin of interest in artwork and attach copy of any document creating interest*]

I understand that I must promptly notify the museum in writing of any change of address or change in ownership of the artwork.

I declare under penalty of perjury that [to the best of my knowledge or I am authorized to act on behalf of the claimant and am informed and believe that] the information contained in this notice is true.

Signed: [*signature of claimant or representative*]

Date: _____

RECEIPT FOR NOTICE OF INTENT TO PRESERVE INTEREST

Notice Received by: _____[*name*]

Date of Receipt: _____

Copy of Receipt Returned to Claimant

by: _____[*name*]

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawMuseums



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DIVISION VII: PERSONAL TRANSACTIONS
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C. Loan Agreements Between Museums and Lenders

32-102E California Legal Forms--Transaction Guide § 102E.223

§ 102E.223 Receipt for Notice of Intent to Preserve Interest in Artwork on Loan to Museum**[1] Comment--Use of Form**

This form is a receipt to be used by a museum after receiving a notice of intent to preserve an interest in artwork on loan to the museum [*see* § 102E.222]. The museum must furnish a receipt within 30 days to anyone who submits a notice of intent to preserve an interest in the artwork to the museum. The receipt must be mailed to the address given on the notice. (If the notice is submitted on the optional statutory form [*see Civ. Code* § 1899.5(c)], the museum may complete the receipt portion of the form and mail a copy of the receipt to the claimant.) If the notice does not include a receipt portion, the museum must provide an original receipt, such as this form [*see Civ. Code* § 1899.3(c)].

For discussion of the museum's options and duties on receiving a defective notice of intent to preserve an interest in the artwork [*see Civ. Code* § 1899.5(b)], *see* § 102E.222[1][c].

[2] FORM**Receipt for Notice of Intent to Preserve Interest in Artwork on Loan to Museum**

RECEIPT FOR NOTICE OF INTENT TO PRESERVE INTEREST

Claimant's Name: _____

Address: _____

Telephone: _____

Description of Artwork: [*copy description in lender's notice*]

Date Artwork Was Lent to Museum: _____

Interest in Artwork: [*copy description in lender's notice*]Notice Received by: _____ [*name*]

Date of Receipt: _____

Copy of Receipt Returned to Claimant by: _____ [*name*]

Date: _____

Museum's Name: _____

Museum's Address: _____

Person to Contact Regarding Loan: _____ [*name or title*]

Telephone: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewEducation LawMuseums



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C. Loan Agreements Between Museums and Lenders

32-102E California Legal Forms--Transaction Guide § 102E.224

§ 102E.224 Museum's Rejection of Notice of Intent to Preserve Interest in Artwork

[1] Comment

[a] Use of Form

This form is a museum's notice to a lender or other claimant who has filed a notice of intent to preserve an interest in artwork on loan to the museum [*see* § 102E.222] that the museum believes that notice is ineffective.

[b] Museum's Responsibilities

The museum need not retain the notice of intent to preserve an interest in the artwork if the notice does not meet the statutory content requirements [*Civ. Code* § 1899.5(b); *see* *Civ. Code* § 1899.5(a); *see also* § 102E.222[1][c]]. However, if the museum does not intend to retain a notice for this reason, it must notify the claimant promptly, at the address given on the notice, that the museum believes the notice is ineffective to preserve an interest in the artwork. The museum must also indicate the reasons for its belief. The fact that the museum retains the notice does not mean that the museum accepts the sufficiency or accuracy of the notice or that the notice is effective to preserve an interest in the artwork on loan to the museum [*Civ. Code* § 1899.5(b)].

For a discussion of the required contents of notices given by museums to lenders [*see* *Civ. Code* § 1899.2(b)], and the requirements for delivery by mail or publication [*see* *Civ. Code* § 1899.2(a)], *see* § 102E.32, § 102E.33, and § 102E.222[1][c] and [e].

[2] FORM

Museum's Rejection of Notice of Intent to Preserve Interest in Artwork

To: _____[claimant's name]
 _____[claimant's address]

Date of Loan: _____

Lender's Name: _____

Lender's Address: _____

Museum's Name: _____

Museum's Address: _____

Person to Contact Regarding Loan: _____[*name or title*]

Telephone Number: _____

You are notified that _____[*name of museum*] believes your notice, a copy of which is attached, is ineffective to preserve an interest in the artwork described in it. The museum believes that the notice is ineffective for the following reasons: [*describe deficiencies*].

Please contact _____[*name or title given above*] to discuss this matter. Your failure to respond to this notice or to file a notice of intent to preserve an interest in the artwork that complies with the requirements set forth in *California Civil Code Section 1899.5(a)* may result in the loss of your rights in the artwork. See *California Civil Code Section 1899 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawMuseums



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C. Loan Agreements Between Museums and Lenders

32-102E California Legal Forms--Transaction Guide § 102E.225

§ 102E.225 Museum's Notice That Borrowed Artwork Requires Conservation or Disposition**[1] Comment****[a] Use of Form**

This form is a notice to be given by a museum, informing a lender of artwork that the artwork requires conservation or disposition. For a discussion of the required contents of notices given by museums to lenders, and the required manner of giving notice [*see Civ. Code § 1899.2(a), (b)*], see §§ 102E.32, 102E.33, and 102E.222[1][c], [e]. For a notice by publication, to be used in the event the museum cannot locate the lender and immediate conservation or disposition of the artwork is required [*see Civ. Code § 1899.6(a)(2)*], see § 102E.226.

[b] Conservation or Disposition of Borrowed Artwork Without Lender's Consent

The museum may dispose of or apply conservation measures to the artwork without the lender's consent if the proposed conservation or disposition is necessary to protect the artwork, other property in the museum's custody, or the health and safety of the public or the museum's staff. Before disposing of the artwork or applying conservation measures, the museum must attempt to notify the lender of the problem and either obtain the lender's consent to the proposed measures or return the artwork [*see Civ. Code § 1899.6(a)*]. For further discussion, see § 102E.36.

[2] FORM**Museum's Notice That Borrowed Artwork Requires Conservation or Disposition**To: _____ [*lender's name*]Address: _____ [*address of lender*]

Date of Loan: _____

Museum's name: _____

Museum's address: _____

Person to Contact Regarding Loan: _____[*name or title*]
Telephone: _____

The records of _____[*museum's name*] indicate that the museum has the following artwork on loan from you: [*describe artwork*].

In order to protect [the artwork *or* other property in the museum *or* the health and safety of the public and the museum's staff], we recommend that [the artwork be disposed of *or describe proposed conservation measures*]. Please contact _____[*name or title shown above*] to discuss this matter.

Your failure to respond to this notice may result in the application of the described conservation or disposition measures to the artwork without your permission, the creation of a lien on the artwork for the costs of applying the described measures, and/or the loss of your rights in the artwork. See *California Civil Code Section 1899 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawMuseums



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C. Loan Agreements Between Museums and Lenders

32-102E California Legal Forms--Transaction Guide § 102E.226

§ 102E.226 Museum's Notice by Publication That Borrowed Artwork Requires Conservation or Disposition

[1] Comment

[a] Use of Form

This form is a museum's notice by publication, informing a lender of artwork that the artwork requires conservation or disposition. It is for use by the museum when the museum is unable to reach the lender at the lender's last address of record, and immediate conservation or disposition is required to protect the artwork, other property in the museum's custody, or the health and safety of the public or the museum's staff [*see Civ. Code §§ 1899.6(a), 1899.7(a)*].

Before taking conservation measures or disposing of the artwork in this situation, the museum must publish this notice at least once a week for three successive weeks in a newspaper of general circulation in both the county in which the museum is located and the county of the lender's most recent address as shown in the museum's records [*Civ. Code §§ 1899.2(a), 1899.6(a)(2); see Civ. Code § 1899.1(b)*].

For a discussion of the general requirements for notices given by museums to lenders, see §§ 102E.32, 102E.33, and 102E.222[1][c], [e].

[b] Conservation or Disposition Without Lender's Permission

If the museum receives no response for 120 days after publication of the notice, the museum may apply conservation measures or dispose of the artwork [*Civ. Code § 1899.6(a)(2)*]. The statute does not state whether the 120-day period begins to run when the notice is first published or after it has been published once a week for three successive weeks. Thus, if it is possible to delay conservation or disposal without endangering persons or other property, conservation measures or disposition of the artwork should not be undertaken until 120 days after the end of the three-week publication period.

The museum may apply conservation measures to or dispose of the artwork without the lender's permission when the lender has been contacted and will neither agree to the protective measures the museum recommends nor terminate the

loan and retrieve the artwork [*see Civ. Code § 1899.6(a)(1)*].

[c] Contract Prohibiting Conservation or Disposition

The museum may not apply conservation measures or dispose of property on loan if a written loan agreement provides to the contrary [*Civ. Code § 1899.6(a)*].

[d] Museum's Lien and Liability for Injury or Loss

The museum has a lien on the artwork and on the proceeds from any disposition of the artwork, for the conservation or disposition costs permissibly incurred by the museum [*Civ. Code § 1899.6(b)(1)*]. The museum is not liable for injury or loss of the artwork if the museum (1) had a reasonable belief at the time the conservation or disposition was undertaken that the action was necessary to safeguard the artwork, other property in the museum's custody, or the health and safety of the public or the museum's staff; and (2) exercised reasonable care in its choice and application of conservation measures [*Civ. Code § 1899.6(b)(2)*].

[2] FORM

Museum's Notice by Publication That Borrowed Artwork Requires Conservation or Disposition

To: _____ [*lender's name*]

Address: _____ [*lender's last-known address*]

Date of Loan: _____

The records of _____ [*museum's name*] indicate that the museum has artwork on loan from you. Your failure to notify the museum in writing of a change of address or ownership of the artwork on loan or to contact the museum in writing regarding the loan may result in the loss of your rights in the artwork. See *California Civil Code Section 1899 et seq.*

For information regarding the loan, please contact:

_____ [*name or title of person to be contacted*]

_____ [*address*]

_____ [*telephone number*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawMuseums



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32-102E California Legal Forms--Transaction Guide § 102E.227

§ 102E.227 Museum's Notice That Borrowed Artwork Was Damaged or Lost**[1] Comment--Use of Form**

This form is a notice to be used by a museum to notify a lender of artwork that the artwork has been damaged or lost. The museum must give the lender prompt notice of any known damage or loss [*Civ. Code* § 1899.3(d)]. The museum is deemed to have given notice to the lender if the museum mails the notice to the lender's most recent address as shown on the museum's records [*Civ. Code* § 1899.1(b)] and receives proof of receipt within 30 days from the date the notice was mailed [*Civ. Code* § 1899.2(a)].

If the museum does not have an address for the lender, or if the museum does not receive proof of receipt within 30 days after mailing the notice to the lender, the museum will be deemed to have given notice if it publishes a notice at least once a week for three successive weeks in a newspaper of general circulation in both the county in which the museum is located and the county of the lender's most recent address as shown in the museum's records [*Civ. Code* § 1899.2(a); see *Civ. Code* §§ 1899.1(b), 1899.7]. For a form for notice by publication, see § 102E.228.

For a discussion of the general requirements for notices given by museums to lenders, see §§ 102E.32, 102E.33, and 102E.222[1][c], [e].

[2] FORM**Museum's Notice That Borrowed Artwork Was Damaged or Lost**

To: _____ [lender's name]

Address: _____ [lender's address]

Date of Loan: _____

The records of _____ [museum's name] indicate that the museum has the following artwork on loan from you: [describe artwork]. This notice is to inform you that the artwork has been [lost or damaged]. Your failure to respond to this notice may result in the loss of your rights in the artwork. See *California Civil Code Section 1899 et seq.*

For information regarding the artwork, please contact:

_____ *[name or title of person to be contacted]*

_____ *[address]*

_____ *[telephone number]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Education LawMuseums



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32-102E California Legal Forms--Transaction Guide § 102E.228

§ 102E.228 Museum's Notice by Publication That Borrowed Artwork Was Damaged or Lost

[1] Comment

[a] Use of Form

This form is a notice by publication for use by a museum when it is unable to give a lender notice by mail that artwork on loan to the museum has been damaged or lost. The museum is required to notify the lender promptly of any known damage or loss [*Civ. Code § 1899.3(d)*].

If the museum does not have an address for the lender, or does not receive proof of receipt of a mailed notice within 30 days after mailing it, the museum will be deemed to have notified the lender if the museum publishes this notice at least once a week for three successive weeks in a newspaper of general circulation in both the county in which the museum is located and the county of the lender's most recent address as shown in the museum's records [*Civ. Code §§ 1899.2(a), 1899.7(a); see Civ. Code § 1899.1(b)*].

For a discussion of the general requirements for notices given by museums to lenders, see §§ 102E.32, 102E.33, and 102E.222[1][c], [e].

[b] Limitation of Lender's Action Against Museum

The lender may not bring an action against the museum, based on the damage or loss of the artwork, more than three years from the date the museum gave the lender notice of the damages or loss, or 10 years from the date of the damage or loss, whichever occurs earlier [*Civ. Code § 1899.8*].

[c] Museum's Duty on Receiving Communication From Lender

If, within three years of publishing the notice that the artwork was damaged or lost, the museum receives either (1) a notice of the lender's (or another claimant's) intent to preserve an interest in the artwork [*see Civ. Code §§ 1899.4(b), 1899.5(a); see also § 102E.222*]; (2) a notice of the lender's (claimant's) change of address; or (3) a notice of a change

in the ownership of the artwork [*see Civ. Code § 1899.4(a); see also § 102E.231*], then the museum must promptly respond with a notice in writing of the nature and approximate date of the damage or loss [*Civ. Code § 1899.7(b)*].

[d] Limitation of Lender's Action

If the museum mails the information about damage or loss to the lender (or other claimant) within 30 days of receiving the lender's (claimant's) notice, the three-year limitation period for filing an action against the museum [*see Civ. Code § 1899.8; [b], above*] runs from the date the museum's notice by publication was completed [*Civ. Code § 1899.7(b)*].

[2] FORM

Museum's Notice by Publication That Borrowed Artwork Was Damaged or Lost

To: _____ [*lender's name*]

Address: _____ [*lender's last-known address*]

Date of Loan: _____

The records of _____ [*museum's name*] indicate that the museum has artwork on loan from you. Your failure to notify the museum in writing of a change of address or ownership of the artwork on loan or to contact the museum in writing regarding the loan may result in the loss of your rights in the artwork. See *California Civil Code Section 1899 et seq.*

For information regarding the loan, please contact:

_____ [*name or title of person to be contacted*]

_____ [*address*]

_____ [*telephone number*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewEducation LawMuseums



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32-102E California Legal Forms--Transaction Guide § 102E.229

§ 102E.229 Museum's Notice to Terminate Loan of Artwork

[1] Comment

[a] Use of Form

This form is a notice to be used by a museum when it intends to terminate a loan of artwork that was made for an indefinite term or was made on or after January 1, 1984, for a term longer than seven years [*Civ. Code § 1899.9(a)*]. A loan for a specified term becomes a loan for an indefinite term if the property remains in the museum's custody after the specified term expires [*Civ. Code § 1899.9(b)*].

The content of this notice is prescribed by statute [*Civ. Code §§ 1899.2(b), 1899.9(a)*]. For a discussion of the required contents of notices given by museums to lenders generally, see § 102E.32, § 102E.33, and § 102E.222[1][c], [e].

[b] Limitation of Lender's Action to Recover Artwork

The lender may not bring an action to recover the artwork more than three years after the museum gives the lender this notice of intent to terminate the loan [*Civ. Code § 1899.10(a)*; see *Code Civ. Proc. § 338*; see also *Civ. Code § 1899.2(a)* (when notice is deemed given)]. In addition, no action may be brought against the museum to recover the artwork when more than 25 years have passed from the date of the last written contact between the lender and the museum, as evidenced in the museum's records [*Civ. Code § 1899.10(b)*]. The lender will be deemed to have donated the artwork to the museum if the lender fails to file an action to recover the artwork within these periods [*Civ. Code § 1899.10(c)*].

However, if the museum did not give notice of intent to terminate the loan, and the lender proves that the museum received a notice of intent to preserve an interest in the artwork [see § 102E.222] within the 25 years immediately preceding the date the lender's right to recover the artwork would have otherwise expired [see *Civ. Code § 1899.10(b)*], the lender may recover the artwork or, if it has been disposed of, its reasonable value at the time of disposal plus interest [*Civ. Code § 1899.10(e)*].

[2] FORM**Museum's Notice to Terminate Loan of Artwork**

To: _____ [lender's name]

Address: _____ [lender's address]

Date of Loan: _____

The records of _____ [museum's name] indicate that the museum has artwork on loan from you. The museum wishes to terminate the loan. You must contact the museum, establish your ownership of the artwork, and make arrangements to collect the artwork. If you fail to do so promptly, you will be deemed to have donated the artwork to the museum. See *California Civil Code Section 1899 et seq.*

For information regarding the loan, please contact:

_____ [name or title of person to be contacted]

_____ [address]

_____ [telephone number]

Legal Topics:

For related research and practice materials, see the following legal topics:

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32-102E California Legal Forms--Transaction Guide § 102E.230

§ 102E.230 Museum's Notice of Intent to Report Borrowed Artwork as Unclaimed Property

[1] Comment--Use of Form

This form is a notice for use by a museum to notify the lender of artwork that the museum intends to report the artwork as unclaimed property to the State Controller for disposition in accordance with the provisions of the Unclaimed Property Law [*Code Civ. Proc. § 1500 et seq.*; see Ch. 102C, *Lost and Unclaimed Property*].

The provisions in *Civ. Code § 1899 et seq.*, when applicable, supersede the Unclaimed Property Law. However, the museum may, at its option, dispose of borrowed artwork under the Unclaimed Property Law, provided the artwork has been unclaimed for more than seven years [*Civ. Code § 1899.11(a)*]. If the museum elects to proceed under the Unclaimed Property Law, it must mail notice to the lender of its intent not less than six months or more than 12 months before reporting the artwork to the State Controller for disposition [*Civ. Code § 1899.11(a)*; see *Code Civ. Proc. § 1530*].

The content of this notice is prescribed by statute [*Civ. Code §§ 1899.2(b), 1899.11(b)*]. For a discussion of the required contents of notices given by museums to lenders generally, see §§ 102E.32, 102E.33, and 102E.222[1][c], [e].

[2] FORM

Museum's Notice of Intent to Report Borrowed Artwork as Unclaimed Property

To: _____ [lender's name]
Address: _____ [lender's address]
Date of Loan: _____

The records of _____ [museum's name] indicate that the museum has artwork on loan from you. The museum wishes to terminate the loan. You must contact the museum, establish your ownership of the artwork, and make arrangements to collect the artwork before _____ [date], or the artwork will be disposed of in accordance with the provisions of the Unclaimed Property Law (*Code of Civil Procedure Section 1500 et seq.*).

For information regarding the loan, please contact:

_____ *[name or title of person to be contacted]*

_____ *[address]*

_____ *[telephone number]*

Legal Topics:

For related research and practice materials, see the following legal topics:

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32-102E California Legal Forms--Transaction Guide § 102E.231

§ 102E.231 Lender's Notice of Change of Address or Change in Ownership of Artwork

[1] Comment--Use of Form

This form is a notice to the museum by the lender of artwork for an indefinite period or for a term longer than seven years, reporting either a change in the owner's address or a change in ownership of the artwork.

The owner of the artwork is responsible for notifying the museum promptly in writing of any change of the owner's address or change in ownership of the artwork. Failure to notify the museum of these changes may result in the owner's loss of rights in the artwork [*Civ. Code § 1899.4(a)*]. If the ownership of the artwork changes, the new owner should file with the museum a notice of intent to preserve an interest in the artwork [*see Civ. Code § 1899.5(a)*; *see also § 102E.222*].

For a discussion of the required contents of notices given by lenders to museums [*Civ. Code § 1899.2(b)*], *see §§ 102E.34, 102E.35*.

[2] FORM

Lender's Notice of Change of Address or Change in Ownership of Artwork

To: _____ [*museum's name*]
_____ [*museum's address*]

Lender's Name: _____

Lender's Address: _____

Date of Loan: _____

Description of Artwork: _____

Effective _____ [*date of change*], _____ [the above-named lender's address is
_____ (*new address*) or the owner of the above-described artwork has changed. The new owner's

name and address are: _____ (*specify*).

Date: _____

Signed: _____ [*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
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DIVISION VII: PERSONAL TRANSACTIONS
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33-103 California Legal Forms--Transaction Guide 103.syn

§ 103.syn Synopsis to Chapter 103: INVENTION DEVELOPMENT SERVICES

§ 103.01 California Statutes

§§ 103.02-103.04 [Reserved]

§ 103.05 Law Reviews

§ 103.06 Text References

§§ 103.07-103.09 [Reserved]

§ 103.10 Purpose and Legislative Intent Behind Invention Development Services Contract Act

[1] Protection of Public

[2] Protection of Inventors

[3] Invention Developers

§ 103.11 Persons and Entities Covered

§ 103.12 Required Contents and Formalities

[1] Written Contract

[2] Bond and Security Requirements for Invention Developers

[3] Disclosure Requirements

[4] Disclosure of Certain Contractual Conditions

§ 103.13 Other Restrictions on Invention Developers

§ 103.14 Waiver and Enforceability of Contract

§ 103.15 Remedies for Violations of Act

§§ 103.16-103.99 [Reserved]

§ 103.100 Facts--Invention Developer

Scope

§ 103.101 Facts--Customer Information

Scope

§ 103.102 Facts--Developer's Operations

Scope

§§ 103.103-103.109 [Reserved]

§ 103.110 Application of California Invention Development Services Contracts Act

[1] Parties to Transaction

Scope

[2] Nature of Transaction

Scope

§§ 103.111-103.119 [Reserved]

§ 103.120 Financial Security Procedure

[1] Bond Requirements

Scope

[2] Alternatives to Bond

Scope

§ 103.121 Solicitation and Negotiation Procedure

[1] Advertising and Solicitation

Scope

[2] Initial Contact and Negotiations

Scope

§§ 103.122-103.129 [Reserved]

§ 103.130 Contract Contents and Formalities

Scope

§§ 103.131-103.139 [Reserved]

§ 103.140 Post-Contract Procedures

Scope

§§ 103.141-103.199 [Reserved]

§ 103.200 Disclosure Statement of Invention Developer

[1] Comment

[a] Use of Form

[b] Writing Required

[c] Effect of Failure to Make Required Disclosures

[2] FORM

Disclosure Statement of Invention Developer

§ 103.201 Cover Sheet for Invention Development Services Contract

[1] Comment--Use of Form

[2] FORM

Cover Sheet for Invention Development Services Contract

§ 103.202 Invention Development Services Contract

[1] Comment

[a] Use of Form

[b] Services and Charges

[c] Identification of Developer, Maintenance of Records, and Achievements

[d] Advisory Legends

[e] Other Contract Requirements

[f] Remedies and Liabilities

[2] FORM

Invention Development Services Contract

§ 103.203 Statement as to Subsequent Contracts Contemplated by Invention Developer

[1] Comment

[a] Use of Form

[b] Required Attachments

[2] FORM

Statement as to Subsequent Contracts Contemplated by Invention Developer

§ 103.204 Notice of Cancellation of Contract by Customer

[1] Comment

[a] Use of Form

[b] Exercising Right to Cancel

[2] FORM

Notice of Cancellation of Contract by Customer

§ 103.205 Notice of Cancellation of Contract by Invention Developer

[1] Comment--Use of Form

[2] FORM

Notice of Cancellation of Contract by Invention Developer

§ 103.206 Quarterly Statement of Invention Development Services

[1] Comment

[a] Use of Form

[b] Maintaining Records

[2] FORM

Quarterly Statement of Invention Development Services

§ 103.207 Surety Bond for Invention Developer [Form SFSB-409]

[1] Comment

[a] Use of Form

[b] Bond Requirement

[c] Filing and Fees

[d] Claimants Against Bond

[2] FORM

Surety Bond for Invention Developer [Form SFSB-409]

§ 103.208 Declaration of Income for Invention Developer [Form LP/SF-409D]

[1] Comment

[a] Use of Form

[b] Filing and Fees

[2] FORM

Declaration of Income for Invention Developer [Form LP/SF-409D]



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33-103 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers the California Invention Development Services Contracts Act [*Bus. & Prof. Code § 22370 et seq.*]. The chapter discusses the law governing invention development services, and provides a guide to transactions subject to the Act. Forms include a disclosure statement, cover sheet, and sample contract for invention development services, as well as required notices and statements. California Secretary of State forms for use by persons or business entities subject to the Act are also reproduced.

This chapter does not discuss the acquisition, transfer, or protection of patent rights to inventions under federal law. For detailed discussion of the substantive law of patents in the United States, as well as patent application and enforcement procedures, see Chisum, *PATENTS* (Matthew Bender), and Adelman et al., *PATENT LAW PERSPECTIVES* (Matthew Bender). Detailed coverage of procedures before the U.S. Patent and Trademark Office may be found in Horwitz, *PATENT OFFICE RULES AND PRACTICE* (Matthew Bender). For discussion and forms concerning licensing of patents, see Einhorn, *PATENT LICENSING TRANSACTIONS* (Matthew Bender).

For coverage of international patent law and procedure, see Sinnott, *WORLD PATENT LAW AND PRACTICE* (Matthew Bender). For coverage of copyrights, see Ch. 103A, *Copyrights*. For coverage of trademarks, see Ch. 103B, *Trademarks*.



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PART I. RESEARCH GUIDE
A. Primary Sources

33-103 California Legal Forms--Transaction Guide § 103.01

§ 103.01 California Statutes

Invention development services contracts law. *Bus. & Prof. Code § 22370 et seq.*

Legislative declarations. *Bus. & Prof. Code § 22370.*

Definitions. *Bus. & Prof. Code § 22371.*

Contract requirements. *Bus. & Prof. Code §§ 22372, 22374, 22379, 22382.*

Cancellation rights. *Bus. & Prof. Code §§ 22373, 22374.*

Disclosure requirements. *Bus. & Prof. Code §§ 22374, 22378-22381.*

Acquisition of interest in inventor's title. *Bus. & Prof. Code § 22375.*

Assignee's rights. *Bus. & Prof. Code §§ 22376, 22377.*

Periodic reports. *Bus. & Prof. Code § 22378.*

Advertising. *Bus. & Prof. Code §§ 22380, 22393.*

Relationship to other laws. *Bus. & Prof. Code § 22382.*

Void and unenforceable contracts. *Bus. & Prof. Code §§ 22383-22385, 22388.*

Misrepresentations and failure to make disclosures, consequences of. *Bus. & Prof. Code §§ 22384, 22386, 22388.*

Civil actions for damages. *Bus. & Prof. Code § 22386.*

Criminal penalties; actions by public prosecutors for injunctive relief. *Bus. & Prof. Code § 22387.*

Bonding requirements. *Bus. & Prof. Code § 22389 et seq.*

Records, maintenance of. *Bus. & Prof. Code § 22392.*

Severability of statutory provisions. *Bus. & Prof. Code § 22394.*

Developer required to maintain confidentiality of information disclosed by inventor. *Bus. & Prof. Code § 22395.*

Ownership of inventions generally. *Civ. Code §§ 980-984.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewPatent LawClaims & SpecificationsGeneral Overview



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PART I. RESEARCH GUIDE
A. Primary Sources

33-103 California Legal Forms--Transaction Guide §§ 103.02-103.04

[Reserved]

§§ 103.02[Reserved]



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PART I. RESEARCH GUIDE
B. Secondary Sources

33-103 California Legal Forms--Transaction Guide § 103.05

§ 103.05 Law Reviews

Kulik, *The Idea Submission Case: When Is an Idea Protected Under California Law?* 32 Bev. Hills B.A.J. 99 (1998).

Behringer & Gustafson, *The Risk of Placing a Nonpatented Invention on Sale*, 29(5) Prac. Law. 53 (1983).

Legal Topics:

For related research and practice materials, see the following legal topics:

Patent Law
Claims & Specifications
General Overview



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PART I. RESEARCH GUIDE
B. Secondary Sources

33-103 California Legal Forms--Transaction Guide § 103.06

§ 103.06 Text References

CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 411, *Patents and Inventions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Patent LawClaims & SpecificationsGeneral OverviewPatent LawOwnershipEmployee Inventions & Shop Rights



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B. Secondary Sources

33-103 California Legal Forms--Transaction Guide §§ 103.07-103.09

[Reserved]

§§ 103.07[Reserved]



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CHAPTER 103 INVENTION DEVELOPMENT SERVICES
PART II. LEGAL BACKGROUND

33-103 California Legal Forms--Transaction Guide § 103.10

§ 103.10 Purpose and Legislative Intent Behind Invention Development Services Contract Act

[1] Protection of Public

The California Invention Development Services Contracts Act [*Bus. & Prof. Code § 22370 et seq.*] regulates the activities of invention developers offering services to the public. The express purpose of the Act is to safeguard the public against fraud, deceit, imposition, and financial hardship, and to foster and encourage competition, fair dealing, and prosperity in the field of invention development services. The Legislature's intent was to accomplish this purpose by prohibiting or restricting false and misleading advertising, onerous contract terms, harmful financial practices, and other unfair, dishonest, deceptive, destructive, unscrupulous, fraudulent, and discriminatory practices by which the public has been injured in connection with invention development services. However, the Act expresses an intent not to interfere with, or further regulate, persons who provide researching, marketing, surveying, or other kinds of consulting services to professional manufacturers, marketers, publishers, or others purchasing these services [*see Bus. & Prof. Code § 22370(a), (b)*].

[2] Protection of Inventors

The invention development services legislation is intended to protect "inventors," as defined in the Act. Inventors are members of the general public who have ideas or inventions believed to have substantial commercial value, but who normally do not have the resources or expertise necessary to develop, manufacture, or market these ideas or inventions. These persons generally do not earn their livelihood from developing, manufacturing, promoting, or marketing ideas or inventions, or from manufacturing or marketing products, publishing literary works, or owning, operating, or controlling commercial enterprises [*Bus. & Prof. Code § 22370(a)*].

Inventors are also protected by a rule of case law, independent of the Act. When an inventor entrusts a secret idea or device to another person under an arrangement whereby the other person agrees to develop, patent, and commercially exploit the idea in return for royalties to be paid to the inventor, a confidential or fiduciary relationship arises between the parties [*Stevens v. Marco (1956) 147 Cal. App. 2d 357, 373, 305 P.2d 669*]. This rule remains viable, and has been applied to protect an inventor when the developer construed their agreement so as to justify withholding significant royalties received from patent licensees. "In a growing global economy, where a valuable patent can be licensed all over the world and be worth billions of dollars, there is every reason to afford the utmost protection to

inventors who entrust their secrets to others for developing, patenting, manufacturing and licensing the secrets in exchange for royalties" [*City of Hope Nat'l Med. Ctr. v. Genentech, Inc.* (2004) 123 Cal. App. 4th 306, 343-350, 20 Cal. Rptr. 3d 234].

[3] Invention Developers

The Act is designed to protect inventors in their dealings with "invention developers." The Legislature found that a significant number of persons have realized that inventors are willing to expend substantial sums for services represented to result in the development, manufacture, promotion, sale, or general exploitation of the commercial value of the inventors' ideas or inventions. The developers' services are generally offered for a fixed fee, plus either a percentage of the income that may be derived from the sale or marketing of the invention or idea, or a partial ownership interest in it. The inventors generally assume a very passive role in the development, promotion, manufacture, or sale of their ideas or inventions after the contract with the invention developer is executed, and usually do little more than receive periodic reports from the developers [*see Bus. & Prof. Code § 22370(a)*]. For additional information on who constitutes an "invention developer" for purposes of the act, see § 103.110.

Legal Topics:

For related research and practice materials, see the following legal topics:

Patent Law
Claims & Specifications
General Overview
Patent Law
Ownership
Employee Inventions & Shop Rights



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103 INVENTION DEVELOPMENT SERVICES
PART II. LEGAL BACKGROUND

33-103 California Legal Forms--Transaction Guide § 103.11

§ 103.11 Persons and Entities Covered

The invention development services law primarily regulates the contractual relationship between the invention developer and the inventor (referred to as the "customer" in the Act) [see *Bus. & Prof. Code § 22371(a), (b)*]. Governments and charitable, scientific, educational, and religious organizations are exempt from application of the law [see *Bus. & Prof. Code § 22371(b), (d)*]. Persons and business entities with either a net worth of \$100,000 or gross receipts for the year of \$50,000 are not included within the meaning of "customer" and therefore are not subject to the law's protections [see *Bus. & Prof. Code § 22371(b)*]. Persons and business entities whose gross receipts from contracts for invention development services do not exceed 10 percent of their gross receipts from all sources during the fiscal year preceding the year in which any contract for invention development services is signed are not considered "invention developers" for purposes of the Act [see *Bus. & Prof. Code § 22371(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Patent Law Claims & Specifications General Overview Patent Law Ownership Employee Inventions & Shop Rights



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33-103 California Legal Forms--Transaction Guide § 103.12

§ 103.12 Required Contents and Formalities

[1] Written Contract

Contracts for invention development services must be in writing [*Bus. & Prof. Code § 22372(a)*] and are subject to cancellation within seven days after the signing of the contract [*see Bus. & Prof. Code § 22373*]. A copy of the written contract must be provided to the customer at the time he or she signs it [*Bus. & Prof. Code § 22372(a)*].

[2] Bond and Security Requirements for Invention Developers

To enter lawfully into invention development services contracts, invention developers must be properly bonded or make adequate substitute financial security arrangements [*see Bus. & Prof. Code § 22389 et seq.*]. The contract must contain several required provisions implementing the protections of the law [*see Bus. & Prof. Code § 22379*]. For a discussion of the required contractual provisions, see § 103.202[1][b].

[3] Disclosure Requirements

Various types of disclosures must be made under the Invention Development Services Contracts Act [*see § 103.200[2]*]. These primarily pertain to the following matters:

- Fees [*see Bus. & Prof. Code §§ 22372(b), 22379(a), (h), 22380, 22381(a)*].
- Cancellation rights [*see Bus. & Prof. Code §§ 22373, 22374*].
- Legal patent protection problems [*see Bus. & Prof. Code §§ 22374, 22379(p), 22381(d)*].
- Extent of invention developer's services [*see Bus. & Prof. Code §§ 22372(b), 22378, 22379(b)-(d)*].
- Extent of developer's expenditures on customer's behalf [*see Bus. & Prof. Code §§ 22379(i), 22381(b)*].

- Numbers of the developer's past customers and their actually realized earnings beyond investment [see *Bus. & Prof. Code* §§ 22379(j), (k), 22381(c)].

[4] Disclosure of Certain Contractual Conditions

The following protective provisions are the subject of special disclosure statements to be issued separately from the contract itself:

- Fact of fee charges (advertising of services) [*Bus. & Prof. Code* § 22380].
- Fees, expenditures, numbers of customers and their earnings, and warning regarding potential loss of patent, trademark, or copyright protection (communication on first contact with customer) [*Bus. & Prof. Code* § 22381; see § 103.200].
- Cancellability of contract, and warnings regarding potential loss of patent, trademark, or copyright protection (cover letter to contract) [*Bus. & Prof. Code* § 22374; see § 103.204].
- Contemplation of subsequent contracts (statement at time of first contract) [*Bus. & Prof. Code* § 22372(b); see § 103.203].
- Quarterly progress report on services to date [*Bus. & Prof. Code* § 22378; see § 103.206].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewPatent LawClaims & SpecificationsGeneral OverviewPatent LawDate of Invention & PriorityGeneral Overview



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33-103 California Legal Forms--Transaction Guide § 103.13

§ 103.13 Other Restrictions on Invention Developers

An invention developer may not acquire a direct interest in title to the invention, unless the developer contracts to manufacture the invention and acquires the interest at or about the time that the contract for manufacture is executed. However, a developer may contract to receive a portion of any proceeds accruing to the customer as a result of the performance of invention development services by the developer [*Bus. & Prof. Code § 22375*]. Assignments of the developer's right are subject to the inventor's defenses [*see Bus. & Prof. Code §§ 22376, 22377*]. The developer must retain records relating to each contract for three years [*Bus. & Prof. Code § 22392*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Patent LawClaims & SpecificationsGeneral OverviewPatent LawOwnershipEmployee Inventions & Shop Rights



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33-103 California Legal Forms--Transaction Guide § 103.14

§ 103.14 Waiver and Enforceability of Contract

Waiver by the customer of provisions of the governing law is void and unenforceable [*Bus. & Prof. Code § 22385*]. A contract for invention development services entered into through willful misrepresentation is likewise of no effect [*Bus. & Prof. Code § 22384*]. A contract made after the developer's failure to make certain precontractual disclosures is voidable by the inventor [*see Bus. & Prof. Code § 22388*]. Failure of the contract to comply with the invention development services law generally will render it invalid unless the developer can show nonintentional error despite measures designed to prevent it, and a correction is undertaken [*see Bus. & Prof. Code § 22383*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawTypes of ContractsGeneral OverviewPatent LawClaims & SpecificationsGeneral OverviewPatent LawOwnershipEmployee Inventions & Shop Rights



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33-103 California Legal Forms--Transaction Guide § 103.15

§ 103.15 Remedies for Violations of Act

Persons injured by an invention developer's violation of the governing law, or by certain forms of misrepresentation or lack of required disclosures, may bring an action for the greater of \$3,000 or treble damages, in addition to attorneys' fees [see *Bus. & Prof. Code* § 22386]. Willful violation of the law by the invention developer constitutes a misdemeanor, and may be enjoined in an action in the superior court. Prosecutors at all levels may institute criminal or equitable proceedings for violations of the law [see *Bus. & Prof. Code* § 22387].

For additional discussion of remedies and forms for use in actions under the Act, see *CALIFORNIA FORMS OF PLEADING AND PRACTICE*, Ch. 411, *Patents and Inventions*, § 411.30 et seq. (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Patent LawOwnershipEmployee Inventions & Shop RightsPatent LawRemediesGeneral Overview



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33-103 California Legal Forms--Transaction Guide §§ 103.16-103.99

[Reserved]

§§ 103.16[Reserved]



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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

33-103 California Legal Forms--Transaction Guide § 103.100

§ 103.100 Facts--Invention Developer

NOTE:

This Transaction Guide provides checklists primarily for use by counsel to assist an invention developer client in complying with the provisions of the Invention Development Services Contract Act [*Bus. & Prof. Code § 22370 et seq.*].

1. Type of business organization:

- a. Individual.
- b. Corporation.
- c. Partnership or association.
- d. Limited liability company.
- e. Other.

2. If invention developer is a corporation:

- a. Name of controlling shareholder or shareholders.
- b. Names of officers.
- c. Names and addresses of parent, subsidiary, or other affiliate companies that perform invention development services.

3. If invention developer is a partnership or association, names and business experience of appropriate personnel.
4. Principal place of business and branch offices, if any.
5. Personnel of invention development firm.
 - a. Key employees.
 - (1) Names.
 - (2) Functions and responsibilities.
 - (3) Compensation.
 - (a) Salary.
 - (b) Commission.
 - b. General profile of subordinate employees.
 - c. Business and patent experience and background.
 - d. Relevant financial resources.
6. Total number of customers.
7. Total number of customers who have, due to developer's performance, received money in excess of amount paid to developer for invention development services.

NOTE:

Every contract for invention development services must contain information concerning (1) the total number of customers who have contracted with the developer (although this figure may omit those customers who have contracted within the last 30 days) and (2) the number of past customers who have received, due to the developer's services, money in excess of the amount of money paid for those services [*Bus. & Prof. Code* § 22379(k)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Patent LawOwnershipGeneral Overview



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A. Client Interview--Facts and Documents

33-103 California Legal Forms--Transaction Guide § 103.101

§ 103.101 Facts--Customer Information

1. Name and address of customer (inventor).
2. Whether customer is individual or business entity.
3. Financial resources that may be applied to invention development.
4. Extent of invention development experience.
5. Origin of idea or invention, e.g., through customer's own work, through connection with particular organization, or other.
5. Return and compensation expected.
6. Number and kind of past successes.

Legal Topics:

For related research and practice materials, see the following legal topics:
Patent LawOwnershipGeneral Overview



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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

33-103 California Legal Forms--Transaction Guide § 103.102

§ 103.102 Facts--Developer's Operations

1. Means employed by invention developer to obtain customers.

a. Types of advertisements and advertising media.

b. Types of promotional programs.

2. Available services.

a. Preliminary services.

(1) Capacity to analyze invention in terms of its commercial value.

(2) Capacity to evaluate functions and utility of invention.

(3) Capacity to perform patent search services.

NOTE:

In the event that the invention development firm retains an independent patent search firm, a potential customer will be well-advised to investigate the reputation and business expertise of the retained firm.

b. Manufacturing.

(1) Extent of manufacturing services offered by invention development firm itself with respect to:

(a) Models.

(b) Diagrams and drawings.

(c) Mockups.

(d) Production of invention itself.

(2) Names and qualifications of firms retained by invention development firm to perform manufacturing services.

c. Technical personnel.

(1) Names and qualifications of patent agents or attorneys employed or retained by invention development firm.

(2) Extent to which personnel of firm qualify to advise customer in respect to reformation of ideas or inventions.

d. Sales and promotion.

(1) Capacity of firm to market and sell invention, e.g., contacts and reputation within relevant industry.

(2) Nature of investigative facilities of or retained by firm.

(3) Nature of advertising, public relations, and other promotional media outlets used by invention developer to promote inventions.

e. Records and correspondence retention policy.

NOTE:

Every invention developer is required to maintain all records and correspondence relating to performance of each invention development services contract for a period of not less than three years after expiration of the term of the contract [*Bus. & Prof. Code* § 22392].

f. Developer's gross receipts during past fiscal year from:

(1) Invention development services contracts.

(2) All sources.

Legal Topics:

For related research and practice materials, see the following legal topics:
Patent Law
Anticipation & Novelty
Invention



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33-103 California Legal Forms--Transaction Guide §§ 103.103-103.109

[Reserved]

§§ 103.103[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103 INVENTION DEVELOPMENT SERVICES
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

33-103 California Legal Forms--Transaction Guide § 103.110

§ 103.110 Application of California Invention Development Services Contracts Act

NOTE:

To determine whether the California Invention Development Services Contracts Act [*Bus. & Prof. Code § 22370 et seq.*] applies to a particular transaction, make the determinations listed below.

[1] Parties to Transaction

1. Determine whether "invention developer" is involved in transaction [*Bus. & Prof. Code § 22371(d)*]:

- a. Is party a person, firm, corporation, or association?
- b. Does that person or entity develop, promote, or offer to develop or promote an "invention," as specified in [2], *below*?

2. Determine whether person or entity is exempt from definition of "invention developer"; party is exempt if any of following apply [*Bus. & Prof. Code § 22371(d)*]:

- a. Party is federal, state, or local governmental department or agency.
- b. Party is charitable organization, as defined by Internal Revenue Code.

NOTE:

Exempt charitable organizations under *Bus. & Prof. Code § 22371(d)* are any charitable, scientific, educational, religious, or other organization either qualified under *I.R.C. § 501(c)(3)* or described in *I.R.C. § 170(b)(1)(A)*.

- c. Party's gross receipts from contracts for invention development services during fiscal year preceding

year in which any contract for invention development services is signed does not exceed 10 percent of gross receipts from all sources during that year.

d. Party does not charge fee for invention development services.

NOTE:

For this purpose, a "fee" includes any payment made by a customer to the entity for expenditures made or costs incurred by it, but does not include any payments made from a portion of income received by customer by virtue of invention development services performed for the customer by the entity [*Bus. & Prof. Code* § 22371(d)(4)].

Lawyers are not specifically exempted as such from classification as invention developers. Thus, to the extent an attorney offers or undertakes to develop or promote an invention or idea for a client, the attorney arguably would be acting as an invention developer and would be subject to the invention development law. If this is the case, however, the attorney would be required in several instances [*see* subsequent sections of this Transaction Guide] to state that the he or she (whether or not a patent attorney) is not qualified or permitted to give any advice regarding patent, copyright, or trademark protection matters [*see Bus. & Prof. Code* §§ 22374, 22379(p), 22381(d)], even though the attorney may in fact be legally qualified to render that advice. This contradiction suggests that a qualified attorney at law was not intended to be covered under the invention development law. However, in the absence of an express exemption from the law, attorneys should exercise caution before undertaking any activity that might be construed to constitute invention development services.

3. Determine whether inventor is "customer" [*Bus. & Prof. Code* § 22371(b)].

a. Is inventor a person, firm, corporation, or other entity?

b. Does one or more of following apply to inventor?

(1) Was inventor solicited by developer?

(2) Did inventor inquire about or seek services of developer?

(3) Did inventor enter into contract for invention development services with developer?

4. Determine whether inventor is exempt from definition of "customer" [*Bus. & Prof. Code* § 22371(b)]:

a. Is inventor a federal, state, or local governmental department or agency?

b. Is inventor is charitable organization, as defined by Internal Revenue Code?

NOTE:

Exempt charitable organizations under *Bus. & Prof. Code* § 22371(b) are any charitable, scientific, educational, religious, or other organization either qualified under *I.R.C.* § 501(c)(3) or described in *I.R.C.* § 170(b)(1)(A).

c. Is inventor regularly engaged in a trade, business, or profession, which during calendar year in which any invention development services contract is signed has either:

(1) Net worth of \$100,000 or more; or

(2) Gross receipts from any source of \$50,000 or more?

[2] Nature of Transaction

1. Determine whether subject matter of transaction is "invention" within meaning of Act, which includes [Bus. & Prof. Code § 22371(c)]:

- a. Invention.
- b. Idea.
- c. Concept.
- d. Any combination of above.

2. Determine whether actual or proposed transaction is "contract for invention development services"; that is, contract by which invention developer undertakes to do one or both of following [Bus. & Prof. Code § 22371(a); see also § 103.202[2] (contract)]:

- a. Develop customer's invention.
- b. Promote customer's invention.

Legal Topics:

For related research and practice materials, see the following legal topics:

Patent LawAnticipation & NoveltyAccidental Anticipation & InherencyPatent LawClaims & SpecificationsGeneral OverviewPatent LawDate of Invention & PriorityGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Preliminary Determinations

33-103 California Legal Forms--Transaction Guide §§ 103.111-103.119

[Reserved]

§§ 103.111[Reserved]



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C. Procedural Guide

33-103 California Legal Forms--Transaction Guide § 103.120

§ 103.120 Financial Security Procedure

[1] Bond Requirements

1. Advise developer to maintain bond meeting following requirements:

NOTE:

Except as described in [2], **below**, an invention developer rendering, or offering to render, invention development services in California must maintain a bond that meets the following requirements [*Bus. & Prof. Code* §§ 22389, 22390; **see** § 103.207].

a. Bond must be issued by surety company admitted to do business in California.

b. Principal sum of bond must be:

(1) Five percent of invention developer's gross income from invention development business in California during last fiscal year; and

(2) Not less than \$25,000, whether in first or any subsequent year of operations.

c. Bond must be executed:

(1) In favor of State of California; and

(2) For benefit of any person who, after execution of invention development services contract, is damaged by invention developer's fraud, dishonesty, or failure to perform under contract.

NOTE:

Any person claiming against the bond may maintain an action against the invention developer and the surety [*Code Civ. Proc.* § 996.410(a)].

2. Advise invention developer to file bond:

a. With Secretary of State; and

b. Prior to time developer first commences business in California.

3. Advise invention developer to file declaration of income form available from California Secretary of State simultaneously with surety bond [see § 103.208].

4. Advise invention developer to change bond as necessary to conform to requirements of law within 90 days after end of each fiscal year.

[2] Alternatives to Bond

1. Advise invention developer that undertaking may be substituted for bond provided that undertaking satisfies all requirements for bond under *Bus. & Prof. Code* §§ 22389, 22390, as described in [1], above [see *Code Civ. Proc.* § 995.210(a); see also *Code Civ. Proc.* § 995.190 ("undertaking" defined)].

2. Advise invention developer that deposit in lieu of bond as authorized by *Code Civ. Proc.* § 995.710 is not available [see *Code Civ. Proc.* § 995.710(e) (prohibiting deposit in lieu of bond after January 1, 1999, for deposits with Secretary of State); see also *Bus. & Prof. Code* § 22391].

Legal Topics:

For related research and practice materials, see the following legal topics:

Patent LawSubject MatterProcessesGeneral Overview



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C. Procedural Guide

33-103 California Legal Forms--Transaction Guide § 103.121

§ 103.121 Solicitation and Negotiation Procedure

[1] Advertising and Solicitation

1. Advise invention developer not to make, or authorize, in any advertisement, any reference to developer's compliance with Invention Development Services Contracts Act [*Bus. & Prof. Code* § 22393].
2. Advise invention developer that all advertising must clearly and conspicuously disclose [*Bus. & Prof. Code* § 22380]:
 - a. Fees charged, if any.
 - b. Other consideration required, if any.

NOTE:

Failure to make above disclosures in all advertisements renders any contract subsequently entered into between customer and developer voidable at the option of the customer [*Bus. & Prof. Code* § 22388].

[2] Initial Contact and Negotiations

NOTE:

The invention developer must make the following disclosures to a customer during the first oral communication with the customer or in the developer's first written response to the customer's inquiry, unless the primary purpose of that communication is to arrange an appointment for presentation of the invention developer's services [*Bus. & Prof. Code* § 22381; *see* § 103.200].

Failure to make any of the following disclosures renders any contract subsequently entered into between customer and developer voidable at the option of the customer [*Bus. & Prof. Code* § 22388].

1. Advise developer to disclose information concerning fees, including:

- a. Amount of fee charged, or approximate range of fees;
- b. If applicable, statement that portion of fees charged will be paid as commission to person inducing customer, directly or indirectly, to contract for services of invention developer; and
- c. Approximate portion of fee charged, if any, to be expended for services relating to patent matters.

2. Advise developer to make one of following statements regarding proposed expenditures:

- a. That invention developer does not intend to expend more for invention development services than fee charged customer; or
- b. Statement of estimated expenditures of invention developer in excess of fee received from customer.

3. Advise developer to provide customer with single statement disclosing both:

- a. Total number of customers who have contracted with invention developer; and

NOTE:

This number need not include customers who have contracted within the last 30 days. [*Bus. & Prof. Code* § 22379(k)].

- b. Number of those customers who have received money by virtue of developer's services in excess of amount of money paid by those customers to invention developer.

4. Advise developer to provide customer with information in form required by law concerning potential patent, copyright, or trademark protection.

NOTE:

This disclosure is a statement advising the customer that the contract is legally regulated, and cautions the customer about potential patent, copyright, and trademark protection for ideas or inventions, and various circumstances that could result in loss of that protection [*see Bus. & Prof. Code* § 22381(d)]. The statement is similar to that required to appear on the cover letter disclosure [*see Bus. & Prof. Code* § 22374] and in the contract itself [*see Bus. & Prof. Code* § 22379(p)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Patent LawDate of Invention & PriorityGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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33-103 California Legal Forms--Transaction Guide §§ 103.122-103.129

[Reserved]

§§ 103.122[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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D. Drafting Guide

33-103 California Legal Forms--Transaction Guide § 103.130

§ 103.130 Contract Contents and Formalities

NOTE:

An invention development services contract must be in writing [*Bus. & Prof. Code* § 22372(a)].

1. Draft invention development services contract, which must include following required provisions in at least 10-point, boldface type (or equivalent size, if handwritten) [*Bus. & Prof. Code* §§ 22373(b), 22379; *see* § 103.202[2]]:

a. Identifying information concerning invention developer, including all of following:

(1) Name of person or firm contracting to perform invention development services.

(2) Name under which that person or firm is doing, or has done, business as invention developer.

(3) Name of any parent, subsidiary, or affiliated company that may engage in performing invention development services.

(4) Invention developer's principal business address.

(5) Name and address of invention developer's agent in California authorized to receive service of process.

(6) Invention developer's form of business, such as corporation, partnership, or other entity.

b. Full and detailed description of acts or services which invention developer undertakes to perform for customer.

NOTE:

To the extent that the description affords the invention developer the discretion to decide what acts or services are to be performed, the developer is required to exercise that discretion to promote the best interest of the customer [*Bus. & Prof. Code* § 22379(b)]. To aid the developer in exercising this discretion, the descriptions should be as full and detailed as possible.

c. Statement whether invention developer undertakes to construct one or more prototypes, models, or devices embodying customer's invention.

d. Statement whether developer undertakes to sell or distribute one or more prototypes, models, or devices embodying invention.

e. Information concerning fee charged, including:

(1) Amount of fee;

(2) If applicable, statement that portion of fee will be paid to person inducing, directly or indirectly, customer to contract for services of invention developer, and name(s) of any person(s) receiving any such payment; and

(3) Approximate portion of fee charged, if any, to be expended for services relating to patent matters.

f. One of following statements:

(1) That invention developer does not intend to expend more for invention development services than fee charged; or

(2) Estimated amount of expenditures in excess of fees received.

g. Terms and conditions of payment.

NOTE:

Bus. & Prof. Code § 22379(a) refers to "[t]he terms and conditions of payment required by [*Bus. & Prof. Code*] Section 22373." *Bus. & Prof. Code* § 22373, however, pertains primarily to the right to cancel the contract and obtain a refund of any payments previously made. No other section of the Act actually covers the subject of payment terms and conditions. It is recommended that the contract specifically provide that payments will be returned if cancellation is effected, even though the required cover sheet will also carry this information [*see Bus. & Prof. Code* § 22374]. The contract also should state any other desired terms and conditions of payment.

h. If any oral or written representation of estimated or projected customer earnings has been made, state:

(1) Amount of estimated or projected earnings; and

(2) Data on which it is based.

i. Single statement disclosing both:

(1) Total number of customers who have contracted with invention developer; and

NOTE:

This number need not include customers who have contracted within the last 30 days. [*Bus. & Prof. Code § 22379(k)*].

(2) Number of those customers who have received money by virtue of developer's services in excess of amount of money paid by those customers to invention developer.

j. Information concerning maintenance of records and correspondence relating to performance of invention development services for customer, including:

(1) Statement that invention developer is required to maintain those records and correspondence for period of not less than three years after expiration of term of invention development services contract;

(2) Name and address of custodian of records and correspondence; and

(3) Statement that records and correspondence will be made available for review and copying to customer or representative, at customer's expense, on invention developer's premises during normal business hours, on seven days' written notice, beginning from date notice is placed in United States mail, properly addressed with first-class postage prepaid.

k. Expected date of completion of invention development services.

l. Statement prescribed by statute concerning potential patent, copyright, and trademark protection.

NOTE:

Among other things, this statement advises the customer that the contract is legally regulated, that the developer is neither qualified nor allowed to give advice as to protection under the patent, copyright, or trademark laws, or any other law, and that the contract does not afford that protection. The statement also cautions the customer that the failure to properly inquire into matters of protection or infringement of others' protection may affect the customer's rights. The same statement is carried on the cover letter disclosure that is required to accompany the contract [*see Bus. & Prof. Code § 22374; see also § 103.201*].

m. Notification of time within which right to cancel contract may be exercised, in form prescribed by statute, located immediately above place for customer's signature on contract.

NOTE:

This statement advises the customer of the last day on which to mail or deliver the notice of cancellation, explains the method of cancellation, and advises of reciprocal rights in the invention developer [*see Bus. & Prof. Code § 22373(b)*].

2. Do not include any prohibited provisions in invention development services contract, such as:

a. Any provision by which developer acquires any interest, partial or whole, in title to developer's invention, except [*Bus. & Prof. Code § 22375*]:

(1) Provision to acquire interest in developer's invention in connection with undertaking to manufacture invention; or

(2) Provision by which developer is to receive portion of proceeds accruing to customer as result of developer's performance of invention development services.

b. Any provision requiring customer to execute note, or series of notes, that would cut off, as to third parties, any right of action or defense that customer would have against developer [*Bus. & Prof. Code* § 22376].

c. Any provision waiving any of customer's rights under development services law.

NOTE:

Such a waiver is deemed contrary to public policy and is void and unenforceable [*Bus. & Prof. Code* § 22385].

3. Check invention development services contract for compliance with all other applicable provisions of law.

NOTE:

The provisions of the invention development services contracts law are not exclusive and do not relieve the parties or the contract from compliance with all other applicable provisions of law [*Bus. & Prof. Code* § 22382].

4. Attach required cover sheet containing notices prescribed by statute (but not other notices) to invention development services contract [*Bus. & Prof. Code* § 22374; *see* § 103.201[2]].

NOTE:

The required notice discloses the method for cancellation, informs the customer that the contract is legally regulated, and cautions the customer about potential patent, copyright, and trademark protection, and potential loss of that protection [*see Bus. & Prof. Code* § 22374].

5. Give customer copy of written invention development services contract when customer signs contract [*Bus. & Prof. Code* § 22372(a)].

6. If developer contemplates one or more subsequent contracts in connection with customer's invention, or performance of services in more than one phase covered by one or more subsequent contracts, provide customer with following at time that customer signs first contract [*Bus. & Prof. Code* § 22372(b); *see* § 103.203[2]]:

a. Written statement that one or more subsequent contracts is contemplated in connection with customer's invention; and

b. Copy of one of following:

(1) Any subsequent contract; or

(2) Written summary of each and every subsequent contract, including amount of any fees or other consideration required from customer.

Legal Topics:

For related research and practice materials, see the following legal topics:

Patent Law Claims & Specifications General Overview Patent Law U.S. Patent & Trademark Office Proceedings General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103 INVENTION DEVELOPMENT SERVICES
PART III. TRANSACTION GUIDE
D. Drafting Guide

33-103 California Legal Forms--Transaction Guide §§ 103.131-103.139

[Reserved]

§§ 103.131[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103 INVENTION DEVELOPMENT SERVICES
PART III. TRANSACTION GUIDE
E. Related and Subsequent Procedures

33-103 California Legal Forms--Transaction Guide § 103.140

§ 103.140 Post-Contract Procedures

1. If party wishes to cancel contract, mail or deliver written notice to other party within seven days after date that invention developer and customer sign contract [*Bus. & Prof. Code § 22373(a)*; see §§ 103.204[1][b], 103.205[2]].

NOTE:

Either the customer or the invention developer has the right to cancel an invention development services contract for any reason at any time within seven days after the date both parties signed the contract, notwithstanding any contractual provision to contrary. A party may cancel by written notice mailed or delivered to the other party. If the notice is mailed, it must be postmarked by midnight of the last day of the cancellation period. If delivered, it must be delivered by the end of invention developer's normal business day [*Bus. & Prof. Code § 22373(a)*].

2. If customer has given notice of cancellation as provided in P 1, *above*, mail to customer all of customer's money paid and materials provided within five days after receipt of notice [*Bus. & Prof. Code § 22373(a)*].

3. Deliver to customer, at address specified in contract, written statement of invention development services performed to date within 180 days after contract is executed and at quarterly intervals thereafter throughout contract term [*Bus. & Prof. Code § 22378*; see § 103.206[2]].

4. Maintain all records and correspondence relating to performance of each invention development service contract for not less than three years after expiration of term of each contract [*Bus. & Prof. Code § 22392*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Execution Patent Law Inequitable Conduct General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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PART III. TRANSACTION GUIDE
E. Related and Subsequent Procedures

33-103 California Legal Forms--Transaction Guide §§ 103.141-103.199

[Reserved]

§§ 103.141[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103 INVENTION DEVELOPMENT SERVICES
PART IV. FORMS

33-103 California Legal Forms--Transaction Guide § 103.200

§ 103.200 Disclosure Statement of Invention Developer

[1] Comment

[a] Use of Form

This form is a statement of disclosures required by the California Invention Development Services Contracts Act [*Bus. & Prof. Code § 22370 et seq.*]. An invention developer must make these disclosures to a customer at either the first oral communication with the customer or the first written response to any inquiry by the customer. However, if the primary purpose of the oral communication or written response is only to arrange an appointment with the invention developer for presentation of the firm's development services, the disclosures are not required. The disclosures concern generally the following [*see Bus. & Prof. Code § 22381*]:

- The fee for services, its range, whether a portion of the fee will be paid for commissions, and what portion of the fee goes to patent matters.
- Expenditures and the extent to which, if any, the expenditures will exceed the amount of the fee.
- The total number of the developer's customers in the past, and the number who have realized a profit in excess of the fee.
- A notice in language prescribed by statute, including a warning that the invention developer is neither qualified nor permitted to advise the customer on patent, copyright, or trademark protection.

[b] Writing Required

The disclosures contained in this form must be set forth in a writing, and that writing must be given to each customer at the time of disclosure [*Bus. & Prof. Code § 22381*]. If the invention developer talks to the customer over the telephone, prudent practice suggests that the disclosure be read from the preprinted written disclosure statement in the course of the conversation. During the conversation the developer should obtain the customer's name and address and then fax or mail a copy of the disclosure statement to the customer. If the first communication is made in a personal interview, the

customer should be handed a copy of the disclosure statement by the end of the conversation. If the statement is faxed or mailed, a copy should be retained with appropriate notation regarding the time and manner in which it was communicated to the customer.

[c] Effect of Failure to Make Required Disclosures

Failure to make the disclosures required by the Invention Development Services Contracts Act renders any contract subsequently entered into between the customer and the invention developer voidable at the option of the customer [Bus. & Prof. Code § 22388]. Furthermore, any invention developer who willfully violates the Act by entering into an invention development contract without making the required disclosures is guilty of a misdemeanor [Bus. & Prof. Code § 22387].

[2] FORM

Disclosure Statement of Invention Developer

INVENTION DEVELOPER'S DISCLOSURE STATEMENT

California law requires our firm to provide you with certain information concerning our fees charged, expenditures in rendering our services, customer successes, and other matters. We are therefore providing you with the following information as required by law.

Fee Schedule

Our fee schedule for invention development services is as follows:

[Set forth fee schedule; the following sample language may be modified as appropriate:]

For an examination of your idea or invention, a limited patent search to aid in determining the novelty of the submitted matter, and a report submitted to you concerning our findings, the fee is \$_____.

For undertaking the manufacture of your invention, the fee ranges from \$_____ to \$_____, and may include an interest in the title to your invention as well as a percentage in the proceeds from the sale or assignment of the invention ranging from _____ percent to _____ percent.

For attempting to promote your invention through advertisement in trade journals or written or personal appeals to the appropriate industry, the fee ranges from \$_____ to \$_____.

A portion of any fee so charged will constitute part of the compensation of the agent who will be your initial and primary personal representative within our firm, and through whom you agree to enter into a contractual relationship with our company. Approximately _____ percent of any fee so paid will be expended for services relating to patent matters.

[Continue with the following:]

Proposed Expenditures

Our firm does not intend to expend more for the invention development services than the fee charged in each instance.

[Add, if appropriate:]

However, in the case of promotion of an invention that our firm has agreed to manufacture in exchange for a share of the proceeds from the sale of that invention, our firm may expend up to \$_____ in excess of the fee charged].

[Continue with the following:]

Customer Successes

Our firm is pleased to report that, as of _____[date], a total of [number] customers have entered into contracts with us for invention development services. Of that number, [number] customers have received, by virtue of our performance of invention development services, an amount of money in excess of that amount paid to us by those customers.

Regulation of Contract and Protection of Idea or Invention

Your potential patent rights may be adversely affected by any attempt to commercialize your idea or invention before a patent application covering it is filed. Nonconfidential disclosures of your idea or invention may also trigger certain statutory deadlines for filing a patent application in the United States and would prevent you from obtaining valid patent rights in countries whose law provides that patent applications must be filed before there is a public disclosure.

Any contract for invention development services between you and our firm will be regulated by law. Our firm is not qualified or permitted to advise you whether protection of your idea or invention is available under the patent, copyright, or trademark laws of the United States or any other law. The contract does not provide any patent, copyright, or trademark protection for your idea or invention. If your idea or invention is patentable, copyrightable, or subject to trademark protection, or infringes an existing valid patent, copyright, or trademark, or a patent, copyright, or trademark for which application has been made, your failure to inquire into these matters may affect your rights to your idea or invention.

[EITHER]

Please promptly arrange an appointment with our firm so that we may detail for you the invention development services we are able to offer.

[OR]

This will confirm that you have arranged for an appointment with our firm for a fuller presentation of our invention development services on _____[date], at [time].

Sincerely, [typed name of invention developer]

By: _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Patent Law
Claims & Specifications
General Overview
Patent Law
U.S. Patent & Trademark Office
Proceedings
Continuation Applications
Copendency & Disclosure



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103 INVENTION DEVELOPMENT SERVICES
PART IV. FORMS

33-103 California Legal Forms--Transaction Guide § 103.201

§ 103.201 Cover Sheet for Invention Development Services Contract

[1] Comment--Use of Form

This form is the cover sheet required to accompany any contract for invention development services under the Invention Development Services Contracts Act [*Bus. & Prof. Code § 22370 et seq.*]. The Act requires that the cover sheet be distinctive and conspicuous and that it contain the notice set forth in the Act. The required notice (1) discloses and describes the right of the customer to cancel the contract; (2) advises the customer about the potential loss of patent rights from premature commercial exploitation and disclosure of the invention or idea; and (3) informs the customer that patent, copyright, and trademark protection and advice are not being provided to the customer [*Bus. & Prof. Code § 22374*]. The notice must be imprinted on the cover sheet in boldface type of not less than 10 point in size [*Bus. & Prof. Code § 22374*].

[2] FORM

Cover Sheet for Invention Development Services Contract

COVER SHEET FOR INVENTION DEVELOPMENT SERVICES CONTRACT

The following disclosures are required by law:

You have the right to cancel this contract for any reason at any time within seven days from the date you and the invention developer sign the contract and you receive a fully executed copy of it. To exercise this option you need only mail or deliver to this invention developer written notice of your cancellation. The method and time for notification is set forth in this contract immediately above the place for your signature. Upon cancellation, the invention developer must return by mail, within five business days, all money paid and all materials provided by you.

Your potential patent rights may be adversely affected by any attempt to commercialize your idea or invention before a patent application covering it is filed. Nonconfidential disclosures of your idea or invention may also trigger certain statutory deadlines for filing a patent application in the United States and would prevent you

from obtaining valid patent rights in countries whose law provides that patent applications must be filed before there is a public disclosure.

This contract between you and the invention developer is regulated by law. The invention developer is not qualified or permitted to advise you whether protection of your idea or invention is available under the patent, copyright, or trademark laws of the United States or any other law. This contract does not provide any patent, copyright, or trademark protection for your idea or invention. If your idea or invention is patentable, copyrightable, or subject to trademark protection, or infringes an existing valid patent, copyright, or trademark or a patent, copyright, or trademark for which application has been made, your failure to inquire into these matters may affect your rights to your idea or invention.

Legal Topics:

For related research and practice materials, see the following legal topics:

Patent Law Anticipation & Novelty Invention Patent Law Claims & Specifications Theory of Invention



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DIVISION VII: PERSONAL TRANSACTIONS
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33-103 California Legal Forms--Transaction Guide § 103.202

§ 103.202 Invention Development Services Contract

[1] Comment

[a] Use of Form

This form is a sample invention development services contract. The Invention Development Services Contracts Act [*Bus. & Prof. Code § 22370 et seq.*] requires that every contract for invention development services contain certain mandatory provisions. Those mandatory contractual provisions must be set forth in at least 10-point boldface type, or equivalent size, if handwritten [*Bus. & Prof. Code § 22379*].

[b] Services and Charges

The contract must include a full and detailed description of services to be performed, including any construction or distribution of models or prototypes of the customer's invention [*see Bus. & Prof. Code § 22379(b)-(d)*]. The expected date of completion of the services should be indicated [*Bus. & Prof. Code § 22379(o)*]. The fee charged must also be specified, with information about its intended allocation to commission agents, as well as information as to whether the promoter will spend more than the fee on services rendered [*Bus. & Prof. Code § 22379(h), (i)*]. If any representation of estimated or projected customer earnings is or has been made, the contract must include the estimation or projection, along with the supporting data [*Bus. & Prof. Code § 22379(j)*].

Every invention development services contract also must include the terms and conditions of payment required by *Bus. & Prof. Code § 22373* [*Bus. & Prof. Code § 22379(a)*]. *Bus. & Prof. Code § 22373* pertains to the customer's right to cancel the contract. The invention developer and the customer each have the right to cancel a contract for invention development services for any reason at any time within seven days of the date the invention developer and the customer sign the contract. Cancellation must be effected by written notice mailed or delivered to the invention developer or the customer. If that notice is mailed, it must be postmarked by midnight of the last day of the cancellation period. If the notice is delivered, it must be delivered by the end of the invention developer's normal business day. Within five business days after receipt of notice of cancellation by the customer, the invention developer must return to the customer, by mail, all moneys paid and all materials provided by the customer [*Bus. & Prof. Code § 22373(a)*].

Every contract must contain a prescribed statement in 10-point boldface type, immediately above the place at which the customer signs the contract, relating to the cancellation rights described above [*Bus. & Prof. Code* § 22373(b)]. Although neither *Bus. & Prof. Code* § 22379 nor *Bus. & Prof. Code* § 22373 expressly requires it, basic contract drafting principles would suggest that the better practice is to set forth any applicable terms and conditions of payment, such as the form and timing of payments.

An invention developer may not acquire any interest in the title to a customer's invention, unless the invention developer contracts to manufacture the invention and acquires the interest for that purpose at or about the time the contract for manufacture is executed. Nevertheless, an invention developer may draft and enter into a contract permitting the developer to share in the proceeds resulting from the development services [*Bus. & Prof. Code* § 22375]. The contract, on the other hand, may not require or entail execution of any notes that may be separately negotiated to third parties free of the customer's actions or defenses against the developer; any assignee of the developer is subject to all equities and defenses in the customer's favor at time of assignment [*see Bus. & Prof. Code* §§ 22376, 22377].

[c] Identification of Developer, Maintenance of Records, and Achievements

The contract must give the invention developer's name, any fictitious names used in the business, the form of business entity, and the names of any affiliate companies who may participate in performance [*Bus. & Prof. Code* § 22379(e)]. The principal business address, as well as the name and address of the developer's California agent for service of process must also be included [*Bus. & Prof. Code* § 22379(f)].

The invention developer must state that the firm is required to maintain all records and correspondence regarding performance of services for at least three years after the contract expires [*Bus. & Prof. Code* § 22379(l)]. The name and address of the records custodian should be listed [*Bus. & Prof. Code* § 22379(m)], along with a statement that the records are available for review or copying by the customer or the customer's agent on the terms and procedure prescribed by law [*Bus. & Prof. Code* § 22379(n)].

The contract also must set forth, in a single statement, both the total number of customers who have contracted with the invention developer (except that contracts entered into within the last 30 days need not be reflected) and the total number of customers who have received more money from the developer's services than they have paid to the developer [*Bus. & Prof. Code* § 22379(k)]. The developer may wish to include other information concerning the promoter's efforts and services, such as how many cases have not been fully processed, and how many ended with desirable and tangible accomplishment apart from earnings.

[d] Advisory Legends

Two kinds of statements must be set out verbatim in the language of statute. One notice (1) warns of potential adverse consequences to patent rights from premature commercialization or disclosure, (2) states that the contract is regulated by law, (3) cautions the customer that the invention developer is not qualified or permitted to advise on the matter of patent, copyright, or trademark protection, and (4) cautions the customer that the contract provides no patent, copyright, or trademark protection and that the customer is responsible for inquiring into the extent of that protection, if any [*Bus. & Prof. Code* § 22379(p)]. The other statement notifies the customer of the last day on which it is possible to cancel the contract and recites the cancellation procedure. This latter statement must appear immediately above the customer's signature line [*Bus. & Prof. Code* § 22373(b); *see* [b], *above*].

[e] Other Contract Requirements

Every contract for invention development services must be in writing, and a copy of the written contract must be given to the customer at the time of execution [*Bus. & Prof. Code* § 22372(a)]. The contract must be accompanied by a cover sheet carrying prescribed disclosures [*Bus. & Prof. Code* § 22374; *see* § 103.201[2]]. The contract is subject to the

customer's right to cancel for any reason by a prescribed procedure within seven days of execution [*Bus. & Prof. Code* § 22373(a); see [b], *above*; see also § 103.204[1][b]]. If subsequent contracts are contemplated, the customer must be given a written statement of that fact, accompanied by copies or summaries of those contracts, at the time of signing the first contract [*Bus. & Prof. Code* § 22372(b); see § 103.203[2]]. Any waivers by the customer of provisions of the invention development services law are unenforceable [*Bus. & Prof. Code* § 22385].

[f] Remedies and Liabilities

The customer may void a contract if the invention developer has failed to make the initial disclosures required by law prior to negotiations [*Bus. & Prof. Code* § 22388; see § 103.200[1][c]]. Moreover, any contract not in compliance with the Invention Development Services Contracts Act is void and unenforceable, unless the developer can show that the noncompliance was unintentional and resulted from a bona fide error, notwithstanding the use of reasonable procedures adopted to avoid any such errors, and makes an appropriate correction [*Bus. & Prof. Code* § 22383]. Any contract entered into in reliance on any willful and false, fraudulent, or misleading representation by the invention developer is likewise void and unenforceable [*Bus. & Prof. Code* § 22384].

A developer who violates the Invention Development Services Contracts Act may incur civil liability to the injured customer for \$3,000 or three times the amount of actual damages sustained, whichever amount is greater [*Bus. & Prof. Code* § 22386]. The court also may award reasonable attorneys' fees to the plaintiff [*Bus. & Prof. Code* § 22386]. Criminal prosecution and injunctive relief may also result from violations of the contract requirements of the governing law [see *Bus. & Prof. Code* § 22387].

[2] FORM

Invention Development Services Contract

INVENTION DEVELOPMENT SERVICES CONTRACT

This agreement is entered into on _____[*date*], between _____[*name of invention developer*] ("Invention Developer") and _____[*name of inventor*] ("Inventor");

Recitals

Inventor has an [*idea or invention*] believed to be of substantial commercial value and desires to procure invention development services from Invention Developer for the development [, promotion, manufacture, and marketing] of _____[*his or her or its*] [*idea or invention*]. Invention Developer has the resources and expertise necessary for the development[, promotion, manufacture, and marketing] of ideas and inventions and desires to perform for compensation the invention development services specified in this agreement.

IT IS THEREFORE AGREED AS FOLLOWS:

ARTICLE I

PARTIES AND SUBJECT MATTER

Inventor's Identity and Address

Section 1.01. Inventor is and represents [*himself or herself or itself*] to be the inventor of the [*idea or invention*] described in Section 1.02, below, which is the subject matter of this agreement. All notices and correspondence

pertaining to this agreement shall be mailed or delivered to Inventor at the following address: _____.
Inventor may change the address to which notices or correspondence will be mailed or delivered by notifying Invention Developer in writing of the new address.

Idea or Invention

Section 1.02. The [idea or invention] of Inventor that is the subject matter of this Agreement is described as follows: [describe to the extent necessary to clarify developer's contractual rights and duties]. This [idea or invention] is referred to in this agreement as the "Invention."

Disclosure of Invention and Confidentiality

Section 1.03. Inventor shall disclose the Invention to the Invention Developer under this agreement for the purpose of enabling Invention Developer to undertake and perform the invention development services described below. Invention Developer shall preserve in confidence the Invention and reveal only those details of the Invention as are necessary to perfect its practical application, to promote and market it in legitimate trade circles and appropriate industrial sources, to obtain any necessary approval from private and governmental agencies and organizations, and to otherwise perform its duties under this agreement.

Invention Developer's Identity and Address

Section 1.04. Invention Developer, [who is an individual or specify type of business entity, e.g., which is a corporation duly organized and operating under the laws of California], [doing or having previously done] business under the name of _____ [trade name], is the [firm or person] contracting to perform the described invention development services. Invention Developer's principal place of business is _____ [address]. The name of Invention Developer's agent in California who is authorized to receive service of process is _____ [name], whose address for receipt of service of process is _____ [address]. [_____ (Name of company) is _____ (a subsidiary or a parent or an affiliate) company of Invention Developer and may engage in performing certain of the invention development services provided for in this agreement.]

ARTICLE II SERVICES

[Describe invention development services to be performed in detail, such as the following examples in Sections 2.01, 2.01, and 2.03, below.]

Patent Research

Section 2.01. Invention Developer shall immediately initiate a preliminary patent research program and shall

- (a) Thoroughly examine the Invention for all of its distinguishing features and possible uses.
- (b) Gather all other materials found to be necessary to support or explain the Invention for research purposes.

- (c) Prepare complete instructions for research personnel.
- (d) Classify the subject matter and the field of investigation.
- (e) Instruct Invention Developer's [specially retained] patent research personnel to engage in a selective and specially limited search of prior United States patents relevant to the Invention.
- (f) Procure from the United States Patent and Trademark Office copies of relevant inventions located by special research personnel of Invention Developer.
- (g) Consult with Inventor and present the results of the preliminary patent research study on the Invention and discuss with Inventor the significance of these results for possible development and promotion of the Invention.

Idea Promotion

Section 2.02. Invention Developer shall promote the idea of Inventor and shall

- (a) Thoroughly examine the Invention for all of its marketable features.
- (b) Prepare a complete prospectus regarding the Invention, with a digest of the Invention and its function, along with appropriate photographs, designs, or other illustrations which, in the opinion of Invention Developer, serve and enhance the purpose of the prospectus, and which does not disclose the specific and patentable features in any detail that might jeopardize the patentable status of the Invention.
- (c) Print the prospectus in an appropriate manner within the standards of the idea-promotion industry.
- (d) Prepare a brief introductory cover sales letter to introduce the prospectus.
- (e) Mail the prospectus or accompanying letter, or both, to selected industry personnel who may be potentially interested in such an invention, including business leaders, key management personnel, and key corporate officials, as appropriate.
- (f) Contact industry personnel by telephone or in person to discuss possible commercial uses for the Invention.
- (g) Advertise in selected trade journals, inviting inquiry as to the Invention and asking for inquiries and requests to receive the prospectus or to arrange an interview with a member of the staff of Invention Developer.
- (h) Provide Inventor with information concerning the progress and results of all the above-described services taken to promote the Invention.
- (i) Represent Inventor in negotiations with any of the above industry personnel who indicate an appropriate interest in the Invention, making offers to or accepting offers from those persons only on terms approved in writing by Inventor.

Manufacture of Invention

Section 2.03. Invention Developer shall undertake the exclusive manufacture of the Invention and shall

- (a) Accomplish all or any part of the manufacture, at any time during the course of production, either through its own

facilities or those of any related or nonrelated enterprise.

(b) Manufacture the Invention to the appropriate specifications and quality set forth in [*specify source of specifications, e.g., (1) the formal plan of the Invention to be prepared by Invention Developer and approved by Inventor, and (2) any patent application or letters patent granted, as of the time of manufacture*].

(c) Manufacture the Invention in the quantity as Invention Developer determines to be appropriate in light of the demand for the Invention to be, including a quantity sufficient to meet the demands of any binding commitments made by Invention Developer.

(d) Have the exclusive license to arrange for manufacture of the Invention, or its component parts, at any facilities throughout the United States or the world. [This exclusive right of Invention Developer to manufacture or grant manufacturing rights as to the Invention shall expire on _____ (date).]

[Continue with the following:]

Completion of Services

Section 2.04. Invention Developer shall complete the above-described services by _____ [date].

Prototype or Model

Section 2.05. Invention Developer shall construct a [prototype of or model of or device embodying] the Invention for purposes of illustration and demonstration in its program of development and promotion of the Invention. [Additionally, Invention Developer shall construct a limited number of exhibits of the Invention and shall sell or otherwise distribute them among industrial personnel for the purpose of promoting the Invention.]

Estimated Earnings

Section 2.06. The parties acknowledge that Invention Developer has neither made nor shall make any oral or written representations to Inventor regarding the estimated or projected earnings of Inventor resulting from the development and promotion of the Invention. Invention Developer may make those representations at the time of the negotiation or execution of final contracts with specific customers, but only in relation to those potential and actual contracts.

ARTICLE III CONSIDERATION

[EITHER]

Flat Fee

Section 3.01. In consideration for the invention development services to be provided under this agreement, Inventor shall pay to Invention Developer a fee of \$_____ on or before _____ [date].

[OR]

Installment Fee

Section 3.01. In consideration for the invention development services to be provided under this agreement, Inventor shall pay to Invention Developer a fee of \$_____, to be paid in installments as follows: *[specify installment schedule, e.g., 30 percent on execution of this agreement, 30 percent on completion of the prototype described in Section 2.05, the balance on completion of the remainder of services specified in this agreement]*.

[EITHER]

Share of Proceeds

Section 3.02. Inventor shall immediately assign to Invention Developer, in further consideration for the invention development services provided for in this agreement, a _____ percent interest in any proceeds from the Invention received as a result of the invention development services performed by Invention Developer.

[AND/OR]

Share of Title

Section 3.03. Inventor shall immediately assign to Invention Developer a _____ percent proprietary interest in the Invention and in any patent procured for the Invention, as consideration for the undertaking of Invention Developer in [arranging] the manufacture of the Invention in the appropriate quantity and quality as provided for in this agreement.

[CONTINUE]

Application of Fees

Section 3.04. Invention Developer shall apply _____ [_____ percent or \$_____] of the above-described fee[s] to the compensation of _____ [name], authorized agent of Invention Developer, who is acting as the personal representative of Invention Developer in dealing with Inventor, and who has contracted with Inventor on behalf of Invention Developer. [Approximately _____ percent of the fee[s] shall be expended for services relating to patent matters.] [It is not the intention of Invention Developer to expend more than the fee(s) charged under this agreement for the invention development services or It is estimated that Invention Developer will expend \$_____ in excess of the fee(s) charged under this agreement in performing its services].

Refunds

Section 3.05. Notwithstanding anything to the contrary in this agreement, if Inventor or Invention Developer should cancel this agreement within seven days after execution of this agreement, as provided by Section 5.02 of this Agreement, Invention Developer shall return to Inventor, by mail, within five business days after receipt of Inventor's notice of cancellation, all moneys paid and all materials provided by Inventor.

ARTICLE IV RECORDS

Other Customers

Section 4.01. Invention Developer is pleased to disclose that a total of [number] customers have previously contracted with Invention Developer, as of _____[date within previous 30 days], and of this number [number] have received, by virtue of Invention Developer's performance of invention development services, an amount of money in excess of the amount of money paid by those customers to Invention Developer. *[If desired, provide additional statistics concerning success of developer's services.]*

Retention of Records of Services Performed

Section 4.02. Invention Developer is required by law to maintain all records and correspondence relating to performance of the invention development services for each of its inventors for at least three years after expiration of the term of any such contract for invention development services. All records and correspondence are maintained in the custody of _____[name], at _____[address]. Those materials will be made available to Inventor, or Inventor's representative, for review and copying at Inventor's expense on Invention Developer's premises during normal business hours and on seven day' written notice. The time period for response to any request for inspection and copying of records will begin from the date that the Inventor's written notice is placed in the United States mail properly addressed, first-class postage prepaid.

ARTICLE V NOTICES AND RIGHTS

Patent, Copyright, and Trademark Protection

Section 5.01. *California Business and Professions Code Section 22379(p)* requires that the following notice be included in this agreement:

Your potential patent rights may be adversely affected by any attempt to commercialize your idea or invention before a patent application covering it is filed. Nonconfidential disclosures of your idea or invention may also trigger certain statutory deadlines for filing a patent application in the United States and would prevent you from obtaining valid patent rights in countries whose laws provides that patent applications must be filed before there is a public disclosure.

This contract between you and the invention developer is regulated by law. The invention developer is not qualified or permitted to advise you whether protection of your idea or invention is available under the patent, copyright, or trademark laws of the United States or any other law. This contract does not provide any patent,

copyright, or trademark protection for your idea or invention. If your idea or invention is patentable, copyrightable, or subject to trademark protection, or infringes an existing valid patent, copyright, or trademark or a patent, copyright, or trademark for which application has been made, your failure to inquire into these matters may affect your rights to your idea or invention.

Right to Cancel

Section 5.02. Notwithstanding any contractual provision to the contrary, Invention Developer and Inventor shall each have the right to cancel this agreement for any reason at any time within seven days of the date Invention Developer and Inventor sign this agreement. Cancellation shall be effected by written notice mailed or delivered to Invention Developer or Inventor. If the notice is mailed, it must be postmarked by midnight of the last day of the cancellation period. If the notice is delivered, it must be delivered by the end of Invention Developer's normal business day.

Execution

The parties have executed this agreement at _____[city], California, on the date set forth at the beginning of this agreement.

INVENTION DEVELOPER

_____ [name of firm]

By _____ [signature]

[typed name and title]

[The following notice must be included in 10-point boldface type immediately above the place at which the customer signs the agreement (Bus. & Prof. Code § 22373).]

NOTICE TO INVENTOR

The seven-day period during which you may cancel this contract for any reason by mailing or delivering written notice to the invention developer will expire on:

_____ [last date to mail or deliver notice]

If you choose to mail your notice, it must be placed in the United States mail properly addressed first-class postage prepaid and postmarked before midnight of this date. If you choose to deliver your notice to the invention developer directly, it must be delivered to the invention developer by the end of the developer's normal business day on this date. The invention developer also has the right to cancel this contract by notice similarly mailed or delivered.

INVENTOR

_____ [signature]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Patent Law Anticipation & Novelty Invention Patent Law Claims & Specifications Theory of Invention



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103 INVENTION DEVELOPMENT SERVICES
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33-103 California Legal Forms--Transaction Guide § 103.203

§ 103.203 Statement as to Subsequent Contracts Contemplated by Invention Developer

[1] Comment

[a] Use of Form

This form is a statement that an invention developer contemplates one or more subsequent contracts in connection with an invention. The form may be adapted, in the alternative, to state that the invention developer contemplates the performance of services in connection with an invention in more than one phase, with the performance of each phase covered in one or more subsequent contracts. In the event that the invention developer contemplates either or both of the above-described alternatives, the developer must so indicate in a writing supplied to the customer [*see Bus. & Prof. Code § 22372(b)*].

[b] Required Attachments

The writing must be accompanied by a copy of the written contract or a written summary of the terms of each and every contemplated subsequent contract, including the amount of any fees or other consideration required from the customer, at the time the customer signs the first contract [*Bus. & Prof. Code § 22372(b)*].

[2] FORM

Statement as to Subsequent Contracts Contemplated by Invention Developer

STATEMENT AS TO SUBSEQUENT CONTRACTS CONTEMPLATED BY INVENTION DEVELOPER

[*Letterhead of invention developer*]

_____[*date*]

_____[*Name of customer*]

[Street address]

[City, state, zip]

Dear _____[name of customer]:

As you know, the contract that we are about to sign concerning your [idea or invention] covers only the following [preliminary] stages of the development of your [idea or invention]: [specify]. In order fully to develop and obtain maximum benefit for you from your [idea or invention], we anticipate that the following additional invention development services will be needed: [specify].

If you so desire, our firm will be able and willing to contract with you for the performance of the additional services described above. [A copy of a proposed contract to cover these additional services is attached to this letter or The general terms and conditions of any subsequent contract for these additional services are as follows:
_____ (describe terms and conditions, including any fees or compensation)].

Sincerely, [typed name of invention developer]
By _____ [signature]
[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract ModificationsGeneral OverviewPatent LawClaims & SpecificationsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103 INVENTION DEVELOPMENT SERVICES
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33-103 California Legal Forms--Transaction Guide § 103.204

§ 103.204 Notice of Cancellation of Contract by Customer

[1] Comment

[a] Use of Form

This form is a customer's notice of cancellation of an invention development services contract. Under the Invention Development Services Contracts Act [*Bus. & Prof. Code § 22370 et seq.*], the customer has the right to cancel a contract for invention development services for any reason, as does the invention developer [*Bus. & Prof. Code § 22373(a)*]. This cancellation right exists notwithstanding any contractual provision to the contrary [*Bus. & Prof. Code § 22373(a)*].

[b] Exercising Right to Cancel

The right must be exercised within seven days after execution of the contract by both parties. Cancellation is effected by written notice to the other party, either mailed or delivered. Mailing must be postmarked by midnight of the last day of the cancellation period. If delivered, the notice must arrive by the end of the invention developer's normal business day. If the customer cancels the contract, the invention developer must return, by mail, all moneys paid and all materials provided by the customer [*Bus. & Prof. Code § 22373(a)*].

If the notice is mailed by the customer, it is advisable to send it by certified mail, return receipt requested. If delivery is made in person, a previously prepared acknowledgment of receipt should be submitted to the person accepting delivery for signature and immediately returned to the delivery person. An optional receipt is included at the end of this form.

[2] FORM

Notice of Cancellation of Contract by Customer

_____ [*Name of customer*]
 _____ [*Street address of customer*]
 _____ [*City, state, zip*]

_____ [date]

TO: _____ [Name of authorized representative]
 _____ [Name of invention developer]
 _____ [Street address]
 _____ [City, state, zip]

NOTICE OF CANCELLATION

Dear _____ [name of authorized representative]:

You are hereby notified that in accordance with *California Business and Professions Code Section 22373(a)*, I hereby cancel the contract for invention development services entered into with _____ [name of invention developer] on _____ [date] [and all related contracts].

You are requested to remit to me, at the above address, all moneys paid [and all materials provided] by me, that is, the sum of \$[and _____ (describe all materials provided to invention developer)], no later than five business days after receipt of this notice of cancellation, as required by *California Business and Professions Code Section 22373(a)*.

Sincerely, _____ [signature of customer]
 [typed name]

[If notice will be delivered in person, it is recommended that a copy of the notice be prepared and the following acknowledgment of receipt attached to that copy, to verify that notice was delivered and received within the applicable time period.]

ACKNOWLEDGMENT OF RECEIPT

Receipt of the foregoing Notice of Cancellation at the time and date noted below is hereby acknowledged.
 _____ Dated:

[typed name of invention developer]
 By _____ [signature]
 [typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Rescission & Redhibition General Overview Patent Law Inequitable Conduct General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103 INVENTION DEVELOPMENT SERVICES
PART IV. FORMS

33-103 California Legal Forms--Transaction Guide § 103.205

§ 103.205 Notice of Cancellation of Contract by Invention Developer**[1] Comment--Use of Form**

This form is a notice of cancellation for use by an invention developer to cancel an invention development services contract. The invention developer, like the customer, has the right to cancel a contract for invention development services for any reason, and at any time within seven days after the date of execution of the contract [*Bus. & Prof. Code* § 22373(a)]. For further discussion of the right to cancel, see § 103.204[1].

[2] FORM**Notice of Cancellation of Contract by Invention Developer**

[Letterhead of invention developer]

_____[date]

_____[Name of customer]

_____[Street address]

_____[City, state, zip]

NOTICE OF CANCELLATION

Dear _____[name of customer]:

You are hereby notified that in accordance with *California Business and Professions Code Section 22373(a)*, _____[name of invention developer] hereby cancels the contract for invention development services entered into between you and _____[name of invention developer] on _____[date], and all other contracts related to and dependent on that contract.

Enclosed is a check for the sum of \$_____, which constitutes a refund of all moneys paid to _____[*name of invention developer*] by you in connection with the above-described contract(s). [The materials provided to _____(*name of invention developer*) by you, that is, _____(*description of materials*), are being sent to you under separate cover.] _____[*name of invention developer*] and you have no further obligations to one another under the above-mentioned contract.

Please contact me at [*telephone number*] if you have any questions.

Sincerely, [*typed name of invention developer*]

By _____ [*signature*]

[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Rescission & Redhibition General Overview Patent Law Claims & Specifications General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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33-103 California Legal Forms--Transaction Guide § 103.206

§ 103.206 Quarterly Statement of Invention Development Services

[1] Comment

[a] Use of Form

This form is a quarterly statement of invention development services. The invention developer must prepare a written statement of the invention development services performed to date with respect to each and every contract for those services. The statement must be delivered to the customer at the address specified in the contract. The statement must be sent at quarterly intervals throughout the term of the contract; however, the first statement need not be sent until 180 days after the contract is executed [*Bus. & Prof. Code § 22378*].

If there is more than one contract with a given customer, whether or not each contract is an independent one for different development services for that customer, it would seem the required report may be combined into the same written statement of services, as long as it is clear to which contract the reported services are attributable.

The following form suggests listing the full complement of various areas in which the particular invention developer is prepared to render services, whether or not all are covered under the customer's individual contract. If no activity has occurred in any one of the listed areas, the developer can either leave that area blank or report "none."

[b] Maintaining Records

The invention developer is required to maintain all records and correspondence relating to performance of invention development services contracts for at least three full years after completion of each contract [*Bus. & Prof. Code § 22392*]. This requirement must be set forth in any contract for invention development services [*Bus. & Prof. Code § 22379(l)*], and the contract must also disclose the names and addresses of the custodians of those records [*Bus. & Prof. Code § 22379(m)*].

[2] FORM

Quarterly Statement of Invention Development Services

[Letterhead of invention developer]

_____ [date]

_____ [Name of customer]

_____ [Street address]

_____ [City, state, zip]

STATEMENT OF INVENTION DEVELOPMENT SERVICES PERFORMED

The following invention development services have been performed for you in connection with the contract(s) between _____ [name of invention developer] and you, dated _____. This statement covers services performed for you for the period beginning _____ [date], and ending _____ [date].

[Set forth description of all activities performed with respect to each type of service listed below during the statement period. If no activities were performed for a particular type of service during the statement period, leave the space blank or insert the words "none" or "no activities during period," or similar language. If any type of service listed below is inapplicable to the particular customer's contract, either omit that service from the statement, or insert the words "not applicable" in the space provided.]

(1) Patent search and research:

_____ .

(2) Analysis of idea or invention:

_____ .

(3) Evaluative report on idea or invention:

_____ .

(4) Construction of prototype or model of invention:

_____ .

(5) Manufacture of invention:

_____ .

(6) Composition and distribution of promotional letters or brochures:

_____ .

(7) Advertisements in trade journals:

_____ .

(8) Publicity and public relations pieces placed:

_____ .

(9) Interviews with interested parties:

_____ .

(10) Miscellaneous marketing campaign:

_____ .

(11) Negotiations for employment of invention:

_____ .

(12)

_____ [Other]:

_____ .

If you desire further details about any of the above-reported matters, or if you are interested in arranging for activity in any areas of service indicated above but not reported, please contact me at the above address or telephone number.

Sincerely, *[typed name of invention developer]*

By _____ *[signature]*

[typed name and title]

Legal Topics:

For related research and practice materials, see the following legal topics:

Patent Law Date of Invention & Priority General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103 INVENTION DEVELOPMENT SERVICES
PART IV. FORMS

33-103 California Legal Forms--Transaction Guide § 103.207

§ 103.207 Surety Bond for Invention Developer [Form SFSB-409]

[1] Comment

[a] Use of Form

This form is a surety bond for an invention developer. The form was drafted by the Attorney General [*see 11 Cal. Code Reg. § 25(b)*; 11 Cal. Code Reg. § 63.4 (amendment filed 8/26/99 and submitted to Office of Administrative Law for printing only)] under legislation requiring that office to approve the form of all bonds of private persons required by statute to furnish bonds to state agencies, to assure their conformity to applicable law [*see Gov. Code § 11110*]. Parties may request that the Attorney General revoke or modify particular bond approvals [*Gov. Code §§ 11111, 11113*]. The form is published by the Secretary of State's Office as Form SFSB-409.

This form may be obtained in a variety of ways from the California Secretary of State. It can be picked up from the Office of the Secretary of State, located at 1500 11th Street, Suite 345, Sacramento, CA 95814. The form can be obtained by requesting it by regular mail from the Office of the Secretary of State, P.O. Box 944225, Sacramento, CA 94244-2250, or by requesting it by telephone, 916-653-3984. Finally, the form can be downloaded from the Business Service Center page of the Secretary of State's website, which is located at <http://www.sos.ca.gov/business/>.

[b] Bond Requirement

Any invention developer who renders invention development services in California, or offers to do so, is required to maintain a bond issued by a surety company admitted to do business in California. The principal sum of the bond must be 5 percent of the promoter's gross income from that business in California during the last fiscal year. However, the sum may not be less than \$25,000 in the first or any subsequent year of operations [*Bus. & Prof. Code § 22389*]. For a Declaration of Income form provided by the Secretary of State, see § 103.208[2].

An undertaking (that is, a surety, indemnity, fiduciary, or like undertaking executed by sureties alone) will satisfy the bond required of an invention developer [*see Code Civ. Proc. §§ 995.190* ("undertaking" defined), 995.210(a)(statutory bonds and statutory undertakings interchangeable)]. An invention developer's undertaking must satisfy all statutory requirements for a bond set forth in *Bus. & Prof. Code §§ 22389 and 22390* [*see Code Civ. Proc. § 995.210(a)*]. After

January 1, 1999, a deposit in lieu of bond may not be used for deposits with the Secretary of State [*Code Civ. Proc.* § 995.710(e)].

[c] Filing and Fees

A copy of the bond must be filed with the California Secretary of State before the time the invention developer initially begins business in California. There is a period of 90 days following the end of each fiscal year during which the bond may be changed, if needed, to conform to the requirements of the controlling statutory provision [*Bus. & Prof. Code* § 22389].

The executed document and a filing fee must be sent to the California Secretary of State [*see* § 103.207[2], *below*]. There is no filing fee for an amendment to a previously filed bond.

[d] Claimants Against Bond

The bond runs in favor of the State of California and to the benefit of anyone who has entered into a contract for invention development services with the invention developer and who has been damaged by fraud, dishonesty, or failure to provide services under the contract [*Bus. & Prof. Code* § 22390]. A claimant against the bond may maintain an action against both the invention developer and the surety [*see Code Civ. Proc.* § 996.410(a); *see also Bus. & Prof. Code* § 22391 (asserting claim against deposit used in lieu of bond); *Code Civ. Proc.* § 995.710(e) (prohibiting deposit in lieu of bond after January 1, 1999, for deposits with Secretary of State)]. Liability of the surety, however, is confined to the amount of the bond [*Code Civ. Proc.* § 996.470(a)].

[2] FORM

Surety Bond for Invention Developer [Form SFSB-409]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:
Patent LawClaims & SpecificationsEnablement RequirementGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103 INVENTION DEVELOPMENT SERVICES
PART IV. FORMS

33-103 California Legal Forms--Transaction Guide § 103.208

§ 103.208 Declaration of Income for Invention Developer [Form LP/SF-409D]

[1] Comment

[a] Use of Form

This form is a declaration of income for an invention developer. The form is published by the Secretary of State's Office as Form LP/SF-409D.

This form can be obtained from the California Secretary of State's office or can be downloaded from the Secretary of State's web site at <http://www.sos.ca.gov/business/>.

Any invention developer who renders invention development services in California, or offers to do so, is required to maintain a bond issued by a surety company admitted to do business in California. The principal sum of the bond must be five percent of the promoter's gross income from that business in California during the last fiscal year *Bus. & Prof. Code § 22389*. (However, the sum may not be less than \$25,000 in the first or any subsequent year of operations [*Bus. & Prof. Code § 22389*]).

For the Secretary of State's surety bond form for invention developers, see § 103.207[2].

[b] Filing and Fees

This form should be filed with the California Secretary of State simultaneously with the surety bond in § 103.207[2]]. There is no filing fee. The document is not subject to public inspection [*see § 103.208[2], below*].

[2] FORM

Declaration of Income for Invention Developer [Form LP/SF-409D]

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:

Patent LawU.S. Patent & Trademark Office ProceedingsFiling RequirementsGeneral OverviewPatent LawU.S. Patent
& Trademark Office ProceedingsFiling RequirementsFees



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103A COPYRIGHTS

33-103A California Legal Forms--Transaction Guide 103A.syn

§ 103A.syn Synopsis to Chapter 103A: COPYRIGHTS

§ 103A.01 Federal Sources

[1] Constitution

[2] Statutes

[3] Regulations

§§ 103A.02-103A.04 [Reserved]

§ 103A.05 Law Reviews and Periodicals

§ 103A.06 Annotations

§ 103A.07 Text References

§§ 103A.08-103A.09 [Reserved]

§ 103A.10 Federal Preemption

[1] Constitutional Basis for Copyright Protection

[2] Governing Statutes

[3] Exemptions From Preemption

§ 103A.11 California Intellectual Property Law

[1] Theories of Recovery Under State Law

[2] Test for Preemption

§ 103A.12 International Law and Agreements

§§ 103A.13-103A.19 [Reserved]

§ 103A.20 What Is Copyright?

[1] Exclusive, Independent Rights

[2] Additional Rights for Authors of Visual Art

[a] Rights of Attribution and Integrity

[b] Exercise of Rights

[c] Duration of Rights

§ 103A.21 Copyright Distinguished From Patent and Trademark

§ 103A.22 What Can Be Protected

[1] Works Protected Under 1976 Act

[2] Subject Matter of Protection

[3] Compilations and Derivative Works

[a] Extent of Protection

[b] Test for Derivative Copyright

[c] Test for Compilation Copyright

§ 103A.23 What Cannot Be Protected

§§ 103A.24-103A.29 [Reserved]

§ 103A.30 Statutory Limitations on Exclusive Rights--In General

§ 103A.31 Reproduction by Libraries and Archives

[1] Rights of Reproduction and Distribution

[2] Limitations on Rights

§ 103A.32 Performances and Displays

§ 103A.33 Secondary Transmissions

§ 103A.34 Ephemeral Recordings

§ 103A.35 Reproduction of Pictorial, Graphic, and Sculptural Works

§ 103A.36 Sound Recordings

[1] Limitations of Exclusive Rights

[2] Nonexclusive Right to Record

§ 103A.37 Architectural Works

§ 103A.38 Copies or Adaptations of Computer Programs

§ 103A.39 Transfer or Display of Particular Copy or Phonorecord

§ 103A.40 Fair Use

[1] Guidelines for Determining Fair Use

[2] Factors to Be Considered

[a] Purpose and Character of Use

[b] Nature of Copyrighted Work

[c] Size of Portion Used in Relation to Entire Copyrighted Work

[d] Harm to Market or Value of Copyrighted Work

[3] Examples of Fair Uses

§§ 103A.41-103A.44 [Reserved]

§ 103A.45 Ownership of Right Is Distinct From Ownership of Object

§ 103A.46 Who Owns the Copyright

[1] Identity of Author

[2] Initial Owner

[3] Work for Hire

[4] Joint Works

[5] Collective Works

§§ 103A.47-103A.49 [Reserved]

§ 103A.50 Transfer of Rights Is Distinct From Transfer of Copies or Phonorecords

§ 103A.51 Transfer of Ownership or Rights

[1] Transfer Generally

[2] Writing Required for Transfer

§ 103A.52 Disposition of Copyrighted Materials

[1] First Sale by Owner of Copy or Phonorecord

[2] Renting, Leasing, or Loaning Phonorecords or Computer Programs

[3] Display of Copy

§ 103A.53 Recording Transfers of Copyright

§ 103A.54 Priority Between Conflicting Transfers

§ 103A.55 Recovering Ownership of Transferred Rights--Termination of Transfers and Licenses

§ 103A.56 Security Interests in Copyrights

§§ 103A.56-103A.59 [Reserved]

§ 103A.60 Copyright Secured Automatically on Creation

§ 103A.61 Publication

§ 103A.62 Requirements of Notice

[1] Works Published Before January 1, 1978

[2] Works Publicly Distributed Before March 1, 1989, but After 1977

[3] Works Publicly Distributed on or After March 1, 1989

[4] Notice Remains Important

§ 103A.63 Form and Position of Copyright Notice

§ 103A.64 Constructive Notice

§ 103A.65 Unauthorized Removal

§§ 103A.66-103A.69 [Reserved]

§ 103A.70 Copyright Office and Registrar of Copyrights

§ 103A.71 Nature of Copyright Registration

§ 103A.72 Registration and Infringement Actions

§ 103A.73 Registration Procedures

§ 103A.74 Deposit of Copies or Phonorecords With Library of Congress

[1] Mandatory Deposit of Published Works

[2] Use of Mandatory Deposit to Satisfy Registration Requirement

§ 103A.75 Preregistration of Unpublished Work Being Prepared for Commercial Distribution

§§ 103A.76-103A.79 [Reserved]

§ 103A.80 Compulsory Licensing

§ 103A.81 Negotiated Licenses

[1] Operation of Jukebox

[2] Noncommercial Broadcasting

[3] Implied Grant of License

§§ 103A.82-103A.84 [Reserved]

§ 103A.85 Duration and Renewal of Copyright

[1] Works Created on or After January 1, 1978

[2] Works Created Before January 1, 1978, but Not Published or Registered by That Date

[3] Works Created and Published or Registered Before January 1, 1978

§ 103A.86 Restoration of U.S. Copyright in Certain Foreign Works

§§ 103A.87-103A.89 [Reserved]

§ 103A.90 Copyright Infringement

§ 103A.91 Remedies

[1] Injunctions and Restraining Orders

[2] Statutory Damages and Attorneys' Fees

[3] Criminal Penalties

[4] Forfeiture of Infringing Materials or Loss of Broadcast License

[5] Nuisance Abatement

§§ 103A.92-103A.94 [Reserved]

§ 103A.95 Rights in Computer Software

[1] Extent of Protection

[2] Limitations on Protection

§§ 103A.96-103A.98 [Reserved]

§ 103A.99 Semiconductor Chip Protection

- [1] Semiconductor Chips Not Protected Under Traditional Copyright Law
 - [2] "Industrial Copyrights" for Mask Works Embodied in Semiconductor Chips
 - [3] Owner's Exclusive Rights
 - [4] When Protection Applies
 - [5] Duration of Protection
 - [a] With Registration
 - [b] Without Registration
 - [6] Scope of Protection
 - [7] Notice of Protection
 - [8] Documentation of Protection
 - [9] Application for Registration
 - [10] Recordation of Documents Relating to Mask Works
 - [11] Infringement
 - [a] Violation of Exclusive Rights
 - [b] Civil Action
 - [c] Damages
 - [d] Other Available Relief
 - [e] Attorneys' Fees and Costs
 - [f] Evidentiary Effect of Registration Certificate
 - [g] When Application for Protection Is Refused
 - [h] Imported Goods
 - [i] Limitation of Liability of Innocent Purchaser
- § 103A.100 Facts--Copyright Registration

Scope

§ 103A.101 Documents

Scope

§§ 103A.102-103A.109 [Reserved]

§ 103A.110 Availability of Copyright Protection

Scope

§ 103A.111 Copyright Ownership

Scope

§§ 103A.112-103A.119 [Reserved]

§ 103A.120 Affixing Notice of Copyright

Scope

§ 103A.121 Deposit Requirements

Scope

§ 103A.122 Registering Claim of Copyright

Scope

§ 103A.123 Depositing Copies or Phonorecords for Copyright Registration

Scope

§ 103A.124 Notice of Objection to Nonprofit Performance

Scope

§ 103A.125 Preregistering Unpublished Work

Scope

§§ 103A.126-103A.129 [Reserved]

§ 103A.130 Use, Disposal, or Importation of Copy or Phonorecord

Scope

§ 103A.131 Making Fair Use of Work

Scope

§ 103A.132 Nonprofit Performance of Nondramatic Musical or Literary Works

Scope

§ 103A.133 Compulsory License to Make and Distribute Phonorecords

Scope

§ 103A.134 Employing Works for Educational or Library Purposes

Scope

§ 103A.135 Performing Works for Handicapped Persons

Scope

§§ 103A.136-103A.149 [Reserved]

§ 103A.150 Transfer of Copyright

Scope

§ 103A.151 Termination of Licenses and Transfers for Extended Terms of Copyrights Subsisting Before January 1, 1978

Scope

§ 103A.152 Recordation of Transfers and Other Documents

Scope

§ 103A.153 Correction or Amplification of Registration (Supplementary Registration)

Scope

§ 103A.154 Correction of Record or Status of Copyright

Scope

§ 103A.155 Claim For Renewal of Subsisting Copyright

Scope

§ 103A.156 Notice of Potential Infringement

Scope

§§ 103A.157-103A.199 [Reserved]

§ 103A.200 Application for Copyright Registration [U.S. Copyright Office Form CO]

[1] Comment

[a] Use of Form

[b] Alternative Ways to Register Copyright

[c] Circulars and Factsheets

[d] Deposit of Work Being Registered

[e] Notice of Copyright

[2] FORM

§§ 103A.201-103A.205 [Reserved]

§ 103A.206 Application for Copyright Registration for Group of Serial Issues of Collective Work Made for Hire [U.S. Copyright Office Form SE/GROUP]

[1] Comment

[a] Use of Form

[b] Mailing Complimentary Subscription to Library of Congress

[c] Completing the Application

[2] FORM

Application for Copyright Registration for Group of Serial Issues of Collective Work Made for Hire [U.S. Copyright Office Form SE/GROUP]

§ 103A.207 Application for Copyright Registration of Group of Daily Newspapers and Newsletters Published in One Calendar Month [U.S. Copyright Office Form G/DN]

[1] Comment

[a] Use of Form

[b] Definitions

[c] Deposit Requirements for Newspapers

[d] Deposit Requirements for Newsletters

[e] Completing the Application

[2] FORM

Application for Copyright Registration of Group of Daily Newspapers and Newsletters Published in One Calendar Month [U.S. Copyright Office Form G/DN]

§ 103A.208 Adjunct Application for Copyright Registration for a Group of Contributions to Periodicals [U.S.

Copyright Office Form GR/CP]

[1] Comment

[a] Use of Form

[b] Requirements for Single Registration of Group of Works

[c] Deposit Requirements

[d] Procedure for Group Registration

[e] Completing the Application

[2] FORM

Adjunct Application for Copyright Registration for a Group of Contributions to Periodicals [U.S. Copyright Office Form GR/CP]

§ 103A.209 Application for Supplementary Copyright Registration [U.S. Copyright Office Form CA]

[1] Comment

[a] Use of Form

[b] Restrictions on Use of Form

[c] Completing the Application

[d] Copyright Office's Procedure After Completing a Supplementary Registration

[2] FORM

Application for Supplementary Copyright Registration [U.S. Copyright Office Form CA]

§ 103A.210 [Reserved]

§ 103A.211 Application for Renewal Registration and Addendum [U.S. Copyright Office Form RE]

[1] Comment

[a] Use of Form

[b] Copyright Terms and Renewal in General

[c] Renewal Filing Period

[d] Who May Renew

[e] Completing the Application

[2] FORM

Application for Renewal Registration [U.S. Copyright Office Form RE]

Addendum to U.S. Copyright Office Form RE

§§ 103A.212-103A.219 [Reserved]

§ 103A.220 Notice of Objection to Noncommercial Performance of Nondramatic Literary or Musical Work

[1] Comment

[a] Use of Form

[b] Notice Required as Basis for Infringement

[c] Contents of Notice

[d] Signature Requirements

[e] Service of Notice

[2] FORM

Notice of Objection to Noncommercial Performance of Nondramatic Literary or Musical Work

§ 103A.221 Notice of Termination of Transfers and Licenses Covering Extended Renewal Term of Copyright in Existence on January 1, 1978

[1] Comment

[a] Use of Form

[b] Governing Law

[c] Persons Entitled to Terminate Grant

[d] Time and Manner of Termination

[e] Contents of Notice

[f] Signature Requirements

[g] Service of Notice

[h] Recordation of Notice

[i] Rights on Reversion

[2] FORM

Notice of Termination of Transfers and Licenses Covering Extended Renewal Term of Copyright in Existence on January 1, 1978

§ 103A.222 Advance Notice of Potential Copyright Infringement of Works Consisting of Sounds, Images, or Both

[1] Comment

[a] Use of Form

[b] Contents of Notice

[c] Signature Requirements

[d] Service of Notice

[2] FORM

Advance Notice of Potential Copyright Infringement of Works Consisting of Sounds, Images, or Both

§ 103A.223 Authorization (License) to Use Copyrighted Work

[1] Comment

[a] Use of Form

[b] Exclusive Rights of Copyright Owner

[c] Validity of Authorization

[d] Terms of Authorization

[e] Recordation

[2] FORM

Authorization (License) to Use Copyrighted Work

§ 103A.224 Assignment of Copyright

[1] Comment

[a] Use of Form

[b] Contents of Form

[c] Transfer of Copyright in General

[d] Requirements for Validity

[e] Recordation

[f] Assignment of Renewal Right

[g] Taxation of Assignment

[2] FORM

Assignment of Copyright

§ 103A.225 Document Cover Sheet for Recordation of Documents in U.S. Copyrights Office

[1] Comment

[a] Use of Form

[b] Completing Document Cover Sheet

[2] FORM

Document Cover Sheet for Recordation of Documents in U.S. Copyrights Office

§§ 103A.226-103A.239 [Reserved]

§ 103A.240 Application for Registration of Mask Work Embodied in Semiconductor Chip Product [U.S. Copyright Office Form MW]

[1] Comment

[a] Use of Form

[b] Where to Obtain Forms

[c] Additional Submissions Required With Form

[d] Who May Submit Form

[e] Completing the Application

[f] When to Submit Application for Registration

[g] Deposit Requirements for Commercially Exploited Work

[h] Deposit Requirements for Work That Has Not Been Commercially Exploited

[i] Trade Secret Protection

[j] Special Relief

[k] Single Registration

[l] What Constitutes Single Work

[m] Registration in Most Complete Form

[2] FORM

Application for Registration of Mask Work Embodied in Semiconductor Chip Product [U.S. Copyright Office Form MW]



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33-103A California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter discusses the protections afforded to intellectual property under the federal copyright law. The chapter covers what copyright can and cannot protect, how to secure copyright protection, copyright registration, compulsory and negotiated licenses, and limitations on copyrights, such as fair use. The chapter discusses initial copyright ownership and transfer of ownership or rights. It also covers the federal Semiconductor Chip Protection Act of 1984. Step-by-step procedural guides are provided for copyright registration and deposit. Forms include official applications for copyright registration, an application for registration of a mask work embodied in a semiconductor chip product, a form for assignment of copyright, an authorization to use a copyrighted work, and several notices.

Copyright considerations specific to the entertainment industry are discussed in Ch. 87, *Entertainment Contracts* . Protection of computer software, including copyright, is covered in Ch. 57, *Computer-Related Transactions* . Trademarks are discussed in Ch. 103B, *Trademarks* .



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A. Primary Sources

33-103A California Legal Forms--Transaction Guide § 103A.01

§ 103A.01 Federal Sources

[1] Constitution

Power of Congress to secure to authors the exclusive right to their writings. U.S. Const., art. I, § 8, cl. 8.

[2] Statutes

Federal Copyright Law. *17 U.S.C. § 101 et seq.*

Subject matter and scope for copyright. *17 U.S.C. § 101 et seq.*

Exclusive rights in copyrighted works. *17 U.S.C. § 106.*

Rights of certain authors to attribution and integrity. *17 U.S.C. § 106A.*

Exemption for skipping portions of audio or video content of motion picture, during performance in or transmitted to household for private home viewing, or creation or provision of computer program or other technology designed for that purpose. *17 U.S.C. § 110(11)*].

Scope of exclusive rights.

Pictorial, graphic, and sculptural works. *17 U.S.C. § 113.*

Sound recordings. *17 U.S.C. § 114.*

Nondramatic musical works (compulsory license for making and distributing phonorecords). *17 U.S.C. § 115.*

Certain works in connection with noncommercial broadcasting. *17 U.S.C. § 118.*

Architectural works. *17 U.S.C. § 120.*

Limitation on Exclusive Rights.

Fair Use. *17 U.S.C. § 107.*

Reproduction by libraries and archives. *17 U.S.C. § 108.*

Effect of transfer of particular copy or phonorecord. *17 U.S.C. § 109.*

Exemption of certain performances and displays. *17 U.S.C. § 110.*

Secondary transmissions. *17 U.S.C. § 111.*

Ephemeral recordings. *17 U.S.C. § 112.*

Computer programs. *17 U.S.C. § 117.*

Secondary transmissions of superstations or network stations for private home viewing.
17 U.S.C. § 119.

Reproduction for blind or other people with disabilities. *17 U.S.C. § 121.*

Negotiated licensing agreements between jukebox operators and copyright owners. *17 U.S.C. § 116.*

Ownership and transfer of copyright. *17 U.S.C. § 201 et seq.*

Duration of copyright. *17 U.S.C. § 301 et seq.*

Notice, deposit, and registration of copyrights. *17 U.S.C. § 401 et seq.*

Infringement of copyright and remedies. *17 U.S.C. § 501 et seq.*

Infringing importation of copies and phonorecords. *17 U.S.C. § 601 et seq.*

Copyright Office and regulations. *17 U.S.C. § 701 et seq.*

Copyright arbitration royalty panels. *17 U.S.C. § 801 et seq.*

Semiconductor Chip Protection Act of 1984. *17 U.S.C. § 901 et seq.*

Mask works eligible for protection. *17 U.S.C. §§ 902, 914.*

Ownership, transfer, licensing, and recordation. *17 U.S.C. § 903.*

Duration of protection. *17 U.S.C. § 904.*

Exclusive rights protected. *17 U.S.C. § 905.*

Limited rights to reproduce without infringement. *17 U.S.C. § 906.*

Innocent infringement. *17 U.S.C. § 907.*

Registration of claim of protection. *17 U.S.C. § 908.*

Notice of protection. *17 U.S.C. § 909.*

Enforcement. *17 U.S.C. § 910.*

Civil actions. *17 U.S.C. § 911.*

Audio Home Recording Act of 1992. *17 U.S.C. § 1001 et seq.*

Federal tax considerations with respect to copyright.

Amortization of expenses incurred in creating or acquiring music or music copyrights. *I.R.C. § 167(g)(8).*

Limitation on deduction for charitable contribution of certain self-created musical works. *I.R.C. § 170(e)(1)(A).*

Personal holding company income. *I.R.C. § 543(a).*

Determination of source of income. *I.R.C. §§ 861, 862.*

Copyright not a capital asset. *I.R.C. § 1221(a)(3).*

Capital gains treatment for certain self-created musical works. *I.R.C. § 1221(b)(3).*

Definition of copyright as not including property used in trade or business. *I.R.C. § 1231(b)(1)(C).*

[3] Regulations

Copyright Office, Library of Congress. *37 C.F.R. § 201.1 et seq.*

General copyright provisions. *37 C.F.R. § 201.1 et seq.*

Registration of claims to copyright. *37 C.F.R. § 202.1 et seq.*

Criteria used by Library of Congress to select "best edition." *37 C.F.R. § 202.19(b)(1); 37 C.F.R. pt. 202, app. B.*

Freedom of Information Act. *37 C.F.R. § 203.1 et seq.*

Privacy Act provisions. *37 C.F.R. § 204.1 et seq.*

Semiconductor chip mask work protection. *37 C.F.R. § 211.1 et seq.*

Recordation of documents. *37 C.F.R. § 211.2.*

Fees. *37 C.F.R. § 211.3.*

Registration of claim of protection. *37 C.F.R. § 211.4.*

Identifying materials deposited with application for registration. *37 C.F.R. § 211.5.*

Affixing notice of protection. *37 C.F.R. § 211.6.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawDuration & RenewalGeneral OverviewCopyright LawFormalitiesGeneral OverviewCopyright
LawSubject MatterGeneral Overview



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[Reserved]

§§ 103A.02[Reserved]



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PART I. RESEARCH GUIDE

B. Secondary Sources

33-103A California Legal Forms--Transaction Guide § 103A.05

§ 103A.05 Law Reviews and Periodicals

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Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Formalities General Overview Copyright Law Owner Rights General Overview Copyright Law Subject Matter General Overview



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33-103A California Legal Forms--Transaction Guide § 103A.06

§ 103A.06 Annotations

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Annot., Invalidity of Copyright as Defense to Copyright Infringement Action. 148 A.L.R. Fed. 413 (1998) .

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Annot., Fabric and Dress Designs as Protected by Copyright Under Federal Copyright Act, 26 A.L.R. Fed. 408 (1976) .

Annot., Making, Selling, or Distributing Counterfeit or "Bootleg" Tape Recordings or Phonograph Records as Violation of Federal Law, 25 A.L.R. Fed. 207 (1975) .

Annot., Right to Publish Advertising Material Originally Appearing in Plaintiff's Publication, 55 A.L.R.3d 180 (1974) .

Annot., Extent of Doctrine of "Fair Use" Under Federal Copyright Act, 23 A.L.R.3d 139 (1969) .

Annot., Rights and Remedies of Co-Owners of Copyright, 3 A.L.R.3d 1301 (1965) .

Annot., Prospective Assignment of Renewal Rights in Copyright, 2 A.L.R.3d 1403 (1965) .

Annot., Apportionment and Computation of Profits for Which Copyright Infringer Is Liable, 2 A.L.R.3d 1211 (1965) .

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawDuration & RenewalGeneral OverviewCopyright LawFormalitiesGeneral OverviewCopyright
LawOwner RightsGeneral OverviewCopyright LawSubject MatterGeneral Overview



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PART I. RESEARCH GUIDE

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33-103A California Legal Forms--Transaction Guide § 103A.07

§ 103A.07 Text References

California Legal Forms (Matthew Bender).

Ch. 57, *Computer-Related Transactions*.

Ch. 73, *Funding a Revocable Trust*.

Ch. 76, *Assignments of Rights and Obligations*.

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Ch. 3, *License and Franchises*, Forms 3.27- 3.44.

Ch. 5B, *Miscellaneous Assignments*, Forms 5B.11-5B.17.

Ch. 12, *Employment and Compensation*, Forms 12.68, 12.87, 12.88.

Warren's Forms of Agreements, Ch. 71, *Copyright* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawDuration & RenewalGeneral OverviewCopyright LawFormalitiesGeneral OverviewCopyright

LawSubject MatterGeneral Overview



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§§ 103A.08[Reserved]



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CHAPTER 103A COPYRIGHTS

PART II. LEGAL BACKGROUND

A. Governing Law

33-103A California Legal Forms--Transaction Guide § 103A.10

§ 103A.10 Federal Preemption

[1] Constitutional Basis for Copyright Protection

The source of the federal government's power over copyright is the Copyright Clause of the United States Constitution. That clause grants Congress the power to protect, for a limited time, the exclusive rights of authors and inventors to their respective writings and discoveries [U.S. Const., art. I, § 8, cl. 8]. Its primary purpose is to advance public welfare through the talents of authors, by granting enforceable rights, free from burdensome requirements [*Mazer v. Stein* (1953) 347 U.S. 201, 219, 74 S. Ct. 460, 98 L. Ed. 630 ; see *Goldstein v. California* (1973) 412 U.S. 546, 555, 93 S. Ct. 2303, 37 L. Ed. 2d 163 (Copyright Clause facilitates protection of literary and artistic works on national basis)]. Secondly, the clause is meant to encourage the individual effort of authors by personal gain [*Mazer v. Stein* (1953) 347 U.S. 201, 219, 74 S. Ct. 460, 98 L. Ed. 630] .

[2] Governing Statutes

Federal copyright protection is governed by Title 17 of the United States Code [17 U.S.C. § 101 *et seq.*] and by its implementing regulations [see 37 C.F.R. pt. 201 *et seq.*].

Under the Federal Copyright Act of 1976 (Act) [17 U.S.C. § 101 *et seq.*], a single federal system has been established for the protection of literary property. The Act abolishes the former dual system of "common law copyright" for unpublished works and federal statutory copyright for published works. Formerly, federal copyright protection began once a work had been published [see *Nimmer On Copyright, Ch. 1, Constitutional Aspects of Copyright, § 1.01[B]; Ch. 2, The Subject Matter of Copyright, § 2.02* (Matthew Bender)]. Under the 1976 Act, however, copyright protection in an original work of authorship begins as soon as it is created by being fixed in any tangible medium of express from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device [17 U.S.C. § 102(a); see 17 U.S.C. § 101 (when work is fixed in tangible medium); see also H.R. Rep. No. 94-1476 at 129 (1976); § 103A.22[1]]. Thus, state common law copyright protection is expressly preempted by the Federal Copyright Act of 1976 [17 U.S.C. § 301(a)].

The superseded Copyright Act of 1909 is not necessarily immaterial in current cases. For instance, that act could be

relevant on the issue of whether the work in question either received copyright protection under the 1909 act or fell into the public domain while that act was in force [see *Societe Civile Succession Richard Guino v. Renoir* (9th Cir. 2008) 549 F.3d 1182, 2008 U.S. App. LEXIS 24755, at *6-*20 (defendant infringed plaintiff's copyright in sculptures that were created in 1913-1917 and first published in 1917 in France; from 1917 to 1978, those sculptures were neither protected by copyright in United States nor in public domain; on January 1, 1978, they became subject to Copyright Act of 1976, under which in 1984 copyright protection was secured by registration)].

On or after May 1, 1991, the effective date of the Visual Artists Rights Act of 1990 [see Pub. L. No. 101-650, § 610(a), 104 Stat. 5128-5133], all legal or equitable rights equivalent to any of the rights of attribution and integrity for works of visual art [see 17 U.S.C. § 101 (definition)] conferred by 17 U.S.C. § 106A are governed exclusively by that section and related provisions of the copyright law. As of that date, these provisions preempt the common law or statutes of any state [17 U.S.C. § 301(f)(1)].

Exemptions to this federal preemption are discussed in [3], *below*.

[3] Exemptions From Preemption

Exceptions to this rule of preemption [see [1], *above*] apply to all of the following:

- Works not copyrightable under federal law, including works not fixed in any tangible medium of expression [17 U.S.C. § 301(b)(1); see, e.g., *Civ. Code* § 980 *et seq.*; see also § 103A.110, PP 2, 4 (examples)].
- Causes of action arising from undertakings begun before January 1, 1978 [17 U.S.C. § 301(b)(2)]. For copyright claims under California common law, this exception applies when the defendant's infringement, not just the plaintiff's creation of the work, occurred before January 1, 1978 [*Klekas v. EMI Films, Inc.* (1984) 150 Cal. App. 3d 1102, 1110].
- Causes of action arising from works protected by the Copyright Act of 1909, which was applicable before January 1, 1978, the effective date of the Copyright Act of 1976. The 1909 Act applies in such cases even if the alleged infringement occurred in 1978 or later [*Magnuson v. Video Yesteryear* (9th Cir. 1996) 85 F.3d 1424, 1427-1428].
- Activities violating legal or equitable rights that are not equivalent to any of the exclusive rights granted under a copyright [17 U.S.C. § 301(b)(3); see 17 U.S.C. § 106 (exclusive rights in copyrighted works); see also § 103A.20].
- State and local landmarks, historic preservation, zoning, or building codes relating to architectural works protected under 17 U.S.C. § 102(a)(8) [17 U.S.C. § 301(b)(4)].
- Rights or remedies with respect to sound recordings fixed before February 15, 1972 [see 17 U.S.C. § 301(c)].
- For works of visual art, any cause of action from undertakings begun before May 1, 1991, the effective date of the Visual Artists Rights Act of 1990 [17 U.S.C. § 301(f)(2)(A); see [2], *above*]; activities violating legal or equitable rights that are either not equivalent to any of the rights conferred by the copyright law with respect to works of visual art [see 17 U.S.C. § 106A] or that extend beyond the life of the author [17 U.S.C. § 301(f)(2)(B), (C)].

The rule of federal preemption applies only to the state courts and will not preclude the application of the *forum non*

conveniens doctrine to foreign copyright holders. The Ninth Circuit has upheld the dismissal of a copyright infringement action under the *forum non conveniens* analysis, even though infringement occurred within the United States, when both parties were Singapore corporations that had registered copyrights in Singapore and the United States [*Creative Technology Ltd. v. Aztech System PTE, Ltd.* (9th Cir. 1995) 61 F.3d 696, 704] .

For additional discussion of the scope of preemption of state laws by the federal copyright law, see Nimmer On Copyright, Ch. 1, *Constitutional Aspects of Copyright* (Matthew Bender).

For discussion of state protection of intangible property interests that supplements federal protection, see § 103A.11.

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Constitutional Protections Application of Federalism Federal Preemption Copyright Law Duration & Renewal General Overview Copyright Law Formalities General Overview Copyright Law Owner Rights General Overview Copyright Law Subject Matter General Overview



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PART II. LEGAL BACKGROUND

A. Governing Law

33-103A California Legal Forms--Transaction Guide § 103A.11

§ 103A.11 California Intellectual Property Law

[1] Theories of Recovery Under State Law

The Copyright Act 1976 does not affect or limit any right or remedies under the common law or statutes of any state relating to activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of the copyright as specified in 17 U.S.C. § 106. The common law rights of privacy, publicity, and trade secrets, as well as the general laws of defamation and fraud, appear to remain unaffected by federal preemption [*see* 17 U.S.C. § 301, Notes of Committee on the Judiciary, H.R. Rep. No. 94-1476, at 132 (1976); *see also* Nimmer On Copyright, Ch. 1, *Constitutional Aspects of Copyright* (Matthew Bender)].

State protection for works of authorship not protectable under federal law, including works of authorship that are not fixed in any tangible medium of expression, and sound recordings fixed before February 15, 1972, is governed by Civ. Code § 980 et seq. Educ. Code § 66450 et seq. offer some measure of protection against the unauthorized distribution of copies of classroom lectures.

For further discussion of protection of literary property and ideas under California law, see California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* (Matthew Bender).

[2] Test for Preemption

The courts generally use an "extra element test" to determine whether a state cause of action is equivalent to a copyright claim. If, under state law, the act of reproduction, performance, distribution, or display will *in itself* infringe the state-created right, then the right is preempted. However, if other elements are required in addition to or instead of the acts of reproduction, performance, distribution, or display in order to constitute a state-created cause of action, then the right does not lie within the general scope of copyright and there is no preemption [*Summit Mach. Tool Mfg. v. Victor CNC Systems* (9th Cir. 1993) 7 F.3d 1434, 1439-1440 ; *Gladstone v. Hillel* (1988) 203 Cal. App. 3d 977, 987, 250 Cal. Rptr. 372 ; *see, e.g., Oddo v. Ries* (9th Cir. 1984) 743 F.2d 630, 635 (conversion of tangible property involves actions different from those proscribed by federal copyright laws and thus is not preempted)]. The "extra element" must be one that changes the nature of the action so that it is qualitatively different from a copyright infringement claim [*Summit*

Mach. Tool Mfg. v. Victor CNC Systems (9th Cir. 1993) 7 F.3d 1434, 1439-1440 ; *Gladstone v. Hillel* (1988) 203 Cal. App. 3d 977, 987, 250 Cal. Rptr. 372 ; see, e.g., *Donald Frederick Evans v. Continental Homes, Inc.* (11th Cir. 1986) 785 F.2d 897, 914 (common law unfair competition claim required proof of elements other than those mandated in action under Copyright Act)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawDuration & RenewalGeneral OverviewCopyright LawFormalitiesGeneral OverviewCopyright LawOwner RightsGeneral OverviewCopyright LawOwner RightsState RegulationCopyright LawSubject MatterGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART II. LEGAL BACKGROUND

A. Governing Law

33-103A California Legal Forms--Transaction Guide § 103A.12

§ 103A.12 International Law and Agreements

There is no such thing as an "international copyright" that will protect an author's work throughout the world. Protection against unauthorized use generally depends on the copyright laws of the each country. However, most countries offer protection to foreign works under certain conditions, and these conditions have been simplified by international copyright treaties and conventions. For a list of countries that maintain copyright relations with the United States, see U.S. Copyright Office Circular No. 38a, *International Copyright Relations of the United States*. For a detailed discussion of these issues, see Nimmer On Copyright, Ch. 17, *Foreign and International Copyright* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Foreign & International Protections Protected Rights International Trade Law Trade Agreements General Overview International Trade Law Trade Agreements Intellectual Property Provisions



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CHAPTER 103A COPYRIGHTS

PART II. LEGAL BACKGROUND

A. Governing Law

33-103A California Legal Forms--Transaction Guide §§ 103A.13-103A.19

[Reserved]

§§ 103A.13[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART II. LEGAL BACKGROUND

B. Nature of Copyright

33-103A California Legal Forms--Transaction Guide § 103A.20

§ 103A.20 What Is Copyright?

[1] Exclusive, Independent Rights

Copyright is a form of protection provided to authors of published or unpublished "original works of authorship," including literary, musical, dramatic, musical, artistic, and certain other intellectual works [see 17 U.S.C. §§ 102, 104]. The legal protection available for a copyrighted work is expressed in terms of six exclusive rights that are provided by the Act. These rights are exclusive in that they can be exercised only by their owner [see 17 U.S.C. § 106]. However, these rights are not absolute, as they are subject to a number of limitations in the Act [see §§ 103A.30-103A.40]. Accordingly, subject to those limitations, a copyright owner has the exclusive right to do or to authorize others to do any of the following activities [17 U.S.C. § 106]:

- To reproduce copyrighted work in copies or phonorecords.
- To distribute the reproductions to the public (by sale or other transfer of ownership, or by lending, renting, or leasing them).
- To prepare derivative works based on the copyrighted work.
- To perform the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, and pantomimes, and motion pictures and other audiovisual works.
- To display the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, pictorial, graphic, or sculptural works, including the individual images of motion pictures and other audiovisual works.
- In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission [see § 103A.36[1]].

Terms such as "copies," "publication," "display," and "perform" are given broad meanings in the Act [*see 17 U.S.C. § 101*]. This approach was taken to encompass future technological developments for the creation and fixation of copyrightable works [*see H.R. Rep. No. 94-1476, at 51, 52 (1976)*].

[2] Additional Rights for Authors of Visual Art

[a] Rights of Attribution and Integrity

As a result of the Visual Artists Rights Act of 1990 [Pub. L. No. 101-650, §§ 601-610, 104 Stat. 5128-5133], which became effective on May 1, 1991, visual artists and photographers have additional rights that are independent of the exclusive rights described in [1], *above*. These rights are referred to as rights of attribution and integrity, and apply only to a "work of visual art" [17 U.S.C. § 106A; *see 17 U.S.C. § 101* ("work of visual art" defined)].

These rights entitle authors (that is, visual artists and photographers) to claim authorship of their work ("attribution" rights) [17 U.S.C. § 106A(a)(1)(A); *see 17 U.S.C. § 107* (fair use limitation)]. These rights also entitle authors to prevent the use of their name as authors of any work of visual art that they did not create [17 U.S.C. § 106A(a)(1)(B); *see 17 U.S.C. § 107* (fair use limitation)]. The rights further entitle authors to prevent the use of their names in the event of a distortion, mutilation, or other modification of their work that would be prejudicial to their honor or reputation [17 U.S.C. § 106A(a)(2); *see 17 U.S.C. § 107* (fair use limitation)].

In addition, the author has the right to prevent any intentional distortion, mutilation, or other modification of the work that would be prejudicial to his or her honor or reputation and to prevent destruction of the work, if it is of recognized stature ("integrity" rights) [17 U.S.C. § 106A(a)(3); *see 17 U.S.C. § 113(d)* (limitations for works incorporated in or made part of building)].

These rights are subject to certain limitations [*see 17 U.S.C. § 107* (fair use limitation for attribution rights); 17 U.S.C. § 113(d) (limitations on integrity rights for works incorporated in or made part of building)] and to specified exceptions [*see 17 U.S.C. § 106A(c)*].

[b] Exercise of Rights

The rights of attribution and integrity apply to the author of a work of visual art, whether or not the author is also the copyright owner [17 U.S.C. § 106A(b)]. Ownership of these rights with respect to a work of visual art is distinct from ownership of any copy of the work, or of a copyright or any exclusive right under copyright law in that work [17 U.S.C. § 106A(e)(2)].

Rights of attribution and integrity may be waived, but may not be transferred [17 U.S.C. § 106A(e)(1)]. Any waiver is effective only if the author expressly agrees to waiver in a signed writing and only for the work and particular uses identified in the waiver [17 U.S.C. § 106A(e)(1)]. Waiver by one author of a joint work waives specified rights for all authors [17 U.S.C. § 106A(e)(1)].

[c] Duration of Rights

For works of visual art created after May 1, 1991, rights of attribution and integrity last for the life of the author [17 U.S.C. § 106A(d)(1)]. For qualifying works created before that date, for which title had not been transferred from the author by May 1, 1991, the rights are coextensive with and expire at the same time as the exclusive rights conferred by 17 U.S.C. § 106 [17 U.S.C. § 106A(d)(2); *see § 103A.85* (duration of copyright)]. In the case of a joint work of visual art prepared by two or more authors, the rights endure for the life of the last surviving author [17 U.S.C. § 106A(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Formalities General Overview Copyright Law Publication General Overview Copyright Law Subject Matter General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART II. LEGAL BACKGROUND

B. Nature of Copyright

33-103A California Legal Forms--Transaction Guide § 103A.21

§ 103A.21 Copyright Distinguished From Patent and Trademark

The terms "copyright," "trademark," and "patent" are frequently confused. Copyright law protects artistic, literary, musical, dramatic, and audiovisual works fixed in any tangible medium of expression, such as books, phonorecords, CD-ROM, computer software, motion pictures, videocassettes, photographs, and paintings [*see 17 U.S.C. §§ 101, 102*]. Copyright law regulates the use of these materials by someone other than the copyright owner.

Patent law, on the other hand, is a grant of rights for an invention. Patent protection is available only for the following:

- A new and useful industrial or technical process, machine, article of manufacture, or composition of matter (such as chemical compositions), or new and useful improvements of these items [*see 35 U.S.C. § 101*].
- A new, original, and ornamental design for an article of manufacture [*see 35 U.S.C. § 116*].
- A distinct and new asexually produced variety of plant [*see 35 U.S.C. § 116*].

Patent law regulates the making, use, or selling of a patented invention by someone other than its owner.

A trademark is "any work, name, symbol, or device, or any combination of them used by a manufacturer or merchant to identify his products and distinguish them from those manufactured or sold by others" [35 U.S.C. § 1127]. Trademark ownership provides the exclusive right to use the trademark to refer to a particular product.

For coverage of patent law, see generally Chisum On Patents(Matthew Bender). For discussion of trademarks, see Ch. 103B, *Trademarks* . California's Invention Development Services law is covered in Ch. 103, *Invention Development Services* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawSubject MatterGeneral OverviewPatent LawSubject MatterGeneral OverviewTrademark LawSubject MatterGeneral Overview



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CHAPTER 103A COPYRIGHTS

PART II. LEGAL BACKGROUND

B. Nature of Copyright

33-103A California Legal Forms--Transaction Guide § 103A.22

§ 103A.22 What Can Be Protected

[1] Works Protected Under 1976 Act

Copyright protects "original works of authorship" that are "fixed in any tangible medium of expression" [17 U.S.C. § 102(a); see 17 U.S.C. § 101 (definitions); § 103A.110]. The medium may be now known or one later developed. A work is considered sufficiently fixed if it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device [17 U.S.C. § 102(a)].

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that is being transmitted, is "fixed" for purposes of the Act if a fixation of the work is being made simultaneously with its transmission [17 U.S.C. § 101]. For example, a live television broadcast of a news event, sporting event, or live performance of music or drama is disseminated to the public in an unfixed form. However, the coverage is almost always simultaneously recorded. The copyright owner in this case would be protected by federal copyright law and could proceed in federal court against an infringer of the live broadcast [see Notes of Committee on the Judiciary to § 102, H.R. Rep. No. 94-1476, at 52 (1976)]. In one case, the Ninth Circuit held that the act of loading copyrighted system maintenance software into a computer's random access memory (RAM) created a copy of protectable expression that was sufficiently "fixed" to constitute an infringement of the copyright. The court reasoned that even though the copy is lost from the RAM when the computer is switched off, the operator could view the system error log and diagnose any problems with the computer while the software was in the RAM [*MAI Systems Corp. v. Peak Computer, Inc.* (9th Cir. 1993) 991 F.2d 511, 518-519, cert. dismissed, 510 U.S. 1033 (1994)] .

The term "original works of authorship" has been purposely left undefined because it is intended to incorporate without change the standard of originality established by the courts under the present copyright statute. In this way, new forms of creative expression may come within the definition, although protection is not unlimited [see H.R. Rep. No. 94-1476, at 51 (1976)]. For example, reconstructions of nonexistent original works are not eligible for copyright registration [*Kodadek v. MTV Networks, Inc.* (9th Cir. 1998) 152 F.3d 1209, 1212 (drawings)].

[2] Subject Matter of Protection

Works of authorship protected by the Copyright Act include the following [17 U.S.C. § 102(a); see 17 U.S.C. § 101 (definitions)]:

- Literary works.
- Musical works, including any accompanying words.
- Dramatic works, including any accompanying music.
- Pantomimes and choreographic works.
- Pictorial, graphic, and sculptural works.
- Motion pictures and other audiovisual works.
- Sound recordings.
- Architectural works.

[3] Compilations and Derivative Works**[a] Extent of Protection**

Federal copyright protection extends to works that are either compilations and derivative works [17 U.S.C. § 103(a)]. A "compilation" is a work formed by collecting and assembling preexisting materials or that consists of data that are selected, coordinated, or arranged so that the resulting work as a whole constitutes an original work of authorship; the term includes collective works [17 U.S.C. § 101]. A "derivative work" is one based on one or more preexisting works, such as a translation, musical arrangement, or dramatization [17 U.S.C. § 101]. A derivative work must be substantially different from the work on which it is based to be copyrightable [*Gracen v. Bradford Exchange* (7th Cir. 1983) 698 F.2d 300, 305] .

The copyright in a compilation or derivative work extends only to the material contributed by the author, as distinguished from the preexisting material used in the work, and does not imply any exclusive right in the preexisting material. This type of copyright is independent of, and does not affect the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material [17 U.S.C. § 103(b)]. In addition, copyright protection under the 1976 Act does not extend to any part of the work in which preexisting material was unlawfully used [17 U.S.C. § 103(a); see H.R. Rep. No. 94-1476, at 57, 58 (1976) (examples)].

[b] Test for Derivative Copyright

In deciding whether to grant copyright protection to a derivative work, courts must be concerned about the impact that a derivative copyright will have on the copyright privileges and rights of the owner of the underlying work. The body of law regarding derivative copyrights is designed to strike a balance between the holder of a copyright in the underlying work and the creator of a work that is made by copying that underlying work [*Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.* (9th Cir. 1998) 122 F.3d 1211, 1219 , cert. denied, 523 U.S. 1021 (1998)] .

The test of a derivative copyright is two-fold. First, to support a copyright, the original aspects of a derivative work must be more than trivial. Second, the original aspects of a derivative work must reflect the degree to which it relies on

preexisting material and must not in any way affect the scope of any copyright protection in that preexisting material [*Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.* (9th Cir. 1998) 122 F.3d 1211, 1220, cert. denied, 523 U.S. 1021 (1998) (adopting so-called *Durham* test and discussing at length district court's proper application of that test in this case); see *Durham Industries, Inc. v. Tomy Corp.* (2d Cir. 1980) 630 F.2d 905, 909] .

[c] Test for Compilation Copyright

In the case of compilations, originality rather than the time and effort expended by the compiler (the so-called "sweat of the brow") in making the compilation is the touchstone of copyright protection, at least in compilations such as directories and other fact-based works [*Feist Pub. v. Rural Tel. Serv.* (1991) 499 U.S. 340, 359-360, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (repudiating "sweat of the brow" doctrine)]. To merit copyright protection, the facts, materials, or data must be selected, coordinated, or arranged in such a way as to render the work as a whole original. Therefore, there will be some fact-based (or data-based or other materials-based) work in which the selection, coordination, and arrangement will not be sufficiently original to trigger copyright protection [*Feist Pub. v. Rural Tel. Serv.* (1991) 499 U.S. 340, 358, 111 S. Ct. 1282, 113 L. Ed. 2d 358] . The requisite originality is not a stringent standard, and does not require that facts, data, or other materials be presented in an innovative or surprising way. The selection and arrangement of those facts, data, or materials, however, cannot be so mechanical or routine as to require no creativity whatsoever [*Feist Pub. v. Rural Tel. Serv.* (1991) 499 U.S. 340, 358, 362, 111 S. Ct. 1282, 113 L. Ed. 2d 358] . Thus, a telephone book's white pages listings, limited to basic subscriber information (name, town, and telephone number) and arranged alphabetically does not contain the requisite originality to be copyrightable as a compilation [*Feist Pub. v. Rural Tel. Serv.* (1991) 499 U.S. 340, 362-363, 111 S. Ct. 1282, 113 L. Ed. 2d 358] . On the other hand, "organizers" (calendar-type books produced to help users plan daily activities, typically containing uncopyrightable blank forms for recording calendar and address information, as well as uncopyrightable utilitarian features such as pockets for business cards) can be copyrightable as compilations if the selection, coordination, and arrangement of materials and data in the organizer attain sufficient originality [*Harper House, Inc. v. Thomas Nelson, Inc.* (9th Cir. 1989) 889 F.2d 197, 204-205, cert. denied, 510 U.S. 1113 (1994)] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawCivil Infringement ActionsStandingCopyright Act of 1976Copyright LawSubject MatterGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

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B. Nature of Copyright

33-103A California Legal Forms--Transaction Guide § 103A.23

§ 103A.23 What Cannot Be Protected

There are many reasons why a work cannot be copyright protected. For example, the work may have been created by an employee of the U.S. government [*see 17 U.S.C. § 105*]; it may containing no original authorship (for example, standard calendars, tape measures, schedules of sporting events, insurance forms) [*37 C.F.R. § 202.1*; *see, e.g., Bibbero Systems, Inc. v. Colwell Systems, Inc. (9th Cir. 1990) 893 F.2d 1104, 1107-1108* (blank insurance billing forms not subject to copyright protection because forms do not provide any information until they are filled out by patient and provider)]; or it may consist only of basic plots or ideas [*37 C.F.R. § 202.1*].

Examples of types of material are not protected under federal copyright law include the following:

- Works that have not been fixed in a tangible medium [*17 U.S.C. § 301(b)(1)*]*--*for example, an improvisation or an unrecorded choreographic work, performance, or broadcast [*see H.R. Rep. No. 94-1476, at 131 (1976)*].
- Ideas, plans, and systems, as distinguished from the particular manner in which they are expressed or described in a writing [*37 C.F.R. § 202.1*].
- Works consisting entirely of information that is common property containing no original authorship (for example, standard calendars, tape measures, and schedules of sporting events) [*37 C.F.R. § 202.1*].
- Ideas (including basic plots), procedures, processes, systems, methods of operation, concepts, principles, or discoveries, as distinguished from a description, explanation, or illustration [*see 17 U.S.C. § 102(b)*; *37 C.F.R. § 202.1*]; for example, purely literary characters (such as protagonists in novels), being merely concepts, cannot be protected by copyright, although a character depicted in a work such as a film or comic book can be protected, provided the character is especially distinctive and displays consistent, widely identifiable traits [*Halicki Films v. Sanderson Sales & Mktg. (9th Cir. 2008) 547 F.3d 1213, 2008 U.S. App. LEXIS 23396, at *24-*25* (citing case holding that Sam Spade character in Dashiell Hammett novels is not protectable by copyright, and citing cases extending copyright protection

to film characters Godzilla, James Bond, and Rocky Balboa)].

- Words and short phrases, such as names, titles, and slogans; familiar symbols or designs; mere variations in typographic ornamentation, lettering or coloring; mere listing of ingredients or contents [37 C.F.R. § 202.1; see *Fishler v. Twentieth Century-Fox Film Corporation* (S.D. Cal. 1958) 159 F. Supp. 215, 217 (title protected under trademark theory); *Kirkland v. National Broadcasting Co., Inc.* (E.D. Pa. 1976) 425 F. Supp. 1111, 1115 (title safeguarded under theory of unfair competition)].

For a more exhaustive list of categories of material generally not eligible for copyright protection, see § 103A.110. For discussion of the extent of copyright protection for computer programs, see § 103A.95.

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawSubject MatterGeneral Overview



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B. Nature of Copyright

33-103A California Legal Forms--Transaction Guide §§ 103A.24-103A.29

[Reserved]

§§ 103A.24[Reserved]



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CHAPTER 103A COPYRIGHTS

PART II. LEGAL BACKGROUND

C. Limitations on Copyrights

33-103A California Legal Forms--Transaction Guide § 103A.30

§ 103A.30 Statutory Limitations on Exclusive Rights--In General

17 U.S.C. § 106 [see § 103A.20[1]] does not accord a copyright owner complete control over all possible uses of his or her work. There are a number of statutory limitations on the exclusive rights afforded a copyright owner under the Act [see *Dowling v. United States* (1985) 473 U.S. 207, 217, 105 S. Ct. 3127, 87 L. Ed. 2d 152 (distinguishing copyright holder's property rights from possessory interest of owner of simple goods because copyright holder's dominion is subjected to defined limits)]. These limitations are described in §§ 103A.31-103A.40.

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright Law
Formalities
General Overview



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CHAPTER 103A COPYRIGHTS

PART II. LEGAL BACKGROUND

C. Limitations on Copyrights

33-103A California Legal Forms--Transaction Guide § 103A.31

§ 103A.31 Reproduction by Libraries and Archives

[1] Rights of Reproduction and Distribution

It is not an infringement of copyright for libraries or archives, or any of their employees acting within the scope of their employment, to reproduce and distribute no more than one copy or phonorecord of a work, provided that the following conditions are satisfied [17 U.S.C. § 108(a)]:

- The reproduction or distribution is made without any purpose of direct or indirect commercial advantage.
- The library or archives collections are open to the public, or available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to unaffiliated persons doing research in specialized fields.
- The reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord reproduced under 17 U.S.C. § 108.

Rights of reproduction and distribution under 17 U.S.C. § 108 also apply to three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation and security or for deposit for research use in another library or archives, as well as to three copies or phonorecords of a published work duplicated solely for replacement purposes, subject to specified conditions [see 17 U.S.C. § 108(b), (c)].

In addition, a library or archives may replace (through reproduction) unavailable copies or phonorecords that cannot be obtained for a fair price [see 17 U.S.C. § 108(e); see also 37 C.F.R. § 201.14 (warnings of copyright for use by certain libraries or archives)]. For a detailed discussion of this right of reproduction, see § 103A.134.

A library or archives, or its employees, are not liable for copyright infringement due to the unsupervised use of

reproducing equipment located on its premises, if the equipment displays a notice that the making of a copy may be subject to the copyright law [17 U.S.C. § 108(f)(1)]. However, a person who uses a library's or archives' reproducing equipment will be liable for copyright infringement if the act exceeds fair use [17 U.S.C. § 108(f)(2); see 17 U.S.C. § 107 (fair use)].

[2] Limitations on Rights

The rights of reproduction and distribution under 17 U.S.C. § 108 do not apply to specified types of works [17 U.S.C. § 108(i) (musical, pictorial, graphic, sculptural, and audiovisual works generally exempted); see § 103A.134].

These rights are also inapplicable if the library or archives, or its employee, is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material. This is true whether the reproduction or distribution is made on one occasion or over a period of time, and whether it is intended for aggregate use by one or more individuals or for separate use by the individual members of a group [17 U.S.C. § 108(g)(1)].

The library's or archives' reproduction rights do not extend to cases in which the library or archives, or its employee, engages in systematic reproduction or distribution of single or multiple copies or phonorecords of certain material [see 17 U.S.C. § 108(d)]; however, this prohibition does not extend to interlibrary arrangements as long as their purpose or effect is not to substitute the arrangements for subscriptions or purchases [17 U.S.C. § 108(g)(2)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawOwner RightsReproductionGeneral OverviewCopyright LawOwner RightsReproductionLimitations



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CHAPTER 103A COPYRIGHTS

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C. Limitations on Copyrights

33-103A California Legal Forms--Transaction Guide § 103A.32

§ 103A.32 Performances and Displays

A copyright owner has the exclusive right to publicly perform most types of copyrighted works [*see 17 U.S.C. § 106(4), (5); see also Nimmer On Copyright, Ch. 8, The Nature of the Rights Protected by Copyright, § 8.14* (Matthew Bender)].

However, there are limited exemptions from this performance right. These include performances or displays of a work for classroom instruction, instructional broadcasts, religious services, nonprofit performances, vending establishment performances, transmissions to handicapped persons, and nonprofit fraternal organizations in which there is generally no direct or indirect admission charge, or if there is an admission charge, the net proceeds are used exclusively for education, religious, or charitable purposes [*see 17 U.S.C. § 110; see also §§ 103A.134, 103A.135*]. In addition, the Family Movie Act of 2005 [Pub. L. No. 109-9, § 201 et seq. (Apr. 27, 2005)] created an exemption from liability for infringement in making, providing, or using technology to skip portions of movies viewed at home [*see 17 U.S.C. § 110(11); see also § 103A.136*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Formalities General Overview Copyright Law Owner Rights Performance General Overview



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C. Limitations on Copyrights

33-103A California Legal Forms--Transaction Guide § 103A.33

§ 103A.33 Secondary Transmissions

The existence of transmission facilities used by radio, television, cable television, and similar systems, has resulted in statutory protections for the owners of transmitted copyrighted work. These protections are based on the following definitions: A "primary transmission" is a transmission made to the public by a transmitting facility whose signals are being received and further transmitted by a secondary transmission service, regardless of where or when the performance or display was first transmitted [17 U.S.C. § 111(f)]. A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission, or non-simultaneously with the primary transmission if by certain cable systems [see 17 U.S.C. § 111(f)].

A secondary transmission to the public of a primary transmission that embodies a performance or display of a work is actionable as an infringement of copyright if the primary transmission is not made for the reception of the public at large, but is limited to reception to certain members of the public [17 U.S.C. § 111(b)]. However, this type of secondary transmission is specifically exempted if all of the following conditions are satisfied [17 U.S.C. § 111(b)]:

- The primary transmission is made by a broadcast station licensed by the Federal Communications Commission (FCC).
- The carriage of signals comprising the secondary transmission is required by the FCC.
- The signal of the primary transmitter is not changed in any way by the secondary transmitter.

Other forms of exempt secondary transmissions include those from non-cable apartment house and hotel systems, instructional systems, and certain carriers, and non-cable transmissions by a government body or other nonprofit organization [see 17 U.S.C. § 111(a)]. For the most part, the statutory provisions with regard to secondary transmissions are directed to the operation and licensing of cable television systems, and to the terms and conditions for statements of account, royalties, and non-simultaneous secondary transmissions [see 17 U.S.C. § 111(c)-(f); see also 37 C.F.R. § 201.17 (statement of account covering compulsory licenses for secondary transmissions by cable systems); H.R. Rep. No. 94-1476, at 88-101 (1976)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawOwner RightsDisplayGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.34

§ 103A.34 Ephemeral Recordings

"Ephemeral recordings" are copies or phonorecords of a work made for purposes of later transmission by a broadcasting organization legally entitled to transmit the work [H.R. Rep. No. 94-1476, at 101 (1976)].

Except in the case of a motion picture or other audiovisual work, an authorized organization may make a single copy or phonorecord of a particular transmission program [see 17 U.S.C. § 101 "transmission program" defined)] embodying the work (under a license or transfer of the copyright or under limitations on exclusive rights in sound recordings) [see 17 U.S.C. § 114(a)], which is not an infringement of copyright provided the following points are satisfied.

First, the copy or phonorecord may be retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it [17 U.S.C. § 112(a)(1)(A)]. Second, the copy or phonorecord may be used only for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security [17 U.S.C. § 112(a)(1)(B)]. Finally, unless preserved exclusively for archival purposes, the copy or phonorecord must be destroyed within six months from the date the program was first transmitted to the public [17 U.S.C. § 112(a)(1)(C)].

More permissive rules govern the making and use of ephemeral recordings by governmental bodies and other nonprofit organizations [see 17 U.S.C. § 112(b)-(d)].

A transmitting organization is also entitled to transmit to the public a performance of a sound recording [see 17 U.S.C. §§ 114(d)(1)(C), (f)] and is entitled to a statutory license to make not more than one phonorecord of the sound recording (unless the terms of the statutory license allow for more), if specified conditions are satisfied [see 17 U.S.C. § 112(e)].

It is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled under 17 U.S.C. § 110(2) to transmit a performance or display [see § 103A.134, P 4] to make copies or phonorecords of a work that is in digital form and, solely to the extent permitted in 17 U.S.C. § 110(2), of a work that is in analog form, embodying the performance or display to be used for making transmissions authorized under 17 U.S.C. § 110(2), if the copies or phonorecords are both [17 U.S.C. § 112(f)(1)]:

- Retained and used solely by the body or institution that made them, and no further copies or phonorecords are reproduced from them, except as authorized under *17 U.S.C. § 110(2)*; and
- Used solely for transmissions authorized under that section.

This does not authorize the conversion of print or other analog versions of works into digital formats, except that conversion is permitted with respect to the amount of the works authorized to be performed or displayed under *17 U.S.C. § 110(2)*, if no digital version of the work is available to the institution, or the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use under *17 U.S.C. § 110(2)* [*17 U.S.C. § 112(f)(2)*].

The transmission program embodied in a copy or phonorecord is not subject to protection as a derivative work under the copyright law except with the express consent of the owners of copyright in the preexisting works employed in the program [*17 U.S.C. § 112(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright Law Owner Rights Reproduction Limitations



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33-103A California Legal Forms--Transaction Guide § 103A.35

§ 103A.35 Reproduction of Pictorial, Graphic, and Sculptural Works

The exclusive right of the owner of a copyrighted pictorial, graphic, or sculptural work to reproduce a work in copies [see 17 U.S.C. § 106(4), (5)] includes the right to reproduce the work in or on any kind of article, whether useful or otherwise [17 U.S.C. §§ 101, 113(a); see 37 C.F.R. § 202.10].

Pictorial, graphic, and sculptural works include works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans [17 U.S.C. § 101]. These works also include the *form* of works of artistic craftsmanship, but not their mechanical aspects [17 U.S.C. § 101]. Moreover, the design of a "useful article" [see 17 U.S.C. § 101 (definition)] is considered a pictorial, graphic, or sculptural work only if, and to the extent that, the design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article [17 U.S.C. § 101; see *Fabrica Inc. v. El Dorado Corp.* (9th Cir. 1983) 697 F.2d 890, 893 (interpreting 17 U.S.C. § 101 to mean that if article has *any* utilitarian function, it can be denied copyright protection except to extent that its artistic features can be identified separately and are capable of existing independently as a work of art)]. For example, the copyright of a drawing or model of a car does not extend to the manufacture of the car itself [see 17 U.S.C. § 113(b); see also H.R. Rep. No. 94-1476, at 105 (1976)]. Similarly, if a work has been lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, it is not an infringement of copyright to make, distribute, or display pictures or photographs of the articles in advertising, commentaries, or in news reports [17 U.S.C. § 113(c); see H.R. Rep. No. 94-1476, at 105 (1976)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawSubject MatterGeneral OverviewCopyright LawSubject MatterPictorial, Graphic & Sculptural WorksGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.36

§ 103A.36 Sound Recordings

[1] Limitations of Exclusive Rights

The exclusive rights of an owner of the copyright in a sound recording are limited to the rights to reproduce the sound recording in copies or phonorecords, to prepare derivative works based on the copyrighted sound recording, to distribute copies or phonorecords of the sound recording to the public by transfer of ownership, or by rental, lease, or loan, and to perform the copyrighted work publicly by means of a digital audio transmission [17 U.S.C. §§ 106(1)-(3), (6), 114(a); see 17 U.S.C. § 101 ("digital transmission" defined); see also 17 U.S.C. § 114(d) (exempt transmissions and retransmissions)].

The exclusive right to reproduce the sound recording in copies or phonorecords under 17 U.S.C. § 106(1) is limited to the right to duplicate the sound recording in the form of phonorecords, or of copies of audiovisual works, that directly or indirectly recapture the actual recorded sounds [17 U.S.C. § 114(b)]. Preparation of derivative works under 17 U.S.C. § 106(2) is limited to the extent that the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality [17 U.S.C. § 114(b)]. These exclusive rights under 17 U.S.C. § 106(1) and (2) do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even if the sounds imitate or simulate those in the copyrighted sound recording [17 U.S.C. § 114(b)]. The exclusive rights in a sound recording under 17 U.S.C. § 106(1)-(3) do not apply to sound recordings included in educational television and radio programs distributed or transmitted by or through public broadcasting entities, provided that copies or phonorecords of those programs are not commercially distributed by or through public broadcast entities to the general public [17 U.S.C. § 114(b); see 47 U.S.C. § 397 ("educational television and radio programs" defined); see also 17 U.S.C. § 118(f) ("public broadcasting entities" defined)].

With respect to sound recordings [see 17 U.S.C. § 114], there is no limitation on the exclusive right under 17 U.S.C. § 106(4) to perform publicly, by means of a phonorecord, a literary, musical, dramatic, choreographic or audiovisual work, or a pantomime [17 U.S.C. § 114(c)].

[2] Nonexclusive Right to Record

A recorded performance of a musical composition embodies two distinct groups of legal rights: (1) rights in the musical composition itself, i.e., the tune and lyrics; and (2) rights in the phonograph recording "fixing" the performance of that musical composition. The rights in the musical composition are subject to the compulsory licensing provisions of the copyright law [see § 103A.80]. Once the owner of the copyrighted musical composition permits one recording to be made of a performance of that composition, the right to record it becomes nonexclusive and all persons may make a "similar use" of the musical composition, provided they comply with the compulsory licensing provisions of the copyright law.

Record piracy, however, is not a similar use of the composition. Compliance by a record pirate with the compulsory licensing provisions only provides a defense to a copyright infringement action brought by the owners of the musical composition. That compliance is no defense to an infringement action brought against the pirate by the owners of the copyright in the "pirated" phonograph record that fixes a performance of that composition on record [*A & M Records, Inc. v. Heilman* (1977) 75 Cal. App. 3d 554, 562-564, 142 Cal. Rptr. 390, cert. denied, 436 U.S. 952 (1978)] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawSubject MatterGeneral OverviewCopyright LawSubject MatterSound Recordings



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33-103A California Legal Forms--Transaction Guide § 103A.37

§ 103A.37 Architectural Works

Architectural works enjoy copyright protection under terms of the Architectural Works Copyright Protection Act [*see 17 U.S.C. § 102(a)(8); see also* Pub. L. No. 101-650, §§ 701-706, 104 Stat. 5133-5134]. For purposes of the copyright law, an "architectural work" is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features [*17 U.S.C. § 101*].

The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place [*17 U.S.C. § 120(a)*]. Moreover, the owner of a building embodying an architectural work may, without the consent of the author or copyright owner of the architectural work, make or authorize alterations to the building, and destroy or authorize the destruction of the building [*17 U.S.C. § 120(b)*].

The amendments to the copyright law effected by the Architectural Works Copyright Protection Act apply to any architectural work created on or after December 1, 1990 (the enactment date of that Act). The amendments also apply to any architectural work that on December 1, 1990, was unconstructed and embodied in unpublished plans or drawings; however, protection for these works afforded by the Architectural Works Copyright Protection Act terminates on December 31, 2002, unless the work has been constructed by that date [Pub. L. No. 101-650, § 706, 104 Stat. 5134; *see 17 U.S.C. § 101*, Note].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawSubject MatterGeneral OverviewCopyright LawSubject MatterArchitectural Works



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33-103A California Legal Forms--Transaction Guide § 103A.38

§ 103A.38 Copies or Adaptations of Computer Programs

The owner of a copy of a computer program has limited rights to make another copy or adaptation of the program [see 17 U.S.C. § 117]. For further discussion of rights in computer software, see § 103A.95.

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Copyright Protection General Overview Copyright Law Subject Matter General Overview



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33-103A California Legal Forms--Transaction Guide § 103A.39

§ 103A.39 Transfer or Display of Particular Copy or Phonorecord

The owner of a particular copy or phonorecord lawfully made under the Act is entitled to transfer or display that copy or phonorecord without the authority of the copyright owner [*see 17 U.S.C. § 109(a), (c)*]. However, these privileges do not apply to the commercial rental, leasing, or lending of a phonorecord or computer program, by other than nonprofit libraries or educational institutions for nonprofit purposes, unless authorized by the copyright owner [*see 17 U.S.C. § 109(b), (d)*; *see also Quality King Distributors, Inc. v. L'Anza Research Intern., Inc. (1998) 523 U.S. 135, 118 S. Ct. 1125, 1128-1134, 140 L. Ed. 2d 254* (first sale doctrine applies to imported copies)]. For further discussion of copyright transfer, see § 103A.52.

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawSubject MatterGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.40

§ 103A.40 Fair Use

[1] Guidelines for Determining Fair Use

One of the more important limitations on the exclusive rights afforded a copyright owner under the Act is the doctrine of "fair use" of a copyrighted work by reproduction for purposes of criticism, comment, news reporting, reaching, scholarship, or research [see 17 U.S.C. § 107]. The "fair use" of a copyrighted work is the privilege of persons other than the copyright owner to use the work for certain purposes, despite the exclusive use granted to the owner by the copyright. Accordingly, fair use is not an infringement of copyright [17 U.S.C. § 107]. Its purpose is to balance the exclusive rights of the copyright holder against the public's interest in dissemination of information affecting areas of universal concern, such as art, science, history, or industry [*Meeropol v. Nizer* (2d Cir. 1977) 560 F.2d 1061, 1068 , cert. denied, 434 U.S. 1013 (1978)] .

The 1976 Act accorded for the first time an express statutory right of fair use of a copyrighted work [see 17 U.S.C. § 107]. The defense of fair use, however, had been a well established judicially created doctrine long before the 1976 Act [see, e.g., *Mathews Conveyer Co. v. Palmer-Bee Co.* (6th Cir. 1943) 135 F.2d 73, 85 (discussing factors to consider in determining fair use)]. The statutory defense of fair use embraced the scope and general purpose of the judicial doctrine, but did not change, narrow, or enlarge it in any way [see *Elsmere Music, Inc. v. National Broadcasting Co.* (S.D.N.Y. 1980) 482 F. Supp. 741, 744-745 , aff'd, 623 F.2d 252 (2d Cir. 1980)] . In determining the scope and limits of the fair use doctrine, counsel should therefore consider pre-1978 as well as post-1978 cases that discuss the issue at hand.

In determining whether the use made of a work in any particular case is a fair use of a work, 17 U.S.C. § 107 continues to require that certain factors be considered by a court. These statutory factors must be weighed together; none can be treated in isolation [*Campbell v. Acuff-Rose Music, Inc.* (1994) 510 U.S. 569, 577, 114 S. Ct. 1164, 127 L. Ed. 2d 500] . These factors include the following [17 U.S.C. § 107; see, e. g., *Los Angeles News Service v. KCAL-TV Channel 9* (9th Cir. 1997) 108 F.3d 1119, 1121 , cert. denied, 522 U.S. 823 (1997)] :

- The purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes [see [2][a], below].

- The amount and substantiality of the portion used in relation to the copyrighted work as a whole [see [2][b], *below*].
- The nature of the copyrighted work [see [2][c], *below*].
- The effect of the use on the potential market for or value of the copyrighted work [see [2][d], *below*].

The fact that a work is unpublished does not itself bar a finding of fair use if such a finding is made after consideration of all factors listed above [17 U.S.C. § 107], although courts have shown less lenience toward quotation of unpublished materials [see *Nimmer On Copyright, Ch. 13, Infringement Actions--Subsequent Aspects*, § 13.05 (Matthew Bender) (collecting cases)].

Fair use under the statute specifically includes reproduction for purposes of criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research [17 U.S.C. § 107].

For detailed analysis of the doctrine of fair use, see *Nimmer On Copyright, Ch. 13, Infringement Actions--Subsequent Aspects*, § 13.05 (Matthew Bender).

[2] Factors to Be Considered

[a] Purpose and Character of Use

In determining whether a use should be judged fair or unfair in an infringement action, courts consider the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes [see 17 U.S.C. § 107(1)]. However, commercial use is not presumptively unfair, at least when the use is "transformative" as opposed to simple verbatim duplication for commercial purposes [see, e.g., *Campbell v. Acuff-Rose Music, Inc.* (1994) 510 U.S. 569, 591, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (commercial nature of song parody does not render it presumptively unfair); *Triangle Publications, Inc. v. Knight-Ridder Newspapers* (5th Cir. 1980) 626 F.2d 1171, 1174-1175]. "Transformative use" is use that builds on the prior material, transforming it into something new, and is generally accepted as the preferred form of fair use [see generally *Nimmer On Copyright, Ch. 13* (Matthew Bender)].

In one case, use of copyrighted materials for educational purposes when materials were purchased from copyright owner enhanced the value of the copyright and was protected by fair use doctrine [*Allen v. Academic Games League of American, Inc.* (9th Cir. 1996) 89 F.3d 614, 617]. However, an educational nonprofit use does necessarily result in a finding of fair use [see, e.g., *Marcus v. Rowley* (9th Cir. 1983) 695 F.2d 1171, 1175, disapproved on other grounds, *Hustler Magazine, Inc. v. Moral Majority, Inc.* (9th Cir. 1986) 796 F.2d 1148 (finding of nonprofit educational purpose does not compel finding of fair use if other factors are contrary)].

A set of guidelines have been prepared with respect to the application of fair use to classroom copying and educational uses of music [see H.R. Rep. No. 94-1476, at 146 (1976)].

The fair use doctrine has frequently also been applied to the following:

- Criticism and comment [see, e.g., *Suid v. Newsweek Magazine* (D.D.C. 1980) 503 F. Supp. 146, 148 (quoting passages from book about John Wayne in article following actor's death)].
- Parody [see, e.g., *Campbell v. Acuff-Rose Music, Inc.* (1994) 510 U.S. 569, 579-591, 114 S. Ct. 1164, 127 L. Ed. 2d 500 ("rap song" parody of copyrighted popular song "Oh, Pretty Woman" may be fair use, depending on balancing of factors set forth under 17 U.S.C. § 107); *Elsmere Music Inc. v.*

National Broadcasting Co. (2d Cir. 1980) 623 F.2d 252, 253, aff'd, 623 F.2d 252 (2d Cir. 1980) (Saturday Night Live sketch parodying I Love New York campaign); *Walt Disney Productions v. Air Pirates (9th Cir. 1978) 581 F.2d 751, 756-757, cert. denied, 439 U.S. 1132 (1979)* (parody is potential fair use subject to multifactor analysis codified in 17 U.S.C. § 107); cf. *Walt Disney Productions v. Mature Pictures Corp. (S.D.N.Y. 1975) 389 F. Supp. 1397, 1398* (permissible parody is not complete copy of original)].

■ Matters of public interest [see, e.g., *Meeropol v. Nizer (2d Cir. 1977) 560 F.2d 1061, 1068, cert. denied, 434 U.S. 1013* (publication of Julius and Ethel Rosenberg letters); *Time Incorporated v. Bernard Geis Associates (S.D.N.Y. 1968) 293 F. Supp. 130, 146* (sketches based on film of President Kennedy's assassination)].

[b] Nature of Copyrighted Work

Courts give weight to the nature of the copyrighted work in their fair use analysis [see 17 U.S.C. § 107(2)]. For example, fair use has often been successfully asserted with respect to limited copying of textbooks or other informational material prepared primarily for limited distribution and dealing with scientific or historical topics [see, e.g., *Eisenschiml v. Fawcett Publications, Inc. (7th Cir. 1957) 246 F.2d 598, 604, cert. denied, 355 U.S. 907* (historical facts about Lincoln)]. However, creative material prepared for general public distribution has also been found to be the subject of fair use [see, e.g., *Triangle Publications, Inc. v. Knight-Ridder Newspapers (5th Cir. 1980) 626 F.2d 1171, 1175* (magazine cover used in television ad); but see *Dr. Pepper Co. v. Sambo's Restaurants, Inc. (N.D. Tex. 1981) 517 F. Supp. 1202, 1208* (use of television commercial too similar to "Be a Pepper" commercial)]. The Supreme Court has passed over this factor without giving it much attention, stating that it is often not much help [*Campbell v. Acuff-Rose Music, Inc. (1994) 510 U.S. 569, 586, 114 S. Ct. 1164, 127 L. Ed. 2d 500*]. This factor is of most relevance in the fair use analysis when the original material and the copy are different in nature [*Sony Computer Entertainment America v. Bleem, LLC (9th Cir. 2000) 214 F.3d 1022, 1028*].

[c] Size of Portion Used in Relation to Entire Copyrighted Work

Courts consider the amount and substantiality of the portion used in relation to the copyrighted work as a whole [see 17 U.S.C. § 107(3)], and apply a standard of reasonableness in making this determination [see, e.g., *Rosemont Enterprises, Inc. v. Random House, Inc. (2d Cir. 1966) 366 F.2d 303, 310, cert. denied, 385 U.S. 1009* (standard of reasonableness)].

In the case of parody, for example, the Supreme Court has recognized that the parodist must be able to use enough of the original work to make the object of the parody's critical wit recognizable. Parody is justified so long as it does not take more of the original that is appropriate for its purposes of criticism. Such a use may be a fair use, even though the portion taken was the "heart" of the original [*Campbell v. Acuff-Rose Music, Inc. (1994) 510 U.S. 569, 594-595, 114 S. Ct. 1164, 127 L. Ed. 2d 500*].

[d] Harm to Market or Value of Copyrighted Work

Finally, courts consider the effect of the use on the potential market for or value of the copyrighted work [see 17 U.S.C. § 107(4)]. Although some courts have treated this factor as the most important of the factors to be considered [see, e.g., *Triangle Publications, Inc. v. Knight-Ridder Newspapers (5th Cir. 1980) 626 F.2d 1171, 1177*], the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*, clarified that this factor--harm to the value or market of the work--is not a consideration overriding all others. Rather, its importance will vary depending on the other factors [*Campbell v. Acuff-Rose Music, Inc. (1994) 510 U.S. 569, 594-595, 114 S. Ct. 1164, 127 L. Ed. 2d 500*].

In determining the effect of the defendant's use on the potential market for or value of the copyrighted work, the courts

have looked to the function of each work regardless of the media in which each appeared. When two works fulfill the same function, the scope of fair use is restricted. Thus, if the use adversely affects the value of any future adaptation rights, even though unexercised, in the copyrighted works, the courts will find the use unfair even though defendant's work was in a different media [see, e.g., *Iowa State University v. American Broadcasting* (2d Cir. 1980) 621 F.2d 57, 61-62 (educational film of Olympic Athlete contemplated commercial exposure and commercial network's Olympic broadcast of film was infringement)].

On the other hand, if defendant's use of material similar to plaintiff's work performs a substantially different function than the copyrighted work, the courts may permit the fair use defense even though both works employ the same or similar media [see, e.g., *Karll v. Curtis Pub. Co.* (E.D. Wisc. 1941) 39 F. Supp. 836, 837-838 (value of official football team song was not diminished by quoting eight lines in article about team)]. For example, a rap parody of a popular song may be found not to be a fair use to the extent that the parody harms the potential derivative market for other rap versions of the original song. However, the fact that a parody (like a scathing critical review) may harm the market for the original work by reducing demand for it does not give rise to damages that are remediable under the copyright law, and such harm may not be considered in determining whether the parody is a fair use [*Campbell v. Acuff-Rose Music, Inc.* (1994) 510 U.S. 569, 592-594, 114 S. Ct. 1164, 127 L. Ed. 2d 500] .

Moreover, home video recording of copyrighted works that, according to findings, (1) amounted mostly to "time-shifting," (2) would not be objected to by substantial numbers of copyright holders who licensed their works for free television, and (3) did not impair the value of the copyrighted works, have been held to be fair use [*Sony Corp. v. Universal City Studios, Inc.* (1984) 464 U.S. 417, 419-428, 104 S. Ct. 774, 78 L. Ed. 2d 574 , reh'g denied, 465 U.S. 1112] .

[3] Examples of Fair Uses

The doctrine of fair use is further illustrated by some of the activities that a court might determine as fair use under the circumstances [H.R. Rep. No. 94-1476, at 65 (1976)]:

- A quotation of excerpts in a review or criticism for purposes of illustration or comment.
- A quotation of short passages in a scholarly or technical work for illustration or clarification of the author's observations.
- The use in a parody of some of the content of the work parodied [see generally *Campbell v. Acuff-Rose Music, Inc.* (1994) 510 U.S. 569, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (parody of copyrighted song); see also [2][a], above].
- A summary of an address or article with brief quotations in a news report.
- Reproduction by a library of a portion of a work to replace part of a damaged copy.
- Reproduction by a teacher or student of a small part of a work to illustrate a lesson.
- Use of copyrighted academic games in an interscholastic tournament [see *Allen v. Academic Games League of American, Inc.* (9th Cir. 1996) 89 F.3d 614, 617] .
- Reproduction of a work in legislative or judicial proceedings or reports.
- Incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawCivil Infringement ActionsDefensesFair UseGeneral OverviewCopyright LawOwner
RightsAdaptationLimitationsCopyright LawSubject MatterGeneral Overview



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33-103A California Legal Forms--Transaction Guide §§ 103A.41-103A.44

[Reserved]

§§ 103A.41[Reserved]



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D. Copyright Ownership

1. Initial Ownership

33-103A California Legal Forms--Transaction Guide § 103A.45

§ 103A.45 Ownership of Right Is Distinct From Ownership of Object

A "copyright owner" is the owner of any of the exclusive rights comprised in a copyright [17 U.S.C. § 101]. However, ownership of a copyright, or of any rights under a copyright, is distinct from ownership of any material object in which the work is embodied [17 U.S.C. § 202; see § 103A.111, P 2, NOTE].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawOwner RightsGeneral Overview



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D. Copyright Ownership

1. Initial Ownership

33-103A California Legal Forms--Transaction Guide § 103A.46

§ 103A.46 Who Owns the Copyright

[1] Identity of Author

The identity of an author affects the copyrightable status of a work in two instances. First, if the author is not a national or domiciliary of the United States, the work must qualify for federal protection under one of a number of specified criteria relating to, among other things, the place of first publication of the work and the type of publisher [*see 17 U.S.C. § 104(b)*; § 103A.110; *see also 17 U.S.C. § 104A*; § 103A.86]. Second, copyright protection is not available for works of the United States Government. However, the federal government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise [*17 U.S.C. § 105*].

[2] Initial Owner

The copyright in a work protected by the 1976 Act initially vests in the author or authors of the work [*17 U.S.C. § 201(a)*]. In the case of a work for hire [*see [3], below*], the employer (or other person for whom the work is specially prepared) is considered the author of the work and is regarded as the initial owner of the work unless there is a specific written agreement otherwise by the parties [*17 U.S.C. § 201(b)*]. However, when the work consists of separate contributions in a collective work, the author of the separate contribution is regarded as the initial owner of the separate contribution, even though copyright ownership of the collective work as a whole may vest in another person [*17 U.S.C. § 201(b)*; *see H.R. Rep. No. 94-1476*, at 121 (1976); *see also [5], below*].

[3] Work for Hire

A work is "for hire" when it is prepared by an employee within the scope of his or her employment or when it is specially ordered or commissioned for use in a collective work or for other purposes specified by statute [*see 17 U.S.C. § 101*]. In determining whether a work was prepared by an employee, principles of the common law of agency apply. Many factors, including the hiring party's right to control the manner and means by which the product is made, the skill required, and the duration of the relationship between the parties, must be considered; and no one factor is determinative [*Community for Creative Non-Violence v. Reid (1989) 490 U.S. 730, 752-753, 109 S. Ct. 2166, 104 L. Ed. 2d 811*].

(when free-lance sculptor was hired to produce single work, that work was neither "work for hire" prepared within scope of employment nor specially commissioned for purpose specified by statute); see Ch. 84, *Independent Contractors* ; Ch. 85, *Employment Agreements*].

[4] Joint Works

A work is a "joint work" when it is prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole [17 U.S.C. § 101]. The authors of a joint work are co-owners of the copyright [17 U.S.C. § 201(a)]. Co-owners are tenants in common; and as such, each has an independent right to license the use of the work, subject to a duty of accounting to the other co-owners for any profits [H.R. Rep. No. 94-1476, at 121 (1976); see *Pye v. Mitchell* (9th Cir. 1978) 574 F.2d 476, 480] . In the Ninth Circuit, joint authorship requires each author to make an independently copyrightable contribution to the work [*Ashton-Tate Corp. v. Ross* (9th Cir. 1990) 916 F.2d 516, 521] .

In the case of a work, such as a motion picture, that is the result of the creative contributions of many individuals, authorship entails more than merely making a valuable and copyrightable contribution. In the absence of a determinative contract, several factors may be among the criteria for authorship. First, an author superintends the work by exercising control. Second, putative coauthors make objective manifestations of their shared intent to be coauthors. Third, the audience appeal of a joint work turns on the combined contributions of the coauthors, and the share of each in the work's success cannot be appraised. Control in many cases will be the most important factor; the absence of control is strong evidence of the absence of coauthorship. The factors cannot be reduced to a rigid formula, however, because the creative relationships to which they apply vary too much. Different people do creative work together in different ways, and even among the same people working together the relationship may change over time as the work proceeds [*Aalmuhammed v. Lee* (9th Cir. 2000) 202 F.3d 1227, 1234-1235 (plaintiff could not support claim to be coauthor of motion picture *Malcolm X*, although plaintiff did have quantum meruit claim for making valuable, copyrightable contribution)].

[5] Collective Works

Two sets of copyrights exist for a collective work [17 U.S.C. § 101 ("collective work" defined)]. Copyright in an individual contribution is distinct from copyright in the collective work and vests initially in the author of the contribution [17 U.S.C. § 201(c)]. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series [17 U.S.C. § 201(c)].

Under 17 U.S.C. § 201(c), a publisher could reprint a contribution from one issue in a later issue of a magazine, for example, or could reprint an article from one edition of an encyclopedia in a later revision of it, but the publisher could not revise the contribution itself or include it in a new anthology or an entirely different collective work. Essentially, that code section adjusts a publisher's copyright in its collective work to accommodate a freelance contributor's copyright in the contribution. If there is demand for a freelance article standing alone or in a new collection, 17 U.S.C. § 201(c) allows the freelance contributor to benefit from that demand; after authorizing initial publication, the contributor may also sell the article to others [*New York Times Co. v. Tasini* (2001) 533 U.S. 483, 533 U.S. 483, 121 S. Ct. 2381, 2389, 150 L. Ed. 2d 500 (freelance-contributed articles first published in *New York Times* could not, without contributors' consent, later be published in online computer database; that database must be viewed as entirely new collective work rather than "revision" of original collective work)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawOwner RightsGeneral OverviewCopyright LawOwnership InterestsGeneral Overview



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D. Copyright Ownership

1. Initial Ownership

33-103A California Legal Forms--Transaction Guide §§ 103A.47-103A.49

[Reserved]

§§ 103A.47[Reserved]



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33-103A California Legal Forms--Transaction Guide § 103A.50

§ 103A.50 Transfer of Rights Is Distinct From Transfer of Copies or Phonorecords

Transfer of ownership of a copyright or any exclusive rights under a copyright does not convey any property rights in the material object subject to the transfer, absent an agreement otherwise [17 U.S.C. § 202]. Similarly, transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not, of itself, convey any rights in the copyrighted work embodied in the object [see 17 U.S.C. § 202].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawConveyancesGeneral OverviewCopyright LawOwner RightsPerformanceElements of
PerformanceCopyright LawOwnership InterestsGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.51

§ 103A.51 Transfer of Ownership or Rights

[1] Transfer Generally

The ownership of a copyright may be transferred in whole or in part by means of conveyance or by operation of law, and is to be treated as a personal property right on the death of the owner [17 U.S.C. § 201(d)(1)]. Thus, the owner of a copyright is empowered to transfer all or any fraction of the ownership interest to another person, thereby making that person a whole or joint owner [*Gardner v. Nike, Inc.* (9th Cir. 2002) 279 F.3d 774, 779] . Moreover, any of the exclusive rights specified by the 1976 Act may be transferred and owned separately [17 U.S.C. § 201(d)(2); see Notes of Committee to Judiciary to § 201, H.R. Rep. No. 94-1476, at 123 (1976)]. However, the owner's right of transfer under 17 U.S.C. § 201(d)(1) is not conferred on a licensee by virtue of an exclusive license (or on any transferee by virtue of any transfer) under 17 U.S.C. § 201(d)(2), because the rights of an exclusive licensee (or other transferee) are limited, by the language of the statute, "to all of the *protection and remedies* accorded to the copyright owner by" the Copyright Act. Therefore, the Copyright Act does not allow a copyright licensee to transfer any rights under an exclusive license without the consent of the licensor (that is, the owner) [*Gardner v. Nike, Inc.* (9th Cir. 2002) 279 F.3d 774, 780 ; cf. *Harris v. Emus Records Corp.* (9th Cir. 1984) 734 F.2d 1329, 1333 (same conclusion under 1909 Copyright Act)].

Whenever a person who owns a copyright transfers that copyright to another person so that the transferee can make and sell a product embodying that copyright, the value of the copyright interest is exempt from sales and use tax under *Rev. & Tax. Code* §§ 6011(c)(10) and 6012(c)(10) [*Preston v. State Bd. of Equalization* (2001) 25 Cal. 4th 197, 214, 105 Cal. Rptr. 2d 407, 19 P.3d 1148] .

An involuntary transfer of ownership or of any exclusive right is not effective under the copyright law except as provided under Title 11 of the United States Code (Bankruptcy) [see 17 U.S.C. § 201(e)].

[2] Writing Required for Transfer

To be valid, any transfer of copyright ownership, other than by operation of law, must be in writing, signed by the

owner or his or her agent [17 U.S.C. § 204(a)]. Any purported transfer without a writing is not valid [*Radio Television Espanola S.A. v. New World Entertainment, Ltd.* (9th Cir. 1999) 183 F.3d 922, 929 (facsimile transmission did not set forth terms of license agreement); *PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal. App. 4th 579, 52 Cal. Rptr. 2d 877 (exchange of correspondence indicating favorable consideration of plaintiff's proposal did not constitute valid contract for exclusive manufacturing rights when there was no writing communicated to plaintiff that copyright holder intended as a memorandum of contract)].

The writing must be the product of the parties' negotiations and the execution of the writing must be substantially contemporaneous with the parties' oral agreement to transfer the copyright [*Konigsberg Intern. Inc. v. Rice* (9th Cir. 1994) 16 F.3d 355, 357 (letter written three and one-half years after alleged oral agreement, which did not directly acknowledge that transfer had occurred or indicate any specific terms, was not sufficient); *cf. Magnuson v. Video Yesteryear* (9th Cir. 1996) 85 F.3d 1424, 1429 n.1 (non-contemporaneous writing was sufficient to establish valid assignment of copyright under Copyright Act of 1909, applicable to undertakings commenced before January 1, 1978, when there was no dispute that transfer had occurred or terms on which it occurred)].

A certificate of acknowledgment is not required but is, in certain cases, prima facie evidence of the execution of the transfer [see 17 U.S.C. § 204(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawConveyancesGeneral OverviewCopyright LawOwner RightsGeneral OverviewCopyright LawOwner RightsPerformanceGeneral OverviewCopyright LawOwnership InterestsGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.52

§ 103A.52 Disposition of Copyrighted Materials

[1] First Sale by Owner of Copy or Phonorecord

The owner of a copy or phonorecord lawfully made under the copyright law (or the owner's agent) generally has the right to sell or otherwise dispose of his or her possession of the copy or phonorecord [17 U.S.C. § 109(a)]. The first sale or gift of each copy or phonorecord by its owner, or under the owner's authority, is referred to as the "first sale" [see *Parfums Givenchy v. Drug Emporium* (9th Cir. 1994) 38 F.3d 477, 480, cert. denied, 514 U.S. 1004 (1995), disapproved on other grounds, *Quality King Distributors, Inc. v. L'Anza Research Intern., Inc.* (1998) 523 U.S. 135, 118 S. Ct. 1125, 140 L. Ed. 2d 254] .

The "first sale" doctrine protects a reseller of a copyrighted item lawfully purchased abroad and imported into the United States for resale [*Quality King Distributors, Inc. v. L'Anza Research Intern., Inc.* (1998) 523 U.S. 135, 118 S. Ct. 1125, 1128-1134, 140 L. Ed. 2d 254] . Permission to import copyrighted goods may be implied under 17 U.S.C. § 602(a), which requires only that importation be "authorized," but does not specify "written" or "express" consent of the copyright owner [*Disenos Artisticos e Industriales v. Costco Wholesale Corp.* (9th Cir. 1996) 97 F.3d 377, 380] .

In the case of certain foreign works in which the copyright has been restored under 17 U.S.C. § 104A [see § 103A.86], the right to sell or dispose of a copy of the work without authorization of the copyright owner for purposes of direct or indirect commercial advantage is limited to a specified 12-month period following the date that notice of intent to enforce the restored copyright has been given [see 17 U.S.C. § 109(a)].

[2] Renting, Leasing, or Loaning Phonorecords or Computer Programs

Neither the owner of a particular copy of a phonorecord nor a person in possession of a particular copy of a computer program may lawfully rent, lease, or lend possession of the record or program for the purposes of direct or indirect commercial advantage [17 U.S.C. § 109(b)(1)(A)]. However, a nonprofit library or educational institution may rent, lease, or lend a phonorecord for nonprofit purposes [17 U.S.C. § 109(b)(1)(A)]. Similarly, a nonprofit educational institution may transfer possession of a lawfully made copy of a computer program to another nonprofit educational

institution, or to faculty, staff, and students, if the package for each copy of the program has affixed to it a copyright warning prescribed by statute [17 U.S.C. § 109(b)(2)(A); see 37 C.F.R. § 201.24 (notice)].

[3] Display of Copy

The owner of a particular copy lawfully made under the copyright law (or person authorized by the owner) is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located [17 U.S.C. § 109(c)]. However, this right does not extend to a person who has acquired possession of the copy or phonorecord by rental, lease, loan, or otherwise, without acquiring ownership of it, unless authorized by the copyright owner [17 U.S.C. § 109(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawOwner RightsPerformanceGeneral OverviewCopyright LawOwnership InterestsGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.53

§ 103A.53 Recording Transfers of Copyright

Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office. Recordation serves as constructive notice of the facts stated in the document [*see 17 U.S.C. § 205(c); see also §§ 103A.64, 103A.65* (constructive notice and removed notices), § 103A.225 (cover sheet for submission of documents for recordation)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawConveyancesGeneral OverviewCopyright LawOwner RightsGeneral OverviewCopyright LawOwner RightsPerformanceGeneral OverviewCopyright LawOwnership InterestsGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.54

§ 103A.54 Priority Between Conflicting Transfers

The copyright law establishes a priority between conflicting transfers [*see 17 U.S.C. § 205(d)*]. For transfers executed within the United States, the one executed first prevails if it is recorded within one month after its execution, or within two months after its execution outside the United States [*17 U.S.C. § 205(d)*; *see 17 U.S.C. § 205(c)* (recording)]. Otherwise, the transfer last executed prevails, provided it was recorded first, taken in good faith for a valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer [*17 U.S.C. § 205(d)*].

A nonexclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if the license is evidenced by a writing signed by the owner of the rights licensed or the owner's agent [*17 U.S.C. § 205(e)*]. However, the license must have been taken before execution of the transfer, or in good faith before recording of the transfer and without notice of it [*17 U.S.C. § 205(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawOwner RightsGeneral OverviewCopyright LawOwner RightsPerformanceGeneral OverviewCopyright LawOwnership InterestsGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.55

§ 103A.55 Recovering Ownership of Transferred Rights--Termination of Transfers and Licenses

The nontestamentary transfer or license of a copyright of a work not made for hire, or of any right under a copyright, executed by an author on or after January 1, 1978, is subject to termination, under specified conditions, within a period of five years beginning at the end of 35 years from the date the grant was executed [*see 17 U.S.C. § 203(a)*]. If the grant covers the right of publication of the work, the period begins at the end of the shorter of the following periods: 35 years from the publication date of the work under the grant; or 40 years from the date of execution of the grant [*17 U.S.C. § 203(a)(3)*].

On the date of termination, all rights covered by the terminated grant revert to the author or other persons entitled to exercise termination rights, subject to specified limitations [*see 17 U.S.C. § 203(b)*; *see also 17 U.S.C. § 203(a)(1), (2)* (ownership and exercise of termination interest if author is deceased)]. Future rights that will revert on termination of the grant become vested on the date the notice of termination is served [*see 17 U.S.C. § 203(b)(2)*; *see also 17 U.S.C. § 203(a)(4)* (service)].

If the rights under an existing copyright were transferred before January 1, 1978, the author or other specified persons may terminate those rights for the extended term, except in the case of a copyright in a work made for hire [*see 17 U.S.C. § 304(c)*]. For additional discussion of these rights, and a notice terminating transfers and licenses for the extended renewal term of a copyright in existence on January 1, 1978, see § 103A.221.

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawConveyancesGeneral OverviewCopyright LawOwner RightsGeneral OverviewCopyright LawOwner RightsPerformanceGeneral OverviewCopyright LawOwnership InterestsGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.56

§ 103A.56 Security Interests in Copyrights

The Copyright Act permits the owner of a copyright to create a security interest in it. The Copyright Act's use of the word "mortgage" as one definition of a "transfer" [see 17 U.S.C. § 101] is properly read to include security interests under Article 9 of the Uniform Commercial Code [*Aerocon Engineering, Inc. v. Silicon Valley Bank (In re World Auxiliary Power Co.)* (9th Cir. 2002) 303 F.3d 1120, 1126] .

Division 9 of the Commercial Code, which generally governs security interests in property other than real property [see generally Ch. 42, *Secured Transactions*], does not apply to security interests in copyrights "to the extent that any ... statute ... of the United States preempts" Division 9 [*Com. Code* § 9109(c)(1)]. Insofar as the Copyright Act concerns security interests in copyrights, it preempts state law [see 17 U.S.C. § 301(a); see also § 103A.10]. Therefore, security interests in copyrights are governed primarily by the Copyright Act [see *Moldo v. Matsco, Inc. (In re Cybernetic Servs.)* (9th Cir. 2001) 252 F.3d 1039, 1056 ("The Copyright Act, by its terms, governs security interests."); but, to the extent that the Copyright Act could not be applied with respect to the matter, security interests in copyrights would be governed by Division 9 of the Commercial Code.

The Copyright Act permits a security agreement covering a *registered* copyright--that is, any document evidencing the transfer of a security interest in a registered copyright--to be recorded in the Copyright Office [see 17 U.S.C. § 205(c); see also § 103A.53]. A duly recorded security agreement preserves the priority of the creditor's security interest [see 17 U.S.C. § 205(d); see also § 103A.54]. Since the Copyright Act covers the matter of preserving priority, no filing is necessary under Division 9 of the Commercial Code; indeed, no filing under Division 9 is even possible, with respect to a security interest in a registered copyright [see *Com. Code* §§ 9310(a),(b)(3), 9311(a)(1); cf. *Aerocon Engineering, Inc. v. Silicon Valley Bank (In re World Auxiliary Power Co.)* (9th Cir. 2002) 303 F.3d 1120, 1128 (construing former *Com. Code* §§ 9104 and 9302, now superseded but essentially continued in *Com. Code* §§ 9109, 9310, and 9311: "For registered copyrights, the only proper place to file is the Copyright Office.")].

A security agreement covering an *unregistered* copyright cannot be recorded in the Copyright Office, however; and there is no other way, under the Copyright Act, for a creditor to preserve the priority of the creditor's security interest in

an unregistered copyright [*Aerocon Engineering, Inc. v. Silicon Valley Bank (In re World Auxiliary Power Co.)* (9th Cir. 2002) 303 F.3d 1120, 1128 ("the Copyright Act doesn't provide for the rights of secured parties to unregistered copyrights; it only covers the rights of secured parties in *registered* copyrights"; original emphasis)]. Therefore, Division 9 of the Commercial Code, by its terms, "governs perfection and priority of security interests in unregistered copyrights"; and on this matter, the Copyright Act does not preempt the state law [*Aerocon Engineering, Inc. v. Silicon Valley Bank (In re World Auxiliary Power Co.)* (9th Cir. 2002) 303 F.3d 1120, 1128] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawOwner RightsGeneral OverviewCopyright LawOwnership InterestsGeneral Overview



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33-103A California Legal Forms--Transaction Guide §§ 103A.56-103A.59

[Reserved]

§§ 103A.56[Reserved]



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33-103A California Legal Forms--Transaction Guide § 103A.60

§ 103A.60 Copyright Secured Automatically on Creation

For works created on or after January 1, 1978, copyright protection subsists from the time the work is created in fixed form [17 U.S.C. § 302(a); see 17 U.S.C. §§ 101, 102(a)]. The copyright of the work of authorship *immediately* becomes the property of the author who created the work [see 17 U.S.C. § 201(a); see also 17 U.S.C. § 201(b) (works for hire); § 103A.46[3]; U.S. Copyright Office Circular No. 1, Copyright Basics, *Who Can Claim Copyright*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawOwnership InterestsWorks Made for HireCopyright LawSubject MatterGeneral OverviewCopyright LawSubject MatterStatutory Copyright & FixationScope of Protection



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33-103A California Legal Forms--Transaction Guide § 103A.61

§ 103A.61 Publication

Under the Copyright Act of 1909, in effect before 1978, federal copyright was generally secured by the act of publication with notice of copyright, provided other statutory requirements were met [*see former 17 U.S.C. § 10*].

Statutory copyright protection now exists whether or not the work is published [*see 17 U.S.C. §§ 101, 301*]. However, once the work is published, the author must register the copyright within five years in order for the registration certificate to constitute prima facie evidence of the validity of the copyright [*see 17 U.S.C. § 410(c)*].

"Publication," as defined by the 1976 Act occurs when copies or phonorecords are distributed to the public by the following means [*17 U.S.C. § 101*]:

- Sale or other transfer of ownership.
- Rental, lease, or lending.
- The act of offering to distribute copies or phonorecords to a group of persons for purpose of further distribution, public performance, or public display.

A public performance or display does not, of itself, constitute publication [*17 U.S.C. § 101*].

Publication remains important under the 1976 Act for several reasons:

- Works published in the United States are subject to mandatory deposit requirements [*see 17 U.S.C. § 407; see also § 103A.74*].
- Publication of a work affects the limitations on exclusive rights set forth in *17 U.S.C. § 107-121* [*see §§ 103A.30-103A.40* (limitations)].

- The year of publication determines the duration of copyright protection for anonymous and pseudonymous works when the author's identity is not revealed in the records of the Copyright Office [see 17 U.S.C. § 302(c); see also § 103A.85].
- Deposit requirements differ for published and unpublished works [see 17 U.S.C. § 408(b); 37 C.F.R. §§ 202.19(b), 202.20(b); see also § 103A.200[1][d]].
- Copies of works published before March 1, 1989, must bear notice of copyright or risk loss of copyright protection [see 37 C.F.R. § 202.2(a)(2); see also 103A.62[2]]

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawPublicationGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.62

§ 103A.62 Requirements of Notice

[1] Works Published Before January 1, 1978

Works published before January 1, 1978, are governed by prior copyright law [see 37 C.F.R. § 202.2(a)(1)]. Under that law, if a work was published under the copyright owner's authority without a statutory notice, or with an inadequate notice, all copyright protection for that work was permanently lost in the United States [see former 17 U.S.C. §§ 10, 19; 37 C.F.R. § 202.2(a)(2); see also 37 C.F.R. § 202.2(b) (examples of defects in notice)].

[2] Works Publicly Distributed Before March 1, 1989, but After 1977

Under former 17 U.S.C. §§ 401 and 402, a notice of copyright was *required* to be placed on publicly distributed copies of a protected work or on publicly distributed phonorecords. This requirement was deleted by the Berne Convention Implementation Act of 1988 [see Pub. L. No. 100-568, 102 Stat. 2861 (1988)], which took effect on March 1, 1989, the date on which the Berne Convention entered into force with respect to the United States [Pub. L. 100-568, § 13(a), 102 Stat. 2861 (1988)]. Any cause of action arising under the Federal Copyright Act before March 1, 1989, is governed by the provisions of the Act in effect when the cause of action arose [Pub. L. 100-568, § 13(b), 102 Stat. 2861 (1988)].

For copies and phonorecords publicly distributed by authority of the copyright owner before March 1, 1989, but after 1977, the omission of a copyright notice [see 17 U.S.C. §§ 401-403] will not invalidate the copyright in the following situations [17 U.S.C. § 405(a), (e); see 17 U.S.C. § 406 (governing effect of error in name of copyright owner or date contained in pre-Berne-Convention notices)]:

- Omission occurs only on a small number of copies or phonorecords distributed publicly [see, e.g., *Lifshitz v. Walter Drake & Sons, Inc.* (9th Cir. 1986) 806 F.2d 1426, 1432-1433 (15,00 items too many to qualify for exception); see also *Lloyd v. Schlag* (9th Cir. 1989) 884 F.2d 409, 415 (number of charms distributed to public was too large to qualify for exception)]; or
- The work was registered before or the copyright owner registers the work within five years after the publication without notice and a reasonable effort is made to add notice to all copies or phonorecords

distributed publicly; or

- Omission is in violation of an express written requirement that was a condition of the copyright owner's authorization for public distribution; or
- Omission is the result of an unauthorized removal, destruction, or obliteration of a notice.

In addition, copyright notice has been restored by statute for motion pictures that were first fixed or published without the required copyright notice in the territory of a North American Free Trade Agreement (NAFTA) country after January 1, 1978, and before March 1, 1989, under certain circumstances [*see 17 U.S.C. § 104A; see also 37 C.F.R. § 301.31* (procedure for restoring copyright protection)]; § 103A.86].

[3] Works Publicly Distributed on or After March 1, 1989

For works publicly distributed by authority of the copyright owner on or after March 1, 1989 [*see Pub. L. No. 100-568, § 13, 102 Stat. 2861* (1988)], a notice of copyright *may* be placed on publicly distributed copies of protected work or on all publicly distributed phonorecords [*17 U.S.C. §§ 401(a), 402(a); see 17 U.S.C. § 401(b)* (form for notice)]. The notice must be affixed to the copies in a manner and location that provide reasonable notice of the claim of copyright [*17 U.S.C. § 401(c)*].

The Copyright Office does not take a position on whether reprints of works first published with notice before March 1, 1989, which are distributed on or after March 1, 1989, must bear the copyright notice [*see U.S. Copyright Office Circular No. 3, Copyright Notice, Use of Copyright Notice*].

[4] Notice Remains Important

Although copyright notice is no longer required, its use remains important. In the event that a work is infringed, if notice in the specified form and position [*see 17 U.S.C. §§ 401(b), (c)* (copy), 402(b), (c) (phonorecord); *see also § 103A.63*] appears on the published copy or phonorecord to which a defendant in a copyright infringement suit had access, the court will not give any weight to a defendant's interposition of an innocent infringement defense (that is, that defendant did not realize that the work was protected) in mitigation of actual or statutory damages, except as provided in the last sentence of *17 U.S.C. § 504(c)(2)* (statutory damages against nonprofit educational institution, library, archives, or public broadcaster remitted if infringer believed fair use doctrine applied) [*17 U.S.C. §§ 401(d), 402(d)*]. Copyright holders should bear in mind, however, that simply affixing a copyright notice without registering the copyright will not adequately protect the copyright in most cases, since registration, or preregistration [*see § 103A.75*] in an appropriate case, usually is a prerequisite to bringing an infringement suit [*17 U.S.C. §§ 411(a), 412; see § 103A.72*]. For further discussion of infringement, *see §§ 103A.90-103A.91*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawPublicationGeneral Overview



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E. How to Secure Copyright Protection

33-103A California Legal Forms--Transaction Guide § 103A.63

§ 103A.63 Form and Position of Copyright Notice

The copyright notice must contain specified information and be affixed to the copies or phonorecords in a manner and location that will provide reasonable notice of the claim of copyright [17 U.S.C. § 401(b), (c) (copies); 17 U.S.C. § 402(b), (c) (phonorecords) *see* 37 C.F.R. § 202.2 (copyright notice)]. The implementing regulations include examples of satisfactory methods of affixation and positions for various types of visually perceptible works [*see* 37 C.F.R. § 201.20 (methods and positions of affixation); *see also* 17 U.S.C. § 401(c) (position of notice)]. For further discussion of the required form, position, and methods of affixing the copyright notice, *see* § 103A.120.

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawFormalitiesNoticeGeneral OverviewCopyright LawFormalitiesNoticeRequirementsGeneral OverviewCopyright LawFormalitiesNoticeRequirementsContent & Form



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33-103A California Legal Forms--Transaction Guide § 103A.64

§ 103A.64 Constructive Notice

Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the document, provided that (1) the document (or material attached to it) specifically identifies the work to which it pertains so that the work, after it is indexed, can be found by a reasonable search under its title and registration number and (2) the work has been registered [17 U.S.C. § 205(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright Law Formalities Notice General Overview



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33-103A California Legal Forms--Transaction Guide § 103A.65

§ 103A.65 Unauthorized Removal

The unauthorized removal, destruction, or obliteration of a copyright notice does not affect protection of the copyright under the copyright law [17 U.S.C. § 405(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawFormalitiesNoticeGeneral OverviewCopyright LawFormalitiesNoticeRemovals



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33-103A California Legal Forms--Transaction Guide §§ 103A.66-103A.69

[Reserved]

§§ 103A.66[Reserved]



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33-103A California Legal Forms--Transaction Guide § 103A.70

§ 103A.70 Copyright Office and Registrar of Copyrights

As director of the Copyright Office of the Library of Congress, the Register of Copyrights is responsible for all administrative functions and duties pertaining to the copyright law [see 17 U.S.C. § 701]. These duties include establishing implementing regulations [see 17 U.S.C. § 702; see also 37 C.F.R. pts. 201, 202], preparing, maintaining and searching copyright records [see 17 U.S.C. § 705, and distributing free copyright registration forms and general informational material [see 17 U.S.C. § 707; see also § 103A.200[1][c]].

Records of all deposits, registrations, recordations, and other copyright law actions are indexed and kept in the Copyright Office [17 U.S.C. § 705(a)]. These records are open for inspection and searching by the public [17 U.S.C. § 705(b)]. Further, on request and payment of a specified fee [see 17 U.S.C. § 708(a)(9)], the Copyright Office will prepare a report of the information contained in its records with respect to any deposit, registration, or recorded document [see 17 U.S.C. § 705]. On request and payment of a fee, the Office will also provide copies of any of its public records or indices [see 17 U.S.C. § 706]. For information on searching the Copyright Office records concerning the copyright status or ownership of a work, request U.S. Copyright Office Circular No. 22, How to Investigate the Copyright Status of a Work, and Circular No. 23, The Copyright Card Catalog and the Online Files of the Copyright Office. Also see U.S. Copyright Office Circular No. 1b, Limitations on the Information Furnished by the U.S. Copyright Office.

Copyright Office records in machine-readable form catalogued from January 1, 1978, to the present, including registration and renewal information and recorded documents, are available for searching on the Internet. These files may be examined through LOCIS (Library of Congress Information System). Access to LOCIS requires Telnet support. If an online service provider supports Telnet, the provider's Internet users can connect to LOCIS through the world wide web or directly by using Telnet, as follows:

World Wide Web: www.copyright.gov/rb.html.

Telnet: [locis.loc.gov](telnet://locis.loc.gov).

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright Law Formalities Deposit & Registration General Overview



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33-103A California Legal Forms--Transaction Guide § 103A.71

§ 103A.71 Nature of Copyright Registration

The owner of a copyright or of any exclusive right in a published work may register a claim to that work in the Copyright Office by depositing copies of the work, together with an application and deposit fee [see 17 U.S.C. §§ 408-410 and discussion in §§ 103A.73-103A.75]. In general, registration is a legal formality intended to make a public record of basic facts of a particular copyright [U.S. Copyright Office Circular No. 1, Copyright Basics, *Copyright Registration*; see 17 U.S.C. § 101 ("registration" defined)]. Copyright registration is not a condition of copyright protection [17 U.S.C. § 408(a)], except in some instances to preserve a pre-Berne Convention copyright that would otherwise be invalidated because of omission of the required copyright notice [see 17 U.S.C. § 405(a)(2)]. However, the owner of a copyright or of any exclusive right in the copyrighted work may voluntarily register a claim to that work in the Copyright Office by depositing copies of the work along with an application and deposit fee [see 17 U.S.C. §§ 408-410; see also § 103A.73 (procedures)].

A certificate of registration made before or within five years of publication of the work constitutes prima facie evidence of the validity of the copyright [17 U.S.C. § 410(c); see § 103A.61 (publication)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Civil Infringement Actions Presumptions & Requirements Registration Requirement Copyright Law Conveyances Formalities General Overview Copyright Law Formalities Deposit & Registration General Overview



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33-103A California Legal Forms--Transaction Guide § 103A.72

§ 103A.72 Registration and Infringement Actions

Although registration is not usually a requirement for the existence of a copyright [*see § 103A.71*], failure to register a copyright may significantly impede the copyright holder's ability to protect and enforce the holder's rights in many cases.

Registration, or preregistration in an appropriate case [*see § 103A.75*], usually is a prerequisite to bringing an infringement suit [*17 U.S.C. § 411(a)*]. Furthermore, a plaintiff who brings an infringement action under the Copyright Act ordinarily may not recover statutory damages or attorney's fees for either of the following [*17 U.S.C. § 412*]:

- Any infringement of copyright in an unpublished work commenced before the effective date of its registration, unless preregistration requirements were met [*see § 103A.75*]; or
- Any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless registration is made within three months after the first publication of the work.

Limited exceptions exist to the requirement of registration as a prerequisite to a copyright infringement action. An action brought for violation of the author's rights under *17 U.S.C. § 106A* (relating to the attribution and related rights of the author of a work of *visual* art may be instituted without regard to registration [*17 U.S.C. § 411(a)*]. In addition, in the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner, either before or after that fixation takes place, may institute an action for infringement [*see 17 U.S.C. § 501*] if the copyright owner does both of the following [*17 U.S.C. § 411(c)*]:

- Serves notice on the infringer, not less than 48 hours before the fixation, identifying the work and the specific time and source of its first transmission and declaring an intention to secure copyright in the work; and
- Registers the work, if required by *17 U.S.C. § 411(a)*, within three months after its first transmission.

For detailed discussion of copyright registration and its effects on infringement actions, see Nimmer On Copyright, Ch. 7, *Statutory Formalities* , and Ch. 21, *Copyright Office Forms and Related Materials* (Matthew Bender). For additional discussion of infringement, see §§ 103A.90, 103A.91.

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawCivil Infringement ActionsGeneral OverviewCopyright LawFormalitiesDeposit & RegistrationGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.73

§ 103A.73 Registration Procedures

Registration may be made at any time within the life of the copyright [*see 17 U.S.C. § 408(a)*]. Unlike the law in effect before 1978 [*see 17 U.S.C. §§ 12, 13*], when a work has been registered in unpublished form, it is not necessary to make another registration, although the copyright owner may register the published edition, if desired [*see 17 U.S.C. § 408(e)*].

The owner of a copyright or of any exclusive right in the copyrighted work may register a copyright claim with the Copyright Office by submitting an application and registration fee and depositing copies of the work [*17 U.S.C. §§ 408, 409; see 37 C.F.R. § 202.3* (registration of copyright); *see also § 103A.122* (registration procedures); §§ 103A.200-103A.211 (registration forms)]. The Register of Copyrights will register the claim and issue a certificate of registration if he or she determines that the deposited materials are copyrightable and that other requirements have been met [*17 U.S.C. § 410(a)*]. If the Register determines that the material is not copyrightable or the claim is invalid for any other reason, he or she will refuse registration and notify the applicant in writing of the reasons for refusal [*17 U.S.C. § 410(b)*].

Registration becomes effective on the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office [*17 U.S.C. § 410(d)*].

For a guide to registration procedures, see § 103A.122. Supplementary registration is covered in § 103A.153. Renewal registration is discussed in § 103A.155. Official registration forms and instructions are explained and reproduced in §§ 103A.200-103A.211. For a more detailed discussion of registration procedures, see Nimmer On Copyright, Ch. 7, *Statutory Formalities*, and Ch. 21, *Copyright Office Forms and Related Materials* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
 Copyright Law Formalities Deposit & Registration General Overview



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33-103A California Legal Forms--Transaction Guide § 103A.74

§ 103A.74 Deposit of Copies or Phonorecords With Library of Congress

[1] Mandatory Deposit of Published Works

Although copyright registration is not required, the 1976 Act establishes a mandatory deposit requirement for works published in the United States [17 U.S.C. § 407(a); see 17 U.S.C. § 101 ("publication" defined)]. In general, the owner of copyright or of the exclusive right of publication in the work must deposit the following in the Copyright Office, within three months after publication in the United States:

- Two complete copies of the best edition of the work [see 17 U.S.C. § 101 ("best edition" defined)],
or
- If the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually perceptible material published with the work [see 17 U.S.C. § 407(a)-(c)].

Although this deposit is not a condition of copyright protection [17 U.S.C. § 407(a)], the Register of Copyright may issue a written demand for the required deposit any time after the work has been published, and impose a fee if the deposit is not made within three months of the demand [see 17 U.S.C. § 407(d)].

In the case of published computer programs and published computerized information works, such as statistical compendia, serials, and reference works, that are not copy-protected, only one complete copy of the best edition [see 17 U.S.C. § 101; 37 C.F.R. § 202.19(b)(1); 37 C.F.R. pt. 202, app. B ("best edition" defined)] is required to be deposited with the Copyright Office. If the works are copy-protected, two copies of the best edition must be deposited [37 C.F.R. § 202.19(d)(2)(vii)].

Certain works are exempted from this deposit requirement [see 37 C.F.R. § 202.19(c) (exemptions from deposit requirement)], and an owner may request "special relief" from some aspects of the deposit requirement under specified circumstances [see 37 C.F.R. § 202.19(e)].

For a detailed list of deposit requirements for various types of works, see § 103A.121.

[2] Use of Mandatory Deposit to Satisfy Registration Requirement

As part of the application for copyright registration [see § 103A.73], the applicant must deposit copies or phonorecords of the copyrighted work [17 U.S.C. § 408(b); 37 C.F.R. § 202.20(c) (nature of required deposit)].

Copies and phonorecords deposited for the Library of Congress under 17 U.S.C. § 407 and 37 C.F.R. § 202.19 [see [1], *above*] may be used to satisfy the deposit requirements for copyright registration. In order to have this dual effect, the copies or phonorecords must be accompanied by an application for registration of claim to copyright in the work represented by the deposit, and either a registration fee or a deposit account number on the application [37 C.F.R. § 202.20(e)].

An applicant who fails to exercise this joint deposit option must comply with a separate set of requirements applicable solely to registration deposits [37 C.F.R. § 202.20(c) (nature of required deposit)]. See § 103A.123 for a list of these requirements.

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawFormalitiesGeneral OverviewCopyright LawFormalitiesDeposit & RegistrationGeneral OverviewCopyright LawPublicationCopyright Act of 1976



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33-103A California Legal Forms--Transaction Guide § 103A.75

§ 103A.75 Preregistration of Unpublished Work Being Prepared for Commercial Distribution

It is possible to preregister an unpublished work that is being prepared for commercial distribution if the work is in a class that has had a history of infringement prior to authorized commercial distribution [*see 17 U.S.C. § 408(f)(1),(2)*]. See § 103A.125 for a procedural guide to preregistration.

Preregistration enables the registrant to maintain an action based on infringement occurring before normal registration [*see 17 U.S.C. § 411(a)*]. However, as an incentive for the copyright owner to effect a normal registration, an action based on preregistration will be subject to mandatory dismissal insofar as the action concerns infringement occurring before publication or within two months after publication, unless the copyright owner has completed a normal registration within either three months after publication of the work or one month after the copyright owner learned of the infringement [*see 17 U.S.C. § 408(f)(4)*; *see also 17 U.S.C. § 412* (copyright owner may not recover statutory damages or attorney's fees, in action based on preregistration, unless normal registration has been completed within stated period)].

Not later than three months after the first publication of a preregistered work, the copyright owner must submit to the Copyright Office an application for registration of the work, a deposit, and the appropriate fee [*17 U.S.C. § 408(f)(3)*].

While preregistration of a work offers advantages to a copyright owner [*see 17 U.S.C. §§ 408(f), 411, 412*], preregistration of a work does not constitute prima facie evidence of the validity of the copyright or of the facts stated in the application for preregistration or in the preregistration record. The fact that a work has been preregistered does not create any presumption that the Copyright Office will register the work on submission of an application for registration [*37 C.F.R. § 202.16(c)(13)*].

The Register of Copyrights has determined that the following classes of works are eligible for preregistration [*37 C.F.R. § 202.16(b)(1)*]:

- Motion pictures.

- Sound recordings.
- Musical compositions.
- Literary works being prepared for publication in book form.
- Computer programs (including video games).
- Advertising or marketing photographs.

Any person who willfully infringes a copyright by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, is guilty of an offense, if the person knew or should have known that the work was intended for commercial distribution [17 U.S.C. § 506(a)(1)(C)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Formalities General Overview Copyright Law Formalities Deposit & Registration Registration General Overview



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33-103A California Legal Forms--Transaction Guide §§ 103A.76-103A.79

[Reserved]

§§ 103A.76[Reserved]



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 G. Licenses

33-103A California Legal Forms--Transaction Guide § 103A.80

§ 103A.80 Compulsory Licensing

The 1976 Act provides for compulsory licensing for various uses of a copyrighted work [*see 17 U.S.C. §§ 111(c), (d)* (secondary transmissions by cable systems), 115 (making and distributing phonorecords), 119 (secondary transmission by satellite carriers for private home viewing)]. Compulsory licensing is essentially a statutory exception to the Act's provisions that the copyright owner has certain specified exclusive rights in the work [*see 17 U.S.C. § 106; see also § 103A.20[1]*] and that anyone who violates any of those rights is an infringer of the copyright [*see 17 U.S.C. §§ 501(a), 511(a); see also § 103A.90*].

The Copyright Act provides for compulsory licensing in the following circumstances [*see 37 C.F.R. §§ 201.17-201.19* (notices and statements of account for compulsory licenses)]:

- A cable system may obtain a compulsory license to make secondary transmissions to the public of primary transmission made by a broadcast station licensed by the Federal Communications Commission (FCC) or an appropriate governmental authority of Canada or Mexico [*see 17 U.S.C. §§ 111(c)(1), (d); see also 17 U.S.C. §§ 111(c)(2)* (actions constituting infringement)].
- Once phonorecords of a nondramatic musical work have been distributed to the public under the authority of the copyright owner, others may obtain a compulsory license to make and distribute their own phonorecords of the work, under specified conditions [*see 17 U.S.C. § 115; see also Peer Intern. Corp. v. Pausa Records* (9th Cir. 1990) 909 F.2d 1332, 1337, cert. denied, 498 U.S. 1109 (1991) (failure to pay royalties under private license agreement is not act of infringement under 17 U.S.C. § 115(c)(5))].
- "Satellite carriers" may obtain a "statutory" (that is, compulsory) license to make secondary transmissions to the public for private home viewing of a primary transmission made by a "super station" or by a network station, under specified circumstances [*see 17 U.S.C. § 119*].

The Copyright Act also provides for negotiated licensing of the performances of nondramatic musical works on

coin-operated phonorecords ("jukeboxes") and for negotiated licensing for the use of pictorial, graphic, sculptural, and nondramatic musical works by public broadcasting entities [*see* 17 U.S.C. §§ 116, 118; *see also* § 103A.81].

For detailed discussion on compulsory and negotiated license provisions under the Copyright Act, see Nimmer On Copyright, Ch. 8, *The Nature of the Rights Protected by Copyright* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawConveyancesLicensesGeneral OverviewCopyright LawFormalitiesGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.81

§ 103A.81 Negotiated Licenses

[1] Operation of Jukebox

Copyright owners and jukebox operators or their respective agents may negotiate licensing agreements for the public performance of copyrighted works on a jukebox, covering the terms and royalty rates for the performance of those works and the proportionate division of fees among the copyright owners [17 U.S.C. § 116(a), (b)(1); see 17 U.S.C. § 116(d) ("coin-operated phonorecord player" [jukebox] and "operator" defined)].

Parties not subject to such a negotiation may have the terms and rates and the division of fees determined by a panel of experts (called "copyright royalty judges") appointed by the Librarian of Congress or, before June 1, 2005, by ad hoc copyright arbitration royalty panels [17 U.S.C. § 116(b)(2); see 17 U.S.C. § 801 et seq. (appointment of and proceedings by copyright royalty judges); see also former 17 U.S.C. § 116(b)(2); Pub. L. No. 108-419, § 6 (operative date of amendments enacted by Copyright Royalty and Distribution Reform Act of 2004; transitional application of former provision of Copyright Act mandating proceedings by ad hoc copyright arbitration royalty panels pursuant to former 17 U.S.C. § 801 et seq.)]. Licensing agreements negotiated between one or more copyright owners and one or more jukebox owners will be given effect in lieu of any otherwise applicable determination made by the copyright royalty judges (or, before June 1, 2005, a copyright arbitration royalty panel) [17 U.S.C. § 116(c)].

[2] Noncommercial Broadcasting

Public broadcasting entities [see 17 U.S.C. § 118(f) (definition)] may negotiate with copyright owners to obtain a license to perform published nondramatic musical works and other specified copyrighted works [see 17 U.S.C. § 118(b)]. These licenses cover terms and rates of royalty payments and division of fees among copyright owners [see 17 U.S.C. § 118(b)]. Copyright owners and public broadcasting entities may also submit to the copyright royalty judges (or, before June 1, 2005, the Librarian of Congress) proposed licenses covering activities relating to these works [see 17 U.S.C. § 118(b)(1)].

In the absence of a negotiated agreement, a panel of experts (called "copyright royalty judges") appointed by the Librarian of Congress (or, before June 1, 2005, a copyright arbitration royalty panel) must determine and publish in the

Federal Register a schedule of rates and terms, which is binding on all owners of copyright in the subject works and on the public broadcasting entities [17 U.S.C. § 118(b)(4); *see* 17 U.S.C. § 801 *et seq.* (appointment of and proceedings by copyright royalty judges); *see also* former 17 U.S.C. § 118(b)(3); Pub. L. No. 108-419, § 6 (operative date of amendments enacted by Copyright Royalty and Distribution Reform Act of 2004; transitional application of former provisions of Copyright Act mandating proceedings by ad hoc copyright arbitration royalty panels pursuant to former 17 U.S.C. § 801 *et seq.*)]. However, a license agreement voluntarily negotiated at any time between any of the copyright owners and any public broadcasting entity will be given effect in lieu of any determination by the Librarian of Congress or the copyright royalty judges if a copy of the agreement is filed with the copyright royalty judges (or, before June 1, 2005, filed in the Copyright Office) within 30 days of execution in accordance with applicable regulations [17 U.S.C. § 118(b)(2)].

On compliance with the terms of any voluntary license agreement negotiated by the parties or of any determination by the copyright royalty judges (or, before June 1, 2005, a determination by a copyright arbitration royalty panel), a public broadcasting entity may engage in specified activities regarding the copyrighted works [*see* 17 U.S.C. § 118(c)].

[3] Implied Grant of License

A license is deemed to have been granted implicitly if the following three facts are established [*Asset Mktg. Sys. v. Gagnon* (9th Cir. 2008) 542 F.3d 748, 2008 U.S. App. LEXIS 19179, at *14-*15] .

First, a person--the licensee--requested the creation of a work (which is a work of the kind that can be subject to copyright). The request need not be explicit or formalized; what matters is that the licensee took the initial steps toward creation of the work, having that result in mind. Creation of the work was responsive to the licensee's initiative [*see Asset Mktg. Sys. v. Gagnon* (9th Cir. 2008) 542 F.3d 748, 2008 U.S. App. LEXIS 19179, at *16] .

Second, the creator--the copyright owner and licensor--made that particular work and delivered it to the licensee who requested it. That is, the work was created specifically for the licensee. Whether the work was actually delivered could be disputed; for instance, a customized computer program could have been installed on the licensee's computer as object code (which is readable by the computer but not easily readable by a person), while the creator retained the source code (which a person can read and which can be modified by a programmer), and then the creator could plausibly deny that the program was delivered. In any event, as long as the other two facts are established, and the licensee in fact has some meaningful use of the work, a court may conclude that an implied license has been granted [*see Asset Mktg. Sys. v. Gagnon* (9th Cir. 2008) 542 F.3d 748, 2008 U.S. App. LEXIS 19179, at *17] .

Third, the licensor intended that the licensee-requestor would use the work in some way appropriate to the nature of the work: for example, copying and distributing it (for example, the work is a special effect created for use in a film) or using and modifying it for use in business operations (for example, the work is a customized computer program) [*Asset Mktg. Sys. v. Gagnon* (9th Cir. 2008) 542 F.3d 748, 2008 U.S. App. LEXIS 19179, at *15] . The relevant intent is the licensor's objective intent at the time of the creation and delivery of the work, as manifested by the parties' conduct. A court should consider the following factors to determine whether the creator had such an intent [*Asset Mktg. Sys. v. Gagnon* (9th Cir. 2008) 542 F.3d 748, 2008 U.S. App. LEXIS 19179, at *18-*19] :

- Whether the parties were engaged in a short-term discrete transaction as opposed to an on-going relationship;
- Whether the creator submitted (regardless of whether the parties signed) a written contract providing that copyrighted material could be used only with the creator's future involvement or express permission; and
- Whether the creator's conduct during the creation or delivery of the copyrighted material indicated

that use of the material without the creator's involvement or consent was permissible.

If an implied license was granted, then two dependent issues can arise. First, as to the durability of the license: if the licensee gave consideration--in the usual case, the licensee pays money to the creator--then the license possibly is irrevocable [see *Asset Mktg. Sys. v. Gagnon* (9th Cir. 2008) 542 F.3d 748, 2008 U.S. App. LEXIS 19179, at *23] , but possibly it has been converted into a contract [see *Effects Assocs., Inc. v. Cohen* (9th Cir. 1990) 908 F.2d 555, 559 n.7]. Second, as to the scope of the license--whether it is limited in any way (such as by geographic area), whether it is exclusive or not, and what the licensee is entitled to do with, and with respect to, the work (for instance, whether a computer program may be modified): the evidence of the parties' intent must be considered in each case [see, e.g., *Asset Mktg. Sys. v. Gagnon* (9th Cir. 2008) 542 F.3d 748, 2008 U.S. App. LEXIS 19179, at *21-*22 (court's finding that creator of work intended to grant nonexclusive, unlimited license was supported by fact that creator submitted draft of agreement to licensee, which contained statement to that effect; and fact that parties never signed it was irrelevant)]. A licensee infringes the owner's copyright if the licensee's use exceeds the scope of the license [*S.O.S., Inc. v. Payday, Inc.* (9th Cir. 1989) 886 F.2d 1081, 1087] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawConveyancesLicensesGeneral OverviewCopyright LawFormalitiesGeneral Overview



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G. Licenses

33-103A California Legal Forms--Transaction Guide §§ 103A.82-103A.84

[Reserved]

§§ 103A.82[Reserved]



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PART II. LEGAL BACKGROUND

H. Duration and Renewal of Copyrights

33-103A California Legal Forms--Transaction Guide § 103A.85

§ 103A.85 Duration and Renewal of Copyright

[1] Works Created on or After January 1, 1978

For works originally copyrighted on or after January 1, 1978, the copyright law has eliminated all renewal requirements and established a single copyright term and different methods of computing the duration of a copyright [*see 17 U.S.C. § 302(a)*].

A copyright in a work created (fixed in a tangible medium for the first time) on or after January 1, 1978 subsists from its creation and endures for the author's life plus 70 years [*17 U.S.C. § 302(a)*; *see 17 U.S.C. § 101* ("created" defined)]. This term applies to works that are unpublished, published during the author's lifetime, and published posthumously [*H.R. Rep. No. 94-1476, at 136 (1976)*].

Copyright on a joint work prepared by two or more authors who did not work for hire endures for a term consisting of the life of the last surviving author plus 70 years [*17 U.S.C. § 302(b)*].

Anonymous and pseudonymous works, and works made for hire [*see 17 U.S.C. § 101* (definitions)] are protected for 95 years from publication, or for 120 years from creation, whichever is shorter [*see 17 U.S.C. § 302(c)*]. However, if the identity of one or more of the authors of an anonymous or pseudonymous work is revealed either in its registration records [*see 17 U.S.C. § 408(a), (d)*] or in a statement filed with the Copyright Office in accordance with *17 U.S.C. § 302(c)*, the copyright will endure for a period of 70 years after the death of the identified author or authors [*17 U.S.C. § 302(c)*; *see 17 U.S.C. § 302(a), (b)*].

All copyright terms run to the end of the calendar year in which they would otherwise expire [*17 U.S.C. § 305*].

[2] Works Created Before January 1, 1978, but Not Published or Registered by That Date

The duration of copyright for works created before January 1, 1978, but not published or registered by that date will generally be computed in the same way as for works created on or after January 1, 1978: The life-plus-70-year or 95/120-year terms will apply [*17 U.S.C. § 303(a)*; *see 17 U.S.C. § 302*; *see also* [1], *above*]. However, in no case will

the terms of copyright for works in this category expire before December 31, 2002, and for works published on or before December 31, 2002, the term of copyright will not expire before December 31, 2047 [17 U.S.C. § 303(a)].

The distribution of a phonorecord before January 1, 1978 does not constitute publication of the embodied musical work for any purpose [17 U.S.C. § 303(b); see *ABKCO Music, Inc. v. LaVere* (9th Cir. 2000) 217 F.3d 684, 691 (Congress intended that 17 U.S.C. § 303(b) would clarify law on issue in question and nullify Ninth Circuit's "aberrational" *La Cienega* decision); *La Cienega Music Co. v. ZZ Top* (9th Cir. 1995) 53 F.3d 950, 953 (distribution of phonorecord was "publication" of embodied work and "the clock started ticking under the Copyright Act of 1909")].

[3] Works Created and Published or Registered Before January 1, 1978

Any copyright that was existing in its first term on January 1, 1978, endures for 28 years from the time that the copyright was first secured under prior law [17 U.S.C. § 304(a)(1)(A)]. Specified persons are entitled to a renewal and extension of the copyright for an additional term of 67 years [see 17 U.S.C. § 304(a)(1)(B), (C)]. Renewal is automatic, and no application for renewal is required [17 U.S.C. § 304(a)(3)(B)]. The renewal owner may, however, apply to register the renewed copyright [see 17 U.S.C. § 304(a)(3)(A)], in which case the extended term vests on the date of application for registration; otherwise, the extended term vests on the last day of the original term of the copyright [17 U.S.C. § 304(a)(2)(A), (B)]. Any copyright still in its renewal term when the Sonny Bono Copyright Term Extension Act became effective has a copyright term of 95 years from the date the copyright was originally secured [17 U.S.C. § 304(b); see Pub. L. No. 105-298, § 207 (Oct. 27, 1998; effective date 90 days after enactment); see also 17 U.S.C. § 304(c) (termination of transfer and licenses covering extended renewal term)].

For procedures for renewal of copyright claims in works created before January 1, 1978, see § 103A.155. The official application for renewal registration of an existing copyright obtained before January 1, 1978, as well as an addendum for use in renewing a copyright for a work that was published between January 1, 1964, and December 31, 1977, and was not registered during its first 28-year copyright term, are reproduced in § 103A.211[2].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawDuration & RenewalGeneral OverviewCopyright LawDuration & RenewalRenewalGeneral Overview



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H. Duration and Renewal of Copyrights

33-103A California Legal Forms--Transaction Guide § 103A.86

§ 103A.86 Restoration of U.S. Copyright in Certain Foreign Works

Congress has restored copyright protection for certain works created by foreign authors that have entered the public domain in the United States because of (1) noncompliance with formalities imposed at any time by United States copyright law, including failure of renewal, lack of proper notice, or failure to comply with any manufacturing requirements; (2) lack of subject matter protection, in the case of sound recordings fixed before February 15, 1972; or (3) lack of national eligibility [see 17 U.S.C. § 104A(a), (b), (h)(6)(A), (C)].

Restored copyright protection vests automatically on the "date of restoration" [see 17 U.S.C. § 104A(a)(1)(A)]. The "date of restoration" of a restored copyright is January 1, 1996, if the source country of the restored work is a nation adhering to the Berne Convention or a World Trade Organization member country on that date; or it is the date of adherence or proclamation, in the case of any other source country of the restored work [17 U.S.C. § 104A(h)(2)].

Restored copyright protection applies only to works created by nationals or domiciliaries of "eligible countries," that is, any nation, other than the United States, that either (1) becomes a World Trade Organization member country after the date of the enactment of the Uruguay Round Agreements Act, or (2) on that date of enactment was, or after that date of enactment became, a member of the Berne Convention, or (3) after that date of enactment became subject to a proclamation that the nation provides restored copyright protection to authors who are United States nationals or domiciliaries on substantially the same basis as provided under 17 U.S.C. § 104A [see 17 U.S.C. § 104A(g), (h)(3), (6)(D)]. Furthermore, to be eligible for restored copyright protection, the work (1) must not be in the public domain in its source country through expiration of term of protection, and (2) if published, the work must have first been published in an eligible country and not published in the United States during the 30-day period following publication in the eligible country [see 17 U.S.C. § 104A(h)(6)(B), (D)].

Procedures for enforcement and remedies for infringement of restored copyright protection are set forth in 17 U.S.C. § 104A(c)-(e). On or after the date of restoration, an owner of the copyright in a restored work who intends to enforce the copyright against a "reliance party" [see 17 U.S.C. § 104A(h)(4) (definition)] must either file a notice of intent containing specified information with the Copyright Office or serve a notice of intent directly on the reliance party [see 17 U.S.C. § 104A(c), (d)(2), (e)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright Law Foreign & International Protections General Overview



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H. Duration and Renewal of Copyrights

33-103A California Legal Forms--Transaction Guide §§ 103A.87-103A.89

[Reserved]

§§ 103A.87[Reserved]



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I. Copyright Infringement and Remedies

33-103A California Legal Forms--Transaction Guide § 103A.90

§ 103A.90 Copyright Infringement

Anyone who violates any of the exclusive rights of a copyright owner under 17 U.S.C. §§ 106-122 or of the author of a work of visual art under 17 U.S.C. § 106A or who imports copies or phonorecords into the United States in violation of the copyright law [see 17 U.S.C. § 602] is an infringer of the copyright [17 U.S.C. § 501(a)].

"Anyone" includes any state, any instrumentality of a state, and any officer or employee of a state or instrumentality of a state acting in his or her official capacity, all of whom are subject to the copyright law to the same extent as any nongovernmental entity [17 U.S.C. § 501(a); see 17 U.S.C. § 511]. The legal or beneficial owner of an exclusive right under a copyright, and certain primary transmitters and broadcast stations, may bring an infringement action [see 17 U.S.C. § 501(b)-(e)].

A legal or beneficial owner of a copyright may assign the right to an accrued cause of action for copyright infringement, without any other copyright rights accompanying the assignment, to the creator of a work for hire, or to any other person, and such an assignee may sue on that cause of action for infringement [*Silvers v. Sony Pictures Entertainment, Inc.* (9th Cir. 2003) 330 F.3d 1204, 1206-1207, 1209] . For discussion and a general form for assignment of a cause of action, see Ch. 76, *Assignment of Rights and Obligations* .

Innocent infringement is a defense to an infringement action [see § 103A.62[4]].

For detailed discussion of what constitutes copyright infringement, see Nimmer On Copyright, Ch. 13, *Infringement Actions--Substantive Aspects* (Matthew Bender), and California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
 Copyright LawCivil Infringement ActionsGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.91

§ 103A.91 Remedies

[1] Injunctions and Restraining Orders

A court may grant injunctions and restraining orders (operative throughout the United States) to prevent or stop copyright infringements [17 U.S.C. § 502; *see, e.g., Dr. Seuss Enterprises, L.P. v. Penguin Books* (9th Cir. 1997) 109 F.3d 1394, 1403-1406] .

[2] Statutory Damages and Attorneys' Fees

An infringer is liable for either the copyright owner's actual damages and any additional profits of the infringer [see 17 U.S.C. § 504(a), (b)], or statutory damages for all infringements involved in the action [see 17 U.S.C. § 504(c), (d) (special damages if there was no reasonable ground for believing use of copyright was exempt under 17 U.S.C. § 110(5))]. In any civil action under the copyright law, the court may also award full costs by or against any party other than the United States, and attorneys' fees to the prevailing party [see 17 U.S.C. § 505].

Attorneys' fee awards are not limited to exceptional circumstances, and fee motions are to be considered in a manner that seeks to promote the objectives of the Copyright Act [*Magnuson v. Video Yesteryear* (9th Cir. 1996) 85 F.3d 1424, 1432] . When ruling on motions for attorneys' fees, the court will consider the following factors: degree of success obtained, frivolousness, the motivations of the parties, objective unreasonableness, and the need in the particular circumstances to advance considerations of compensation and deterrence [*Fogerty v. Fantasy, Inc.* (1994) 510 U.S. 517, 534 n.19, 114 S. Ct. 1023, 127 L. Ed. 2d 455] .

Except for specified types of actions [see 17 U.S.C. §§ 106A(a), 411(c)], registration of the copyright, or preregistration of an unpublished work [see § 103A.75], is a prerequisite to recovering statutory damages or attorney's fees [17 U.S.C. § 412; see 17 U.S.C. §§ 504, 505 (statutory damages; attorneys' fees)]. Statutory damages or attorneys' fees may not be awarded for any infringement of copyright in an unpublished work begun before the effective date of its registration, if the requirements for preregistration were not met [17 U.S.C. § 412(1)]. For any infringement of copyright begun after the first publication of the work and before the effective date of its registration, statutory damages or attorneys' fees may not be awarded unless registration is made within three months after the first publication of the work [17 U.S.C. §

412(2)].

For further discussion of the scope of remedies available for infringement of a copyright, see Nimmer On Copyright, Ch. 14, *Infringement Actions--Remedies* (Matthew Bender), and California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright* (Matthew Bender).

[3] Criminal Penalties

In addition to any other similar remedies provided by law, forfeiture, destruction, and restitution relating to a violation of 17 U.S.C. § 506 will be subject to 18 U.S.C. § 2323, to the extent provided in that section [17 U.S.C. § 506(b)]. Therefore, any article, the making or trafficking of which is prohibited under 17 U.S.C. § 506, is subject to civil forfeiture to the U.S. government, as is also any property used, or intended to be used, in any manner or part to commit or facilitate the violation of 17 U.S.C. § 506, or any property constituting or derived from any proceeds obtained directly or indirectly as a result of the violation [18 U.S.C. § 2323(a)(1)]; and in imposing sentence on a person convicted of an offense under 17 U.S.C. § 506, the court must order, in addition to any other sentence imposed, that the person forfeit to the U.S. government any such property that is subject to civil forfeiture [18 U.S.C. § 2323(b)(1)].

Any person who, with fraudulent intent, places on any article, or publicly distributes or imports for public distribution any article bearing, a notice of copyright or similar words, knowing them to be false, is subject to a fine [17 U.S.C. § 506(c)].

Any person who knowingly makes a false representation of a material fact in an application for registration is also subject to a fine [17 U.S.C. § 506(e)], as is a person who, with fraudulent intent, removes or alters any notice of copyright appearing on a copy of a copyrighted work [17 U.S.C. § 506(d)]. A willful infringement for commercial advantage or private financial gain may subject the infringer to both a fine and imprisonment [17 U.S.C. § 506(a)].

Under state law, a person who fails to disclose the origin of a recording or audiovisual work is subject to being fined or imprisoned, or both, if, for commercial advantage or private financial gain, the person knowingly advertises or offers for sale or resale, or sells or resells, or causes the rental, sale or resale, or rents, or manufactures, or possesses for these purposes, any recording or audiovisual work, the cover, box, jacket, or label of which does not clearly and conspicuously disclose the actual true name and address of the manufacturer and the name of the actual author, artist, performer, producer, programmer, or group [Penal Code § 653w(a)].

[4] Forfeiture of Infringing Materials or Loss of Broadcast License

At any time while an infringement action is pending, the court may order the impounding, on such terms as it may deem reasonable, of (1) all copies or phonorecords claimed to have been made or used in violation of the exclusive right of the copyright owner, (2) all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced, and (3) records documenting the manufacture, sale, or receipt of things involved in any such violation, provided that any records seized must be taken into the custody of the court [17 U.S.C. § 503(a)(1)]. As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced [17 U.S.C. § 503(b)].

In an action for a cable system's alteration of programming [see 17 U.S.C. § 111(c)(3)], the court may order that the cable system be deprived of the benefit of a compulsory license for one or more distant signals carried by the cable system for 30 days [see 17 U.S.C. § 510(b)].

In the event of a conviction for a violation of Penal Code § 653w [see § 103A.91[3]], the court may order the forfeiture

and destruction or other disposition of all articles, including, but not limited to, phonograph records, discs, wires, tapes, films, or any other article on which sounds or images can be recorded or stored, and any and all electronic, mechanical, or other devices for manufacturing, reproducing or assembling these articles, that were used in connection with, or which were part of, the violation [*Penal Code* § 653v].

[5] Nuisance Abatement

Until January 1, 2015 [*Bus. & Prof. Code* § 17802], if there is a conviction for a violation of *Penal Code* § 653w [see § 103A.91[3]], then a nonresidential building or place used by the convicted person in committing that violation is deemed a nuisance that may be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance [*Bus. & Prof. Code* § 17800(a),(c)]. The district attorney of the county where the nuisance exists, or any city attorney in the county, or any citizen of California who resides in the county, may maintain an action to abate and prevent the nuisance and to perpetually enjoin the person conducting or maintaining it, and the owner, lessee, or agent of the building or place, in or on which the nuisance exists, from directly or indirectly maintaining or permitting it [*Bus. & Prof. Code* § 17800(a)]. For discussion and forms for use in an action to abate a nuisance, see California Forms of Pleading and Practice, Ch. 391, *Nuisance* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawCivil Infringement ActionsRemediesGeneral OverviewCopyright LawCivil Infringement ActionsRemediesInjunctive Relief



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33-103A California Legal Forms--Transaction Guide §§ 103A.92-103A.94

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J. Computer Software

33-103A California Legal Forms--Transaction Guide § 103A.95

§ 103A.95 Rights in Computer Software

[1] Extent of Protection

Computer programs (that is, software) are literary works [see 17 U.S.C. § 101 ("computer program" and "literary works" defined)], subject to protection from unauthorized copying under the copyright law [*Apple Computer, Inc. v. Franklin Computer Corp.* (3d Cir. 1983) 714 F.2d 1240, 1249 (computer program in object code embedded in ROM chip is appropriate subject for copyright); see *Williams Electronics, Inc. v. Artic Intern., Inc.* (3d Cir. 1982) 685 F.2d 870, 877 (rejecting argument that infringement of computer program was limited to copying computer text, but not to duplication of computer program fixed on silicon chip); see, e.g., *Micro Star v. Formgen, Inc.* (1998) 154 F.3d 1107, 1112 (CD containing 300 downloaded "levels" of play created by players of popular computer game was unauthorized derivative work); cf. *Sony Computer Enter., Inc. v. Connectix Corp.* (9th Cir. 2000) 203 F.3d 596, 607 (drafting entirely new object code for game station was transformative, despite similarities to defendant's playstation in function and screen output, and thus did not infringe on defendant's copyright)]. However, copyright protection does not extend to the methodology or processes adopted by the programmer, but only to the "writing" expressing the programmer's ideas [H.R. Rep. No. 94-1476, at 57 (1976); see *Apple Computer, Inc. v. Franklin Computer Corp.* (3d Cir. 1983) 714 F.2d 1240, 1250] .

Copyright protection includes the structure, sequence, and organization of the program, as well as its literal code [*Whelan Associates v. Jaslow Dental Laboratory* (3d Cir. 1986) 797 F.2d 1222, 1248] , although the Ninth Circuit has held that certain aspects of graphical user interface software (e.g., the use of windows to display multiple images on a computer screen and to facilitate user interaction with the information contained in the windows; iconic representation of familiar objects from the office environment; manipulation of icons to convey instructions and control operation of the computer; use of menus to store information or computer functions in a place that is convenient to reach, but saves screen space for other images; and opening and closing of objects as a means of retrieving, transferring, and storing information) are "ideas" in which no copyright protection inheres [see *Apple Computer, Inc. v. Microsoft Corp.* (9th Cir. 1994) 35 F.3d 1435, 1443-1444] .

The owner of a copyright in software has a cause of action for infringement if the holder of a license to use the software

makes copies of it in violation of the license [*Wall Data Inc. v. Los Angeles County Sheriff's Dep't* (9th Cir. 2006) 447 F.3d 769, 774 (no fair use defense was available to avoid infringement liability when sheriff's department bought 3,663 single-computer licenses for software, installed that software on more than 6,000 computers in its network, and configured network-managing servers so that no more than 3,663 of those computers could use that software at any given time)].

[2] Limitations on Protection

It is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that program provided that the new copy or adaptation is either [17 U.S.C. § 117(a)]

- Created as an essential step in the utilization of the computer program in conjunction with a machine and is used in no other manner; or
- For archival purposes only and all archival copies are destroyed in the event that continued possession of the computer program ceases to be rightful.

This protection against infringement liability is afforded to an owner, and does not reach a mere licensee, of a copy of the software. Generally, if the copyright owner makes it clear (for instance, in a "shrink-wrap" license or a "click-through" license) that the owner is granting only a license to a copy of software and imposes significant restrictions on the purchaser's ability to redistribute or transfer that copy, then the purchaser is considered to be a licensee, not an owner, of the software [*Wall Data Inc. v. Los Angeles County Sheriff's Dep't* (9th Cir. 2006) 447 F.3d 769, 784-785 (also stating in dictum that even if software purchaser were owner rather than licensee of multiple copies of software, "essential step" defense could not embrace copying of software onto many more computers than number of single-computer licenses that were purchased)]. In actual fact, scarcely any end user of software actually owns a copy of the program--a user merely has a license in almost every case, in accordance with common practice in the software industry.

Exact copies prepared as described above may be leased, sold, or otherwise transferred, along with the copy from which the copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations prepared in this manner may be transferred only with authorization of the copyright owner [17 U.S.C. § 117(b)]. In addition, subject to certain conditions, it is not an infringement for an owner or lessee of a machine to make or authorize the making of a copy of a computer program solely for purposes of maintenance or repair of that machine [see 17 U.S.C. § 117(c)].

For further discussion of protection of computer software, see Ch. 57, *Computer-Related Transactions* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Copyright Protection Formalities & Ownership Interests General Overview Copyright Law Owner Rights General Overview Copyright Law Ownership Interests General Overview



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J. Computer Software

33-103A California Legal Forms--Transaction Guide §§ 103A.96-103A.98

[Reserved]

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K. Semiconductor Chip Protection Act

33-103A California Legal Forms--Transaction Guide § 103A.99

§ 103A.99 Semiconductor Chip Protection

[1] Semiconductor Chips Not Protected Under Traditional Copyright Law

Copyright law does not protect "useful articles" as such, and semiconductor chip products are defined as useful articles for purposes of the copyright law [17 U.S.C. § 101; see H.R. Rep. No. 98-781, at 5-11, *reprinted at* 5 U.S.C.C.A.N. 5754-5760 (1984)]. "Masks" (as distinguished from "mask works"), which are the schematic drawings of chip layouts and accompanying technical information, may be registered under the copyright law as technical drawings. However, the protection of a technical drawing does not protect the copyright owner with respect to unauthorized duplication of the finished useful article (the chip embodying the mask work) represented by the drawing [see 17 U.S.C. § 113; H.R. Rep. No. 98-781, at 8, *reprinted at* 5 U.S.C.C.A.N. 5757 (1984); see also 17 U.S.C. § 901(a)(2) ("mask work" defined as series of related images that represent patterns embodied in semiconductor chip product); see generally 17 U.S.C. § 901(a) (definitions)].

[2] "Industrial Copyrights" for Mask Works Embodied in Semiconductor Chips

The Semiconductor Chip Protection Act of 1984 (the Act) [17 U.S.C. § 901 *et seq.*] created a new approach to protecting intellectual property embodied in semiconductor chips by means of an "industrial copyright," as distinguished from the traditional author's copyright. This industrial copyright is designed to protect the mask work, which is an integral part of the manufacturing process of and embodied in a chip, and therefore the chip, from unauthorized duplication [see H.R. Rep. No. 98-781, at 5-11, *reprinted at* 5 U.S.C.C.A.N. 5754-5760 (1984)].

The Act defines a semiconductor chip product ("chip") as a product that has two or more layers of metallic, insulating, or semiconductor material deposited on or etched from a piece of semiconductor material, and functions as an electronic circuit [17 U.S.C. § 901(a)(1)]. A "mask work" is a series of related images that represent the patterns embodied in a semiconductor chip product [see 17 U.S.C. § 901(a)(2)].

The Act [17 U.S.C. § 901 *et seq.*] provides protection for and exclusive rights to persons owning semiconductor chip products. The Act is specific to semiconductor chips, but other applicable copyright provisions are still available [17 U.S.C. § 912(a); see, e.g., [1], *above*]. The owner of a mask work protected under the Act [17 U.S.C. § 901 *et seq.*] has

the exclusive rights to do and to authorize the reproduction of the mask work by any means or the importation or distribution of a semiconductor chip product in which the mask work is embodied [17 U.S.C. § 905; *see* 17 U.S.C. § 902(a), (b) (eligibility for protection); *see also* 17 U.S.C. §§ 902(c), 906(a) (limitations on protected rights)]. Owner's rights are further discussed in [3], *below*.

[3] Owner's Exclusive Rights

The "owner" of a mask work is the person who created it, that person's legal representative if deceased or legally incapacitated, or a transferee. However, if the mask work is created within the scope of a person's employment, the owner is the employer for whom the mask work was created or the transferee from the employer [17 U.S.C. § 901(a)(6)].

In general, the owner of a mask work protected under the Semiconductor Chip Protection Act (the Act) has exclusive rights to reproduce the mask work or to import or distribute the chip in which it is fixed or embodied and may induce or permit others to do either of these [17 U.S.C. §§ 903(a), 905]. The owner of exclusive rights in a mask work may transfer all of them or license all or less than all of them [17 U.S.C. § 903(b)]. However, if a license has been granted, the owner of a chip made by the licensee may import, distribute, dispose of, or use the chip without further authorization from the owner of the mask work [17 U.S.C. § 906(b)].

Any license or transfer of rights in a mask work may be accomplished by a written instrument signed by the owner or his or her agent [17 U.S.C. § 903(b)]. For a semiconductor chip license agreement, *see* Ch. 57, *Computer-Related Transactions*, Form 57.52. An owner's rights in a mask work may also be transferred or licensed by operation of law, be bequeathed, or pass under the law of intestate succession [17 U.S.C. § 903(b)].

[4] When Protection Applies

A mask work fixed in a semiconductor chip is eligible for protection under the Act in the following circumstances:

- If the mask work is first commercially exploited in the United States [*see* 17 U.S.C. § 902(a)(1)(B)].
- If, on the date on which the mask work is registered with the Copyright Office [*see* 17 U.S.C. § 908; *see also* [5][a], *below*] or is first commercially exploited anywhere in the world, whichever occurs first, the owner is a national or domiciliary of the United States or a nation that protects mask works, or is a stateless person domiciled anywhere [*see* 17 U.S.C. § 902(a)(1)(A), (C), (2)].

Commercial exploitation of a mask work is the distribution of the chip that embodies the mask work to the public for commercial purposes. However, "commercial exploitation" includes an offer to sell or transfer a chip only if the offer is in writing and the offer occurs after the mask work is fixed in the chip [17 U.S.C. § 901(a)(5)].

[5] Duration of Protection

[a] With Registration

The protection provided for a mask work begins on the date the mask work is registered or the date it is first commercially exploited anywhere in the world, whichever occurs first [17 U.S.C. § 904(a); *see* 17 U.S.C. § 908 (registration procedures); *see also* [9], *below*], whichever occurs first. When the mask work is registered, the rights of the owner are protected for 10 years [17 U.S.C. § 904(b)].

[b] Without Registration

An unregistered mask work is protected for two years from the date on which it is first commercially exploited

anywhere in the world. Protection will terminate at the end of that time unless an application for registration has been made within the two-year period [17 U.S.C. § 908(a)]. However, registration is a prerequisite to an infringement action [see 17 U.S.C. § 910(b)(1); but see 17 U.S.C. § 910(b)(2) (permitting infringement action following refusal of registration)], and so, as a practical matter, registration is necessary in order to enforce any of the exclusive rights possessed by the owner of the mask work. Thus, the Act essentially provides the owner with a two-year grace period within which to register the work.

[6] Scope of Protection

There is no protection under the Act for a mask work that is not original or that is commonplace or familiar in the semiconductor industry [17 U.S.C. § 902(b)]. Protection does not extend to any idea, concept, principle, system, discovery, procedure or process, or method of operation, regardless of the form in which it is embodied or described in the mask work [17 U.S.C. § 902(c)].

If a chip contains patented circuitry, the patent is not affected by the fact that the mask work is protected under the Act. Similarly, mask work protection does not affect the scope, duration, ownership, or subsistence of copyright protection of programs, data bases, or any other copyrightable work embodied in the chip [see 17 U.S.C. § 912(a)].

State laws providing equivalent protection to mask works are preempted [see 17 U.S.C. § 912(c), (d)]. However, state laws protecting trade secrets are a different form of protection and are not preempted [see H.R. Rep. No. 98-781, at 28, 29, *reprinted at* 5 U.S.C.C.A.N. 5777 (1984)].

Reproduction of the mask work is not an infringement of the owner's rights if done solely for "reverse engineering" purposes, that is, for teaching, analyzing, or evaluating the concepts or techniques embodied in the mask work or the inherent circuitry, logic flow, or organization used in the mask work [17 U.S.C. § 906(a)(1)]. It is not an infringement for the person who performs this type of analysis or evaluation to incorporate the results in an original mask work made for distribution [17 U.S.C. § 906(a)(2)]. This limitation on the owner's rights is intended to permit and encourage improvements on or alternatives to the chip, but only if the second mask work is the product of substantial study and analysis and not the mere result of plagiarism [see H.R. Rep. No. 98-781, at 21-23, *reprinted at* 5 U.S.C.C.A.N. 5770-5772 (1984)].

The reverse-engineering provision allows copying the entire mask work. It does not distinguish between the protectable and non-protectable elements of the chip as long as the copying is for the purpose of teaching, evaluating, or analyzing the chip. Although a product created from that analysis must be original, the process of studying the chip is not limited to copying ideas or concepts. It is permissible to reproduce a registered mask work as a step in the process of creating an original chip, as long as the purpose of reproducing the chip is appropriate. Only minimal ingenuity is necessary for a second chip to qualify as original. Since the similarities in a chip may outweigh the differences, in an infringement action there would have to be sufficient evidence about both the similarities and the differences in the mask works to allow a jury to determine whether the allegedly infringing mask works were original as defined under the Act [*Altera Corp. v. Clear Logic, Inc.* (9th Cir. 2005) 424 F.3d 1079, 1088] .

[7] Notice of Protection

The owner of a mask work for which protection is provided may affix notice to the mask work and to masks and semiconductor chip products embodying the mask work, in a manner and location as to give reasonable notice of that protection. The affixation of notice is not a condition of protection, but constitutes prima facie evidence of notice of protection [17 U.S.C. § 909].

The notice must consist of the words "mask work," the symbol "M*", or the symbol "M" (the letter M in a circle), and the name of the owner or an abbreviation by which it is recognized or generally known [17 U.S.C. § 909(b); 37

C.F.R. § 211.6(b)(1), (2). The notice may be a label securely affixed or imprinted on the package or container used as a permanent receptacle of the chip or a notice imprinted on or otherwise affixed in the top or other visible layer of the chip [*37 C.F.R. § 211.6(c)*].

[8] Documentation of Protection

The exclusive rights in a mask work subject to protection belong to the owner of the mask work, who may transfer or bequeath all or any part of those rights by written instrument [*17 U.S.C. § 903(a), (b)*; see [5], *above* (duration of protection)]. Any document pertaining to a mask work may be recorded in the Copyright Office, and the recordation of any transfer or license gives all persons constructive notice of the facts stated in the recorded document [*17 U.S.C. § 903(c)(1)*]. In the case of a conflicting transfer of the exclusive rights in a mask work, the first executed will be void as against a subsequent transfer that is made for a valuable consideration and without notice of the first transfer, unless the first transfer is recorded within three months after the date of its execution and prior to the date of the subsequent transfer [*17 U.S.C. § 903(c)(2)*].

[9] Application for Registration

The owner of a mask work may apply to the Register of Copyrights for registration of a claim of protection in a mask work. Protection will terminate if the application is not made within two years after the date on which the mask work is first commercially exploited [*17 U.S.C. § 908(a)*; see [5], *above* (duration of protection)].

PRACTICE TIP:

As a practical matter, waiting to register the work until near the end of the two-year pre-registration commercial exploitation period will not extend the period of protection, because protection of a mask work begins either on the date the mask work is registered or when it is first commercially exploited anywhere in the world, whichever occurs first [*17 U.S.C. § 904(a)*; see [5], *above*].

Application is made on a form prescribed by the Register of Copyrights and designed to elicit information relating to the preparation or identification of the mask work, the existence or duration of protection, and ownership [*17 U.S.C. § 908(c)*]. The application must be accompanied by the fee set by the Copyright Office [see *37 C.F.R. § 211.3(a)*] and all required identifying material [*17 U.S.C. § 908(c), (d)*]. For detailed discussion of these requirements and an illustration of the application form, see § 103A.240.

The effective date of registration of a claim of protection is the date on which an application and necessary accompanying material was received in the Copyright Office [*17 U.S.C. § 908(e)*].

Any applicant for registration who is dissatisfied with the refusal of the Register of Copyrights to issue a certificate of registration may seek judicial review of that refusal. The failure of the Register of Copyrights to issue a certificate of registration within four months after an application was filed constitutes a refusal [*17 U.S.C. § 908(g)*; see *17 U.S.C. § 910(b)(2)* (institution of civil action for infringement); see also [11][b], *below*].

[10] Recordation of Documents Relating to Mask Works

Any document relating to a mask work may be recorded in the Copyright Office. Recordation gives all persons constructive notice of the facts concerning the transfer or license [*17 U.S.C. § 903(c)(1)*]. The procedures for recordation are the same as those applicable to documents related to copyrighted works [*37 C.F.R. §§ 201.4, 211.2* (requirements for recordation)]. For a guide to those procedures, see § 103A.152.

[11] Infringement

[a] Violation of Exclusive Rights

Any person who violates any of the exclusive rights of the owner of a mask work by conduct in or affecting commerce is liable as an infringer of those rights [17 U.S.C. § 910(a)]. For purposes of infringements occurring on or after November 15, 1990, "any person" includes any state, any instrumentality of a state, and any officer or employee of a state or instrumentality of a state acting in his or her official capacity [17 U.S.C. § 910(a); Pub. L. No. 101-553, § 3, 104 Stat. 2749 (1990) (effective date)]. For infringement occurring on and after that date, any state, and any instrumentality of the state, officer, or employee, is subject to the provisions of the Act [17 U.S.C. 901 *et seq.*] in the same manner and to the same extent as any nongovernmental entity [17 U.S.C. § 910(a); *see* 17 U.S.C. § 911(g)(1) (states are not immune from suit in federal court for violation of the Act)]. Sovereign immunity under the Copyright Act of 1976 is discussed in § 103A.90.

[b] Civil Action

Articles imported in violation of the owner's rights are subject to seizure and forfeiture in the same manner as property imported in violation of the customs laws. Any forfeited articles will be destroyed as directed by the Secretary of the Treasury or the court, except that the articles may be returned to the country of export whenever it is shown that the importer had no reasonable grounds for believing that his or her acts constituted a violation of the law [17 U.S.C. § 910(c)(2)].

The owner of a protected mask work or its exclusive licensee is entitled to institute a civil action for any infringement with respect to the mask work that is committed after the commencement of that protection [17 U.S.C. § 910(b)(1)]. Any court having jurisdiction of a civil action arising under the Act may grant temporary and permanent injunctive relief on terms the court deems reasonable to prevent or restrain infringement of the exclusive rights in a mask work [17 U.S.C. § 911(a)]. An action for infringement must be brought within three years after the claim accrues [17 U.S.C. § 911(d)]. For discussion of the right to sue under 17 U.S.C. § 910(b)(2) if registration is applied for but refused, see [g], *below*.

[c] Damages

On finding liability for infringement of any exclusive right, the court must award actual damages suffered as a result of the infringement. The court also must award the infringer's profits that are attributable to the infringement and that are not taken into account in computing the award of actual damages. In establishing the infringer's profits, the injured person need present proof only of the infringer's gross revenue; the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the mask work [17 U.S.C. § 911(b), (g)(2)].

A person entitled to institute a civil action for infringement may elect, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one mask work for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in an amount not more than \$250,000 [17 U.S.C. § 911(c), (g)(2)].

[d] Other Available Relief

At any time while an action for infringement of the exclusive rights in a mask work is pending, the court may order the impounding of all semiconductor chip products, and any articles by means of which those products may be reproduced, that are claimed to have been made, imported, or used in violation of those exclusive rights. Applications for those orders will be heard and determined in the same manner as an application for preliminary injunctive relief [17 U.S.C. § 911(e)(1), (g)(2)]. As part of a final judgment, the court may order the destruction or other disposition of any infringing semiconductor chip products, and any articles by means of which those products may be reproduced [17 U.S.C. § 911(e)(2), (g)(2)].

[e] Attorneys' Fees and Costs

The court may allow the recovery of full costs, including reasonable attorneys' fees, to the prevailing party [17 U.S.C. § 911(f), (g)(2)].

[f] Evidentiary Effect of Registration Certificate

In any action for infringement, the certificate of registration constitutes prima facie evidence of the facts stated in the certificate and of the fact that the applicant who was issued the certificate has met the requirements of the Act [17 U.S.C. § 901 *et seq.*] and applicable regulations, with respect to the registration of claims [17 U.S.C. § 908(f)].

[g] When Application for Protection Is Refused

If the application for registration of a claim of protection and registration of the mask work has been refused, the applicant may institute a civil action for infringement if notice of the action, together with a copy of the complaint, is served on the Register of Copyrights. The Register may opt to become a party to the action with respect to the issue of whether the claim of protection is eligible for registration, but his or her failure to become a party shall not deprive the court of jurisdiction to determine that issue [17 U.S.C. § 910(b)(2)].

[h] Imported Goods

Articles imported in violation of the owner's rights are subject to seizure and forfeiture in the same manner as property imported in violation of the customs laws. Any forfeited articles must be destroyed as directed by the Secretary of the Treasury or the court, except that the articles may be returned to the country of export whenever it is shown that the importer has no reasonable grounds for believing the his or her acts constituted a violation of the law [17 U.S.C. § 910(c)(2)].

[i] Limitation of Liability of Innocent Purchaser

An innocent purchaser of an infringing semiconductor chip product will not incur liability with respect to the importation or distribution of units of the infringing semiconductor chip product that occurs before the innocent purchaser has notice of protection with respect to the mask work embodied in the semiconductor chip product [17 U.S.C. § 907; *see* 17 U.S.C. § 901(a)(7) (*innocent purchaser* is one who buys a chip in good faith and without notice of its protection under the Act)]. That innocent purchaser is liable only for a reasonable royalty on each unit of the infringing semiconductor chip product that he or she imports or distributes after having notice of protection with respect to the mask work embodied in the semiconductor chip product. These limitations extend to any person who directly or indirectly purchases an infringing semiconductor chip product from an innocent purchaser [17 U.S.C. § 907].

PRACTICE TIP:

Because neither registration, recordation of documents, nor the placement of a notice symbol on a legitimate chip is likely to give an otherwise innocent purchaser actual knowledge of the infringement, the only way the owner of a mask work can protect itself against infringement is to do whatever possible to make itself aware of all new chips that enter the marketplace, whether incorporated into a computer or not [*see* 17 U.S.C. § 901(b) (distribution of computer is distribution of chip)], determine whether or not any of them infringe on its protected mask work, and notify the producer and purchaser of any claimed infringement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawOwner RightsGeneral OverviewCopyright LawOwnership InterestsGeneral OverviewCopyright LawSubject MatterSemiconductor Chips & Boat HullsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

33-103A California Legal Forms--Transaction Guide § 103A.100

§ 103A.100 Facts--Copyright Registration

1. Name and address of copyright claimant.
2. For identified author(s):
 - a. Name.
 - b. Nationality or domicile.
 - c. Date of death, if applicable.
3. For anonymous or pseudonymous work, nationality or domicile of author(s).

NOTE:

An "anonymous work" is a work the copies or phonorecords of which do not identify any natural person as the author. A "pseudonymous work" is a work the copies or phonorecords of which identify the author under a fictitious name [17 U.S.C. § 101].

4. Whether or not work is made for hire [see 17 U.S.C. § 101; see also § 103A.46[3]].
5. If copyright claimant is not author, method by which claimant obtained ownership of copyright.
6. Type of work.
7. Title of work, and any previous or alternative titles under which work can be identified.
8. Year creation of work was completed.

9. For published work, date and nation in which it was first published.

NOTE:

Distribution before January 1, 1978, of a phonorecord does not constitute publication of the musical work embodied in the phonorecord [17 U.S.C. § 303(b); *see Batjac Prods. Inc. v. Goodtimes Home Video Corp. (9th Cir. 1998) 160 F.3d 1223, 1235*]. This rule also applies to works released on phonorecords after that date [*see* 17 U.S.C. § 302].

10. For compilation or derivative work [*see* § 103A.22[3]]:

- a. Identification of any preexisting work(s) that client's work is based on or incorporates.
- b. Additional material covered by copyright claim being registered.

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawFormalitiesDeposit & RegistrationRegistrationGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

33-103A California Legal Forms--Transaction Guide § 103A.101

§ 103A.101 Documents

1. Previous complete versions of work or of any of its components.
2. Any similar works previously published by others.
3. Previously issued certificates of copyright in work or any of its other versions or components.
4. Agreements transferring (on exclusive or nonexclusive basis) any rights in work or any of its previous versions or components.
5. Materials (for example, playbills, notices, posters, ads, etc.) evidencing dates, places, and other identifying indicia of any previous public or nonpublic performances, displays, or other presentations of work.
6. Best editions (one or more copies or phonorecords) of work (or exhibits evidencing existence if it is otherwise impractical to transmit them) [*see 17 U.S.C. § 101* ("best edition" defined); *see also § 103A.121*, P 1b, NOTE].
7. Earliest tangible versions or formulations of present work extant, or other original fragments.
8. Accounting records showing receipt of any royalties or other compensation for any previous use of work.
9. Agreements with others to compose or produce work.

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawFormalitiesGeneral Overview



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33-103A California Legal Forms--Transaction Guide §§ 103A.102-103A.109

[Reserved]

§§ 103A.102[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

33-103A California Legal Forms--Transaction Guide § 103A.110

§ 103A.110 Availability of Copyright Protection

1. Does work satisfy all of following criteria and therefore qualify for federal copyright protection [17 U.S.C. § 301]?

a. Is it an "original work of authorship" [17 U.S.C. § 102(a); *see* 17 U.S.C. § 101]?

NOTE:

This phrase, which is purposely left undefined in the Copyright Law, is intended to incorporate without change the standard of originality established by the courts under the prior copyright law [*see* H.R. Rep. No. 94-1476, at 51, 52 (1976); *see also* § 103A.22[1]].

(1) Works of authorship include [17 U.S.C. § 102(a); *see* 17 U.S.C. § 101]:

(a) Literary works.

(b) Musical works, including any accompanying words.

(c) Dramatic works, including any accompanying music.

(d) Pantomimes and choreographic works.

(e) Pictorial, graphic, and sculptural works.

(f) Motion pictures and other audiovisual works.

(g) Sound recordings.

(h) Architectural works.

(2) Does work contain any one of the following unprotected categories of work [17 U.S.C. § 102(b)]?

NOTE:

The statutory exclusion of the following categories applies regardless of the form in which they are described, explained, illustrated, or embodied in the work [17 U.S.C. § 102(b)].

For examples of these excluded works, see § 103A.23.

(a) Ideas.

(b) Procedures.

(c) Processes.

(d) Systems.

(e) Methods of operation.

(f) Concepts.

(g) Principles.

(h) Discoveries.

b. Is work fixed in any tangible medium of expression from which it can be perceived, reproduced, or otherwise communicated, either directly or with aid of machine or device [17 U.S.C. § 102(a)]?

NOTE:

A work is "fixed" in a tangible medium of expression when its authorized embodiment in a copy or phonorecord is sufficiently permanent to permit it to be communicated for a period of more than transitory duration. This includes a work consisting of transmitted sounds, images, or both if a fixation of the work is made simultaneous with its transmission [17 U.S.C. § 101]. An unfixed work of authorship, such as an improvisation or an unrecorded choreographic work, performance, or broadcast, continues to be subject to protection under state common law or statute, but is not eligible for federal statutory protection [*see* 17 U.S.C. § 301; *see also* H.R. Rep. No. 94-1476, at 131 (1976)].

c. Does work fall within either of following categories that do not qualify for federal copyright protection?

(1) Work produced by federal government.

NOTE:

The federal government is not precluded from receiving and holding copyrights transferred to it by any method [17 U.S.C. § 105].

(2) Sound recording fixed before February 15, 1972 [17 U.S.C. § 301(c); *see* H.R. Rep. No. 94-1476, at 133 (1976); *see also* *Nimmer On Copyright*, Ch. 2, *The Subject Matter of Copyright*, § 2.10(A) (Matthew Bender)].

2. If work is ineligible for federal copyright protection, does it qualify for common law or state statutory copyright protection?

a. Subject matter is excluded from scope of Copyright Act [*see 17 U.S.C. § 301(b)(1)*; *see also* P 1, *above*].

NOTE:

Examples of this kind of subject matter include the following works of authorship that are not considered fixed in any tangible medium of expression: choreography that has not been filmed or notated, extemporaneous speeches, original works of authorship communicated solely through conversations or live broadcasts, and dramatic sketches or musical compositions improvised or developed from memory, without being recorded or written down [*17 U.S.C. § 301(b)(1)*; H.R. Rep. No. 94-1476, at 131 (1976)].

b. Matter involves any cause of action arising from undertakings started before January 1, 1978.

NOTE:

The Copyright Act of 1909 (former *17 U.S.C. §§ 1-216*) applies to undertakings begun before January 1, 1978, if the work in question attained federal copyright under its provisions [*Magnuson v. Video Yesteryear* (9th Cir. 1996) 85 F.3d 1424, 1427] .

c. Matter involves activity that violates legal or equitable rights that are not equivalent to any exclusive rights within general scope of federal copyright [*17 U.S.C. § 301(b)(3)*].

NOTE:

These activities are matters of commercial or personal rights, such as privacy, publicity, trade secrets, deceptive trade practices, and misappropriation [H.R. Rep. No. 94-1476, at 132 (1976)].

d. Matter involves common law or state law rights or remedies governing sound recordings fixed before February 15, 1972 [*17 U.S.C. § 301(c)*].

e. State and local landmarks, historic preservation, zoning, or building codes relating to architectural works protected under the copyright law [*17 U.S.C. §§ 101* ("architectural works" defined), 102(a)(8) (applicability of copyright protection)].

3. If subject matter of work qualifies under copyright law [*see* P 1, *above*], does author's nationality or domicile affect copyrightable status of work [*see 17 U.S.C. § 104*]?

a. Federal copyright protection applies to unpublished works without regard to author's nationality or domicile [*17 U.S.C. § 104(a)*].

b. For published works, federal protection applies if [*17 U.S.C. § 104(b)*]:

(1) On date of first publication [*see 17 U.S.C. § 101* ("publication" defined)], one or more of work's authors is any of following:

(a) National or domiciliary of United States;

(b) National, domiciliary, or sovereign authority of treaty party; or

(c) Stateless person, wherever domiciled.

(2) Work is first published in:

(a) United States; or

(b) Foreign nation that, on date of first publication, is treaty party.

(3) Work is sound recording that was first fixed in treaty party.

(4) Work is in or on building or structure located in United States or treaty party and is either:

(a) Pictorial, graphic, or sculptural work that is incorporated in building or other structure, or

(b) Architectural work that is embodied in building.

(5) Work is first published by:

(a) United Nations or any of its specialized agencies; or

(b) Organization of American States.

(6) Work comes within scope of Presidential proclamation.

4. If work is compilation or derivative work [see § 103A.22[3]], what portions qualify for protection under copyright law?

a. Copyright extends only to material contributed by author of compilation or derivation [17 U.S.C. § 103(b)].

NOTE:

The copyright in a compilation or a derivative work does not imply any exclusive right in the preexisting material. The copyright is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material [17 U.S.C. § 103(b)].

b. Protection does not extend to:

(1) Preexisting material employed in work [17 U.S.C. § 103(b)]; or

(2) Any part of work in which preexisting material has been used unlawfully [17 U.S.C. § 103(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright Law Collective & Derivative Works Scope of Protection



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

33-103A California Legal Forms--Transaction Guide § 103A.111

§ 103A.111 Copyright Ownership

1. Who will own copyright?

a. Author of work [17 U.S.C. § 201(a)].

b. If joint work, the authors [17 U.S.C. § 201(a)].

NOTE:

A "joint work" is one prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole [17 U.S.C. § 101]. These authors are co-owners of the copyright and, as such, are tenants in common. As a tenant in common, each co-owner has an independent right to license the use of the work, subject to a duty of accounting to the other co-owners for any profits [H.R. Rep. No. 94-1476, at 121 (1976); *see Pye v. Mitchell* (9th Cir. 1978) 574 F.2d 476, 480] .

c. If work is made for hire, employer, unless parties have signed written agreement to the contrary [17 U.S.C. § 201(b)].

NOTE:

A "work made for hire" is a work prepared by an employee within the scope of his or her employment, or a work specially ordered or commissioned for certain specified uses if the parties agree in writing that the work will be considered a work made for hire [*see* 17 U.S.C. § 101; *Community for Creative Non-Violence v. Reid* (1989) 490 U.S. 730, 748-751, 109 S. Ct. 2166, 104 L. Ed. 2d 811 ; *see also* Ch. 84, *Independent Contractors* ; Ch. 85, *Employment Agreements*].

d. If work is a collective work [17 U.S.C. § 201(c)]:

NOTE:

A "collective work" is one in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole [*17 U.S.C. § 101*].

(1) Author of each individual contribution owns copyright in that contribution.

(2) Owner of copyright in collective works is presumed to have acquired only privilege of reproducing and distributing as part of:

(a) That particular collective work;

(b) Any revision of that collective work; and

(c) Any later collective work in same series.

2. Who will own any material object in which copyrighted work is embodied [*see 17 U.S.C. § 202*]?

NOTE:

Ownership of a copyright or any of the exclusive rights under it is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of the object does not of itself convey any rights in the copyrighted work embodied in the object. Further, in the absence of agreement, transfer of ownership of the copyright or any exclusive rights does not convey property rights in any material object [*17 U.S.C. § 202*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Ownership Interests General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

33-103A California Legal Forms--Transaction Guide §§ 103A.112-103A.119

[Reserved]

§§ 103A.112[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART III. TRANSACTION GUIDE

C. Procedural Guide

1. Copyright Owner

33-103A California Legal Forms--Transaction Guide § 103A.120

§ 103A.120 Affixing Notice of Copyright

NOTE:

Works first publicly distributed by authority of the copyright owner on or after March 1, 1989 [*see* Pub. L. 100-568, § 13, 102 Stat. 2861], are not required to have a notice of copyright affixed to them [17 U.S.C. § 401(a)]. However, affixing a notice benefits the copyright owner by limiting an infringer's ability to successfully raise an "innocent infringement" defense in an infringement action [17 U.S.C. §§ 401(d), 402(d)]. For further discussion of this point, see § 103A.62[4].

1. If desired, whenever copyrighted work is published anywhere by copyright owner, place notice of copyright on all publicly distributed copies from which work can be visually perceived either directly or with aid of machine or device [17 U.S.C. § 401(a); *see* 17 U.S.C. § 101 ("published" defined)].

a. Position notice in manner and location that will [17 U.S.C. § 401(c); *see* 37 C.F.R. § 201.20]:

(1) Give reasonable notice of claim of copyright; and

(2) Satisfy any:

(a) Additional applicable statutory requirements [*see* PP 2-4, *below*]; and

(b) Applicable regulatory methods of affixation and positioning [*see* § 103A.120 P (5)].

b. Include following elements in notice [*see* 17 U.S.C. § 401(b)]:

(1) One of the following:

(a) Copyright symbol © (letter "C" in a circle).

(b) Word "Copyright."

(c) Abbreviation "Copr."

(2) Year of first publication of work.

NOTE:

For compilations or derivative works with previously published material, the year of first publication of the compilation or derivative work is sufficient. The year may be omitted from pictorial, graphic, or sculptural works (with or without accompanying text) that are reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or useful articles [17 U.S.C. § 401(b)(2); *see* 17 U.S.C. § 101 ("useful article" defined)].

(3) Identity of copyright owner by one of following [17 U.S.C. § 401(b)(3)]:

(a) Name.

(b) Abbreviation by which name can be recognized.

(c) Generally known alternative designation of owner.

2. Affix notice of copyright to all publicly distributed phonorecords of copyrighted sound recording published anywhere under authority of copyright owner [*see* 17 U.S.C. § 402(a); *see* 17 U.S.C. § 101 ("published," "phonorecords," "sound recordings" defined)].

a. Place notice on one of following in manner and location that give reasonable notice of copyright claim [*see* 17 U.S.C. § 402(c)]:

(1) Surface of phonorecord; or

(2) Phonorecord label or container.

b. Include following elements in notice [17 U.S.C. § 402(b)]:

(1) Symbol [Sound recording copyright] (letter "P" in a circle).

(2) Year of first publication of sound recording.

(3) Identity of copyright owner, by either [17 U.S.C. § 402(b)]:

(a) Name;

(b) Abbreviation by which name can be recognized; or

(c) Generally known alternative designation of owner.

NOTE:

If the producer of the sound recording is named on the phonorecord labels or containers,

and if no other name appears in conjunction with the notice, the producer's name will be considered a part of the notice [17 U.S.C. § 402(b)(3)].

3. Whenever work incorporating United States government works (and consisting preponderantly of one or more works of those works) is published [see 17 U.S.C. § 101 ("published" defined)], prepare and affix notice by:

- a. Satisfying requirements described in P 1 or 2, *above*; and
- b. Including statement identifying, either affirmatively or negatively, those portions of copy or phonorecord embodying any copyrighted work [see 17 U.S.C. § 403].

NOTE:

Works of the federal government are not eligible for copyright protection [see 17 U.S.C. § 105].

4. For collective work consisting of separate contributions, affix notice [see 17 U.S.C. § 404(a)]:

- a. On separate contributions in manner discussed in PP 1-3, *above* [see 37 C.F.R. § 201.20 (regulatory examples of placement); see also § 103A.120, P 5c]; and/or
- b. As single notice [see PP 1-3, *above*, for applicable requirements], which will:

NOTE:

The option discussed in P b, *above*, applies regardless of the ownership of copyright in the contributions and whether or not they have been previously published. It does not apply to advertisements inserted on behalf of persons other than the owner of copyright in the collective work [17 U.S.C. § 404(a)].

(1) Be applicable to collective work as a whole; and

(2) Satisfy notice requirements with respect to separate contributions it contains.

NOTE:

With respect to copies and phonorecords publicly distributed before March 1, 1989, if the person named as the copyright owner of the collective work as a whole is not the owner of copyright in a separate contribution that does not bear its own notice, the separate contribution is subject to the law governing erroneous names in copyright notices [17 U.S.C. § 404(b); see 17 U.S.C. § 406(a); Pub. L. No. 100-568, §§ 7(d), 13, 102 Stat. 2858, 2861]. For further discussion of this issue, see § 103A.62[2].

5. For visually perceptible copies of copyrighted works, comply with following, if applicable [see 37 C.F.R. § 201.20(d)-(i)]:

NOTE:

The Register of Copyrights has promulgated the following regulatory examples of methods of affixation and positions of the copyright notice on various works. These methods satisfy the notice requirement of 17 U.S.C. § 401(c) [see § 103A.120, P 1a], but are not exhaustive of satisfactory methods of affixation and positioning [17 U.S.C. § 401(c); 37 C.F.R. § 201.20]. Whether a notice affixed according to the

regulations is acceptable depends on whether it is permanently legible to an ordinary user of the work under normal conditions of use and affixed to the copies in such a manner and position that it is not concealed from view on reasonable examination [37 C.F.R. § 201.20(c)(1)]. If the notice is not affixed in one of the locations provided in the regulatory examples, it will still be acceptable if a person looking in one of those locations would be reasonably certain to find the notice in another somewhat different location [37 C.F.R. § 201.20(c)(2)].

a. For works published in book form [see 37 C.F.R. § 201.20(b)(4)], reproduce notice in any of following positions [37 C.F.R. § 201.20(d)]:

- (1) Title page.
- (2) Page immediately following title page.
- (3) Either side of front cover and if none exists, either side of front leaf.
- (4) Either side of back cover and if none exists, either side of back leaf.
- (5) First page of main body of work.
- (6) Last page of main body of work.
- (7) Any page between front page and first page of main body, if:
 - (a) There are no more than 10 pages between front page and first page of main body; and
 - (b) Notice is reproduced prominently and set apart from other matter on page where it appears.
- (8) Any page between last page of main body and back page, if:
 - (a) There are no more than 10 pages between last page of main body and back page; and
 - (b) Notice is reproduced prominently and set apart from other matter on page where it appears.

b. For work published as issue of periodical or serial, any of following locations:

- (1) Any location specified in PP a(1)-(8), *above*.
- (2) As part of, or adjacent to, masthead [see 37 C.F.R. § 201.20(b)(8) ("masthead" defined)].
- (3) On page containing masthead if notice is reproduced prominently and is set apart from other matter appearing on page.
- (4) Adjacent to a prominent heading, appearing at or near front of issue, containing title of periodical or serial and any combination of volume and issue number and date of issue.

c. For musical work:

(1) Any location specified in P a or b, *above*; or

(2) On first page of music.

d. For single-leaf works [*see 37 C.F.R. § 201.20(b)(9)* (definition)], reproduce notice anywhere on front or back of leaf [*37 C.F.R. § 201.20(e)*].

e. For separate contribution to collective work that will bear its own notice of copyright [*see 37 C.F.R. § 201.20(f)*; *see also 17 U.S.C. § 404*; § 103A.122 P (4)(b)]:

(1) If separate contribution is reproduced on single page, place notice:

(a) Under title of contribution on that page;

(b) Adjacent to contribution; or

(c) On same page if, through format, wording, or both, application of notice to particular contribution is made clear.

(2) If separate contribution is reproduced on more than one page of collective work, place notice:

(a) Under a title appearing at or near beginning of contribution;

(b) On first page of main body of contribution;

(c) Immediately following end of contribution; or

(d) On any page where contribution appears, if contribution is reproduced on no more than 20 pages of collective work;

NOTE:

If the notice appears as described in P d, *above*, it must be reproduced prominently and set apart from any other matter on the page where it appears. Further, the format and wording, or both, of the notice must make it clear that the notice applies to the separate contribution [*37 C.F.R. § 201.20(f)(2)(iv)(B), (C)*].

(3) If separate contribution is musical work, place notice:

(a) In any location specified in P (1) or (2), *above*; or

(b) On first page of music of contribution.

(4) As alternative to placing notice on page where separate contribution itself appears, place notice clearly in juxtaposition with separate listing of contribution:

(a) By title; or

(b) If contribution is untitled, by description reasonably identifying contribution.

NOTE:

The placement of the notice in juxtaposition with this description will suffice only if the notice and description appear on the page bearing the copyright notice for the collective work as a whole, or in a clearly identified and readily accessible table of contents or listing of acknowledgments appearing near the front or back of the collective work as a whole [37 C.F.R. § 201.20(f)(4)].

f. For works reproduced in machine-readable copies, affix and position notice in any of following ways [37 C.F.R. § 201.20(g)]:

NOTE:

Examples of these works are magnetic tapes or disks, or punched cards, from which the work cannot ordinarily be visually perceived except with the aid of a machine or device [37 C.F.R. § 201.20(g)].

(1) Include notice in copies in machine-readable form so that on printouts it appears either with or near title, or at end of work.

(2) Display notice:

(a) At user's terminal at sign-on; and

(b) Continuously on terminal display.

(3) Reproduce notice legibly and durably (so as to withstand normal use) on gummed or other label securely affixed to:

(a) Copies; or

(b) Box, reel, cartridge, cassette, or other container used as permanent receptacle for copies.

g. For motion pictures and other audio-visual works [37 C.F.R. § 201.20(h)]:

(1) Include notice in copies by photomechanical or electronic process, so that it ordinarily would appear whenever work is performed in its entirety.

(2) Place notice:

(a) With or near title;

(b) With cast, credits, and similar information;

(c) At or immediately following beginning of work; or

(d) At or immediately preceding end of work.

(3) For untitled motion picture or other audiovisual work whose duration is 60 seconds or less, include notice:

(a) In any location listed in P (1), *above*; or

(b) In copies by photomechanical or electronic process, on leader of film or tape immediately preceding beginning of work, so that it ordinarily would appear to projectionist or broadcaster when preparing work for performance.

(3) For motion picture or other audiovisual work distributed to public for private use, include notice:

(a) In any location specified in P (1), *above*; or

(b) On any housing or container serving as permanent receptacle for work.

h. For pictorial, graphic, and sculptural works [37 C.F.R. § 201.20(i)]:

(1) If work is reproduced in two-dimensional copies, affix notice directly or by means of label cemented, sewn, or otherwise attached durably (so as to withstand normal use) to:

(a) Either front or back of copies; or

(b) Any backing, mounting, matting, framing, or other material to which copies are durably attached (so as to withstand normal use) or in which they are permanently housed.

(2) If work is reproduced in three-dimensional copies, affix notice directly or by means of label cemented, sewn, or otherwise attached durably (so as to withstand normal use), to:

(a) Any visible portion of work; or

(b) Any base, mounting, framing, or other material on which copies are durably attached (so as to withstand normal use), or in which they are permanently housed.

(3) When, because of size or physical characteristics of material in which work is reproduced in copies, it is impossible or extremely impracticable to affix notice directly or by durable label, affix notice on tag that is:

(a) Of durable material that will withstand normal use; and

(b) Attached to copy so as to remain with copy while passing through normal channels of commerce.

(4) For work reproduced in copies consisting of sheetlike or strip material bearing multiple or continuous reproductions of work, affix notice:

(a) To reproduction itself;

(b) To margin, selvage, or reverse side of material at frequent and regular intervals; or

(c) If material contains neither selvage nor reverse side, to tags or labels attached to copies and to any spools, reels, or containers housing them so that notice is visible while copies are passing through normal channels of commerce.

(5) For work permanently housed in a container (for example, game or puzzle box), reproduce notice on permanent container.

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Formalities General Overview Copyright Law Formalities Notice General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART III. TRANSACTION GUIDE

C. Procedural Guide

1. Copyright Owner

33-103A California Legal Forms--Transaction Guide § 103A.121

§ 103A.121 Deposit Requirements

1. Unless exempted or eligible for "special relief" [see § 103A.121, PP 2, 3], deposit copies of best edition of published work in Copyright Office in following manner [17 U.S.C. § 407; 37 C.F.R. § 202.19(d)(1); see 17 U.S.C. § 101 ("best edition" and "publication" defined); see also P b, NOTE, below]:

NOTE:

This deposit must be made by the owner of copyright or of the exclusive right of publication in a work published in the United States [17 U.S.C. § 407(a)]. The deposit may be made without an accompanying registration [H.R. Rep. No. 94-1476, at 150 (1976)]. The purpose of this requirement is to provide the Library of Congress with copies and phonorecords of all works published in this country [see 17 U.S.C. § 407(b)]. Although deposit is not a condition of copyright protection [17 U.S.C. § 407(a)], the Register of Copyright may issue a written demand for a deposit and fine any person who does not comply with the demand within three months [see 17 U.S.C. § 407(d)].

a. Make deposit within three months after date of publication [17 U.S.C. § 407(a); see 17 U.S.C. § 101 ("publication" defined)].

b. Deposit appropriate number of copies of best edition of work and related materials:

NOTE:

The "best edition" of a work is the edition, published at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purpose [17 U.S.C. § 101; 37 C.F.R. § 202.19(b)(1)]. The criteria used by the Library of Congress to

select the best edition from among two or more published editions of the same version of the same work are described in detail in 37 C.F.R. pt. 202, app. B. Only the version in effect at the time of deposit may be used [37 C.F.R. § 202.19(b)(1)(ii)].

(1) For published sound recordings [17 U.S.C. § 407(a)(2); 37 C.F.R. § 202.19(d)(1)(ii)]:

(a) Two complete phonorecords of best edition; and

(b) Any printed or other visually perceptible material published with phonorecords.

NOTE:

These phonorecord accompaniments include the text or pictorial matter appearing on record sleeves and album covers, or embodied in separate leaflets or booklets included in the containers. Thus, the entire package (and not just the disk, tape, or other form of phonorecord involved) must be deposited [H.R. Rep. No. 94-1476, at 151 (1976)].

(2) For published computer programs and published computerized information works, such as statistical compendia, serials, and reference works [37 C.F.R. § 202.19(d)(2)(vii)]:

(a) One complete copy of best edition, if work is not copy-protected; and

(b) Two copies of best edition, if work is copy-protected.

(3) For published works other than sound recordings, two complete copies of best edition [17 U.S.C. § 407(a)(1); 37 C.F.R. § 202.19(d)(1)(i)].

c. Comply with following additional or alternative requirements, if applicable:

(1) Deposit only one complete copy of best edition of any of the following:

(a) Published three-dimensional cartographic representations of area (e.g., globes and relief models) [37 C.F.R. § 202.19(d)(2)(i)].

(b) Musical composition published in copies only, or in both copies and phonorecords, if only publication of copies in United States occurred by rental, lease, or lending [37 C.F.R. § 202.19(d)(2)(v)].

(c) Published multimedia kits prepared for use in systematic instructional activities and that include literary works, audiovisual works, sound recordings, or any combination of these works [37 C.F.R. § 202.19(d)(2)(vi)].

(2) For published motion pictures, deposit [37 C.F.R. § 202.19(d)(2)(ii)]:

(a) Only one complete copy of best edition; and

(b) Separate description of its contents (e.g., continuity, pressbook, or synopsis) [see 37 C.F.R. § 202.19(d)(2)(ii) (procedures for return of copies)].

(3) For published work deposited in hologram form, accompany deposit with two sets of [37 C.F.R. §

202.19(d)(2)(iii):

(a) Precise instructions for displaying image fixed in hologram; and

(b) Identifying material clearly showing displayed image [see 37 C.F.R. § 202.21 (deposit of identifying material instead of copies)].

(4) When individual author is owner of copyright in published pictorial or graphic work and fewer than five copies have been published, or work published and sold or offered for sale in limited edition of up to 300 numbered copies, deposit following in lieu of standard two copies [37 C.F.R. § 202.19(d)(2)(iv)]:

(a) One complete copy of best edition of work; or

(b) Photographs or other identifying material [see 37 C.F.R. § 202.21 (deposit of identifying material instead of copies)].

(5) Satisfy format requirements set forth in P 3, *below* [see 37 C.F.R. § 202.21].

d. If desired, use these deposited materials to satisfy deposit provisions for copyright registration [see § 103A.123] by submitting both of following along with deposit [37 C.F.R. § 202.20(e); see 37 C.F.R. § 202.19(f)(1)]:

(1) Application for registration [see § 103A.122, P 1b]; or

(2) Registration fee or deposit account number on application.

2. Do *not* provide Copyright Office with copies of any of following categories of material [see 37 C.F.R. § 202.19(c) (exemptions from deposit requirements of 17 U.S.C. § 407(a))]:

a. Diagrams and models that [37 C.F.R. § 202.19(c)(1)]:

(1) Illustrate scientific or technical works; or

(2) Formulate scientific or technical information in linear or three-dimensional form.

NOTE:

Examples of such diagrams and models include an architectural or engineering blueprint, plan, or design, a mechanical drawing, or an anatomical model [37 C.F.R. § 202.19(c)(1)].

b. Greeting cards, picture postcards, and stationery [37 C.F.R. § 202.19(c)(2)].

c. Lectures, sermons, speeches, and addresses when published individually and not as collection of works of one or more authors [37 C.F.R. § 202.19(c)(3)].

d. Literary, dramatic, and musical works published only as embodied in phonorecords [37 C.F.R. § 202.19(c)(4)].

NOTE:

This category does not exempt the owner of copyright, or of the exclusive right of publication, in a sound recording resulting from the fixation of these works in a phonorecord from the applicable deposit requirements for sound recording [37 C.F.R. § 202.19(c)(4)].

e. Automated databases available only online in United States [37 C.F.R. § 202.19(c)(5)], *except* the following categories (which must be deposited) [37 C.F.R. § 202.19(c)(5)]:

- (1) Automated databases distributed in form of machine-readable copies (for example, magnetic tape or disks, CD-ROM formats, or punch cards).
- (2) Computerized information works in nature of statistical compendia, serials, and reference works.
- (3) Works published in form requiring use of machine or device for purposes of optical enlargement (for example, film, filmstrips, slide films, and works published in any variety of microform).
- (4) Works published in visually perceptible form but used in connection with optical scanning devices.
- (5) Works reproduced in CD-ROM formats.

f. Three-dimensional sculptural works [37 C.F.R. § 202.19(c)(6)].

g. Any works published only as reproduced in or on jewelry, dolls, toys, games, plaques, floor coverings, wallpaper and similar commercial wall coverings, textile and other fabrics, packaging material, or any useful article [37 C.F.R. § 202.19(c)(6); *see* 17 U.S.C. § 101 ("useful article" defined)].

h. Prints, labels, and other advertising matter published in connection with rental, lease, lending, licensing, or sale of articles of merchandise, works of authorship, or services [37 C.F.R. § 202.19(c)(7)].

i. Tests, and answer material for tests, when published separately from other literary works [37 C.F.R. § 202.19(c)(8)].

j. Works first published as individual contributions to collective works [37 C.F.R. § 202.19(c)(9)].

NOTE:

This category does not exempt the owner of copyright, or of the exclusive right of publication, in the collective work as a whole, from the applicable deposit requirements for the collective work [37 C.F.R. § 202.19(c)(9)].

k. Works first published outside United States and later published in United States without change in copyrightable content, if [37 C.F.R. § 202.19(c)(10)]:

- (1) Before publication in United States, work was registered under 17 U.S.C. § 408; or
- (2) Work was registered under 17 U.S.C. § 408, but before any demand for deposit [*see* 17 U.S.C. § 407(d)].

l. Works published only as embodied in soundtrack that is integral part of motion picture [37 C.F.R. § 202.19(c)(11)].

NOTE:

This category does not exempt the owner of copyright, or of the exclusive right of publication, in the motion picture, from the applicable deposit requirements for the film [37 C.F.R. § 202.19(c)(11)].

m. Motion pictures that [37 C.F.R. § 202.19(c)(12)]:

(1) Consist of television transmission programs; and

(2) Have been published, if at all, only by reason of license or other grant to nonprofit institution of right to make fixation of programs directly from transmission to public, with or without right to make further uses of fixations.

3. Confirm that any material to be deposited satisfies following requirements [37 C.F.R. § 202.21(a)-(h)]:

NOTE:

These requirements apply not only to the mandatory deposits discussed in this section of the Transaction Guide, but also to deposits made in connection with copyright registrations [*see* 37 C.F.R. § 202.21(a); *see also* 37 C.F.R. § 202.20 (deposits for copyright registration); § 103A.123].

a. Consists of photographic prints, transparencies, photostats, drawings, or similar two-dimensional reproductions or renderings of work.

b. Is visually perceivable without aid of machine or device.

c. Color:

(1) If pictorial or graphic work, reproduces actual colors employed in work.

(2) In all other cases, is in black and white or reproduces actual colors.

d. Includes as many pieces of identifying material as necessary to show clearly entire copyrightable content of work.

e. Consists of only one set of complete identifying material, except in cases of holograms [*see* 37 C.F.R. §§ 202.19(d)(2)(iii), 202.20(c)(2)(iii); *see also* P 1c(3), *above*, § 103A.123, P 2d].

f. Contains only pieces of uniform size, as follows:

NOTE:

The only exception to this rule applies to separate drawings or similar reproductions of copyright notices [*see* 37 C.F.R. § 202.21(e); *see also* PP 3i, j, *below*].

(1) Photographic transparencies must be:

(a) At least 35 mm in size; and

(b) If 3 x 3 inches or less, fixed in cardboard, plastic, or similar mounts to facilitate identification, handling, and storage.

NOTE:

The Copyright Office prefers that transparencies larger than 3 x 3 inches be mounted in a way that facilitates their handling and preservation, and reserves the right to require this mounting in particular cases [37 C.F.R. § 202.21(c)].

(2) All other types of identifying material must be:

(a) At least 3 x 3 inches and not more than 9 x 12 inches, and preferably 8 x 10 inches; and

(b) If less than lifesize, large enough to show clearly entire copyrightable content of work.

g. Contains at least one piece of identifying material which, on its front, back, or mount, indicates:

(1) Title of work; and

(2) Exact measurement of one or more dimensions of work.

h. If work has been published with notice of copyright, includes at least one piece of identifying material that clearly shows notice and its position on work.

NOTE:

If necessary because of the size or position of the notice, a separate drawing or similar reproduction must be submitted. It must be no smaller than 3 x 3 inches and no larger than 9 x 12 inches, show the exact appearance and content of the notice, and show the specific position of the notice on the work [37 C.F.R. § 202.21(d)].

i. For separate registration of fixed, unpublished work, or published work that is published only as embodied in soundtrack that is integral part of motion picture, any identifying material deposited in lieu of actual copy consists of [37 C.F.R. § 202.21(f)]:

NOTE:

The requirements discussed in PP d through f, **above** [see 37 C.F.R. § 202.21(b)-(e)], do not apply to this kind of identifying material [37 C.F.R. § 202.21(f)].

(1) Transcription of entire work, or reproduction of entire work on phonorecord; and

(2) Photographs or other reproductions from motion picture showing title of motion picture, soundtrack credits, and copyright notice for soundtrack, if any.

j. For unpublished motion pictures (including unpublished transmission programs that are fixed and transmitted to public), any identifying material deposited in lieu of actual copy consists of [37 C.F.R. § 202.21(g)]:

NOTE:

The requirements set forth in PP d through h, **above** [see 37 C.F.R. § 202.21(b)-(e)], do not apply to this kind of identifying material [37 C.F.R. § 202.21(g)].

A "description" of a motion picture [see PP (1), (2), **below**] is a continuity, pressbook, or a synopsis, and includes the following [37 C.F.R. § 202.21(g); see 37 C.F.R. § 202.21(h) ("description" in cases in which deposit copy of motion picture cannot be viewed for examining purposes on Copyright Office's equipment)]:

■ Title or continuing title of work, and episode title, if any.

■ Nature and general content of program.

- Date when work was first fixed.
- Indication whether or not fixation was simultaneous with first transmission
- Date of first transmission, if any.
- Running time.
- Any credits appearing on work.

(1) Audio cassette or other phonorecord reproducing entire soundtrack or other sound portion of motion picture, and description of motion picture; or

(2) Set consisting of one frame enlargement of similar visual reproduction from each 10-minute segment of motion picture, and description of motion picture.

4. If work is not exempt from deposit, consider requesting "special relief" from deposit requirement from Register of Copyrights:

a. Select one of following permissible forms of special relief [37 C.F.R. § 202.19(e)(1)]:

(1) Exemption from deposit requirements.

NOTE:

The Register may grant this exemption for single works and for series or groups of works [37 C.F.R. § 202.19(e)(1)].

(2) Deposit of one copy or phonorecord, or alternative identifying material, in lieu of two copies or phonorecords otherwise required.

(3) Deposit of copies or phonorecords that are:

(a) Incomplete; or

(b) Other than those normally comprising best edition.

b. Prepare written request that [37 C.F.R. § 202.19(e)(3)]:

(1) Sets forth specific reasons why request should be granted.

(2) Is signed by or on behalf of owner of copyright or exclusive right to publication of work.

(3) Addressed to Associate Register for Registration and Recordation Program Copyright Office.

5. Consider requesting certificate of receipt for deposit by submitting following to Copyright Office [37 C.F.R. § 202.19(f)(3)]:

NOTE:

Certificates of receipt are issued in response to requests made after the date of deposit only if the requesting party is identified in the records of the Copyright Office as having made the deposit [37 C.F.R. § 202.19(f)(3)].

a. Required fee.

b. Written request that identifies:

(1) Depositor.

(2) Work deposited.

(3) Nature and format of copy or phonorecord deposited.

(4) Date of receipt.

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Formalities Deposit & Registration General Overview Copyright Law Formalities Deposit & Registration Deposit General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART III. TRANSACTION GUIDE

C. Procedural Guide

1. Copyright Owner

33-103A California Legal Forms--Transaction Guide § 103A.122

§ 103A.122 Registering Claim of Copyright

1. If desired, register claim of copyright by delivering following to Copyright Office [*17 U.S.C. § 408; 37 C.F.R. § 202.3(c)(2)*]:

NOTE:

The owner of the copyright or of any exclusive right in the work may obtain registration of the copyright at any time during the subsistence of the first term of copyright in any published or unpublished work in which the copyright was secured before January 1, 1978, and during the subsistence of any copyright secured on or after that date [*17 U.S.C. § 408(a); 37 C.F.R. § 202.3(c)(1); see § 103A.73*].

a. Deposit required under *17 U.S.C. § 408* and *37 C.F.R. § 202.20* [*see § 103A.123*].

b. Official application [*17 U.S.C. § 409; 37 C.F.R. § 202.3(c)(2); see § 103A.200-103A.208* (application forms)].

NOTE:

The application may be submitted by any author or other copyright claimant of the work or the owner of any exclusive right in the work, or their agents [*37 C.F.R. § 202.3(c)(1)*].

Applications should be submitted in the class most appropriate to the nature of the authorship in which copyright is claimed. Applications for contributions to collective works should be submitted in the class representing the copyrightable authorship in the contribution. For derivative works, the application should be submitted in the class most appropriately representing the copyrightable authorship involved in recasting,

transforming, adapting, or otherwise modifying the preexisting work. If a work contains elements of authorship in which copyright is claimed which fall into two or more classes, the submission should be made in the class most appropriate to the type of authorship that predominates in the work as a whole.

The Copyright Office recommends using its on-line registration process called the Electronic Copyright Office (eCO), which does not involve handling any paper forms; for information, see www.copyright.gov/eco/faq.html. The preferred alternative to using eCO is to use Form CO [37 C.F.R. § 202.3(b)(2)(ii)], which is illustrated in § 103A.200[2]. Instructions for completing and mailing Form CO are provided on the Copyright Office web site, and the form can be downloaded from the web site, at www.copyright.gov/forms.

c. Fee [see 17 U.S.C. § 708(a)(1)].

NOTE:

For current fee amounts, check the U.S. Copyright Office website at www.copyright.gov or call (202) 707-3000 for current fee information.

d. Certificate [see P 5, *below*].

2. Submit one application and registration fee for any of following "single works" [37 C.F.R. § 202.3(b)(4)]:

NOTE:

The Copyright Office of the Library of Congress has determined that all copyrightable expression owned by the same claimant and embodied in a computer program, or first published as a unit with a computer program, including computer screen displays, is considered a "single work" for purposes of registration, and should be registered on a single application form [*Policy Decision of the Copyright Office*, 53 Fed. Reg. 21817-21820 (1988) ; see 37 C.F.R. § 202.3(b)(4), (10)].

a. For published work, all copyrightable elements otherwise recognizable as self-contained works, included in single unit of publication, and in which copyright claimant is same.

b. For unpublished work, all copyrightable elements otherwise recognizable as self-contained works, combined in single unpublished collection that:

(1) Has elements assembled in orderly form;

(2) Bears single title identifying collection as a whole;

(3) Has same copyright claimant for all elements and for collection as a whole; and

(4) Concerning author(s):

(a) Has same author for all elements; or

(b) If elements were done by different authors, has at least one author who has contributed copyrightable authorship to each element.

NOTE:

Registration of an unpublished "collection" extends to each copyrightable element in the collection and to the authorship, if any, involved in selecting and assembling the collection [37 C.F.R. § 202.3(b)(4)(i)(B)].

In the case of applications for registration as a single work [*see* P 2, *above*] or for group registration of contributions to periodicals [*see* P 3, *below*], the "year in which creation of this work was completed" that must be listed on the application means the latest year in which the creation of any copyrightable element was completed [37 C.F.R. § 202.3(b)(4)(ii)].

3. If dealing with group of works that qualifies for single copyright registration, submit appropriate basic application and adjunct application [*see* 17 U.S.C. § 408(c)(2); 37 C.F.R. § 202.3(b)(8)(i); *see also* § 103A.208[1][a] (adjunct application)].

4. Do not attempt to obtain more than one copyright registration for same version of particular work except under following circumstances [37 C.F.R. § 202.3(b)(11)]:

a. If work has been registered as unpublished, first published edition of work may be registered, even if it does not represent new version.

b. When someone other than author is identified as copyright claimant in a registration, author may register same version in his or her own name as copyright claimant.

NOTE:

This provision does not permit an employee or other person working for hire to make a later registration in his or her own name [*see* 17 U.S.C. § 101 ("work made for hire" defined)]. In the case of a joint work, one author may obtain a later registration in his or her own name as copyright claimant when an earlier registration identifies only another author as the claimant [37 C.F.R. § 202.3(b)(11)(ii) n. 5].

c. If applicant alleges that earlier registration for same version is unauthorized and legally invalid.

5. Include certification with application, consisting of [37 C.F.R. § 202.3(c)(2)]:

a. Designation of whether applicant is:

(1) Author of work.

(2) Other copyright claimant in work.

(3) Owner of exclusive rights in work.

(4) Agent of any person described in PP (1)-(3), *above* (whose identity must also be given).

b. Handwritten signature and typed or printed name of applicant, or electronic equivalent in electronically submitted application [*see* 37 C.F.R. § 202.3(c)(2)(ii)].

c. Declaration that statements made in application are correct to best of applicant's knowledge.

d. Date of certification.

NOTE:

An application for registration of a published work will not be accepted if the date of certification is earlier than the date of publication given in the application [37 C.F.R. § 203.2(c)(2)].

If the application is approved, the Register of Copyrights will register the claim and issue to the applicant a certificate of registration. The certificate will contain the information given in the application together with the number and effective date of the registration [17 U.S.C. § 410(a)]. The effective date of a copyright registration is the date on which the Copyright Office received the complete application package (including application, deposit, and fee), which is later determined by the Register of Copyrights or a court of competent jurisdiction to be acceptable for registration [17 U.S.C. § 410(d)]. If the Register determines that the deposited material does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register will refuse registration and notify the applicant in writing of the reasons for refusal [17 U.S.C. § 410(b)]. When a certificate is issued, it is prima facie evidence of the validity of the copyright and the facts stated in the certificate for at least five years [see 17 U.S.C. § 410(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Formalities Deposit & Registration General Overview Copyright Law Formalities Deposit & Registration Registration General Overview



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1. Copyright Owner

33-103A California Legal Forms--Transaction Guide § 103A.123

§ 103A.123 Depositing Copies or Phonorecords for Copyright Registration

1. If desired, use materials provided in accordance with mandatory deposit requirement [see § 103A.121] to satisfy deposit provisions for optional copyright registration [see § 103A.122 P 1(a)] by submitting both of following along with mandatory deposit [37 C.F.R. § 202.20(e); see 37 C.F.R. § 202.19(f)(1)]:

- a. Application for registration [see § 103A.122, P 1b]; or
- b. Registration fee or deposit account number on application.

2. If circumstances preclude use of procedure described in P 1, *above*, and applicant does not desire "special relief" [see P 3, *below*], deposit following materials as part of application for copyright registration [17 U.S.C. § 408(b), (c); see 37 C.F.R. § 202.20(c)(2)(i)-(xx)]:

NOTE:

Any identifying material discussed in P 2, *above*, must meet the format requirements set forth in 37 C.F.R. § 202.21 [see § 103A.121, P 3].

a. Except as otherwise provided in the remainder of this section (§ 103A.123), deposit following materials [37 C.F.R. § 202.20(c)(1)]:

NOTE:

The requirements listed *below*, calling for a "best edition" or "work as first published" will be satisfied if the applicant complies with any applicable alternative requirements set forth in the remainder of this section (§ 103A.123) [see 37 C.F.R. § 202.20(c)(2)].

(1) For unpublished works, one complete copy or phonorecord.

(2) For works first published in United States before January 1, 1978, two complete copies or phonorecords of work as first published.

(3) For works first published in United States on or after January 1, 1978, two complete copies or phonorecords of best edition.

(4) For works first published outside of United States, one complete copy or phonorecord of work either as first published or of best edition.

NOTE:

Any works simultaneously first published within and outside of the United States will be considered to be first published in the United States [37 C.F.R. § 202.20(c)(1)(iv)].

b. Deposit only one complete copy or phonorecord if work falls in any of following categories [37 C.F.R. § 202.20(c)(2)(i)]:

(1) Published three-dimensional cartographic representations of area (for example, globes and relief models).

(2) Published diagrams illustrating scientific or technical works or formulating scientific or technical information in linear or other two-dimensional form, such as:

(a) Architectural or engineering blueprint; or

(b) Mechanical drawing.

(3) Published greeting cards, picture postcards, and stationery.

(4) Lectures, sermons, speeches, and addresses published individually and not as collection of works of one or more authors.

(5) Published contributions to collective work.

(6) Musical compositions published in copies only, or in both copies and phonorecords, if only publication of copies occurred by rental, lease, or loan.

(7) Published multimedia kits prepared for use in systematic instructional activities that include one or more of following:

(a) Literary works.

(b) Audiovisual works.

(c) Sound recordings.

(8) Works exempted from requirement of depositing identifying material [see 37 C.F.R. § 202.20(c)(2)(xi)(B)(5); see also PP 2k, l, below].

c. For motion pictures [37 C.F.R. § 202.20(c)(2)(ii)]:

(1) If published [see 37 C.F.R. § 202.20(b)(2)(ii)], deposit following:

- (a) One complete copy; and
- (b) Separate description of its contents (e.g., continuity, pressbook, or synopsis).

(2) If unpublished [see 37 C.F.R. § 202.20(c)(2)(ii)], (including unpublished television transmission programs fixed and transmitted to public) deposit identifying material in lieu of actual copy.

d. For work deposited in form of hologram, accompany copy or copies with [37 C.F.R. § 202.20(c)(2)(iii)]:

- (1) Precise instructions for displaying image fixed in hologram; and
- (2) Photographs or other identifying material that clearly show displayed image.

NOTE:

The number of sets of instructions and identifying material must be the same as the number of copies required [37 C.F.R. § 202.20(c)(2)(iii)].

e. For unpublished pictorial or graphic work, deposit identifying material in lieu of actual copy [37 C.F.R. § 202.20(c)(2)(iv)].

f. For published pictorial or graphic work, deposit one complete copy or identifying material in lieu of two actual copies when individual author is owner of copyright and either [37 C.F.R. § 202.20(c)(2)(iv)]:

- (1) Fewer than five copies of work have been published; or
- (2) Work has been published and sold or offered for sale in limited edition of no more than 300 numbered copies.

g. For prints, labels, and other advertising matter published in connection with rental, lease, loan, licensing, or sale of articles of merchandise, works of authorship, or services, deposit one complete copy in lieu of two copies [37 C.F.R. § 202.20(c)(2)(v)].

(1) If print or label is published in larger work (e.g., newspaper or other periodical), consider submitting one copy of entire page or pages on which it appears in lieu of entire larger work [37 C.F.R. § 202.20(c)(2)(v)].

(2) If prints or labels are physically inseparable from a three-dimensional object, submit identifying material rather than actual copy or copies except under certain conditions [37 C.F.R. § 202.20(c)(2)(v); see 37 C.F.R. § 202.20(c)(2)(xi)(B)(4)].

h. For tests and answer material for tests published separately from other literary works, deposit only one complete copy [37 C.F.R. § 202.20(c)(2)(vi)].

i. For fixed, unpublished computer program, database, compilation, statistical compendium, or similar material, or if published, published only in form of machine-readable copies (e.g., magnetic tape or disks, punched cards,

semiconductor chip products) other than CD-ROM format from which work cannot ordinarily be perceived except with aid of machine or device, deposit following [37 C.F.R. § 202.20(c)(2)(vii); *see also* 37 C.F.R. § 202.20(c)(2)(viii) (deposit requirements for machine-readable copies of works other than computer programs, databases, and works fixed in CD-ROM format); 37 C.F.R. § 202.20(c)(2)(ix) (deposit requirements for copies containing both visually perceptible and machine-readable material other than CD-ROM format)]:

(1) For published or unpublished computer programs, one copy of identifying portions [see 37 C.F.R. § 202.20(c)(2)(vii)(A)] of program, reproduced as follows:

(a) In form visually perceptible without aid of machine or device; and

(b) Either on paper or in microform.

(2) For published and unpublished automated data bases, compilations, statistical compendia, and other literary works so fixed or published, one copy of identifying portions of work, reproduced as follows [see 37 C.F.R. § 202.20(c)(2)(vii)(D); *see also* 37 C.F.R. § 202.20(c)(2)(vii)(D)(3)-(5) (requirements for revised or updated versions of database)]:

(a) In form visually perceptible without aid of machine or device; and

(b) Either on paper or in microform.

j. For any unpublished work that is fixed, or any published work that is published, only in form of two-dimensional reproduction on sheetlike materials or packaging material, deposit one copy in form of actual swatch or piece sufficient to show all elements of work in which copyright is claimed and any copyright notice appearing on work [37 C.F.R. § 202.20(c)(2)(x)].

NOTE:

Examples of these sheetlike materials include textile and other fabrics, wallpaper and similar commercial wall coverings, carpeting, flow tile, similar commercial floor coverings, wrapping paper, and similar packaging material [37 C.F.R. § 202.20(c)(2)(x)].

(1) If work consists of repeated pictorial or graphic design, show complete design and at least part of one repetition [37 C.F.R. § 202.20(c)(2)(x)].

(2) Deposit identifying material instead of copy if [37 C.F.R. § 202.20(c)(2)(x)]:

(a) Sheetlike material in or on which a published work has been reproduced has been embodied in or attached to three-dimensional object (e.g., wearing apparel, furniture); and

(b) Work has been published only in that form.

k. Except as provided in P l, *below*, deposit identifying material instead of copy or copies in following cases [37 C.F.R. § 202.20(c)(2)(xi)]:

(1) Any three-dimensional sculptural work, including any illustration or formulation of artistic expression or information in three-dimensional form.

NOTE:

Examples of these works include statues, carvings, ceramics, moldings, constructions, models, and maquettes [37 C.F.R. § 202.20(c)(2)(xi)(A)(1)].

(2) Any two-dimensional or three-dimensional work that:

(a) If unpublished, has been fixed; or

(b) If published, has been published only in or on jewelry, dolls, toys, games, except as provided in P l(3), *below*, or any three-dimensional useful article.

l. In following cases, do not deposit identifying material in accordance with P k, *above* [37 C.F.R. § 202.20(c)(2)(xi)(B)]:

(1) Three-dimensional cartographic representations of area (for example, globes and relief models).

(2) Works that have been fixed or published in or on useful article that comprises one of elements of unit of publication of educational or instructional kit which also includes literary or audiovisual work, sound recording, or any combination of those works.

(3) Published games consisting of multiple parts packaged and published in box or similar container with flat sides and with dimensions of no more than 12 x 24 x 6 inches.

(4) Works reproduced on three-dimensional containers or holders (for example, boxes, cases, and cartons) when container or holder can be readily opened out, unfolded, slit at corners, or in some other way made adaptable for flat storage, and copy, when flattened, does not exceed 96 inches in any dimension.

(5) Any three-dimensional sculptural work that, if unpublished, has been fixed, or, if published, has been published only in form of jewelry cast in base metal, which does not exceed four inches in any dimension.

m. For separate registration of fixed, unpublished work, or published work that is published only as embodied in soundtrack that is integral part of motion picture, deposit identifying material in lieu of actual copy or copies of motion picture [37 C.F.R. § 202.20(c)(2)(xii)].

n. When deposit required exceeds 96 inches in any dimension, submit identifying material instead of actual copy or copies [37 C.F.R. § 202.20(c)(2)(xiii)].

o. For pictorial advertising material (except that published in connection with motion pictures), deposit either [37 C.F.R. § 202.20(c)(2)(xiv)]:

(1) One copy as published.

(2) Prepublication material consisting of camera-ready copy.

p. For contributions to collective works, deposit one of following [37 C.F.R. § 202.20(c)(2)(xv)]:

(1) One complete copy of best edition of entire collective work.

(2) If published in newspaper, complete section containing contribution, or entire page containing

contribution, or contribution cut from paper in which it appeared.

(3) Photocopy of contribution as published in collective work.

q. For group registration of related serials, deposit one complete copy of best edition of each issue included in group registration [37 C.F.R. § 202.20(c)(2)(xvii)].

NOTE:

In addition, two complimentary subscriptions must be entered and maintained in the name of the Library of Congress, and copies must be submitted regularly and promptly after publication [37 C.F.R. § 202.20(c)(2)(xvii)].

r. For architectural works, deposit [see 37 C.F.R. § 202.20(c)(2)(xviii)]:

(1) For unconstructed buildings, one complete copy of architectural drawing or blueprint in visually perceptible form showing overall form of building and any interior arrangements of spaces or design elements, or both, in which copyright is claimed.

(2) For designs of constructed buildings, both:

(a) One complete copy of architectural drawing or blueprint in visually perceptible form showing overall form of building and any interior arrangements of spaces or design elements, or both, in which copyright is claimed.

(b) Identifying material in form of photographs complying with 37 C.F.R. § 202.21.

s. For work fixed in CD-ROM format, deposit complete copy of CD-ROM package, including complete copy of any accompanying operating software and instructional manual and, if work is fixed in print as well as CD-ROM, also deposit printed version of work embodied in CD-ROM [37 C.F.R. § 202.20(c)(2)(xix)].

t. For groups of photographs registered with one application under 37 C.F.R. § 202.3(b)(4)(i)(B) or (10) (unpublished collection or group registration of published photographs), deposit photographs in one of following formats (listed in order of preference) [37 C.F.R. § 202.20(c)(2)(xx)]:

(1) Digital form on one or more CD-ROMs (including CD-RW's) or DVD-ROMs, in one of following formats: JPEG, GIF, TIFF, or PCD.

(2) Unmounted prints measuring at least 3 inches by 3 inches (not to exceed 20 inches by 24 inches).

(3) Contact sheets.

(4) Slides, each with single image.

(5) Any format in which photograph has been published (for example, clippings from newspapers or magazines).

(6) Photocopy of each photograph included in group, clearly depicting photograph, provided that if registration is made pursuant to 37 C.F.R. § 202.3(b)(10) for group registration of photographs, photocopy must be either photocopy of unmounted print measuring at least 3 inches by 3 inches (not to exceed 20 inches by 24 inches) or photocopy of photograph in format in which it has been published, and

if photograph was published as color photograph, photocopy must be color photocopy.

(7) Slides, each containing up to 36 images.

(8) Videotape clearly depicting each photograph.

3. If desired, apply for "special relief" from standard deposit requirements [*see* P 2, *above* (standard deposit requirements)] as follows [*see* 37 C.F.R. § 202.20(d)]:

NOTE:

This request for special relief may be combined with a request for special relief from the mandatory deposit requirements [37 C.F.R. § 202.20(d)(3); *see* 37 C.F.R. § 202.19(e); *see also* § 103A.121, P 4].

Any identifying material discussed **below** must meet the format requirements set forth in 37 C.F.R. § 202.21 [*see* § 103A.121, P 3].

a. Request permission to do any of following, if desired:

(1) Deposit one copy or phonorecord, or alternative identifying material, in lieu of one or two copies or phonorecords otherwise required.

(2) Deposit incomplete copies or phonorecords, or copies of phonorecords other than those normally comprising best edition.

(3) Deposit actual copy or copies, in lieu of identifying material otherwise required.

(4) Deposit of identifying material that does not comply with 37 C.F.R. § 202.21

b. Prepare written request that [37 C.F.R. § 202.20(d)(3)]:

(1) Sets forth specific reasons why request should be granted; and

(2) Is signed by or on behalf of person signing application for registration.

c. Submit application to Associate Register for Registration and Recordation Program of Copyright Office [37 C.F.R. § 202.20(d)(3)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawFormalitiesDeposit & RegistrationGeneral OverviewCopyright LawFormalitiesDeposit & RegistrationRegistrationGeneral Overview



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1. Copyright Owner

33-103A California Legal Forms--Transaction Guide § 103A.124

§ 103A.124 Notice of Objection to Nonprofit Performance

NOTE:

A nonprofit performance of a copyrighted nondramatic literary or musical work is not an infringement of copyright if certain conditions are met. One of these conditions prohibits the imposition of a direct or indirect admission charge unless both of the following apply: (1) the proceeds of any admission charge (after deducting reasonable production costs) are used exclusively for educational, religious, or charitable purposes; and (2) the copyright owner does not object to the imposition of such an admission charge [*17 U.S.C. § 110(4)(B)*; *see § 103A.132*, P 1]. This section describes the procedure a copyright owner must follow in order to make such an objection.

1. Prepare notice of objection [*17 U.S.C. § 110(4)(B)*; *37 C.F.R. § 201.13(c)*; *see § 103A.220*].

NOTE:

The Copyright Office does not provide printed forms for the use of persons serving Notices of Objection [*37 C.F.R. § 201.13(b)*]. § 103A.220[2] is a notice of objection, and § 103A.220[1] discusses the required contents [*see 37 C.F.R. § 201.13(c)(1)*] and applicable signature requirements [*see 37 C.F.R. § 201.13(d)*].

2. Have notice served on person responsible for performance [*37 C.F.R. § 201.13(e)*]:

- a. At least seven days before date of performance [*see 17 U.S.C. § 110(4)(B)(ii)*].

NOTE:

The date of service is the date the notice is received by the person responsible for the performance or any agent or employee of that person [*37 C.F.R. § 201.13(e)(3)*].

b. By any of following methods:

(1) Personal service.

(2) First-class mail.

(3) Telegram, cablegram, or similar form of communication, if notice meets all of the other applicable requirements [*see* P 1, *above*], and before performance takes place, person responsible for performance receives written confirmation of notice, bearing actual handwritten signature of each copyright owner or agent.

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawFormalitiesGeneral OverviewCopyright LawOwner RightsPerformanceGeneral Overview



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1. Copyright Owner

33-103A California Legal Forms--Transaction Guide § 103A.125

§ 103A.125 Preregistering Unpublished Work

NOTE:

The effective date of a preregistration is the day the application and fee for preregistration of a work are received in the Copyright Office, provided the Copyright Office later notifies the claimant that the work has been preregistered [*see* P 6, *below*] or a court of competent jurisdiction concludes that the work was acceptable for preregistration [37 *C.F.R.* § 202.16(c)(9)]. The preregistration record will be available to the public on the Copyright Office web site at www.copyright.gov [37 *C.F.R.* § 202.16(c)(12)].

1. Verify that work is eligible for preregistration because all of following conditions are satisfied [37 *C.F.R.* § 202.16(b)(3); *see* 17 *U.S.C.* § 408(f); § 103A.75]:

- a. Work is unpublished.
- b. Work is being prepared for commercial distribution [*see* P 2, *below*].
- c. Work is in one of following classes of works, which Register of Copyrights has determined have had history of infringement prior to authorized commercial release [37 *C.F.R.* § 202.16(b)(1)]:
 - (1) Motion pictures.
 - (2) Sound recordings.
 - (3) Musical compositions.
 - (4) Literary works being prepared for publication in book form.

(5) Computer programs (including video games).

(6) Advertising or marketing photographs.

NOTE:

Works that are not copyrightable subject matter under title 17 of the United States Code may not be preregistered in the Copyright Office [37 C.F.R. § 202.16(c)(2)].

At any time an interested person may petition the Register of Copyrights for a determination as to whether a particular class of works has had a history of copyright infringement prior to authorized release, which would justify inclusion of that class of works among the classes of works eligible for preregistration [37 C.F.R. § 202.16(c)(14)].

2. Verify that work qualifies as being prepared for commercial distribution because following conditions are satisfied [37 C.F.R. § 202.16(b)(2)]:

a. Claimant, in statement certified by authorized preregistering party, has reasonable expectation that work will be commercially distributed to public.

b. Preparation of work has commenced and at least some portion of work has been fixed in tangible medium of expression, as follows:

(1) For motion picture, filming of motion picture must have commenced.

(2) For sound recording, recording of sounds must have commenced.

(3) For musical composition, at least some of musical composition must have been fixed either in form of musical notation or in copy or phonorecord embodying performance of some or all of work.

(4) For literary work being prepared for publication in book form, actual writing of text of work must have commenced.

(5) For computer program, at least some of computer code (either source code or object code) must have been fixed.

(6) For advertising or marketing photograph, photograph (or, in case of group of photographs intended for simultaneous publication, at least one of photographs) must have been taken.

3. Prepare and submit application for preregistration.

a. Find and complete application (Form PRE) on Copyright Office web site at www.copyright.gov, and ensure that application includes:

NOTE:

A work eligible for preregistration may be preregistered by submitting an application and fee (which is not refundable) to the Copyright Office [37 C.F.R. § 202.16(c)(1)]. An

application for preregistration is made using Electronic Form PRE, which is available exclusively, and can only be submitted electronically, on the Copyright Office website [37 C.F.R. § 202.16(c)(3)].

For the purpose of preregistration on a single application and on payment of a single preregistration fee, all copyrightable elements (1) that are otherwise recognizable as self-contained works, (2) that are to be included and first published in a single unit of publication, and (3) in which the copyright claimant is the same, will be considered a single work eligible for preregistration [37 C.F.R. § 202.16(c)(4)].

(1) Detailed description of work [see P 4, *below*]; and

(2) Prescribed certification [see P 5, *below*].

b. Submit application electronically on web site.

c. Pay fee [see 37 C.F.R. § 202.16(c)(5) (amount of fee and methods of payment)].

4. As part of application, submit detailed description of work--but use not more than 2,000 characters (approximately 330 words)--based on information available at time of application, sufficient to reasonably identify work [37 C.F.R. § 202.16(c)(6)]:

NOTE:

No deposit of the work being preregistered should be submitted with an application for preregistration. Generally, the Copyright Office will not review descriptions for adequacy, but in an action for infringement of a preregistered work, the court might evaluate the adequacy of the description to determine whether the preregistration actually describes the work that is alleged to be infringed, taking into account the information available to the applicant at the time of preregistration and taking into account the legitimate interest of the applicant in protecting confidential information [37 C.F.R. § 202.16(c)(6)].

a. For motion pictures, include following information to extent known at time of filing [37 C.F.R. § 202.16(c)(6)(i)]:

(1) Subject matter.

(2) Summary or outline.

(3) Director and primary actors.

(4) Principal location of filming.

(5) Any other information that would assist in identifying this particular work being preregistered.

b. For sound recordings, include following information to extent known at time of filing [37 C.F.R. § 202.16(c)(6)(ii)]:

- (1) Subject matter of work or works recorded.
- (2) Performer or performing group.
- (3) Genre of work recorded (such as classical, pop, musical comedy, soft rock, heavy metal, gospel, rap, hip-hop, blues, jazz).
- (4) Titles of musical compositions being recorded.
- (5) Principal recording location.
- (6) Composers of recorded musical compositions embodied on sound recording.
- (7) Any other information that would assist in identifying this particular sound recording.

c. For musical compositions, include following information to extent known at time of filing [37 *C.F.R.* § 202.16(c)(6)(iii)]:

- (1) Subject matter of lyrics, if any.
- (2) Genre of work (for example, classical, pop, musical comedy, soft rock, heavy metal, gospel, rap, hip-hop, blues, jazz).
- (3) Performer.
- (4) Principal recording location.
- (5) Record label, motion picture, or other information relating to any sound recordings or motion pictures that are being prepared for commercial distribution and will include this musical composition.
- (6) Any other information that would assist in identifying this particular musical composition.

d. For literary works in book form, include following information to extent known at time of filing [37 *C.F.R.* § 202.16(c)(6)(iv)]:

- (1) Genre of book (such as biography, novel, history, etc.), which should include brief summary of work including, subject matter (for example, biography of President Lincoln, history of Civil War, fantasy novel).
- (2) Description (where applicable) of plot, primary characters, events, or other key elements of content of work.
- (3) Any other salient characteristics of book (for instance, whether it is later edition or revision of previous work), as well as any other detail which may assist in identifying this literary work in book form.

e. For computer programs (including videogames), include following information to extent known at

time of filing [37 C.F.R. § 202.16(c)(6)(v)]:

- (1) Nature, purpose and function of computer program, including programming language in which it is written.
- (2) Any particular organization or structure in which program has been created.
- (3) Form in which it is expected to be published (for example, as online-only product).
- (4) Whether there have been previous versions (and identification of such previous versions).
- (5) Identities of persons involved in creation of this computer program.
- (6) For video game, subject matter of game and overall object, goal, or purpose of game, its characters, if any, and general setting and surrounding found in game.

f. For advertising or marketing photographs, include following information to extent known at time of filing [37 C.F.R. § 202.16(c)(6)(vi)]:

- (1) Subject matter depicted in photograph, including information such as particular product, event, public figure, or other item or occurrence that photograph is intended to advertise or market.
- (2) To extent possible and applicable, additional details that will assist in identifying this particular photograph, such as:
 - (a) Party for whom such advertising photograph was taken.
 - (b) Approximate time period during which photograph was taken.
 - (c) Approximate number of photographs to be included in grouping of photographs.
 - (d) Any events associated with photograph.
 - (e) Location and physical setting or surrounding depicted in photograph.
 - (f) Optional explanation of general presentation (such as lighting, background scenery, positioning of elements of subject matter as it is seen in photograph) and any locations and events, if applicable, associated with photograph.

NOTE:

The Copyright Office will conduct a limited review of an application for preregistration, in order to ascertain whether the application describes a work that is in a class of works that the Register of Copyrights has determined to have had a history of infringement prior to authorized commercial release. However, a work will not be preregistered unless the applicant has provided all of the information requested on the application and has certified that all of the information provided on the application is correct to the best of the applicant's knowledge [37 C.F.R. § 202.16(c)(7)].

5. Certify on application that [37 C.F.R. § 202.16(c)(8)]:

a. Person submitting application for preregistration is author, copyright claimant, or owner of exclusive rights, or authorized agent of author, copyright claimant, or owner of exclusive rights, of work submitted for this preregistration.

b. Information given in application is correct to best of that person's knowledge.

c. Work is being prepared for commercial distribution.

d. That person has reasonable expectation that work will be commercially distributed to public.

6. After application and supporting documents have been anticipated, await official notification to claimant by email [37 C.F.R. § 202.16(c)(10)].

7. If certified copy of official notification in physical form is needed, contact Records Research and Certification Section of Information and Reference Division to order copy [37 C.F.R. § 202.16(c)(11); see 37 C.F.R. § 201.1(a)(3) (address)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawFormalitiesGeneral OverviewCopyright LawFormalitiesDeposit & RegistrationRegistrationGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

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1. Copyright Owner

33-103A California Legal Forms--Transaction Guide §§ 103A.126-103A.129

[Reserved]

§§ 103A.126[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

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33-103A California Legal Forms--Transaction Guide § 103A.130

§ 103A.130 Use, Disposal, or Importation of Copy or Phonorecord

1. If client owns copy or phonorecord lawfully made under copyright law (or is acting under authority of owner), advise client of right to do following without obtaining permission of copyright owner [17 U.S.C. § 109]:

a. Sell or otherwise dispose of possession of copy or phonorecord [17 U.S.C. § 109(a)].

NOTE:

This right is subject to substantial exceptions for sound recordings and computer programs that preclude its exercise [*see* 17 U.S.C. § 109(b); *see also* 17 U.S.C. § 109(e); Pub. L. No. 101-650, § 840(c), 104 Stat. 5136 (certain electronic audiovisual games)]. Furthermore, unless authorized by the copyright owner, the right does not extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it [17 U.S.C. § 109(d)].

b. Display copy publicly, either directly or by projection of no more than one image at a time, to viewers present at place where copy is located [17 U.S.C. § 109(c)].

NOTE:

Unless authorized by the copyright owner, this right does not extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it [17 U.S.C. § 109(d)].

c. Publicly perform or display a lawfully made copy of an electronic audiovisual game in coin-operated equipment [17 U.S.C. § 109(e)].

NOTE:

This right does not apply to any work of authorship embodied in the audiovisual game if the copyright owner of the electronic audiovisual game is not also the copyright owner of the work of authorship [17 U.S.C. § 109(e)]. Nor does it apply to any public performance or display that occurs on or after October 1, 1995 [see Pub. L. No. 101-650, §§ 803, 804(a), (c), 104 Stat. 5135, 5136].

2. If client wishes to import copyrighted materials, advise client of statutory right to import:

a. Copies or phonorecords under authority or for use of federal government or of any state or political subdivision of state, but not for [17 U.S.C. § 602(a)(1)]:

(1) Use in schools; or

(2) Purposes other than archival use, if importing audiovisual works.

b. For private use of importer and not for distribution [17 U.S.C. § 602(a)(2)]:

(1) One copy or phonorecord of any one work at any one time; or

(2) Copies or phonorecords forming part of personal baggage of importer who is arriving from outside United States.

c. The following, if importation is by or for organization operated for scholarly, educational, or religious purposes and not for private gain [17 U.S.C. § 602(a)(3)]:

(1) One copy of audiovisual work solely for its archival purposes; and

(2) Up to five copies or phonorecords of any other work for its library lending or archival purposes.

NOTE:

This provision applies unless the importation of the copies or phonorecords is part of an activity consisting of systematic reproduction or distribution, engaged in by an organization in violation of the rights of reproduction and distribution [17 U.S.C. § 602(a)(3); see 17 U.S.C. § 108(g)(2) (rights of reproduction and distribution)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawFormalitiesGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.131

§ 103A.131 Making Fair Use of Work

1. Advise client that a person other than copyright owner may lawfully make fair use of copyrighted work for purposes such as [17 U.S.C. § 107]:

- a. Criticism.
- b. Comment.
- c. News reporting.
- d. Teaching.
- e. Scholarship.
- f. Research.

NOTE:

These uses include reproduction in copies or phonorecords, derivative works, performance, or display [*see* 17 U.S.C. § 107].

2. In making fair use determination, consider following factors [17 U.S.C. § 107]:

- a. Purpose and character of use, including whether it is of commercial nature or is for nonprofit educational purposes.
- b. Nature of copyrighted work.

c. Amount and substantiality of portion used in relationship to copyrighted work as a whole.

d. Effect of use on potential market for or value of copyrighted work.

NOTE:

The fact that a work is unpublished does not, of itself, bar a finding of fair use, if that finding is made upon consideration of all of the factors listed in P 2, *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Civil Infringement Actions Defenses Fair Use Fair Use Factors



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33-103A California Legal Forms--Transaction Guide § 103A.132

§ 103A.132 Nonprofit Performance of Nondramatic Musical or Literary Works

1. If client wishes to give nonprofit performance of nondramatic literary or musical work, advise client to take following steps to avoid infringement of copyright [17 U.S.C. § 110(4)]:

a. Do not transmit performance to public.

NOTE:

The performance must be given directly in the presence of its audience, by means of living performers, playing of phonorecords, or the operation of a receiving apparatus [H.R. Rep. No. 94-1476, at 85 (1976)].

b. Do not give performance for any purpose of direct or indirect commercial advantage.

NOTE:

The performance may not be in connection with commercial or profit enterprises, even though admission is free [H.R. Rep. No. 94-1476, at 85 (1976)].

c. Do not pay any fee or other compensation for performance to any of its performers, promoters, or organizers.

d. Do not impose direct or indirect admission charge unless both of following apply:

(1) Proceeds from admission charge, after deducting reasonable production costs, are used exclusively for educational, religious, or charitable purposes, and not for private gain.

(2) Copyright owner does not serve notice of objection [see § 103A.124; see also § 103A.103A.220[2] (form for notice)].

2. Advise any client interested in performing nondramatic musical work by vending establishment (e.g., record store) to take following steps to avoid infringement of copyright [17 U.S.C. § 110(7)]:

- a. Limit performance to nondramatic musical work.
- b. Confirm that establishment is open to public at large.
- c. Do not impose a direct or indirect admission charge.
- d. Have, as sole purpose of performance, promotion of retail sale of copies of phonorecords of work, or of audiovisual or other devices used in performance.
- e. Do not transmit performance:
 - (1) Beyond place where establishment is located; or
 - (2) Outside of immediate area where sale is occurring.

3. If applicable, instruct client that display of any work or presentation of following materials in course of services at place of worship or other religious assembly may be given without constituting infringement of copyright [17 U.S.C. § 110(3)]:

NOTE:

Activities at a house of worship that are for social, educational, fundraising, or entertainment purposes are not exempted by this provision (although they may be covered by the exemption for performances under noncommercial circumstances) [see 17 U.S.C. § 110(4); see also P 1, *above*]. The required locale excludes the concept of religious broadcast or other transmissions, even from a place of worship; but it does not prevent sacred assemblies at other locations for convention of the religious body (such as an outdoor theater) [H.R. Rep. No. 94-1476, at 84, 85 (1976)].

- a. Nondramatic literary or musical work.
- b. Dramatic-musical work of religious nature.

NOTE:

This exemption is designed to include certain kinds of sacred music forms that might be regarded as "dramatic" in nature, such as oratorios, cantatas, musical settings of masses, and choral services. It is not intended to include secular musical forms, for example, opera, musical plays, or motion pictures, even if they have an underlying religious or philosophical theme and are given in the course of the services [H.R. Rep. No. 94-1476, at 84 (1976)].

4. Instruct client that performance at annual agricultural or horticultural fair or exhibition may be given and is not an infringement of copyright if performance [17 U.S.C. § 110(6)]:

- a. Is limited to nondramatic musical work; and
- b. Is given by organization or body conducting fair or exhibition.

NOTE:

This exemption also protects these entities from liability for copyright infringement for the above types of performances given by any other entity or person at the fair (for example, concessionaire), but does not protect those other entities or persons [*see* 17 U.S.C. § 110(6)].

5. If client wishes to give performance in course of social function, instruct client to take following steps to avoid infringement problems [17 U.S.C. § 110(10)]:

a. Perform only nondramatic literary or musical work.

b. Confirm that social function is:

(1) Organized and promoted by:

(a) Nonprofit veterans' organization; or

(b) Nonprofit fraternal organization; and

(2) Not open to general public.

NOTE:

This prohibition does not extend to invitees of the above organizations [17 U.S.C. § 110(10)].

c. Use proceeds from performance, after deducting production costs, exclusively for charitable purposes and not for financial gain.

NOTE:

The social functions of any college or university fraternity or sorority are not covered by this provision unless the social function is held solely to raise funds for a specific charitable purpose [17 U.S.C. § 110(10)].

6. If client is nonprofit organization or governmental body, explain that it can do following without infringing copyright:

a. Distribute single copy or phonorecord of nondramatic musical work of religious nature, but only by complying with following [17 U.S.C. § 112(c)]:

(1) Reproduce only:

(a) Particular transmission program embodying performance of above work.

(b) Sound recording of above work.

(2) Do not impose direct or indirect charge for making or distributing the copies or phonorecords.

(3) Use each copy or phonorecord exclusively for single transmission to public by any transmitting organization entitled to transmit to public under license or transfer of copyright.

(4) Preserve no more than single copy exclusively for archival purposes.

(5) Destroy all other copies or phonorecords within one year from date transmission program was first transmitted to public.

NOTE:

These programs are prepared on tape or disk and distributed by mailing a single copy to each broadcast station carrying a program. The program producer either pays the station to carry the program or furnishes it free of charge. After the performance the tape is returned or the disk is destroyed. The station, having a performing license, compensates any copyright owner [H.R. Rep. No. 94-1476, at 104 (1976)].

b. Transmit performance of nondramatic literary work by [17 U.S.C. §§ 110(8), 112(d)]:

(1) Confirming that performance is by or in course of transmission specifically designed for and primarily directed to:

(a) Blind or other handicapped persons unable to read normal printed material as result of their handicap; or

(b) Deaf or other handicapped persons unable to hear aural signals accompanying transmission of visual signals.

(2) Making performance without any purpose of direct or indirect commercial advantage.

(3) Making transmission through facilities of any of the following:

(a) Governmental body.

(b) Noncommercial educational broadcast station [see 47 U.S.C. § 397 (definition)].

(c) Radio subcarrier authorization [see 47 C.F.R. §§ 73.293-73.295, 73.593-73.595 (definitions)].

(d) Cable system [see 17 U.S.C. § 111(f) (definition)].

(4) Making no more than 10 copies or phonorecords embodying performance.

(5) Confirming that any copy or phonorecord is:

(a) Retained and used exclusively by organization that made it, or by governmental body or nonprofit organization entitled to transmit above performance;

(b) Is not itself reproduced;

(c) Used exclusively for above transmission, or for purposes of archival preservation or security; and

(d) Used without charge by any other governmental body or nonprofit organization that has been authorized by client to use above copy or phonorecord.

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawSubject MatterLiterary WorksGeneral OverviewCopyright LawSubject MatterMusical WorksGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.133

§ 103A.133 Compulsory License to Make and Distribute Phonorecords

1. Inform client that he or she may obtain compulsory license to make and distribute phonorecords of nondramatic musical works if [*see 17 U.S.C. § 115(a)*]:

NOTE:

It should be emphasized that the compulsory license discussed in this section merely grants a non-exclusive right to make and sell, for private use, records of any nondramatic musical works that have been publicly distributed in the United States [*see 17 U.S.C. § 115(a)*].

The compulsory license includes the right of the licensee to distribute or authorize the distribution of a phonorecord of a nondramatic work by means of a digital transmission which constitutes a digital phonorecord delivery, regardless of whether the digital transmission is also a public performance of the sound recording under *17 U.S.C. § 106(6)* or of any nondramatic work embodied in the sound recording under *17 U.S.C. § 106(6)* [*17 U.S.C. § 115(c)(3)(A)*]. For further discussion of this right of digital phonorecord delivery, see P 7, **below**. For detailed discussion, see Nimmer On Copyright, Ch. 8, ***The Nature of the Rights Protected by Copyright*** (Matthew Bender).

The compulsory license also includes the right of licensee to distribute or authorize distribution of the phonorecord by rental, lease, or lending, or by acts or practices in the nature of rental, lease, or lending [*17 U.S.C. § 115(c)(4)*]. The right does not apply to literary or dramatic works or sound recordings. Further, it does not include the right to duplicate a motion picture soundtrack [*see 17 U.S.C. § 101* (definition)], to reproduce the work in sheet music or in other types of copies, or to publicly perform the work as contained in the phonorecords made pursuant to the right [*M. Witmark & Sons v.*

*Standard Music Roll Co. (D.N.J. 1914) 213 F. 532, 534 , **aff'd**, 221 F. 376, 380 (3d Cir. 1915)]* . For additional discussion of this right, see Nimmer On Copyright, Ch. 8, ***The Nature of the Rights Protected by Copyright*** (Matthew Bender).

a. Phonorecords of work have been distributed to United States public under authority of copyright owner; and

b. Client's primary purpose is to make phonorecords for distribution to public for private use (including by means of digital phonorecord delivery).

2. Advise client that compulsory license cannot be used to make phonorecords duplicating a sound recording fixed by another, unless [17 U.S.C. § 115(a)(1)]:

a. Sound recording was fixed lawfully; and

b. Making of phonorecords was authorized by:

(1) Owner of copyright in sound recording; or

(2) If sound recording was fixed before February 15, 1972, by any person who fixed sound recording under:

(a) Express license from owner of copyright in musical work; or

(b) Valid compulsory license for use of work in sound recording.

3. To obtain compulsory license, prepare notice of intention to obtain compulsory license, containing [17 U.S.C. § 115(b); 37 C.F.R. § 201.18]:

NOTE:

The Copyright Office does not provide printed forms for the use of persons serving or filing notices of intention [37 C.F.R. § 201.18(c)].

A person is entitled to serve or file a notice of intention and thereby obtain a compulsory license pursuant to 17 U.S.C. § 115 only if the primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery [37 C.F.R. § 201.18(a)(2)]. A "digital phonorecord delivery" is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. The reproduction of the phonorecord must be sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. Such a phonorecord may be permanent, or it may be made available to the transmission recipient for a limited period of time or for a specified number of performances. A digital phonorecord delivery includes all phonorecords that are made for the purpose of making the digital phonorecord delivery [37 C.F.R. § 201.18(a)(2)].

The notice may designate any number of nondramatic musical works, provided that the copyright owner of each designated work or, in the case of any work having more than one copyright owner,

any one of the copyright owners is the same and that certain required information [see 37 C.F.R. § 201.18(d)(1)(i)-(iv); P b(1), (5), *below*] does not vary. A notice that lists multiple works will be considered a composite filing of multiple notices, and fees will be paid accordingly [37 C.F.R. § 201.18(a)(4)].

A single notice may designate works not owned by the same copyright owner when the notice is served on a common agent of multiple copyright owners [see P 4, *below*], and when each of the works designated in the notice is owned by any of the copyright owners who have authorized that agent to receive notices [37 C.F.R. § 201.18(a)(6)].

If a notice served on a copyright owner or an authorized agent of a copyright owner identifies more than 50 works that are embodied or intended to be embodied in phonorecords made under the compulsory license, the copyright owner or the authorized agent may send the person who served the notice a demand that a list of each of the works so identified be resubmitted in an electronic format, along with a copy of the original notice. The person who served the notice must submit such a list, which must include all of the information required in 37 C.F.R. § 201.18(d)(1)(v) [see P b(6), *below*] within 30 days after receipt of the demand from the copyright owner or authorized agent. The list must be submitted on magnetic disk or another medium widely used at the time for electronic storage of data, in the form of a flat file, wordprocessing document, or spreadsheet, readable with computer software in wide use at such time, with the required information identified or delimited so as to be readily discernible. The list may be submitted by means of electronic transmission (such as e-mail) if the demand from the copyright owner or authorized agent states that such submission will be accepted [37 C.F.R. § 201.18(f)(6)].

A copyright owner or the agent of a copyright owner with authority to receive notices of intention may make public a written policy that it will accept notices of intention to make and distribute phonorecords pursuant to 17 U.S.C. 115 that include less than all of the information required by 37 C.F.R. § 201.18 in a form different from what is required by that section, or delivered by means (including electronic transmission) other than those required by that section. Any notice provided in accordance with such policy will not be rendered invalid for failing to comply with the specific requirements of that section [37 C.F.R. § 201.18(a)(7)].

a. Following statement, at head of notice: "Notice of Intention to Obtain a Compulsory License for Making and Distributing Phonorecords." [37 C.F.R. § 201.18(d)(1)].

b. Clear statement of following information:

NOTE:

This "clear statement" must be a clearly intelligible, legible, and unambiguous statement in the notice itself and must not incorporate by reference any facts or information contained in other documents or records [37 C.F.R. § 201.18(d)(2)].

For purposes of this "clear statement" requirement, information required to be given "if known" or as "expected" must be given in good faith and on the basis of the best knowledge, information, and belief of the person signing the notice. If so given, later developments affecting the accuracy of this information will not affect the validity of the notice [37 C.F.R. § 201.18(d)(3)].

(1) Full legal name of person or entity intending to obtain compulsory license, together with all fictitious or assumed names used by such person or entity for purpose of conducting business of making and distributing phonorecords [37 C.F.R. § 201.18(d)(1)(i)].

(2) Telephone number, full address including specific number and street name or rural route of place of business, and e-mail address, if available, of person or entity intending to obtain compulsory license [37 C.F.R. § 201.18(d)(1)(ii)].

NOTE:

A post office box or similar designation is not sufficient for this purpose except when it is the only address that can be used in that geographic location [37 C.F.R. § 201.18(d)(1)(ii)].

(3) If business organization intends to obtain compulsory license, name and title of chief executive officer, managing partner, proprietor, or other person similarly responsible for management of such entity [37 C.F.R. § 201.18(d)(1)(ii)].

(4) If entity intending to obtain compulsory license is holding company, trust, or other entity that is not expected to be actively engaged in business of making and distributing phonorecords under license or of authorizing making and distribution, all of foregoing information in (1)-(3), *above*, for primary entity expected to be engaged in business of making and distributing phonorecords under license or business of authorizing making and distribution (for example, record company or digital music service) [37 C.F.R. § 201.18(d)(1)(iii)].

(5) Fiscal year of person or entity intending to obtain compulsory license, and statement that fiscal year is calendar year, if it is [37 C.F.R. § 201.18(d)(1)(iv)].

(6) For each nondramatic musical work embodied or intended to be embodied in phonorecords made under compulsory license [37 C.F.R. § 201.18(d)(1)(v)]:

(a) Title of nondramatic musical work.

(b) Name of author or authors, if known.

(c) Copyright owner of work, if known.

(d) Types of all phonorecord configurations already made (if any) and expected to be made under compulsory license (for example, single disk, long-playing disk, cassette, cartridge, reel-to-reel, digital phonorecord delivery, or combination of them).

(e) Expected date of initial distribution of phonorecords already made (if any) or expected to be made under compulsory license.

(f) Name of principal recording artist or group actually engaged or expected to be engaged in rendering performances fixed on phonorecords already made (if any) or expected to be made under compulsory license.

(g) Catalog number or numbers, and label name or names, used or expected to be used on phonorecords already made (if any) or expected to be made under compulsory license.

(h) In case of phonorecords already made (if any) under compulsory license, date or dates of such manufacture.

NOTE:

If the notice will be filed with the Copyright Office pursuant to 37 C.F.R. § 201.18(f)(3) [see P 5, **below**], the notice also must include an affirmative statement that, with respect to the nondramatic musical work(s) named in the notice, the registration records or other public records of the Copyright Office have been searched and found not to identify the name and address of any copyright owner of the work(s) [37 C.F.R. § 201.18(d)(1)(vi)].

c. Signature of person or entity intending to obtain compulsory license or duly authorized agent of such person or entity [37 C.F.R. § 201.18(e)].

(1) If person or entity intending to obtain compulsory license is corporation, signature must be that of duly authorized officer or agent of corporation.

(2) If person or entity intending to obtain compulsory license is partnership, signature must be that of partner or duly authorized agent of partnership.

NOTE:

If the notice is signed by a duly authorized agent for the person or entity intending to obtain the compulsory license, the notice must include an affirmative statement that the agent is authorized to execute the notice on behalf of the person or entity intending to obtain the compulsory license [37 C.F.R. § 201.18(e)(3)].

4. If public records of Copyright Office identify copyright owner of work named in notice and owner's address, have notice served as follows [37 C.F.R. § 201.18(f)(1)]:

NOTE:

It is not necessary to file a copy of the notice in the Copyright Office in this case [37 C.F.R. § 201.18(f)(1)].

a. By mail or reputable courier service.

b. Sent to owner's last address shown by records of Copyright Office.

NOTE:

Service of a notice of intention on a copyright owner may be accomplished by means of service of the notice on either the copyright owner or an agent of the copyright owner with authority to receive the notice [see 37 C.F.R. § 201.18(b) (duties of agent)]. If the work has more than one copyright owner, service of the notice on any one of the co-owners of the work or on an authorized agent of one of the co-owners identified in the notice is sufficient with respect to all co-owners [37 C.F.R. § 201.18(a)(6)].

If a notice of intention is sent by certified mail or registered mail, a mailing receipt is sufficient to prove that service was timely. If a notice of intention is delivered by a reputable courier, documentation from the courier showing the first date of attempted

delivery is also sufficient to prove that service was timely. In the absence of a receipt from the U.S. Postal Service showing the date of delivery or documentation showing the first date of attempted delivery by a reputable courier, the compulsory licensee bears the burden of proving that the notice of intention was served in a timely manner [37 C.F.R. § 201.18(f)(5)].

If the notice is served electronically, the person or entity intending to obtain the compulsory license and the copyright owner must establish a procedure to verify that the notice is being submitted on the authority of the person or entity intending to obtain the compulsory license [37 C.F.R. § 201.18(e)(4)].

5. If notice is sent in manner described in P 4, *above*, and is returned because copyright owner is no longer located at that address or has refused to accept delivery, file original notice with Licensing Division of Copyright Office, accompanied by [37 C.F.R. § 201.18(f)(2)]:

- a. Brief statement that notice was sent to last address for copyright owner shown by records of Copyright Office but was returned; and
- b. Appropriate evidence that notice was sent by mail or reputable courier service to that address.

NOTE:

In these cases, the Copyright Office will specially mark its records to consider the date the original notice was mailed, as shown by the evidence mentioned above, as the date of filing. A written acknowledgment of receipt and filing will be provided to the sender and no filing fee will be required. On request and payment of fee, a Certificate of Filing will be provided to the sender [37 C.F.R. § 201.18(f)(2)].

6. If registration records or other public records of Copyright Office do not identify copyright owner of such work and include address for such owner:

- a. Notice may be filed in Copyright Office [37 C.F.R. § 201.18(f)(3)].

NOTE:

Notices of intention submitted for filing must be accompanied by the fee specified in 37 C.F.R. § 201.3(e). A separate fee will be assessed for each title listed in the notice. Notices of intention are filed by being placed in the appropriate public records of the Licensing Division of the Copyright Office. The date of filing is the date when the notice and fee are both received in the Copyright Office. An acknowledgment of receipt and filing is provided to the sender [37 C.F.R. § 201.18(f)(3)].

- b. Alternatively, if person or entity intending to obtain compulsory license knows name and address of copyright owner of nondramatic musical work, or agent of copyright owner as described in 37 C.F.R. § 201.18(a)(4) [see P 4, *above*], notice of intention may be served on copyright owner or agent of copyright owner by sending notice by mail or delivering it by reputable courier service to address of copyright owner or agent of copyright owner [37 C.F.R. § 201.18(f)(4)].

NOTE:

For purposes of 17 U.S.C. § 115(b)(1), the notice is not considered properly served if the notice is not sent to the copyright owner or the agent of the copyright owner as described in 37 C.F.R. § 201.18(a)(6) [see P 4, *above*] or if the notice is sent to an incorrect address

[37 C.F.R. § 201.18(f)(4)].

7. Instruct licensee to pay royalty to copyright owner for every phonorecord made and distributed in accordance with license [17 U.S.C. § 115(c)] as follows:

NOTE:

Distribution occurs if the person exercising the license has voluntarily and permanently parted with its possession. Whether it was a sale or gift is irrelevant. Forcible separation of copies through theft or fire would not constitute a voluntary parting [17 U.S.C. § 115(c)(2); H.R. Rep. No. 94-1476, at 110 (1976)]. The licensee may distribute or authorize distribution of a phonorecord of a nondramatic musical work by means of a digital transmission [*see* 17 U.S.C. § 101 ("digital transmission" defined)] that constitutes a digital phonorecord delivery [17 U.S.C. § 115(c)(3); *see* 17 U.S.C. § 115(d) ("digital phonorecord delivery" defined)]. The licensee may also distribute or authorize distribution of the phonorecord by renting, leasing, or lending it, or by doing other acts or practices in the nature of rental, lease, or loan [17 U.S.C. § 115(c)(4)].

Royalties need not be paid if the copyright owner is not identified in any of the public records of the Copyright Office. An identified owner is entitled to royalties for phonorecords made and distributed after being so identified, and not for any phonorecords previously made and distributed [17 U.S.C. § 115(c)(1)].

a. For each work embodied in phonorecord, pay appropriate royalty as determined by nature of distribution:

(1) For each distribution consisting of licensee's voluntarily and permanently parting with possession of phonorecord, whether by sale or gift, pay statutory royalty rate [*see* 17 U.S.C. § 115(c)(2)].

(2) For each distribution of phonorecord of nondramatic musical work by means of digital transmission constituting digital phonorecord, pay either statutory royalty rate or negotiated rate, as applicable [*see* 17 U.S.C. § 115(c)(3)].

(3) For each distribution by or in nature of rental, lease, or loan occurring between October 4, 1984, and October 4, 1997, pay proportion of revenue received from rental distribution equal to the proportion of revenue payable under other forms of distribution [17 U.S.C. §§ 109 (note), 115(c)(4); Pub. L. No. 98-450, § 4; Pub. L. No. 100-617, § 1; Pub. L. No. 104-39, § 4; *see* P (1), *above*; *see also* Pub. L. No. 101-650, § 804(c), 104 Stat. 5136 (1990 amendment to 17 U.S.C. § 109(b) does not apply to rentals, leaseings, and lendings occurring on and after Oct. 1, 1997)].

b. Make payment on or before twentieth day of each month for all royalty obligations arising during month next preceding [17 U.S.C. § 115(c)(5)].

NOTE:

Payments are made under oath and according to requirements of the Register of Copyrights [17 U.S.C. § 115(c)(5)].

c. Prepare and distribute monthly statements of account and cumulative annual statements of account [17 U.S.C. § 115(c)(5); *see* 37 C.F.R. § 201.19 (detailed requirements)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawConveyancesLicensesGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART III. TRANSACTION GUIDE

C. Procedural Guide

2. User of Copyrighted Work

33-103A California Legal Forms--Transaction Guide § 103A.134

§ 103A.134 Employing Works for Educational or Library Purposes

1. If client is teacher or someone acting at teacher's request and wishes to take advantage of teacher's "fair use" right to photocopy copyrighted material, advise client to do following [*see 17 U.S.C. § 107; see also H.R. Rep. No. 94-1476, at 68-70 (1976)*]:

NOTE:

The general principles of fair use are discussed in § 103A.131. The following guidelines suggest the minimal standards of educational fair use under the copyright law [H.R. Rep. No. 94-1476, at 68 (1976)]. Although the courts are not bound by these guidelines, they have been endorsed by Congress and are considered by some to be the equivalent of statutory text [*see Nimmer On Copyright, Ch. 13, **Infringement Actions--Substantive Aspects** (Matthew Bender)*].

a. For single copy of a work:

(1) Make copy for only following purposes:

(a) Scholarly research.

(b) Use in teaching.

(c) Preparation to teach.

(2) Reproduce any of following:

(a) Chapter from book.

(b) Article from periodical or newspaper.

(c) Short story, short essay, or short poem, whether or not from collective work.

(d) Chart, graph, diagram, drawing, cartoon, or picture from book, periodical, or newspaper.

b. For multiple copies for classroom use or discussion:

(1) Do not make more than one copy per pupil in a course.

(2) Confirm that notice of copyright appears on each copy.

(3) If work consists of poetry, restrict copying to:

(a) Complete poem of under 250 words printed on not more than two pages.

(b) From longer poem, excerpt of up to 250 words.

(4) If prose, copy only:

(a) Complete article, story, or essay of under 2,500 words.

(b) From longer work, excerpt of at least 500 words and maximum of the lesser of 1,000 words or 10 percent of work.

NOTE:

The limits of poetry or prose may be expanded to complete a line of poetry or a prose paragraph. Certain special works, like illustrated stories for young children, may not be reproduced in their entirety although qualifying under prose guidelines, but an excerpt of two pages with no more than 10 percent of the words found in the text may be copied [*see* H.R. Rep. No. 94-1476, at 69 (1976)].

(5) Limit copies of illustrations to one chart, graph, diagram, drawing, cartoon, or picture per book or per periodical issue.

(6) Confirm that copying is:

(a) Made at instance of individual teacher; and

(b) Not directed by higher authority (for example, school principal or board of education).

(7) Only make copies when it would be unreasonable to expect timely reply to request for permission to use.

(8) Do not copy material for more than one course in school.

(9) During any class term, limit copies to:

(a) Not more than one short poem, article, story, essay, or two excerpts of any one author.

(b) Three of above works from same collective work or periodical volume.

(10) Do not engage in more than nine instances of multiple copying for one course during one class term.

NOTE:

The limitations stated in PP (9) and (10), **above**, do not apply to current news publications in newspapers and periodicals [H.R. Rep. No. 94-1476, at 69 (1976)].

(11) Do not substitute copying for:

(a) Anthologies, compilations, or collective works.

(b) Book or reprint purchases.

(12) Do not copy "consumable" works, such as test booklets and workbooks.

(13) Do not permit same teacher to copy same item from term to term.

(14) Do not charge students for more than actual photocopying cost.

2. If client is interested in making fair use of music for educational purposes, brief client on applicable Congressional guidelines [see H.R. Rep. No. 94-1476, at 70-71 (1976) (guidelines); see also 17 U.S.C. § 107].

3. If client wishes to perform or display copyrighted work at nonprofit educational institution, advise client to avoid infringement problems by confirming that performance or display is done as follows [17 U.S.C. § 110(1)]:

a. By instructors or pupils.

b. In course of face-to-face teaching activities.

NOTE:

Although the work must not be remotely transmitted between the participants, its presence may be augmented or amplified within the same facility to reach a larger number of participants [H.R. Rep. No. 94-1476, at 81 (1976)].

c. In classroom or similar place devoted to instruction.

NOTE:

Although stadiums, gymnasiums, or auditoriums might be used, the presence of a group resembling an audience rather than pupils enrolled in a particular course would violate the exemption [see H.R. Rep. No. 94-1476, at 82 (1976)].

d. In case of motion picture or other audiovisual work, without utilizing copies that person responsible for performance knew, or reasonably should have known, were made in violation of copyright law.

4. If client wishes to present transmitted performance of nondramatic literary or musical work or reasonable and limited portions of any other work as part of instructional activities, notify client of need to make presentation under following circumstances [see 17 U.S.C. § 110(2)(A)-(D)]:

NOTE:

: Generally the performance of a nondramatic literary or musical work or reasonable and limited

portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission, is not an infringement of copyright if the conditions listed below are satisfied. However, this is not true with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities (see note below) transmitted via digital networks, or a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under the Copyright Act, which the transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired [17 U.S.C. § 110(2)].

a. Performance or display is made by, at direction of, or under actual supervision of instructor as integral part of class session offered as regular part of systematic mediated instructional activities of governmental body or accredited nonprofit educational institution.

NOTE:

The term "mediated instructional activities" with respect to the performance or display of a work by digital transmission refers to activities that use the work as an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting. The term does not refer to activities that use, in one or more class sessions of a single course, such works as textbooks, course packs, or other material in any media, copies or phonorecords of which are typically purchased or acquired by the students in higher education for their independent use and retention or are typically purchased or acquired for elementary and secondary students for their possession and independent use [17 U.S.C. § 110(2)].

Accreditation, with respect to an institution providing post-secondary education, is to be determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education; and with respect to an institution providing elementary or secondary education, accreditation is to be as recognized by the applicable state certification or licensing procedures [17 U.S.C. § 110(2)].

b. Performance or display is directly related to, and of material assistance to, teaching content of transmission.

c. Transmission is made solely for (and, to extent technologically feasible, reception of transmission is limited to) either:

(1) Students officially enrolled in course for which transmission is made; or

(2) Officers or employees of governmental bodies as part of their official duties or employment.

d. Transmitting body or institution takes these steps:

(1) Institutes policies regarding copyright;

(2) Provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, laws of United States relating to

copyright; and

(3) Provides notice to students that materials used in connection with course may be subject to copyright protection.

e. Transmitting body or institution takes these steps in case of digital transmission:

(1) Applies technological measures that reasonably prevent retention of work in accessible form by recipients of transmission from transmitting body or institution for longer than class session;

(2) Applies technological measures that reasonably prevent unauthorized further dissemination of work in accessible form by such recipients to others; and

(3) Does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination.

NOTE:

No governmental body or accredited nonprofit educational institution is liable for infringement by reason of the transient or temporary storage of material carried out through the automatic technical process of a digital transmission of the performance or display of that material as authorized under *17 U.S.C. § 110(2)*. No such material stored on the system or network controlled or operated by the transmitting body or institution under *17 U.S.C. § 110(2)* may be maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients. No such copy may be maintained on the system or network in a manner ordinarily accessible to anticipated recipients for a longer period than is reasonably necessary to facilitate the transmissions for which it was made [*17 U.S.C. § 110(2)*].

5. If client is organization or governmental body, inform it of right to make no more than 30 copies of phonorecords of particular transmission program without infringing copyright under following conditions [*17 U.S.C. § 112(b)*]:

a. Client must:

(1) Be entitled to make educational transmission [*see 17 U.S.C. § 110(2)*; *see also* P 4, *above*]; or

(2) Be exercising a right in sound recording that does not belong to copyright owner [*see 17 U.S.C. § 114(a)*; *see also* § 103A.36].

b. Copies or phonorecords permissibly made under above exemption are not themselves reproduced.

c. Maximum of one exhibit is preserved exclusively for archival purposes.

d. Otherwise, remaining exhibits are destroyed within seven years from date of first transmission to public.

6. Instruct client that library or archives may reproduce or distribute one copy or phonorecord of work without

infringing copyright by taking following steps [17 U.S.C. § 108]:

NOTE:

For purposes of 17 U.S.C. § 108, during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit education institution that functions as such, may reproduce, distribute, display or perform in facsimile or digital form a copy or phonorecord of that work (or portions of the work) for purposes of preservation, scholarship or research, provided that (1) the work is not subject to normal commercial exploitation, (2) the work cannot be obtained at a reasonable price, or (3) the copyright owner or agent has not provided notice, as required by the regulations, that either (1) or (2) applies [17 U.S.C. § 108(h)(1), (2)].

For an analysis of the complex components of this important exemption, see Nimmer On Copyright, Ch. 8, ***The Nature of the Rights Protected by Copyright*** (Matthew Bender). This exemption from the copyright owner's reproduction rights [see 17 U.S.C. § 106(1)] is in addition to the rights available to libraries and archives under the fair use doctrine [17 U.S.C. § 108(f)(4); see § 103A.131 (fair use); see also Nimmer On Copyright, Ch. 13, ***Infringement Actions--Substantive Aspects*** (Matthew Bender), for a detailed discussion of "fair use" photocopying].

a. Do not reproduce or distribute for any purpose of direct or indirect commercial advantage.

NOTE:

A library or archives collection contained within an industrial, profit-making, or proprietary institution should be able to operate within the exemption by making isolated, spontaneous renderings of single photocopies without any commercial motivation, or by entering into interlibrary arrangements as described below [H.R. Rep. No. 94-1476, at 74, 75 (1976)].

b. Confirm that library or archives collections are either:

(1) Open to public; or

(2) Available to specialized field researchers who are unaffiliated with library or archives or institution of which those facilities are a part.

c. Include copyright notice.

d. When copy or phonorecord or unpublished work is to be duplicated in facsimile or digital form:

(1) Confirm that work is solely for either:

(a) Purposes of preservation and security; or

(b) Deposit for research use in another library or archives.

(2) Confirm that copy or phonorecord is currently in collections of library or archives.

(3) Confirm that copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to public in that format outside premises of library or archives.

e. When copy or phonorecord of published work is to be duplicated in facsimile or digital form:

- (1) Confirm that material to be duplicated is damaged, deteriorating, lost, or has been stolen.

NOTE:

This right of reproduction applies to three copies or phonorecords of a published work [17 U.S.C. § 108(c)].

- (2) Proceed only if reasonable effort indicates that unused replacement cannot be obtained at fair price.

- (3) Confirm that copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to public in that format outside premises of library or archives.

f. If user requests reproduction of copy or phonorecord of item from collection:

- (1) Do not reproduce if on notice that copy or phonorecord would be used for any purpose other than private study, scholarship, or research.

- (2) Permit user to keep reproduction.

- (3) Display prominently at place where reproduction order is accepted, and include on order form, official warnings of copyright [see 37 C.F.R. § 201.14; see also P g, below].

- (4) Do not reproduce and distribute entire work (or substantial part of it) without first determining, on basis of reasonable investigation, that copy or phonorecord cannot be obtained at fair price.

NOTE:

Subject to certain conditions, this requirement does not apply to the reproduction and distribution of one article or other contribution to a copyrighted collection or periodical issue, or to a small part of any other copyrighted work [17 U.S.C. § 108(d)]. A "small part" of another work would probably be anything comparable in length to a typical contribution to a collection or periodical, such as a chapter from a novel [*Nimmer On Copyright*, Ch. 8, *The Nature of the Rights Protected by Copyright*, § 8.03[2][a] (Matthew Bender)].

g. When making user-requested reproduction [see P f, above], display or distribute warnings of copyright as follows:

- (1) Ensure that Display Warning of Copyright and an Order Warning of Copyright consists of verbatim reproduction of following notice [37 C.F.R. § 201.14(b)]:

NOTICE OF WARNING CONCERNING COPYRIGHT RESTRICTIONS

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

(2) Display warnings as follows [37 C.F.R. § 201.14(c)(1)]:

(a) Print official Display Warning of Copyright [see P (1), *above*] on heavy paper or other durable material in at least 18-point type.

(b) Display so that it is clearly visible, legible, and comprehensible to casual observer within immediate vicinity of place where orders are accepted.

NOTE:

To protect itself against unauthorized and unsupervised reproduction, the library or archives should place on all its reproducing equipment a notice to the effect that the making of a copy may be subject to the copyright law [17 U.S.C. § 108(f)(1)].

(3) Include warnings on reproduction order forms as follows [37 C.F.R. § 201.14(c)(2)]:

(a) Print official Order Warning of Copyright [see P (1), *above*] within box located prominently on order form itself, either on front side of form, or immediately adjacent to space calling for name or signature of person using form.

(b) Print in type size no smaller than that used predominantly throughout form and never smaller than eight-point type.

(c) Print in such a manner as to be clearly legible, comprehensible, and readily apparent to casual reader of form.

h. Do not engage in concerted or systematic reproduction or distribution of multiple copies or phonorecords of same material [see 17 U.S.C. § 108(g); see also H.R. Conf. Rep. No. 94-1733, at 72, 73 (1976)].

i. Do not reproduce and distribute any of following kinds of works [17 U.S.C. § 108(i)], except for preservation or replacement purposes [see 17 U.S.C. § 108(b),(c); see also PP d, e, *above*], or for pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to certain works [see 17 U.S.C. § 108(d),(e); see also P f, *above*], or when reproducing under special exemption for last 20 years of copyright term [see 17 U.S.C. § 108(h); see also NOTE in P 6, *above*]:

(1) Musical works.

(2) Pictorial, graphic, or sculptural works.

(3) Motion pictures or other audiovisual works, except for audiovisual work dealing with news.

NOTE:

The exception for audiovisual works dealing with news is intended to apply to programs of actual news reporting, not to those of a more documentary or magazine format nature [see H.R. Rep. No. 94-1476, at 77, 78 (1976)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawSubject MatterGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART III. TRANSACTION GUIDE

C. Procedural Guide

2. User of Copyrighted Work

33-103A California Legal Forms--Transaction Guide § 103A.135

§ 103A.135 Performing Works for Handicapped Persons

1. To avoid infringement of copyright while performing nondramatic literary work for persons with impaired sight or hearing [17 U.S.C. § 110(8)]:

- a. Have performance transmitted primarily to above persons.
- b. Do not give performance for purpose of direct or indirect commercial advantage.
- c. Confirm that transmission is made through facilities of:
 - (1) Governmental body.
 - (2) Noncommercial educational broadcast station [see 47 U.S.C. § 397 (definition)].
 - (3) Radio subcarrier authorization [see 47 C.F.R. §§ 73.293-73.295, 73.593-73.595 (definitions)].
 - (4) Cable system [see 17 U.S.C. § 111(f) (definition)].

2. To avoid infringement of copyright while performing dramatic literary work for persons with impaired sight [17 U.S.C. § 110(9)]:

NOTE:

These provisions are not applicable to more than one performance of the same work by the same performers or under the auspices of the same organization [17 U.S.C. § 110(9)].

- a. Give one performance of work published at least 10 years before performance date.
- b. Have performance transmitted:
 - (1) In manner specifically designed for sighted handicapped.
 - (2) Through facilities of radio subcarrier authorization [*see 47 C.F.R. §§ 73.293-73.295, 73.593-73.595 (definitions)*].
- c. Do not give performance for purpose of direct or indirect commercial advantage.

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawSubject MatterGeneral Overview



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[Reserved]

§§ 103A.136[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART III. TRANSACTION GUIDE

D. Related and Subsequent Procedures

33-103A California Legal Forms--Transaction Guide § 103A.150

§ 103A.150 Transfer of Copyright

NOTE:

A copyright owner may assign all of his or her exclusive rights in a copyrighted work by assigning the renewal copyright without limitation; however, the assignee holds nothing if the owner dies before the beginning of the renewal period. Thus, if a copyright owner promises an assignee of the copyright that he or she will renew the copyright and assign it to the assignee for the renewal term, but dies before the beginning of the renewal period, the assignee may continue to use the work after the renewal date only if he or she obtains an assignment of the copyright for the renewal term from the owner's statutory successor [*Stewart v. Abend* (1990) 495 U.S. 207, 221, 110 S. Ct. 1750, 109 L. Ed. 2d 184] .

1. Draft instrument transferring copyright [see § 103A.224].

NOTE:

There are few formal requirements for an instrument transferring copyright ownership, and these are listed below. The transfer may be made as a separate instrument or as part of a detailed contract dealing with other matters besides the transfer of copyright. The transfer must, however, be made by a written instrument [see 17 U.S.C. § 204(a)].

a. State intent to transfer ownership of copyright.

b. Provide space for signature of owner of rights conveyed, or signature of owner's agent.

c. If desired, add acknowledgment of signature and certificate issued by [17 U.S.C. § 204(b)(1), (2)]:

NOTE:

A certificate of acknowledgment is not required, but it is desirable because it will constitute prima facie evidence of execution [*see* 17 U.S.C. § 204(b)].

(1) Person authorized to administer oaths within United States, if transfer executed in United States.

(2) Diplomatic or consular officer of United States, or person authorized to administer oaths, and whose authority to do so is proved by a certificate, if transfer executed in foreign country.

2. Have instrument of transfer signed by owner or owner's agent [17 U.S.C. § 204(a); *see* 37 C.F.R. § 201.4(c)(1)].

3. Record instrument of transfer in Copyright Office [*see* § 103A.152; *see also* 37 C.F.R. § 201.4 (recordation procedures)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law
Conveyances
General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

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D. Related and Subsequent Procedures

33-103A California Legal Forms--Transaction Guide § 103A.151

§ 103A.151 Termination of Licenses and Transfers for Extended Terms of Copyrights Subsisting Before January 1, 1978

NOTE:

When the Copyright Act became effective on January 1, 1978, it extended the maximum duration of existing copyrights in their first or renewal terms from 56 to 75 years [*see* former 17 U.S.C. § 304(a), (b)]. Any copyright still in its renewal term at the time the Sonny Bono Copyright Term Extension Act became effective has a copyright term of 95 years from the date the copyright was originally secured [17 U.S.C. § 304(b); *see* Pub. L. No. 105-298, § 207 (Oct. 27, 1998; effective 90 days after enactment)]. If the rights under an existing copyright were transferred before the effective date of the Copyright Act, the Act permits the author or other specified persons [*see* 103A.221[1][c]] to terminate those rights for the extended term (except in the case of a copyright in a work made for hire) [*see* 17 U.S.C. § 304(c), (d); *see also* § 103A.221[1]].

In the case of any copyright, other than a work for hire, subsisting in its renewal term on October 27, 1998 (the effective date of the Sonny Bono Copyright Term Extension Act), for which the termination right provided for in 17 U.S.C. § 304(c) has expired by that date and for which that right has not been previously exercised, termination may be effected at any time during a period of five years beginning at the end of 75 years from the date copyright was originally secured [*see* 17 U.S.C. § 304(d)(2)].

For all other contracts with termination rights provided in 17 U.S.C. § 304(c), termination may be effected at any time during a period of five years beginning at the end of 56 years from the date the copyright was originally secured, or beginning on January 1, 1978, whichever is later [17 U.S.C. § 304(c)(3)].

Termination may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or any future grant [17 U.S.C. § 304(c)(5)].

1. Prepare notice of termination [*see* § 103A.221[2]].

NOTE:

The required contents of this notice are discussed in detail in § 103A.221[1][e].

2. Have notice executed by person or persons terminating grant [*see* § 103A.211[1][c]].
3. Accompany handwritten signature of each person effecting termination with statement of full name and address of that person, typewritten or printed legibly by hand, or clearly include such a statement elsewhere in notice [37 C.F.R. § 201.10(c)(4)].
4. Serve notice on each grantee whose rights are being terminated, or on grantee's successor in title [37 C.F.R. § 201.10(d)(1)], by:
 - a. Personal service; or
 - b. First class mail sent to an address which, after a "reasonable investigation" [*see* 37 C.F.R. § 201.10(d)(3) (definition)], is found to be last known address of grantee or successor in title.
5. Record copy of notice in Copyright Office [*see* § 103A.152], accompanied by [37 C.F.R. § 201.10(f)(1)]:
 - a. Statement setting forth date on which notice was served and manner of service, unless that information is contained in notice.
 - b. Fee for recordation [*see* 37 C.F.R. § 201.3(c)].

NOTE:

If separate copies of the notice were served on more than one grantee, only one copy need be submitted for recordation [37 C.F.R. § 201.10(f)(1)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawConveyancesGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.152

§ 103A.152 Recordation of Transfers and Other Documents

NOTE:

An attorney representing a client in copyright matters should consider recording relevant documents with the Copyright Office even when recordation is not required by applicable statute or regulation. After recording a document, the Register of Copyrights will return that document along with a certificate of recordation [17 U.S.C. § 205(b)]. Recordation provides constructive notice to all persons of the facts stated in the document, provided that the document or the material attached specifically identifies work to which it pertains and states that the work is registered.

The procedures discussed below apply to documents commonly recorded in the Copyright Office. However, filing and recordation of certain specialized documents are governed by other law [*see* 37 C.F.R. § 201.4(a)(1)(i)-(vi)].

1. Make sure document to be recorded is either original or legible reproduction satisfying following requirements [37 C.F.R. § 201.4(c)(1), (3)]:

- a. Bearing actual signature or signatures of person or persons who executed it; or
- b. If photocopy or other facsimile is to be recorded in lieu of original, copy must be:
 - (1) Legible.
 - (2) Accompanied by sworn certification or official certification that reproduction is true copy of signed document.

NOTE:

The sworn certification accompanying a reproduction must be signed by at least one

party to the document, or that party's representative [37 C.F.R. § 201.4(c)(1)].

2. If instrument contains a reference to any attached schedule, appendix, or exhibit, either [37 C.F.R. § 201.4(c)(2)(i)]:

NOTE:

The following rules do not apply to attachments that are self-contained parts of a larger instrument; these will be recorded if the person requesting recordation asserts that the document is sufficiently complete as it stands [*see* 37 C.F.R. § 201.4(c)(2)(ii)]. If the document submitted for recordation merely identifies another document or incorporates another document by reference, the other document need not be recorded [37 C.F.R. § 201.4(c)(2)(iii)]. The completeness requirements may be waived in "exceptional cases" [*see* 37 C.F.R. § 201.4(c)(2)(i)].

- a. Submit attachment along with document; or
- b. Have parties delete reference in document.

3. Submit document to Copyright Office along with required fee [*see* 37 C.F.R. § 201.4(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law
Civil Infringement Actions
Presumptions & Requirements
Recordation Requirement
Copyright Law
Conveyances
General Overview



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33-103A California Legal Forms--Transaction Guide § 103A.153

§ 103A.153 Correction or Amplification of Registration (Supplementary Registration)

1. Determine whether correction or amplification is necessary or appropriate.

a. Correction is appropriate if information in basic registration was incorrect at time basic registration was made, and error is not one that Copyright Office should have recognized [37 C.F.R. § 201.5(b)(2)(i)].

b. Amplification is appropriate to reflect additional information that could have been given but was omitted at time of registration or to reflect changes in facts other than those specified in P c, *below* [see 37 C.F.R. § 201.5(b)(2)(ii)].

c. Correction or amplification is *not* appropriate to [37 C.F.R. § 201.5(b)(2)(ii)-(iv)]:

NOTE:

Specific procedures for which supplementary registration is inappropriate are discussed in § 103A.154.

(1) Reflect ownership, division, allocation, licensing, or transfer of rights in work, whether at time of registration or thereafter.

(2) Correct errors in statements or notice on copies of phonorecords of work.

(3) Reflect changes in the content of work.

NOTE:

If the work has been changed substantially, an entirely new registration should be

submitted for the revised version to cover the changes or additions.

(4) Correct renewal claimant or legal basis of claim or to add renewal claimant, if basic renewal registration has been made during last year of work's relevant first-term copyright, unless [see 37 C.F.R. § 201.5(b)(2)(iv)]:

(a) Application for supplementary registration and fee were received in Copyright Office within last year of relevant first-term copyright; and

(b) Clear and convincing evidence is submitted showing that inadvertent error was made in failing to designate correct living statutory renewal claimant in basic renewal registration.

2. To correct or amplify registration, file U.S. Copyright Office Form CA [see § 103A.209[2]] with Copyright Office, together with required fee.

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Civil Infringement Actions Presumptions & Requirements Registration Requirement



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33-103A California Legal Forms--Transaction Guide § 103A.154

§ 103A.154 Correction of Record or Status of Copyright

1. If name on copyright is erroneous [*17 U.S.C. § 406(a)*]:

NOTE:

An erroneous name does not affect the validity or ownership of copyright, but an innocent infringer may have a complete defense under those circumstances [*see 17 U.S.C. § 406(a)*]. Thus, to ensure protection of the copyright owner's rights, it is important that any errors be corrected promptly.

a. Register work in correct name of copyright owner; or

b. Record in Copyright Office [*see § 103A.152*] a document:

(1) Executed by person named in notice; and

(2) Showing ownership of copyright.

2. Document life or death of author by recording document with Copyright Office stating either [*17 U.S.C. § 302(d)*; *see 17 U.S.C. § 302(e)* (presumption as to author's death)]:

NOTE:

Statements regarding the status of the author aid in establishing continuation or end of copyright. Anyone who has an interest in the copyright may record this type of statement [*17 U.S.C. § 302(d)*].

a. Date on which author died, or that author is living on specified date.

b. All of following information:

- (1) Identity of person filing.
- (2) Nature of person's interest.
- (3) Source of information recorded.
- (4) Other information required by regulations of Office of Register of Copyrights.

3. If desirable, alter term of copyright in case of anonymous or pseudonymous works by filing with Copyright Office statement that [17 U.S.C. § 302(c)]:

NOTE:

The copyright term for anonymous or pseudonymous works is 95 years from first publication or 120 years from creation, whichever occurs first. If, before the end of that term, the identity of one or more of the authors is revealed, the copyright endures for the term that would be applicable to a work having a known author--the lifetime of the author plus 70 years after the author's death [*see* 17 U.S.C. § 302(a)-(c)].

a. Identifies one or more authors of work.

NOTE:

Identification must be made before the end of the copyright term based on unidentified authorship. The identifying statement may be recorded by anyone having an interest in the copyright of the anonymous or pseudonymous work [*see* 17 U.S.C. § 708(a)(6)(fee)].

b. Identifies person filing it.

c. Gives nature of person's interest.

d. Gives source of information recorded.

e. Designates particular work affected.

f. Otherwise complies with applicable copyright regulations.

4. If desired, register first published edition of a work previously registered in unpublished form [17 U.S.C. § 408(e)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Civil Infringement Actions Presumptions & Requirements Recordation Requirement



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33-103A California Legal Forms--Transaction Guide § 103A.155

§ 103A.155 Claim For Renewal of Subsisting Copyright

NOTE:

If copyright was originally secured before January 1, 1964, and not renewed at the proper time (that is, within its first term of protection lasting 28 years), copyright protection expired permanently at the end of the 28th year of the first term and could not be renewed [Pub. L. No. 102-307, § 102(g)(2); *see* former 17 U.S.C. § 304(a) (as it existed before June 26, 1992)].

For works originally copyrighted on or after January 1, 1978, the copyright law has eliminated all renewal requirements and established a single copyright term and different methods of computing the duration of a copyright [*see* 17 U.S.C. § 302(a); *see also* § 103A.85[1]].

For copyrights first obtained between January 1, 1964, and December 31, 1977 [*see* Pub. L. No. 102-307, § 102(g)(2)], the second term of copyright is secured automatically, and renewal registration is optional [17 U.S.C. § 304(a)(3) (application to register claim to renewed and extended term of copyright may be made, but such application is not a condition of renewal and extension of copyright for further term of 67 years)]. However, whether or not an application to register a claim is submitted and the claim registered determines the vesting of copyright ownership during the extended 67-year term [*see* 17 U.S.C. § 304(a)(2); § 103A.211[1][b][i]; *see also* 17 U.S.C. § 304(a)(3), (4) (procedure for filing and legal consequences of not filing)]. (Any copyright still in its renewal term when the Sonny Bono Copyright Term Extension Act became effective has a copyright term of 95 years from the date the copyright was originally secured [17 U.S.C. § 304(b); *see* Pub. L. No. 105-298, § 207 (Oct. 27, 1998; effective date 90 days after enactment)]). If renewal is desired, follow the steps listed below.

The official form to use in applying for renewal registration (U.S. Copyright Office Form RE) is reproduced in § 103A.211[2].

1. Have appropriate party claim renewal [see 17 U.S.C. § 304(a)(1)(A)-(C); see 37 C.F.R. § 202.17(f)(1)-(3)]:

NOTE:

Notwithstanding the definition of "posthumous work" in 37 C.F.R. § 202.17(b), a renewal claim may be registered in the name of the proprietor (owner of the copyright at the time of renewal registration), as well as in the name of the appropriate claimant, if there was a contract for exploitation of the work during the author's lifetime but no copyright assignment occurred. However, registration by the Copyright Office in this case should not be interpreted as evidencing the validity of the claim [37 C.F.R. § 202.17(f)(2)].

a. If author is still living, have author claim renewal.

b. If author is not living:

(1) If work is posthumous, and copyright was originally secured by proprietor, have proprietor claim renewal.

NOTE:

A posthumous work is one with respect to which the author made no copyright assignment or other contract for exploitation during his or her lifetime [37 C.F.R. § 202.17(b)].

(2) If work is a periodical, cyclopedic, or other composite work, and copyright was originally secured by proprietor, have proprietor claim renewal.

(3) If work was copyrighted by corporate body other than as assignee or licensee of an individual author, have proprietor claim renewal.

(4) If work was copyrighted by an employer for whom work was made for hire, have proprietor claim renewal.

(5) In case of any other copyrighted work (including contribution to periodical or other composite work):

(a) If author's spouse and/or children are alive, have spouse and/or children claim renewal.

(b) If author's spouse and/or children are not alive but author left will, have author's executor claim renewal.

(c) If author's spouse and/or children are not alive and author left no will, have author's next of kin claim renewal.

NOTE:

When an author dies before the copyright renewal period arrives, his or her statutory successor [see 17 U.S.C. § 304(a)(1)(C); 37 C.F.R. § 202.17(f)(1)] is entitled to the renewal rights, even if the author previously assigned the renewal rights to another person [*Miller Music Corp. v. Charles N. Daniels, Inc.* (1960) 362 U.S. 373, 375, 80 S. Ct.

792, 4 L. Ed. 2d 804 (construing prior law)]. Thus, if a copyright owner promises an assignee of the copyright that he or she will renew the copyright and assign it to the assignee for the renewal term, but dies before the beginning of the renewal period, the assignee may continue to use the work after the renewal date only if he or she obtains an assignment of the copyright for the renewal term from the owner's statutory successor. The right to renew a copyright is contingent and does not vest until the beginning of the renewal period. The assignee's right to the renewal is valid against the world if the copyright owner is alive at the beginning of the renewal period, but it is only an expectancy until that time [*Stewart v. Abend* (1990) 495 U.S. 207, 221, 110 S. Ct. 1750, 109 L. Ed. 2d 184] .

2. Complete renewal registration application form in accordance with its instructions [see § 103A.211].

3. Send application form and fee:

NOTE:

The Copyright Office has no discretion to extend the renewal time limits [37 C.F.R. § 202.17(e)(1)]. However, it does permit registration by telegraph, telefacsimile or similar written communication if it appears that a formal renewal application would not arrive in time, provided specified requirements are satisfied [see 37 C.F.R. § 202.17(e)(3)].

a. Within the last (28th) year before expiration of original term of copyright [see 17 U.S.C. § 304(a)(3)(A)(i)]; or

b. At any time during renewed and extended term of 67 years [see 17 U.S.C. § 304(a)(3)(A)(ii)].

c. Include renewal fee [see § 103A.211[2]].

d. To Library of Congress, Copyright Office, 101 Independence Ave., S.E., Washington, DC 20559-6000.

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawDuration & RenewalGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.156

§ 103A.156 Notice of Potential Infringement

1. If person or entity conducts activities likely to infringe upon copyright, draft advance notice of potential copyright infringement [*see 37 C.F.R. § 201.22(a)(1)*].

NOTE:

The Copyright Office does not provide printed forms for the use of persons serving this notice [*37 C.F.R. § 201.22(b)*]. For a representative notice and a detailed explanation of the required contents of the notice and its signature requirements, see § 103A.222[1][b], [c].

2. Serve notice on infringer not less than 48 hours before first fixation of work [*see 17 U.S.C. § 411(c)(1); 37 C.F.R. § 201.22(e)(1); see also § 103A.222[1][d]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawCivil Infringement ActionsGeneral OverviewCopyright LawFormalitiesGeneral OverviewCopyright LawFormalitiesNoticeGeneral Overview



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33-103A California Legal Forms--Transaction Guide §§ 103A.157-103A.199

[Reserved]

§§ 103A.157[Reserved]



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CHAPTER 103A COPYRIGHTS

PART IV. FORMS

A. Applications for Copyright Protection

33-103A California Legal Forms--Transaction Guide § 103A.200

§ 103A.200 Application for Copyright Registration [U.S. Copyright Office Form CO]

[1] Comment

[a] Use of Form

Form CO, illustrated in [2], *below*, may be used, in lieu of on-line registration at the Electronic Copyright Office [*see* [b], *below*], to register a claim of copyright in any work [*see* 37 C.F.R. § 202.3(b)(2)(ii)]. Although it is illustrated here in blank, Form CO must be completed on a computer using the Adobe Acrobat Reader (or an equivalent utility); then the form must be printed and mailed to the Copyright Office. The form will not be acceptable if the applicant prints it in blank and then completes it or if the applicant adds or changes any data in the form after completing it on a computer and printing it. Instructions for completing and mailing Form CO are provided on, and the form can be downloaded from, the Copyright Office web site at www.copyright.gov/forms.

When the Copyright Office determines that the work can be copyrighted and that the legal and formal requirements have been met, the claim of copyright will be registered, and a certificate of registration will be issued to the applicant [17 U.S.C. 410(a)]. The effective date of a copyright registration is the day on which the application, the deposited work [*see* [d], *below*], and the fee, all acceptable for registration, have all been received in the Copyright Office [17 U.S.C. § 410(d)].

A certificate of registration will be sufficient to support a civil action for infringement [*see* 17 U.S.C. §§ 411, 412] even if the certificate contains inaccurate information, provided (1) the inaccurate information was included on the application for copyright registration without knowledge that it was inaccurate, and (2) the inaccuracy of the information, if it had been known, would not have caused the Register of Copyrights to refuse registration [17 U.S.C. § 411(b)(1)]. Therefore, an innocent mistake in completing the application form (such as failing to recognize existing works that the subject work incorporates) should not render the registration certificate insufficient to support an infringement action.

[b] Alternative Ways to Register Copyright

The Copyright Office recommends using its on-line registration process called the Electronic Copyright Office (eCO), which does not involve handling any paper forms; for information, see www.copyright.gov/eco/faq.html. The preferred alternative to using eCO is to use Form CO, illustrated in [2], *below*. The Copyright Office may continue to accept the following forms but prefers that they not be used. Form CO supersedes these forms, including the short versions and continuation sheets:

- Form TX, for a nondramatic literary work;
- Form PA, for a work of performing art;
- Form SR, for a sound recording;
- Form VA, for a work of visual art; and
- Form SE, for an individual issue of a serial.

However, the Copyright Office prescribes the superseded Forms TX, PA, and VA for use with the group-registration Form GR/CP; see § 103A.208 for further discussion. The Copyright Office will mail any of these forms on request. A request can be submitted on-line at www.copyright.gov/forms/formrequest.html or by mail to the Copyright Information Section, Library of Congress, Copyright Office, 101 Independence Avenue SE, Washington, DC 20559-6000.

Form CO does not supersede the forms for group registration that are illustrated and discussed in this chapter [see §§ 103A.206-103A.208] and does not supersede the forms for supplementing and renewing registrations [see §§ 103A.209, 103A.211].

Any application for copyright registration must be made on the appropriate official form and must be accompanied by the statutory fee [37 C.F.R. § 202.3(c)(2); see 17 U.S.C. § 708(a)(1); 37 C.F.R. § 201.6 (payment and refund of fees)].

[c] Circulars and Factsheets

The Copyright Office publishes basic information about registration, fees, compulsory licenses, and other aspects of the copyright process, which can be downloaded or printed from the Copyright Office web site at www.copyright.gov/circls/ or obtained by mail. Fundamentally helpful are the following:

- Circular 1, "Copyright Basics"
- Circular 1b, "Limitations on Information Furnished by the Copyright Office"
- Circular 1c, "Make Sure Your Application Will Be Acceptable"
- Circular 3, "Copyright Notice"
- Factsheet SL-4, "Current Fees"
- Factsheet SL-15, "New Terms for Copyright Protection"
- Factsheet SL-35, "Online Copyright Registration"

[d] Deposit of Work Being Registered

The application for registration must be accompanied by a deposit of the work being registered [17 U.S.C. § 408(a)]. If the work is unpublished, the applicant must deposit one complete copy or phonorecord. In the case of a published work, the applicant must deposit two complete copies or phonorecords of the "best edition" [see 37 C.F.R. §§ 202.19(b)(1), 202.20(b)(1) (definition)] of the work being registered. In the case of a work first published outside the United States, only one complete copy or phonorecord of the work as so published is required. In the case of a contribution to a collective work, only one complete copy or phonorecord of the best edition of the collective work is required [17 U.S.C. § 408(b)(3),(4); 37 C.F.R. §§ 202.19(b)(2), 202.20(b)(2)(iv)].

On the Copyright Office web site, see Circular 7d, "Mandatory Deposit of Copies or Phonorecords for the Library of Congress," and Circular 7b, " 'Best Edition' of Published Copyrighted Works for the Collection of the Library of Congress," for more information.

[e] Notice of Copyright

For works publicly distributed by authority of the copyright owner on or after March 1, 1989 [see Pub. L. No. 100-568, § 13, 102 Stat. 2861], the placing of copyright notices on publicly distributed copies is optional [17 U.S.C. § 401(a)]. If a notice appears on the copies, it must consist of the following three elements [17 U.S.C. § 401(b)]:

- The symbol (c) (or, on a phonorecord, the letter P in a circle), or the word "Copyright," or the abbreviation "Copr.";
- The year of first publication of the work; and
- The name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

In the case of compilations or derivative works incorporating previously published material, the year of first publication of the compilation or derivative work is sufficient. The year may be omitted if a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles [17 U.S.C. § 401(b)(2)].

The notice must be affixed to the copies in a manner and location that provide reasonable notice of the claim of copyright [17 U.S.C. § 401(c); see § 103A.120].

If copies of a work are distributed without a copyright notice, an infringer may be able to defeat an infringement action or reduce the amount of damages in the action by asserting an "innocent infringement" defense [see 17 U.S.C. §§ 401(d), 406(a); see also § 103A.62[2]-[4]].

[2] FORM

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Copyright Protection Formalities & Ownership Interests Formalities Deposit Copyright Law Formalities General Overview Copyright Law Formalities Deposit & Registration Registration Applications



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DIVISION VII: PERSONAL TRANSACTIONS

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33-103A California Legal Forms--Transaction Guide §§ 103A.201-103A.205

[Reserved]

§§ 103A.201[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART IV. FORMS

A. Applications for Copyright Protection

33-103A California Legal Forms--Transaction Guide § 103A.206

**§ 103A.206 Application for Copyright Registration for Group of Serial Issues of Collective Work Made for Hire
[U.S. Copyright Office Form SE/GROUP]**

[1] Comment

[a] Use of Form

This form is the official application for copyright registration of a group of issues of a serial collective work made for hire. This form may be used only if all of the following conditions are satisfied [see "When to Use This Form" and "Which Issues May Be Included in a Group Registration" under "Basic Information" in the official instructions reproduced in [2], *below*; see also 37 C.F.R. § 202.3(b)(6)]:

- The applicant must have provided a complimentary subscription for two copies of the serial to the Library of Congress, confirmed by a letter to the Library of Congress [see [b], *below*].
- The claim must be in a "collective work," i.e., a work in which a number of contributions are assembled into a collective whole [see 17 U.S.C. § 101].
- Each issue must be essentially an all-new collective work.
- Each issue must be a "work made for hire," as defined below.
- The author(s) and claimant(s) must be the same person(s) or organization(s) for all of the issues.
- Each issue must have been created no more than one year prior to publication.
- All issues in the group must have been published within the same calendar year.

A "work made for hire" is (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for certain uses (including use as a contribution to a collective work), if the parties

expressly agree in a written instrument signed by them that the work will be considered a work made for hire [see 17 U.S.C. § 101]. The employer or person for whom the work was prepared is considered the author of a work made for hire [see 17 U.S.C. § 201(b)].

If any of the above-listed conditions does not apply, the applicant must register issue separately, using Form CO, which is illustrated in § 103A.200[2], *above*.

Any application for copyright registration must be made on the appropriate official form [37 C.F.R. § 202.3(c)(2)].

[b] Mailing Complimentary Subscription to Library of Congress

As noted in [a], *above*, an applicant may not use this form to register a group of issues for a serial work unless the applicant has provided the Library of Congress a complimentary subscription to two copies of the serial, which must be confirmed by a letter addressed to Group Periodicals Registration, Library of Congress, Washington, DC 20540-4161 [see 37 C.F.R. § 202.3(b)(6)(i)(A),(ii)]. The complimentary subscription copies should be mailed to the Library of Congress *separately from the letter and from the application*. The copies should be mailed to the same address, above, as the letter [see 37 C.F.R. § 202.3(b)(6)(iii)]. The Register of Copyrights may revoke the privilege of group registration of serials for failure to submit the required complimentary subscription copies promptly after publication of each issue [see 37 C.F.R. § 202.3(b)(6)(iv)].

[c] Completing the Application

Detailed, line-by-line instructions on how to complete the application for registration are provided with the form. These instructions are reproduced in [2], *below*, along with the form.

The application must be submitted with the appropriate filing fee [see 37 C.F.R. § 202.3(c)] and a deposit [37 C.F.R. § 202.3(b)(6)(v)]. The required deposit for a group registration of serials is one complete copy of the best edition of each issue included in the group registration [37 C.F.R. § 202.3(b)(6)(v)(C)].

For discussion of other general information relating to registration, see § 103A.200[1]. For a detailed discussion of the procedure for registration of a copyright, see § 103A.122.

[2] FORM

Application for Copyright Registration for Group of Serial Issues of Collective Work Made for Hire [U.S. Copyright Office Form SE/GROUP]

[Click here to view image.](#)

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Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law Copyright Protection Formalities & Ownership Interests Ownership Interests Works Made for Hire Copyright Law Formalities Deposit & Registration Registration General Overview Copyright Law Formalities Deposit & Registration Registration Applications Copyright Law Ownership Interests Works Made for Hire



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART IV. FORMS

A. Applications for Copyright Protection

33-103A California Legal Forms--Transaction Guide § 103A.207

§ 103A.207 Application for Copyright Registration of Group of Daily Newspapers and Newsletters Published in One Calendar Month [U.S. Copyright Office Form G/DN]

[1] Comment

[a] Use of Form

This form is the official application for copyright registration for all issues of a daily newspaper or of two or more issues of a newsletter published within one calendar month. This form may be used only if all of the following conditions are satisfied [*see* "When to Use This Form for Newspapers" and "When to Use This Form for Newsletters" under "Basic Information" in the official instructions reproduced in [2], *below*; *see also* 37 C.F.R. § 202.3(b)(7)(i),(9) (newspapers; newsletters)]:

- The work must be a daily newspaper or newsletter [*see* [b], *below* (definitions)].
- The work must be a "work made for hire" [*see* [b], *below* (definitions)].
- The author(s) and claimant(s) must be the same person(s) or organization(s).
- Each issue must be an essentially all-new "collective work" [*see* [b], *below* (definitions)], or an essentially all new issue that has not been published before.
- For newspapers, the claim must include all issue dates within the calendar month within the same year; for newsletters, the claim must include two or more issue dates within the calendar month within the same year.
- The application must be filed within three months of the last publication date included in the group.
- For newsletters only, all issues in the group must have been first published on or after July 1, 1999. (For information about newsletters published before July 1, 1999, contact the Registration and

Recordation Program of the Copyright Office.)

If any of these conditions does not apply, the applicant must register each issue of the newspaper or newsletter separately, using Form CO, which is illustrated in § 103A.200[2].

Any application for copyright registration must be made on the appropriate official form [37 C.F.R. § 202.3(c)(2)].

[b] Definitions

For registration purposes, as defined by the Newspaper Section of the Serials and Government Publications Division of the Library of Congress, a "newspaper" is a serial work that is mainly designed to be a primary source of written information on current events, either local, national, or international in scope. A newspaper contains a broad range of news on all subjects and activities and is not limited to any specific subject matter. Newspapers may be intended either for the general public or for a particular group [see "Definitions" in the official instructions reproduced in [2], *below*; see also 37 C.F.R. § 202.3(b)(7)(ii)].

For registration purposes, a daily "newsletter" is defined as a serial published and distributed by mail or electronic media. Publication must occur at least two days per week, and the newsletter must contain news or information of interest chiefly to a special group (for example, trade and professional associations, corporations, schools, colleges, and churches). Daily newsletters are customarily available by subscription and are not sold on newsstands [see "Definitions" in the official instructions reproduced in [2], *below*; see also 37 C.F.R. § 202.3(b)(9)(i)].

A "collective work" is a work in which a number of contributions are assembled into a collective whole [see 17 U.S.C. § 101; "Definitions" in the official instructions reproduced in [2], *below*].

A "work made for hire" is (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for certain uses (including use as a contribution to a collective work), if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire [see 17 U.S.C. § 101]. The employer or person for whom the work was prepared is considered the author of a work made for hire [see 17 U.S.C. § 201(b)].

[c] Deposit Requirements for Newspapers

Special deposit requirements apply to group newspaper registrations using this form. The application must be accompanied by a deposit of a positive, 35 mm silver-halide microfilm meeting the Library of Congress' best edition criteria that includes all issues published within the calendar month covered by the application. Final editions are required when two or more daily editions are published [see 37 C.F.R. § 202.3(b)(7)(i)(D); see also "What to Deposit for Newspapers" under "Basic Information" in the official instructions reproduced in [2], *below*]. In addition to the final edition of the daily newspaper, the copyright claim and deposit may also include earlier editions published in the same day in a given metropolitan area served by the newspaper, but may not include national or regional editions distributed beyond a given metropolitan area [see 37 C.F.R. § 202.3(b)(7)(i)(D)].

In some cases, the publisher may be exempted from sending microfilm. The Copyright Acquisitions Division of the Copyright Office will notify the publisher if the newspaper is exempted. If the newspaper is exempted, an optional deposit may accompany the application. The deposit should consist of only one of the following [see "What to Deposit for Newspapers" under "Basic Information" in the official instructions reproduced in [2], *below*]:

- Complete print copies of the first and last issues of the month; or
- Print copies of the first section of the first and last issues of the month; or

- Print copies of the first page of the first and last issues of the month.

[d] Deposit Requirements for Newsletters

Special deposit requirements apply to group newsletter registrations using this form. In all cases, one complete copy of each issue included in the group must accompany the form. If the newsletter is published only online, one complete print-out of each issue or a computer disk (or CD-ROM) containing all the issues *and* a print-out of the first and last issues included in the group must be sent [see "What to Deposit for Newspapers" under "Basic Information" in the official instructions reproduced in [2], *below*; see also 37 C.F.R. § 202.3(b)(9)(vi)(A)].

Additional material must be sent only if specifically requested by the Copyright Acquisitions Division. The request will specify the nature of the additional material, which will be either (1) one microfilm copy meeting the specifications given in [c], *above*, for newspapers, or (2) one or two complimentary subscriptions for the Library of Congress [see "What to Deposit for Newspapers" under "Basic Information" in the official instructions reproduced in [2], *below*; see also 37 C.F.R. § 202.3(b)(9)(vi)(B)].

[e] Completing the Application

Detailed, line-by-line instructions on how to complete the application for registration are provided with the form. These instructions are reproduced in [2], *below*, along with the form.

For discussion of other general information relating to registration, including where to obtain this form, see § 103A.200[1]. For a detailed discussion of the procedure for registration of a copyright, see § 103A.122.

[2] FORM

Application for Copyright Registration of Group of Daily Newspapers and Newsletters Published in One Calendar Month [U.S. Copyright Office Form G/DN]

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Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Formalities Deposit & Registration Registration Applications Copyright Law Publication General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART IV. FORMS

A. Applications for Copyright Protection

33-103A California Legal Forms--Transaction Guide § 103A.208

§ 103A.208 Adjunct Application for Copyright Registration for a Group of Contributions to Periodicals [U.S. Copyright Office Form GR/CP]

[1] Comment

[a] Use of Form

This form is an adjunct application for copyright registration. It can be used to register copyright claims for multiple works that qualify for group registration [see [b], *below*]. This form must be submitted with a basic application for registration of a nondramatic literary work on Form TX, or of a work of performing arts on Form PA, or of a work of visual art on Form VA [see 37 C.F.R. § 202.3(b)(8)(ii)(A)]. This form and the necessary basic form can be downloaded as a package from the Copyright Office web site at www.copyright.gov/forms or can be obtained through the mail [see § 103A.200[1][b]]. (The use of Form TX, PA, or VA is discouraged, except in connection with a group registration under Form GR/CP. To register a copyright claim for a single work in any of the categories described above, the Copyright Office recommends using Form CO, which is illustrated in § 103A.200[2].)

The purpose of this form is to provide separate identification for each of the contributions and to give information about their first publication, as required by statute ["Procedure for Group Registration" under "Basic Information" in the official instructions reproduced in [2], *below*; see 17 U.S.C. § 408(c)(2) (single registration of group works)].

The choice of basic application to be submitted with this adjunct form is determined by the nature of the contributions being registered. As long as the contributions meet the requirements for group registration [see [b], *below*], they may be registered together even if they are entirely different in nature, type, or content. If the contributions differ in nature, the form most suitable for the majority of them should be used [see "Procedure for Group Registration" under "Basic Information" in the official instructions reproduced in [2], *below*].

[b] Requirements for Single Registration of Group of Works

A single copyright registration for a group of works may be made if all of the following conditions are met [17 U.S.C. § 408(c)(2); see 37 C.F.R. § 202.3(b)(8)(i)]:

- All of the works are by the same author, who is an individual and not an employer for hire.
- Each of the works was first published as a contribution to a periodical, including a newspaper, within a 12-month period (each of the works need not have been first published during the same calendar year, but to be grouped in a single application, the earliest and latest contributions must not have been first published more than 12 months apart).
- All of the works have the same copyright claimant.
- The appropriate deposit accompanies the application [*see [c], below*].
- The application identifies each contribution separately, including the periodical containing it and the date of its first publication.
- For contributions first published before March 1, 1989, only, each contribution as first published must have borne a separate copyright notice, and the name of the owner of copyright in the work (or an abbreviation or alternative designation of the owner) must have been the same in each notice.

[c] Deposit Requirements

The application form for group registration must be accompanied by one complete copy of each published contribution listed on the form. The deposit may consist of any one of the following, as long as all contents of the contributions are clear and legible [*see "What Copies Should Be Deposited for Group Registration" under "Basic Information" in the official instructions reproduced in [2], below; see also 37 C.F.R. § 202.3(b)(8)(i)(E)*]:

- One copy of the entire periodical issue or newspaper section in which each contribution was first published.
- A photocopy of the contribution itself.
- A photocopy of the entire page containing the contribution.
- The entire page containing the contribution cut or torn from the collective work.
- The contribution cut or torn from the collective work.
- Photographs or photographic slides of the contribution or entire page containing the contribution.

PRACTICE TIP:

These deposit requirements differ from those in the current regulations [*see 37 C.F.R. § 202.3(b)(8)(i)(E)*]. However, there is no need for the applicant to request special relief in writing; the Copyright Office will automatically grant special relief on receipt of the deposit [*see Note under "What Copies Should Be Deposited for Group Registration" under "Basic Information" in the official instructions reproduced in [2], below (explaining that this is done to facilitate registration pending change in regulations)*].

[d] Procedure for Group Registration

An applicant for group registration should complete this form [*see [e], below*] and mail it, together with the appropriate

basic application and the required copy of each contribution, to Library of Congress, Copyright Office, Washington, DC 20559-6000 [see 37 C.F.R. § 202.3(b)(8)(ii); see also [c], above, 17 U.S.C. § 408(b)(4) (deposit requirement)]. The fee for registration is the same, no matter how many contributions are listed [see 37 C.F.R. § 202.3(b)(4)].

[e] Completing the Application

Detailed, line-by-line instructions on how to complete the application for registration may be requested with the form. These instructions are reproduced in [2], below, along with the form.

Advantages and disadvantages to group registration are noted in the basic information provided with the form's instructions [see Note #3 under "Basic Information" in the official instructions reproduced in [2], below].

For discussion of other general information relating to registration, including where to obtain this form, see § 103A.200[1]. For a detailed discussion of the procedure for registration of a copyright, see § 103A.122.

[2] FORM

Adjunct Application for Copyright Registration for a Group of Contributions to Periodicals [U.S. Copyright Office Form GR/CP]

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Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Formalities Deposit & Registration Registration Applications Copyright Law Publication General Overview Copyright Law Subject Matter General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART IV. FORMS

A. Applications for Copyright Protection

33-103A California Legal Forms--Transaction Guide § 103A.209

§ 103A.209 Application for Supplementary Copyright Registration [U.S. Copyright Office Form CA]

[1] Comment

[a] Use of Form

This form is the official application for supplementary copyright registration. The form is used to correct an error or to amplify information given in an earlier registration. Accordingly, supplementary registration may only be made if a basic copyright registration for the same work has already been completed [*see 17 U.S.C. § 408(d)*; *see also 37 C.F.R. § 201.5(b)*].

[b] Restrictions on Use of Form

Supplementary registration may *NOT* be used for the following [*see "Please Note" under "Basic Information" in the official instructions reproduced in [2], below; see also 37 C.F.R. § 201.5(b)(2)(iii)*]:

- To correct errors in statements on the copies or phonorecords of the work in question, or to reflect changes in the content of the work. (If the work has been changed substantially, the applicant should consider making an entirely new registration for the revised version to cover the additions or revisions [*see 37 C.F.R. § 201.5(b)(2)(iii)*].)
- As a substitute for renewal registration [*see 37 C.F.R. § 201.5(b)(2)(iv)*]. (For an application for renewal registration, *see § 103A.211[2]* (U.S. Copyright Office Form RE).)
- To correct an error regarding publication when the work was registered as an unpublished work.
- As a substitute for recording a transfer of copyright or other document pertaining to rights under a copyright. (Recording a document under the copyright law gives all persons constructive notice of the facts stated in the document and may have other important consequences in cases of infringement or conflicting transfers [*see 17 U.S.C. § 205; see also § 103A.53, 103A.225[2]*] (document cover sheet used

to record document)]. Supplementary registration does not have that legal effect.)

[c] Completing the Application

The application for supplementary registration must be accompanied by a fee [*see 17 U.S.C. § 708(a)(1)*] and must clearly identify the registration to be corrected or amplified [*17 U.S.C. § 408(d)*]. The information contained in a supplementary registration augments but does not supersede that contained in an earlier registration [*17 U.S.C. § 408(d)*].

Detailed, line-by-line instructions on how to complete the application for registration are provided with the form. These instructions are reproduced in [2], *below*, along with the form [*see also 37 C.F.R. § 201.5(c)*].

If additional space is needed, complete the continuation sheet reproduced in § 103A.210[2] and attach it to this form.

For discussion of other general information relating to registration, including where to obtain this form, see § 103A.200[1]. For a detailed discussion of the procedure for supplementary registration, see § 103A.153.

[d] Copyright Office's Procedure After Completing a Supplementary Registration

On completion of a supplementary registration, the Copyright Office will assign a new registration number in the appropriate registration category and issue a certificate of supplementary registration under that number. The basic registration will not be expunged or canceled, and the two registrations will stand in the Copyright Office records [*see 37 C.F.R. § 201.5(d)*; *see also* "What Happens When a Supplementary Registration Is Made?" under "Basic Information in the official instructions reproduced in [2], *below*].

[2] FORM

Application for Supplementary Copyright Registration [U.S. Copyright Office Form CA]

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Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Formalities Deposit & Registration Registration Applications Copyright Law Publication General Overview Copyright Law Subject Matter General Overview



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A. Applications for Copyright Protection

33-103A California Legal Forms--Transaction Guide § 103A.210

[Reserved]

§ 103A.210[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART IV. FORMS

A. Applications for Copyright Protection

33-103A California Legal Forms--Transaction Guide § 103A.211

§ 103A.211 Application for Renewal Registration and Addendum [U.S. Copyright Office Form RE]

[1] Comment

[a] Use of Form

This form is the official application for renewal registration of an existing copyright obtained before January 1, 1978. Also reproduced is an addendum for use in renewing a copyright for a work that was published between January 1, 1964, and December 31, 1977, and that was not registered during its first 28-year copyright term.

[b] Copyright Terms and Renewal in General

For works originally copyrighted between January 1, 1950, and December 31, 1977, the copyright law provides a first term of copyright protection lasting for 28 years, plus renewal for a second term of 47 years [see former 17 U.S.C. § 304(a)]. For copyrights originally secured before January 1, 1964, the copyright was required to be affirmatively renewed for the extended term. If the copyright were not renewed at the proper time (that is, before the end of 1991), copyright protection expired permanently at the end of the 28th year of the first term and could not be renewed [see former 17 U.S.C. § 304(a) (as in effect prior to June 16, 1992); Pub. L. No. 102-307, § 102(g)(2), 106 Stat. 266].

For copyrights secured between January 1, 1964, and December 31, 1977 [see Pub. L. No. 102-307, § 102(g)(2), 106 Stat. 266], a second term of copyright of 67 years is secured automatically, and renewal registration is optional [17 U.S.C. § 304(a)(3) (application to register claim to renewed and extended term of copyright may be made, but such application is not a condition of renewal and extension of copyright for further term of 67 years)]. However, whether or not an application to register a claim is submitted and the claim registered determines the vesting of copyright ownership during the extended 67-year term [see 17 U.S.C. § 304(a)(2); see also 17 U.S.C. § 304(a)(3), (4) (procedure for application to register claim for renewal period)]. If an application to register a claim for a renewal term has been made within one year before the expiration of the original term of copyright, and the claim is registered, the copyright vests in the proprietor of the copyright who is entitled to claim renewal of copyright at the time the application is made [17 U.S.C. § 304(a)(2)(A)(i)]. On the other hand, if no such application is made, or the claim pursuant to that application is not registered, copyright will vest, on the beginning of the renewal term, in the person or entity that was the proprietor

of the copyright as of the last day of the original term of the copyright [17 U.S.C. § 304(a)(2)(A)(ii)].

Any copyright still in its renewal term when the Sonny Bono Copyright Term Extension Act became effective has a copyright term of 95 years from the date the copyright was originally secured [17 U.S.C. § 304(b); *see* Pub. L. No. 105-298, § 207 (Oct. 27, 1998; effective date 90 days after enactment); *see also* 17 U.S.C. § 304(c) (termination of transfer and licenses covering extended renewal term)].

For works originally copyrighted on or after January 1, 1978, copyright law has eliminated all renewal requirements and established a single copyright term and different methods of computing the duration of a copyright [*see* 17 U.S.C. § 302(a)]. For discussion of the duration of these copyrights, *see* § 103A.85[1]. Also helpful is Factsheet SL-15, "New Terms for Copyright Protection."

[c] Renewal Filing Period

In order to register a renewal copyright, the renewal application and fee must be received in the Copyright Office within the last (28th) calendar year before the expiration of the original term of copyright or at any time during the renewed and extended term of 67 years [*see* 17 U.S.C. § 304(a)(3)(A)]. All terms of the original copyright run through the 28th calendar year, making the period for renewal registration during the original term from December 31st of the 27th year of the copyright through December 31 of the following year [*see* 17 U.S.C. § 304(a)(3)(A); *see also* "Renewal Filing Period" under "Basic Information" in the official instructions reproduced in [2], *below*]. For help in calculating the renewal period for a particular copyright, *see* "Renewal Filing Period" under "Basic Information" in the official instructions reproduced in [2], *below*.

[d] Who May Renew

Except in the case of four specified types of works (discussed below), copyright law gives the right of renewal to the individual author of the work (or to certain of the author's beneficiaries), regardless of who owned the copyright during the original term. Specifically, the renewal claim may be registered in the names of the following persons, in descending order of eligibility [*see* 17 U.S.C. § 304(a)(1)(C); 37 C.F.R. § 202.17(f)(1)]:

- The author of the work, if still living.
- The widow, widower, or children of the author, if the author is not living.
- The author's executors, if there is a will and neither the author nor any widow, widower, or child of the author is living.
- The author's next of kin, in the absence of a will and if neither the author nor any widow, widower, or child of the author is living.

The proprietor (owner of the copyright at the time of renewal registration) of the copyright is entitled to claim renewal in the case of the following four types of work:

- Posthumous work [*see* 17 U.S.C. § 304(a)(1)(B)(i); 37 C.F.R. § 202.17(f)(i); *see also* 37 C.F.R. § 202.17(b) (defining posthumous work as work published after the author's death as to which no copyright assignment or other contract for exploitation has occurred during the author's lifetime)].
- Periodical, cyclopedic, or other composite work [*see* 17 U.S.C. § 304(a)(1)(B)(i); 37 C.F.R. § 202.17(f)(i)].

- Work originally copyrighted by a corporate body other than as assignee or licensee of the individual author [*see 17 U.S.C. § 304(a)(1)(B)(ii); 37 C.F.R. § 202.17(f)(1)(ii)*].

- Work copyrighted by an employer for whom the work was made for hire [*see 17 U.S.C. § 304(a)(1)(B)(ii); 37 C.F.R. § 202.17(f)(1)(ii)*].

Notwithstanding the definition of "posthumous work" in *37 C.F.R. § 202.17(b)*, a renewal claim may also be registered in the name of the proprietor, as well as in the name of the author or certain of the author's beneficiaries (as listed above), if there was a contract for exploitation of the work during the author's lifetime but no copyright assignment occurred. However, renewal in the latter case should not be interpreted as evidencing the validity of the claim [*37 C.F.R. § 202.17(f)(2)*].

[e] Completing the Application

Detailed, line-by-line instructions on how to complete the application to register a renewal claim may be requested with Form RE; instructions for the Addendum to Form RE are printed on the back of the form. Both sets of instructions are reproduced in [2], *below*, along with the forms.

For information on where to obtain forms and publications, see *§ 103A.200[1][b]*. Helpful publications include Circular 15, "Renewal of Copyright," and Circular 15a, "Duration of Copyright: Provisions of the Law Dealing With the Length of Copyright Protection." For a discussion of the procedure for renewal, see *§ 103A.155*.

[2] FORM

Application for Renewal Registration [U.S. Copyright Office Form RE]

[Click here to view image.](#)

[Click here to view image.](#)

Addendum to U.S. Copyright Office Form RE

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Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawDuration & RenewalRenewalGeneral OverviewCopyright LawFormalitiesDeposit & RegistrationRegistrationGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

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A. Applications for Copyright Protection

33-103A California Legal Forms--Transaction Guide §§ 103A.212-103A.219

[Reserved]

§§ 103A.212[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103A COPYRIGHTS
PART IV. FORMS
B. Related Forms

33-103A California Legal Forms--Transaction Guide § 103A.220

§ 103A.220 Notice of Objection to Noncommercial Performance of Nondramatic Literary or Musical Work

[1] Comment

[a] Use of Form

This form is a notice of objection to a noncommercial performance of a nondramatic literary or musical work. This type of notice must be served as a condition of preventing this kind of performance [17 U.S.C. § 110(4); see 37 C.F.R. § 201.13(a)(1)]. The Copyright Office does not provide printed forms for this notice [37 C.F.R. § 201.13(b)].

[b] Notice Required as Basis for Infringement

The performance of a nondramatic literary or musical work (other than in a transmission to the public), without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation to the performers, promoters, or organizers, is not an infringement of copyright if there is no direct or indirect admission charge [17 U.S.C. § 110(4)(A)].

Additionally, performance of a nondramatic literary or musical work (other than in a transmission to the public), without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation to the performers, promoters, or organizers, is not an infringement of copyright if the proceeds (after deducting reasonable production costs) are used exclusively for educational, religious, or charitable purposes and not for private financial gain [17 U.S.C. § 110(4)(B)]. However, in this case, performance *will* constitute an infringement if the copyright owner serves a written notice of objection to the performance [17 U.S.C. § 110(4)(B)].

[c] Contents of Notice

A notice of objection must clearly state that the copyright owner objects to the performance. It must also contain all of the following [37 C.F.R. § 201.13(c)(1); see 17 U.S.C. § 110(4)(B)]:

- Reference to the statutory authority on which the notice is based, either by a citation to 17 U.S.C. §

110(4), or by a more general characterization or description of that provision.

- The date and place of the performance to which objection is being made. If the exact date or place or both are not known to the copyright owner, it is sufficient if the notice describes whatever information the copyright owner has about the date or place of performance and the source of that information, unless the source was considered private or confidential.

- Clear identification, by title and at least one author, of the work to which objection is made. A notice may cover any number of separately identified copyrighted works owned by the copyright owner or owners serving the objection. Alternatively, a blanket notice, with or without separate identification of certain copyrighted works, and purporting to cover one or more groups of copyrighted works not separately identified by title and author, may be given [see 37 C.F.R. § 201.13(c)(2) (additional requirements for blanket notice)]. This form is designed for a specifically identified work or works and must be modified to meet the blanket notice requirements.

- A concise statement of the reasons for the objection.

A notice of objection must also contain a clear and prominent statement explaining that a failure to exclude the works identified in the notice from the performance in question may subject the person responsible for the performance to liability for copyright infringement, and that the objection is without legal effect if there is no direct or indirect charge for the performance and if the other conditions of 17 U.S.C. § 110(4) are met [37 C.F.R. § 201.13(c)(3)].

[d] Signature Requirements

The notice must be signed by each copyright owner or the owner's agent. The signature of each owner or agent must be an actual handwritten signature, accompanied by the date of the signature and the full name, address, and telephone number of that person, typewritten or printed legibly by hand. If the notice is initially served in the form of a telegram [see [e] below], the requirement for a handwritten signature will be waived if the other requirements for that type of service are met [37 C.F.R. § 201.13(d)].

[e] Service of Notice

The notice must be served on the person responsible for the performance at least seven days before the date of the performance [17 U.S.C. § 110(4)(B)(ii); 37 C.F.R. § 201.13(e)(1)]. The notice may be served personally or by first class mail. It may also be served by telegram, cablegram, or another similar form of communication if the notice meets all of the other applicable requirements, and before the performance takes place, the person responsible for the performance receives written confirmation of the notice, bearing the actual handwritten signature of each copyright owner or an authorized representative [37 C.F.R. § 201.13(e)(2)].

The date of service is the date the notice of objection is received by the person responsible for the performance or any agent or employee of that person [37 C.F.R. § 201.13(e)(3)].

[2] FORM

Notice of Objection to Noncommercial Performance of Nondramatic Literary or Musical Work

NOTICE OF OBJECTION TO NONCOMMERCIAL PERFORMANCE OF A NONDRAMATIC LITERARY OR MUSICAL WORK

To: _____[name of person responsible for performance]
 _____[address]

NOTICE IS HEREBY GIVEN that _____[*name of copyright owner*], pursuant to *Title 17, Section 110(4), of the United States Code*, objects to the performance of _____[*clearly identify work(s) by title and at least one author*], to be given on _____[*date of performance*], at _____[*place of performance; if date or place or both are not known, give whatever information copyright owner has about date and place of performance and state source of that information unless source is private or confidential*], for the following reasons:

_____[*Insert concise statement of reasons for objection*].

FAILURE TO EXCLUDE THE WORK[S] IDENTIFIED IN THIS NOTICE FROM THE PERFORMANCE IN QUESTION MAY SUBJECT THE PERSON RESPONSIBLE FOR THE PERFORMANCE TO LIABILITY FOR COPYRIGHT INFRINGEMENT.

This Notice of Objection is without legal effect if there is no direct or indirect admission charge for the performance and if the other conditions of *Title 17, Section 110(4), of the United States Code* are met.

_____ Dated:

_____ [*signature of owner or agent*]

[*typed name*]

_____ [*address*]

_____ [*telephone number*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright Law Formalities Notice General Overview Copyright Law Subject Matter Literary Works General Overview Copyright Law Subject Matter Musical Works General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103A COPYRIGHTS
PART IV. FORMS
B. Related Forms

33-103A California Legal Forms--Transaction Guide § 103A.221

§ 103A.221 Notice of Termination of Transfers and Licenses Covering Extended Renewal Term of Copyright in Existence on January 1, 1978

[1] Comment

[a] Use of Form

This form is a notice terminating transfers and licenses for the extended renewal term of a copyright that was in existence (in either its first or renewal term) on January 1, 1978 [*see 17 U.S.C. § 304(a)* (duration of subsisting copyrights)]. If the rights of such a copyright were transferred before January 1, 1978, the author or other specified persons [*see [c], below*] may terminate those rights for the extended term, except in the case of a copyright in a work made for hire [*see 17 U.S.C. § 304(c), (d)*]. This form may be used to effect notice of termination of these transfers and licenses.

[b] Governing Law

17 U.S.C. § 304(c), (d) governs termination of transfers and licenses covering an extended copyright renewal term.

17 U.S.C. § 304(c) governs termination of transfers and licenses covering an extended renewal term for any copyright (other than a work for hire) subsisting in either its first or renewal term on January 1, 1978. Its provisions are discussed in [c]-[i], *below*.

17 U.S.C. § 304(d) governs termination rights provided in *17 U.S.C. § 304(c)* for any copyright (other than a work for hire) subsisting in its renewal term on October 27, 1998 (the effective date of the Sonny Bono Copyright Term Extension Act), if those rights have expired by that date and if they have not been previously exercised by their author or owner. In these circumstances, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright, other than by will, executed before January 1, 1978, by persons specified in *17 U.S.C. § 304(a)(1)(C)* [*see § 103A.211[1][b][iii]*] is subject to termination under the following conditions [*17 U.S.C. § 304(d)*]:

- The conditions specified in *17 U.S.C. § 304(c)(1), (2)* [*see [c], below* (persons entitled to terminate)];

17 U.S.C. § 304(c)(4) [see [d]-[g], *below* (time and manner of termination; service, signature, contents of notice)]; 17 U.S.C. § 304(c)(5) [see [d], *below* (termination despite agreement to contrary)]; and 17 U.S.C. § 304(c)(6) [see [i], *below* (reversion rights)] apply to terminations in the last 20 years of the copyright term as provided by the Sonny Bono Copyright Term Extension Act [see 17 U.S.C. § 304(b)] (copyrights in renewal term on October 27, 1998, have copyright term of 95 years from date copyright originally secured).

- Termination may be effected at any time during a period of five years beginning at the end of 75 years from the date copyright was originally secured [see [d], *below*].

[c] Persons Entitled to Terminate Grant

A grant executed by a person or persons other than the author may be terminated by the surviving person or persons who executed it [17 U.S.C. § 304(c)(1)].

When a grant is executed by one or more of the authors of the work, the grant may be terminated, to the extent of a particular author's share in the ownership of the renewal copyright, by the author who executed it or, if the author is dead, by the person or persons who own and are entitled to exercise a total of more than one half of that author's termination interest [17 U.S.C. § 304(c)(1)].

When the author who executed the grant is dead, his or her termination interest is owned and may be exercised by his or her spouse, children, or grandchildren, as follows:

- The author's surviving spouse owns the author's entire termination interest unless there are surviving children or grandchildren of the author, in which case the widowed spouse owns one half of the author's interest and the other half is divided among the author's surviving children and the surviving children of any dead children [17 U.S.C. § 304(c)(2)(A), (B)].
- If there is no spouse, the author's surviving children and the surviving children of any dead children own the author's entire termination interest [17 U.S.C. § 304(c)(2)(B)].
- The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of the author's children represented. The share of the children of a dead child in a termination interest can be exercised only by the action of the majority of them [17 U.S.C. § 304(c)(2)(C)].
- If the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee owns the author's entire termination interest [17 U.S.C. § 304(c)(2)(D)].

[d] Time and Manner of Termination

Termination is effected by serving an advance notice in writing on the grantee or the grantee's successor in title [17 U.S.C. § 304(c)(4); see [g], *below* (service)].

In the case of any copyright, other than a work for hire, subsisting in its renewal term on October 27, 1998 (the effective date of the Sonny Bono Copyright Term Extension Act), for which the termination right provided for in 17 U.S.C. § 304(c) has expired by that date and for which that right has not been previously exercised, termination may be effected at any time during a period of five years beginning at the end of 75 years from the date copyright was originally secured [see 17 U.S.C. § 304(d)(2)].

For all other contracts with termination rights provided in 17 U.S.C. § 304(c), termination may be effected at any time during a period of five years beginning at the end of 56 years from the date the copyright was originally secured, or beginning on January 1, 1978, whichever is later [17 U.S.C. § 304(c)(3)].

Termination may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or any future grant [17 U.S.C. § 304(c)(5)].

[e] Contents of Notice

The Copyright Office does not provide printed forms for notices of termination [37 C.F.R. § 201.10(a)]. A notice of termination must include clear identification of each of the following [37 C.F.R. § 201.10(b)(1)]:

- If the termination is made under 17 U.S.C. § 304(c) or (d), a statement to that effect.
- The name of each grantee whose rights are being terminated, or the grantee's successor in title, and each address at which service of the notice is being made.
- The title and name of at least one author of each work, the date the copyright was originally secured in each work, and if possible, the original copyright registration number.
- A brief statement reasonably identifying the grant to which the notice of termination applies.
- The effective date of termination.
- If the termination is made under 17 U.S.C. § 304(d), a statement that termination of renewal term rights under 17 U.S.C. § 304(c) has not been previously exercised.
- If the grant is being terminated by a person or persons other than the author [see [c], above], a list of the surviving person or persons who executed the grant.
- If the grant is being terminated by the successors of a deceased author [see [c], above], either [37 C.F.R. § 201.10(b)(1)(vii)]:
 - A list of the names and relationships to that author of the author's surviving spouse, surviving children, and all the surviving children of any deceased child, together with specific indication of the person or persons executing the notice who constitute more than one half of the author's termination interest; or
 - If all of that information is not available, a statement of as much of the information as is currently available to the person or persons signing the notice, along with a brief explanation of the reason why the full information is lacking, together with a statement that to the best of that person's knowledge and belief, the notice has been signed by all persons whose signatures are necessary to terminate the grant [see [c], above].

All of the above-listed information must be clearly and unambiguously specified in the notice itself, without incorporation by reference of information in other documents or records [37 C.F.R. § 201.10(b)(2)].

[f] Signature Requirements

If the grant being terminated was executed by a person or persons other than the author, the notice must be signed by all of the surviving persons who executed the grant or by their agents [37 C.F.R. § 201.10(c)(1)].

In the case of a termination of a grant executed by one or more of the authors of the work, the notice as to any one author's share must be signed by that author or by his or her duly authorized agent. If that author is dead, the notice must be signed by the number and proportion of the owners of that author's termination interest required under 17 U.S.C. § 304(c) or (d), whichever applies, or by their duly authorized agents, and must contain a brief statement of their relationship or relationships to that author [37 C.F.R. § 201.10(c)(2); *see* [c], *above*]. If the signature is by an agent, it must clearly identify the person or persons on whose behalf the agent is acting [37 C.F.R. § 201.10(c)(3)].

The handwritten signature of each person effecting termination must be accompanied by a statement of the full name and address of that person, typewritten or printed legibly by hand, or must clearly correspond to such a statement elsewhere in the notice [37 C.F.R. § 201.10(c)(4)].

This form is designed to be used when the grant to be terminated was executed by the author. However, the form may be adapted for use when the grantor was someone other than the author simply by listing the surviving person or persons who executed the grant and changing the signature block accordingly [*see* 17 U.S.C. § 304(c)(1); *see also* 37 C.F.R. § 201.10(c)(1)].

[g] Service of Notice

The notice must be served not less than two or more than 10 years before the date of termination [*see* 17 U.S.C. § 304(c)(4)(A)]. The date of termination falls either within the five-year period specified by 17 U.S.C. § 304(c)(3) [*see* [d], *above*] or, in the case of a termination under 17 U.S.C. § 304(d), governing termination rights that have expired on or before October 27, 1998, within the five year period specified by 17 U.S.C. § 304(d)(2) [17 U.S.C. § 304(c)(4)(A); *see* [d], *above*].

The notice must be served on each grantee whose rights are being terminated, or on the grantee's successor in title, by personal service or by first class mail sent to an address which, after a reasonable investigation, is found to be the last known address of the grantee or successor in title [37 C.F.R. § 201.10(d)(1)].

[h] Recordation of Notice

A copy of the notice must be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect [17 U.S.C. § 304(c)(4)(A); *see* 37 C.F.R. §§ 201.4 (requirements for recordation); *see also* §§ 103A.152 (recordation procedures), 103A.225[2] (cover sheet for documents submitted for recordation)].

A copy of the notice will be recorded on payment of the specified fee [*see* 37 C.F.R. § 201.10(f)(2)]. The copy submitted for recordation must be a complete and exact duplicate and must include the actual signatures or a reproduction of the actual signatures. If separate copies of the notice were served on more than one grantee, only one copy need be submitted for recordation. The copy submitted for recordation must be accompanied by a statement setting forth the date on which the notice was served and the manner of service, unless that information is contained in that notice itself [37 C.F.R. § 201.10(f)(1)].

[i] Rights on Reversion

In the case of a grant executed by someone other than the author, all rights that were covered by the terminated grant revert, on the effective date of termination, to all those entitled to terminate the grant under 17 U.S.C. § 304(c)(1) [17 U.S.C. § 304(c)(6); *see* [c], *above* (persons entitled to terminate)].

In the case of a grant executed by one or more authors of the work, all of a particular author's rights that were covered by the terminated grant revert, on the effective date of termination, to that author [17 U.S.C. § 304(c)(6)]. If that author is dead, those rights revert to the persons owning the author's termination interest under 17 U.S.C. § 304(c)(2) [see [c], above], including those owners who did not join in signing the advance notice of termination [17 U.S.C. § 304(c)(6); see 17 U.S.C. § 304(c)(4); see also [d], above (time and manner of termination)].

Reversion rights are subject to certain limitations [see 17 U.S.C. § 304(c)(6)(A)-(F)].

[2] FORM

Notice of Termination of Transfers and Licenses Covering Extended Renewal Term of Copyright in Existence on January 1, 1978

NOTICE OF TERMINATION

To: _____ [name of grantee of interest in copyright or grantee's successor in title]
 _____ [address at which notice will be served]

YOU ARE HEREBY NOTIFIED that, pursuant to Title 17, Section 304(c) [add if applicable: and Section 304(d)] of the United States Code, all right, title, and interest which you may own or possess by reason of a grant executed on _____ [date], by _____ [name of author or author's representative] in a copyrighted work titled _____ [title of work] and authored by _____ [name(s) of author(s)] [if original copyright registration number is known, add: , original copyright registration number _____], which has an original copyright registration date of _____ [date], is terminated by this notice, effective _____ [date].

The grant terminated above is further described as follows: _____ [insert brief statement clearly identifying the grant and rights covered by it].

[If author who executed the grant is deceased, add:]

The following list contains the names of the successors of the above-named author and their relationships to the author, and indicates the person(s) executing this notice who hold more than one half of the author's termination interest:

[List only surviving individuals, e.g.:]

Name	Relationship	Executed Notice
_____ [name]	Spouse	_____ [yes or no]
_____ [name]	Child	_____ [yes or no]
_____ [name]	Child	_____ [yes or no]
_____ [name]	Issue of deceased child _____ [name]	_____ [yes or no]
_____ [name]	Issue of deceased child _____ [	_____ [yes or no]

name]

[*CONTINUE*]

FOLLOWING THE TERMINATION DATE, ANY FURTHER EXERCISE OF THE TRANSFER OR LICENSE WHICH IS THE SUBJECT OF THIS NOTICE CONSTITUTES AN INFRINGEMENT OF COPYRIGHT.

Dated: _____.

[*Include following signature block for each person signing notice:*]

_____ [*signature*]

[*typed name*]

_____ [*address*]

[*If signed by agent of person exercising termination, add:*]

Agent for _____ [*name*]

[*agent's typed name*]

_____ [*agent's address*]

_____ [*agent's telephone number*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawConveyancesGeneral OverviewCopyright LawConveyancesLicensesGeneral OverviewCopyright LawConveyancesTransfer TerminationsGeneral OverviewCopyright LawDuration & RenewalRenewalGeneral OverviewCopyright LawDuration & RenewalRenewalConveyances



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103A COPYRIGHTS
PART IV. FORMS
B. Related Forms

33-103A California Legal Forms--Transaction Guide § 103A.222

§ 103A.222 Advance Notice of Potential Copyright Infringement of Works Consisting of Sounds, Images, or Both

[1] Comment

[a] Use of Form

This form is an advance notice of potential copyright infringement. It enables a copyright owner to institute an action for copyright infringement either before or after the first fixation of a work consisting of sounds, images, or both that is first fixed simultaneously with its transmission. It entitles the owner to enjoy the full remedies the copyright law provides for copyright infringement, provided the work is registered within three months after its first transmission [*see 17 U.S.C. § 411(b); 37 C.F.R. § 201.22(a)(1)*]. The Copyright Office does not provide printed forms for this notice [*37 C.F.R. § 201.22(b)*].

[b] Contents of Notice

The notice must be clearly and prominently captioned "ADVANCE NOTICE OF POTENTIAL INFRINGEMENT." It must clearly state that the copyright owner objects to the relevant activities of the person responsible for the potential infringement, and must include all the following [*37 C.F.R. § 201.22(c)(1)*]:

- Reference to *17 U.S.C. § 411(c)* as the statutory authority for the notice.
- The date, specific time, and expected duration of the intended first transmission of the work or works contained in the specific transmission program [*17 U.S.C. § 411(c)(1)*].
- The source of the intended first transmission of the work or works [*17 U.S.C. § 411(c)(1)*].
- Clear identification by title of the work or works [*see 17 U.S.C. § 411(c)(1)*]. A single notice may cover all works of the copyright owner embodied in a single transmission program. If any work is untitled, the notice must contain a detailed description of that work.

- The name of at least one person or entity that will be considered the author of the work on its fixation.
- The identity of the copyright owner. "Copyright owner" means the author or a person or organization that has obtained ownership of an exclusive right initially owned by the author [37 C.F.R. § 201.22(a)(2)]. If the copyright owner is someone other than the author, the notice must also include a brief general statement summarizing the means by which the copyright owner obtained ownership of the copyright and the particular rights that are owned.
- A description of the relevant activities of the person responsible for the potential infringement which, if carried out, would result in an infringement of copyright.

The notice must also include clear and prominent statements explaining that the relevant activities, if carried out, may subject the person responsible to liability for copyright infringement, and must declare that the owner intends to secure copyright of the work on its fixation [17 U.S.C. § 411(c)(1); 37 C.F.R. § 201.22(c)(2); see 17 U.S.C. § 101 (defining when work is "fixed")].

[c] Signature Requirements

The notice must be signed by the copyright owner or the owner's agent. The signature must be an actual handwritten signature, accompanied by the date of the signature and the full name, address, and telephone number of that person, typewritten or printed legibly by hand. If the notice is initially served in the form of a telegram [see [d], below], the requirement for a handwritten signature will be waived if the other requirements for that type of service are met [37 C.F.R. § 201.22(d)].

[d] Service of Notice

The notice must be served on the infringer not less than 48 hours before the first fixation of the work (by the intended simultaneous transmission) [17 U.S.C. § 411(c)(1); 37 C.F.R. § 201.22(e)(1)].

The notice may be served personally or by first class mail. It may also be served by telegram, cablegram, or another similar form of communication if the notice meets all of the other applicable requirements, and, before the first fixation and simultaneous transmission takes place, the person responsible for the potential infringement receives written confirmation of the notice, bearing the actual handwritten signature of each copyright owner or an authorized representative [37 C.F.R. § 201.13(e)(2)].

The date of service is the date the notice of objection is received by the person responsible for the potential infringement or any agent or employee of that person [37 C.F.R. § 201.22(e)(3)].

[2] FORM

Advance Notice of Potential Copyright Infringement of Works Consisting of Sounds, Images, or Both

ADVANCE NOTICE OF POTENTIAL INFRINGEMENT

To: _____[name of potential infringer]
 _____[address]

This Notice is given for the work entitled _____[title of work; if work is untitled, substitute a detailed description of work], authored by _____[name of at least one person or entity that will be considered the author of the work on its fixation]. _____[Name of copyright owner; if copyright owner is not the

author, add brief general statement summarizing means by which copyright owner obtained ownership of copyright and particular rights owned, e.g., HAS CONTRACTED WITH THE AUTHOR TO ACQUIRE EXCLUSIVE RIGHTS TO THE PRODUCTION, TRANSMISSION, OR OTHER USE OF THIS WORK,) IS THE COPYRIGHT OWNER OF THIS WORK, AND INTENDS TO SECURE COPYRIGHT IN THE WORK ON ITS FIXATION.

The first transmission of the work will take place on _____[*date*], at _____[*specific time*], and will last _____[*state expected duration of intended transmission*]. The source of the intended first transmission is _____[*describe source*].

NOTICE IS HEREBY GIVEN that _____[*name of copyright owner*], pursuant to *Title 17, Section 411(c), of the United States Code*, objects to _____[*recite relevant activities of the person responsible for the potential infringement*]. THESE ACTIVITIES, IF CARRIED OUT, MAY SUBJECT THE PERSON RESPONSIBLE TO LIABILITY FOR COPYRIGHT INFRINGEMENT.

Dated _____.

_____ [signature of copyright owner or agent]

[typed name]

_____ [address]

_____ [telephone number]

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawCivil Infringement ActionsGeneral OverviewCopyright LawSubject MatterGeneral OverviewCopyright LawSubject MatterSound Recordings



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART IV. FORMS

B. Related Forms

33-103A California Legal Forms--Transaction Guide § 103A.223

§ 103A.223 Authorization (License) to Use Copyrighted Work

[1] Comment

[a] Use of Form

This form is an authorization or license granting permission to use a copyrighted work. It is a general form, containing the basic information necessary to grant permission. It assumes that the permission will be limited in scope and that the copyright owner will retain the basic rights to the work. The form does not attempt to illustrate any of the infinitely variable licensing arrangements that are possible under the copyright law [see [d], *below*]. For an agreement assigning all of a copyright owner's rights under a copyright, see § 103A.224[2].

[b] Exclusive Rights of Copyright Owner

The owner of a copyright has exclusive rights to reproduce, distribute, perform, display, or prepare derivative works based on the copyrighted material, and to authorize others to do the same [see 17 U.S.C. § 106]. Thus, unless a proposed use of copyrighted material falls within a recognized limitation to these exclusive rights [see 17 U.S.C. §§ 107-121], anyone who wants to make use of a copyrighted work must obtain permission from the copyright owner. Failure to do so may result in liability for copyright infringement [see 17 U.S.C. §§ 501-513]. For discussion of permissible uses of copyrighted works and the copyright law in general, see §§ 103A.30-103A.40.

[c] Validity of Authorization

The copyright law specifically provides that the ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable law of intestate succession [17 U.S.C. § 201(d)].

[d] Terms of Authorization

The terms under which an authorization to use copyrighted material will be granted vary enormously. The nature of the

right granted may be very broad in scope [*see, e.g., § 103A.224[2]*] or extremely limited. In some cases, the author may grant the right for little or no consideration, while in other cases the permission may involve complex arrangements including royalties and rights to derivative works.

This form does not provide for consideration; it merely grants permission to use the right. The form, however, does contain an optional provision granting the right subject to the terms and conditions of a separate agreement executed by the parties. In the alternative, language similar to that set forth in this form may be included in the contract itself.

For examples of entertainment agreements containing provisions affecting the copyright rights of the parties, and discussion of copyright problems peculiar to the entertainment industry, see Ch. 87, *Entertainment Contracts*. The form in § 87.233 is an option agreement for dramatization of a literary work and includes provisions governing the rights of the parties in derivative works. License agreements for the distribution of copyrighted computer software are contained in Ch. 57, *Computer-Related Transactions*. For additional agreements for the licensing of a copyrighted work, a detailed checklist for drafting those agreements, and a discussion of the tax considerations involved, see Rabkin & Johnson, *Current Legal Forms with Tax Analysis*, Ch. 3, *Licenses and Franchises* (Matthew Bender).

[e] Recordation

If desired, this instrument may be recorded in the Copyright Office [*see 37 C.F.R. § 201.4(c)* (recording requirements)]. For additional information on recordation, see § 103A.224[1][c][iii].

[2] FORM

Authorization (License) to Use Copyrighted Work

AUTHORIZATION TO USE COPYRIGHTED WORK

[In accordance with the terms, conditions, and limitations contained in the agreement dated _____, between _____[*name*] and _____[*name*], and subject to the performance of all terms and conditions of that agreement], the undersigned authorizes _____[*name of person or entity seeking authorization*], _____[*address*] to _____[*specify use to be made of copyrighted work*] the following works:

_____ [Title], by _____ [author of copyright work]

_____ [Title], by _____ [author of copyright work]

The authorization granted in this document is strictly limited to the use described above[, and is further restricted as follows: _____ (*specify any restrictions on use of copyrighted work*)].

Except as specifically provided in this authorization, the owner of the copyright retains all rights to reproduce, distribute, perform, or display the above works and any derivative works based on those works, as well as all other rights, privileges, and remedies granted or reserved to a copyright owner under the copyright law of the United States.

_____ Dated:

_____ [signature of copyright owner]

[typed name]

_____ [address]

OWNER OF COPYRIGHT

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawConveyancesLicensesGeneral OverviewCopyright LawSubject MatterGeneral Overview



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33-103A California Legal Forms--Transaction Guide § 103A.224

§ 103A.224 Assignment of Copyright

[1] Comment

[a] Use of Form

This form is an assignment of the copyright to a published book. It can be adapted for other types of copyrighted works.

In addition to assigning the copyright, this form also specifically includes the transfer of all rights to the book. This second assignment is included because, absent such an agreement, the transfer of ownership of a copyright or any exclusive rights under a copyright does not convey any property rights in the material object subject to the copyright [see 17 U.S.C. § 202].

For a form for assignment of copyright (without consideration and for the purpose of changing formal title only) to the trustees of an inter vivos trust, see *Ch. 73, Funding a Revocable Trust*, § 74.370. For discussion of assignments in general, see *Ch. 76, Assignments and Obligations*. For forms of consent and notice concerning assignments, also see *Ch. 76, Assignments and Obligations*, § 76.20 et seq.

[b] Contents of Form

To be valid, a transfer of copyright ownership must be in writing and must [see 17 U.S.C. § 204(a); see also [d], below]

- State intent to transfer ownership of copyright.
- Provide space for signature of owner of rights conveyed, or signature of owner's agent.
- If desired, add acknowledgment of signature and certificate issued by
 - In the case of a transfer executed in the United States, a person authorized to administer oaths within the United States; or

- In the case of a transfer executed in a foreign country, a diplomatic or consular officer of the United States or a person authorized to administer oaths whose authority is proved by a certificate of such an officer.

A certificate of acknowledgment is not required, but it is desirable because it will constitute prima facie evidence of execution [see 17 U.S.C. § 204(b)].

The transfer may be made as a separate instrument or as part of a detailed contract dealing with other matters besides the transfer of copyright.

[c] Transfer of Copyright in General

The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law. Ownership may be bequeathed by will or pass under the law of intestate succession [17 U.S.C. § 201(d)(1)]. Any of the exclusive rights included in a copyright may be transferred and owned separately [17 U.S.C. § 201(d)(2)].

[d] Requirements for Validity

A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance or memorandum of the transfer is made in writing and signed by the owner of the rights conveyed or the by owner's agent [17 U.S.C. § 204(a)]. The writing must to be "substantially contemporaneous" with the agreement to transfer the copyright [see *Konigsberg Intern. Inc. v. Rice* (9th Cir. 1994) 16 F.3d 355, 357 (letter written three and one-half years after alleged oral agreement was not sufficient); cf. *Magnuson v. Video Yesteryear* (9th Cir. 1996) 85 F.3d 1424, 1429 n.1 (non-contemporaneous writing was sufficient to establish valid assignment of copyright under Copyright Act of 1909, applicable to undertakings commenced before January 1, 1978, when there was no dispute that transfer had occurred or terms on which it occurred)]. A notarial acknowledgment is not required, but is prima facie evidence of the execution of the transfer [see 17 U.S.C. § 204(b)].

[e] Recordation

Any transfer of copyright ownership may be recorded in the Copyright Office if the document filed for recordation bears the actual signature of the person who executed it, or if it is accompanied by a sworn or official certification that it is a true copy of the original, signed document [17 U.S.C. § 205(a); 37 C.F.R. § 201.4(c)(1)]. On receipt of the appropriate documentation and the registration fee [see 17 U.S.C. § 708 (fees)], the Register of Copyrights will record the document and return it with a certification of recordation [17 U.S.C. § 205(b); see 37 C.F.R. § 201.4 (recording requirements)]. Recordation gives all persons constructive notice of the facts stated in the recorded document [see 17 U.S.C. § 205(c)].

For the official document cover sheets for use in submitting documents to the Copyright Office for recordation, see § 103A.225[2].

[f] Assignment of Renewal Right

When an author dies before the copyright renewal period arrives, the author's statutory successor [see 17 U.S.C. § 304(c)(1), (2)] is entitled to the renewal rights, even if the author previously assigned the renewal rights to another party [*Miller Music Corp. v. Charles N. Daniels, Inc.* (1960) 362 U.S. 373, 375, 80 S. Ct. 792, 4 L. Ed. 2d 804 (decided under prior law)]. Thus, if a copyright owner promises an assignee of the copyright that he or she will renew the copyright and assign it to the assignee for the renewal term, but dies before the beginning of the renewal period, the assignee must obtain an assignment of the copyright for the renewal term from the owner's statutory successor in order to continue to use the work. The right to renew a copyright is contingent, and does not vest until the commencement of

the renewal period. The assignee's right to the renewal is valid against the world if the copyright owner is alive at the beginning of the renewal period; however, the assignee's right to renewal is only an expectancy until that time [*Stewart v. Abend* (1990) 495 U.S. 207, 221, 110 S. Ct. 1750, 109 L. Ed. 2d 184] .

[g] Taxation of Assignment

The sale of a copyright by an author results in ordinary income to the author [see *I.R.C. § 1221(a)(3)* (copyright excluded from definition of capital asset)]. A copyright is not a "Section 1231 asset," which would result in capital gains on the sale of the copyright [*I.R.C. § 1231(b)(1)(C)*; *Treas. Reg. § 1.1231-1*]. However, the sale of the copyright by a person who has purchased the copyright from the author or has inherited the copyright from the author results in capital gain [*Gershwin v. United States* (Ct. Cl. 1957) 153 F. Supp. 477, 480, 139 Ct. Cl. 722] . If the owner of the copyright has acquired the copyright from the author as a gift, the owner will not obtain capital gains from the sale of the copyright [*I.R.C. § 1221(a)(3)(C)*].

[2] FORM

Assignment of Copyright

ASSIGNMENT OF COPYRIGHT

This AGREEMENT is made between _____[*name of assignor*] ("Assignor") and _____[*name of assignee*], ("Assignee").

RECITALS

1. Assignor is the owner of the book entitled _____[*title*] by _____[*name of author*] ("book"), which was published by _____[*name of publisher*] in _____[*year*], in _____[*city*], _____[*state*]. Assignor is also the owner of the copyright on that book ("copyright"), which was registered by the United States Copyright Office on _____[*date*].

THE PARTIES AGREE AS FOLLOWS:

Transfer of Copyright

[*EITHER, if consideration for transfer will not be specified in assignment:*]

2. For valuable consideration (receipt of which is acknowledged), Assignor sells, assigns, and transfers to Assignee, all of Assignor's interest in the book and in the copyright, together with all rights to secure renewals, reissues, and extensions of the copyright.

[*OR, if assignment will specify the consideration for the transfer:*]

2. Assignor sells, assigns, and transfers to Assignee, all of Assignor's interest in the book and in the copyright, together with all rights to secure renewals, reissues, and extensions of the copyright, in return for _____[*specify method of payment of purchase price or payment or royalties, e.g., the sum of \$*_____] *[add, if applicable:, receipt of which is acknowledged by Assignor].*

[Continue with the following:]

Assignor's Warranties

3. Assignor warrants and represents to Assignee:

(a) Assignor is the sole owner of and has the exclusive right to use the book and the copyright, free and clear of any liens, encumbrances, licenses, or claims of any nature, and has made no agreement with respect to the book or the copyright that is in conflict with this agreement.

(b) Except as specified in Paragraph 1 of this Agreement, no other copyright has been effected, nor has any other registration relating to copyright protection been made with respect to the book.

(c) Assignor agrees to authorize and direct _____[his or her] heirs and personal representatives to execute any instrument and perform any legal act that Assignee may think necessary to secure the copyright, or any renewal or extension of the copyright.

(d) Each of the covenants contained in this Paragraph 3 will be deemed to be a separate covenant.

Amendments of Assignment

4. This Assignment may be amended only in writing signed by the party against whom, or against whose successors and assigns, enforcement of the change is sought.

Effect of Partial Invalidity

5. If any term, provision, or application of this Assignment is held invalid or unenforceable, the remainder of this Assignment, and any application of its terms and provisions will not be affected by that invalidity, but will remain valid and enforceable.

Notices

6. Any notices or other communications required or permitted by this agreement must be in writing and will be deemed served when personally delivered to the party to whom directed or when deposited in the United States mail, first-class postage prepaid, addressed to the Assignor at _____[*mailing address*], or the Assignee at _____[*mailing address*]. Either party may change its address for the purpose of this paragraph by giving written notice of the change to the other party in the manner provided in this paragraph.

Attorneys' Fees

7. If any litigation is begun between the parties to this agreement concerning the assignment and transfer made by it, the party prevailing in the litigation will be entitled, in addition to any other relief as may be granted, to a reasonable sum for its attorneys' fees in the litigation. That sum will be determined by the court in the litigation or in a separate action brought for that purpose.

Sole Agreement

8. This agreement constitutes the sole agreement between Assignor and Assignee respecting the assignment of the copyright and the transfer of rights to the book, and correctly sets forth mutual obligations of Assignor and Assignee as of its date. Any agreements or representations respecting the assignment of copyright or the transfer of all rights of the book not expressly set forth in this agreement are null and void.

Governing Law

9. This Assignment will be governed by the laws of California.

Effective Date

10. This Assignment will be effective on the date set forth below.

[Add, if desired:]

Counterparts

11. This Assignment may be executed in counterparts with all those counterparts together constituting one original of this Assignment.

[Continue with the following:]

Executed on _____, at _____[place of execution].

Date: _____.

ASSIGNOR

_____ [signature]

[typed name]

[Add, if applicable:]

CONSENT OF ASSIGNOR'S SPOUSE

The undersigned, the _____[wife or husband] of the above-mentioned Assignor
_____[name of assignor], consents to and joins in the assignment that is the subject of this Agreement.

Date: _____.

_____ [signature of assignor's spouse]
 [typed name]

[Continue with the following:]

ASSIGNEE

_____ [signature]
 [typed name]

[Add acknowledgment, if desired; acknowledgments taken in California must be in substantially the following form (Civ. Code § 1189(a)):]

ACKNOWLEDGMENT

State of California

County of _____

On _____ [date], before me, _____ [name and title of officer taking acknowledgment], personally appeared _____ [name(s) of person(s) signing instruments], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is or are] subscribed to the within instrument and acknowledged to me that _____ [he or she or they] executed the same in _____ [his or her or their] authorized [capacity or capacities], and that by [his or her or their] signature[s] on the instrument the person[s], or entity on behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____[Seal]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Performance Assignment Consent Copyright Law Formalities General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103A COPYRIGHTS
PART IV. FORMS
B. Related Forms

33-103A California Legal Forms--Transaction Guide § 103A.225

§ 103A.225 Document Cover Sheet for Recordation of Documents in U.S. Copyrights Office

[1] Comment

[a] Use of Form

This form is to official cover sheet to use when submitting documents (for example, transfers of ownership, changes of name, and licenses) for recordation in the U.S. Copyright Office. Recordation of a document with the Copyright Office gives constructive notice of the facts stated in the recorded document, provided that (1) the document, or material attached to the document, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work; and (2) the work has been registered [17 U.S.C. § 205(c); see 37 C.F.R. § 201.4 (requirements for recordation); see also §§ 103A.152 (recordation procedures), 103A.225[2] (cover sheet for documents submitted for recordation)].

Two copies of this Document Cover Sheet should be submitted with each document [see "Basic Information" in the official instructions reproduced in [2], *below*].

[b] Completing Document Cover Sheet

Detailed, line-by-line instructions on how to complete the document cover sheet are provided with the form. These instructions are reproduced in [2], *below*, along with the form.

For information on where to obtain this form, see § 103A.200[1]. For a detailed discussion of the procedure for recordation of transfer and other documents, see § 103A.152.

[2] FORM

Document Cover Sheet for Recordation of Documents in U.S. Copyrights Office

Click here to view image.

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawCivil Infringement ActionsPresumptions & RequirementsRecordation RequirementCopyright
LawFormalitiesGeneral Overview



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[Reserved]

§§ 103A.226[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103A COPYRIGHTS

PART IV. FORMS

C. Protection of Semiconductor Chip Mask Works

33-103A California Legal Forms--Transaction Guide § 103A.240

§ 103A.240 Application for Registration of Mask Work Embodied in Semiconductor Chip Product [U.S. Copyright Office Form MW]

[1] Comment

[a] Use of Form

This form is the official application for registration of a claim of protection of an owner's rights in a mask work [see 17 U.S.C. § 908(a)]. For discussion of the protection available for a mask work embodied in a semiconductor chip product ("chip") under the Semiconductor Chip Protection Act [17 U.S.C. § 901 *et seq.*], see § 103A.99.

[b] Where to Obtain Forms

This form may be ordered in writing from the Library of Congress, Copyright Office, 101 Independence Avenue, S.E., Washington, DC 20559-6000 or by calling the Forms and Publications Hotline at (202) 707-9100. Forms, circulars, and other information may also be accessed and downloaded from the Copyright Office website at www.copyright.gov. To speak to an information specialist, call (202) 707-3000 (TTY: (202) 707-6737). Circulars are also available from Fax-on-Demand at (202) 707-2600.

Helpful circulars and information sheets Circular 1c, "Make Sure Your Application Will Be Acceptable." See also 37 C.F.R. § 211.1 *et seq.*, discussing the deposit of identifying material required to be submitted with this form [see [g], *below*].

The application must be made on either a printed copy of this form or on a legible photocopy made on a good grade of 8 1/2 x 11 (preferably blue-colored) paper, suitable for automatic feeding through a photocopier [see "General Information" in the official instructions reproduced in [2], *below*]. The application must contain the information required by the form and its accompanying instructions [37 C.F.R. § 211.4(b)(3)].

[c] Additional Submissions Required With Form

The application for mask work registration must be accompanied by the statutory fee [37 C.F.R. § 211.4(b)(3); *see* 37 C.F.R. § 211.3(a) (fee schedule)]. See the Copyright Office website at www.copyright.gov or call (202) 707-3000 for current fee information.

The application must also be accompanied by a deposit of all identifying material required under the law [*see* 17 U.S.C. § 908(c), (d); 37 C.F.R. § 211.4(b)(3); *see also* [g], *below*].

If additional space is needed, complete and attach U.S. Copyright Office Form MW/CON (continuation sheet for Form MW) to this form.

[d] Who May Submit Form

The application may be submitted by the owner of the mask work or by the agent of the owner [37 C.F.R. § 211.4(b)(2)]. The owner of a mask work includes one who has obtained the transfer all of the exclusive rights in the work. "Owner" does not include the transferee of less than all of the exclusive rights in the work or any licensee [37 C.F.R. § 211.4(b)(2); *see generally* § 103A.99[3]].

[e] Completing the Application

Detailed, line-by-line instructions on how to complete the application for registration are provided with the form. These instructions are reproduced in [2], *below*, along with the form. The application has been designed by the Copyright Office to elicit information bearing on the preparation or identification of the mask work to be protected, the existence or duration of protection, and ownership of the mask work [*see* 17 U.S.C. § 908(c)].

The application must include a certification stating that the applicant is authorized to submit the application and that the statements are correct to the best of that person's knowledge. The certification must be signed with that person's handwritten signature, accompanied by his or her typed or printed name [37 C.F.R. § 211.4(b)(3)].

[f] When to Submit Application for Registration

Application for registration of a claim of protection should be made within two years of the date of the first commercial application, because statutory protection for a mask work which has been commercially exploited [*see* 17 U.S.C. § 901(a)(5) (definition)] anywhere in the world is terminated if the application is not made within that two-year period [*see* 17 U.S.C. § 908(a); § 103A.99[5]].

[g] Deposit Requirements for Commercially Exploited Work

If a mask work has been commercially exploited [*see* 17 U.S.C. § 901(a)(5) (definition); *see also* § 103A.99[3]], the application for registration must be accompanied by four representations of the mask work fixed in the form of the semiconductor chip product in which it was first commercially exploited. Defective chips may be deposited provided that the mask work contribution would be revealed in reverse dissection of the chips. The four representations must be accompanied by a visually perceptible representation of each layer of the mask work. These representations must consist of either sets of plastic color overlay sheets, drawings or plots in composite form on a single sheet or multiple sheets, or a photograph of each layer of the work fixed in the chip. The visually perceptible representation must be reproduced on material which can be readily stored in an 8 1/2 -x-11-inch format, and must be reproduced at a magnification sufficient to reveal the basic circuitry design of the mask work, at least 20 times magnification [37 C.F.R. § 211.5(b)(1)].

Exceptions to this deposit requirement exist for material that contains trade secret information [37 C.F.R. § 211.5(b)(1), (c)(1); *see* [i], *below*]. Special relief may also be granted [37 C.F.R. § 211.5(d); *see* [j], *below*].

[h] Deposit Requirements for Work That Has Not Been Commercially Exploited

If a mask work has not been commercially exploited [*see* 17 U.S.C. § 901(a)(5) (definition); § 103A.99[3]], the application for registration must be accompanied by one of the following [37 C.F.R. § 211.5(b)(2)]:

- When the mask work contribution in which registration is sought represents 20 percent or more of the area of the intended final form, a visually perceptible representation of the work in accordance with 37 C.F.R. § 211.5(b)(1) (required deposit for commercially exploited mask works). In addition, an applicant may deposit four representations in the most complete form of the mask work as fixed by the semiconductor product.
- When the mask work contribution in which registration is sought represents less than 20 percent or more of the area of the intended final form, a visually perceptible representation of the work that reveals the totality of the mask work contribution to a person trained in the state of the art. The visually perceptible representations may consist of any combination of plastic overlay sheets, drawings or plots in composite form, or a photograph or photographs of the entire mask set. If the visually perceptible representations fail to identify all of the elements of the mask work, additional explanatory material may be included. The visually perceptible representation must be reproduced on material which can be readily stored in an 8 1/2 -x-11-inch format, and must be of sufficient magnification and completeness to reveal all elements of the contribution. In addition, an applicant may deposit four representations in the most complete form of the mask work as fixed by the semiconductor product.

As in the case of commercially exploited work, special exceptions to this deposit requirement exist for material that contains trade secret information [37 C.F.R. § 211.5(b)(2), (c)(2); *see* [i], *below*]. Special relief may also be granted [37 C.F.R. § 211.5(d); *see* [j], *below*].

[i] Trade Secret Protection

If specific layers of a mask work contain information in which trade secret protection is asserted [*see generally* Ch. 57, *Computer-Related Transactions* (trade secret law)], certain material may be withheld from deposit. For commercially exploited mask works, no more than two layers of a five or more layer mask work may be withheld [*see* 37 C.F.R. § 211.5(c)(1)]. For mask works that have not been commercially exploited, any layer may be withheld [*see* 37 C.F.R. § 211.5(c)(2)].

In lieu of a visually perceptible representation of the withheld material, the applicant must submit "identifying portions." For commercially exploited mask works, "identifying portions" means (1) a printout of the mask-work design data pertaining to each withheld layer, reproduced in microform or (2) visually perceptible representations in accordance with 37 C.F.R. § 211.5(b)(1)(i)-(iii), with those portions containing sensitive information maintained under a claim of trade secrecy blocked out, provided the portions remaining are greater than those blocked out [37 C.F.R. § 211.5(c)(1)].

For mask works not commercially exploited falling under 37 C.F.R. § 211.5(b)(2)(i), any layer may be withheld, and in lieu of the visually perceptible representations required, "identifying portions" means (1) a printout of the mask-work design data pertaining to each withheld layer, reproduced in microform, in which sensitive information maintained under a claim of trade secrecy has been blocked out or stripped or (2) visually perceptible representations in accordance with 37 C.F.R. § 211.5(b)(2)(i), with those portions containing sensitive information maintained under a claim of trade secrecy blocked out, provided the portions remaining are greater than those blocked out [37 C.F.R. § 211.5(c)(2)]. Otherwise, if the mask work has not been commercially exploited, the identifying portions must be accompanied by a single photograph of the top or other visible layers of the work. Sensitive information maintained under a claim of trade secrecy may be blocked out or stripped from the identifying portions, provided blocked-out portions do not exceed the

remaining portions [37 C.F.R. § 211.5(c)(2)].

[j] Special Relief

The applicant may request special relief from the deposit requirements discussed above. A request must be made in writing to the Associate Register for Registration and Recordation Program, Library of Congress, Copyright Office - RPO, 101 Independence Avenue, SE, Washington, DC 20559-6200, and must be signed by the person who signs the application. It must set forth specific reasons why the request should be granted and propose an alternative form of deposit [37 C.F.R. § 211.5(d)]. Neither the Act nor the applicable regulations contain any guidelines as to what considerations might justify the granting of special relief.

[k] Single Registration

As a general rule, only one registration may be made for the same version of a mask work. However, if an applicant alleges that an earlier registration for the same version is unauthorized and legally invalid, a registration may be made in the applicant's name. The applicant's allegation must be set forth in a signed affidavit submitted for recordation [37 C.F.R. § 211.4(c); see 37 C.F.R. §§ 201.4, 211.2 (requirements for recordation); see also § 103A.152 (recordation procedures); § 103A.225[2] (cover sheet for documents submitted for recordation)]. Notwithstanding the general rule, owners of mask works in final forms of semiconductor chip products that are produced by adding metal connection layers to unpersonalized gate arrays may separately register the entire unpersonalized gate array and the custom metallization layers [see 37 C.F.R. § 211.4(c)(2)].

[l] What Constitutes Single Work

A mask work that has not been commercially exploited [see 17 U.S.C. § 901(a)(5) (definition); § 103A.99[3]] will be considered a single mask work that can be registered by a single application and payment of a single registration fee if all of its elements have been fixed in a particular form of a chip by the time the application is filed and if the same person owns all elements of the mask work [37 C.F.R. § 211.4(d)].

A mask work that has been commercially exploited will be treated as a single work if all of its elements have been fixed in a particular form of a chip by the time the chip was first commercially exploited and if the same person owns all elements of the mask work [37 C.F.R. § 211.4(d)].

[m] Registration in Most Complete Form

Owners seeking registration of a mask work contribution must submit the entire original mask work contribution in its most complete form as fixed in a semiconductor chip product. The most complete form means the stage of the manufacturing process that is closest to completion [37 C.F.R. § 211.4(e)]. When the owner is unable to register on the basis of the most complete form because he or she lacks control over the most complete form, this fact must be stated in Space 2 of the form [see [2], below]. In these circumstances, the owner may register on the basis of the most complete form in his or her possession [37 C.F.R. § 211.4(e)].

For applicants seeking to register an unpersonalized gate array or custom metallization layers under 37 C.F.R. § 211.4(c)(2), the most complete form is the entire chip on which the unpersonalized gate array resides or custom metallization layers reside, and registration covers those elements of the chip in which work protection is asserted [37 C.F.R. § 211.4(e)].

[2] FORM

Application for Registration of Mask Work Embodied in Semiconductor Chip Product [U.S. Copyright Office Form MW]

[Click here to view image.](#)

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Copyright LawSubject MatterSemiconductor Chips & Boat HullsGeneral OverviewCopyright LawSubject
MatterSemiconductor Chips & Boat HullsFormalitiesCopyright LawSubject MatterSemiconductor Chips & Boat
HullsMask Works



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CHAPTER 103B TRADEMARKS

33-103B California Legal Forms--Transaction Guide 103B.syn

§ 103B.syn Synopsis to Chapter 103B: TRADEMARKS

§ 103B.01 California Statutes

§ 103B.02 Federal Sources

[1] Federal Statutes

[2] Federal Regulations

§§ 103B.103-103B.106 [Reserved]

§ 103B.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 103B.08-103B.09 [Reserved]

§ 103B.10 Governing Law

[1] Model State Trademark Law; Trademarks and Service Marks Unit

[2] Lanham Act

[3] Common Law

§ 103B.11 Definitions

[1] "Trademark"

[2] "Service Mark"

[3] "Mark"

[4] "Trade Name"

[5] "Person"

[6] "Applicant"

[7] "Registrant"

[8] "Use"

[9] "Abandoned"

§ 103B.12 Registration of Mark

[1] Application

[2] Examination by Trademarks Unit

[3] Additional Information and Amendment of Application

[4] Certificate of Registration

[a] Issuance and Content of Certificate

[b] Evidentiary Effect

[c] Term of Registration

[5] Public Access to Records

§ 103B.13 Impediments to Registration

[1] Marks That Cannot Be Registered

[a] Immoral, Deceptive, or Scandalous Matter

[b] Disparaging Matter

[c] Government Flag, Emblem, or Insignia

[d] Living Individual's Identity

[e] Confusing Mark

[2] Nondistinctive Mark

[a] Definition

[b] Categories of Distinctiveness

[3] Disclaimer of Objectionable Component

[4] Concurrent Applications for Identical or Similar Marks

§ 103B.14 Denial of Application

[1] Right to Amend and Resubmit Application

[2] Judicial Review

§ 103B.15 Procedures After Registration

[1] Renewal of Term

[2] Cancellation of Registration

[a] Request by Registrant or Assignee

[b] Unrenewed Term

[c] Judicial Order or Finding

[d] Check for Fee Is Dishonored

[e] Confusing Mark

[3] Fraudulent Registration

§ 103B.16 Recordation of Related Instruments

[1] Assignment of Registration

[2] Change of Registrant's Name

[3] License or Other Event

§ 103B.17 Limitation of Effect on Security Interests Under U.C.C.

§§ 103B.18-103B.99 [Reserved]

§ 103B.100 Facts

Scope

§ 103B.101 Documents

Scope

§§ 103B.102-103B.109 [Reserved]

§ 103B.110. Determining Whether to Register in California

Scope

§§ 103B.111-103B.119 [Reserved]

§ 103B.120 California Registration

Scope

§§ 103B.121-103B.129 [Reserved]

§ 103B.130 Renewal of California Registration

Scope

§ 103B.131 Recordation of Assignment of Registration of Mark

Scope

§§ 103B.131-103B.199 [Reserved]

§ 103B.200 Registration Application for Trademark or Service Mark

[1] Comment

[a] Use of Form

[b] Required Content

[c] Disclosure of Application Under Lanham Act

[d] Drawing of Mark

[e] Translation of Foreign Words

[f] Declaration of Accuracy

[g] Specimens

[h] Fee

[2] FORM

Scope

§ 103B.201 Application for Renewal of Registration Term

[1] Comment--Use of Form

[2] FORM

Scope

§ 103B.202 Assignment of Registration

[1] Comment--Use of Form

[2] FORM

Scope

§ 103B.203 Change of Mark Owner's Name

[1] Comment--Use of Form

[2] FORM

Scope



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103B TRADEMARKS

33-103B California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers the registration of trademarks and service marks under the Model State Trademark Law as enacted in California [*see Cal. Bus. & Prof. Code § 14200 et seq.*]. The Legal Background discusses the types of marks and highlights the protection afforded by that law. The Transaction Guide provides an overview of considerations for determining whether to register a mark under that law and the procedures for registration. The chapter includes forms relevant to the registration of marks under that law.

For discussion of, and forms for use in, an action to prevent infringement of a mark or unfair competition involving the use of a mark, *see* California Forms of Pleading and Practice, Ch. 549, *Trademarks* (Matthew Bender).



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CHAPTER 103B TRADEMARKS

PART I. RESEARCH GUIDE

A. Primary Sources

33-103B California Legal Forms--Transaction Guide § 103B.01

§ 103B.01 California Statutes

Goodwill of business. *Cal. Bus. & Prof. Code § 14100 et seq.*

Model State Trademark Law. *Cal. Bus. & Prof. Code § 14200 et seq.*

Trade names. *Cal. Bus. & Prof. Code § 14401 et seq.*

Trade name registration. *Cal. Bus. & Prof. Code § 14411 et seq.*

Container brands. *Cal. Bus. & Prof. Code § 14425 et seq.*

Farm names. *Cal. Bus. & Prof. Code § 14460 et seq.*

Laundry supply designations. *Cal. Bus. & Prof. Code § 14480 et seq.*

Association insignia and names. *Cal. Bus. & Prof. Code § 14492 et seq.; Cal. Corp. Code § 21300 et seq.*

Trademark may be subject of ownership. *Cal. Civ. Code § 655.*

Income tax considerations. *Rev. & Tax. Code §§ 17277, 18052, 24368.1, 24916, 24916.2.*



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A. Primary Sources

33-103B California Legal Forms--Transaction Guide § 103B.02

§ 103B.02 Federal Sources

[1] Federal Statutes

Trademark Act of 1946 (Lanham Act). *15 U.S.C. § 1051 et seq.*

Provisions implementing Madrid Protocol (concerning international registration of marks), in force in United States on and after November 2, 2003. *15 U.S.C. § 1141 et seq.*

Income tax considerations. *I.R.C. §§ 861-863, 871, 881, 1016, 1253, 1441, 1442.*

[2] Federal Regulations

Importation of merchandise with infringing marks. *19 C.F.R. § 133.0 et seq.*

Rules of practice in trademark cases. *37 C.F.R. § 2.1 et seq.*

International Schedule of Classes of Goods and Services. *37 C.F.R. § 6.1.*



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CHAPTER 103B TRADEMARKS

PART I. RESEARCH GUIDE

A. Primary Sources

33-103B California Legal Forms--Transaction Guide §§ 103B.103-103B.106

[Reserved]

§§ 103B.103[Reserved]



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PART I. RESEARCH GUIDE

B. Secondary Sources

33-103B California Legal Forms--Transaction Guide § 103B.07

§ 103B.07 Text References

[1] Matthew Bender Sources

Hilliard, Welch, & Marvel, Trademarks and Unfair Competition Deskbook (Matthew Bender).

Horwitz, World Trademark Law and Practice (Matthew Bender).

LaFrance, Understanding Trademark Law (Matthew Bender).

LaLonde, Gilson on Trademarks (Matthew Bender).

California Forms of Pleading and Practice, Ch. 549, *Trademarks and Trade Names* (Matthew Bender).

Rose & Anderson, California Intellectual Property Laws (Matthew Bender).

[2] Additional Text References

Witkin, *Summary of California Law*, vol. 13, Personal Property, §§ 81-82 (10th ed. 2005).



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B. Secondary Sources

33-103B California Legal Forms--Transaction Guide §§ 103B.08-103B.09

[Reserved]

§§ 103B.08[Reserved]



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§ 103B.10 Governing Law

[1] Model State Trademark Law; Trademarks and Service Marks Unit

The former California Trademark Law [former *Cal. Bus. & Prof. Code § 14200 et seq.*] was superseded, effective January 1, 2008, by the Model State Trademark Law, codified at *Cal. Bus. & Prof. Code § 14200 et seq.* Significant changes include the following:

- The duration of a California registration (formerly 10 years) is now five years [see § 103B.12[4][c]].
- The classification of goods and services now are those adopted by the U.S. Patent and Trademark Office [see § 103B.200[1][b]].
- A single application may include multiple classifications of goods or services [see § 103B.200[1][b]].
- The applicant is required to disclose whether the U.S. Patent and Trademark Office ever refused to register the mark and, if so, the reasons why registration was refused [see § 103B.200[1][c]].
- Applicants are required to declare that the material facts in the application are true. A willful inaccurate statement can expose the applicant to a civil penalty of up to \$10,000 [see § 103B.200[1][f]].

The Model State Trademark Law is administered by the Trademarks and Service Marks Unit in the Secretary of State's office [see *Cal. Bus. & Prof. Code § 14202(j)*], which is referred to in this chapter as the Trademarks Unit. It has a web site at <http://www.sos.ca.gov/business/ts/>.

If any provision of the Model State Trademark Law, or the application of any provision to any person or circumstance, is held invalid, the remainder of the Model State Trademark Law is not to be affected by that holding [*Cal. Bus. & Prof. Code § 14265*].

For discussion of, and forms for use in, an action to prevent infringement of a mark or unfair competition involving the use of a mark, see California Forms of Pleading and Practice, Ch. 549, *Trademarks* (Matthew Bender).

[2] Lanham Act

The intent of the Model State Trademark Law is to provide a system of state trademark registration and protection substantially consistent with the federal system of trademark registration and protection under the Trademark Act of 1946, commonly called the Lanham Act, which is codified at 15 U.S.C. § 1051 *et seq.* To that end, the construction given the Lanham Act should be examined as nonbinding authority for interpreting and construing the Model State Trademark Law [*Cal. Bus. & Prof. Code* § 14272].

For discussion of the federal system of trademark registration and protection under the Lanham Act, see LaLonde, Gilson on Trademarks (Matthew Bender).

[3] Common Law

Nothing in the Model State Trademark Law adversely affects the rights or the enforcement of rights in marks acquired in good faith at any time within common law [*Cal. Bus. & Prof. Code* § 14259].

Legal Topics:

For related research and practice materials, see the following legal topics:

Trademark LawProtection of RightsRegistrationEvidenceTrademark LawProtection of RightsRegistrationFederal
RegistrationTrademark LawProtection of RightsRegistrationPrincipal Register



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33-103B California Legal Forms--Transaction Guide § 103B.11

§ 103B.11 Definitions

[1] "Trademark"

"Trademark" means any word, name, symbol, or device, or any combination of those, used by a person to identify and distinguish the goods of that person, including a unique product, from those manufactured or sold by others, and to indicate the source of the goods, even if that source is unknown [*Cal. Bus. & Prof. Code § 14202(a)*].

[2] "Service Mark"

"Service mark" means any word, name, symbol, or device, or any combination of those, used by a person to identify and distinguish the services of that person, including a unique service, from the services of others, and to indicate the source of the services, even if that source is unknown. Titles, character names used by a person, and other distinctive features of radio or television programs may be registered as service marks notwithstanding that they, or the programs, may advertise the goods of the sponsor [*Cal. Bus. & Prof. Code § 14202(b)*].

[3] "Mark"

"Mark" includes any trademark or service mark entitled to registration under the Model State Trademark Law, whether registered or not [*Cal. Bus. & Prof. Code § 14202(c)*].

California law also offers protection for container brands [*see Cal. Bus. & Prof. Code § 14427*], farm names [*see Cal. Bus. & Prof. Code § 14461*], laundry supply designations [*see Cal. Bus. & Prof. Code § 14482*], and association insignia [*see Cal. Corp. Code § 21301*].

[4] "Trade Name"

"Trade name" means any name used by a person to identify a business or vocation of that person [*Cal. Bus. & Prof. Code § 14202(d)*]. A trade name cannot be registered as such under the Model State Trademark Law, but a trade name that qualifies as a trademark or service mark may be registered as a mark.

For discussion of, and forms for use in, an action to prevent unfair competition involving the plaintiff's trade name, see *California Forms of Pleading and Practice*, Ch. 549, *Trademarks*, § 549.107 (Matthew Bender).

[5] "Person"

The term "person" and any other word or term used to designate the applicant or other party entitled to a benefit or privilege or rendered liable under the provisions of the Model State Trademark Law includes a juristic person as well as a natural person. The term "juristic person" includes a firm, partnership, corporation, union, association, or other organization capable of suing and being sued in a court of law [*Cal. Bus. & Prof. Code § 14202(e)*].

[6] "Applicant"

"Applicant" means the person filing an application for registration of a mark under the Model State Trademark Law, and the legal representatives, successors, or assigns of the person [*Cal. Bus. & Prof. Code § 14202(f)*].

[7] "Registrant"

"Registrant" means the person to whom the registration of a mark under the Model State Trademark Law is issued, and the legal representatives, successors, or assigns of the person [*Cal. Bus. & Prof. Code § 14202(g)*].

[8] "Use"

"Use" means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For the purposes of the Model State Trademark Law, a mark is deemed to be in use if it is used on either of the following [*Cal. Bus. & Prof. Code § 14202(h)*]:

- On goods when it is placed in any manner on the goods or other containers or the displays associated therewith or on the tags or labels affixed thereto or, if the nature of the goods makes that placement impracticable, on documents associated with the goods or their sale, and the goods are sold or transported in commerce in California; or
- On services when it is used or displayed in the sale or advertising of services and the services are rendered in California.

[9] "Abandoned"

"Abandoned" means that either of the following has occurred [*Cal. Bus. & Prof. Code § 14202(i)*]:

- A mark's use has been discontinued with intent not to resume that use. Intent not to resume the use may be inferred from circumstances. Nonuse for two consecutive years constitutes prima facie evidence of abandonment.
- When any course of conduct of the owner, including acts of omission as well as commission, causes the mark to lose its significance as a mark.

Legal Topics:

For related research and practice materials, see the following legal topics:

Trademark LawSubject MatterAbbreviations, Acronyms & MonogramsTrademark LawSubject MatterImages & LikenessesTrademark LawSubject MatterPicturesTrademark LawSubject MatterRecordings



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§ 103B.12 Registration of Mark

[1] Application

Subject to the limitations set forth in the Model State Trademark Law, any person who uses a mark may file with the Trademarks Unit, on a form prescribed by the Trademarks Unit, an application for registration of that mark [*Cal. Bus. & Prof. Code § 14207(a)*]. See § 103B.200[2] for an illustration of the prescribed form and accompanying instructions.

However, a mark by which the goods or services of any applicant for registration may be distinguished from the goods or services of others cannot be registered if it meets any of the criteria specified in *Cal. Bus. & Prof. Code § 14205* [see § 103B.13[1]].

[2] Examination by Trademarks Unit

On the filing of an application for registration and payment of the application fee, the Trademarks Unit may cause the application to be examined for conformity with the Model State Trademark Law [*Cal. Bus. & Prof. Code § 14209(a)*].

[3] Additional Information and Amendment of Application

The applicant must provide any additional pertinent information requested by the Trademarks Unit, including a description of a design mark, and may make, or authorize the Trademarks Unit to make, amendments to the application as may be reasonably requested by the Trademarks Unit or deemed by the applicant to be advisable in order to respond to any rejection or objection [*Cal. Bus. & Prof. Code § 14209(b)*].

The Trademarks Unit may make amendments to the application submitted by the applicant on the applicant's agreement, or may require the submission of a new application [*Cal. Bus. & Prof. Code § 14209(d)*].

[4] Certificate of Registration

[a] Issuance and Content of Certificate

On compliance by the applicant with the requirements of the Model State Trademark Law, the Trademarks Unit must cause a certificate of registration to be issued and delivered to the applicant. The certificate of registration must be issued under the signature of the Secretary of State and the seal of the state, and show the following information [*Cal. Bus. & Prof. Code § 14215(a)*]:

- The name and business address and, if a corporation, the state of incorporation, or if a partnership, the state in which the partnership is organized and the names of the general partners, as specified by the Trademarks Unit, of the person claiming ownership of the mark;
- The date claimed for the first use of the mark anywhere and the date claimed for the first use of the mark in California;
- The class of goods or services and a description of the goods or services on or in connection with which the mark is used;
- A reproduction of the mark; and
- The registration date and the term of the registration of the mark [*see [c], below*].

[b] Evidentiary Effect

Any certificate of registration issued by the Trademarks Unit under the provisions of the Model State Trademark Law, or a copy of a certificate duly certified by the Trademarks Unit, is admissible in evidence as competent and sufficient proof of the registration of the mark in any action or judicial proceeding in any court of California [*Cal. Bus. & Prof. Code § 14215(b)*].

[c] Term of Registration

A registration of mark pursuant to the Model State Trademark Law is effective for a term of five years from the date of registration and may be renewed for successive periods of five years [*Cal. Bus. & Prof. Code § 14217(a),(b)*; *see § 103B.15[1]*].

Any registration in force under the former law when the Model State Trademark Law became effective, January 1, 2008, was automatically extended for the unexpired term of the registration under the former law, becoming eligible for renewal under the Model State Trademark Law on expiration of that term [*Cal. Bus. & Prof. Code § 14217(c)*].

[5] Public Access to Records

The Trademarks Unit must keep for public examination a record of all marks registered or renewed under the Model State Trademark Law, as well as a record of all related documents recorded pursuant to *Bus. & Prof. Code § 14220* [*Cal. Bus. & Prof. Code § 14225*]. See § 103B.15 for discussion of the recordation of related documents.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Trademark LawProtection of RightsRegistration



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33-103B California Legal Forms--Transaction Guide § 103B.13

§ 103B.13 Impediments to Registration

[1] Marks That Cannot Be Registered

[a] Immoral, Deceptive, or Scandalous Matter

A mark cannot be registered if it consists of or comprises immoral, deceptive, or scandalous matter [*Cal. Bus. & Prof. Code § 14205(a)*].

[b] Disparaging Matter

A mark cannot be registered if it consists of or comprises matter that may disparage or falsely suggest a connection with persons living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute [*Cal. Bus. & Prof. Code § 14205(b)*].

[c] Government Flag, Emblem, or Insignia

A mark cannot be registered if it consists of or comprises the flag or coat of arms or other insignia of the United States of America, of any state or municipality, or of any foreign nation, or any simulation of any of those [*Cal. Bus. & Prof. Code § 14205(c)*].

[d] Living Individual's Identity

A mark cannot be registered if it consists of or comprises the name, signature, or a portrait identifying a particular living individual, except by the individual's written consent [*Cal. Bus. & Prof. Code § 14205(d)*].

[e] Confusing Mark

A mark cannot be registered if it consists of or comprises a mark that so resembles a mark registered in California or a mark or trade name previously used by another and not abandoned, as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion or mistake, or to deceive [*Cal. Bus. & Prof. Code § 14205(f)*].

[2] Nondistinctive Mark**[a] Definition**

A mark cannot be registered if it consists of a mark that is any of the following [*Cal. Bus. & Prof. Code § 14205(e)*]:

- When used on or in connection with the goods or services of the applicant, is merely descriptive or deceptively misdescriptive of them.
- When used on or in connection with the goods or services of the applicant, is primarily geographically descriptive or deceptively misdescriptive of them.
- Is primarily merely a surname, provided, however, that this will not prevent the registration of a mark used by the applicant that has become distinctive of the applicant's goods or services.

The Trademarks Unit may accept as evidence that the mark has become distinctive, as used on or in connection with the applicant's goods or services, proof of continuous use of it as a mark by the applicant in California for the five years before the date the claim of distinctiveness is made [*Cal. Bus. & Prof. Code § 14205(e)*].

[b] Categories of Distinctiveness

Marks are often classified by the courts in five categories of increasing distinctiveness [*Two Pesos, Inc. v. Taco Cabana, Inc.* (1992) 505 U.S. 763, 767-771, 112 S. Ct. 2753, 120 L. Ed. 2d 615 ; *Park'N Fly, Inc. v. Dollar Park & Fly, Inc.* (1985) 469 U.S. 189, 194, 196, 105 S. Ct. 658, 83 L. Ed. 2d 582] :

- Generic;
- Descriptive;
- Suggestive;
- Arbitrary; and
- Fanciful.

A mark in any of the last three categories intrinsically serves to identify a particular source of a product and so may be deemed inherently distinctive and generally entitled to protection [*see, e.g., GoTo.com, Inc. v. Walt Disney Co.* (9th Cir. 2000) 202 F.3d 1199, 1207 (logo comprising words "Go" and "To" in white letters enclosed in green circle with ".com" in black letters trailing over circle's edge was suggestive trademark for search-engine web site)].

A mark that is "merely descriptive" of the product is not inherently distinctive and generally is not protectable unless it has acquired "secondary meaning," that is, unless customers associate the mark with a particular source [*Two Pesos, Inc. v. Taco Cabana, Inc.* (1992) 505 U.S. 763, 767-771, 112 S. Ct. 2753, 120 L. Ed. 2d 615 ; *Park'N Fly, Inc. v. Dollar Park & Fly, Inc.* (1985) 469 U.S. 189, 194, 196, 105 S. Ct. 658, 83 L. Ed. 2d 582] . Color alone, if it has attained "secondary meaning," may be a trademark, provided the color is "nonfunctional" (that is, is not essential to the product's use or purpose and does not affect its cost or quality) [*Qualitex Co. v. Jacobson Products Co., Inc.* (1995), 514 U.S. 159, 166, 115 S. Ct. 1300, 131 L. Ed. 2d 248] .

A generic mark is one that is merely the common word for a type of product (for example, "car" or "egg") [*Park'N Fly, Inc. v. Dollar Park & Fly, Inc.* (1985) 469 U.S. 189, 194, 105 S. Ct. 658, 83 L. Ed. 2d 582 (if products and services

could be classified zoologically, then generic or common descriptive mark would be one that refers, or has come to be understood as referring, to "genus" of products or services)]. It is not registerable even with a showing of secondary meaning [see *Filipino Yellow Pages, Inc. v. Asian Journal Publications, Inc.* (9th Cir., 1999) 198 F.3d 1143, 1146-1147 (combination of two generic terms results in generic mark, not descriptive one)].

A mark composed of generic or descriptive words is not automatically invalid as a trademark, however. The validity and distinctiveness of a composite trademark is determined by viewing the trademark as a whole, as it appears in the marketplace, and not by dissecting it and reviewing the validity of its components [*Self Realization Fellowship Church v. Ananda* (9th Cir. 1995) 59 F.3d 902, 912] .

[3] Disclaimer of Objectionable Component

The Trademarks Unit may require the applicant to disclaim an unregistrable component of an otherwise registrable mark, and an applicant may voluntarily disclaim a component of a mark sought to be registered. No disclaimer can prejudice or affect the applicant's or registrant's rights, then existing or thereafter arising, in the disclaimed matter or the applicant's or registrant's rights of registration on another application if the disclaimed matter is or has become distinctive of the applicant's or registrant's goods or services [*Cal. Bus. & Prof. Code § 14209(c)*].

[4] Concurrent Applications for Identical or Similar Marks

In the event that several applications that are concurrently being processed by the Trademarks Unit seek registration of identical or confusingly similar marks for the same or related goods or services, the Trademarks Unit must grant priority to the applications in the order of filing. If a prior-filed application is granted a registration, the other application or applications must then be rejected. Any rejected applicant may bring an action for cancellation of the registration on grounds of prior or superior rights to the mark, in accordance with the provisions of *Bus. & Prof. Code § 14230* [*Cal. Bus. & Prof. Code § 14209(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Trademark Law
Protection of Rights
Registration
Supplemental Register
Trademark Law
Subject Matter
Geographic
Terms
Unprotectable Terms



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§ 103B.14 Denial of Application

[1] Right to Amend and Resubmit Application

If an applicant is found not to be entitled to registration, the Trademarks Unit must so advise the applicant, stating the reasons. The applicant has a reasonable period of time, as specified by the Trademarks Unit, in which to reply or to amend the application, in which event the application must be re-examined. This procedure may be repeated until the Trademarks Unit finally refuses registration of the mark or the applicant fails to reply or amend within the specified period, whereupon the application will be deemed to have been abandoned [*Cal. Bus. & Prof. Code § 14209(e)*].

[2] Judicial Review

If the Trademarks Unit finally refuses registration of the mark, the applicant may seek a writ of mandamus to compel registration. A writ may be granted, but without costs to the Trademarks Unit, on proof that all statements in the application are true and that the mark is otherwise entitled to registration [*Cal. Bus. & Prof. Code § 14209(f)*].

For discussion of, and forms for use in, an action for a writ of mandamus to compel registration of a mark, see California Forms of Pleading and Practice, Ch. 474C, *Procedures in Reviewing Agency Decisions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Trademark LawProtection of RightsRegistrationAmendments



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§ 103B.15 Procedures After Registration

[1] Renewal of Term

On application filed within six months before the expiration of the current term of registration, in a manner complying with the requirements of the Trademarks Unit, the registration may be renewed for a term of five years from the end of the expiring term [*Cal. Bus. & Prof. Code § 14217(a)*], and may be renewed for successive periods of five years in like manner [*Cal. Bus. & Prof. Code § 14217(b)*]. See § 103B.201[2] for an illustration of the prescribed form and accompanying instructions.

[2] Cancellation of Registration

[a] Request by Registrant or Assignee

The Trademarks Unit must cancel a registration concerning which the Trademarks Unit receives a voluntary request for cancellation from the registrant or the assignee of record [*Cal. Bus. & Prof. Code § 14230(a)*]. See § 103B.16[1] for discussion of assignments.

[b] Unrenewed Term

The Trademarks Unit must cancel a registration granted under the Model State Trademark Law and not renewed in accordance with the provisions of the Model State Trademark Law [*Cal. Bus. & Prof. Code § 14230(b)*]. See [1], *above*, for discussion of renewal.

[c] Judicial Order or Finding

The Trademarks Unit must cancel a registration if cancellation is ordered on any ground by a court of competent jurisdiction [*Cal. Bus. & Prof. Code § 14230(d)*] and must cancel a registration concerning a mark with regard to which a court of competent jurisdiction finds any of the following [*Cal. Bus. & Prof. Code § 14230(c)*]:

- The registered mark has been abandoned.

- The registrant is not the owner of the mark.
- The registration was granted improperly.
- The registration was obtained fraudulently.
- The mark is or has become the generic name for the goods or services, or a portion of them, for which it has been registered.
- The registered mark is so similar to a mark registered by another person in the U.S. Patent and Trademark Office before the date of the filing of the application for registration by the registrant under the Model State Trademark Law as to be likely to cause confusion or mistake, or to deceive, and has not been abandoned. However, should the registrant prove that the registrant is the owner of a concurrent registration of a mark in the U.S. Patent and Trademark Office covering an area including California, the registration under the Model State Trademark Law may not be canceled for that area of the state.

[d] Check for Fee Is Dishonored

The Trademarks Unit must cancel a registration or renewal if a check or other remittance accepted in payment of the filing fee is not paid on presentment. However, the Trademarks Unit must give written notice to the registrant before cancellation for this reason and then must allow 30 days from the date of the notification letter for payment by cashier's check or the equivalent [*Cal. Bus. & Prof. Code § 14230(e)*].

[e] Confusing Mark

Within six months of the date of registration, the Trademarks Unit must cancel a registration issued in violation of the proscription of *Bus. & Prof. Code § 14205(f)* against registration of a confusing mark [*Cal. Bus. & Prof. Code § 14230(f)*]. See § 103B.13[1][f] for discussion of that proscription.

[3] Fraudulent Registration

Any person who, either for himself or herself or on behalf of another person, procures the filing or registration of any mark pursuant to the Model State Trademark Law by knowingly making any false or fraudulent representation or declaration, either orally or in writing, or by any other fraudulent means, is liable to pay all damages sustained as a consequence of the filing or registration, to be recovered by or on behalf of the person injured, in any court of competent jurisdiction [*Cal. Bus. & Prof. Code § 14240*].

Legal Topics:

For related research and practice materials, see the following legal topics:
 Trademark LawProtection of RightsRegistrationRenewal



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§ 103B.16 Recordation of Related Instruments

[1] Assignment of Registration

Any mark and its registration under the Model State Trademark Law can be assigned along with the goodwill of the business in which the mark is used, or with that part of the goodwill of the business connected with the use of and symbolized by the mark [*Cal. Bus. & Prof. Code § 14220(a)*].

An application may be filed with the Trademarks Unit for recordation of the assignment. On recording the assignment, the Trademarks Unit must issue, in the name of the assignee, a new certificate for the remainder of the current term of the registration [*Cal. Bus. & Prof. Code § 14220(a)*]. See § 103B.202[2] for an illustration of the prescribed form of application and accompanying instructions for recordation of an assignment. When an assignment has been recorded by the Trademarks Unit, the record is prima facie evidence of the execution of the assignment [*Cal. Bus. & Prof. Code § 14220(d)*].

An assignment of any registration under the Model State Trademark Law is void as against any subsequent purchaser for valuable consideration without notice, unless it is recorded with the Trademarks Unit within three months after the date of assignment or before the subsequent purchase [*Cal. Bus. & Prof. Code § 14220(a)*].

[2] Change of Registrant's Name

Any registrant or applicant effecting a change of the name of the person to whom the mark is registered or for whom an application has been filed may, on a form prescribed by the Trademarks Unit, record a certificate of change of name of the registrant or applicant with the Trademarks Unit. The Trademarks Unit may consequently issue a new certificate of registration, in the new name of the registrant, for the remainder of the current term, or issue an original certificate of registration in the new name of the applicant [*Cal. Bus. & Prof. Code § 14220(b)*]. See § 103B.203[2] for an illustration of the prescribed form of application and accompanying instructions for recordation of a change of name.

[3] License or Other Event

Various instruments that relate to a mark registered or an application pending pursuant to the Model State Trademark

Law, including, but not limited to, licenses, may be recorded at the discretion of the Trademarks Unit, provided the instrument is in writing and is duly executed [*Cal. Bus. & Prof. Code § 14220(c)*]. Acknowledgment is prima facie evidence of the execution of an instrument [*Cal. Bus. & Prof. Code § 14220(d)*]. A photocopy of the instrument must be accepted for recording if it is certified by a party to it, or a successor, to be a true and correct copy of the original [*Cal. Bus. & Prof. Code § 14220(e)*].

An instrument related to a security interest or a mortgage might not be accepted for recordation by the Trademarks Unit (possibly because a risk of confusion could arise if such instruments were recorded at various governmental offices). In the bill for enactment of the Model State Trademark Law [*see AB 1484, 2007-2008 Reg. Sess.*], a specific reference to such instruments in *Bus. & Prof. Code § 14220(c)* was deleted before the bill was passed, and a limiting provision was inserted that specifically refers to security interests under Division 9 of the Commercial Code [*see § 103B.17*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Trademark Law Conveyances Assignments Trademark Law Protection of Rights Conveyances Recordation



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§ 103B.17 Limitation of Effect on Security Interests Under U.C.C.

Neither the Model State Trademark Law nor the recordation of any instrument received by the Trademarks Unit pursuant to the Model State Trademark Law [see § 103B.15] can have any effect on any security interest governed by Division 9 of the Commercial Code, including, but not limited to, any effect relating to attachment, perfection, priority, or enforcement [*Cal. Bus. & Prof. Code § 14220(f)*].



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PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

33-103B California Legal Forms--Transaction Guide § 103B.100

§ 103B.100 Facts

1. Reason for client consultation.
 - a. Registration of mark.
 - b. Renewal of registration.
 - c. Assignment of mark.
2. Information about client:
 - a. Full legal name.
 - b. Business address and telephone number.
 - c. Residence address and telephone number, if client is individual.
 - d. Country of citizenship.
3. Organization of business.
 - a. If business is partnership:
 - (1) Name of partnership.
 - (2) Jurisdiction (state or foreign country) under laws of which it is organized.

(3) Name and country of citizenship of each general partner.

(4) Domicile of partnership (state and country).

b. If business is corporation:

(1) Name of corporation.

(2) State or foreign country of incorporation.

c. For other types of businesses:

(1) Name of business entity.

(2) Jurisdiction (state or foreign country) under laws of which it is organized.

(3) Client's title or affiliation with any business entity that owns mark.

4. If applicant is not domiciled in California, name and address of agent for service of process in California.

5. Description of use of mark.

a. Identification of goods on or in connection with which mark is used in commerce.

NOTE:

For guidelines on identifying the goods and services, see the Patent and Trademark Office's online version of the Acceptable Identification of Goods and Service Manual at <http://tess2.uspto.gov/netathtml/tidm.html>.

b. Identification of services in connection with which mark is used in commerce.

c. Manner in which mark is used in commerce on or in connection with goods or services:

(1) Used on labels attached to goods.

(2) Used in advertisements for services.

(3) Otherwise used (describe).

6. Class number of goods or services, if known.

NOTE:

Consult the International Schedule of Classes of Goods and Services [37 C.F.R. § 6.1; see *Cal. Bus. & Prof. Code* § 14235].

7. Dates of use of mark in California:

a. Date first used in commerce.

- b. Date last used in commerce, if not currently in use.
8. Whether any other entity will be using mark, and if so:
- a. Name and owner(s) of that entity.
 - b. Business address and telephone number of that entity.
 - c. Whether that entity controls or is controlled by client with respect to nature and quality of goods or services in connection with which mark is used.
9. Whether use of mark has ever been abandoned [*see* § 103B.11[9]] and, if so:
- a. Dates and time period of nonuse.
 - b. Description of nonuse.
 - c. Reason for nonuse.
10. Whether mark has been or will be assigned [*see* generally § 103B.131].
11. Whether mark has previously been denied registration, and, if so:
- a. Date of denial.
 - b. Reasons for denial.
12. Whether registration of mark has ever previously been formally opposed, and, if so:
- a. Date of previous application(s) for registration.
 - b. Name and address of opposing person or entity.
 - c. Reasons for opposition.
 - d. Disposition of proceeding.
 - e. Likelihood of further opposition in future.
13. Whether client is aware of any other person or entity who believes that he or she has been or would be damaged by registration of mark, such as competitor using similar mark.
- a. Name and address of person or entity.
 - b. Whether person has filed or threatened to file petition to cancel registration [*see Cal. Bus. & Prof. Code* § 14230].
14. If client has already applied for federal registration of mark on basis of intent to use [*see 15 U.S.C. § 1051(b)*]:
- a. Date application was filed.

- b. Date notice of allowance was issued.
- c. Particular goods and/or services in connection with which mark has been used in commerce.
- d. Client's ongoing efforts to use mark in commerce, such as:
 - (1) Product or service research or development.
 - (2) Market research.
 - (3) Manufacturing activities.
 - (4) Promotional activities.
 - (5) Steps to acquire distributors.
 - (6) Steps to obtain required governmental approval.
- e. Whether client has previously requested and received extension(s) of time in which to file statement of use.

Legal Topics:

For related research and practice materials, see the following legal topics:
Trademark LawProtection of RightsRegistrationTrademark LawSubject Matter



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CHAPTER 103B TRADEMARKS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

33-103B California Legal Forms--Transaction Guide § 103B.101

§ 103B.101 Documents

1. Partnership agreement, if applicable.
2. Articles of incorporation, if applicable.
3. Exact copy of mark sought to be registered.
4. Copy of past or present federal certificate of registration or notice of allowance.

NOTE:

When the U.S. Patent and Trademark Office has determined that a mark meets the requirements for federal registration, it issues a certificate to the effect that the applicant has complied with the law and is entitled to registration of the mark on the principal or supplemental register, as the case may be [15 U.S.C. § 1057(a); 37 C.F.R. § 2.151]. For applications based on intent to use, the Patent and Trademark Office issues a notice of allowance as an interim step before actual use is proved to support issuance of a certificate of registration [15 U.S.C. §§ 1051(d)(1), 1062(a)].

5. Certification or certified copy of foreign registration, if any.
6. Opinions, reports, or decisions of U.S. Patent and Trademark Office on past applications or registrations of mark.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsGoverning Documents & ProceduresArticles of Incorporation &

BylawsBusiness & Corporate LawGeneral PartnershipsFormationTrademark LawSubject Matter



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CHAPTER 103B TRADEMARKS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

33-103B California Legal Forms--Transaction Guide §§ 103B.102-103B.109

[Reserved]

§§ 103B.102[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103B TRADEMARKS

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

33-103B California Legal Forms--Transaction Guide § 103B.110

§ 103B.110. Determining Whether to Register in California

1. Determine designation of mark as either [*Cal. Bus.&Prof. Code § 14203*]:
 - a. Trademark.
 - b. Service mark.
2. Confirm that mark is more than "trade name" [*see § 103B.11[4]*].
3. Confirm that mark is "used" in California in commerce [*see § 103B.11[8]*].
4. Determine whether mark consists of or comprises any matter for which registration is not allowed [*see § 103B.13[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Trademark LawProtection of RightsRegistrationState Registration



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 103B TRADEMARKS

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

33-103B California Legal Forms--Transaction Guide §§ 103B.111-103B.119

[Reserved]

§§ 103B.111[Reserved]



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CHAPTER 103B TRADEMARKS

PART III. TRANSACTION GUIDE

C. Procedural Guide to Registration of Mark

33-103B California Legal Forms--Transaction Guide § 103B.120

§ 103B.120 California Registration

1. Complete application for registration of mark, Form LP/TM 100 [*see § 103B.200[2]*].
2. File application accompanied by:
 - a. Three specimens of mark [*Cal. Bus.&Prof. Code § 14207(e)*].

NOTE:

The Trademarks Unit advises [*see <http://www.sos.ca.gov/business/ts/faqs.htm>*] that for a trademark, the specimen can be a label of the product sold or a photograph of the mark on the product itself, if the product is too big or bulky to send through the mail. For example, if the mark is printed on the front of tee-shirts, three photographs of the mark on the tee-shirt could be sent rather than sending three tee-shirts. For a service mark, the specimen can be a sample of how the services are being advertised. A telephone-directory advertisement, a flyer, a business card, or a photograph of a billboard advertising the services could be submitted. The specimen for a service mark must demonstrate the nature of the services rendered. The specimen must be something that could be handed to an average member of the public, and that person would immediately know what services are being provided by the company using the mark.

Photocopies, computer printouts, or camera-ready layouts of the mark will not be accepted as specimens. The mark owner must have released the product or service into the market prior to seeking registration of the trademark or service mark with the Secretary of State. If an advertisement cannot be provided, the mark owner must submit tags, labels, or photographs of products bearing the mark to be registered. A trademark or service mark cannot be registered until the mark owner has provided services or sold products with the mark to be registered. The Trademarks Unit must see specimens so as to be sure that the

mark is being used in commerce and to conclude that the word or phrase to be registered functions properly as a trademark or service mark. The mark owner must wait until proper specimens can be provided before applying to register the mark.

b. English translation of mark, if mark or any part of mark is not in English language [*Cal. Bus.&Prof. Code § 14207(g)*].

c. Filing fee [*Cal. Bus.&Prof. Code § 14207(f)*; see § 103B.200[1][h]].

Legal Topics:

For related research and practice materials, see the following legal topics:
Trademark LawProtection of RightsRegistrationState Registration



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C. Procedural Guide to Registration of Mark

33-103B California Legal Forms--Transaction Guide §§ 103B.121-103B.129

[Reserved]

§§ 103B.121[Reserved]



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CHAPTER 103B TRADEMARKS

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D. Related and Subsequent Procedures

33-103B California Legal Forms--Transaction Guide § 103B.130

§ 103B.130 Renewal of California Registration

NOTE:

California registration of a mark is effective for five years from the date of registration and may be renewed for successive periods of five years [*Cal. Bus. & Prof. Code § 14217(a),(b)*].

1. Complete application for renewal, Form LP/TM 109 [*see § 103B.201[2]*].
2. File application, accompanied by renewal fee, within six months before expiration of current term of registration [*see § 103B.201[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Trademark LawProtection of RightsRegistrationRenewalTrademark LawProtection of RightsRegistrationState
Registration



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D. Related and Subsequent Procedures

33-103B California Legal Forms--Transaction Guide § 103B.131

§ 103B.131 Recordation of Assignment of Registration of Mark

1. Draft and have parties execute appropriate instrument in writing sufficient to effect assignment of registration of mark.

NOTE:

Trademarks and service marks are typically assigned in connection with other transactions, such as the sale of a business or franchise, or the right to manufacture and sell a particular product. The appropriate agreements are found in the chapters dealing with those types of transactions.

2. Have parties sign and acknowledge that writing [*see § 103B.202[1]*].

NOTE:

Acknowledgment is prima facie evidence of the execution of an instrument of assignment [*Cal. Bus.&Prof. Code § 14220(d)*]. A photocopy of an instrument of assignment will be accepted for recording if it is certified by a party to the assignment, or a successor, to be a true and correct copy of the original [*Cal. Bus.&Prof. Code § 14220(e)*].

3. Complete application for recordation of assignment of registration of trademark or service mark, Form LP/TM 108 [*see § 103B.202[2]*].
4. File application, accompanied by recording fee, with Trademarks Unit [*see § 103B.202[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Trademark LawProtection of RightsRegistrationGray Market Goods & Recordation With CustomsTrademark

LawSubject Matter



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D. Related and Subsequent Procedures

33-103B California Legal Forms--Transaction Guide §§ 103B.131-103B.199

[Reserved]

§§ 103B.131[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 103B TRADEMARKS
PART IV. FORMS

33-103B California Legal Forms--Transaction Guide § 103B.200

§ 103B.200 Registration Application for Trademark or Service Mark

[1] Comment

[a] Use of Form

This form is prescribed by the Trademarks and Service Marks Unit (the Trademarks Unit), in the Secretary of State's office, for use in applying for registration of a trademark or service mark under the Model State Trademark Act [see *Cal. Bus. & Prof. Code* § 14207(a); § 103B.12[1]]. It is designated as Form LP/TM 100. The form and instructions for using it can be downloaded from the Trademarks Unit's web site at <http://www.sos.ca.gov/business/ts/forms.htm>. (A registration form published by the Trademarks Unit before January 1, 2008, does not comply with the Model State Trademark Law and will not be accepted for filing.)

The Secretary of State's web site, at <http://www.sos.ca.gov/business/ts/faqs.htm>, provides answers to frequently asked questions about registering trademarks and service marks.

[b] Required Content

An application for registration of a mark must set forth the following information, at least [*Cal. Bus. & Prof. Code* § 14207(a)]:

- The name and business address of the person applying for the registration and, if that person is a corporation or partnership, the state of incorporation or the state in which the partnership is organized and the names of the general partners, as specified by the Trademarks Unit.
- The date the mark was first used anywhere and the date it was first used in California by the applicant or a predecessor in interest.
- A statement that the applicant is the owner of the mark, that the mark is in use, and that, to the knowledge of the person verifying the application, no other person has registered in California, or has the right to use the mark, either in the identical form or in such near resemblance as to be likely, when

applied to the goods or services of the other person, to cause confusion, to cause mistake, or to deceive.

- The goods or services on or in connection with which the mark is used, the mode or manner in which the mark is used on or in connection with the goods or services, and the class in which the goods or services fall.

The classification of goods and services must conform to the classifications adopted by the U.S. Patent and Trademark Office [see 37 C.F.R. § 6.1]. A single application for registration of a mark may include any or all goods on which, or services with which, the mark is actually being used, indicating the appropriate class or classes of goods or services [Cal. Bus. & Prof. Code § 14235].

[c] Disclosure of Application Under Lanham Act

The Trademarks Unit also requires a statement as to whether an application to register the mark, or portions or a composite of the mark, has been filed by the applicant or a predecessor in interest with the U.S. Patent and Trademark Office. If so, the applicant must provide full particulars with respect to any such application, including the filing date and serial number of each application, the status of the allocation, and, if the application was finally refused registration or has otherwise not resulted in a registration, the reasons for that refusal or result [Cal. Bus. & Prof. Code § 14207(b)].

[d] Drawing of Mark

The Trademarks Unit also requires that a drawing of the mark must accompany the application [Cal. Bus. & Prof. Code § 14207(c)].

[e] Translation of Foreign Words

If the mark or any part of the mark is in any language other than English, the application must be accompanied by a certified translation in English [Cal. Bus. & Prof. Code § 14207(g)].

[f] Declaration of Accuracy

The application must include a declaration of accuracy signed by the applicant or by a member of the firm or an officer of the corporation or association, or by a general partner of the partnership, making application. If the person signing the declaration willfully states as true in the declaration any material fact that he or she knows to be false, he or she could be subject to a civil penalty of not more than \$10,000. An action for that penalty may be brought by any public prosecutor. The person signing the declaration must be informed of this penalty in writing [Cal. Bus. & Prof. Code § 14207(d)]. See Item 14 on the form.

[g] Specimens

The application must be accompanied by three specimens showing the mark as actually used [Cal. Bus. & Prof. Code § 14207(e); see § 103B.120 P 2.a.].

[h] Fee

The application must be accompanied by a fee payable to the Trademarks Unit as set forth in Gov. Code § 12193(a) [Cal. Bus. & Prof. Code § 14207(f)]. For the current filing fee, see the Secretary of State's web site at <http://www.sos.ca.gov/business/ts/forms.htm>. The fee is not refundable [Cal. Bus. & Prof. Code § 14260].

When a single application includes goods or services that fall within multiple classes [see [a], above], the Trademarks Unit may require payment of a fee for each class [Cal. Bus. & Prof. Code § 14235].

The Trademarks Unit must cancel a registration if a check or other remittance accepted in payment of the filing fee is not paid on presentment. However, the Trademarks Unit must give written notice to the registrant before cancellation for this reason and then must allow 30 days from the date of the notification letter for payment by cashier's check or the equivalent [*Cal. Bus. & Prof. Code § 14230(e)*].

[2] FORM

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33-103B California Legal Forms--Transaction Guide § 103B.201

§ 103B.201 Application for Renewal of Registration Term

[1] Comment--Use of Form

This form is prescribed by the Trademarks and Service Marks Unit (the Trademarks Unit), in the Secretary of State's office, for use in applying for renewal of the registration term of a trademark or service mark under the Model State Trademark Act [*see Cal. Bus. & Prof. Code § 14217(a)*; § 103B.15[1]]. It is designated as Form LP/TM 109. The form and instructions for using it can be downloaded from the Trademarks Unit's web site at <http://www.sos.ca.gov/business/ts/forms.htm>. (A renewal form published by the Trademarks Unit before January 1, 2008, does not comply with the Model State Trademark Law and will not be accepted for filing.)

The application for renewal must be filed within six months before the expiration of the current term of registration. A renewal fee, payable to the Trademarks Unit, must accompany the application for renewal of the registration as set forth in *Gov. Code § 12193(c)* [*Cal. Bus. & Prof. Code § 14217(a)*]. For the current filing fee, see the Secretary of State's web site at <http://www.sos.ca.gov/business/ts/forms.htm>. The fee is not refundable [*Cal. Bus. & Prof. Code § 14260*]. The Trademarks Unit must cancel a renewal if a check or other remittance accepted in payment of the filing fee is not paid on presentment. However, the Trademarks Unit must give written notice to the registrant before cancellation for this reason and then must allow 30 days from the date of the notification letter for payment by cashier's check or the equivalent [*Cal. Bus. & Prof. Code § 14230(e)*].

All applications for renewal under the Model State Trademark Law, whether of registrations made under the Model State Trademark Law or of registrations effected under any prior act, must include a verified statement that the mark has been and is still in use and include a specimen showing actual use of the mark on, or in connection with, the goods or services with which the mark is associated [*Cal. Bus. & Prof. Code § 14217(d)*].

[2] FORM

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33-103B California Legal Forms--Transaction Guide § 103B.202

§ 103B.202 Assignment of Registration

[1] Comment--Use of Form

This form is prescribed by the Trademarks and Service Marks Unit (the Trademarks Unit), in the Secretary of State's office, for use in applying for recordation of an assignment of the registration of a trademark or service mark under the Model State Trademark Act [*see Cal. Bus. & Prof. Code § 14220(a)*; § 103B.15[2]]. It is designated as Form LP/TM 108. The form and instructions for using it can be downloaded from the Trademarks Unit's web site at <http://www.sos.ca.gov/business/ts/forms.htm>. (An assignment form published by the Trademarks Unit before January 1, 2008, does not comply with the Model State Trademark Law and will not be accepted for filing.)

Assignment must be by an instrument in writing duly executed and may be recorded with the Trademarks Unit on the payment of the recording fee payable to the Trademarks Unit as set forth in *Gov. Code § 12193(b)* [*Cal. Bus. & Prof. Code § 14220(a)*]. For the current filing fee, see the Secretary of State's web site at <http://www.sos.ca.gov/business/ts/forms.htm>. The fee is not refundable [*Cal. Bus. & Prof. Code § 14260*].

Acknowledgment is prima facie evidence of the execution of an instrument of assignment [*Cal. Bus. & Prof. Code § 14220(d)*]. A photocopy of an instrument of assignment must be accepted for recording if it is certified by a party to the assignment, or a successor, to be a true and correct copy of the original [*Cal. Bus. & Prof. Code § 14220(e)*].

[2] FORM

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33-103B California Legal Forms--Transaction Guide § 103B.203

§ 103B.203 Change of Mark Owner's Name

[1] Comment--Use of Form

This form is prescribed by the Trademarks and Service Marks Unit (the Trademarks Unit), in the Secretary of State's office, for use in applying for recordation of a change of a mark owner's name [*see Cal. Bus. & Prof. Code § 14220(b); § 103B.17[2]*]. It is designated as Form LP/TM 110. The form and instructions for using it can be downloaded from the Trademarks Unit's web site at <http://www.sos.ca.gov/business/ts/forms.htm>. (A change-of-name form published by the Trademarks Unit before January 1, 2008, does not comply with the Model State Trademark Law and will not be accepted for filing.) There may be a filing fee [*see Cal. Bus. & Prof. Code § 14220(b)*]. For the current filing fee, see the Secretary of State's web site at <http://www.sos.ca.gov/business/ts/forms.htm>. The fee is not refundable [*Cal. Bus. & Prof. Code § 14260*].

The instructions for the form state that it must be accompanied by "a true and correct copy of the original document showing proof of name change, or a copy of the original document filed in another jurisdiction and certified by the filing office of that jurisdiction." However, a photocopy of an instrument effecting a change of name is acceptable for recording if it is certified by the party or a successor, to be a true and correct copy of the original [*Cal. Bus. & Prof. Code § 14220(e)*].

This form is suitable for use only when a mark owner's name has been changed without an assignment or other transfer of the mark. If ownership of the mark has been transferred, the *form in § 103B.202[2]* should be used to apply for recordation of an assignment.

[2] FORM

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 104 HEALTH CARE TRANSACTIONS, CONSENTS, AND DIRECTIVES

33-104 California Legal Forms--Transaction Guide 104.syn

§ 104.syn Synopsis to Chapter 104: HEALTH CARE TRANSACTIONS, CONSENTS, AND DIRECTIVES

§ 104.01 California Sources

[1] Statutes

[2] Regulations

[3] California Attorney General Opinions

§ 104.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 104.03-104.04 [Reserved]

§ 104.05 Law Reviews and Periodicals

§ 104.06 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 104.07-104.09 [Reserved]

§ 104.10 Hospital and Physician Defined

§ 104.11 Patient Consent

[1] Informed Consent Required

[2] General Disclosure Requirements

[a] Physician's Duty to Disclose

[b] Scope of Disclosure Duty

[3] Specific Disclosure Requirements

[a] Additional Disclosures for Sterilization

[b] Additional Disclosures for Hysterectomy

[4] Exceptions to Informed Consent Requirement; Special Rules

§ 104.12 Patients' Bill of Rights

§ 104.13 Arbitration

[1] In General

[2] Medical Malpractice Disputes

[3] Appeal of Arbitration Proceedings

§ 104.14 Confidentiality of Medical Records

[1] General Requirements for Release

[2] Consequences of Unauthorized Release

[3] AIDS Testing

[4] Consumer Privacy Protection

§ 104.15 Format Requirements for Printed Health Care Documents

§§ 104.16-104.29 [Reserved]

§ 104.30 Overview of Statute

[1] Scope of Statute

[2] Transitional Provisions

[3] Effect of Directive Executed Under Former Law

[4] Definitions

§ 104.31 Requirements for Health Care Directive

§ 104.32 Duties of Health Care Providers

- [1] Duty to Communicate
- [2] Record Keeping
- [3] General Duty to Comply With Health Care Instructions

§ 104.33 Immunities and Liabilities

- [1] Health Care Provider Immunity
- [2] Liability for Intentional, Unexcused Noncompliance
- [3] Liability for Malfeasance Regarding Directive

§ 104.34 Declining to Comply With Health Care Directive

- [1] By Health Care Provider

- [a] Basis for Decision

- [b] Duties

- [2] By Agent

§ 104.35 Revocation of Health Care Directive

- [1] Revocation by Patient
- [2] Revocation by Operation of Law

§ 104.36 Judicial Enforcement

- [1] Parties Entitled to Petition Court
- [2] Purposes for Which Petition May Be Filed
- [3] Advance Directive May Limit Authority to Petition Court
- [4] Contents of Petition; Service
- [5] Temporary Order Pending Disposition
- [6] Dismissal
- [7] Award of Attorneys' Fees

§ 104.37 Powers of Attorney for Health Care

- [1] Nature and Use

[2] Governing Law and Terminology

[3] Drafting Issues

[4] Durable Powers Executed Under Former Law

§ 104.38 Health Care Surrogates

[1] Designation of Surrogate

[2] Duties of Surrogate

[3] Disqualification

[4] Authority of Domestic Partner to Make Health Care Decisions

§ 104.39 Requests Regarding Resuscitative Measures

[1] Definition and Effect

[2] Contents

§ 104.40 Advance Health Care Directive Registry

§§ 104.41-104.99 [Reserved]

§ 104.100 Medical Care and Arbitration

[1] Facts

Scope

[2] Documents

Scope

§ 104.101 Advance Health Care Directives

[1] Facts

Scope

[2] Documents

Scope

§§ 104.102-104.109 [Reserved]

§ 104.110 Hospital Admission Agreement

Scope

§ 104.111 Arbitration Agreement

Scope

§ 104.112 Consent and Refusal to Medical Treatment or Procedure

Scope

§ 104.113 Authorization for Release of Medical Records

Scope

§§ 104.114-104.119 [Reserved]

§ 104.120 Hospital Admission Agreement

Scope

§ 104.121 Arbitration Agreement

Scope

§ 104.122 Patients' Bill of Rights

Scope

§ 104.123 Consent and Refusal to Medical Treatment or Procedure

Scope

§ 104.124 Advance Health Care Directive

Scope

§ 104.125 Physician Orders for Life Sustaining Treatment

Scope

§§ 104.126-104.139 [Reserved]

§ 104.140 Revocation of Arbitration Agreement

Scope

§ 104.141 Revocation of Advance Directive

Scope

§§ 104.142-104.199 [Reserved]

§ 104.200 Conditions of Admission to Hospital

[1] Comment

- [a] Use of Form
- [b] Patient's Consent to Treatment
- [c] Release of Information
- [d] Personal Valuables of the Patient
- [e] Financial Agreement
- [f] Assignment of Insurance Benefits
- [g] Arbitration Clause
- [h] Invalid Contracts
- [i] Format Requirements

[2] FORM

Conditions of Admission to Hospital

§ 104.201 Arbitration Agreement Between Hospital and Patient

[1] Comment

- [a] Use of Form
- [b] General Characteristics of Arbitration
- [c] Statutory Requirements Governing Medical Services Contract Arbitration Requirements
- [d] Rescission and Disaffirmance
- [e] Adhesion
- [f] Rules of Arbitration
- [g] Parties Bound by Contract
- [h] Advantages and Disadvantages of Arbitration

[2] FORM

Arbitration Agreement Between Hospital and Patient

§ 104.202 Arbitration Clause Between Hospital and Patient for Inclusion in Hospital Admission Agreement

[1] Comment--Use of Form

[2] FORM

Arbitration Clause Between Hospital and Patient for Inclusion in Hospital Admission Agreement

§ 104.203 CMA Physician-Patient Arbitration Agreement

[1] Comment

[a] Use of Form

[b] Services to Minors

[c] Substituting Physicians

[d] Patient's Copy of Agreement

[2] FORM

CMA Physician-Patient Arbitration Agreement

§ 104.204 CMA-CAHHS Medical Arbitration Rules

[1] Comment--Use of Form

[2] FORM

Scope

§ 104.205 Supplemental Agreement by Responsible Person on Behalf of Minor, Unborn Child, or Disabled Person--To Be Attached to Arbitration Agreement

[1] Comment

[a] Use of Form

[b] Disabled Person

[2] FORM

Supplemental Agreement by Responsible Person on Behalf of Minor, Unborn Child, or Disabled Person--To Be Attached to Arbitration Agreement

§ 104.206 Hospital Patients' Bill of Rights

[1] Comment

[a] Use of Form

[b] Patients' Bill of Rights

[c] Posting Requirements

[d] Format Requirements

[2] FORM

Hospital Patients' Bill of Rights

§§ 104.207-104.219 [Reserved]

§ 104.220 Patient's Consent to Treatment or Procedure

[1] Comment

[a] Use of Form

[b] Disclosure Requirements

[c] Patient's Right to Consent

[d] When Patient's Express Personal Consent Is Not Required

[e] Consent of Minors

[f] Emergencies

[g] Patient Lacking Capacity to Make Health Care Decisions

[h] Conservatorships in General

[i] Conservatorships Under Lanterman-Petris-Short Act

[j] Agents Under Power of Attorney; Health Care Surrogates

[k] Consent to HIV Testing

[l] Malpractice Actions

[2] FORM

Patient's Consent to Treatment or Procedure

§ 104.221 Authorization for and Consent to Surgery or Special Diagnostic or Therapeutic Procedures

[1] Comment--Use of Form

[2] FORM

Authorization for and Consent to Surgery or Special Diagnostic or Therapeutic Procedures

§ 104.222 Patient's Refusal of Treatment or Procedure

[1] Comment

[a] Use of Form

[b] Right to Refuse Treatment

[2] FORM

Patient's Refusal of Treatment or Procedure

§ 104.223 Authorization for Release of Medical Information--CMA Form

[1] Comment

[a] Use of Form

[b] Ownership of Records

[c] Information in Records

[d] Release Pursuant to Confidentiality of Medical Information Act

[e] Release to Attorney

[f] Subpoenaed Records

[g] Release to Others

[h] Privacy Acts

[2] FORM

Authorization for Release of Medical Information--CMA Form

§§ 104.224-104.229 [Reserved]

§ 104.230 Advance Health Care Directive (Durable Power of Attorney)

[1] Comment

[a] Use of Form

[b] Contents

[c] Health Care Instruction Distinguished From Power of Attorney

[d] Limiting Agent's Authority

[e] Limiting Authority to Institute Judicial Proceedings

[f] Acknowledgment and Witness Requirements

[g] Format Requirements

[2] FORM

Advance Health Care Directive (Durable Power of Attorney)

§ 104.231 Statutory Explanation Regarding Advance Health Care Directive

[1] Comment--Use of Form

[2] FORM

Statutory Explanation Regarding Advance Health Care Directive

§ 104.232 Registration Form for Written Advance Health Care Directive--Secretary of State's Official Form [Form LP/SF 461]

[1] Comment

[a] Use of Form

[b] Registry System

[c] Amendment and Revocation

[2] FORM

Registration Form for Power of Attorney for Health Care--Secretary of State's Official Form [Form LP/SF 461]

§ 104.233 Physician Orders for Life Sustaining Treatment

[1] Comment

[a] Use of Form

[b] Contents

[c] Advanced Health Care Directive Distinguished

[d] Completion and Execution of Form

[e] Modification and Revocation of Form

[2] FORM



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33-104 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers medical and hospital services that are provided pursuant to written agreements between patients and health care providers. The chapter covers hospital care and arbitration agreements, authorizations for and consents to medical and hospital treatment, refusals to consent to medical and hospital treatment, and release of medical records and information. The chapter also discusses the Health Care Decisions Law [*Prob. Code § 4600 et seq.*], effective July 1, 2000, which provides for the creation, form, and revocation of advance health care directives, including powers of attorney for health care, and for the appointment of health care surrogates. Although the chapter focuses principally on medical and hospital services for competent adults, it also contains some discussion of medical services for minors and incompetent persons. For other coverage of medical care for minors and incompetent persons, see Ch. 66, *Guardianships* , Ch. 66A, *Conservatorships* , and Ch. 100, *Custody, Control, and Support of Minors* .

This chapter does not cover anatomical gifts or abortion rights and procedures. Anatomical gifts are regulated by the Uniform Anatomical Gift Act [*see Health & Safety Code §§ 7150-7156.5*], which is covered in Ch. 106, *Anatomical Gifts* . Abortion rights are covered in part by the Therapeutic Abortion Act [*see Health & Safety Code § 123400 et seq.*], which is discussed in Ch. 100A, *Personal Affairs of Minors* .



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§ 104.01 California Sources

[1] Statutes

Medical Board of *California. Bus. & Prof. Code § 2002 et seq.*

Use of M.D. and D.O. designations. *Bus. & Prof. Code §§ 2275, 2450.*

Violation of personal rights. *Civ. Code § 43 et seq.*

Confidentiality of Medical Information Act. *Civ. Code § 56 et seq.*

Information Practice Act of 1977. *Civ. Code § 1798 et seq.*

Patient's valuables stored by hospital. *Civ. Code §§ 1852 (ordinary care), 1859, 1860.*

Arbitration, general provisions. *Code Civ. Proc. §§ 1280-1294.2.*

Arbitration of medical malpractice. *Code Civ. Proc. § 1295.*

Physician-patient privilege. *Evid. Code § 990 et seq.*

Medical record information release to attorney. *Evid. Code § 1158.*

Production of hospital records, subpoena duces tecum. *Evid. Code § 1560 et seq.*

Medical treatment for minors. *Fam. Code § 6900 et seq.*

Management and operation of municipal hospitals. *Gov. Code § 37604 et seq.*

Signature by mark. *Health & Safety Code § 18.*

State Department Public Health. *Health & Safety Code § 20.*

Health facilities, generally. *Health & Safety Code § 1250 et seq.*

"Health facility" defined. *Health & Safety Code § 1250.*

"General acute care hospital" defined. *Health & Safety Code § 1250(a).*

"Acute psychiatric hospital" defined. *Health & Safety Code §§ 1250(b), 1250.2.*

"Skilled nursing facility" defined. *Health & Safety Code § 1250(c).*

Hospital, prohibitive use of word. *Health & Safety Code § 1256.*

Bond, hospital storing patient's valuables. *Health & Safety Code § 1318.*

Special Hospital: Hospice Pilot Project. *Health & Safety Code §§ 1339.30-1339.37.*

Criminal penalties for sale or donation of blood, body organs or tissue, semen for purposes of artificial insemination, or breast milk by persons who have AIDS or have tested reactive to HIV. *Health & Safety Code § 1621.5.*

Blood donations. *Health & Safety Code §§ 1625-1628.*

Informed consent requirements for hysterectomies. *Health & Safety Code §§ 1690, 1691.*

Patient access to health records. *Health & Safety Code § 1795 et seq.*

AIDS and AIDS antibody testing.

Medi-Cal benefits for home and community-based services for persons with AIDS or Aids Related Conditions (ARC). *Health & Safety Code § 120855; Welf. & Inst. Code § 14132(y).*

Disclosure of test results and notification of persons exposed to HIV. *Health & Safety Code §§ 120985, 121010, 121015, 121022.*

Consent to testing. *Health & Safety Code § 120990.*

Confidentiality of health records and test results. *Health & Safety Code §§ 121075-121022, 121250-121260.*

AIDS Research and Confidentiality Act. *Health & Safety Code §§ 121075-121125.*

Format and delivery requirements for specified written materials for patients. *Health & Safety Code § 123222.1 et seq.*

Patient's principal spoken language on health records. *Health & Safety Code § 123147*

"Assault" defined. *Penal Code § 240.*

"Battery" defined. *Penal Code § 242.*

Medical treatment for conservatees, generally. *Prob. Code §§ 1880-1898, 2354-2357.*

Medical treatment for adult without conservator. *Prob. Code §§ 3200-3211.*

Health Care Decisions Law. *Prob. Code § 4600 et seq.*

Disclosure of information to protection and advocacy agency for persons with developmental disabilities. *Welf. & Inst. Code §§ 4514.3, 5328.06; Civ. Code § 1798.24b.*

Protection and advocacy agency for persons with developmental disabilities and mental illness. *Welf. & Inst. Code §§*

4900-4905.

Lanterman-Petris-Short Act. *Welf. & Inst. Code § 5000 et seq.*

Confidentiality of mental health records. *Welf. & Inst. Code § 5328.*

Medical treatment for gravely disabled conservatee. *Welf. & Inst. Code §§ 5357, 5358, 5358.2.*

Children's Civil Commitment and Mental Health Treatment Act of 1988. *Welf. & Inst. Code § 5585 et seq.*

Bronzan-McCorquodale Act (mental health services for mentally disordered). *Welf. & Inst. Code §§ 5600-5770.5.*

Adult and Older Adult Mental Health Care Services Act. *Welf. & Inst. Code § 5800 et seq.*

Children's Mental Health Services Act. *Welf. & Inst. Code § 5850 et seq.*

Institutions for mental disease. *Welf. & Inst. Code § 5900 et seq.*

[2] Regulations

General acute care hospital. *22 Cal. Code Reg. § 70001 et seq.*

Patients' rights. *22 Cal. Code Reg. § 70707.*

Sterilization requirements. *22 Cal. Code Reg. §§ 70707.1-70707.4.*

Hysterectomy. *22 Cal. Code Reg. § 70707.5.*

Additional requirements for informed consent when certain federal funds used. *22 Cal. Code Reg. § 70707.6.*

Hospital's requirement for written admission, transfer, and discharge policies. *22 Cal. Code Reg. § 70717(a).*

Schedule of hospital charges must be available to patients on request. *22 Cal. Code Reg. § 70717(b).*

Medical records contents. *22 Cal. Code Reg. § 70749.*

Medical records ownership and maintenance. *22 Cal. Code Reg. § 70751(b), (c).*

Personal valuables of patients. *22 Cal. Code Reg. § 70755.*

Patients' rights in acute psychiatric hospital. *22 Cal. Code Reg. § 71507.*

[3] California Attorney General Opinions

Superior court jurisdiction concerning adult medical treatment. *60 Ops. Cal. Atty. Gen. 382 (1977) .*

Conservator's procedures for making medical decisions. *60 Ops. Cal. Atty. Gen. 375 (1977) .*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareGeneral OverviewHealthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentEnd-of-Life DecisionsAdvance Directives



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§ 104.02 Federal Sources

[1] Statutes

Right to Privacy Act. *5 U.S.C. §§ 551, 552.*

Federal Arbitration Act. *9 U.S.C. § 1 et seq.*

[2] Regulations

Disclosure of alcohol and drug abuse records. *42 C.F.R. § 2.1 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Family Protection & Welfare General Overview Healthcare Law Treatment General Overview Healthcare
Law Treatment End-of-Life Decisions Abortion Right to Privacy



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§§ 104.03[Reserved]



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33-104 California Legal Forms--Transaction Guide § 104.05

§ 104.05 Law Reviews and Periodicals

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Mead, *Durable Powers of Attorney for Healthcare*, 39 *Prac. Law.* 39 (July 1993).

Nevins, *The Durable Power of Attorney for Health Care: Enhancing the Printed Forms*, 14 *L.A. Law.* 40 (Nov. 1991).

Alexander, *Death by Directive*, 28 *Santa Clara L. Rev.* 67 (1988).

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Herman & Gorman, *Hospital Liability and AIDS Treatment: The Need for a National Standard of Care*, 20 *U.C. Davis L. Rev.* 441 (1987).

Comment, *Suicidal Competence and the Patient's Right to Refuse Lifesaving Treatment*, 75 *Cal. L. Rev.* 707 (1987).

Novick, *Medical Malpractice: Arbitrating Disputes*, 2 *L.A. Law.* 34 (1979).

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney Durable Powers Healthcare Law Treatment General Overview



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33-104 California Legal Forms--Transaction Guide § 104.06

§ 104.06 Text References

[1] Matthew Bender Sources

Attorney' S Dictionary of Medicine(Matthew Bender).

Attorneys' Textbook of Medicine(Matthew Bender 3d ed.).

California Legal Forms(Matthew Bender).

Ch. 60, *Estate Planning*.

Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

Ch. 98, *Powers of Attorney*.

Ch. 100A, *Personal Affairs of Minors*.

Ch. 105, *Nursing Homes and Care for the Elderly*.

Ch. 106, *Anatomical Gifts*.

California Forms of Pleading and Practice(Matthew Bender).

Ch. 4, *Abortion and Birth Control Methods*.

Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*.

Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding*.

Ch. 34, *Contractual Arbitration: Judicial Review*.

Ch. 58, *Assault and Battery* (medical consent issues).

Ch. 295, *Hospitals*.

Ch. 414, *Physicians and Other Medical Personnel*.

Ch. 427, *Principal and Agent*.

California Wills and Trusts, Ch. 150, *Durable Powers of Attorney for Health Care* (Matthew Bender).

Louisell & Williams, Medical Malpractice, Ch. 22, *Consent to Treatment* (Matthew Bender).

[2] Additional Text References

2000 Health Care Decisions Law and Revised Power of Attorney Law, 30 Cal. L. Revision Comm'n Rep. 1 (Mar. 2000)(also available separately as California Law Revision Commission Publication No. 208).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareGeneral OverviewHealthcare LawTreatmentGeneral Overview



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[Reserved]

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§ 104.10 Hospital and Physician Defined

A "hospital," as used in this chapter, is a general acute care hospital, licensed by the State Department of Health Services and defined by statute as a health facility organized, maintained, and operated for the diagnosis, care, prevention, and treatment of physical or mental illness, including convalescence and rehabilitation, for one or more persons, to which persons are admitted for a 24-hour stay or longer, having a duly constituted governing body with overall administrative and professional responsibilities and an organized medical staff, and providing 24-hour inpatient care, including medical, nursing, surgical, anesthesia, laboratory, radiology, pharmacy, and dietary services [*Health & Safety Code §§ 1250(a), 1253*]. A general acute care hospital may include more than one physical plant maintained and operated on separate premises [*Health & Safety Code §§ 1250(a), 1250.8*]. A general acute care hospital that exclusively provides acute medical rehabilitation center services, including at least physical therapy, occupational therapy, and speech therapy, may provide for the required surgical and anesthesia services through a contract with another acute care hospital [*Health & Safety Code § 1250(a)*]. In general, the term does not include acute psychiatric hospitals, clinics, nursing homes, sanitariums, convalescent homes, or maternity homes [*see Health & Safety Code §§ 1202, 1250, 1256*].

An "acute psychiatric hospital" means a health facility having a duly constituted governing body with overall administrative and professional responsibility and an organized medical staff that provides 24-hour inpatient care for mentally disordered, incompetent, or other referrals [*see Welf. & Inst. Code §§ 5000 et seq., 6000 et seq.*], including the following basic services: medical, nursing, rehabilitative, pharmacy, and dietary services [*Health & Safety Code § 1250(b)*].

A "skilled nursing facility" is a health facility that provides skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis [*Health & Safety Code § 1250(c)*].

The term "physician" means a physician and surgeon licensed by the Board of Medical Quality Assurance or the Osteopathic Medical Board of California. Persons licensed by either of these boards have equal professional status and hold M.D. or D.O. degrees [*Bus. & Prof. Code §§ 2100.2, 2142.7, 2396, 2450*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Family Protection & Welfare General Overview Healthcare Law Business Administration &
Organization General Overview Healthcare Law Treatment General Overview



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§ 104.11 Patient Consent

[1] Informed Consent Required

A patient's consent must be obtained before any medical treatment is performed or administered by a physician or hospital. If the consent is not obtained, either impliedly by the voluntary submission of the patient to treatment, or expressly by oral or written consent of the patient, the physician or hospital personnel technically may be committing assault and battery when providing medical treatment for the patient [see *Kritzer v. Citron* (1950) 101 Cal. App. 2d 33, 38-39, 224 P.2d 808 ; *Cobbs v. Grant* (1972) 8 Cal. 3d 229, 240, 104 Cal. Rptr. 505, 502 P.2d 1 ; see also *Valdez v. Percy* (1939) 35 Cal. App. 2d 485, 491, 96 P.2d 142] . "Assault" is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another" [Penal Code § 240]. The absence of lawful consent is part of this definition [*Kritzer v. Citron* (1950) 101 Cal. App. 2d 33, 40, 224 P.2d 808] . "Battery" is a consummated assault [*People v. Glover* (1967) 257 Cal. App. 2d 502, 506, 65 Cal. Rptr. 219] , and is defined as "any willful and unlawful use of force or violence upon the person of another" [Penal Code § 242]. Further, assault or battery may result if the patient consents to a particular treatment or procedure, but a substantially different treatment or procedure is performed [*Cobbs v. Grant* (1972) 8 Cal. 3d 229, 239, 104 Cal. Rptr. 505, 502 P.2d 1] .

Although assault or battery may be the issue when a medical treatment or procedure is performed without appropriate patient consent, the issue of negligence by the physician arises when the patient gives his or her consent to treatment but the physician failed to meet his or her duty to disclose pertinent information [see *Cobbs v. Grant* (1972) 8 Cal. 3d 229, 241, 104 Cal. Rptr. 505, 502 P.2d 1] . The reasoning is that, in order for the patient's consent to treatment to be effective, it must be an informed consent, that is, a reasoned and intelligent decision to consent. Therefore, as part of the physician's overall obligation to the patient, there is a duty of reasonable disclosure of the available choices with respect to the proposed therapy and the dangers inherently and potentially involved in each [*Cobbs v. Grant* (1972) 8 Cal. 3d 229, 243, 104 Cal. Rptr. 505, 502 P.2d 1] . However, a physician is not negligent in failing to disclose sufficient information on which to base an informed consent in the following situations [*Cobbs v. Grant* (1972) 8 Cal. 3d 229, 245-246, 104 Cal. Rptr. 505, 502 P.2d 1] :

- The patient requests that he or she not be so informed.

- The procedure is simple, and the danger is remote and commonly appreciated to be remote.
- The physician can prove by a preponderance of the evidence that a reasonable person would find that physician relied on facts demonstrating that patient would be so upset by disclosure that the patient would not be able to dispassionately weigh risks of refusing the treatment or procedure.

Special exist with respect to the right of a minor to consent to medical treatment. For forms and discussion relating to a minor's right to consent to medical treatment, see Ch. 100A, *Personal Affairs of Minors*.

[2] General Disclosure Requirements

[a] Physician's Duty to Disclose

Although a physician, as an expert, may appreciate the risks inherent in a treatment, diagnostic test, or other procedure, the risks involved in deciding against the procedure, and the probability of success, the weighing of these risks and the decision for or against the procedure is ordinarily reserved to the patient. Therefore, the physician has an obligation to make reasonable disclosure to the patient of the available therapies and the dangers inherently and potentially involved in each [*Truman v. Thomas* (1980) 27 Cal. 3d 285, 292-293, 165 Cal. Rptr 308, 611 P.2d 902 ; *Cobbs v. Grant* (1972) 8 Cal. 3d 229, 243, 104 Cal. Rptr. 505, 502 P.2d 1] . A physician may not minimize the known dangers of the procedure to induce the patient's consent, or deceive the patient about the seriousness of the procedure [*Salgo v. Leland Stanford etc. Bd. Trustees* (1957) 154 Cal. App. 2d 560, 578, 317 P.2d 170 ; *Berkey v. Anderson* (1969) 1 Cal. App. 3d 790, 804, 82 Cal. Rptr. 67] .

The duty to disclose is not diminished because the patient rejects a recommended procedure. The California Supreme Court has held that patients do not have the burden of inquiring as to the potential consequences of rejecting a procedure, and that physicians have a duty to disclose potentially serious consequences [*Truman v. Thomas* (1980) 27 Cal. 3d 285, 292-293, 165 Cal. Rptr. 308, 611 P.2d 902] .

[b] Scope of Disclosure Duty

The scope of the duty of disclosure must be measured by the patient's need of whatever information is material to the decision, and whether a potential peril must be disclosed depends on its materiality to the patient's decision [*Canterbury v. Spence* (D.C. Cir. 1972) 464 F.2d 772, 786-787 ; *Cobbs v. Grant* (1972) 8 Cal. 3d 229, 245, 104 Cal. Rptr. 505, 502 P.2d 1] . However, it is recognized that in deciding how much to tell a patient about the risks of a proposed treatment or procedure, a physician must use a certain amount of discretion in evaluating a patient's mental and emotional state [see *Salgo v. Leland Stanford etc. Bd. Trustees* (1957) 154 Cal. App. 2d 560, 578, 317 P.2d 170 ; see also *Cobbs v. Grant* (1972) 8 Cal. 3d 229, 246, 104 Cal. Rptr. 505, 502 P.2d 1] , and the physician need not disclose risks when the patient requests that he or she not be so informed [*Cobbs v. Grant* (1972) 8 Cal. 3d 229, 245, 104 Cal. Rptr 505, 502 P.2d 1] .

To meet the duty of disclosure, a physician need not give the patient a mini-course in medical science [*Cobbs v. Grant* (1972) 8 Cal. 3d 229, 244, 104 Cal. Rptr. 505, 502 P.2d 1] . Further, the physician is not required to discuss relatively minor risks inherent in common treatments or procedures when it is common knowledge that these inherent risks are of very low occurrence. However, in such instances, the physician must make necessary inquiries to determine whether for the particular patient the common treatment or procedure is contraindicated, such as, for example, inquiries made to determine whether the patient has adverse reactions to medication [*Cobbs v. Grant* (1972) 8 Cal. 3d 229, 244, 104 Cal. Rptr. 505, 502 P.2d 1] . On the other hand, when a complicated procedure, such as surgery, inherently involves a known risk of death or serious bodily harm, the physician has a duty to disclose these potential harms to the patient, and the explanation must be in lay terms [*Cobbs v. Grant* (1972) 8 Cal. 3d 229, 244, 104 Cal. Rptr. 505, 502

P.2d 1] . The physician must also reveal additional information as a skilled practitioner of good standing would provide under similar circumstances [*Cobbs v. Grant* (1972) 8 Cal. 3d 229, 244-245, 104 Cal. Rptr. 505, 502 P.2d 1] .

These guidelines are most difficult to apply when the chances of the occurrence of a particular complication are very small. In hindsight, a patient may say that he or she would not have consented to a specific procedure had he or she known of the risk of that complication. However, the patient would have to establish a causal relationship between the physician's lack of disclosure and the injury to the patient, that is, to establish that, had a revelation been made, consent to treatment would not have been given [*Cobbs v. Grant* (1972) 8 Cal. 3d 229, 245, 104 Cal. Rptr. 505, 502 P.2d 1] . In resolving the issue of causation, courts apply an objective test of what a prudent person in the patient's position would have decided if adequately informed of all significant perils [*Cobbs v. Grant* (1972) 8 Cal. 3d 229, 245, 104 Cal. Rptr. 505, 502 P.2d 1] .

[3] Specific Disclosure Requirements

[a] Additional Disclosures for Sterilization

An individual gives informed consent for a sterilization procedure only under the following circumstances [22 Cal. Code Reg. § 70707.3(a)]:

- The person obtaining consent offered to answer any questions the individual may have regarding the procedure; provided the individual with a copy of the consent form and booklet on sterilization published by the Department of Health Services; and made specific oral disclosures regarding the procedure and alternatives [see 22 Cal. Code Reg. § 70707.3(a)(1)(C)].
- Suitable arrangements were made to ensure that the requisite information was effectively communicated to any individual who is blind, deaf, or otherwise handicapped.
- An interpreter was provided if the individual seeking sterilization did not understand the language used on the consent form or in the oral disclosures.
- The individual seeking sterilization was permitted to select a witness to be present during the informed consent process.
- Sterilization was requested without fraud, duress, or undue influence.
- Specified informed consent requirements were met [see 22 Cal. Code Reg. § 70707.4].

A physician or a physician's designee may conduct the informed consent process [22 Cal. Code Reg. § 70707.3(c)]. A copy of the signed consent form must be given to the patient, and a copy retained by the physician and the hospital in the patient's medical records [22 Cal. Code Reg. § 70707.3(d)].

[b] Additional Disclosures for Hysterectomy

Special disclosure requirements apply to the performance of hysterectomies [see *Health & Safety Code* § 1690; see also 22 Cal. Code Reg. § 70707.5(a)]. Before performing a hysterectomy, physicians must provide specific information to the patient, both orally and in writing, and obtain a signed statement from the patient indicating that she has read and understood the written information and that the information has been discussed with her by her physician and surgeon or a designee [*Health & Safety Code* § 1690(a), (b)]. The patient must be informed that she may freely withhold or withdraw her consent for the hysterectomy without jeopardizing her right to future medical care or government medical benefits [*Health & Safety Code* § 1690(a)(1)]. The type of surgery and other procedures involved, the possible risks,

discomforts, and side effects associated with those procedures (including those associated with the use of anesthetics), and the benefits expected to result must be explained [*Health & Safety Code* § 1690(a)(2), (4), (5)]. The physician must also describe known appropriate alternative treatments in writing and in language understood by the patient; noncompliance with this requirement is unprofessional conduct [*Health & Safety Code* §§ 1690(a)(2), 1691; *see Bus. & Prof. Code* § 2234].

Except for a previously sterile woman, a hysterectomy may only be performed or arranged for under the following circumstances [22 *Cal. Code Reg.* § 70707.5(a); *see Health & Safety Code* § 1690(a)(6)-(8)]:

- The person obtaining authorization orally and in writing informed the individual (and any representatives) that the hysterectomy will render the individual permanently sterile [*see Health & Safety Code* § 1690(a)(3), (b) (exception for previously sterile or postmenopausal women)].
- The expected period of hospitalization and recovery and the cost of the surgery was disclosed [*Health & Safety Code* § 1690(a)(6)-(8)].
- The individual (and any representatives) signed a written acknowledgment of receipt of this information.
- The individual has been informed of consultation rights with a second physician.

For previously sterile women, the physician must discuss the preexisting sterility and certify in the patient's health record that the individual was previously sterile and the cause of that sterility [22 *Cal. Code Reg.* § 70707.5(c)].

A copy of the signed statement acknowledging receipt of the requisite information must be given to the patient, and a copy retained by the physician and the hospital in the patient's medical records [22 *Cal. Code Reg.* § 70707.5(b)].

The informed consent procedure described above need not be followed in a life-threatening emergency situation. However, the physician must execute a signed, handwritten statement certifying the nature of the emergency [*Health & Safety Code* § 1690(c)].

[4] Exceptions to Informed Consent Requirement; Special Rules

Limited instances exist when the patient's personal consent is not required. These exceptions and other special rules are discussed in greater detail in § 104.220. The exceptions include the following:

- Medical treatment for a minor, in which case consent usually may be given by the parent, parents, or legal guardian of the minor, unless an exception specified by statute applies [*see Fam. Code* § 6900 *et seq.*].
- Emergency medical treatment when immediate treatment is necessary to preserve the life or health of the patient, in which case the patient's consent is implied [*Preston v. Hubbell* (1948) 87 *Cal. App. 2d* 53, 57-59, 196 *P.2d* 113 ; *see Prob. Code* §§ 2354(c) (consent by conservator to emergency medical treatment), 3210(b)(capacity determination procedures do not limit provision of emergency health care)].
- When the patient lacks the capacity to give his or her informed consent or, in the parlance of the Health Care Decisions Law, capacity to make a "health care decision" [*see Prob. Code* §§ 3200(b), 3201, 4617].

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawBusiness Administration & OrganizationGeneral OverviewHealthcare LawTreatmentGeneral
OverviewHealthcare LawTreatmentPatient ConsentGeneral Overview



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33-104 California Legal Forms--Transaction Guide § 104.12

§ 104.12 Patients' Bill of Rights

A person who enters a hospital as a patient has certain rights as a patient. In California, a patient's precise rights depend on the type of hospital he or she enters [*see 22 Cal. Code Reg. §§ 70707 (general acute care hospitals), 71507 (acute psychiatric hospitals)*].

General acute care hospitals must adopt a written policy on patients' rights and post the list in Spanish and English in appropriate places in the hospital so that the patients may read these rights [*22 Cal. Code Reg. § 70707*]. Important features of this "patient's *bill of rights*" include a patient's right to receive information from his or her physician about the patient's illness, the course of treatment, and prospects for recovery; to receive as much information about a proposed treatment as is necessary to give an informed consent or to refuse a course of treatment; to participate actively in decisions regarding the patient's medical care, including the right to refuse treatment, to the extent permitted by law; and to have confidential treatment of all communications and records pertaining to his or her care and stay in the hospital.

Acute psychiatric hospitals must adopt a written policy on patients' rights and prominently post the list in Spanish and English [*22 Cal. Code Reg. § 71507(a), (c)*]. Important features of *22 Cal. Code Reg. § 71507* include a patient's right to confidential communications and to refuse certain treatments. The physician with overall responsibility for treatment (or a designee) may deny some of the specified patients' rights for good cause, provided that the denial and its basis are entered into the patient's medical record. However, the right to refuse psychosurgery, to be informed of the confidential complaint procedure, and any right guaranteed by law or regulation may not be denied [*22 Cal. Code Reg. § 71507(b)*]. Further, the right to refuse shock treatment may only be denied under certain circumstances [*22 Cal. Code Reg. § 71507(b); see Welf. & Inst. Code § 5326.7*].

When a patient is admitted to an acute care hospital, the hospital must ask if the patient wants specified information regarding patients' rights and responsibilities to be provided to the patient's next of kin or agent under a durable power of attorney for health care [*Health & Safety Code § 123222.2(b)(1)*]. The hospital must provide that information if the patient so directs [*Health & Safety Code § 123222.2(b)(1)*]. The material provided must include a comprehensive Patients' *Bill of Rights*, including the regulatory patients' rights for general acute care hospitals contained in *22 Cal.*

Code Reg. § 70707, and the rights afforded to patients under *42 C.F.R. § 482.13* [*Health & Safety Code § 123222.2(b)(2)(A)*; see § 104.206]. The hospital may also provide written materials regarding the hospital's expectations of patients and patients' responsibilities while the patient is receiving care at the hospital [*Health & Safety Code § 123222.2(b)(2)(B)*]. On the request of the patient, or of the patient's next of kin or agent under a durable power of attorney for health care, a representative of any hospital providing patients' rights information or other documentation described above must explain the materials provided [*Health & Safety Code § 123222.2(c)*]. Similar requirements exist for skilled nursing facilities [*Health & Safety Code § 1250(c)*], intermediate care facilities [*Health & Safety Code § 1250(d)*], and nursing facilities [*Health & Safety Code § 1250(k)*] [see *Health & Safety Code § 123222.2(a)*; see also *Ch. 105, Nursing Homes and Care for the Elderly, § 105.22[3]*].

For the full text of the patients' *bill of rights*, see § 104.206.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentPatient ConsentGeneral OverviewHealthcare LawTreatmentPatient ConsentInformed Consent



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33-104 California Legal Forms--Transaction Guide § 104.13

§ 104.13 Arbitration

[1] In General

Arbitration is a method of resolving disputes whereby the parties voluntarily agree to submit their dispute to private unofficial persons in an arbitration hearing rather than to a court of law. Public policy strongly favors arbitration as a speedy and relatively inexpensive means to resolve disputes [*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal. 3d 312, 322, 197 Cal. Rptr. 581, 673 P.2d 251 ; see *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal. 4th 362, 373, 36 Cal. Rptr. 2d 581, 885 P.2d 994 (decision to arbitrate motivated by desire to avoid delay and cost)]. The policy favoring arbitration over litigation as a means of settling disputes is codified in the Code of Civil Procedure [see *Code Civ. Proc.* §§ 1280-1294.2].

The applicable statutes include provisions relating to arbitration agreements [*Code Civ. Proc.* §§ 1281-1281.8], conduct of the arbitration proceedings [*Code Civ. Proc.* §§ 1282-1284.2], enforcement of the award [*Code Civ. Proc.* §§ 1285-1288.8], and judicial proceedings [*Code Civ. Proc.* §§ 1290-1294.2].

Written agreements to submit to arbitration a controversy that exists or thereafter arises are valid, enforceable, and irrevocable except on those grounds as exist for the revocation of any contract [*Code Civ. Proc.* § 1281]. Stated differently, private arbitration is a matter of agreement between the parties and is governed by contract law [*Platt Pac., Inc. v. Andelson* (1993) 6 Cal. 4th 307, 313 . 24 Cal. Rptr. 2d 597, 862 P.2d 158] . Therefore, to form an enforceable contract, the parties' consent must be freely given [*Civ. Code* § 1565; see *Civ. Code* § 1566]. Apparent consent is not free when obtained through, among other things, duress, menace, or fraud [*Civ. Code* § 1567]. Whether an arbitration contract exists is a question of fact [see *Cochran v. Rubens* (1996) 42 Cal. App. 4th 481, 485-487, 49 Cal. Rptr. 2d 672 (status of book account is question of fact)].

For further discussion of arbitration, see § 104.201[1]. For detailed coverage of the arbitration process, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* , Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* , and Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

[2] Medical Malpractice Disputes

The term "medical malpractice" encompasses all acts in the provision of medical services and care that may give rise to tort liability. Stated differently, medical malpractice is a departure from the proper standards of medical care [*Waters v. Bourhis* (1985) 40 Cal. 3d 424, 433-434, 220 Cal. Rptr. 666, 709 P.2d 469] . Medical malpractice may arise from negligent acts or omissions in the rendering of professional services that are the proximate cause of injury or wrongful death (professional negligence) and from the provision of unnecessary or unauthorized medical services [see *Baker v. Sadick* (1984) 162 Cal. App. 3d 618, 622-627, 208 Cal. Rptr. 676 ; see also *Bus. & Prof. Code* § 6146(c); *Civ. Code* §§ 3333.1(c), 3333.2(c); *Code Civ. Proc.* §§ 340.5(2), 364(f)(2), 667.7(e)(3), 1295(g)(2)]. Professional negligence as applied to hospitals has been broadly defined [see *Murillo v. Good Samaritan Hosp.* (1979) 99 Cal. App. 3d 50, 56-57, 160 Cal. Rptr. 33 ; *Williams v. Superior Court* (1994) 30 Cal. App. 4th 318, 324, 36 Cal. Rptr. 2d 112] , and includes tort claims based on the failure to supervise or protect the safety of a patient [*Bellamy v. Appellate Dep't* (1996) 50 Cal. App. 4th 797, 809, 57 Cal. Rptr. 2d 894 (distinguishing between professional and ordinary negligence)].

The statutes relating to arbitration in general [see *Code Civ. Proc.* §§ 1280-1294.2] have been expressly applied to agreements to arbitrate medical malpractice disputes [see *Doyle v. Giuliani* (1965) 62 Cal. 2d 606, 43 Cal. Rptr. 697, 401 P.2d 1] . The issue of arbitration of medical malpractice also is specifically covered by a separate statute that, among other things, sets forth the precise language to be used when an arbitration clause is included in any contract for medical services, and provides for rescission of a contract on proper notice [see *Code Civ. Proc.* § 1295; see also § 104.200[1]].

[3] Appeal of Arbitration Proceedings

An aggrieved party in an arbitration proceeding may appeal from any of the following [*Code Civ. Proc.* § 1294; see *Code Civ. Proc.* § 1294.2 (appellate proceedings)]:

- An order dismissing or denying a petition to compel arbitration.
- An order dismissing a petition to confirm, correct, or vacate an award.
- An order vacating an award unless a rehearing in arbitration is ordered.
- A judgment entered pursuant to the general arbitration laws.
- A special order after final judgment.

A party may not appeal an order compelling arbitration, but the validity of the order may be reviewed on appeal from a judgment confirming an award [*Wheeler v. St. Joseph Hosp.* (1976) 63 Cal. App. 3d 345, 353, 133 Cal. Rptr. 775] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Alternative Dispute Resolution Arbitrations General Overview Healthcare Law Treatment General Overview



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33-104 California Legal Forms--Transaction Guide § 104.14

§ 104.14 Confidentiality of Medical Records

[1] General Requirements for Release

The confidential relationship between a physician and patient is an established rule [*Cole v. Wolfskill* (1920) 49 Cal. App. 52, 54, 192 P. 549] . Any confidential communication between a patient and physician is protected by the physician-patient privilege [Evid. Code §§ 990-1007], and the willful betrayal of a professional secret by a physician constitutes unprofessional conduct [Bus. & Prof. Code §§ 2100.2, 2379]. The term "willful" means an actual and conscious infraction of duty, done deliberately and intentionally and with the design and purpose to cause an injury [see *McPheeters v. Board of Medical Examiners* (1930) 103 Cal. App. 297, 299-301 (construing former State Medical Practice Act, § 14, subdivision 2)].

The Confidentiality of Medical Information Act [Civ. Code §§ 56-56.37] prohibits unauthorized disclosures of medical information by health care providers and employers, except in certain situations.

All information and records obtained in the course of providing services under various provisions of the Welfare and Institutions Code are confidential unless otherwise provided by statute [Welf. & Inst. Code § 5328; see Welf. & Inst. Code §§ 5328.01-5328.06].

For forms and discussion relating to a minor's right to consent to medical treatment and obtain records concerning that treatment, see Ch. 100A, *Personal Affairs of Minors* .

[2] Consequences of Unauthorized Release

A violation of the Confidentiality of Medical Information Act [Civ. Code §§ 56-56.37] entitles a patient to recover compensatory and punitive damages, attorneys' fees, and court costs [see Civ. Code § 56.35]. A violation that causes injury to a patient is also punishable as a misdemeanor [Civ. Code § 56.36(a)]. In addition to other remedies available at law, an individual may bring an action against any person or entity who has negligently released confidential information in violation of the Act, for nominal, actual damages, or both [see Civ. Code § 56.36(b)]. In addition, any person or entity who negligently discloses medical information in violation of the Act will be liable for administrative

finances and civil penalties [see *Civ. Code* § 56.36(c)].

[3] AIDS Testing

Despite the general rule of nondisclosure [see, e.g., *Health & Safety Code* § 120980], any physician with a patient who has tested positive for HIV infection may inform persons who are believed to have had specified contacts with the patient that they may have been exposed to HIV [*Health & Safety Code* § 121015; see *Health & Safety Code* § 120775 (definitions of "AIDS," "HIV," and "HIV test")]. Specifically, this information may be disclosed to any person the physician reasonably believes to be the patient's spouse or sexual partner, to any person the physician reasonably believes to have shared hypodermic needles with the patient, or to a local health officer [*Health & Safety Code* § 121015(a)]. However, a physician may not disclose any identifying information about the patient, except as required by *Health & Safety Code* § 121022 (required reporting of HIV cases using patient names, by health care providers, laboratories, and local health officers) [*Health & Safety Code* § 121015(a)]. Before making any disclosure, the physician must discuss the test results with the patient and offer appropriate educational and psychological counseling [*Health & Safety Code* § 121015(b)]. The physician must also notify the patient of his or her intent to notify the patient's contacts and attempt to obtain the patient's voluntary consent for the notification. No physician is required to make these disclosures, except as required by *Health & Safety Code* § 121022 (required reporting of HIV cases using patient names, by health care providers, laboratories, and local health officers), but any physician who chooses to do so must refer persons who are advised of possible exposure for appropriate care, counseling, and follow-up [*Health & Safety Code* § 121015(b), (c)].

The local health officer may make similar disclosures to any person reasonably believed to be the spouse or sexual partner of a person who has tested positive on an HIV test, or any person who has shared hypodermic needles with such a person. Like physicians, local health officers who make this kind of disclosure are required to refer persons who are advised of their possible exposure for appropriate care and follow-up [*Health & Safety Code* § 121015(d)]. Similarly, health officers are forbidden to disclose any identifying information of the person believed to be infected, or the physician making the initial report [*Health & Safety Code* § 121015(d)]. When a health officer completes an attempt to advise a person of his or her possible exposure to AIDS, the officer must expunge all records regarding the attempt [*Health & Safety Code* § 121015(d)].

Disclosure of the results of an HIV test is prohibited in all other circumstances unless the disclosure is made under one of the following conditions:

- Pursuant to *Health & Safety Code* § 121022, which requires reporting of HIV cases using patient names to the local health officer and then to the state, by health care providers, laboratories, and local health officers [see *Health & Safety Code* § 121022(a)].
- Pursuant to the written authorization of the person tested or a person lawfully authorized to make health care decisions for him or her [see *Health & Safety Code* §§ 120980, 121020].
- In specified circumstances, by a hospital, physician, blood bank, plasma center, public health officer, or other specified person or agency, to another such person or agency [see *Health & Safety Code* §§ 1603.1, 1603.3].
- By the physician who ordered the test, to the test subject's medical record or health care provider [see *Civ. Code* § 56.05(d)] other than health care service plans for the purposes of diagnosis, care, or treatment of the patient [*Health & Safety Code* § 120985].
- To the test subject, his or her legal representative, conservator, or any person authorized to consent to the test on his or her behalf [*Health & Safety Code* § 121010; see *Health & Safety Code* § 120990].

- To the test subject's health care provider [*see Civ. Code § 56.05(j)*], not including health care service plans, an agent or employee of a health care provider who provides the test subject with direct care and treatment, or a health care provider that procures, processes, distributes, or uses a human body part donated under the Uniform Anatomical Gift Act [*Health & Safety Code § 121010*].

- Regarding the results of tests performed on cadavers [*see Health & Safety Code § 120980*].

No person may be compelled in any state, county, city, or other local civil, criminal, administrative, legislative, or other proceeding to identify or provide identifying characteristics of any individual who is the subject of a test to detect antibodies to HIV [*Health & Safety Code § 120975*]. Similarly, any person who willfully, maliciously, or negligently discloses the results of an HIV test [*see Health & Safety Code § 120775(c)* (definition)] to a third party in a manner that identifies or provides identifying characteristics of the person to whom the test applies, except in accordance with a written authorization [*see Health & Safety Code § 120980(g)*], or as provided in *Health & Safety Code §§ 1603.1, 1603.3, or 121022*, is subject to civil and criminal liability, depending on the circumstances of the disclosure and its consequences [*see Health & Safety Code § 120980(a)-(d)*].

[4] Consumer Privacy Protection

A business may not orally request medical information directly from an individual, regardless of whether the information pertains to that individual, and use, share, or otherwise disclose that information for direct marketing purposes, unless the business does the following before obtaining the information [*Civ. Code § 1798.91(b)*]:

- Orally disclose to the individual, in the same conversation during which the business seeks to obtain the information, that the business wants the information to market or advertise products, goods, or services to the individual.
- Obtain the consent of the individual to whom the information pertains, or a person legally authorized to consent for that individual, to permit his or her medical information to be used or shared to market or advertise products, goods, or services to the individual.
- Make and maintain, for two years after the date of the conversation, an audio recording of the entire conversation.

A business may not request in writing medical information directly from an individual, regardless of whether the information pertains to that individual, and use, share, or otherwise disclose that information for direct marketing purposes, unless the business does the following before obtaining that information [*Civ. Code § 1798.91(c)*]:

- Disclose in a clear and conspicuous manner that it is obtaining the information to market or advertise products, goods, or services to the individual.
- Obtain the written consent of the individual to whom the information pertains, or a person legally authorized to consent for that individual, to permit his or her medical information to be used or shared to market or advertise products, goods, or services to the individual.

These restrictions and requirements do not apply to:

- A health care provider, health care service plan, or contractor [*Civ. Code § 1798.91(d)*; *see Civ. Code § 56.05* (definitions)];

- Insurance institutions, agents, or support organizations, when engaged in an insurance transaction [*Civ. Code* § 1798.91(e); see *Ins. Code* § 791.02 (definitions)];
- A telephone corporation [see *Pub. Util. Code* § 234 (definition)], when providing certain telephone services and products, if the corporation does not share or disclose medical information obtained as a consequence of providing those services and products [see *Pub. Util. Code* §§ 2881-2881.2] to third parties for direct marketing purposes [*Civ. Code* § 1798.91(f)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewPublic Health & Welfare LawSocial ServicesDisabled & Elderly
PersonsAdvocacy & ProtectionMedical Records



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33-104 California Legal Forms--Transaction Guide § 104.15

§ 104.15 Format Requirements for Printed Health Care Documents

Specified printed materials that are provided to a patient by an employee or authorized agent of a general acute care hospital [*Health & Safety Code § 1250(a)*] must be printed in at least a 12-point font that is clear and legible [*Health & Safety Code § 123222.1(a)*]. These materials include the following [*Health & Safety Code § 123222.1(b)*]:

- Admission, discharge papers, and forms from general acute care hospitals.
- Medical and therapeutic instructions prepared by the facility specifically for an individual upon his or her discharge from a general acute care hospital.
- Any contract for consent for hospitalization, or agreement to assume financial responsibility between a patient and a general acute care hospital.
- Instructions and forms for advance health care directives [*see Prob. Code § 4605* (definition); *see also § 104.30 et seq.*].
- Information produced by the hospital regarding the rights and responsibilities of patients or residents while receiving care at the hospital, and regarding grievances and appeals, including forms and instructions.
- Correspondence written, printed, or produced by the general acute care hospital.

The hospital's policies and procedures are specifically excluded from these requirements [*Health & Safety Code § 123222.1(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral Overview



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[Reserved]

§§ 104.16[Reserved]



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§ 104.30 Overview of Statute

[1] Scope of Statute

The Health Care Decisions Law [*Prob. Code § 4600 et seq.*] provides for the creation, form, and revocation of advance health care directives and powers of attorney for health care [*see Prob. Code § 4600 et seq.*]. The Health Care Decisions Law provides a comprehensive statutory scheme covering various related subjects that formerly were covered by separate statutes, including the Natural Death Act [*Health & Safety Code § 7185 et seq.*] and the statutes governing durable powers of attorney for health care [*Prob. Code § 4600 et seq.*], which were repealed as of July 1, 2000 [*see* [2], [3], *below*].

The Health Care Decisions Law applies to health care decisions for adults lacking capacity to make those decisions for themselves, except as otherwise provided [*Prob. Code § 4651(a)*]. It does not effect the law governing the right of an individual to make health care decisions while having capacity, emergency health care, or health care for unemancipated minors [*Prob. Code § 4651(b)*]. The Health Care Decisions Law permits withholding or withdrawing health care to permit the natural process of dying, but no other act or omission to end life, such as mercy killing, assisted suicide, or euthanasia [*Prob. Code § 4653*]. It does not authorize consent to any of the following on behalf of a patient: commitment to or placement in a mental health treatment facility; convulsive treatment [*see Welf. & Inst. Code § 5325*]; psychosurgery [*see Welf. & Inst. Code § 5325*]; sterilization; or abortion [*Prob. Code § 4652*].

The Health Care Decisions Law also covers the manner of making health care decisions for patients with surrogates [*see Prob. Code § 4711 et seq.*; *see § 104.38*].

[2] Transitional Provisions

Except as otherwise provided, the Health Care Decisions Law applies to all advance health care directives, including, but not limited to, durable powers of attorney for health care and declarations under the Natural Death Act [former *Health & Safety Code § 7185 et seq.* (repealed effective July 1, 2000)], regardless of whether they were given or executed before, on, or after July 1, 2000 [*Prob. Code § 4665(a)*].

The Health Care Decisions Law applies to all proceedings concerning advance health care directives begun on or after July 1, 2000 [*Prob. Code* § 4665(b)]. The law also applies to all proceedings concerning written advance health care directives begun before July 1, 2000, unless the court determines that application of a particular provision of the law would substantially interfere with the effective conduct of the proceedings or the rights of the parties and other interested persons, in which case the particular provision of the Health Care Decisions Law does not apply and prior law applies [*Prob. Code* § 4665(c)].

[3] Effect of Directive Executed Under Former Law

The Health Care Decisions Law does not affect the validity of an advance health care directive executed before July 1, 2000, that was valid under prior law [*Prob. Code* § 4665(d)]. Further, the law does not affect the validity of a durable power of attorney for health care executed on a printed form that was valid under prior law, regardless of whether execution occurred before, on, or after July 1, 2000 [*Prob. Code* § 4665(e)]. For more detailed discussion of the status of durable powers of attorney executed under former law, see § 104.37[4].

[4] Definitions

Unless otherwise required, the definitions of the Act govern its construction as follows:

- An "advance health care directive" or "advance directive" means either (1) an individual health care instruction (a patient's written or oral directive concerning a health care decision for the patient) or (2) a power of attorney for health care (a written instrument designating an agent to make health care decisions for the principal) [*Prob. Code* § 4605; see *Prob. Code* §§ 4623, 4629].
- "Agent" means a person designated in a power of attorney for health care to make health care decisions for the principal, regardless of whether the person is referred to as an agent, attorney-in-fact, or another term, and includes a successor or alternate agent [*Prob. Code* § 4605].
- "Capacity" means a person's ability to understand the nature and consequences of a decision and to make and communicate a decision, and includes, in the case of proposed health care, the ability to understand its significant benefits, risks, and alternatives [*Prob. Code* § 4609].
- "Domestic partners" are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring and who meet specified requirements, including having both filed a Declaration of Domestic Partnership with the California Secretary of State [see *Fam. Code* § 297; see also *Ch. 110, Nonmarital Cohabitation Agreements and Related Transactions*, §§ 110.50 et seq., 110.220].
- "Health care" means any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient's physical or mental condition [*Prob. Code* § 4615].
- "Health care decision" means a decision made by a patient or the patient's agent, conservator, or surrogate, regarding the patient's health care, including (1) the selection or discharge of health care providers and institutions; (2) the approval or disapproval of diagnostic tests, surgical procedures, and programs of medication; and (3) directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation [*Prob. Code* § 4617].
- "Health care institution" means an institution, facility, or agency authorized by law to provide health care in the ordinary course of business [*Prob. Code* § 4619].

- "Health care provider" means an individual authorized by law to provide health care in the ordinary course of business or practice of a profession [*Prob. Code § 4621*].
- "Individual health care instruction," or "individual instruction," means a patient's written or oral direction concerning a health care decision for the patient [*Prob. Code § 4623*].
- "Patient" means an adult whose health care is under consideration, including a principal under a power of attorney for health care, and an adult who has given an individual health care instruction or designated a surrogate [*Prob. Code §§ 4625, 4633*].
- "Power of attorney for health care" means a written instrument designating an agent to make health care decisions for the principal [*Prob. Code § 4629*].
- "Primary physician" means a physician designated by a patient (or the patient's agent, conservator, or surrogate) to have primary responsibility for the patient's health care, or where a designated physician is not reasonably available or does not exist, a physician who undertakes the responsibility [*Prob. Code § 4631*].
- "Supervising health care provider" means the primary physician, or if the primary physician is not reasonably available or does not exist, the health care provider who has undertaken the responsibility for a patient's health care [*Prob. Code § 4641*].
- "Surrogate" means an adult, other than a patient's agent or conservator, authorized under the Health Care Decisions Law to make a health care decision for the patient [*Prob. Code § 4643*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Healthcare Law Treatment General Overview



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§ 104.31 Requirements for Health Care Directive

A written advance health care directive is legally sufficient if all of the following requirements are satisfied [*Prob. Code § 4673(a)*; *see Prob. Code § 4680* (power of attorney is legally sufficient if it satisfies same requirements)]:

- The advance directive contains the date of its execution.
- The advance directive is signed either by the patient, or in the patient's name by another adult in the patient's presence and at the patient's direction.
- The advance directive is either acknowledged before a notary public or signed by at least two witnesses who satisfy specified statutory requirements [*see Prob. Code §§ 4674* (general requirements for witnesses), *4675* (additional requirements when individual is patient in skilled nursing facility)].

An electronic advance health care directive or a power of attorney for health care is legally sufficient if [*Prob. Code § 4673(b)*]:

- The requirements of *Prob. Code § 4673(a)* (discussed *above*) are satisfied;
- The directive is acknowledged before a notary public; and
- Any digital signature used meets the following requirements:
 - The digital signature either meets the general California legal requirements for digital signatures by public entities [*see Gov. Code § 16.5*; 2 Cal. Code Reg. § 22000 et seq], or uses an algorithm approved by the National Institute of Standards and Technology.
 - The digital signature is unique to the person using it.

- The digital signature is capable of verification.
- The digital signature is under the sole control of the person using it.
- The digital signature is linked to data in such a manner that if the data are changed, the digital signature is invalidated.
- The digital signature persists with the document and not by association in separate files.
- The digital signature is bound to a digital certificate.

If a general acute care hospital [*Health & Safety Code § 1250(a)*] provides a patient with instructions and forms for advance health care directives, those materials must be printed in at least a 12-point font that is clear and legible [*Health & Safety Code § 123222.1(a), (b)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Estate, Gift & Trust Law Powers of Attorney Durable Powers Healthcare Law Treatment General Overview



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33-104 California Legal Forms--Transaction Guide § 104.32

§ 104.32 Duties of Health Care Providers

[1] Duty to Communicate

Before implementing a health care decision made for a patient, a supervising health care provider, if possible, must promptly communicate to the patient the decision made and the identity of the person making the decision [*Prob. Code § 4730*].

A primary physician who makes or is informed of a determination that a patient lacks or has recovered capacity, or that another condition exists affecting an individual health care instruction or the authority of an agent, conservator of the person, or surrogate, must promptly communicate the determination to the patient, if possible, and to a person then authorized to make health care decisions for the patient [*Prob. Code § 4732*].

A supervising health care provider who knows of a revocation of a power of attorney for health care, or a disqualification of a surrogate, must make reasonable efforts to notify the agent or surrogate of the revocation or disqualification [*Prob. Code § 4731(b)*].

[2] Record Keeping

A supervising health care provider who knows of the existence of an advanced directive, a revocation of an advanced directive, or a designation or disqualification of a surrogate, must promptly record its existence in the patient's health care record. If it is in writing, the supervising health care provider must request a copy [*Prob. Code § 4731(a)*]; if a copy is provided, the supervising health care provider must arrange for its maintenance in the patient's health care record [*Prob. Code § 4731(a)*].

A primary physician who makes or is informed of a determination that a patient lacks or has recovered capacity, or that another condition exists affecting an individual health care instruction or the authority of an agent, conservator of the person, or surrogate, must promptly record the determination in the patient's health care record [*Prob. Code § 4732*].

[3] General Duty to Comply With Health Care Instructions

In general, a health care provider or health care institution providing care to a patient must comply with an individual health care instruction for the patient and a reasonable interpretation of that instruction by a person then authorized to make health care decisions for the patient [*Prob. Code § 4733(a)*; *but see Prob. Code §§ 4734, 4735* (grounds for noncompliance)]. Similarly, the provider or institution must comply with a health care decision for the patient by a person then authorized to make health care decisions for the patient, to the same extent as if the decision had been made by the patient while having capacity [*Prob. Code § 4733(b)*].

For a discussion of when a health care provider may decline to comply with a health care instruction and the attendant responsibilities, see § 104.34.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Business Administration & Organization General Overview Healthcare Law Treatment General Overview



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33-104 California Legal Forms--Transaction Guide § 104.33

§ 104.33 Immunities and Liabilities

[1] Health Care Provider Immunity

A health care provider or institution acting in good faith and in accordance with generally accepted health care standards is not subject to civil or criminal liability, or discipline for unprofessional conduct, for any actions in compliance with the Health Care Decisions Law, including, but not limited to, the following [*Prob. Code § 4740*]:

- Complying with a health care decision of a person that the health care provider or institution believes in good faith has the authority to make a health care decision for the patient, including a decision to withhold or withdraw health care.
- Declining to comply with an individual instruction or health care decision based on a belief that the person then lacked authority.
- Complying with an advanced directive and assuming that the directive was valid when made and has not been revoked or terminated.
- Declining to comply with an individual instruction or health care decision for reasons of conscience, or because the instruction or decision requires ineffective health care or health care that is contrary to generally accepted health care standards [*see Prob. Code §§ 4734, 4735; see also § 104.34*]

A person acting as an agent or surrogate under this part is not subject to civil or criminal liability or to discipline for unprofessional conduct for health care decisions made in good faith [*Prob. Code § 4741*].

[2] Liability for Intentional, Unexcused Noncompliance

A health care provider or institution that intentionally violates the provisions of the Health Care Decisions Law [*see Prob. Code §§ 4650-4743*] is subject to liability to the aggrieved individual for damages of \$2,500 or actual damages resulting from the violation, whichever is greater. The aggrieved individual is also entitled to reasonable attorneys' fees

[*Prob. Code § 4742(a)*]. These damages are cumulative and not exclusive of any other remedies provided by law [*Prob. Code § 4742(c)*]. However, under circumstances discussed in § 104.34, a provider or institution may decline to comply with a health care directive without incurring liability [*see Prob. Code §§ 4734-4736*].

[3] Liability for Malfeasance Regarding Directive

Any person who intentionally falsifies, forges, conceals, defaces, or obliterates an individual's advance directive (or a revocation of an advance directive) without the individual's consent, or who coerces or fraudulently induces an individual to give, revoke, or not to give an advance directive, is subject to liability to that individual for the greater of (1) \$10,000 or (2) the actual damages resulting from the violation. The person is also liable for reasonable attorneys' fees [*Prob. Code § 4742(b)*]. These damages are cumulative and not exclusive of any other remedies provided by law [*Prob. Code § 4742(c)*].

Any person who alters or forges a written advance directive of another, or willfully conceals or withholds personal knowledge of a revocation of an advance directive, with the intent to cause a withholding or withdrawal of health care necessary to keep a patient alive, contrary to the desires of the patient, and thereby directly causes the death of the patient to be hastened due to withholding or withdrawal of health care, is subject to prosecution for unlawful homicide [*Prob. Code § 4743; see Penal Code § 187 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawGeneral OverviewHealthcare LawActions Against Healthcare WorkersGeneral Overview



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§ 104.34 Declining to Comply With Health Care Directive

[1] By Health Care Provider

[a] Basis for Decision

A health care provider may decline to comply with an individual instruction or health care decision for reasons of conscience [*Prob. Code § 4734(a)*]. Similarly, a health care institution may decline to comply with an individual instruction or health care decision if the instruction or decision is contrary to a policy of the institution that is expressly based on reasons of conscience, provided that the policy was timely communicated to the patient or the person then authorized to make health care decisions for the patient [*Prob. Code § 4734(b)*].

A health care provider or institution may decline to comply with an individual instruction or health care decision that requires medically ineffective health care, or health care contrary to generally accepted health care standards applicable to the health care provider or institution [*Prob. Code § 4735*].

[b] Duties

When declining to comply with an individual instruction or health care decision, the health care provider or institution must do all of the following [*Prob. Code § 4736*]:

- Promptly inform the patient, if possible, and any person then authorized to make health care decisions for the patient.
- Immediately make all reasonable efforts to assist in the transfer of the patient to another health care provider or institution that is willing to comply with the instruction or decision, unless that assistance is refused by the patient or person then authorized to make health care decisions for the patient.
- Provide continuing care to the patient until a transfer can be accomplished or until it appears that a transfer cannot be accomplished.

- Continue appropriate pain relief and other palliative care.

[2] By Agent

The statutes themselves are not specific regarding what happens if an agent is unable or unwilling to act, or unwilling to act in accordance with a specific direction of the principal. The Law Revision Commission comments to *Prob. Code § 4687* (discussed below) state that an agent may, without liability, decline to act under a power of attorney [*2000 Health Care Decisions Law and Revised Power of Attorney Law*, 30 Cal. L. Revision Comm'n Reports at 83 (Mar. 2000)].

Prob. Code § 4685 gives the agent under a power of attorney for health care who is available and willing to make health care decisions priority over any other person in making health care decisions for the principal. Presumably, if the agent is unwilling or unable to make health care decisions, the power to do so would devolve upon the next person, in order of priority, who is legally entitled to do so. A recommended approach to this problem is to name one or more alternate agents to act in the event that the first named agent is unable or unwilling to do so. This approach is implicitly suggested by *Prob. Code § 4701*, the statutory form power of attorney for health care, which provides for the naming of an agent and two alternate agents [*Prob. Code § 4701*, P 1.1].

An agent who declines to act under a power of attorney for health care still has any right to make or participate in making health care decisions for the principal that the agent would otherwise have apart from the attorney [*Prob. Code § 4687*]. The Law Revision Commission comments to this section make clear that an agent who declines to act under a power in accordance with the principal's wishes (for example, because of changed circumstances), can still have the right to make or participate in health care decisions for the principal without being bound by the principal's stated desires, to the extent that the person designated as the agent has that right under the applicable law apart from the power of attorney [*2000 Health Care Decisions Law and Revised Power of Attorney Law*, 30 Cal. L. Revision Comm'n Reports at 83 (Mar. 2000)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentEnd-of-Life DecisionsAdvance Directives



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§ 104.35 Revocation of Health Care Directive

[1] Revocation by Patient

A patient having capacity may revoke the designation of an agent only by a signed writing, or by personally informing the supervising health care provider [*Prob. Code § 4695(a)*]. A patient having capacity may revoke all or any part of an advance directive, other than the designation of an agent, at any time and in any manner that communicates an intent to revoke [*Prob. Code § 4695(b)*].

A health care provider, agent, conservator, or surrogate who is informed of the revocation of an advance health care directive must promptly communicate that fact to the supervising health care provider and to any health care institution providing care to the patient [*Prob. Code § 4696*].

[2] Revocation by Operation of Law

If the principal's marriage to the agent is dissolved or annulled after executing a power of attorney for health care, the principal's designation of the former spouse as an agent to make health care decisions is revoked [*Prob. Code § 4697(a)*]. If an agent's authority is revoked solely because of dissolution or annulment, it is revived by the principal's remarriage to the agent [*Prob. Code § 4697(b)*].

An advance health care directive that conflicts with an earlier advance directive revokes the earlier advance directive to the extent of the conflict [*Prob. Code § 4698*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentPatient ConsentGeneral Overview



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33-104 California Legal Forms--Transaction Guide § 104.36

§ 104.36 Judicial Enforcement

[1] Parties Entitled to Petition Court

Judicial intervention is disfavored under the Health Care Decisions Law. In general, an advanced directive or health care decision by an agent or surrogate is effective without judicial intervention [*Prob. Code § 4750*]. However, provide a mechanism for interested persons to petition the court for various purposes [*see Prob. Code §§ 4750-4771*]. Persons permitted to file a petition include the following [*Prob. Code § 4765; but see Prob. Code § 4753*]:

- The patient.
- The patient's spouse, unless legally separated.
- A relative of the patient.
- The patient's agent or surrogate.
- The conservator of the person of the patient.
- The court investigator of the county where the patient resides [*see Prob. Code § 1454*].
- The public guardian of the county where the patient resides.
- The supervising health care provider or health care institution involved with the patient's care.
- Any other interested person or friend of the patient.

[2] Purposes for Which Petition May Be Filed

A petition may be filed for any one or more of the following purposes [*Prob. Code § 4766*]:

- Determining whether or not the patient has capacity to make health care decisions.
- Determining whether an advance health care directive is in effect or has terminated.
- Determining whether the acts or proposed acts of an agent or surrogate are consistent with the patient's desires or, if the patient's desires are unknown or unclear, whether the proposed acts of the agent or surrogate are in the patient's best interest.
- Declaring that the authority of an agent or surrogate is terminated, after a determination by the court that the agent or surrogate has made a health care decision that authorized something illegal, or after a determination by the court of the following:
 - The agent or surrogate has violated or has failed or is unfit to perform the duty under an advance directive to act consistent with the patient's desires, or is acting in a manner that is clearly contrary to the patient's best interests.
 - At the time of the court's determination, the patient lacks capacity to execute or revoke the advance directive or disqualify the surrogate.
- Compelling a third person to honor individual health care instructions or the authority of an agent or surrogate.

[3] Advance Directive May Limit Authority to Petition Court

In general, an advance directive may eliminate the authority of persons listed in [1], *above*, to petition the court with regard to the purposes listed in [2], *above* [*Prob. Code § 4753(a)*]. The individual executing the advance directive must be represented by a licensed attorney, who must certify that he or she advised the client of the applicable law and the consequences of signing or not signing the advance directive, and thereafter the client must have executed the advance directive [*Prob. Code § 4753(a)*]. The attorney must sign a certificate to this effect in substantially similar form to that provided by statute [*see Prob. Code § 4753(a); see also § 104.230[2]*].

However, the advance directive may *not* limit the following persons' rights to petition the court for particular purposes [*Prob. Code § 4753(b)*]:

- The conservator of the person, with respect to determining whether an advance directive is in effect or terminated, or declaring that an agent's or surrogate's authority has terminated for improper conduct [*see Prob. Code § 4766(b), (d)*].
- The agent under a power of attorney for health care, with regard to determining whether an advance directive is in effect or terminated, or determining whether the acts or proposed acts of the agent or surrogate are consistent with the patient's desires or best interests [*see Prob. Code § 4766(b), (c)*].

[4] Contents of Petition; Service

The petition must state facts showing that the petition is authorized [*see Prob. Code §§ 4750-4771*], the grounds for the petition, and if known to the petitioner, the terms of any advance directive in question [*Prob. Code § 4767*]. The petition should be filed in the superior court, with venue determined in the following order of priority [*Prob. Code §§ 4760, 4763*]:

- The county in which the patient resides.
- The county in which the patient or surrogate resides.
- Any other county that is in the patient's best interests.

Notice of the time and place for the hearing and a copy of the petition must be served on the patient and the agent or surrogate, if not the petitioner, at least 15 days before the hearing date [*Prob. Code § 4769(a)*]. For petitions to compel a third person to honor individual health care instructions or the authority of an agent or surrogate, notice of hearing and a copy of the petition must be served in the manner required for civil actions [*Prob. Code § 4769(b)*; see *Code Civ. Proc. §§ 413.10-417.40*].

[5] Temporary Order Pending Disposition

For good cause, a court may issue a temporary order prescribing the treatment of the patient pending the disposition of the petition [*Prob. Code § 4770*]. If a person has both a conservator of the person and an effective power of attorney for health care, the court that appointed the conservator may, for good cause, issue a temporary order prescribing the treatment of the patient pending the disposition of the petition [*Prob. Code § 4770* (duration limited to period needed to file petition and rule)].

[6] Dismissal

A court may dismiss a petition if it appears that the proceeding is not reasonably necessary to protect the interests of the patient. The court must stay or dismiss the proceeding in whole or in part when the interests of justice require that the matter be heard in another state [*Prob. Code § 4768*; see *Code Civ. Proc. § 410.30*].

[7] Award of Attorneys' Fees

In a proceeding commenced by a person other than an agent or surrogate, the court may order reasonable attorneys' fees to one of the following [*Prob. Code § 4771*]:

- The agent or surrogate, if the court determines that the proceeding was commenced without reasonable or probable cause.
- The petitioner, if the court determines that the agent or surrogate has clearly violated the duties under the advanced directive.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentPatient ConsentGeneral Overview



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33-104 California Legal Forms--Transaction Guide § 104.37

§ 104.37 Powers of Attorney for Health Care

[1] Nature and Use

Powers of attorney for health care allow a designated agent to make health care decisions for the principal to the same extent that the principal could make health care decisions if the principal had the capacity to do so [*Prob. Code § 4683(a)*]. The agent is also authorized by statute to make decisions that may be effective after the principal's death, including making dispositions under the Uniform Anatomical Gift Act [*Health & Safety Code § 7150 et seq.*; see Ch. 106, *Anatomical Gifts*], authorizing an autopsy [see *Health & Safety Code § 7113*], and directing the disposition of the principal's remains [*Prob. Code § 4683(b)*; see *Health & Safety Code § 7100 et seq.*]. These powers are subject to any limitations contained in the power of attorney [*Prob. Code § 4683*]. Powers of attorney for health care are important personal planning tools for clients and should be discussed with every client in connection with preparation of the client's estate plan. For additional discussion of the use of durable powers of attorney, see § 104.230.

[2] Governing Law and Terminology

Prior to July 1, 2000, durable powers of attorney for health care, like other durable powers of attorney, were governed by the general provisions of the Power of Attorney Law [*Prob. Code § 4100 et seq.*], augmented by special provisions applicable specifically to durable powers of attorney for health care [former *Prob. Code § 4600 et seq.* (repealed effective July 1, 2000)]. Effective July 1, 2000, however, durable powers of attorney are no longer governed by the Power of Attorney Law [see *Prob. Code § 4050(a)(1)*]. Instead, they are governed by the Health Care Decisions Law [*Prob. Code § 4600 et seq.*; see *Prob. Code § 4680*], as discussed in §§ 104.30-104.36.

The Health Care Decisions law generally abandons the term "durable powers of attorney for health care" (except with reference to powers executed under prior law [see, e.g., *Prob. Code § 4665(a), (e)*]), and instead substitutes the simpler term "power of attorney for health care" [see *Prob. Code §§ 4629, 4680-4690*], the statutory definition of which is set forth in § 104.30[4]. This chapter generally adopts the statutory terminology, and uses the term "durable powers of attorney" only with reference to powers executed under the former law.

Powers of attorney for health care, in turn, are simply treated as a species of "advance health care directive" [*Prob.*

Code § 4605], a term that also encompasses any other written or oral direction by a patient concerning a health care decision by that patient, including selection and discharge of health care providers, approval or disapproval of medical treatments and procedures, and directions to provide or withhold all forms of health care [see *Prob. Code §§ 4605, 4617, 4623* (applicable definitions)]. Under the Uniform Health Care Decisions Law, a power of attorney is legally sufficient if it satisfies the requirements for an advance health care directive under *Prob. Code § 4673* [*Prob. Code § 4680*; see §§ 104.30[4], 104.31, 104.124, 104.230[1]].

[3] Drafting Issues

Even when durable powers of attorney for health care were governed by the Power of Attorney law, the standard practice was to create a separate instrument for a durable power of attorney for health care, rather than combining it with a durable power of attorney for property management. Since these two types of powers are now governed by completely different statutes, the use of separate instruments is essential.

Prob. Code § 4701 contains a statutory form for an advance health care directive, consisting of a power of attorney for health care coupled with health care instructions. This form may be used to create an advance health care directive, but its use is not required, and it may be freely modified by the drafter of the power to reflect the wishes and intentions of the individual who will execute it [*Prob. Code § 4700*]. The form in § 104.230 is based on the statutory form, with modifications designed to enhance its utility.

For additional discussion of drafting issues relating to durable powers of attorney, see the comment to § 104.230.

[4] Durable Powers Executed Under Former Law

The Health Care Decisions Law applies to all durable powers of attorney, regardless of whether they were executed before, on, or after July 1, 2000 [*Prob. Code § 4665(a)*]. However, the Health Care Decisions Law does not affect the validity of any durable power of attorney for health care executed before July 1, 2000, as long as it was valid under prior law [*Prob. Code § 4665(d)*]. Similarly, any durable power of attorney executed on a printed form that was valid under prior law is also valid, regardless of whether it was executed before, on, or after July 1, 2000 [*Prob. Code § 4665(e)*].

Proceedings concerning durable powers of attorney commenced before July 1, 2000, are governed by the Health Care Decisions Law unless the court determines that application of a particular provision of that law would substantially interfere with the effective conduct of the proceedings or the rights of the parties and other interested persons, in which case the particular provision does not apply, and prior law instead applies [*Prob. Code § 4665(c)*]. All proceedings involving durable powers of attorney for health care commenced after July 1, 2000, are governed by the Health Care Decisions Law [*Prob. Code § 4665(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Healthcare Law Treatment General Overview Healthcare Law Treatment Patient Consent General Overview



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33-104 California Legal Forms--Transaction Guide § 104.38

§ 104.38 Health Care Surrogates

[1] Designation of Surrogate

A patient may designate an adult as a surrogate to make health care decisions by personally informing the supervising health care provider [*Prob. Code § 4711*]. The designation of a surrogate must be promptly recorded in the patient's health care record [*Prob. Code § 4711(a)*]. Unless the patient specifies a shorter period, a surrogate designation is effective only during the course of treatment or illness or during the stay in the health care institution when the surrogate designation is made, or for 60 days, whichever period is shorter [*Prob. Code § 4711(b)*]. The expiration of a surrogate designation does not affect any role the person designated under *Prob. Code § 4711(a)* may have in making health care decisions for the patient under any other law or standards of practice [*Prob. Code § 4711(c)*]. If the patient has designated an agent under a power of attorney for health care, the surrogate designated under *Prob. Code § 4711(a)* has priority over the agent for the period provided in *Prob. Code § 4711(b)*, but the designation of a surrogate does not revoke the designation of an agent unless the patient communicates the intention to revoke in compliance with *Prob. Code § 4695(a)* [*Prob. Code § 4711(d)*; see § 104.35[1]].

Within 24 hours of the arrival, in the emergency department of a general acute care hospital, of a patient who is unconscious or otherwise incapable of communication, the hospital must make reasonable efforts to contact the patient's agent, surrogate, or a family member or other person the hospital reasonably believes has the authority to make health care decisions on behalf of the patient [*Health & Safety Code § 4717(a)*; see *Health & Safety Code § 4717(a)(1), (2)* (what constitutes reasonable efforts); see also *Health & Safety Code § 4717(b)* (documentation requirements)]. This requirement, however, is suspended during any period in which the hospital implements its disaster and mass casualty program, or its fire and internal disaster program [*Health & Safety Code § 4717(c)*].

[2] Duties of Surrogate

A surrogate must make health care decisions in accordance with the patient's individual instructions, if any, and other wishes to the extent known to the surrogate [*Prob. Code § 4714*]. Otherwise, the surrogate must make decisions in accordance with the surrogate's determination of the patient's best interests, taking into account the patient's personal values to the extent known by the surrogate [*Prob. Code § 4714*].

[3] Disqualification

A patient having capacity at any time may disqualify another person, including a family member, from acting as the patient's surrogate, by a signed writing or by personally informing the supervising health care provider [*Prob. Code* § 4715].

[4] Authority of Domestic Partner to Make Health Care Decisions

If a patient lacks the capacity to make a health care decision, the patient's domestic partner has the same authority as a spouse has to make a health care decision for his or her incapacitated spouse [*Prob. Code* § 4716(a); *see Prob. Code* § 4716(b)(1); *Prob. Code* § 4609 ("capacity" defined); *Prob. Code* § 4716(b)(2); *Prob. Code* § 4615 ("health care" defined); *Prob. Code* § 4716(b)(3); *Prob. Code* § 4617 ("health care decision" defined); § 104.30[4] (definitions)]. The term "domestic partners" for these purposes does not simply mean any two cohabiting individuals; rather, the term is defined to mean two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring and who meet specified requirements, including having both filed a declaration of domestic partnership with the California Secretary of State [*see Prob. Code* § 4716(b)(4); *Fam. Code* § 297; *see also Bouley v. Long Beach Memorial Medical Center* (2005) 127 Cal. App. 4th 601, 606, 25 Cal. Rptr. 3d 813 (domestic partner who had signed declaration of domestic partnership held to have standing to sue medical center for wrongful death under *Code Civ. Proc.* § 377.60, which applied retroactively)].

The above provision may not be construed to expand or restrict the ability of a spouse to make a health care decision for an incapacitated spouse [*Prob. Code* § 4716(a)]. For discussion of the rights of spouses and others to make health care decisions for incapacitated persons, *see* § 121.220[1][g].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney General Overview Healthcare Law Treatment General Overview Healthcare Law Treatment Patient Consent General Overview



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33-104 California Legal Forms--Transaction Guide § 104.39

§ 104.39 Requests Regarding Resuscitative Measures

[1] Definition and Effect

A "request regarding resuscitative measures" is a written document, signed by an individual with capacity, or a legally recognized health care decisionmaker, and the individual's physician, that directs a health care provider regarding resuscitative measures [*Prob. Code § 4780(a)(1)*]. A request regarding resuscitative measures is not an advance health care directive [*Prob. Code § 4780(a)(1)*; see *Prob. Code § 4605* (definition); § 104.30[4]].

A request regarding resuscitative measures includes one, or both of, the following [*Prob. Code § 4780(a)(2)*]:

- A prehospital "do not resuscitate" form as developed by the Emergency Medical Services Authority or other substantially similar form [see <http://www.emsa.ca.gov/pubs/pdf/DNRForm.pdf> (Prehospital Do Not Resuscitate (DNR) Form, developed by the California Emergency Medical Services Authority, in concert with the California Medical Association)].
- A Physician Orders for Life Sustaining Treatment form, as approved by the Emergency Medical Services Authority [see § 104.233[2]].

A "Physician Orders for Life Sustaining Treatment form" (POLST) is a request regarding resuscitative measures that directs a health care provider regarding resuscitative and life-sustaining measures [*Prob. Code § 4780(a)(3)*].

A health care provider must explain the POLST form and the medical intervention and procedures offered by the form [*Prob. Code § 4780(c)*; see *Prob. Code § 4621* ("health care provider" defined)]. The health care provider must complete the form based on patient preferences and medical indications [*Prob. Code § 4780(c)*]. The form must be signed by a physician and the patient or his or her legally recognized health care decisionmaker [*Prob. Code § 4780(c)*]. The health care provider, during the process of completing the form, should inform the patient about the difference between an advance health care directive and the POLST [*Prob. Code § 4780(c)*; see *Prob. Code § 4605* ("advance health care directive" defined); § 104.31 (requirements for advance health care directive); § 104.233[1][c]].

A legally recognized health care decisionmaker may execute a POLST form only if the individual lacks capacity, or the individual has designated that the decisionmaker's authority is effective, in accordance with *Prob. Code* § 4682, discussed below [*Prob. Code* § 4780(b)]. A legally recognized health care decisionmaker must make health care decisions in accordance with the individual's health care instructions, to the extent they are known to the decisionmaker, or with the individual's best interest in mind, taking into account the individual's personal values, if known [*Prob. Code* § 4781.5; see *Prob. Code* §§ 4684, 4714 (duties of decisionmaker or surrogate)]. An individual having capacity may revoke a POLST form at any time and in any manner that communicates an intent to revoke [*Prob. Code* § 4780(d); see *Prob. Code* § 4695 (revocation); § 104.35].

A request regarding resuscitative measures may also be evidenced by a medallion engraved with the words "do not resuscitate" or the letters "DNR," a patient identification number, and a 24-hour toll free number, issued by a person pursuant to an agreement with the Emergency Medical Services Authority [*Prob. Code* § 4780(e)].

A health care provider must treat an individual in accordance with a POLST form, unless the form requires medically ineffective health care or health care contrary to generally accepted health care standards applicable to the health care provider or institution [*Prob. Code* § 4781.2(a), (b)]. A physician may conduct an evaluation of the individual and, if possible, in consultation with the individual, or the individual's legally recognized health care decisionmaker, issue a new order consistent with the most current information available about the individual's health status and goals of care [*Prob. Code* § 4781.2(c)].

The legally recognized health care decisionmaker of an individual without capacity must consult with the individual's treating physician before making a request to modify that individual's POLST form [*Prob. Code* § 4781.2(d)]. An individual with capacity may at any time request alternative treatment to that treatment ordered on the form [*Prob. Code* § 4781.2(e)].

If the orders in an individual's request regarding resuscitative measures directly conflict with his or her individual health care instruction, the most recent order or instruction is effective [*Prob. Code* § 4781.4].

A health care provider who honors a request regarding resuscitative measures is not subject to criminal prosecution, civil liability, discipline for unprofessional conduct, or administrative sanction, as a result of his or her reliance on the request, provided that the health care provider (1) believes in good faith that the action or decision is consistent with the governing statutes [see *Prob. Code* § 4780 et seq.] and (2) has no knowledge that the action or decision would be inconsistent with a health care decision that the individual signing the request would have made under like circumstances [*Prob. Code* § 4782]. Absent knowledge to the contrary, a health care provider may presume that a request regarding resuscitative measures is valid and unrevoked [*Prob. Code* § 4784].

For purposes of these requests, the term "health care provider" includes, but is not limited to, individuals authorized by law to provide health care in the ordinary course of business [see *Prob. Code* § 4621] and emergency response employees [*Prob. Code* § 4781]. These rules apply regardless of whether the individual executing a request regarding resuscitative measures is within or outside a hospital or other health care institution [*Prob. Code* § 4785].

[2] Contents

Forms for requests regarding resuscitative measures printed after January 1, 1995, must include the following acknowledgment [*Prob. Code* § 4783(a)]:

By signing this form, the legally recognized health care decisionmaker acknowledges that this request regarding resuscitative measures is consistent with the known desires of, and with the best interest of, the individual who is the subject of the form.

A printed form substantially similar to approved by the Emergency Medical Services Authority [see *Prob. Code* § 4780(a)(2)(A); § 104.233[2] (form)] is valid and enforceable if all of the following conditions are met [*Prob. Code* § 4783(b)]:

- The form is signed by the individual, or the individual's legally recognized health care decisionmaker, and a physician.
- The form directs health care providers regarding resuscitative treatment.
- The form contains all other information required by *Prob. Code* § 4783.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentEnd-of-Life DecisionsDo-Not-Resuscitate Orders



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33-104 California Legal Forms--Transaction Guide § 104.40

§ 104.40 Advance Health Care Directive Registry

Prob. Code § 4800 directs the Secretary of State to establish a registry system through which a person who has executed a written advance health care directive may register, in a central information center, information regarding the advance directive, making that information available upon request to any health care provider, the public guardian, the legal representative of the registrant [*Prob. Code § 4800(a)*]. Hospitals are required, within 24 hours after a patient who is unconscious or otherwise incapable of communicating arrives in the emergency room, to make reasonable efforts to contact the patient's agent, surrogate, or family member, or another person the hospital reasonably believes has the authority to make health care decisions on behalf of the patient [*Prob. Code § 4717(a)*]. The hospital will be deemed to have discharged this duty if, among other things, it contacts the Secretary of State, directly or indirectly, including by voice mail or fax, to inquire whether the patient has registered an advance health care directive with the Advance Health Care Directive Registry, if the hospital has evidence of the patient's registry identification card from the patient, the patient's family, or an authorized agent [*see Prob. Code § 4717(a)(3)*; *see also § 104.220[1][f]*]. Accordingly, attorneys should be aware of the procedure for registering an advance health care directive, so that they can evaluate whether registration is appropriate in individual situations.

Information that may be received by the registry is limited to the registrant's name, social security number, driver's license number, or other individual identifying number established by law, if any, address, date and place of birth, the registrant's advance health care directive, the intended place of deposit or safekeeping of the written advance health care directive, and the name and telephone number of the agent and any alternative agent [*Prob. Code § 4800(c)*]. Information that may be released on request may not include the registrant's social security number, except when necessary to verify the identity of the registrant [*Prob. Code § 4800(c)*]. The Secretary of State's official registration form is reproduced in this chapter in § 104.232[2].

Registration with the Secretary of State does not affect the registrant's ability to revoke the registrant's advance health care directive or a later executed advance directive, nor does registration raise any presumption of validity or superiority among any competing advance directives or revocations [*Prob. Code § 4804*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentEnd-of-Life DecisionsAdvance Directives



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33-104 California Legal Forms--Transaction Guide §§ 104.41-104.99

[Reserved]

§§ 104.41[Reserved]



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33-104 California Legal Forms--Transaction Guide § 104.100

§ 104.100 Medical Care and Arbitration

[1] Facts

1. Information about patient.

a. Name, address, and telephone number of patient.

b. Status of patient:

(1) Competent adult;

(2) Minor;

NOTE:

If the patient is a minor, the minor's age and birthrate should be obtained. This information is important for arbitration agreements since a patient should be asked to agree on his or her own behalf to an arbitration provision once he or she attains the age of 18. A special form for an arbitration agreement made on behalf of a minor is *set forth in § 104.205*.

(3) Incompetent person;

NOTE:

The medical, as well as legal, competency of a patient is important for determining whose consent must be obtained for a proposed treatment or procedure [*see § 104.200*].

(4) Disabled person; or

NOTE:

The term "disabled person" is discussed in § 104.205[1]. A special form for an arbitration agreement made on behalf of a minor, disabled person, or unborn child is *set forth in § 104.205*.

(5) Unborn child.

c. Whether patient has already been admitted to the hospital or visited physician, or whether he or she is preparing to visit physician or to enter hospital.

2. Information on physician or physicians involved.

a. Name, address, and telephone number of physician or physicians.

b. Type of agreement involved.

(1) Arbitration [*see §§ 104.201-104.205*].

(2) Consent or refusal to treatment or surgery [*see §§ 104.220-104.222*].

3. Information on hospital involved.

a. Name, address, and telephone number of hospital.

b. Name, title, and telephone number of official representative for hospital.

c. Type of agreement involved.

(1) Conditions of admission to hospital [*see § 104.200*].

(2) Arbitration [*see §§ 104.02-104.07*].

(3) Verification of consent to treatment [*see §§ 104.220, 104.221*].

(4) Refusal of treatment [*see § 104.222*].

(5) Patient's *bill of rights* [*see § 104.206*].

(6) Authorization for release of medical records [*see § 104.223*].

d. Whether hospital is licensed by State Department of Public Health [*see Health & Safety Code §§ 20, 1250 et seq.*].

NOTE:

This chapter covers only those hospitals that are licensed by the Department of Health Services (DHS). Almost all California hospitals are licensed by the DHS. However, the Veterans Administration Hospital and other federal government hospitals are not licensed by the DHS, and thus are not within the scope of this chapter.

e. Type of hospital, e.g., general acute care or acute psychiatric hospital.

[2] Documents

1. Prior agreements on subject matter, such as:

- a. Arbitration agreements.
- b. Consents or refusals to treatment.
- c. Authorization for release of medical records.
- d. Health Care Decisions Law directives or revocations.
- e. Any agreements or powers of attorney executed under Natural Death Act (repealed effective July 1, 2000) or other former law.

2. Authorization to act on behalf of patient, if relevant.

- a. Court appointment order for guardian or conservator.
- b. Authorization from parent to third person.
- c. Special court orders for medical treatment.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewHealthcare LawTreatmentGeneral Overview



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33-104 California Legal Forms--Transaction Guide § 104.101

§ 104.101 Advance Health Care Directives

[1] Facts

1. Information on principal.

a. Name, address, and telephone number of principal.

b. Status:

(1) Competent adult;

(2) Minor;

NOTE:

If the principal is a minor, the minor's age and birthrate should be obtained. This information is important for health care directives, which may only be executed by an adult of sound mind [*Prob. Code §§ 4670, 4671(a)*].

(3) Incompetent person; or

NOTE:

Only an adult of sound mind may execute an advance health care directive [*Prob. Code §§ 4670, 4671(a)*].

(4) Disabled person.

c. Whether principal has some dangerous or emergency medical condition.

- d. Whether principal is resident in skilled nursing facility.

NOTE:

If the principal is a resident in a skilled nursing facility when executing a written advance health care directive, additional witnessing requirements apply [*see Prob. Code § 4675; see also § 104.230[1][f]*].

2. Information on agent or surrogate.

a. Name, address, telephone, and fax number.

b. Status and employment.

NOTE:

A supervising health care provider, or employee of the institution or facility where the principal is receiving care, cannot act as an agent or surrogate, except for an employee, other than a supervising health care provider, who is related to the principal or works at the same institution or facility as the principal [*Prob. Code § 4659(a), (b)*]. A conservator under the Lanterman-Petris-Short Act [*Welf. & Inst. Code § 5000 et seq.*] may not act as an agent or surrogate unless the conservatee is represented by legal counsel who signs a certificate indicating that the conservatee was advised of the applicable law and potential consequences before to executing an advance directive [*Prob. Code § 4659(c)*].

3. Information on primary physician and any other health care providers.

NOTE:

If the principal sees more than one physician, this information should be obtained for each physician so that it may be referred to later to determine which is the attending or primary physician. The term "primary physician" means a physician designated by a patient or the patient's agent, conservator, or surrogate, to have primary responsibility for the patient's health care or, in the absence of a designation or if the designated physician is not reasonably available or declines to act as primary physician, a physician who undertakes the responsibility [*Prob. Code § 4631*].

a. Name, address, telephone, and fax number of physician(s).

b. Name, address, telephone, and fax number of health care providers.

c. Whether principal has discussed any attitudes regarding health care decisions.

4. Name, title, and telephone number of official representative of any hospital or other facility where principal resides.

5. Type of document involved.

a. Individual health care instruction.

NOTE:

An adult having capacity may give an individual health care instruction [*Prob. Code § 4670*]. The instruction may be oral or written, and may be contingent on the existence of a specified condition [*Prob. Code § 4670*].

- b. Power of attorney for health care.

NOTE:

An adult having capacity may execute a power of attorney for health care [*Prob. Code* § 4671(a)]. A power of attorney for health care is a written instrument designating an agent to make health care decisions for the principal [*Prob. Code* § 4629].

[2] Documents

1. Health Care Decisions Law directives or revocations.
2. Any agreements or powers of attorney executed under Natural Death Act (repealed effective July 1, 2000) or other former law.
3. Any other health care instructions or other documents affecting health care decisions.
4. Any previously made consents or refusals to treatment.
5. Existing will and/or trust documents, particularly any "living will."
6. Authorization to act on behalf of patient, if relevant.
 - a. Court appointment order for guardian or conservator.
 - b. Authorization from parent to third person.
 - c. special court orders for medical treatment.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentEnd-of-Life DecisionsAdvance Directives



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33-104 California Legal Forms--Transaction Guide §§ 104.102-104.109

[Reserved]

§§ 104.102[Reserved]



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33-104 California Legal Forms--Transaction Guide § 104.110

§ 104.110 Hospital Admission Agreement

1. Determine which of following provisions will be included in agreement [*see* § 104.200].

- a. Provision stating level of nursing care that will be provided by hospital.
- b. Provision for consent to medical and surgical care provided by hospital at direction of patient's physician.

NOTE:

It may be technical assault [*see Penal Code* § 240] and battery [*see Penal Code* § 242] if services are rendered to the patient without his or her implied consent. Counsel should consider including an express consent clause in the form. For further discussion of consent, see § 104.11.

- c. Authorization for release of information to insurance company or other third-party payor of patient.

NOTE:

Although the hospital owns the medical record of the patient, the hospital must safeguard the information contained in the record against loss, defacement, tampering, or use by unauthorized persons [22 *Cal. Code Reg.* § 70751(b)]. Authorization for release is required when information in a patient's medical record will be released to anyone not directly concerned with the care of the patient [22 *Cal. Code Reg.* § 70707(b)(8)].

- d. Information regarding availability of fire-proof safe for storing patient's personal valuables.

NOTE:

The general liability for a hospital storing a patient's personal valuables is that of depository for hire [*see*

Civ. Code § 1859]. This liability may be further limited if the hospital keeps a fireproof safe and notifies the patient that the safe is available for his or her specified personal property [*see Civ. Code § 1860*].

- e. Financial clause stating that in consideration of services rendered by hospital, patient will obligate himself or herself to pay for services.

NOTE:

The financial clause may include a provision referring delinquent bills to an attorney or collection agency for collection. However, if a hospital uses the phrase "reasonable attorney's fees and collection expenses" in the admission agreement, the hospital may not assess patients a collection fee in excess of the actual cost of collection [*Bondanza v. Peninsula Hosp. & Medical Center (1979) 23 Cal. 3d. 260, 266-267, 152 Cal. Rptr. 446, 590 P.2d 22* (hospital's enforcement of collection charge was unlawful when hospital assessed large charge without attempting to fix actual collection cost, failed to estimate and agree with patient regarding amount of collection costs to be paid in event of default, and made no showing that it would be impractical to fix actual collection costs)].

- f. Provision for assignment of insurance benefits.

NOTE:

Because a majority of hospital expenses are ultimately paid for by the insurance company of the patient, this clause facilitates the collection of payment by allowing the insurance company to pay the hospital directly.

- g. Provision informing patient that he or she may verify that payment by his or her insurance company will be accepted by hospital.

NOTE:

Verification of coverage may be accomplished by maintaining at the admission office a current list of health care service plans that have contracted with the hospital.

- h. Provision for arbitration of disputes that may arise.

NOTE:

Strict statutory requirements specify the language that must be used in arbitration clauses and their placement in a contract [*see Code Civ. Proc. § 1295*]. Counsel should consider making this an entirely separate agreement, as discussed in § 104.201[1][b]-[d].

2. Determine whether facts of client's case require modification of agreement as to any of the following:

- a. Level of care provided by nursing staff.
- b. Whether physicians are employees or independent contractors to hospital.
- c. Hospital services routinely available for patients, such as:
 - (1) X-ray examinations.
 - (2) Laboratory tests.
 - (3) Anesthesia.

3. Duration of agreement.

NOTE:

The agreement usually covers the period of time that the patient is in the hospital. If the patient is discharged from the hospital, and is subsequently readmitted to the same hospital, another admission agreement probably will have to be executed.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral Overview



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33-104 California Legal Forms--Transaction Guide § 104.111

§ 104.111 Arbitration Agreement

1. Determine whether arbitration agreement is desirable under circumstances [*see §§ 104.201, 104.203, 104.205*].

NOTE:

Some of the advantages and disadvantages of such an agreement are discussed in § 104.201[1][d].

2. If agreement is for hospital, determine whether arbitration agreement will be part of hospital admission agreement [*see § 104.202*] or separate agreement [*see § 104.201*].

3. Determine which arbitration rules will govern agreement.

NOTE:

The rules of the California Hospital Association and California Medical Association specify that they will be used in conjunction with the rules of the American Arbitration Association.

a. American Arbitration Association.

b. California Medical Association/California Association of Hospitals and Health Systems [*see § 104.204*].

c. General state arbitration provisions [*see Code Civ. Proc. §§ 1280-1294.2*].

4. Determine parties to be bound by agreement.

- a. Patient alone, or also heirs, personal representatives, or others [*see* § 104.203].
- b. Only hospital and its employees, or also physicians with staff privileges [*see* § 104.201].
- c. Physician alone, or also the physician's corporation or substituting physicians or physician's heirs and personal representatives and others, or all of these [*see* § 104.203].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsArbitration ClausesHealthcare LawTreatmentGeneral Overview



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33-104 California Legal Forms--Transaction Guide § 104.112

§ 104.112 Consent and Refusal to Medical Treatment or Procedure

1. Determine which of following forms must be drafted:
 - a. Patient's consent form [*see § 104.220*], for use by physician.
 - b. Verification of patient's consent form [*see § 104.221*], for use by hospital.
 - c. Patient's refusal of treatment or procedure form [*see § 104.222*], for use by either physician or hospital.
2. If patient's consent form will be drafted [*see § 104.220*], ascertain following:
 - a. Whether physician knows legal requirements for informed consent and has made appropriate disclosures.

NOTE:

For a complex treatment or procedure, the physician must disclose to the patient the following information for the proposed treatment and any available alternative methods of treatment: the nature, risks, and potential complications and consequences of each [*Cobbs v. Grant* (1972) 8 Cal. 3d 229, 243, 104 Cal. Rptr. 505, 502 P.2d 1] . The determination of when a treatment or procedure is complex enough to require an informed consent is a medical decision. The physician's duty of disclosure is discussed in § 104.11.

- b. If consent form is being drafted for specific case:

- (1) Name of medical condition;

(2) Name, nature, and extent of proposed treatment or procedure;

(3) Name of physician performing treatment or procedure;

(4) Name of physician informing patient; and

(5) Whether patient will sign for himself or herself, or name and capacity of person signing for patient.

3. If verification of patient's consent form will be drafted [*see* § 104.221], ascertain following:

a. Whether anesthesiologists, pathologists, or radiologists are hospital employees or independent contractors.

b. Whether hospital is teaching facility for interns and residents.

NOTE:

The authorization for surgery [*see* § 104.221] may be modified to include a clause stating that the hospital is a teaching institution for interns and that residents who will be involved in the care of the patient.

c. Name and explanation in lay terms of treatment, operation, or procedure.

d. Name of attending physician and surgeon.

4. If patient's refusal of treatment or procedure form will be drafted [*see* § 104.222], ascertain following information:

a. Name of informing physician.

b. Name and nature of proposed treatment or procedure.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentPatient ConsentGeneral OverviewHealthcare LawTreatmentPatient ConsentInformed Consent



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33-104 California Legal Forms--Transaction Guide § 104.113

§ 104.113 Authorization for Release of Medical Records

1. Determine whether authorization is required.

a. Patient's medical records must be made available upon request of any of following [22 *Cal. Code Reg. § 70751(a)*]:

(1) Admitting physician.

(2) Registered nurse or physician's assistant who has been granted privileges under 22 *Cal. Code Reg. § 70706.1*.

(3) Hospital, its medical staff, or any authorized officer, agent, or employee of either.

(4) Authorized representatives of Department of Health Services.

(5) Any other person authorized by law to request medical records.

b. Under Confidentiality of Medical Information Act [*Civ. Code §§ 56-56.37*], health care provider or health care service plan must disclose medical information when compelled to do so by any of following [*Civ. Code § 56.10(b)*]:

NOTE:

Under Confidentiality of Medical Information Act [*see Civ. Code §§ 56-56.37*], no health care provider, health care service plan, contractor, or corporation and its subsidiaries and its affiliates may intentionally share, sell, use for marketing, or otherwise use any medical information for any purpose not necessary to provide health care services to the patient, except to the extent expressly authorized by the patient or health plan subscriber or as provided by *Civ. Code § 56.10(b), (c)* [*Civ. Code § 56.10(d)*]. In addition, no contractor or corporation and its subsidiaries and its affiliates may further disclose a patient's medical

information received under *Civ. Code § 56.10* to a person or entity that is not engaged in providing direct health care services to the patient or the patient's health care provider, service plan, insurer, or self-insured employer, except to the extent expressly authorized by the patient or health plan subscriber or as provided by *Civ. Code § 56.10(b), (c)* [*Civ. Code § 56.10(e)*]. Further, any health care provider, health services plan, pharmaceutical company, or contractor, who creates, maintains, abandons, destroys, or disposes of medical records must do so in a manner that preserves their confidentiality [*Civ. Code § 56.101*].

Certain types of medical information (for example, licensing and statistical information, information sought by a law enforcement agency, and patient discharge data) are not subject to the limitations of the Confidentiality of Medical Information Act [*see Civ. Code § 56.30*].

(1) Court order.

(2) Board, commission, or administrative agency (for purposes of lawful adjudication).

(3) Subpoena, subpoena duces tecum, notice to appear [*see Code Civ. Proc. § 1987*], or any provision authorizing discovery in court or administrative proceeding.

(4) Board, commission, or administrative agency (pursuant to investigative subpoena) [*see Gov. Code § 11180 et seq.*].

(5) Arbitrator or arbitration panel, when arbitration is lawfully requested pursuant to subpoena duces tecum [*see Code Civ. Proc. § 1282.6*].

(6) Search warrant lawfully issued to government law enforcement agency.

(7) Patient or patient's representative under *Health & Safety Code § 123100 et seq.*

(8) Coroner, when requested in the course of an investigation by coroner's office for purpose of identifying the decedent or locating next of kin, or when investigating deaths that may involve public health concerns, organ or tissue donation, child or elder abuse, suicides, poisonings, accidents, sudden infant death, suspicious, unknown, or criminal deaths, or when otherwise authorized by decedent's representative.

(9) Any other law.

c. Under Confidentiality of Medical Information Act [*Civ. Code §§ 56-56.37*], health care provider or health care service plan may disclose medical information without authorization to any of following [*Civ. Code § 56.10(c)*]:

(1) Other health care providers, health care service plans, contractors or other health care professionals, or facilities for purposes of diagnosis or treatment of patient.

(2) Insurer, employer, health care or hospital service plan, employee benefit plan, governmental authority, contractor, or any other person responsible for paying for health services rendered, to extent necessary to allow payment.

NOTE:

If the patient, by reason of a comatose or other disabling medical condition, is unable to consent to the

disclosure of medical information, and no other arrangements have been made to pay for the health care services being rendered to the patient, the information may be disclosed to a governmental authority to the extent necessary to determine the patient's eligibility for, and to obtain payment under a governmental program for health care services provided to the patient. The information also may be disclosed to another provider or plan as necessary to assist the other provider in obtaining payment for health care services rendered by that provider to the patient [*Civ. Code* § 56.10(c)(2)]. A person "responsible for paying for health services rendered to the patient" could include the account holder for a credit card that the patient used to obtain the services; and, without the patient's authorization, the provider or service plan could disclose the patient's medical information "to the extent necessary to allow responsibility for payment to be determined and payment to be made" [*Civ. Code* § 56.10(c)(2); *Colleen M. v. Fertility & Surgical Assocs.* (2005) 132 Cal. App. 4th 1466, 1477-1478, 34 Cal. Rptr. 3d 439] .

(3) Any person providing billing, claims management, medical data processing, or other administrative services for providers or persons specified in P (2), *above*.

NOTE:

Information disclosed for this purpose may not be further disclosed by the recipient in a way that would violate the Act [*Civ. Code* § 56.10(c)(3)].

(4) Organized committees and agents of professional societies, medical staffs of licensed hospitals, or other persons engaged in reviewing health care professionals or health care services [*see Civ. Code* § 56.10(c)(4)].

(5) Any private or public body responsible for licensing or accrediting provider of health care or health care service plan.

NOTE:

Information for this purpose may be disclosed only for purposes of review; no patient-identifying medical information may be removed from the premises except as expressly permitted or required elsewhere by law, nor may that information be disclosed by the recipient in any way that would violate the Act [*Civ. Code* § 56.10(c)(5)].

(6) County coroner in course of official investigation, when requested for all purposes not included in *Civ. Code* § 56.10(b)(8) (discussed in P (b)(8), *above*).

(7) Public agencies, clinical investigators, including investigators conducting epidemiologic studies, health care research organizations, and accredited public or private nonprofit institutions for bona fide research purposes.

NOTE:

Any information so disclosed may not be further disclosed by the recipient in any way that would disclose the identity of a patient or violate the Act [*Civ. Code* § 56.10(c)(7)].

(8) Employer (if medical information was created as result of employment-related health care services provided to employee at request and expense of employer).

NOTE:

A health care provider or health care services plan may disclose to the employer only that part of the patient's medical information that (1) is relevant to the proceeding in which the patient has placed at issue his or her medical history, provided that information is used only in connection with that proceeding; and (2) describes functional limitations of the patient that may entitle the patient to leave from work for medical reasons or limit the patient's fitness to perform his or her present work, provided no statement of medical cause is included in the information disclosed [*Civ. Code* § 56.10(c)(8)].

(9) Sponsor, insurer, or administrator of plan or policy from which patient seeks coverage or benefits, if information was created by health care provider or health care service plan at request and expense of sponsor for purpose of evaluating application for coverage or benefits.

NOTE:

Disclosure may not be made for this purpose if the provider or plan has previously been notified in writing of an agreement by the sponsor, insurer, or administrator to the contrary [*Civ. Code* § 56.10(c)(9)].

(10) Health care service plan, by health care providers that contract with plan for purposes of administering plan.

(11) Insurance institution, agent, or support organization, subject to provisions of *Ins. Code* § 791 et seq. (standards for use of information gathered by insurance institutions), if institution or agent has complied with all requirements for obtaining information [see *Ins. Code* § 791 et seq.].

(12) Probate court investigator during any investigation required or authorized in conservatorship proceeding under the Guardianship-Conservatorship Law [see *Prob. Code* § 1400], or probate court investigator, probation officer, or domestic relations investigator engaged in determining need for initial guardianship or continuation of existing guardianship.

NOTE:

Information that may be disclosed for this purpose is limited to that which is relevant to the patient's condition, care, and treatment [*Civ. Code* § 56.10(c)(12)].

(13) Organ procurement organization or tissue bank processing tissue of decedent for transplantation into body of another person, but only with respect to donating decedent for purpose of aiding transplant [*Civ. Code* § 56.10(c)(13) see *Health & Safety Code* § 1635].

(14) When disclosure is otherwise specifically authorized by law to disclosure [*Civ. Code* § 56.10(c)(14)].

NOTE:

For example, information may be disclosed, either directly or indirectly, to the federal Food and Drug Administration regarding adverse events related to drug products or medical device problems [*Civ. Code* § 56.10(c)(14)].

(15) State-recognized or federally recognized disaster relief organization for the purpose of responding to disaster welfare inquiries.

NOTE:

Information that may be disclosed for this purpose is limited to basic information including the patient's name, city of residence, age, sex, and general condition [*Civ. Code* § 56.10(c)(15)].

(16) Third party for purposes of encoding, encrypting, or otherwise anonymizing data.

NOTE:

However, the recipient of the information may not further disclose the information in a way that would violate the Act, including unauthorized manipulation of coded or encrypted medical information that reveals individually identifiable medical information [*Civ. Code* § 56.10(c)(16)].

(17) Any entity contracting with health care service plan or its contractors to monitor or administer care of enrollees

for a covered benefit, for purposes of chronic disease management programs authorized by a treating physician, or to any disease management organization [see *Health & Safety Code* § 1399.900 (definition)] that complies fully with physician authorization requirements of *Health & Safety Code* § 1399.902, provided that health care service plan or its contractor has provided description of disease management services to a treating physician or to health care services plan's or contractor's network of physicians.

NOTE:

Nothing in this provision may be construed to require physician authorization for the care or treatment of the adherents of any well-recognized church or religious denomination who depend solely on prayer or spiritual means for healing in the practice of their religion [*Civ. Code* § 56.10(c)(17)].

(18) Local health department, to prevent or control disease, as permitted by state and federal law.

NOTE:

Disclosure may include, but is not limited to, reporting disease, injury, vital events, for example, birth or death, and conducting public health surveillance, public health investigations, and public health interventions, as authorized or required by state or federal law or regulation [*Civ. Code* § 56.10(c)(18)].

(19) To a specified type of employee welfare benefit plan formed under the Taft-Hartley Act (29 U.S.C. § 186(c)(5)), or to an entity contracting with that employee welfare benefit plan, if, among other requirements, the disclosure is for a specified purpose, is made pursuant to a request accompanied by a written authorization for the release of the information, and is authorized by and made in a manner consistent with HIPAA [*Civ. Code* § 56.10(c)(21)(A)].

d. Under Confidentiality of Medical Information Act [*Civ. Code* §§ 56-56.37], psychotherapist [see *Evid. Code* § 1010 (definition)] may disclose medical information, consistent with applicable law and standards of ethical conduct, if psychotherapist, in good faith, believes disclosure is necessary to "prevent or lessen a serious and imminent threat to the health or safety of a reasonably foreseeable victim or victims, and the disclosure is made to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat" [*Civ. Code* § 56.10(c)(19)].

e. Under Confidentiality of Medical Information Act [*Civ. Code* §§ 56-56.37], health care provider may disclose medical information to county social worker, probation officer, or any other person who is legally authorized to have custody or care of minor, for purpose of coordinating minor's health care services and medical treatment [*Civ. Code* §§ 56.10(c)(20), 56.103(a); see generally *Civ. Code* § 56.103(b)-(h) (definitions and restrictions on further disclosure)].

f. Licensed hospital, physician, dentist, registered nurse, and certain other health care providers must make patient's records available to attorney (or attorney's representative authorized in writing) for inspection and copying before filing of action or appearance of defendant in action, on presentation of patient's written authorization [*Evid. Code* § 1158].

NOTE:

The medical provider must make the records available to the attorney within five business days of the request [*Evid. Code* § 1158].

2. Determine information to be released.

NOTE:

Regulations prescribe the basic information that must be contained in the medical record of a patient [see 22 Cal. Code Reg. § 70749].

3. Determine whether hospital still maintains medical records to be released.

NOTE:

The hospital owns the medical record of a patient. It must maintain the record of an adult patient for a minimum of seven years following the discharge of the patient. If the patient is a minor, it must maintain the record for at least one year after the minor reaches the age of 18, but in any event for not less than seven years [22 *Cal. Code Reg. § 70751(b), (c)*].

4. Determine whether any special federal or state laws or regulations apply.

NOTE:

For example, there are specific laws and regulations relating to the records for alcohol and drug abuse patients [*see 42 C.F.R. §§ 2.31-2.61-1*].

5. Ascertain facts relevant to specific authorization, including all of following [*Civ. Code § 56.11(d)-(i)*]:

NOTE:

An authorization for the release of medical information will be valid under the Confidentiality of Medical Information Act of 1981 [*Civ. Code §§ 56-56.37*] if all of the following are stated [*Civ. Code § 56.11(d)-(i)*; *see also § 104.223*].

- a. Specific uses and limitations on types of medical information to be disclosed.
 - b. Names or functions of health care provider, health service plan, pharmaceutical company, or contractor that may disclose information.
 - c. Names or functions of persons or entities authorized to receive medical information.
 - d. Specific uses and limitations on use of medical information by persons or entities authorized to receive medical information.
 - e. Specific date after which provider of health care, health care service plan, pharmaceutical company, or contractor is no longer authorized to disclose medical information.
6. Ensure that authorization advises person signing it of right to receive copy of authorization.
 7. Draft authorization for release of medical information [*see Civ. Code § 56.11*; *see also § 104.223*].
 8. Advise holders of information of potential liability for unauthorized release of information, such as:
 - a. Libel [*see Civ. Code § 45*].
 - b. Libel on its face [*see Civ. Code § 45a*].
 - c. Slander [*see Civ. Code § 46*].
 - d. Defamation [*see Civ. Code § 44*].
 - e. Violation of general personal rights [*see Civ. Code § 43*].
 - f. Compensatory and punitive damages, plus attorneys' fees and costs of litigation [*see Civ. Code §*

56.35].

g. Misdemeanor conviction [*see Civ. Code § 56.36(a)*].

h. Nominal and/or actual damages sustained by individual bringing civil suit [*see Civ. Code § 56.36(b)*].

i. Various administrative fines and civil penalties [*see Civ. Code § 56.36(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewPublic Health & Welfare LawSocial ServicesDisabled & Elderly
PersonsAdvocacy & ProtectionMedical Records



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Preliminary Determinations

33-104 California Legal Forms--Transaction Guide §§ 104.114-104.119

[Reserved]

§§ 104.114[Reserved]



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33-104 California Legal Forms--Transaction Guide § 104.120

§ 104.120 Hospital Admission Agreement

1. Draft hospital admission agreement [*see §§ 104.110, 104.200*].
2. Advise client regarding procedures for execution of agreement:
 - a. When to execute:
 - (1) Usually, at time of admission to hospital; or
 - (2) As soon after admission as possible, if patient was temporarily unable to sign at the time of admission; or
 - (3) In rare cases, such as for maternity labor, execution may be in advance of admission.

b. Who should sign:

NOTE:

Signature requirements are discussed in § 104.200[1].

- (1) Patient, if he or she is a competent adult; or
- (2) Parent, legal guardian, conservator, or other authorized person.

c. Witnesses.

NOTE:

Although witnesses are not ordinarily required, prudence suggests that an agreement be witnessed by

one other person. When a patient cannot write but signs with a mark, one witness is required [*see Health & Safety Code § 18*].

3. Provide patient with copy of agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentGeneral Overview



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33-104 California Legal Forms--Transaction Guide § 104.121

§ 104.121 Arbitration Agreement

NOTE:

A signed arbitration agreement containing the required statutory provisions governs all subsequent open-book account transactions for medical services until or unless revoked [*Code Civ. Proc. § 1295(c)*; *see Cochran v. Rubens* (1996) 42 Cal. App. 4th 481, 486-487, 49 Cal. Rptr. 2d 672 (three years without ongoing contact terminated arbitration agreement); *but see Gross v. Recabaren* (1988) 206 Cal. App. 3d 771, 778, 253 Cal. Rptr. 820 (evidence of ongoing relationship despite 18 month lapse in contact)]. The contract is not a contract of adhesion, nor unconscionable, nor otherwise improper, provided that the agreement conforms to the applicable statutory provisions [*Code Civ. Proc. § 1295(d)*; *see § 104.201[1]*]. Further, the agreement is not subject to disaffirmance if signed by the minor's parent or legal guardian [*Code Civ. Proc. § 1295(d)*].

1. Draft arbitration agreement [*see §§ 104.111, 104.201, 104.203*].

a. Required provisions:

(1) Include arbitration provision as first article of contract.

NOTE:

The arbitration provision, when one is used, must be the first article of any contract for medical services that provides for arbitration of any dispute as to the professional negligence of a health care provider, and must be expressed in exact language prescribed by statute [*see Code Civ. Proc. § 1295(a)*; *see also §§ 104.201-104.203*]. The terms "health care provider" and "professional negligence" are defined by statute [*see Code Civ. Proc. § 1295(g)*].

(2) Include notice of arbitration immediately before signature line.

NOTE:

A notice containing exact language prescribed by statute must appear immediately before signature line, in at least 10-point bold red type. The notice must state that the parties, by signing the agreement, are giving up their right to a jury or court trial [*see Code Civ. Proc. § 1295(b); see also § 104.201*].

In *Allied-Bruce Terminix Cos., Inc. v. Dobson*, the United States Supreme Court held that the Federal Arbitration Act preempts state law that seeks to invalidate arbitration agreements [*Allied-Bruce Terminix Cos., Inc. v. Dobson* (1995) 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753] . This decision throws into question whether the lack of this notice renders the agreement unenforceable.

b. Draft any other arbitration provisions [*see §§ 104.201-104.203*].

2. Draft and attach other relevant documents.

a. Medical arbitration rules [*see § 104.204*].

b. Agreement on behalf of another person [*see § 104.205*].

3. Execute arbitration agreement.

a. Usually at first office visit, or when admitted to hospital and in conjunction with hospital admission form.

b. If execution is on behalf of minor, subsequent agreement should be considered when:

(1) Minor later turns age 18 and is still under care and treatment of physician.

(2) Person signing agreement is not parent or legal guardian of minor.

NOTE:

For the parties to be protected from disaffirmance of the agreement, the agreement must be signed by the parent or legal guardian on behalf of the minor [*see Code Civ. Proc. § 1295(d)*]. The parent or legal guardian should be asked to sign an arbitration agreement as soon as he or she is available [*see § 104.205*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewContracts LawContract Conditions & ProvisionsGeneral OverviewHealthcare LawTreatmentGeneral Overview



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33-104 California Legal Forms--Transaction Guide § 104.122

§ 104.122 Patients' Bill of Rights

NOTE:

General acute care hospitals and acute psychiatric hospitals [*see Health & Safety Code § 1250 (definitions)*] and must adopt, print, and post their patients' rights lists in both English and Spanish [22 *Cal. Code Reg. §§ 70707, 71507*].

1. Draft patients' *bill of rights* [*see § 104.206*].

- a. List all rights prescribed by regulation [*see 22 Cal. Code Reg. §§ 70707, 71507*].
- b. List any other rights to be guaranteed in addition to those prescribed by regulation

NOTE:

The patients' rights document presents the position of the hospital and medical staff. Therefore, any additional rights listed in the agreement should be approved by the hospital and the medical staff.

2. Arrange for translation into Spanish.

3. Post patients' rights [22 *Cal. Code Reg. §§ 70707(b), 71507(c)*].

- a. Post list in both English and Spanish.
- b. Post list within hospital.

NOTE:

General acute care hospitals must post patients' rights in appropriate places within the hospital so that patients may read their rights [22 *Cal. Code Reg. § 70707(b)*]. Acute psychiatric hospitals must post the rights prominently [22 *Cal. Code Reg. § 71507(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentPatient ConsentGeneral Overview



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33-104 California Legal Forms--Transaction Guide § 104.123

§ 104.123 Consent and Refusal to Medical Treatment or Procedure

1. Draft appropriate consent or refusal to treatment form.

a. If consent form is being drafted [*see §§ 104.220, 104.221*], include to extent known:

- (1) Name of medical condition.
- (2) Name, nature, and extent of proposed treatment or procedure.
- (3) Name of physician performing treatment or procedure;
- (4) Name of physician informing patient.
- (5) Patient's signature or name, signature, and capacity of person signing for patient.

b. If patient's refusal of treatment or procedure form will be drafted [*see § 104.222*], state:

- (1) Name of informing physician.
- (2) Name and nature of proposed treatment or procedure.

2. Have patient (or patient's representative, if appropriate) execute consent or refusal to treatment form.

NOTE:

A consent form typically is signed after the physician has given the patient a comprehensive disclosure of the nature of treatment, inherent risks, and potential consequences and complications for the proposed treatment and for each available alternative method of treatment and before the treatment or procedure. Verification of consent forms are usually executed at the time of admission to the hospital; hospital

employees should first verbally verify with the patient that the physician has obtained the patient's informed consent. A refusal of treatment may be executed by patient at any time before treatment, including during his or her stay in hospital.

For discussion of the special consent requirements applicable to minor patients, see Ch. 100A, ***Personal Affairs of Minors***.

a. Obtain required signatures:

(1) Patient ordinarily must sign if he or she is a competent adult [*Cobbs v. Grant* (1972) 8 Cal. 3d 229, 243-244, 104 Cal. Rptr. 505, 502 P.2d 1] .

NOTE:

The fact that a patient has a conservator does not necessarily preclude the patient from giving valid consent to medical treatment. In fact, the opposite is true. Unless the conservatee has been adjudicated to lack the capacity to give informed consent to medical treatment, the conservatee may consent to his or her own medical treatment and consent of the conservator is not required [*Prob. Code* § 2354(a); **but see** *Prob. Code* § 2354(b) (consent of conservator is sufficient, notwithstanding refusal of conservatee, if conservator obtains order under *Prob. Code* § 2357)].

Note that the requirement of informed consent is generally inapplicable to emergency medical treatment [**see** *Cobbs v. Grant* (1972) 8 Cal. 3d 229, 243-244, 104 Cal. Rptr. 505, 502 P.2d 1] .

(2) Conservator may consent to health care *for patient having capacity to consent* if one of following situations exist:

NOTE:

These rules are subject to the priority of an agent appointed under a valid advance health care directive [*Prob. Code* § 4685].

(a) Patient has not expressed an objection to consent.

NOTE:

A conservator may consent to medical treatment for a conservatee, but the consent of the conservator is not required if the conservatee has the capacity to give informed consent to medical treatment. Moreover, the consent of the conservator alone ordinarily is not sufficient if the conservatee objects to the treatment [*Prob. Code* § 2354(a); **but see** *Prob. Code* § 2354(b) (consent of conservator is sufficient, notwithstanding refusal of conservatee, if conservator obtains order under *Prob. Code* § 2357)].

(b) Conservator has first obtained a court order authorizing treatment under *Prob. Code* § 2357.

NOTE:

If the conservator obtains an order under *Prob. Code* § 2357 specifically authorizing the treatment, the conservator may require the patient to receive the treatment whether the conservatee objects or not [*Prob. Code* § 2354(b)].

(c) Conservator determines in good faith on basis of medical advice that an emergency exists and treatment is required

for alleviation of severe pain or conservatee has medical condition which, if not immediately diagnosed and treated, will lead to serious disability or death [*Prob. Code* § 2354(c)].

(3) If patient lacks capacity to make a health care decision, one of the following, as appropriate:

NOTE:

Issues regarding an individual's capacity to make a health care decision with respect to existing or continuing condition generally are determined under the petition procedure set out in *Prob. Code* §§ 3200, 3212 if the person does not have a conservator. Under the Health Care Decisions Law, unless otherwise specified in a written advance health care directive, a determination that a patient lacks or has recovered capacity, or that another condition exists that affects an individual health care instruction or the authority of an agent or surrogate, is to be made by the primary physician [*Prob. Code* § 4658].

(a) Agent under power of attorney for health care [*Prob. Code* § 4685].

NOTE:

Unless the power of attorney for health care provides otherwise, an agent designated in a power of attorney who is known to the health care provider to be reasonably available and willing to make health care decisions has priority over any other person in making health care decisions for the principal [*Prob. Code* § 4685]. The Law Revision Commission comments to *Prob. Code* § 4685 make it clear that this section was intended to give an agent priority over a conservator or a statutory surrogate [**2000 Health Care Decisions Law and Revised Power of Attorney Law**, 30 Cal. L. Revision Comm'n Reports at 82 (Mar. 2000)].

Nothing in the Health Care Decisions Law authorizes an agent under a power of attorney for health care to make a health care decision if the principal objects to the decision--apparently, whether the principal has capacity or not. If the principal objects to the health care decision of the agent under a power of attorney, the matter will be governed by the law that would apply if there were no power of attorney for health care [*Prob. Code* § 4689].

(b) Adult surrogate designated orally or in writing by patient [*Prob. Code* § 4711; see § 104.38].

NOTE:

A patient may designate an adult as a surrogate to make health care decisions by personally informing the supervising health care provider. The designation of a surrogate must be promptly recorded in the patient's health care record [*Prob. Code* § 4711(a); see **2000 Health Care Decisions Law and Revised Power of Attorney Law**, 30 Cal. L. Revision Comm'n Reports at 101 (Mar. 2000)](clarifying that statutory language encompasses both oral and written designations)]. Unless the patient specifies a shorter period, a surrogate designation under is effective only during the course of treatment or illness or during the stay in the health care institution when the surrogate designation is made, or for 60 days, whichever period is shorter [*Prob. Code* § 4711(b)]. The expiration of a surrogate designation does not affect any role the person designated under *Prob. Code* § 4711(a) may have in making health care decisions for the patient under any other law or standards of practice [*Prob. Code* § 4711(c)]. If the patient has designated an agent under a power of attorney for health care, the surrogate designated under *Prob. Code* § 4711(a) has priority over the agent for the period provided in *Prob. Code* § 4711(b), but

the designation of a surrogate does not revoke the designation of an agent unless the patient communicates the intention to revoke in compliance with *Prob. Code* § 4695(a) [*Prob. Code* § 4711(d); *see* § 104.35[1]].

(c) Conservator, if patient is a conservatee, has been adjudicated to lack capacity to make health care decisions, and no agent has been designated under an advance health care directive [*Prob. Code* § 2355(a); *see Prob. Code* §§ 1880, 1881 (adjudication of lack of capacity to give informed consent to medical treatment), 2356(e), 2657, 4685 (priority of agent)].

NOTE:

A conservator has exclusive authority to make health care decisions for the conservatee under the above-listed circumstances [*Prob. Code* §§ 1880, 2355(a); *see Prob. Code* §§ 2356(e), 4685 (priority of agent)]. The conservator is required to make health care decisions for the conservatee in accordance with the conservatee's individual health care instructions, if any, and other wishes to the extent known to the conservator. Otherwise, the conservator must make the decision in accordance with the conservator's determination of the conservatee's best interest. In determining the conservatee's best interest, the conservator is required to consider the conservatee's personal values to the extent known to the conservator. The conservator may require the conservatee to receive the health care, whether or not the conservatee objects. In this case, the health care decision of the conservator alone is sufficient, and no person is liable because the health care is administered to the conservatee without the conservatee's consent [*Prob. Code* § 2355(a)].

Special rules apply to certain types of drugs and treatment, such as experimental drugs, convulsive treatment, and placement of persons suffering from dementia in a secured facility [*see Prob. Code* §§ 2356, 2356.5].

Prob. Code § 2357 provides a procedure for obtaining a court order if a ward or conservatee has an existing or continuing medical condition not otherwise authorized to be performed on the ward or conservatee under *Prob. Code* §§ 2252-2255.

No court order empowering a conservator appointed under the Probate Code to give informed consent for medical treatment on behalf of a conservatee may be granted unless supported by a declaration executed by a licensed physician (or a licensed psychologist acting within the scope of his or her licensure) that the conservatee lacks the capacity to give an informed consent for any form of medical treatment and the reasons for the incapacity [*Prob. Code* § 1890(c)].

For discussion of consent by a conservator appointed pursuant to the Lanterman-Petris-Short Act [*Welf. & Inst. Code* § 5000 *et seq.*], *see* § 104.220[1][i].

(d) Court-authorized person if adult patient is unable to give consent, patient does not have agent under advance health care directive, designated health care surrogate, or conservator of person, if treatment is for existing or continuing medical condition [*see Prob. Code* §§ 3201, 3203, 3208].

b. Witnesses.

(1) Have competent adult witness patient's signature.

NOTE:

Ordinarily, there is no witness requirement applicable to consent and refusals. However, it is recommended that the patient's signature be witnessed by at least one competent adult.

(2) Have competent adult witness form when patient signs by mark [*see Health & Safety Code § 18*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentPatient ConsentGeneral OverviewHealthcare LawTreatmentPatient ConsentRight to Refuse Treatment



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33-104 California Legal Forms--Transaction Guide § 104.124

§ 104.124 Advance Health Care Directive

1. Discuss nature, operation, and effect of advance health care directive with principal [*see § 104.231*].
2. Draft advance health care directive [*see § 104.230*].
 - a. Select and appoint agent (and alternate) to exercise power of attorney for health care.

NOTE:

The principal should communicate with the person being named as agent to ensure that the person is willing to assume the responsibility and that the agent understands the patient's wishes. The agent may not be an operator or employee of a community care facility or a residential care facility at which the principal receives care, or a supervising health care provider or employee of the health care institution at which the principal receives care, unless your agent is related to the principal or is a coworker [*see Prob. Code § 4701*].

- b. Ensure that selected agent is not:

(1) Supervising health care provider, or employee of institution or facility where the principal is receiving care.

NOTE:

A supervising health care provider, or employee of the institution or facility where the principal is receiving care, cannot act as an agent or surrogate, except for an employee, who is not a supervising health care provider, who is related to the principal or works at the same institution or facility as the principal [*Prob. Code § 4659(a), (b)*].

(2) Conservator of principal.

NOTE:

A conservator under the Lanterman-Petris-Short Act [*Welf. & Inst. Code § 5000 et seq.*] may not act as an agent or surrogate unless the conservatee is represented by legal counsel who signs a certificate indicating that the conservatee was advised of the applicable law and potential consequences before to executing an advance directive [*Prob. Code § 4659(c)*].

c. Limit authority of agent, if desired.

NOTE:

Unless the directive limits the authority of the agent, the agent may make all health care decisions regarding the patient/principal. Absent limitation, the agent may (1) consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition; (2) select or discharge health care providers and institutions; (3) approve or disapprove diagnostic tests, surgical procedures, and programs of medication; (4) direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation; (5) make anatomical gifts, authorize an autopsy, and direct disposition of remains [*Prob. Code § 4701*].

d. State specific health care instructions.

e. Express intention regarding donation of bodily organs and tissues.

f. Designate physician (and alternate) as primary care physician.

3. Have principal execute agreement [*see Prob. Code § 4673(a)(1)-(2)*].

NOTE:

An electronic advance health care directive or a power of attorney for health care is legally sufficient if the requirements of *Prob. Code § 4673(a)* [*see P P 3(a), (b), below*] are satisfied, the directive is acknowledged before a notary public, and any digital signatures used meet specified requirements [*see Prob. Code § 4673(b)*]; for discussion of requirements for digital signatures, *see § 104.31*.

a. Have principal sign and date directive, if competent; or

b. Have other adult sign and date directive in principal's presence, in principal's name and at principal's direction.

4. Have agreement acknowledged before notary public or witnessed by at least two witnesses [*Prob. Code § 4673(a)(3)*].

NOTE:

When an advance directive is signed by witnesses, the witnesses must be adults. Each witness signing the advance directive must witness either (1) the signing of the advance directive by the patient or (2) the patient's acknowledgment of the signature or the advance directive [*Prob. Code § 4674(a), (b)*].

a. If witnesses are used, ensure that at least one of is an individual who is neither related to patient by blood, marriage, or adoption, nor entitled to any portion of patient's estate on patient's death under will

existing when advance directive is executed or by operation of law then existing [*Prob. Code § 4674(e)*].

b. If witnesses are used, ensure that none of the following are either of required two witnesses [*Prob. Code § 4674(c)*].

- (1) Patient's health care provider or employee of patient's health care provider.
- (2) Operator or employee of community care facility where patient resides.
- (3) Operator or employee of residential care facility for elderly where patient resides.
- (4) Agent, if advance directive is power of attorney for health care.

5. If patient is in skilled nursing care facility, have patient advocate or ombudsman sign directive:

- a. As one of two required witnesses; or
- b. In addition to notarization.

6. After completing directive, instruct patient to give copy to:

- a. Physician.
- b. Other health care providers.
- c. Health care institutions where patient receives care.
- d. Health care agents.

7. Consider registering advance health care directive with Secretary of State [*see § 104.232* (official Secretary of State registration form)].

NOTE:

Once a written advance health care directive is registered, the information may be made available on request to any health care provider, the public guardian, or other person authorized by the registrant [*see Prob. Code § 4800(a)*]. Registration with the Secretary of State is a non-compulsory filing. The failure to register does not affect the validity of any health care directive [*Prob. Code § 4803*]. However, registrants are required to notify the registry if the directive is revoked or replaced by a subsequent directive [*see Prob. Code § 4802(b), (c); see also § 104.141*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentEnd-of-Life DecisionsAdvance Directives



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33-104 California Legal Forms--Transaction Guide § 104.125

§ 104.125 Physician Orders for Life Sustaining Treatment

1. Discuss nature, operation, and effect of physician orders for life sustaining treatment with individual or individual's legally recognized health care decisionmaker [see § 104.39].
2. Have health care professional complete form, based on individual's preferences and medical indications [see *Prob. Code* § 4780(c); § 104.39[1]; see also § 104.223[2] (form)].
3. Ensure that form is signed by physician and individual or his or her legally recognized health care decisionmaker [see *Prob. Code* § 4780(c); § 104.39[1]].

NOTE:

The health care provider, during the process of completing the form, should inform the individual about the difference between an advance health care directive and the POLST [*Prob. Code* § 4780(c); see *Prob. Code* § 4605 ("advance health care directive" defined); § 104.31 (requirements for advance health care directive); § 104.233[1][c]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Treatment End-of-Life Decisions Life Support



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[Reserved]

§§ 104.126[Reserved]



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33-104 California Legal Forms--Transaction Guide § 104.140

§ 104.140 Revocation of Arbitration Agreement

1. Revoke arbitration agreement by giving written notice within 30 days of signature [*Code Civ. Proc. § 1295(c)*].

NOTE:

There is an exception to this rule when a patient signs the agreement before she knows she is pregnant. In this case, the patient has 30 days from the date she discovers that she is pregnant in which to revoke the agreement on behalf of the baby by written notification to the hospital or physician or both [*see § 104.204; see also § 104.201[1]*].

2. If patient is incapacitated or minor, have guardian or conservator give notice of revocation [*Code Civ. Proc. § 1295(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration ClausesHealthcare LawTreatmentGeneral Overview



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33-104 California Legal Forms--Transaction Guide § 104.141

§ 104.141 Revocation of Advance Directive

NOTE:

An advance health care directive and the designation of an agent may be revoked by operation of law. For discussion, see § 104.35[2].

1. To revoke designation of agent, have principal [*Prob. Code § 4695(a)*]:
 - a. Execute signed writing.
 - b. Personally inform supervising health care provider of revocation.
2. To revoke entire advance directive, or any part other than designation of agent, communicate intent to revoke to supervising health care provider.

NOTE:

A patient having capacity may revoke all or any part of an advance directive, other than the designation of an agent, at any time and in any manner that communicates an intent to revoke [*Prob. Code § 4695(b)*]. A health care provider, agent, conservator, or surrogate who is informed of the revocation of an advance health care directive must promptly communicate that fact to the supervising health care provider and to any health care institution providing care to the patient [*Prob. Code § 4696*].

3. If directive has been registered with Secretary of State, file official form to amend or revoke directive.

NOTE:

Once an advance health care directive is registered, the registrant must notify the registry if the advance directive is amended or revoked [*see Prob. Code § 4802(b)*]. For revocation purposes, the registrant must

complete paragraphs 1 through 8 and the signature block [**see** § 104.232[2]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceGeneral OverviewHealthcare LawTreatmentEnd-of-Life DecisionsAdvance Directives



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33-104 California Legal Forms--Transaction Guide §§ 104.142-104.199

[Reserved]

§§ 104.142[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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A. Admission and Arbitration Forms

33-104 California Legal Forms--Transaction Guide § 104.200

§ 104.200 Conditions of Admission to Hospital

[1] Comment

[a] Use of Form

This form is a typical hospital admission form that sets forth the general conditions of admission to the hospital and informs the patient of the general level of care and treatment that he or she will receive. By signing this form, the patient gives the hospital written consent to provide services pursuant to the instructions of the patient's attending physicians. In view of the need for obtaining the patient's consent for medical treatment [see [b], *below*], hospitals routinely require that this form or a comparable one be signed by patients, or their authorized representatives, at or around the time of hospital admission.

This form is appropriate for use when the patient's attending physicians are not employees of the hospital but are using the hospital facilities to treat the patient in accordance with the physician's privileges as members of the hospital's medical staff. In this situation, the relationship between the hospital and physicians is one in which the physicians are independent contractors [see *Mayers v. Litow* (1957) 154 Cal. App. 2d 413, 418, 316 P.2d 351]. This form, however, may be modified to cover the situation in which the physicians are hospital employees. It may also be modified to apply to the situation involving outpatient services, especially when repetitive rendition of services or a complex procedure will be performed on a patient.

If the patient cannot write, he or she may make a mark. However, a witness then must write the patient's name near the mark and write his or her own name near the patient's name [*Health & Safety Code § 18*].

A copy of the admission agreement should be given to the patient.

[b] Patient's Consent to Treatment

If a patient does not give his or her consent to treatment before hospital or medical services are rendered, either the hospital or the physician or both may be technically committing assault and battery on the patient [*Valdez v. Percy*

(1939) 35 Cal. App. 2d 485, 491, 96 P.2d 142 (performance of an operation on a person who did not consent as technical assault and battery)]. The consent may be implied, as by voluntary submission of the patient to treatment, or expressed, as by an oral or written consent [*Kritzer v. Citron* (1950) 101 Cal. App. 2d 33, 38-39, 224 P.2d 808] . Therefore, to protect itself from a charge of assault and battery based on treatment or services rendered without consent, the hospital should obtain written consent by the patient for hospital services rendered pursuant to instructions of the patient's attending physician.

The patient's consent to a specified treatment or procedure must be an informed consent in order for the consent to be binding. It is the duty of the physician, and not the hospital, to obtain this consent. A physician violates his or her duty of disclosure to the patient if he or she withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment [*Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees* (1957) 154 Cal. App. 2d 560, 578, 317 P.2d 170] . For further discussion of the physician's duty of disclosure, see the §§ 104.11 and 104.220.

The patient's right to receive the requisite information to enable him or her to give an informed consent is specifically provided for in the hospital patients' *bill of rights* [22 Cal. Code Reg. §§ 70707(b)(4), (5) (general acute care hospitals), 71507(a)(9)(acute psychiatric hospitals); see § 104.206].

For detailed discussion of the situations in which someone other than the patient may consent to medical treatment on the patient's behalf, and the persons who may consent to medical treatment, see § 104.220[1].

[c] Release of Information

Confidentiality of hospital patient medical records is protected by the physician-patient privilege [*Evid. Code* § 990 *et seq.*], the standard of conduct prohibiting a physician's betrayal of a professional secret [*Bus. & Prof. Code* § 2225], and the hospital patient's *bill of rights* [22 Cal. Code Reg. § 70707(b)(8)]. 22 Cal. Code Reg. § 70707, which sets forth the hospital patients' *bill of rights*, applies to those hospitals that are licensed by the State Department of Health Services and have a duly constituted governing body with overall administrative and professional responsibilities and an organized medical staff which provides 24-hour inpatient care, including the following basic services: medical, nursing, surgical, anesthesia, laboratory, radiology, pharmacy, and dietary services [*Health & Safety Code* § 1250(a)]. Most general care hospitals probably come within this definition; however, counsel should independently verify that the hospital involved in his or her case is a hospital within this definition.

The hospital must obtain written permission from the patient before his or her medical records can be made available to anyone not directly related to the patient's care [22 Cal. Code Reg. § 70707(b)(8)]. Therefore, this hospital admission form specifically provides for the patient's consent to release of portions of his or her medical records to insurance companies or other organizations with whom the patient may have contracted for the payment of all or part of hospitalization costs.

For further discussion, see §§ 104.14 and 104.223[1].

[d] Personal Valuables of the Patient

If the hospital keeps a fireproof safe and notifies the patient, either personally or by a printed notice posted prominently in the office or the room occupied by the patient, that the hospital keeps such a safe and will not be liable for money, jewelry, documents, furs, fur coats and fur garments, or other articles of unusual value and small compass, unless placed in the safe, the hospital is not liable, except so far as the acts of the hospital or its employees contribute to the loss or injury, for any loss or injury to those articles which are not deposited with the hospital for placement in the safe [*Civ. Code* § 1860]. The extent of liability is limited by statute to \$500 unless the hospital has given the patient a written receipt for a greater amount [*Civ. Code* § 1860].

If the hospital does not maintain a safe for storing the personal valuables of the patient, it must use at least ordinary care for the personal valuables stored with it [*Civ. Code* § 1852]. The liability of a hospital that does not maintain a safe for the losses of or injuries to a patient's personal property is limited by statute to specified maximum amounts, depending on the type of personal property involved, unless the hospital consents in writing to assume a greater liability [*see Civ. Code* § 1859].

The hospital may not use the patient's money and valuables as its own, nor may the hospital mingle them with its own money and valuables. The patient's money and valuables must be separate, intact, and free from any liability that the hospital incurs in the use of its own funds and valuables. Further, the hospital must maintain a record of the patient's money and valuables entrusted to it for safekeeping, including a copy of the receipt furnished to the patient or other person responsible for the patient [22 *Cal. Code Reg.* § 70755]. Hospitals that handle patients' money are required, as a condition precedent to licensing, to file with the State Department of Health Services a bond or undertaking executed by an admitted surety insurer [*see Health & Safety Code* § 1318(a); *see also Code Civ. Proc.* §§ 995.120, 995.210(a)]. The amount of the bond or undertaking will be fixed by the State Department of Health and will be at least \$1,000. Any person injured because of the hospital's improper handling of his or her money may bring an action on the bond [*Health & Safety Code* § 1318(a), (b)].

[e] Financial Agreement

The patient or the agent of the patient who signs this form obligates himself or herself to pay for the services rendered by the hospital. Even if a patient has health insurance or other medical expense coverage, most health insurance plans contain a deductible amount that must be paid by the patient before the plan pays for additional hospital expenses incurred. Counsel should review the specific health insurance plan of a client who is a patient to determine the exact amount for which the patient is personally responsible under the plan.

On the request of a patient, general acute care hospitals offering outpatient services or emergency services must make available a schedule of hospital charges [22 *Cal. Code Reg.* § 70717(b)].

[f] Assignment of Insurance Benefits

An assignment is a transfer of title or ownership of property, or some right or interest in property, from one person to another [*see Commercial Discount Co. v. Cowen* (1941) 18 *Cal. 2d* 610, 614, 116 *P.2d* 599]. Although no particular form of assignment is necessary, an effective assignment must manifest the intention of the owner of the right to transfer the right to another person, without any further action or manifestation of intention [*Cockerell v. Title Ins. & Trust Co.* (1954) 42 *Cal. 2d* 284, 291, 267 *P.2d* 16]. In the absence of a statute requiring the assignment to be in writing, an assignment may be either oral or written [*Swing v. Lingo* (1933) 129 *Cal. App.* 518, 523, 19 *P.2d* 56].

Money due or to become due under a contract generally may be assigned even though the contract contains a clause prohibiting assignment [*Trubowitch v. Riverbank Canning Co.* (1947) 30 *Cal. 2d* 335, 339, 182 *P.2d* 182]. This is permitted because the mere assignment of the money due or to become due is not treated as assignment of the contract [*Butler v. San Francisco Etc.* (1914) 168 *Cal.* 32, 41, 141 *P.* 818]. Additionally, the fact that the money will not be due under a contract until the happening of a future contingency does not prevent it from being assignable [*Baumgarten v. California Pac. T. & T. Co.* (1932) 127 *Cal. App.* 649, 657, 16 *P.2d* 332]. The clause in this form is for the assignment of money to become due. If an insurance plan will be paying some or all of the hospital expenses, its inclusion will allow the hospital to collect the amount due for hospital services rendered to the patient directly from the patient's insurance company. This clause prevents a problem that can arise when the insurance company pays the patient for hospital expenses, but the patient delays paying hospital in turn.

For further discussion on the subject of assignments, see Ch. 76, *Assignment of Rights and Obligations*.

[g] Arbitration Clause

This form may be modified by inserting a clause relating to the arbitration of medical malpractice disputes. However, for the reasons discussed in § 104.201[1][b]-[d], it is ordinarily recommended that a medical malpractice arbitration provision be made a separate agreement. See § 104.202 for the optional clauses that may be included in this form and for the requirements that must be met whenever an arbitration provision is included in this type of agreement.

[h] Invalid Contracts

If the hospital attempts to condition admission to the hospital by requiring that it be released from any and all liability for the negligent or wrongful acts of its employees, and inserts a clause to this effect in the admission agreement, the agreement must fail for being against public policy [*Civ. Code* § 1668; see *Tunkl v. Regents of Univ. of Cal.* (1963) 60 Cal. 2d 92, 95-102, 32 Cal. Rptr. 33, 383 P.2d 441 ; *YMCA of Metropolitan Los Angeles v. Superior Court* (1997) 55 Cal. App. 4th 22, 63 Cal. Rptr. 2d 612, 614-615] . For further discussion, see Ch. 77, *Discharge of Obligations* .

[i] Format Requirements

If a general acute care hospital [*Health & Safety Code* § 1250(a)] provides a patient with admissions papers and forms, or a contract for consent for hospitalization, or an agreement to assume financial responsibility, or information produced by the hospital regarding the patient's rights and responsibilities, those materials must be printed in at least a 12-point font that is clear and legible [*Health & Safety Code* § 123222.1(a), (b)(1), (3), (5)]. However, a hospital may continue to use its supply of materials that exists on January 1, 2003, until that supply is exhausted or until January 1, 2006, whichever occurs first. Effective January 1, 2006, the hospital must comply with the statutory requirements [*Health & Safety Code* § 123222.1(c)].

[2] FORM**Conditions of Admission to Hospital**

CONDITIONS OF ADMISSION TO _____ HOSPITAL

Nursing Care

1. This hospital provides only general duty nursing care unless the patient's physician orders that the patient be provided more intensive nursing care. If the patient's condition is such as to need the service of a special duty nurse, it is agreed that the service must be arranged by the patient or his or her legal representative. The hospital shall in no way be responsible for failure to provide it and is hereby released from any and all liability arising from the fact that the patient is not provided with that additional care.

Medical and Surgical Consent

2. The patient is under the care and supervision of his or her attending physician and it is the responsibility of the hospital and its nursing staff to carry out the instructions of the physician; the undersigned recognizes that all physicians and surgeons furnishing services to the patient, including the radiologist, pathologist, anesthesiologist, and the like, are independent contractors and are not employees or agents of the hospital. The undersigned consents to X-ray examination, laboratory procedures, anesthesia, medical or surgical treatment, or hospital services rendered to the patient under the general and special instructions of the physician.

Release of Information

3. To the extent necessary to determine liability for payment and to obtain reimbursement, the hospital may disclose portions of the patient's record, including his or her medical records, to any person or corporation that is or may be liable, for all or any portion of the hospital's charge, including but not limited to insurance companies, health care service plans, or workers' compensation carriers.

Personal Valuables

4. It is understood and agreed that the hospital maintains a safe for the safekeeping of money and valuables. The hospital is not liable for the loss or damage to any money, jewelry, documents, furs, fur coats and fur garments, or other articles of unusual value and small compass, unless placed in the safe. Further, the hospital is not liable for loss or damage to any other personal property, unless deposited with the hospital for safekeeping.

Financial Agreement

5. The undersigned agrees, whether he or she signs as agent or as patient, that in consideration of the services to be rendered to the patient, he or she hereby individually obligates himself or herself to pay the account of the hospital in accordance with the regular rates and terms of the hospital. Should the account be referred to an attorney for collection, the undersigned will pay reasonable attorneys' fees and all collection expenses. All delinquent accounts bear interest at the legal rate.

Assignment of Insurance Benefits

6. The undersigned authorizes, whether he or she signs as agent or as patient, direct payment to the hospital of any insurance benefits otherwise payable to the undersigned for this hospitalization at a rate not to exceed the hospital's regular charges. It is agreed that payment to the hospital, pursuant to this authorization, by an insurance company discharges the insurance company of any and all obligations under a policy to the extent of that payment. It is understood by the undersigned that he or she is financially responsible for charges not covered by this assignment.

Health Care Service Plans

7. This hospital maintains a list of the health care service plans with which it has contracted. A list of these plans is available on request from the financial office. The hospital has no contract, express or implied, with any plan that does not appear on the list. The undersigned agrees that he or she is individually obligated to pay the full cost of all services rendered to him or her by the hospital if he or she belongs to a plan that does not appear on the above-mentioned list.

Signature and Certification

The undersigned certifies that he or she has read this document, has received a copy, and is either the patient or duly authorized by the patient as patient's general agent to execute the above and accept its terms.

Dated: _____.

Time: _____.

PATIENT OR AUTHORIZED REPRESENTATIVE

[signature of patient, parent, or guardian]

[typed name]

Relationship to patient, if other than patient: _____ [relationship]

For purposes of Financial Agreement, Assignment of Insurance Benefits, Health Care Service Plan, if financial responsibility is assumed by someone other than patient, parent, or legal guardian:

WITNESS:

[name of health care service plan]_____
Dated:_____
[signature of effective witness]

[typed name]

A COPY OF THIS DOCUMENT IS TO BE DELIVERED TO THE PATIENT

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions Arbitration Clauses Healthcare Law Treatment General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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 A. Admission and Arbitration Forms

33-104 California Legal Forms--Transaction Guide § 104.201

§ 104.201 Arbitration Agreement Between Hospital and Patient

[1] Comment

[a] Use of Form

This form is an arbitration agreement, to be used when both the hospital and the patient voluntarily desire to enter into an agreement to submit to arbitration any disputes as to medical malpractice that may arise from the patient's stay in the hospital. This form is to be used when the arbitration agreement between the hospital and the patient will be a separate agreement. Rather than entering into a separate arbitration agreement, a hospital and patient may insert an arbitration clause [*see* § 104.202] into the hospital admission form [*see* § 104.200].

The patient should be given a copy of any medical services contract or arbitration agreement.

[b] General Characteristics of Arbitration

Arbitration is the submission for determination of a disputed matter to private unofficial persons selected in the manner provided by law or by the agreement of the parties [*Stockwell v. Equitable F. & M. Ins. Co. (1933) 134 Cal. App. 534, 540, 25 P.2d 873*] . Usually the hearing is before a tribunal that has the power to render a binding decision, and parties are represented by counsel who may present evidence and examine and cross-examine witnesses. The proceedings are more informal than courtroom litigation, and the rules of evidence and rules of judicial procedure may be more flexible or need not be observed [*see Code Civ. Proc. § 1282.2*].

In California, the general arbitration laws are codified in the Code of Civil Procedure [*see Code Civ. Proc. § 1280 et seq.*]. A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, except upon those grounds as exist for the revocation of any contract [*Code Civ. Proc. § 1281*]. Provisions relating to the appointment of an arbitrator and other procedural matters are also covered by statute. Most of the case law regarding the use of arbitration for medical malpractice disputes involves the application of these statutory provisions. *Code Civ. Proc. § 1295* specifically relates to the arbitration of medical malpractice disputes. It specifies the exact language that must be used in an arbitration provision [*see [c], below*].

[c] Statutory Requirements Governing Medical Services Contract Arbitration Requirements

Arbitration is regarded as a proper and usual means of resolving medical malpractice disputes [*Madden v. Kaiser Foundation Hosp.* (1976) 17 Cal. 3d 699, 706, 131 Cal. Rptr. 882, 552 P.2d 1178] . As evidence of a public policy favoring the use of arbitration in this area, the Legislature has enacted a specific statute relating to the use of arbitration in medical malpractice disputes [see *Code Civ. Proc.* § 1295].

All contracts for medical services containing a provision for arbitration of medical malpractice disputes are subject to the requirements of *Code Civ. Proc.* § 1295. The provision for arbitration of any dispute relating to professional negligence of a health care provider must be the first article of the contract and must include precise statutory language [see *Code Civ. Proc.* § 1295(a)]. A notice, the language of which is also prescribed by statute, must be set forth in at least 10-point bold red type immediately before the signature line provided for the individual contracting for the medical services [see *Code Civ. Proc.* § 1295(b)].

The terms "professional negligence" and "health care provider" are both defined by statute. "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that these services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensed hospital [*Code Civ. Proc.* § 1295(g)(2)]. The term "health care provider" means a broad range of health care service providers, including but not limited to hospitals licensed by the State Department of Health Services, and any person licensed pursuant to the Healing Arts Division of the Business and Professions Code (the division provides for the licensing of dentists, physicians and surgeons, nurses, and other specified health care personnel), or to the Osteopathic Initiative Act, or to the Chiropractic Initiative Act [see *Code Civ. Proc.* § 1295(g)(1)].

Once signed, the contract governs all subsequent open-book account transactions for medical services for which the contract was signed unless or until rescinded or disaffirmed [see *Code Civ. Proc.* § 1295(c); *Cochran v. Rubens* (1996) 42 Cal. App. 4th 481, 485-487, 49 Cal. Rptr. 2d 672 ; see also [d], below].

[d] Rescission and Disaffirmance

A signed contract for medical services containing an arbitration provision that conforms to statutory requirements [see *Code Civ. Proc.* § 1295(a)-(c)] governs all open-book account transactions for medical services for which the contract was signed until or unless rescinded by written notice within 30 days of signature. If the patient is incapacitated or a minor, the written notice of rescission may be given by a guardian or conservator of the patient [*Code Civ. Proc.* § 1295(c)].

One exception to the foregoing rescission rule is provided for in the Rules of Arbitration of the California Medical Association and the California Association of Hospitals and Health Systems. If a patient becomes pregnant or does not know she is pregnant until after signing the arbitration agreement, she has 30 days from the date she discovers she is pregnant in which to revoke the arbitration agreement on behalf of the unborn child. The other party must be notified in writing within the 30 days that the arbitration agreement is being revoked on behalf of the child [see § 104.204[2], P 2(c)].

If the contract is for medical services to a minor and a parent or legal guardian of the minor signed it, the contract is not subject to disaffirmance [*Code Civ. Proc.* § 1295(d)].

[e] Adhesion

If a contract for medical services containing an arbitration provision has been drafted in conformance with the requirements of *Code Civ. Proc.* § 1295, it is not a contract of adhesion, nor unconscionable or otherwise improper [see

Code Civ. Proc. § 1295(e). Some of the major litigation over the use of arbitration for medical malpractice disputes has revolved around the issue of whether a particular arbitration agreement was invalid on the basis of being a contract of adhesion [see *Madden v. Kaiser Foundation Hosp.* (1976) 17 Cal. 3d 699, 131 Cal. Rptr. 882, 552 P.2d 1178 ; see also *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal. App. 4th 1102, 1110, 63 Cal. Rptr. 2d 261 (arbitration clause in attorney's retainer agreement was enforceable); *Wheeler v. St. Joseph Hosp.* (1976) 63 Cal. App. 3d 345, 133 Cal. Rptr. 775] . In a case that did not involve *Code Civ. Proc. § 1295*, the court held that the procedural safeguards of calling the patient's attention to the arbitration clause, requesting the patient to read the clause, and giving the patient a reasonable explanation of its meaning and effect, including an explanation of any options available to the patient, are necessary to bind the parties when an arbitration provision is incorporated into a hospital admission agreement [*Wheeler v. St. Joseph Hosp.* (1976) 63 Cal. App. 3d 345, 361, 133 Cal. Rptr. 775] . To minimize the opportunity for a patient to claim that he or she was not aware of and did not understand the terms of the arbitration provision, and that he or she did not voluntarily contract, it is recommended that a staff member, such as the admissions clerk, follow the procedural safeguards outlined above as a matter of routine regardless of whether the arbitration provision is incorporated into the admissions form, separately agreed on, or entered into between a physician and patient instead of a hospital and patient.

The signing of an agreement meeting the requirements of *Code Civ. Proc. § 1295* does not establish a conclusive presumption that the signing party has consented to arbitration. A contrary rule would violate the constitutional right to a jury trial [see *U.S. Const., amend. VII*; see also *Cal. Const., art. I, § 16*]. The signing party must be permitted to show that he or she was coerced into signing, or did not read the many waiver notices provided and did not realize that the agreement was an agreement to arbitrate [*Ramirez v. Superior Court* (1980) 103 Cal. App. 3d 746, 749-751, 754-755, 163 Cal. Rptr. 223] . In one medical malpractice action, a patient who claimed that she did not remember signing the agreement and that she didn't read English at all and could only read Spanish to a limited extent, was held bound to arbitrate under the arbitration agreement she had signed. If an arbitration agreement complies with the applicable statutory requirements [see *Code Civ. Proc. § 1295*], a person may not, in the absence of fraud, coercion, or excusable neglect (none of which were found to exist in this case), avoid its terms on the ground that he or she failed to read it before signing it [*Bolanos v. Khalatian* (1991) 231 Cal. App. 3d 1586, 1590, 283 Cal. Rptr. 209] .

[f] Rules of Arbitration

The arbitration agreement or medical services contract containing an arbitration provision should specify the arbitration rules that will be used in the event of an arbitration hearing. Different rules have been formulated by the American Arbitration Association, by statute [see *Code Civ. Proc. §§ 1280-1294.2*], and jointly by the California Hospital Association and the California Medical Association and California Association of Hospitals and Health Systems. This form specifies that the CMA/CAHHS Medical Arbitration Rules will apply. Those rules are reproduced in § 104.204 of this publication, and include, among other things, specific provisions relating to the number of arbitrators, pregnant patients, voluntary intervention and joinder, and discovery.

Any hospital arbitration agreement that provides for arbitration in accordance with specific rules should have copies of those rules available for its patients. The Commercial Arbitration Rules of the American Arbitration Association are set forth in Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , and may also be obtained through the regional offices of the American Arbitration Association in San Francisco, Los Angeles, and San Diego.

[g] Parties Bound by Contract

Once a contract for medical services is signed, and until or unless it is later rescinded, both parties to the contract are bound by it. In addition to a person being able to bind himself or herself as a patient to an arbitration agreement, agents and fiduciaries may also bind their principals or beneficiaries to arbitration [see, e.g., *Madden v. Kaiser Foundation Hosp.* (1976) 17 Cal. 3d 699, 709, 131 Cal. Rptr. 882, 552 P.2d 1178] . For example, the agent for a group medical plan has the authority to agree to the inclusion of an arbitration provision [*Madden v. Kaiser Foundation Hosp.* (1976) 17

Cal. 3d 699, 706, 131 Cal. Rptr. 882, 552 P.2d 1178 (arbitration provision was included by amendment to the original contract)]. Further, a parent's right and duty to care for his or her child gives the parent the authority to enter into a contract for medical care that binds the child to arbitrate any dispute arising under the contract [*Doyle v. Giuliani* (1965) 62 Cal. 2d 606, 610, 43 Cal. Rptr. 697, 401 P.2d 1] . Further, a parent may bind both the child and the other parent to arbitrate claims related to medical treatment [see *Bolanos v. Khalatian* (1991) 231 Cal. App. 3d 1586, 1591, 283 Cal. Rptr. 209 (mother bound unborn child and nonsignatory parent)].

This form contains a clause stating that the parties, their heirs, representatives, executors, administrators, successors, and assigns are bound by the agreement. Although this may be effective to bind these persons on a cause of action in the patient, at least one court has refused to bind the patient's heirs in a wrongful death suit [*Rhodes v. California Hosp. Medical Center* (1978) 76 Cal. App. 3d 606, 609-610, 143 Cal. Rptr. 59] . The court reasoned that the policy favoring arbitration does not extend to those who are not parties to an arbitration agreement or who did not authorize another to execute an arbitration agreement, and that even though a wrongful death cause of action must rest on a cause of action in the decedent, it is nonetheless an independent cause of action. Therefore, counsel is cautioned that the inclusion of this clause in the form may not cover the situation of a suit for wrongful death.

When one spouse contracts for prepaid health services for both spouses, the other spouse is bound by the arbitration provisions of the agreement to submit a wrongful death claim to arbitration [*Hawkins v. Superior Court* (1979) 89 Cal. App. 3d 413, 419, 152 Cal. Rptr. 491] . The *Rhodes* case [*Rhodes v. California Hosp. Medical Center* (1978) 76 Cal. App. 3d 606, 609, 143 Cal. Rptr. 59] was distinguished because the patient in that case signed the arbitration agreement on his own behalf in a hospital admission agreement whereas the agreement for health services in the *Hawkins* case was entered into on behalf of both spouses.

If the patient is a minor, disabled person, or unborn child, a separate additional provision [see § 104.205 7] may be executed by the appropriate authorized person and attached to the arbitration agreement.

This form contains an optional clause that may be included if the arbitration agreement will to apply to doctors of medicine having staff privileges with the hospital. This clause is intended for use in those situations when all of the physicians having staff privileges at a hospital have signed and filed with the hospital a document signifying their agreement to arbitrate any malpractice claims. If any other optional provision for the coverage of physicians with staff privileges is desired, counsel is cautioned to avoid ambiguity and uncertainty [see *Wheeler v. St. Joseph Hosp.* (1976) 63 Cal. App. 3d 345, 368, 133 Cal. Rptr. 775] .

[h] Advantages and Disadvantages of Arbitration

The advantages usually cited for the use of arbitration in medical malpractice cases as opposed to traditional judicial proceedings include the following:

- A faster disposition of the claims from the time that the hospital first receives notice of a claim to the time when the arbitration proceedings are concluded.
- The probability that the arbitrator will be technically more knowledgeable than a jury or the average judge.
- The privacy of a hearing that is not being held in open court and an accompanying minimization of publicity.
- The lessened likelihood of an unreasonably excessive award by an over-emotional jury.
- The probability that small claims will be more amenable to arbitration than to litigation.

- The probability that costs will be reduced since the hearings tend to be of shorter duration than judicial proceedings.

The most frequently mentioned and most important disadvantage of the use of arbitration, in terms of either of both parties giving up something, is the fact that both parties must forego their right to a jury trial. Other alleged disadvantages include the following:

- The limited right of appeal provided for by statute [*see Code Civ. Proc. § 1294*].
- A perception of lack of finality and that arbitration only prolongs the dispute and merely defers judicial review.
- The questionable neutrality of the arbitrator.
- The potential for the introduction of damaging evidence that would not ordinarily be allowed in a judicial proceeding.
- The fact that no body of judicial precedents is created.
- The fact that some patients will refuse arbitration.
- The amount of time that staff members must use in answering questions from patients about arbitration.

Although the above-listed factors have been classified as either advantages or disadvantages, the particular facts and circumstances of each case will better determine whether any single factor is indeed an advantage or disadvantage. For example, the potential for introduction of damaging evidence has been classified as a disadvantage; however, in many situations the relaxed rules of evidence can be an advantage, such as when the damaging evidence is against the other party. Therefore, these factors should be used as a checklist of factors to be considered rather than as a fixed list of advantages or disadvantages.

As a practical matter and regardless of the specific facts involved, most hospitals and physicians either rely on arbitration agreements or they do not. Further, many health maintenance organizations (HMOs) require the use of a specified arbitration agreement. Arbitration agreements may or may not be used according to regional or community practice.

[2] FORM

Arbitration Agreement Between Hospital and Patient

HOSPITAL ARBITRATION AGREEMENT

Patient's Name: _____

Admission Number: _____

This Hospital Arbitration Agreement constitutes an integral part of a contract for medical services, represented by the Conditions of Admission to which this Hospital Arbitration Agreement is attached ("the Contract"), by and between Hospital and Patient:

Arbitration

1. It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this Contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this Contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.

Arbitration Rules

2. Arbitration will be in accordance with the current Medical Arbitration Rules of the California Medical Association and the California Association of Hospitals and Health Systems. Copies of those rules are available at the hospital admissions office.

Applicability to Claims and Actions

3. This Hospital Arbitration Agreement applies to any legal claim or civil action in connection with this hospitalization or outpatient service, including but not limited to disputes as to medical malpractice, against this Hospital or its employees [*optional*: and all physicians who have medical staff privileges at this Hospital].

Rescission of Agreement

4. The execution of this Hospital Arbitration Agreement is not a precondition to the furnishing of service by the Hospital. This Hospital Arbitration Agreement may be rescinded by written notice from the Patient or Patient's representative to the Hospital within 30 days of signature.

Parties Bound by Agreement

5. This Hospital Arbitration Agreement binds the parties and their heirs, representatives, executors, administrators, successors, and assigns.

[*The following notice must be in at least 10-point bold red type; see Code Civ. Proc. § 1295(b).*]

NOTICE:

BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.

HOSPITAL

PATIENT

[*typed name of hospital*]By: _____ [signature of patient]
nature] [typed name]

[signature of

[*typed name and title*]

_____ [*signature of
patient's agent or representative, if any*]
[*typed name and relationship to patient*]

TIME OF SIGNING:

_____ [*date*] Hour _____ M.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions Arbitration Clauses Healthcare Law Treatment General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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33-104 California Legal Forms--Transaction Guide § 104.202

§ 104.202 Arbitration Clause Between Hospital and Patient for Inclusion in Hospital Admission Agreement

[1] Comment--Use of Form

This form is an arbitration clause that may be inserted into the conditions of admission to hospital form [see § 104.200] to bind a hospital and patient to arbitration. Alternatively, the arbitration agreement between a hospital and patient may be in the form of a separate arbitration agreement such as that *set out in § 104.201*.

The submission of any medical malpractice disputes to arbitration should not be a precondition to hospital admission. If an arbitration clause is included in the conditions of admission to hospital form [see § 104.200], the title and language of that form may confuse the patient or otherwise lead him or her to believe that arbitration is indeed a condition of hospital admission. Therefore, although inserting an arbitration clause into the conditions of admission to hospital form [see § 104.200] and entering into a separate arbitration agreement [see § 104.202] are both appropriate for the purpose of effecting an arbitration agreement between the hospital and the patient, entering into a separate arbitration agreement may be the preferred method for ensuring that the patient clearly understands that arbitration is not a condition of hospital admission and that he or she agrees to submit any medical malpractice disputes to arbitration.

If this form is inserted into the conditions of admission to hospital form [see § 104.200], the articles of the form must be renumbered because an arbitration clause must appear as the first article in any medical services contract [see *Code Civ. Proc. § 1295(a)*]. Further, a statutory notice must appear directly above the signature [see *Code Civ. Proc. § 1295(b)*]. The statutory requirements and other considerations applicable to an arbitration clause in a medical services contract are fully discussed in § 104.201[1][c].

[2] FORM

Arbitration Clause Between Hospital and Patient for Inclusion in Hospital Admission Agreement

Arbitration Clause Between Hospital and Patient--For Inclusion in Hospital Admission Agreement

Arbitration

1. It is understood that any dispute as to medical malpractice, that is, as to whether any medical services rendered under this Contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.

This arbitration agreement applies to any legal claim or civil action in connection with this hospitalization, including but not limited to a dispute as to medical malpractice against the hospital or its employees [*optional: and all physicians who have medical staff privileges at this hospital*], unless the patient or undersigned initials below or unless rescinded by written notice within 30 days of signature. Arbitration will be in accordance with the current Medical Arbitration Rules of the California Medical Association and the California Association of Hospitals and Health Services. Copies of these rules are available at the hospital admissions office.

This agreement to arbitrate is not a precondition to the furnishing of services under this agreement.

If patient or undersigned does not agree to arbitration, then he or she will initial here: _____

This Hospital Admission Agreement binds the parties and their heirs, representatives, executors, administrators, successors, and assigns.

[Insert the following notice and signature block at end of agreement in at least 10-point bold red type; see Code Civ. Proc. § 1295(b).]

NOTICE:

BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.

HOSPITAL

[*typed name of hospital*]

By: _____ [signature of
nature]

[*typed name and title*]

PATIENT

_____ [signature of

patient]

[*typed name*]

_____ [signature of
patient's agent or representative, if any]

[*typed name and relationship to patient*]

Legal Topics:

For related research and practice materials, see the following legal topics:

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33-104 California Legal Forms--Transaction Guide § 104.203

§ 104.203 CMA Physician-Patient Arbitration Agreement

[1] Comment

[a] Use of Form

This form is an arbitration agreement between a physician and a patient. It was prepared by the California Medical Association for use by physicians in private practice and is reproduced here by permission for illustrative purposes only. It is part of a booklet that also includes the CMA-CAHHS Medical Arbitration Rules [reproduced in § 104.204], which are incorporated into the agreement, as well as introductory materials designed to inform the patient about the nature and effect of the arbitration agreement. These introductory materials are reproduced here, along with the text of the form. Copies of the booklet suitable for distribution to patients may be ordered from CMA Publications, (415) 882-5175. The CMA forms are widely used by physicians.

This form should be given to the patient on his or her first office visit. It provides that the patient may receive the physician's services regardless of whether he or she signs the arbitration agreement. However, the physician should not use this form as a screening device by treating only those persons who agree to sign it. A patient should never be coerced into signing an arbitration agreement since, like all contracts, it must be executed voluntarily.

The arbitration agreement in this form is distinct from any separate arbitration agreement that the patient may enter into with a hospital [see §§ 104.201, 104.202]. An arbitration agreement between a patient and a hospital generally covers an attending physician who has staff privileges [see § 104.201]. However, it may be desirable for the physician and patient to separately agree to arbitrate any disputes regarding services since their professional relationship likely extends to office visits outside of the hospital.

For a detailed discussion of the statutory requirements applicable to arbitration agreements, and the advantages and disadvantages of arbitration agreements, see § 104.201[1][b]-[d]. It is critical that the statutory requirements relating to language and the placement of arbitration provisions in the contract be followed [see *Code Civ. Proc.* § 1295(a)-(c)].

This form provides, in article 3, that the arbitration agreement extends to "any and all treatment provided by the

physician in the future, regardless of the length of time since my [the patient's] last visit to this physician, and regardless of the fact that the patient-physician relationship between myself and the physician may be interrupted for any reason and then recommenced." Such a provision is enforceable. In one case, the court held that a two-year gap between a patient's only treatments by the doctor, and the fact that the second treatment was wholly unrelated to the reason for the first treatment, were irrelevant, and that the arbitration agreement, which was signed on the occasion of the first treatment and was expressly applicable to any future treatments, extended to the second treatment [*Reigelsperger v. Siller* (2007) 40 Cal. 4th 574, 579-580, 53 Cal. Rptr. 3d 887, 150 P.3d 764] .

[b] Services to Minors

When an arbitration provision is included in a contract for medical services to minors, the contract may not be disaffirmed if signed by the minor's parent or legal guardian [*Code Civ. Proc. § 1295(d)*]. If the physician continues to see the patient after he or she attains the age of 18, it is advisable for the physician to enter into a new arbitration agreement with the patient who may then contract on his or her own behalf.

An arbitration agreement made on behalf of a minor is *set forth in § 104.205*. It should be separately executed and attached to this form.

[c] Substituting Physicians

This form provides for coverage of any consenting substitute physician. This may be used when the physician is temporarily absent from his or her practice and has arranged for a substituting physician who agrees in advance to be bound by the agreement. The advance agreement may be a permanent arrangement between the referring and substituting physician, or separate agreements for a limited duration may be made between the two physicians each time the situation arises. In either case, for the protection of the substituting physician, the agreement should in writing.

[d] Patient's Copy of Agreement

The patient should be given a copy of the arbitration agreement at the time of execution. Because this agreement incorporates by reference the arbitration rules *set forth in § 104.204* (medical arbitration rules), a copy of those rules should be attached to the patient's copy of the agreement. The CMA booklet includes both a physician's and a patient's copy of the agreement; only the physician's copy is reproduced here.

[2] FORM

CMA Physician-Patient Arbitration Agreement

[Please see Original Source or contact Editorial Support for assistance.]

[Please see Original Source or contact Editorial Support for assistance.]

Legal Topics:

For related research and practice materials, see the following legal topics:

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33-104 California Legal Forms--Transaction Guide § 104.204

§ 104.204 CMA-CAHHS Medical Arbitration Rules

[1] Comment--Use of Form

This form sets forth the Medical Arbitration Rules of the California Medical Association and the California Association of Hospitals and Health Systems. These rules are designed for use in conjunction with the CMA Physician-Patient Arbitration Agreement [*see* § 104.203], but could be incorporated into other arbitration agreements in appropriate cases. They also be used to govern an arbitration agreement between hospital and patient [*see* § 104.202]. They are the basic rules that will govern prospective arbitration proceedings involving questions of possible medical malpractice. The rules state that except as expressly provided otherwise, the arbitration will be governed by the California statutory arbitration rules [*Code Civ. Proc. § 1280 et seq.*] and California law applicable to actions against health care providers, including the Medical Injury Compensation Reform Act of 1975 [*Civ. Code §§ 3333.1, 3333.2*].

These rules are reproduced here by permission of the California Medical Association for illustrative purposes only. They are included as part of a booklet that also includes the CMA Physician-Patient Arbitration Agreement and related materials [reproduced in § 104.203]. Copies of the booklet may be ordered from CMA Publications, (415) 882-5175.

[2] FORM

CMA-CAHHS Medical Arbitration Rules

[Please see Original Source or contact Editorial Support for assistance.]

Legal Topics:

For related research and practice materials, see the following legal topics:

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33-104 California Legal Forms--Transaction Guide § 104.205

§ 104.205 Supplemental Agreement by Responsible Person on Behalf of Minor, Unborn Child, or Disabled Person--To Be Attached to Arbitration Agreement

[1] Comment

[a] Use of Form

This form is a supplemental agreement to bind a patient to an arbitration agreement. It should be used when the patient is a minor, unborn child, or disabled person, or, in other words, when the patient is unable for legal or medical reasons to sign for himself or herself, and when an arbitration agreement between a patient and hospital [see § 104.201] or a patient and physician [see § 104.203] is entered into by another person on behalf of the patient. The CMA-CAHHS Medical Arbitration Rules [see § 104.204] govern disputes arising from either of the two aforementioned forms of arbitration agreements [see §§ 104.201, 104.203] and specifically bind patients if the appropriate responsible person signs the arbitration agreement on behalf of the minor, unborn child, or disabled person.

The language of this form allows persons responsible for the patient, in addition to the parent or legal guardian, to sign on behalf of the patient, and is in compliance with the provisions of the Medical Arbitration Rules [see § 104.204]. While the parent or legal guardian clearly may enter into a binding arbitration agreement on behalf of a minor [see *Code Civ. Proc.* § 1295(d)], it is less clear whether, and under what circumstances, a responsible person other than a parent or legal guardian may bind the disabled person or minor. In order to be safe, whenever the parent or legal guardian authorizes a third person to consent to the hospital or medical care for a minor, and if the third person signs the arbitration agreement on behalf of the minor, the parent or legal guardian should also sign the arbitration agreement and this form as soon as possible [see *Code Civ. Proc.* § 1295(d)]. The problem involved in attempting to bind a disabled person is discussed [b], *below*.

For forms authorizing third persons to consent to hospital or medical treatment on behalf of a minor, see Ch. 100, *Minors and Parents*.

[b] Disabled Person

The term "disabled person" is used in these arbitration rules [see § 104.204]. A disabled person is described as one who is mentally or physically incapable of understanding the arbitration agreement. The inclusion of persons who are physically incapable of understanding the agreement indicates that other persons, in addition to legally incompetent adults, are to be included in the definition "disabled person." The concern is for patients who are temporarily so distressed or physically ill at the time of negotiating and signing the agreement, that they may not be able to consider rationally and understand the significance and meaning of the agreement. The determination that a person is affected to this degree must be made by the health care provider or the provider's employee based on the symptoms of the patient at the time of signing the agreement. When this situation arises, one method of handling it is for the physician or hospital to have another responsible person sign on behalf of the patient. The rules provide that the signature of the other responsible person for the patient binds the patient to the agreement [see § 104.204]. If the patient regains his or her abilities within 30 days of the signing of the agreement, he or she may revoke the agreement [see *Code Civ. Proc.* § 1295(c)]. However, the form provides, in accordance with the arbitration rules, that the decision of the responsible person on behalf of the patient binds the patient if he or she does not regain the ability to understand the agreement within the 30-day period.

[2] FORM

Supplemental Agreement by Responsible Person on Behalf of Minor, Unborn Child, or Disabled Person--To Be Attached to Arbitration Agreement

AGREEMENT ON BEHALF OF MINOR, UNBORN CHILD, OR DISABLED PERSON

I, _____[*name of responsible person*], as _____[*relationship or authority to act, e.g., parent of or legal guardian of or a responsible person authorized by the parent of the patient, _____(name of parent)*] and responsible for the patient, _____[*name of patient*], have read and understood the attached Arbitration Agreement between [the hospital and the patient *or* the physician and the patient], including the first article and the NOTICE. [*If appropriate, add: I have discussed this Agreement and its terms with the patient in order that the patient may know of and understand it to the limits of the patient's ability.*]

On behalf of the patient, I agree to bind [him or her] to the attached Arbitration Agreement.

If _____[*name of patient*] continues to be unable to exercise _____[*his or her*] rights for 30 days from the date of this Agreement, then my decision [*if appropriate add: or the decision of _____(his or her) parent or legal guardian*] whether or not to revoke this Agreement shall bind the patient. I understand that the decision to revoke this Agreement, whether made by me or by the patient [*if appropriate add: or by the patient's parent or legal guardian*], shall be made by written notification to the hospital [*or physician*] within these 30 days.

Dated:

[*signature of authorized person*]

[*typed name and relationship*]

[*address of authorized person*]

Legal Topics:

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33-104 California Legal Forms--Transaction Guide § 104.206

§ 104.206 Hospital Patients' Bill of Rights

[1] Comment

[a] Use of Form

This form is the list of patients' rights that every general acute care hospital and acute psychiatric hospital licensed by the State Department of Health Services must print and post in the hospital for the patients to read [*see 22 Cal. Code Reg. §§ 70707 (general acute care hospitals), 71507 (acute psychiatric hospitals)*]. The list of rights provided by regulation is not exclusive [*see 22 Cal. Code Reg. §§ 70707(b), 71507(a)*]. The first alternative is for use by general acute care hospitals and the second is for acute psychiatric hospitals.

[b] Patients' Bill of Rights

A person who is admitted to a hospital as a patient retains certain rights. The specific rights that are retained depend on the type of hospital (such as state or federal, psychiatric or general care) and vary from jurisdiction to jurisdiction. California hospitals licensed by the State Department of Health Services pursuant to Chapter 2 of the Health and Safety Code [*see Health & Safety Code §§ 1250-1339.37*] must adopt a written policy on patients' rights and post these rights in the hospital [*22 Cal. Code Reg. §§ 70707 (general acute care hospitals), 71507 (acute psychiatric hospitals)*].

A "general acute care hospital" is a hospital, licensed by the State Department of Health Services, having a duly constituted governing body with overall administrative and professional responsibilities and organized medical staff which provides 24-hour inpatient care, including the following basic services: medical, nursing, surgical, anesthesia, laboratory, radiology, pharmacy, and dietary services [*Health & Safety Code §§ 1250, 1253*]. Although most general care hospitals are included in this definition, counsel should verify that the particular hospital involved is covered. The rights that must be included in a patients' *bill of rights* are prescribed by regulation [*22 Cal. Code Reg. § 70707(b)*]. General acute care hospitals and medical staffs must adopt a written policy on patients' rights and post the list in both Spanish and English in appropriate places in the hospital so that the patients may read them. All hospital personnel must observe these rights, and a procedure must be established whereby patient complaints are forwarded to the hospital administration for appropriate response [*22 Cal. Code Reg. § 70707(a), (c), (d)*].

An "acute psychiatric hospital" means a health facility having a duly constituted governing body with overall administrative and professional responsibility and an organized medical staff that provides 24-hour inpatient care for mentally disordered, incompetent, or other referrals [see *Welf. & Inst. Code* §§ 5000 *et seq.*, 6000 *et seq.*], including medical, nursing, rehabilitative, pharmacy, and dietary services [*Health & Safety Code* § 1250(b)]. Acute psychiatric hospitals must adopt a written policy on patients' rights and post the list in both Spanish and English prominently. All hospital personnel must observe these rights, and a procedure must be established whereby patient complaints are forwarded to the hospital administration for appropriate response [22 *Cal. Code Reg.* § 71507(c), (d)].

When a patient is admitted to a general acute care hospital, the hospital must ask if the patient wants specified information regarding patients' rights and responsibilities to be provided to the patient's next of kin or agent under a durable power of attorney for health care [*Health & Safety Code* § 123222.2(b)(1)]. The hospital must provide that information, if the patient so directs [*Health & Safety Code* § 123222.2(b)(1)]. The material provided must include a comprehensive Patients' *Bill of Rights*, including the regulatory patients' rights for general acute care hospitals contained in 22 *Cal. Code Reg.* § 70707, and the rights afforded to patients under 42 C.F.R. § 482.13 [*Health & Safety Code* § 123222.2(b)(2)(A)].

The hospital may also provide written materials regarding the hospital's expectations of patients and patients' responsibilities while the patient is receiving care at the hospital [*Health & Safety Code* § 123222.2(b)(2)(B)].

On the request of the patient, or of the patient's next of kin or agent under a durable power of attorney for health care, a representative of any hospital providing patients' rights information or other documentation specified above must explain the materials provided [*Health & Safety Code* § 123222.2(c)].

[c] Posting Requirements

General acute care hospitals must post patients' rights in English and Spanish in appropriate places within the hospital so that patients may read their rights [22 *Cal. Code Reg.* § 70707(b)]. Acute psychiatric hospitals must post patients' rights in English and Spanish prominently [22 *Cal. Code Reg.* § 71507(c)].

[d] Format Requirements

Information produced by an general acute care hospital and provided to a patient regarding the patient's rights and responsibilities while receiving care at the hospital, or regarding grievances and appeals, must printed in at least a 12-point font that is clear and legible [*Health & Safety Code* § 123222.1(a), (b)(5)]. However, the hospital may continue to use its supply of materials that exists on January 1, 2003, until that supply is exhausted or until January 1, 2006, whichever occurs first. Effective January 1, 2006, the hospital must comply with the statutory requirements [*Health & Safety Code* § 123222.1(c)].

[2] FORM

Hospital Patients' Bill of Rights

HOSPITAL PATIENTS' BILL OF RIGHTS

This hospital and its medical staff have adopted the following Patients' Rights in the belief and with the expectation that understanding and observation of the rights will result in more effective patient care and in promotion of the confidence and trust which must exist between the patient, the physician, and the Hospital. It is recognized that the patient and the physician must have a personal relationship in order for the patient to receive proper and effective medical care, and that the patient's stay in this Hospital adds a new dimension to this relationship. It is also recognized that the Hospital has responsibilities and duties of its own to the patient. With due regard and respect for these factors, this Hospital and its

medical staff present and support the following Patients' Rights:

[*For general acute care hospital:*]

1. The right to exercise these rights without regard to sex, economic status, educational background, race, color, religion, ancestry, national origin, sexual orientation, marital status, or the source of payment for care.
2. The right to considerate and respectful care.
3. The right to knowledge of the name of the physician who has primary responsibility for coordinating the care and the names and professional relationships of other physicians who will see the patient.
4. The right to receive information about the illness, course of treatment, and prospects for recovery in terms that the patient can understand.
5. The right to receive as much information about any proposed treatment or procedure as the patient may need in order to give informed consent or to refuse this course of treatment. Except in emergencies, this information shall include a description of the procedure or treatment, the medically significant risks involved in this treatment, alternate courses of treatment or nontreatment and the risks involved in each, and the name of the person who will carry out the procedure or treatment.
6. The right to participate actively in decisions regarding medical care. To the extent permitted by law, this includes the right to refuse treatment.
7. The right to full consideration of privacy concerning the medical care program. Case discussion, consultation, examination, and treatment are confidential and should be conducted discreetly. The patient has the right to be advised as to the reason for the presence of any individual.
8. The right to confidential treatment of all communications and records pertaining to the care and the stay in the hospital. Written permission must be obtained before the medical records can be made available to anyone not directly concerned with the care.
9. The right to reasonable responses to any reasonable requests made for service.
10. The right to leave the hospital even against the advice of physicians.
11. The right to reasonable continuity of care and to know in advance the time and location of appointment as well as the persons providing the care.
12. The right to be advised if the hospital physician or personal physician proposes to engage in or perform human experimentation affecting care or treatment. The patient has the right to refuse to participate in such research projects.
13. The right to be informed of continuing health care requirements following discharge from the hospital.
14. The right to examine and receive an explanation of the bill regardless of the source of payment.
15. The right to know which hospital rules and policies apply to the patient's conduct while a patient.
16. The right to have all patients' rights apply to the person who may have legal responsibility to make decisions

regarding medical care on behalf of the patient.

17. The right to designate visitors of the patient's own choosing, if the patient has decision-making capacity, whether or not the visitor is related by blood or marriage unless:

a. No visitors are allowed.

b. The facility reasonably determines that the presence of a particular visitor would endanger the health or safety of the patient, a member of the health facility staff, or other visitors to the health facility, or would significantly disrupt the operations of the facility.

c. The patient has indicated to the health facility staff that the patient no longer wants this person to visit.

18. The right to have the patient's wishes considered for purposes of determining who may visit if the patient lacks decision-making capacity and to have the method of that consideration disclosed in the hospital policy on visitation. At a minimum, the hospital must include any person living in the household.

19. Nothing in these rights may be construed to prohibit a health facility from otherwise establishing reasonable restrictions on visitation, including restrictions on the hours of visitation and the number of visitors.

[The rights set forth in P 20 through 24, below, are contained in 42 C.F.R. § 483.13 :]

20. The right to be free from any physical or chemical restraints imposed for purposes of discipline or convenience, and not required to treat the resident's medical symptoms.

21. The right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion.

22. The right to be free of mistreatment, neglect, and abuse of residents and misappropriation of resident property by the facility staff, which means, in part, that the facility may not use verbal, mental, sexual, or physical abuse, corporal punishment, or involuntary seclusion, or employ individuals who have been found guilty of abusing, neglecting, or mistreating residents by a court of law, or have had a finding entered into the state nurse aide registry concerning abuse, neglect, mistreatment of residents or misappropriation of their property.

23. The right to have all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property, reported immediately to the facility administrator and to other officials in accordance with state law through established procedures (including to the state survey and certification agency).

23. The right to have all alleged violations thoroughly investigated, and to have the facility prevent further potential abuse while the investigation is in progress.

24. The right to have the results of all investigations reported to the administrator or the administrator's designated representative and to other officials in accordance with state law (including to the state survey and certification agency) within five working days of the incident, and if the alleged violation is verified, the right to have the facility take appropriate corrective action.

[For acute psychiatric hospital:]

1. The right to wear one's own clothes, to keep and use personal possessions including toilet articles, and to keep and be allowed to spend a reasonable sum of personal money for canteen expenses and small purchases.
2. The right to have access to individual storage space for private use.
3. The right to see visitors each day.
4. The right to have reasonable access to telephones, both to make and receive confidential calls.
5. The right to have reasonable access to letter writing materials, including stamps, and to mail and receive unopened correspondence.
6. The right to refuse shock treatment.
7. The right to refuse psychosurgery [*see Welf. & Inst. Code § 5325*].
8. The right to be informed of the provisions of law regarding complaints and of procedures for registering complaints confidentially, including but not limited to, the address and telephone number of the complaint receiving unit of the Department.
9. All other rights as provided by law or regulation.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Business Administration & Organization General Overview Healthcare Law Treatment General Overview



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 104 HEALTH CARE TRANSACTIONS, CONSENTS, AND DIRECTIVES
PART IV. FORMS
A. Admission and Arbitration Forms

33-104 California Legal Forms--Transaction Guide §§ 104.207-104.219

[Reserved]

§§ 104.207[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
 CHAPTER 104 HEALTH CARE TRANSACTIONS, CONSENTS, AND DIRECTIVES
 PART IV. FORMS
 B. Authorizations, Consents, and Refusals

33-104 California Legal Forms--Transaction Guide § 104.220

§ 104.220 Patient's Consent to Treatment or Procedure

[1] Comment

[a] Use of Form

This form is a consent to medical treatment to be used by physicians who want a written document signed by the patient as evidence that the patient has been informed of the proposed treatment or procedure, the available alternative treatments, the risks inherent in each treatment or procedure, and the patient consents to the treatment or procedure proposed by the physician. Many malpractice insurers offer their own medical consent forms.

Informed consent concerns the extent to which a physician must disclose to the patient the risks inherent in a proposed treatment and the available alternative treatments so that the patient may have the basis for making an informed and intelligent decision on whether or not to consent to the proposed treatment [see § 104.11]. Although this form may be evidence that informed consent was given by the patient, it is not a substitute for actual consent. For example, a signed form may be attacked if it can be shown that the patient was not actually given sufficient information to make his or her consent meaningful, or that fraud or coercion were used to obtain the patient's signature on the consent form [see *Cobbs v. Grant* (1972) 8 Cal. 3d 229, 104 Cal. Rptr. 505, 502 P.2d 1] .

The form also contains an optional assignment of benefits to the physician, as well as an acknowledgment that the patient is financially responsible for all charges, regardless of whether or not covered or paid by an insurance company. The assignment remains in effect until revoked and authorizes the assignee to release all medical information necessary to receive payment. For further discussion, see § 104.200[1][g].

[b] Disclosure Requirements

A patient's informed consent must be obtained before any medical treatment is performed or administered by a physician or hospital. To obtain that consent, the physician must make reasonable disclosure to the patient of the available therapies and the dangers inherently and potentially involved in each [*Truman v. Thomas* (1980) 27 Cal. 3d 285, 292B293, 165 Cal. Rptr 308, 611 P.2d 902 ; *Cobbs v. Grant* (1972) 8 Cal. 3d 229, 243, 104 Cal. Rptr. 505, 502

P.2d 1] . The scope of the duty of disclosure is measured by the patient's need of whatever information is material to the decision; whether a potential peril must be disclosed depends on its materiality to the patient's decision [*Cobbs v. Grant* (1972) 8 Cal. 3d 229, 245, 104 Cal. Rptr. 505, 502 P.2d 1] . For further discussion of disclosure requirements and informed consent, see § 104.11.

[c] Patient's Right to Consent

If a patient is competent and has the legal capacity to consent to medical treatment, the patient's consent to the treatment ordinarily must be obtained. The United States Constitution does not explicitly mention a right of personal privacy, right of self-determination, right to be left alone, or right to bodily integrity as such; however, the essence of these as a right to personal privacy has been recognized by the United States Supreme Court in several cases dealing with medical treatment. The right to personal privacy in these cases has been based on the *U.S. Const., amend. I, IV, V, or XIV*, or the penumbras of the *Bill of Rights* [see *Roe v. Wade* (1973) 410 U.S. 113, 152-153, 93 S. Ct. 705, 35 L. Ed. 2d 147] . As a fundamental right, the right of personal privacy cannot be regulated by the states unless there is a compelling state interest [*Roe v. Wade* (1973) 410 U.S. 113, 152-155, 93 S. Ct. 705, 35 L. Ed. 2d 147] .

There exists a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions [*Prob. Code* § 810; see also *Prob. Code* § 4657 (presumption of capacity under Health Care Decisions Law)].

[d] When Patient's Express Personal Consent Is Not Required

In accordance with this right of personal privacy, only limited instances exist when the patient's personal consent is not required. The exceptions include the following:

- Medical treatment for a minor, in which case consent usually may be given by the parent, parents, or legal guardian of the minor, unless an exception specified by statute applies [see *Fam. Code* § 6900 et seq.; see also [e], below].
- Emergency medical treatment when immediate treatment is necessary to preserve the life or health of the patient, in which case the patient's consent is implied [*Preston v. Hubbell* (1948) 87 Cal. App. 2d 53, 57-59, 196 P.2d 113 ; see *Prob. Code* §§ 2354(c) (consent by conservator to emergency medical treatment), 3210(b)(capacity determination procedures do not limit provision of emergency health care); see also [f], below].
- When the patient lacks the capacity to give his or her informed consent or, in the parlance of the Health Care Decisions Law, capacity to make a "health care decision" [see *Prob. Code* §§ 3200(b), 3201, 4617; see [g], below].

In most other instances, if the patient has the legal capacity to make health care decisions, the patient must give the consent.

[e] Consent of Minors

For a minor, the authority to consent is generally is transferred to his or her legal guardian or closest available relative [*Cobbs v. Grant* (1972) 8 Cal. 3d 229, 244, 104 Cal. Rptr. 505, 502 P.2d 1] . A parent, guardian, or caregiver of the minor who may authorize medical care [see *Fam. Code* § 6550] may authorize medical or dental care for the minor [*Fam. Code* § 6910].

On a minor's application, a court may grant consent to a minor's medical or dental care if the minor is at least 16 years

old, resides in California, and has no parent or guardian available to grant the necessary consent minor [*Fam. Code § 6911*]. In addition, the consent of the minor alone is authorized in certain limited situations [*see Fam. Code § 6920 et seq.*].

For forms and discussion relating to a minor's right to consent to medical treatment, see Ch. 100A, *Personal Affairs of Minors*.

[f] Emergencies

Various statutes clarify what is meant by an "emergency" for purposes of medical consents. *Prob. Code § 3210(b)* states that nothing in *Prob. Code § 3200 et seq.*, dealing with capacity determinations for adults without conservators, limits the provision of health care in an emergency case in which the health care is required because

- The health care is required for the alleviation of severe pain, or
- The patient has a medical condition that, if not immediately diagnosed and treated, will lead to serious disability or death.

Prob. Code § 2354(c), dealing with consent by conservators in emergency situations, uses essentially identical language.

Hospitals are required, within 24 hours after a patient who is unconscious or otherwise incapable of communication arrives in the emergency room, to make reasonable efforts to contact the patient's agent, surrogate, or a family member or other person the hospital reasonably believes has the authority to make health care decisions on behalf of the patient. The hospital will be deemed to have discharged this duty if it does all of the following: (1) examines the personal effects, if any, accompanying the patient, and any medical records regarding the patient in its possession, and reviews any verbal or written report made by emergency medical technicians or the police, to identify the name of any agent, surrogate, or a family member or other person the hospital reasonably believes has the authority to make health care decisions on behalf of the patient; (2) contacts or attempts to contact any agent, surrogate, or a family member or other person whom the hospital reasonably believes has the authority to make health care decisions on behalf of the patient; and (3) contacts the Secretary of State, directly or indirectly, including by voice mail or fax, to inquire whether the patient has registered an advance health care directive with the Advance Health Care Directive Registry, if the hospital has evidence of the patient's registry identification card from the patient, the patient's family, or an authorized agent [*Prob. Code § 4717(a)*; *see Prob. Code 4800(d)* (issuance of registry identification cards by Secretary of State)]. The hospital's efforts in this regard must be documented in the patient's medical record [*Prob. Code § 4717*].

[g] Patient Lacking Capacity to Make Health Care Decisions

If the patient lacks the capacity to give informed consent or make health care decisions, the person or persons who may consent on the patient's behalf depends on a variety of factors, including the following:

- Whether or not the patient has designated an agent under an advance health care directive [*see Prob. Code § 4683* (authority of agent to make health care decisions)] or a health care surrogate [*Prob. Code § 4711*; *see § 104.23*; *see also [j], below*] to make health care decisions. Unless the power of attorney for health care provides otherwise, an agent designated in a power of attorney who is known to the health care provider to be reasonably available and willing to make health care decisions has priority over any other person, including a conservator, in making health care decisions for the principal [*Prob. Code § 4685*; *see 2000 Health Care Decisions Law and Revised Power of Attorney Law*, 30 Cal. L. Revision Comm'n Reports at 82 (Mar. 2000)]. However, nothing in the Health Care Decisions Law grants a health care surrogate decision-making priority equal to that of an agent under a power of attorney for health

care; thus it appears that a health care surrogate does not have priority over a conservator in making health care decisions.

■ Whether or not the patient has a conservator of the person [see [h], *below*]. The fact that a conservator has been appointed does not automatically mean, in and of itself, that the patient lacks the capacity to make health care decisions [see *Prob. Code* §§ 813, 1881 (capacity for determining consent), 2354(a); see also § 104.123 (detailed checklist explaining when conservator may or may not consent to medical treatment for conservatee)]. However, a conservator of the person may consent on the patient's behalf, whether or not the patient actually consents, if the court determines under *Prob. Code* § 1880 *et seq.* that there is no form of medical treatment for which the conservatee has the capacity to give informed consent, or if a court order for the specific treatment has been obtained under *Prob. Code* § 2357 [*Prob. Code* § 2354(b)].

If there is no advance health care directive, health care surrogate, or conservator of the person, and the situation does not qualify as an emergency [see *Prob. Code* § 3210(b), discussed in [f], *above*], a determination of capacity and authorization for medical treatment under the procedure specified in *Prob. Code* §§ 3200-3212 may be required to authorize the treatment and designate a person who may legally consent [see *Prob. Code* § 3208(a) (power of court to issue order authorizing consent to treatment)]. Note that although there are statements in the case law to the effect that the patient's closest available relative has authority to consent to medical treatment on behalf of an incompetent [see, e.g., *Cobbs v. Grant* (1972) 8 Cal. 3d 229, 243-244, 104 Cal. Rptr. 505, 502 P.2d 1 ("if the patient is a minor or incompetent, the authority to consent is transferred to the patient's legal guardian or closest available relative")], the current statutes governing health care consents nowhere expressly confer such authority on any person (including the patient's spouse, parent, children, or siblings) with respect to an *adult* in a *non-emergency* situation (except in the limited case of skilled nursing and intermediate care facilities; in that case, the list of those having legal authority to make medical treatment decisions on behalf of an incapacitated patient expressly includes "next of kin" [see *Health & Saf. Code* § 1418.8(c)]). Arguments have been advanced that a general right to consent to medical treatment for an incapacitated patient is *implied* in favor of the patient's family or next of kin in various statutes [see *Health & Saf. Code* § 1418.8(c); *Prob. Code* § 4717(a)] or in the case law [see *Cobbs v. Grant*, cited *above*], or that a "community practice" to that effect exists, but there is a lack of direct, solid legal authority clearly establishing such a right [see AB 1990, 1999-2000 Legislative Session, Assembly Judiciary Committee Analysis (March 28, 2000), pp. 10-11 (this bill, which was not enacted, proposed the addition of a new *Health & Saf. Code* § 1261.1, which would have specifically given specified persons, including the patient's family members, legal authority to make medical treatment decisions on behalf of an incapacitated patient; as noted, however, it did not pass)].

Prob. Code § 4716(a) provides that when a patient lacks capacity to make a health care decision, the patient's registered domestic partner [see *Prob. Code* § 4716(b)(4); *Fam. Code* § 4609(b)(1)], if any, has the same authority that a spouse has to make a health care decision for his or her incapacitated spouse. However, this section also expressly provides that it not to be construed to expand or restrict the ability of a spouse to make a health care decision for an incapacitated spouse [*Prob. Code* § 4716(a)]; thus, this section neither affects a spouse's ability to consent to medical treatment, nor grants a domestic partner the right to consent when a similarly situated spouse would not have that right under the same circumstances [see discussion, *above*].

For additional a checklist of the persons who have authority to consent to medical treatment on behalf of another, and the circumstances under which they have that authority, see the checklist and discussion in § 104.123.

[h] Conservatorships in General

The fact that a patient has a conservator does not necessarily preclude the patient from giving valid consent to medical treatment. In fact, the opposite is true. Unless the conservatee has been adjudicated to lack the capacity to give informed consent to medical treatment [see *below*], the conservatee may consent to his or her own medical treatment and consent

of the conservator is not required [*Prob. Code § 2354(a)*; but see *Prob. Code § 2354(b)* (consent of conservator is sufficient, notwithstanding refusal of conservatee, if conservator obtains order under *Prob. Code § 2357*)].

Prob. Code § 1880 authorizes the court to make a general determination that the conservatee lacks the capacity to consent to any form of medical treatment. If the statutory criteria for such a determination are satisfied [see *Prob. Code §§ 811, 1881*], the court, following a hearing [see *Prob. Code §§ 1892, 1895* (procedures for hearing and determination)], may issue an order to that effect and grant the conservator of the person the power to consent to medical treatment as specified in *Prob. Code § 2355* [*Prob. Code §§ 1880, 1896*]. *Prob. Code § 2355* requires that the conservatee make health care decisions for the conservator in accordance with the the conservatee's health care instructions and other wishes, to the extent known, and otherwise in accordance with the conservator's determination of the conservatee's best interest. Special rules apply to certain types of drugs and treatment, such as experimental drugs, convulsive treatment, and placement of persons suffering from dementia in a secured facility [see *Prob. Code §§ 2356, 2356.5*].

In addition, *Prob. Code § 2357* provides a procedure by which a conservator may obtain a court order authorizing medical treatment for an existing or continuing medical condition if that treatment is not otherwise authorized by the applicable statutes, and permitting the conservator to consent to that medical treatment on behalf of the conservatee. A conservator who obtains an order under *Prob. Code § 2357* may require the conservatee to receive medical treatment specifically authorized by that order, whether or not the conservatee consents to the treatment [*Prob. Code § 2354(b)*].

In the absence of authorization under *Prob. Code § 1880 et seq.* or *Prob. Code § 2357* as described above, a conservator has the power to give consent to medical treatment for the conservatee, but only if the conservatee does not object to the treatment [*Prob. Code § 2354(a)*], or if an emergency exists as discussed in [f], above [*Prob. Code § 2354(c)*].

Note that if the conservatee has designated an agent under a power of attorney for health care, that agent, if known to the health care provider to be reasonably available and willing to make health care decisions, has priority over any other person in making health care decisions for the principal [*Prob. Code § 4685*]. The Law Revision Commission comments to *Prob. Code § 4685* make it clear that this section was intended to give an agent priority over a conservator or a statutory surrogate [2000 *Health Care Decisions Law and Revised Power of Attorney Law*, 30 Cal. L. Revision Comm'n Reports at 82 (Mar. 2000)]. Based on the Law Revision Commission comment, it appears that this provision in *Prob. Code § 4685* overrides language in *Prob. Code § 2355* stating that if a conservatee has been adjudicated to lack capacity to make health care decisions, the conservator has "exclusive" authority to make health care decisions for the conservatee [*Prob. Code § 2355(a)*].

[i] Conservatorships Under Lanterman-Petris-Short Act

A conservator appointed pursuant to the Lanterman-Petris-Short Act [*Welf. & Inst. Code § 5000 et seq.*] has the right, if specified in the appointment order, to require the conservatee to receive treatment related specifically to remedying or preventing the recurrence of the conservatee being gravely disabled, or to require the conservatee to receive routine medical treatment unrelated to remedying or preventing the recurrence of the conservatee being gravely disabled [*Welf. & Inst. Code § 5358(b)*]. Notwithstanding the prior issuance of such an order, the conservator must obtain a court order specifically authorizing any surgery on the conservatee except (1) in emergency cases in which the conservatee faces loss of life or serious bodily injury or (2) in cases in which the conservatee gives prior consent to the surgery [*Welf. & Inst. Code § 5358(b)*]. If the court order appointing the conservator does not specifically authorize the conservator to require the conservatee to receive medical treatment, the conservator must obtain a court order for that treatment except in emergency cases in which the conservatee faces loss of life or serious bodily injury [*Welf. & Inst. Code § 5358.2*].

[j] Agents Under Power of Attorney; Health Care Surrogates

If the patient is not competent, and has executed a power of attorney for health care [see § 104.230], the agent

designated in the power of attorney may make health care decisions for the principal to the same extent that the principal could make health care decisions if the principal had the capacity to do so [*Prob. Code § 4683*]. The agent's authority becomes effective only on a determination that the principal lacks capacity, and ceases to be effective on a determination that the principal has recovered capacity [*Prob. Code § 4682*]. Unless the power of attorney specifies otherwise, the principal's primary physician is the one empowered to determine whether or not the patient has capacity for this purpose [*Prob. Code § 4258*]. The patient is presumed to have capacity to make a health care decision; this presumption is one affecting the burden of proof [*Prob. Code § 4657*].

If an agent has been designated under a power of attorney, and that agent is known to the health care provider to be reasonably available and willing to make health care decisions, that agent has priority over any other person in making health care decisions for the principal [*Prob. Code § 4685*], including a conservator [*2000 Health Care Decisions Law and Revised Power of Attorney Law*, 30 Cal. L. Revision Comm'n Reports at 82 (Mar. 2000); see [h], above].

An agent is required to make health care decisions in accordance with the principal's individual health care instructions, to the extent they are known to the agent. Otherwise, the agent must make health care decisions in accordance with the agent's determination of the principal's best interest, taking into account the principal's personal values to the extent known to the agent [*Prob. Code § 4684*]. The agent does *not* have the power to make a health care decision if the principal objects to that decision, apparently regardless of whether or not the principal has the capacity to make that decision himself or herself. If the principal objects, the matter is governed by the law that would apply if there were no power of attorney for health care, as discussed in this comment [*Prob. Code § 4689*]. Furthermore, the authority of an agent to make health care decisions does not extend to certain specified procedures, including commitment or treatment in a mental health facility, convulsive treatment, psychosurgery, sterilization, abortion [*Prob. Code § 4652*], or any health care contrary to generally accepted health care standards [*Prob. Code § 4654*; see also *Prob. Code § 4653* (mercy killing or euthanasia prohibited)].

A patient may designate an adult as a health care surrogate by personally informing the supervising health care provider [*Prob. Code § 4711(a)*]. The designation may be made either orally or in writing [*2000 Health Care Decisions Law and Revised Power of Attorney Law*, 30 Cal. L. Revision Comm'n Reports at 101 (Mar. 2000)]. Unless the patient specifies a shorter period, a surrogate designation is effective only during the course of treatment or illness or during the stay in the health care institution when the surrogate designation is made, or for 60 days, whichever period is shorter [*Prob. Code § 4711(b)*]. The expiration of a surrogate designation does not affect any role the person designated under *Prob. Code § 4711(a)* may have in making health care decisions for the patient under any other law or standards of practice [*Prob. Code § 4711(c)*]. If the patient has designated an agent under a power of attorney for health care, the surrogate designated under *Prob. Code § 4711(a)* has priority over the agent for the period provided in *Prob. Code § 4711(b)*, but the designation of a surrogate does not revoke the designation of an agent unless the patient communicates the intention to revoke in compliance with *Prob. Code § 4695(a)* [*Prob. Code § 4711(d)*; see § 104.35[1]]. For additional discussion of health care surrogates, see § 104.38.

[k] Consent to HIV Testing

Informed consent is generally required for HIV (human immunodeficiency virus) testing done by a medical care advisor, unless a person independently requests the test [see *Health & Safety Code § 120990(a), (b)*; see also *Health & Safety Code § 120990(d), (e)* (exceptions)]. An "HIV test" is any clinical test, laboratory or otherwise, used to identify HIV, a component of HIV, or antibodies or antigens to HIV [*Health & Safety Code § 120775(c)*].

Before ordering an HIV test, a medical care provider must inform the patient that the test is planned, provide information about the test, inform the patient regarding specified treatment options and further testing needed, and advise the patient that he or she has the right to decline the test [see *Health & Safety Code § 120990(a)*]. If a patient declines the test, the medical provider must note that fact in the patient's medical file [*Health & Safety Code § 120990(a)*].

If the patient is not competent to give consent, consent may in some circumstances be given by the person authorized to make health care decisions for the patient, such as a parent, guardian, or conservator [see *Health & Safety Code* § 121020(a)]. A child 12 years of age or older is considered to be competent for purposes of consenting to the HIV test [Fam. Code § 6926; *Health & Safety Code* § 121020(a)].

No person may administer an HIV test unless the person being tested (or his or her parent, guardian, conservator, or other person specified in *Health & Safety Code* § 121020), signs a written statement documenting the person's informed consent [*Health & Safety Code* § 120990(c)]. This requirement, however, does not apply to anonymous HIV testing performed at alternative sites established by the county, in accordance with *Health & Safety Code* §§ 120890 or 120895 [*Health & Safety Code* § 120990(c)].

The written consent requirement also does not apply to tests performed to detect HIV on a cadaver when an autopsy is performed or body parts are donated under the Uniform Anatomical Gift Act (*Health & Safety Code* § 7150 et seq.) [*Health & Safety Code* § 120990(d)]. Written consent is not required when blood is tested as part of a scientific investigation conducted either by a medical researcher approved by an institutional review board or by the Department [*Health & Safety Code* § 120990(e)(1); see *Health & Safety Code* § 120990(e)(2) (tests results must remain anonymous)]. Tests may also be performed without written consent on blood donated for transfusions [see *Health & Safety Code* §§ 1603.1-1603.4] and on certain criminal defendants [*Health & Safety Code* §§ 121050-121070].

[I] Malpractice Actions

Malpractice actions against physicians for treating a patient without having obtained the proper informed consent may be based on one of two theories. If the physician acts without any consent, or the physician obtains consent for one treatment and subsequently performs a substantially different treatment for which no consent was obtained, an action may be based on a theory of assault and battery [*Valdez v. Percy* (1939) 35 Cal. App. 2d 485, 491, 96 P.2d 142 ; *Cobbs v. Grant* (1972) 8 Cal. 3d 229, 239, 104 Cal. Rptr. 505, 502 P.2d 1] . On the other hand, when an undisclosed but known inherent risk results from a treatment, an action based on negligence is proper [*Cobbs v. Grant* (1972) 8 Cal. 3d 229, 240B241, 104 Cal. Rptr. 505, 502 P.2d 1] . Additionally, when the physician guarantees or promises a particular result and the patient consents to the treatment in reliance on that guaranty or promise, an action may be brought on the theory of breach of contract [*Depenbrok v. Kaiser Foundation Health Plan, Inc.* (1978) 79 Cal. App. 3d 167, 171, 144 Cal. Rptr. 724] .

Physicians are not liable for negligence or malpractice if proper consent of the patient has been obtained, and an action is maintained solely on the basis of an unfavorable result that is the natural or expected result of reasonable treatment rendered for the disease or condition [*Civ. Code* § 1714.8].

This form contains an optional clause for use when a specific operation is proposed and consented to, and the physician wants authority to perform additional operations and procedures that are considered necessary and advisable by the chief surgeon and his or her assistants at the time of surgery. The provision is not intended for, nor should it be used as, a blanket consent for the performance of additional surgery that the surgeons consider to be conveniently performable at the time of surgery. Such a broad use of this optional provision could lead to a charge of battery since the surgeons would then be performing an operation for which no informed consent has been obtained.

[2] FORM

Patient's Consent to Treatment or Procedure

PATIENT'S CONSENT TO TREATMENT OR PROCEDURE

I, the undersigned, have been duly informed by Dr. _____ [name of treating physician] of the nature,

risks, and possible complications and consequences, and available alternative methods of treatment to the _____ [name of proposed treatment or procedure] that _____ [he or she] has recommended for _____ [name of person to be treated]. I understand this _____ [name of treatment or procedure] is for the relief of [medical condition] and _____ [I hereby consent to this treatment or I hereby authorize and consent to the performance on _____ (person to be treated) of _____ (name and nature of operation) to be performed by or under the direction of Dr. _____ (name of chief operating surgeon)].

[Optional provision regarding surgery:]

Dr. _____ [name of treating physician or chief surgeon] has explained to me that conditions may arise that are unforeseen at this time, such that Dr. _____ [name of chief surgeon] and the doctors under _____ [his or her] direction may consider it necessary and advisable to perform operations and procedures different from, and in addition to, the _____ [name of operation]. I hereby authorize and consent to the performance of such additional operations and procedures as they consider medically necessary and advisable.

[Optional provision:]

I know that the practice of medicine and surgery is not an exact science and I have neither asked for nor received any guaranties or promises as to the results which will be obtained.

This form has been explained to me and I acknowledge that I have read and understand its contents.

Date: _____.

Time: _____.

_____ [signature of patient or authorized person]
[typed name and relationship]

[Optional:]

Assignment of Benefits

I hereby assign all [medical or medical and surgical] benefits to which I am entitled, including Medicare, private insurance, Medi-Cal, and any other health plans to _____ [name of treating physician or surgeon or medical partnership]. This assignment remains in effect until revoked by me in writing. A photocopy of this assignment is to be considered as valid as an original. I acknowledge that I am financially responsible for all charges, whether or not paid by an insurance company, including [all or reasonable] costs of collection incurred in the event of nonpayment. I hereby authorize the assignee to release all medical information necessary to receive payment.

Date: _____.

_____ [signature of patient or authorized person]

[typed name and relationship]

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentPatient ConsentGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
 CHAPTER 104 HEALTH CARE TRANSACTIONS, CONSENTS, AND DIRECTIVES
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 B. Authorizations, Consents, and Refusals

33-104 California Legal Forms--Transaction Guide § 104.221

§ 104.221 Authorization for and Consent to Surgery or Special Diagnostic or Therapeutic Procedures

[1] Comment--Use of Form

This form is typical of those used by hospitals to verify that a physician has obtained the patient's informed consent to surgery or some other complex procedure or treatment recommended by the physician for the patient. Because it is the physician's duty to obtain the informed consent, this verification form provides the hospital with a method for determining that the patient's informed consent for the indicated treatment or procedure has actually been obtained by the physician. In case of a later dispute on the matter, the form could be used as evidence that the patient gave this consent.

The form may be adapted for use by hospitals that teach interns and residents by adding a clause stating that the hospital is a teaching hospital and that interns and residents will be involved in the care of the patient. Modification may also be made in accordance with variations in the relationships between the hospital and anesthesiologists, pathologists, and radiologists, as independent contractors.

[2] FORM

Authorization for and Consent to Surgery or Special Diagnostic or Therapeutic Procedures

AUTHORIZATION FOR AND CONSENT TO SURGERY OR SPECIAL DIAGNOSTIC OR THERAPEUTIC PROCEDURES

To _____[*name of patient*]

Your attending physician is _____[*name*], M.D.

Your supervising physician or surgeon is _____[*name*], M.D.

Right to Be Informed of Risks and Right to Consent to or Refuse Proposed Procedure

1. The hospital maintains personnel and facilities to assist your physicians and surgeons in their performance of various surgical operations and other special diagnostic and therapeutic procedures. These operations and procedures may all involve risks of unsuccessful results, complications, injury, or even death, from both known and unforeseen causes, and no warranty or guaranty is made as to result or cure. You have the right to be informed of such risks as well as the nature and purpose of the operation or procedure and the available alternative methods of treatment, and this form is not a substitute for such explanations which are provided by the above-named physicians. Except in cases of emergency, operations or procedures are not performed until the patient has had the opportunity to receive such explanations. You have the right to consent to or refuse any proposed operation or procedure anytime prior to its performance.

Performance of Proposed Operation or Procedure

2. Your physician and surgeons have recommended the operations or procedures set forth below. On your authorization and consent, those operations or procedures, together with any different or further procedures that, in the opinion of the supervising physician or surgeon, may be indicated due to any emergency, will be performed on you. The operations or procedures will be performed by the supervising physician or surgeon named above (or in the event of any emergency causing his or her absence, a qualified substitute supervising physician or surgeon to be selected by your attending physician) together with associates and assistants, including anesthesiologists, pathologists, and radiologists from the medical staff of _____[name] Hospital to whom the supervising physician or surgeon may assign designated responsibilities. The persons in attendance for the purpose of performing specialized medical services such as anesthesia, radiology, or pathology are not agents, servants, or employees of the hospital or your supervising physician or surgeon but are independent contractors, and, therefore, your agents, servants, or employees.

Disposition of Body Member, Organ, or Tissue by Pathologist

3. The hospital pathologist is hereby authorized to use his or her discretion in disposition of any member, organ, or other tissue removed from your person during the above-named procedure(s).

Acknowledgment of Authorization

4. Your signature below constitutes your acknowledgment (1) that you have read and agree to the foregoing; (2) that the operation or procedure set forth below has been adequately explained to you by your supervising physician or surgeon and by your anesthesiologist and that you have received all of the information you desire concerning such operation or procedure; and (3) that you authorize and consent to the performance of the operation or procedure.

Operation or Procedure: *[insert description of operation or procedure]*

Dated: _____.

Time: _____.

PATIENT OR AUTHORIZED REPRESENTATIVE

_____ *[signature of patient, parent, or legal guardian]*

[typed name]

[If signed by other than patient, indicate relationship:]

_____ *[relationship]*

WITNESS

_____ [*signature of witness*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentPatient ConsentGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 104 HEALTH CARE TRANSACTIONS, CONSENTS, AND DIRECTIVES
PART IV. FORMS
B. Authorizations, Consents, and Refusals

33-104 California Legal Forms--Transaction Guide § 104.222

§ 104.222 Patient's Refusal of Treatment or Procedure

[1] Comment

[a] Use of Form

This form is a refusal by a patient to permit a hospital or physician, or both, to administer a proposed treatment or procedure. When a physician believes the proposed treatment or procedure is essential to treat a patient's illness, disease, or condition, such as the administering of a blood transfusion, the hospital or physician, or both, may want a written statement of the refusal for their records. However, because the patient has a right to refuse treatment [*see [b], below*], the hospital or physician may not coerce the patient to sign the statement.

[b] Right to Refuse Treatment

While a patient is in the hospital, the right to refuse treatment is provided for in the patient's rights that are prescribed by regulation and which state that the patient has the right to participate actively in decisions regarding his or her medical care and, to the extent permitted by law, this includes the right to refuse treatment [*see 22 Cal. Code Reg. § 70707(b)(6); see also 22 Cal. Code Reg. § 71507 (acute care psychiatric hospitals); 104.206*]. Moreover, the right to refuse treatment is an integral part of a person's right to exercise control over his or her own body and to determine whether or not to submit to medical treatment [*Cobbs v. Grant (1972) 8 Cal. 3d 229, 242, 104 Cal. Rptr. 505, 502 P.2d 1*] .

[2] FORM

Patient's Refusal of Treatment or Procedure

REFUSAL TO PERMIT MEDICAL TREATMENT

I acknowledge that my attending physician, Dr. _____ [*name*], has informed me of the advisability of, the risks inherent in, and the probable consequences of not receiving the following medical treatment: [*insert*

description].

Notwithstanding the recommendation of my attending physician, I hereby request that the foregoing treatment not be administered to me [*if appropriate, add: during my stay at _____ (name) Hospital*] and hereby release [*if appropriate, add: the Hospital, its personnel,*] my attending physician, and any other person participating in my care from any responsibility whatsoever for unfavorable or untoward results caused by my refusal to permit the use of this treatment.

Date: _____.

Time: _____.

PATIENT OR AUTHORIZED REPRESENTATIVE

_____ [*signature of patient, parent, or guardian*]

[*typed name*]

[*If signed by other than patient, indicate relationship:*]

_____ [*relationship*]

WITNESS

_____ [*signature of witness*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentPatient ConsentRight to Refuse Treatment



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DIVISION VII: PERSONAL TRANSACTIONS
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 PART IV. FORMS
 B. Authorizations, Consents, and Refusals

33-104 California Legal Forms--Transaction Guide § 104.223

§ 104.223 Authorization for Release of Medical Information--CMA Form

[1] Comment

[a] Use of Form

This form is the California Medical Association form authorizing a physician to release medical records concerning a patient. It was prepared by the California Medical Association for use by physicians in private practice and is reproduced here by permission. It is accompanied by extensive instructions prepared by the CMA concerning the use of the form, which are not reproduced here. Copies of the form and the accompanying instructions may be ordered from CMA Publications, (415) 882-5175.

The form may be modified for hospital use. A patient in a general acute care hospital has the right to confidential treatment of all communications and records pertaining to his or her care and stay in the hospital, and the permission of the patient must be obtained before the medical records can be made available to anyone not directly concerned with the care of the patient [22 *Cal. Code Reg. § 70707(b)(8)*].

This form also may be adapted for use in special situations, such as to authorize the release of information on alcohol abuse or drug abuse patients. For this situation, however, counsel should review the specific federal and state laws and regulations dealing with the confidentiality of the records of alcohol or drug abuse patients [see 42 *C.F.R. § 2.1 et seq.*; *Welf. & Inst. Code § 5000 et seq.*].

[b] Ownership of Records

The medical record of a patient is the property of the hospital. The hospital must safely preserve the record for a minimum of seven years following the discharge of the patient or, if the patient is an unemancipated minor, the record must be kept for at least one year after the minor becomes 18 years of age and, in any case, not less than seven years [22 *Cal. Code Reg. § 70751(b), (c)* (applicable to general acute care hospitals)].

[c] Information in Records

State regulations set forth a list of information that must, at a minimum, be included in the medical records of a patient in a general acute care hospital. The required information must include, among other things, statistical information on the patient, a history and examination report, progress notes, information on medication administered to the patient, laboratory tests and X-ray examination reports, pathology reports, operative reports, and a discharge summary [see 22 Cal. Code Reg. § 70749].

[d] Release Pursuant to Confidentiality of Medical Information Act

This form is designed to meet the requirements of the Confidentiality of the Medical Information Act of 1981 [Civ. Code § 56 *et seq.*]. Statutory requirements regarding the necessity of obtaining authorizations for release of medical information are found in Civ. Code § 56.10, which also provides exceptions under which authorization is unnecessary. Certain entities and situations are exempt from the provisions of the Act [see Civ. Code § 56.10(b); see also § 104.113]. Additionally, Civ. Code § 56.10(c)(11) provides that medical information may be disclosed without authorization by a health care provider or a health care services plan to an insurance institution, agent, or support organization, subject to the provisions of the Insurance Information and Privacy Protection Act [Ins. Code § 791 *et seq.*], which provides standards and regulations for the collection, use, and disclosure of information gathered in connection with insurance transactions by insurance institutions, agents, or support organizations. Medical information may only be disclosed pursuant to this part if the particular insurance institution, agent, or support organization has complied with all the requirements for obtaining information under the Insurance Information and Privacy Protection Act.

Whenever a demand for settlement or offer to compromise is made on behalf of a patient before service of the complaint on the defendant in a professional negligence suit against a physician or surgeon, the demand must be accompanied by an authorization to disclose medical information to the persons or organizations insuring, responsible for, or defending the professional liability of the physician or surgeon [see Civ. Code § 56.105].

If the authorization is for the purpose of processing an application for health insurance, or enrollment in a nonprofit hospital or health care service plan, and the processing of related claims, the authorization may be signed by the patient's spouse or by the parent, conservator or guardian of a patient who is a minor, or by an enrolled dependent. The authorization may be signed by a parent, conservator, or guardian for the purpose of making a claim for benefits or damages if the claimant is a minor, or for the purpose of underwriting a life insurance policy if the person to be insured is a minor. The minor may sign the authorization for himself or herself if the minor is legally competent to consent to the provision of medical services [Civ. Code § 56.11(c); see Fam. Code § 6900 *et seq.*].

For forms and discussion relating to a minor's consent to medical treatment, see Ch. 100A, *Personal Affairs of Minors*.

[e] Release to Attorney

Before filing an action or the appearance of the defendant in an action, an attorney may present a written authorization signed by the patient to inspect and copy the medical records of the patient. The request must be honored within five days of the presentation, during business hours [Evid. Code § 1158]. The patient's records must also be made available for inspection and copying by the attorney's agent or representative, on presentation of the patient's authorization by the agent or representative [Evid. Code § 1158].

If a request for records is made to an entity expressly covered by the first paragraph of Evid. Code § 1158 (such as a hospital), then an agent or contractor of that entity may be held liable for a violation of the statute if the agent or contractor (1) has assumed the duty of responding to Evid. Code § 1158 requests and (2) is acting for its own advantage and benefit as well the interests of the entity expressly covered by the statute [*Thornburg v. Superior Court* (2006) 138 Cal. App. 4th 43, 53, 41 Cal. Rptr. 3d 156 (contractor assumed hospital's duty to meet statutory obligations when contractor agreed to provide copies of records pursuant to any request received and forwarded by hospital; contractor

acted for its own advantage because contractor was free to impose any fee to person requesting records, hospital was bound to forward any fee it received, and contractor would hold hospital harmless; therefore, contractor could be liable for charging fees exceeding maximum amounts permitted by statute)].

[f] Subpoenaed Records

If the medical records of a patient are subpoenaed, the permissible method of compliance depends on the language of the subpoena. For a subpoena duces tecum, a copy of the records may suffice [*see Evid. Code §§ 1560-1562*]. Even though the records or a copy of the records must be delivered to the court when subpoenaed, the physician-patient privilege [*see Evid. Code § 990 et seq.*] may possibly be assertable. Therefore, the physician should notify the patient that his or her records have been subpoenaed, unless the patient is a party to the action.

[g] Release to Others

If no special statutory provisions govern the disclosure of information in the patient's medical record, the usual criteria for determining whether the physician must obtain the authorization of the patient for release of that information, are (1) whether the information pertains to the care and stay of the patient in the hospital, as opposed to general statistics such as the patient's name and address; and (2) whether the person to whom the information will be released is directly concerned with the care of the patient. Moreover, while the records pertain to the patient, they belong to the hospital and, thus, the hospital has some amount of discretion when a patient wants to see his or her records. In this situation, it may be advisable for the hospital to consult with the patient's physician, depending on the nature of the information that the patient wants to inspect.

[h] Privacy Acts

If a federal hospital is involved, counsel should review the federal Right of Privacy Act of 1974 [*see 5 U.S.C. §§ 551, 552*]. When a state agency may be involved, see the Information Practices Act of 1977 [*Civ. Code § 1798 et seq.* (definition of "state agency")].

[2] FORM

Authorization for Release of Medical Information--CMA Form

[Please see Original Source or contact Editorial Support for assistance.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 104 HEALTH CARE TRANSACTIONS, CONSENTS, AND DIRECTIVES
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33-104 California Legal Forms--Transaction Guide §§ 104.224-104.229

[Reserved]

§§ 104.224[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 104 HEALTH CARE TRANSACTIONS, CONSENTS, AND DIRECTIVES
PART IV. FORMS
C. Advance Health Care Directives and Related Forms

33-104 California Legal Forms--Transaction Guide § 104.230

§ 104.230 Advance Health Care Directive (Durable Power of Attorney)

[1] Comment

[a] Use of Form

This form is an advance health care directive. This advance health care directive may be used to authorize an agent to make decisions regarding the principal's health care, personal care, anatomical gifts, funerals, autopsies, and related matters. It includes a power of attorney for health care (formerly referred to as a "durable power of attorney for health care" [see [c], *below*]). For illustrative purposes, all available provisions have been included in this form; however, they need not all be included when actually drafting an advance directive using this form.

This form is based on the statutory Advance Health Care Directive form [*Prob. Code § 4701*], and contains provisions authorizing the attorney in fact to make health care decisions for the principal, specifying the principal's desires regarding life-prolonging treatment, to make personal care decisions for the principal, and either nominating or authorizing the attorney in fact to nominate a conservator of the principal's person. The statutory form may be used, but its use is not mandatory. An individual may modify all or any part of the statutory form, or use a completely different form [*Prob. Code §§ 4700, 4701*]. Other organizations, including the California Health Care Association, have prepared their own printed forms. The provisions of the Health Care Decisions Law govern the effect of the form as well as any other writing used to create an advance health care directive [*Prob. Code § 4700*].

An advance health care directive must be used if the principal wishes to authorize his or her agent to make health care decisions on his or her behalf. Authorizations relating to health care cannot be made in a durable power for property management [see *Prob. Code §§ 4605, 4665*].

When drafting an advance health care directive, counsel should familiarize himself or herself with the two types of directives [see [c], *below*], and the various statutory provisions relating to advance health care directives, particularly those relating to acknowledgment and witnesses [see [f], *below*].

[b] Contents

A written advance health care directive is legally sufficient if all of the following requirements are satisfied [*Prob. Code* § 4673(a); *see Prob. Code* § 4680 (power of attorney is legally sufficient if it satisfies same requirements)]:

- The advance directive contains the date of its execution.
- The advance directive is signed either (1) by the patient or (2) in the patient's name by another adult in the patient's presence and at the patient's direction.
- The advance directive is either acknowledged before a notary public or signed by at least two witnesses who satisfy specified statutory requirements [*see [f], below*].

An electronic advance health care directive or a power of attorney for health care is legally sufficient if the requirements of *Prob. Code* § 4673(a) are satisfied, the directive is acknowledged before a notary public, and any digital signatures used meet specified requirements [*see Prob. Code* § 4673(b); for discussion of requirements for digital signatures, *see* § 104.31].

[c] Health Care Instruction Distinguished From Power of Attorney

An advance health care directive (or advance directive) may be either an individual health care instruction or a power of attorney for health care [*Prob. Code* § 4605].

An individual health care instruction (or individual instruction) means a patient's written or oral direction concerning a health care decision for the patient [*Prob. Code* § 4623]. An adult having capacity may give an individual instruction, and the instruction may be limited to take effect only if a specified condition arises [*Prob. Code* § 4670].

In contrast, a power of attorney for health care is a written instrument designating an agent to make health care decisions for the patient [*Prob. Code* § 4629]. An adult having capacity may execute a power of attorney, which may also include individual health care instructions [*Prob. Code* § 4671(a)]. The principal may grant authority to the agent to make decisions relating to the personal care of the principal, including, but not limited to, determining where the principal will live, providing meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment [*Prob. Code* § 4671(b)].

Prior to July 1, 2000, durable powers of attorney for health care, like other durable powers of attorney, were governed by the general provisions of the Power of Attorney Law [*Prob. Code* § 4100 *et seq.*], augmented by special provisions applicable specifically to durable powers of attorney for health care [former *Prob. Code* § 4600 *et seq.* (repealed effective July 1, 2000)]. Effective July 1, 2000, however, durable powers of attorney are no longer governed by the Power of Attorney Law [*see Prob. Code* § 4050(a)(1)]. Instead, they are governed by the Health Care Decisions Law [*Prob. Code* § 4600 *et seq.*; *see Prob. Code* § 4680]. The Health Care Decisions law generally abandons the term "durable power of attorney for health care" (except with reference to powers executed under prior law [*see, e.g., Prob. Code* § 4665(a), (e)]), and instead substitutes the simpler term "power of attorney for health care" [*see Prob. Code* §§ 4629, 4680-4690]. Powers of attorney for health care are now treated as a species of "advance health care directive" as noted above [*Prob. Code* § 4605].

[d] Limiting Agent's Authority

Unless the advance health care directive limits the authority of the agent, the agent may make all health care decisions for the patient/principal [*Prob. Code* § 4701]. This form includes a place to limit the agent's authority. If the principal wishes to rely on the agent for all health care decisions, the principal need not limit the agent's authority. If no limitations are stated, the agent has the right to take all of the following actions [*Prob. Code* § 4701]:

- Consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition.
- Select or discharge health care providers and institutions.
- Approve or disapprove diagnostic tests, surgical procedures, and programs of medication.
- Direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation.
- Make anatomical gifts, authorize an autopsy, and direct disposition of remains.

Further, unless otherwise specified in the directive, the agent has the same rights as the patient to request, receive, examine, copy, and consent to the disclosure of medical or any other health care information [*Prob. Code § 4678*].

If the agent has authority to select or discharge health care providers and institutions, that implicitly includes the power to execute contracts of admission when having the principal admitted to a long-term health care facility. Unless the principal elects to restrict the powers of the agent so as to exclude any power to enter into arbitration agreements, the agent has the power to execute arbitration agreements when presented by the long-term health care facility as part of the package of admission documents [*Hogan v. Country Villa Health Servs. (2007) 148 Cal. App. 4th 259, 262, 264, 55 Cal. Rptr. 3d 450*] . On the other hand, when there is no advance health care directive, then there is no such implicit authority from which could arise a power to execute arbitration agreements; and in such a case, a mere family relationship (as between husband and wife, for example) is not alone sufficient to confer authority to agree to an arbitration provision in a nursing-home admission contract [*Flores v. Evergreen at San Diego, LLC (2007) 148 Cal. App. 4th 581, 586-587, 55 Cal. Rptr. 3d 823*] .

[e] Limiting Authority to Institute Judicial Proceedings

In general, an advance health care directive may expressly eliminate the authority of a person otherwise entitled to petition the court for any one or more of the purposes enumerated in the statute, if both of the following requirements are satisfied [*Prob. Code § 4753(a)*; *see Prob. Code §§ 4765, 4766*]:

- The advance directive is executed by an individual having the advice of a lawyer authorized to practice law in the state where the advance directive is executed.
- The individual's lawyer signs a certificate stating the substance of the required statutory language.

An advance health care directive may not limit the authority of a conservator of the person, with respect to a petition relating to an advance directive, to determine whether the directive is in effect or seeking a declaration that the agent's or surrogate's authority is terminated [*Prob. Code § 4753(b)*; *see Prob. Code § 4766(b), (d)*]. Further, a directive may not limit an agent's authority to file a petition relating to a power of attorney for health care to determine whether the directive is in effect or whether acts are consistent with the directive [*Prob. Code § 4753(b)*; *see Prob. Code § 4766(b), (c)* (if patient's wishes are unknown or unclear, court may declare whether actions are in patient's best interest)].

This form includes a lawyer's certificate that complies with the foregoing requirement and the form may be adapted to limit the agent's authority as permitted by statute [*see [2], below*]. For further discussion of judicial proceedings regarding advance health care directives, *see § 104.36*.

[f] Acknowledgment and Witness Requirements

An advance directive must either be acknowledged before a notary public or signed by at least two witnesses [*Prob. Code § 4673(a)(3)*]. When an advance directive is acknowledged before a notary public, the witness requirements discussed below do not apply [*Prob. Code § 4674(g)*], except that a patient advocate or ombudsman must sign the advance directive if the individual is a patient in a skilled nursing facility when the advance directive is executed [*Prob. Code § 4675(a)*].

When an advance directive is signed by witnesses, the witnesses must be adults. Each witness signing the advance directive must witness either (1) the signing of the advance directive by the patient or (2) the patient's acknowledgment of the signature or the advance directive [*Prob. Code § 4674(a), (b)*]. At least one of the witnesses must be an individual who is neither related to the patient by blood, marriage, or adoption nor entitled to any portion of the patient's estate on the patient's death under a will existing when the advance directive is executed or by operation of law then existing [*Prob. Code § 4674(e)*].

None of the following persons may act as a witness [*Prob. Code § 4674(c)*]:

- The patient's health care provider or an employee of the patient's health care provider.
- The operator or an employee of a community care facility.
- The operator or an employee of a residential care facility for the elderly.
- The agent, if the advance directive is a power of attorney for health care.

Each witness must make a declaration, the substance of which is provided for by statute [*Prob. Code § 4674(d)*; see [2], below]. Witnesses satisfying the non-relative, non-heir requirement must sign an additional declaration [*Prob. Code § 4674(f)*; see [2], below]. Further, if an individual is a patient in a skilled nursing facility when a written advance directive is executed, the advance directive is not effective unless a designated patient advocate or ombudsman signs the advance directive as a witness, either as one of two witnesses or in addition to notarization [*Prob. Code § 4675(a)*; see [2], below]. The patient advocate or ombudsman witnessing an advance directive is entitled to rely on the representations of the administrators or staff of the facility, or of family members, as convincing evidence of the identity of the patient, provided that the patient advocate or ombudsman believes that the representations provide a reasonable basis for determining the identity of the patient [*Prob. Code § 4675(b)*].

[g] Format Requirements

If a general acute care hospital [*Health & Safety Code § 1250(a)*] provides a patient with instructions and forms for advance health care directives, those materials must be printed in at least a 12-point font that is clear and legible [*Health & Safety Code § 123222.1(a), (b)(4)*].

[2] FORM

Advance Health Care Directive (Durable Power of Attorney)

ADVANCE HEALTH CARE DIRECTIVE

Part 1

POWER OF ATTORNEY FOR HEALTH CARE

By this document I, _____ [*principal's name*], of _____ [*street address*],

_____[city, state, and zip code], intend to create an advance health care directive under *California Probate Code Section 4600 et seq.* This advance directive shall not be affected by my subsequent incapacity.

1.1. DESIGNATION OF HEALTH CARE AGENT. I do hereby designate and appoint _____[agent's name] of _____[street address], _____[city, state, and zip code], whose telephone number is _____[telephone number], as my agent to make health care decisions for me as authorized in this document. For the purposes of this document, "health care decision" means any decision regarding any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect my physical or mental condition.

[EITHER, if one alternate is to be appointed:]

1.2. ALTERNATE AGENT. If _____[agent's name] is not available or becomes ineligible to act as my agent to make health care decisions for me, or if I revoke _____[his or her] appointment or authority to act as my agent to make health care decisions for me, then I designate the following person to serve as my agent to make health care decisions for me as authorized in this document: _____[name(s) of alternate(s)], _____[street address(es)], _____[city or cities, state(s), and zip code(s)], [telephone number(s)].

[OR, if two alternates are to be appointed:]

1.2. ALTERNATE AGENTS. If _____[agent's name] is not available or becomes ineligible to act as my agent to make health care decisions for me, or if I revoke _____[his or her] appointment or authority to act as my agent to make health care decisions for me, then I designate the following persons to serve as my agent to make health care decisions for me as authorized in this document, such persons to serve in the order listed below:

First Alternate Agent: _____[name]
 _____[street address]
 _____[city, state, and zip code]
 [telephone number].

Second Alternate Agent: _____[name]
 _____[street address]
 _____[city, state, and zip code]
 [telephone number].

[Continue with the following:]

1.3. GENERAL STATEMENT OF AUTHORITY GRANTED. Subject to any limitations in this document, I hereby grant to my agent full power and authority (a) to make health care decisions for me to the same extent that I could make those decisions for myself if I had the capacity to do so, including, without limitation, decisions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care to keep me alive; and (b) to make personal care decisions for me to the same extent that I could make those decisions for myself if I had the capacity to do so, including, without limitation, determining where I will live, providing me meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment for me.

[EITHER, if principal wishes agent's authority to take effect on physician's determination:]

1.4. PERIOD DURING WHICH AGENT'S AUTHORITY IS EFFECTIVE. My agent's authority becomes effective when my primary physician determines that I am unable to make my own health care decisions. My agent's authority ceases to be effective when my primary physician determines that I am again able to make my own health care decisions.

[OR, if principal wishes agent's authority to take effect immediately:]

1.4. AGENT'S AUTHORITY EFFECTIVE IMMEDIATELY. My agent's authority to make health care decisions for me takes effect immediately.

[Continue with the following:]

1.5. AGENT'S OBLIGATION. My agent shall make health care decisions for me in accordance with this power of attorney for health care, any instructions I give in Part 2 of this form, and my other wishes to the extent known to my agent. To the extent my wishes are unknown, my agent shall make health care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent.

[EITHER, if agent is authorized to make all anatomical gifts:]

1.6. ANATOMICAL GIFTS. My agent shall have the power and authority to make a disposition of a part or parts of my body under the Uniform Anatomical Gift Act as provided in Part 4.

[OR, if agent is authorized to make only specified anatomical gifts:]

1.6. ANATOMICAL GIFTS. My agent shall have the power and authority to make a disposition of my *[description of donatable parts]* under the Uniform Anatomical Gift Act.

[OR, if agent is not authorized to make anatomical gifts, use:]

1.6. NO ANATOMICAL GIFTS. Neither my agent nor any other person shall have the power or authority to make a disposition of any of my parts or organs under the Uniform Anatomical Gift Act or any similar law.

[Continue with the following:]

[EITHER, if agent is authorized to dispose of remains:]

1.7. DISPOSITION OF REMAINS. My agent shall have the power and authority to direct the disposition of my remains according to _____ *[his or her]* discretion.

[OR, if agent is not authorized to dispose of remains:]

1.7. NO POWER TO DIRECT DISPOSITION OF REMAINS. My agent shall not have the power or authority to direct the disposition of my remains.

[OR, if agent is authorized to dispose of remains in keeping with principal's expressed desires:]

1.7. DISPOSITION OF REMAINS. My agent shall have the power and authority to direct the disposition of my remains according to my desires as expressed in _____*[specify, e.g., my statements to _____ (agent's name)].*

[Continue with the following:]

[EITHER, if agent has power to authorize autopsy:]

1.8. AUTHORIZATION OF AUTOPSY. My agent shall have the power and authority to authorize an autopsy.

[OR, if agent does not have power to authorize autopsy:]

1.8. NO POWER TO AUTHORIZE AUTOPSY. My agent shall not have the power or authority to authorize an autopsy.

[Continue with the following:]

1.9. NOMINATION OF CONSERVATOR OF PERSON. If a conservator of the person is to be appointed for me, I nominate the following individual to serve as conservator of the person: _____*[nominee's name, address, and phone number].*

[Optional:]

1.10. ARRANGE FOR FUNERAL OR MEMORIAL SERVICE. My agent shall have the power and authority to arrange for my funeral or other memorial service.

[Optional:]

1.11. EXPIRATION. This durable power of attorney for health care advance health care directive expires on *[month, day], [year].*

[Continue with the following:]

Part 2

INSTRUCTIONS FOR HEALTH CARE

[EITHER, if principal wants to preclude use of life-sustaining procedures if continued health care will not improve

prognosis for recovery:]

2.1. STATEMENT OF DESIRES CONCERNING LIFE-PROLONGING TREATMENT, SERVICES, AND PROCEDURES. END-OF-LIFE DECISIONS. Modern medical technology has made possible the artificial prolongation of my life beyond natural limits. I do not wish to artificially prolong the process of my dying if continued health care will not improve my prognosis for recovery. Therefore, I do not want efforts made to prolong my life and I do not want life-sustaining treatment to be provided or continued (1) if I am in an irreversible coma or persistent vegetative state; or (2) if I am terminally ill and the use of life-sustaining procedures would serve only to artificially delay the moment of my death; or (3) under any other circumstances in which the burdens of treatment outweigh the expected benefits. By an "irreversible coma," I mean a coma from which the treating physicians have reasonably concluded I will never regain consciousness. In making decisions about life-sustaining treatment under provision (3), above, I want my agent to consider the relief of suffering and quality of remaining life as well as the extent of the possible prolongation of my life. At the same time that I am signing this advance health care directive, I am entering my initials in the space immediately below this provision to show that I have read this provision and that it reflects my desires.

_____ Initials

[OR, if principal wants to receive medical treatment unless he or she is in an irreversible coma:]

2.1. STATEMENT OF DESIRES CONCERNING LIFE-PROLONGING TREATMENT, SERVICES, AND PROCEDURES. END-OF-LIFE DECISIONS. I want to receive medical treatment that prolongs and sustains my life unless I am in an irreversible coma. By an "irreversible coma," I mean a coma from which the treating physician or physicians have reasonably concluded I will never regain consciousness. If I am in such an irreversible coma, I do not want to receive medical treatment that prolongs and sustains my life. At the same time that I am signing this durable power of attorney for health care advance health care directive, I am entering my initials in the space immediately below this provision to show that I have read this provision and that it reflects my desires.

_____ Initials

[OR, if principal wants to preclude use of life-sustaining procedures if in a terminal condition:]

2.1. STATEMENT OF DESIRES CONCERNING LIFE-PROLONGING TREATMENT, SERVICES, AND PROCEDURES. END-OF-LIFE DECISIONS. If I am in a terminal condition, I do not want any life-sustaining procedures to be used to prolong my life. For purposes of this document, (1) "terminal condition" shall mean an incurable and irreversible condition caused by injury, disease or illness, which, regardless of the application of life-sustaining procedures, would, within reasonable medical judgment, produce death and for which the application of life-sustaining procedures serves only to postpone the moment of my death, and (2) "life-sustaining procedures" shall mean any medical procedure or intervention that utilizes mechanical or other artificial means to sustain, restore, or supplant a vital function which will serve only to artificially prolong the moment of my death. The term "life-sustaining procedures" shall not include the administration of medication or the performance of any medical procedure deemed necessary to alleviate pain. At the same time that I am signing this durable power of attorney for health care advance health care directive, I am entering my initials in the space immediately below this provision to show that I have read this provision and that it reflects my desires.

_____ Initials

[OR, if principal wants to receive medical treatment that will allow him or her to live as long as possible:]

2.1. STATEMENT OF DESIRES CONCERNING LIFE-PROLONGING TREATMENT, SERVICES, AND PROCEDURES. END-OF-LIFE DECISIONS. I want to live as long as possible; therefore, I want to receive all medical treatment that will prolong and sustain my life within the limits of generally accepted health care standards. I want such treatment provided to me regardless of my chances of recovery, my condition, or the cost of such treatment. At the same time that I am signing this durable power of attorney for health care advance health care directive, I am entering my initials in the space immediately below this provision to show that I have read this provision and that it reflects my desires. _____ Initials

[OR, if principal does not wish to include one of the foregoing provisions:]

2.1. STATEMENT OF DESIRES CONCERNING LIFE-PROLONGING TREATMENT, SERVICES, AND PROCEDURES. END-OF-LIFE DECISIONS. None.

[Continue with the following:]

2.2. RELIEF FROM PAIN. I direct that treatment for alleviation of pain or discomfort be provided at all times, even if it hastens my death.

[EITHER]

2.3. ADDITIONAL STATEMENT OF DESIRES, SPECIAL PROVISIONS, AND LIMITATIONS. OTHER WISHES. _____*[Set forth additional statement or add: None].*

[OR, if principal wants palliative care while in a persistently vegetative state:]

2.3. ADDITIONAL STATEMENT OF DESIRES, SPECIAL PROVISIONS, AND LIMITATIONS. OTHER WISHES. If I ever fall into a persistently vegetative state, you are directed to reduce my misery as painlessly as possible.

[OR, if principal wants no extraordinary medical care on becoming senile:]

2.3. ADDITIONAL STATEMENT OF DESIRES, SPECIAL PROVISIONS, AND LIMITATIONS. OTHER WISHES. If I become senile, you are directed to let me die naturally and without any extraordinary medical treatment.

[OR, if principal wants to preclude use of artificial life-support system:]

2.3. ADDITIONAL STATEMENT OF DESIRES, SPECIAL PROVISIONS, AND LIMITATIONS. OTHER WISHES. I do not want to be attached to or treated by any artificial life-support system.

[OR, if principal wants no medical treatment or procedures after entering condition rendering principal unable to make medical decisions, leaving principal unable to communicate, and from which there is no reasonable prospect of recovery:]

2.3. ADDITIONAL STATEMENT OF DESIRES, SPECIAL PROVISIONS, AND LIMITATIONS. OTHER WISHES.

In the event I suffer from an injury, disease, illness or other physical or mental condition which renders me unable to make medical decisions on my own behalf, which leaves me unable to communicate with others meaningfully, and from which there is no reasonable prospect of recovery to a cognitive and sentient life, I direct that no medical treatments or procedures (except as otherwise authorized in this instrument) can be utilized in my care or, if begun, that they be discontinued.

[Continue with the following:]

Part 3**INSTRUCTIONS FOR PERSONAL CARE**

3.1. INDEPENDENT LIVING. I wish to live in my home for as long as that is reasonably possible without endangering my physical or mental health and safety and to receive whatever assistance from household employees or personal care givers may be necessary to permit me to do so. I wish to return home as soon as reasonably possible after any hospitalization or transfer to convalescent care. If my agent determines that I am no longer able to live in my home, I wish that my agent consider alternatives to convalescent care which will permit me as much privacy and autonomy as possible, including such options as placing me in an assisted living facility or board and care facility.

3.2. SOCIAL INTERACTION. I wish to be encouraged to maintain my social relationships and to engage in social interaction even if I am no longer able to recognize my family and friends or to fully participate in social activities.

[Optional:]

_____. **RELIGIOUS OR SPIRITUAL ACTIVITY.** My involvement with _____ *[name of principal's church, synagogue, or other religious or spiritual institution]* has been very important to me. I wish to maintain that involvement as long as possible, even if I no longer fully appreciate its significance. To that end, and in accordance with my established beliefs and customary activities, my agent shall provide for the presence and involvement of church persons, clergy or other persons to attend to my spiritual needs and permit them access to me and shall arrange for my access to activities and publications, including books, tapes, and similar materials, associated with my spiritual involvement.

[Optional:]

_____. **OUTDOOR ACTIVITIES.** I wish to spend significant time outdoors. If I can no longer travel, I wish my agent to arrange for trips to local parks and other areas where I may be outdoors in a natural setting.

[If agent is authorized to make any anatomical gifts, add:]

Part 4**DONATION OF ORGANS AT DEATH**

[EITHER]

4.1. PURPOSES FOR WHICH ORGANS MAY BE DONATED. ORGAN DONATION. Upon my death, my agent may donate any needed organs, tissues, or parts.

[OR]

4.1. ORGANS WHICH MAY BE DONATED. ORGAN DONATION. Upon my death my agent may donate only the following organ organs, tissues, or parts: _____.

[OR]

4.1. ORGANS DONATED FOR SPECIFIED PURPOSE(S). Upon my death my agent may donate any needed organs, tissues, or parts, but only for the following purposes: *[specify, e.g., transplant or therapy or research or education]*. My agent shall not donate any organs, tissues, or parts for the following purposes: *[specify, e.g., transplant or therapy or research or education]*.

[To limit the purposes for which the anatomical gifts can be made, add:]

4.2. PURPOSES. This gift shall be for the following purposes only: *[specify, e.g., transplant or therapy or research or education]*.

[If the principal wishes to designate a primary physician and/or alternate primary physician, add:]

Part 5

PRIMARY PHYSICIAN

5.1. DESIGNATION OF PRIMARY PHYSICIAN. I designate the following physician as my primary physician:

_____ *[name of physician]*
 _____ *[street address]*
 _____ *[city, state, zip code]*
 _____ *[telephone number]*.

[Optional:]

5.2. DESIGNATION OF ALTERNATE PRIMARY PHYSICIAN. If the physician I have designated in Section _____, above, is not willing, able, or reasonably available to act as my primary physician, I designate the following physician as my primary physician:

_____ *[name of physician]*
 _____ *[street address]*
 _____ *[city, state, zip code]*
 _____ *[telephone number]*.

[Continue with the following:]

Part 6

MISCELLANEOUS MATTERS

6.1. INSPECTION AND DISCLOSURE OF INFORMATION RELATING TO MY PHYSICAL OR MENTAL HEALTH. Subject to any limitations in this document, my agent has the power and authority to do all of the following:

- (a) Request, review, and receive any information, verbal or written, regarding my physical or mental health, including, but not limited to, medical and hospital records;
- (b) Execute on my behalf any releases or other documents that may be required in order to obtain this information; and
- (c) Consent to the disclosure of this information.

6.2. SIGNING DOCUMENTS, WAIVERS, AND RELEASES. When necessary to implement the health care decisions that my agent is authorized by this document to make, my agent has the power and authority to execute on my behalf all of the following:

- (a) Documents titled or purporting to be a "Refusal to Permit Treatment" and "Leaving Hospital Against Medical Advice," and
- (b) Any necessary waiver or release from liability required by a hospital or physician.

6.3. PRIOR DESIGNATIONS REVOKED. I revoke any prior durable power of attorney for health care or advance health care directive.

6.4. ADVICE OF LAWYER OBTAINED. My lawyer has advised me concerning my rights in connection with this advance directive and the applicable law and the consequences of signing or not signing this advance directive.

6.5. USE OF PHOTOCOPIES PERMITTED. Persons dealing with my agent may rely fully on a photocopy of this instrument as though the photocopy was an original.

DATE AND SIGNATURE OF PRINCIPAL

I sign my name to this Advance Health Care Directive on [month, day], [year], at _____, California.

_____ [signature]

[principal's name]

[EITHER]

ACKNOWLEDGMENT

State of California

County of _____

)

)

ss

)

On _____ [date], before me, _____ [name of notary], personally appeared _____ [name(s)], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument, and acknowledged to me that _____ [he or she or they] executed the same in _____ [his or her or their] authorized _____ [capacity or capacities], and that by _____ [his or her or their] signature[s] on the instrument the persons[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

_____ [signature of notary]
[typed name]

[OR, if document will not be notarized, use the following statement of witnesses:]

STATEMENT OF WITNESSES

I declare under penalty of perjury under the laws of California (1) that the individual who signed or acknowledged this advance health care directive is personally known to me, or that the individual's identity was proven to me by convincing evidence, (2) that the individual signed or acknowledged this advance directive in my presence, (3) that the individual appears to be of sound mind and under no duress, fraud, or undue influence, (4) that I am not a person appointed as agent by this advance directive, and (5) that I am not the individual's health care provider, an employee of the individual's health care provider, the operator of a community care facility, an employee of an operator of a community care facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.

Signature: _____
Print Name: _____
Residence Address: _____
Date: _____ [month, day], _____ [year]
Signature: _____
Print Name: _____
Residence Address: _____
Date: _____ [month, day], _____ [year]

SPECIAL WITNESS REQUIREMENT

I further declare under penalty of perjury under the laws of California that I am not related to the individual executing this advance health care directive by blood, marriage, or adoption, and, to the best of my knowledge, I am not entitled to any part of the individual's estate upon his or her death under a will now existing or by operation of law.

Signature: _____
Second Signature (optional): _____

[If principal is patient in skilled nursing facility, add:]

STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN

I further declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as a witness as required by subdivision (a) of *California Probate Code Section 4675*.

Signature: _____

Print Name: _____

Address: _____

Date: _____ [month, day], _____ [year]

LAWYER'S CERTIFICATE

I am a lawyer authorized to practice law in the state in which this advance directive was executed, and the principal was my client at the time when this advance directive was executed. I have advised my client concerning _____ [his or her] rights in connection with this advance directive and the applicable law and the consequences of signing or not signing this advance directive, and my client, after being so advised, has executed this advance directive.

_____ [signature]

Dated: _____

[Attorney's name]

Law Firm: _____ [firm name]

Address: _____

Telephone Number: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney Durable Powers Healthcare Law Treatment End-of-Life Decisions Advance Directives



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DIVISION VII: PERSONAL TRANSACTIONS
 CHAPTER 104 HEALTH CARE TRANSACTIONS, CONSENTS, AND DIRECTIVES
 PART IV. FORMS
 C. Advance Health Care Directives and Related Forms

33-104 California Legal Forms--Transaction Guide § 104.231

§ 104.231 Statutory Explanation Regarding Advance Health Care Directive

[1] Comment--Use of Form

This form may be used to advise a principal of the consequences of executing an advance health care directive. It is based on the text of the explanation included in the statutory advance health care directive under *Prob. Code § 4701* [see § 104.230[2]]. This form can be used to establish that the principal has been properly advised before executing the advance health care directive. This form should be read and initialed by the principal at the same time that he or she executes the advance health care directive.

When a principal wishes to limit the authority of the agent regarding health care matters, the principal must state that he or she has been advised as to the consequences of the directive by counsel in the directive [see § 104.230[2], P 6.4; see also § 104.230[2], PP 1.3-1.8]. In addition counsel must certify that he or she has advised the client on these matters [see § 104.230[2]].

If a general acute care hospital [*Health & Safety Code § 1250(a)*] provides a patient with instructions and forms for advance health care directives, those materials must printed in at least a 12-point font that is clear and legible [*Health & Safety Code § 123222.1(a), (b)(4)*]. However, the hospital may continue to use its supply of materials that exists on January 1, 2003, until that supply is exhausted or until January 1, 2006, whichever occurs first. Effective January 1, 2006, the hospital must comply with the statutory requirements [*Health & Safety Code § 123222.1(c)*].

[2] FORM

Statutory Explanation Regarding Advance Health Care Directive

Statutory Explanation Regarding Advance Health Care Directive

You have the right to give instructions about your own health care. You also have the right to name someone else to make health care decisions for you. This form lets you do either or both of these things. It also lets you express your wishes regarding your personal care, donation of organs, and the designation of your primary physician, should you

wish to do so. If you use this form, you may modify all or any part of it. You are free to use a different form.

Part 1 of this form is a power of attorney for health care. Part 1 lets you name another individual as agent to make health care decisions for you if you become incapable of making your own decisions or if you want someone else to make those decisions for you now even though you are still capable. You may also name an alternate agent to act for you if your first choice is not willing, able, or reasonably available to make decisions for you. (Your agent may not be an operator or employee of a community care facility or a residential care facility at which you are receiving care, or your supervising health care provider or employee of the health care institution at which you are receiving care, unless your agent is related to you or is a coworker).

Unless the form you sign limits the authority of your agent, your agent may make all health care decisions for you and all decisions regarding your personal care. This form has a place for you to limit the authority of your agent. You do not need to limit the authority of your agent if you wish to rely on your agent for all health care decisions and personal care decisions that may have to be made. If you choose not to limit the authority of your agent, your agent will have the right to:

- Consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition.
- Select or discharge health care providers and institutions.
- Approve or disapprove diagnostic tests, surgical procedures, and programs of medication.
- Direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation.
- Make anatomical gifts, authorize an autopsy, and direct disposition of remains.
- Make personal care decisions, including determining where you will live, providing meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment for you.

Part 2 of this form lets you give specific instructions about any aspect of your health care, including the provision, withholding, or withdrawal of treatment to keep you alive, as well as the provision of pain relief. You may make other choices and should not sign this form until you are satisfied that the instructions in Part 2 express your wishes and not the wishes of any other person. If you are satisfied to allow your agent to determine what is best for you in making end-of-life decisions and other health care decisions, you need not include Part 2 of this form.

Part 3 of this form lets you give specific instructions about any aspect of your personal care, should you desire to do so. You may make other choices and should not sign this form until you are satisfied that the instructions in Part 3 express your wishes and not the wishes of any other person. If you are satisfied to allow your agent to determine what personal care is best for you, you need not include Part 3 of this form.

[Optional; if the principal has provided for donation of organs at death, add:]

Part [number] of this form lets you express an intention to donate your bodily organs and tissues following your death, should you wish to do so.

[Optional; if the principal has designated a primary physician, add:]

Part [number] of this form lets you designate a physician to have primary responsibility for your health care.

Part [number] of this form contains miscellaneous provisions regarding your advance directive.

[Continue with the following:]

After completing this advance health care directive, sign and date the form at the end. The form must be signed by two qualified witnesses or acknowledged before a notary public. Give a copy of the signed and completed form to your physician, to any other health care providers you may have, to any health care institution at which you are receiving care, and to any health care agents you have named. You should talk to the person you have named as agent to make sure that he or she understands your wishes and is willing to take the responsibility.

You have the right to revoke this advance health care directive or replace this form at any time.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentEnd-of-Life DecisionsAdvance Directives



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 104 HEALTH CARE TRANSACTIONS, CONSENTS, AND DIRECTIVES
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33-104 California Legal Forms--Transaction Guide § 104.232

§ 104.232 Registration Form for Written Advance Health Care Directive--Secretary of State's Official Form [Form LP/SF 461]

[1] Comment

[a] Use of Form

This form is the Secretary of State's official registration form [Form LP/SF 461] for use to register a written advance health care directive with the advance health care directive registry established by the Secretary of State. The form may be used to initially register an advance health care directive, or to amend or revoke an advance health care directive that was previously registered.

PRACTICE TIP

ELECTRONIC FORMS NOTE: Electronic copies of this form that may be filled in and printed out for filing can be obtained at the official website of the California Secretary of State, Business Programs Division, which is located at <http://www.ss.ca.gov/business/business.htm>.

Use of the form is not mandatory, and the failure to register with the Secretary of State does not affect the validity of any advance health care directive [*Prob. Code § 4803*]. Further, the fact of registration does not raise any presumption of validity or superiority among any competing advance directives or revocations [*Prob. Code § 4804*; see [b], *below*]. For this reason, and because many attorneys may simply be unaware of its existence, the registration procedure has not been widely used. Nevertheless, attorneys should be aware of the procedure, and this form, so that they will be able to make a decision about whether or not registration is necessary or appropriate in a particular situation.

The Secretary of State is authorized to charge a fee for registering advance health care directives [*Prob. Code § 4800(c)*], but as of the date of publication of these materials, has not done so; registration is free at this time.

[b] Registry System

The Secretary of State is directed by statute to establish a registry system through which a principal may register, in a

central information center, information regarding the advance directive, making that information available on request to any health care provider, the public guardian, or the legal representative of the registrant [*Prob. Code § 4800(a)*]. Information that may be received by the registry is limited to the registrant's name; social security number, driver's license number, or other individual identifying number; address; date and place of birth; the registrant's advance health care directive; the intended place of deposit or safekeeping of the written advance health care directive; and the name and telephone number of the agent and any alternative agent [*Prob. Code § 4800(c)*]. Information that may be released on request may not include the registrant's social security number, except when necessary to verify the identity of the registrant [*Prob. Code § 4800(c)*].

On receipt of the registrant's information, the Secretary of State must issue to the registrant an identification card indicating that an advance health care directive, or information regarding a directive, has been deposited with the registry [*Prob. Code § 4800(d)*].

The official form operates as notice to the registrant that a health care provider may not honor an advance health care directive until the provider receives a copy from the registrant [*see Prob. Code § 4802(a)*].

Once an advance directive is registered, the registrant or the registrant's legal representative may request that the Secretary of State transmit the information received to the registry system of another jurisdiction as identified by the registrant [*Prob. Code § 4800(e)*].

Hospitals are required, within 24 hours after a patient who is unconscious or otherwise incapable of communicating arrives in the emergency room, to make reasonable efforts to contact the patient's agent, surrogate, or family member, or another person the hospital reasonably believes has the authority to make health care decisions on behalf of the patient [*Prob. Code § 4717(a)*]. The hospital will be deemed to have discharged this duty if, among other things, it contacts the Secretary of State, directly or indirectly, including by voice mail or fax, to inquire whether the patient has registered an advance health care directive with the Advance Health Care Directive Registry, if the hospital has evidence of the patient's registry identification card from the patient, the patient's family, or an authorized agent [*see Prob. Code § 4717(a)(3)*; *see also § 104.220[1][f]*].

Nothing in the registry statutes may be construed to affect the duty of a health care provider to provide information to a patient regarding advance health care directives pursuant to any provision of federal law [*Prob. Code § 4805*].

[c] Amendment and Revocation

This form also may be used to amend or revoke a written advance health care directive. The entire form must be completed if the amendment is before the initial registration [*see [2], below*].

Registration does not affect the ability of the registrant to revoke the registrant's advance health care directive or a later executed advance directive, nor does registration raise any presumption of validity or superiority among any competing advance directives or revocations [*Prob. Code § 4804*]. Once an advance health care directive is registered, the registrant must notify the registry if the advance directive is revoked [*see Prob. Code § 4802(b)*]; for revocation purposes, the registrant must complete items 3 through 7 [*see [2], below*]. Revocation of advance health care directives is discussed further in § 104.35.

A registrant must reregister whenever the registrant executes a subsequent advance directive [*see Prob. Code § 4802(c)*].

[2] FORM

Registration Form for Power of Attorney for Health Care--Secretary of State's Official Form [Form LP/SF

461]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentEnd-of-Life DecisionsAdvance Directives



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 104 HEALTH CARE TRANSACTIONS, CONSENTS, AND DIRECTIVES
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33-104 California Legal Forms--Transaction Guide § 104.233

§ 104.233 Physician Orders for Life Sustaining Treatment

[1] Comment

[a] Use of Form

This form, Physician Orders for Life Sustaining Treatment (POLST), is approved by the Emergency Medical Services Authority [*see Prob. Code § 4780(a)(2)(B)*]. The form is a request regarding resuscitative measures that directs a health care provider regarding resuscitative and life-sustaining measures [*see Prob. Code § 4780(a)(3)*].

This statutory form may be used, but is not mandatory [*see Prob. Code § 4783(b)*]. A printed form substantially similar to this form is valid and enforceable if all of the following conditions are met [*Prob. Code § 4783(b)*]:

- The form is signed by the individual, or the individual's legally recognized surrogate health care decisionmaker, and a physician.
- The form directs health care providers to forgo resuscitative treatment.
- The form contains all other information required by *Prob. Code § 4783*.

The statutory form is available on the website of California Coalition for Compassionate Care, the organization charged with implementing the POLST, at <http://www.emsa.ca.gov/pubs/pdf/ApprovedPOLSTForm.pdf>. This website also includes answers to frequently asked questions, and a POLST Guide for Health Care Professionals [*see www.finalchoices.org*].

[b] Contents

The POLST form addresses a range of treatment options and enables an individual to express his or her treatment preferences regarding life-sustaining treatments such as cardiopulmonary resuscitation, medical intervention, including pain management, and artificially administered nutrition [*see § 104.233[2]*].

[c] Advanced Health Care Directive Distinguished

A request regarding resuscitative measures is not an advance health care directive [*Prob. Code § 4780(a)(1)*]. An "advance health care directive" or "advance directive" means either (1) an individual health care instruction (a patient's written or oral directive concerning a health care decision for the patient) or (2) a power of attorney for health care (a written instrument designating an agent to make health care decisions for the principal) [*Prob. Code § 4605*; see *Prob. Code §§ 4623, 4629*; §§ 104.30[4], 104.230[1]].

The California Coalition for Compassionate Care recommends that an individual have a POLST, as well as an Advance Healthcare Directive or Advance Directive (AHCD)

[http://www.finalchoices.org/C4_textfiles/POLST_brochure_Final.pdf]. The POLST form complements the Advance Directive; it is not intended to replace that document [http://www.finalchoices.org/polst_faq.htm#replace%20ad]. The California Coalition for Compassionate Care explains the differences [http://www.finalchoices.org/C4_textfiles/POLST_brochure_Final.pdf]:

The POLST form reinforces the wishes that you express in your AHCD. The POLST form presents those wishes in an easy-to-understand way. The AHCD is written instructions stating how you want future medical decisions made, in the event that you become unable to make or to communicate those decisions for yourself. The AHCD states who you want to make healthcare decisions for you if you are unable to make them for yourself.

[d] Completion and Execution of Form

A health care provider must explain the POLST form and the medical intervention and procedures offered by the form, and must complete the form based on patient preferences and medical indications [*Prob. Code § 4780(c)*; see *Prob. Code § 4621* ("health care provider" defined)]. The form must be signed by a physician and the patient or his or her legally recognized health care decisionmaker [*Prob. Code § 4780(c)*]. During the process of completing the form, health care provider should inform the patient about the difference between an advance health care directive and the POLST [*Prob. Code § 4780(c)*; see *Prob. Code § 4605* ("advance health care directive" defined); § 104.233[1][c]].

A legally recognized health care decisionmaker may execute a POLST form only if the individual lacks capacity, or the individual has designated that the decisionmaker's authority is effective, in accordance with *Prob. Code § 4682* [*Prob. Code § 4780(b)*]. A legally recognized health care decisionmaker must make health care decisions in accordance with the individual's health care instructions, to the extent they are known to the decisionmaker, or with the individual's best interest in mind, taking into account the individual's personal values, if known [*Prob. Code § 4781.5*; see *Prob. Code §§ 4684, 4714* (duties of decisionmaker or surrogate)].

[e] Modification and Revocation of Form

The legally recognized health care decisionmaker of an individual without capacity must consult with the individual's treating physician before making a request to modify that individual's POLST form [*Prob. Code § 4781.2(d)*]. An individual with capacity may at any time request alternative treatment to that treatment ordered on the form [*Prob. Code § 4781.2(e)*].

An individual having capacity may revoke a POLST form at any time and in any manner that communicates an intent to revoke [*Prob. Code § 4780(d)*; see *Prob. Code § 4695* (revocation); § 104.35].

For discussion of the health care providers obligations relating to a POLST form, see § 104.39.

[2] FORM

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare LawTreatmentEnd-of-Life DecisionsLife Support



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY

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33-105 California Legal Forms--Transaction Guide Scope

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Scope

This chapter deals with long-term care facilities for the elderly. It is designed to aid attorneys in counseling clients who contemplate placing an elderly family member in a long-term care facility. It discusses the different types of facilities and emphasizes coverage of nursing homes. Admission, discharge, and transfer procedures are covered.

This chapter also includes a discussion of life care contracts between elderly persons and long-term care facilities. It analyzes the rights and responsibilities of patients in long-term care facilities and the avenues available to those patients for pursuing grievances. It provides an overview of the payment options and various forms of financial assistance available to patients in long-term care facilities. It also identifies the social agencies that family members may wish to contact when exploring long-term care options for family members.

The Transaction Guide is designed to aid attorneys in explaining the process of placing individuals in long-term care facilities and ensuring that all rights afforded by law are extended to those individuals. This chapter includes admission forms for long-term care facilities and related forms such as life care contracts and payment provisions for long-term care.

This chapter does not provide information on how to obtain licensing for long-term care facilities. It does not cover the health care aspects of long-term care, such as staffing, dietary requirements, and available medical facilities. It does not deal with long-term care facilities that provide specialized care, such as homes for the mentally disordered or incompetent, "locked facilities," or facilities for persons with specific diseases.

For discussion and forms relating to services provided in general acute care hospitals, see Ch. 104, *Health Care Transactions, Consents, and Directives*. For medical consent forms and a discussion relating to medical treatment of minors, see Ch. 100A, *Personal Affairs of Minors*.



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§ 105.01 California Statutes

Bureau of Medi-Cal Fraud. *Gov. Code § 12528.*

Licensing of health facilities. *Health & Safety Code §§ 1250-1323.*

"Skilled nursing facility" defined. *Health & Safety Code § 1250(c).*

"Intermediate care facility" defined. *Health & Safety Code § 1250(d).*

"Nursing facility" defined. *Health & Safety Code § 1250(k); Welf. & Inst. Code § 14002.5(f).*

Policies and procedures regarding loss and theft of patients' property. *Health & Safety Code §§ 1289.3-1289.5* (skilled nursing and intermediate care facilities), *1569.152-1569.154* (residential care facilities).

Transfer of patients due to status or licensing change of facility. *Health & Safety Code §§ 1336-1336.4.*

Special Hospital: Hospice Pilot Project. *Health & Safety Code §§ 1339.30-1339.37.*

Quality of long-term health care facilities. *Health & Safety Code §§ 1417-1439.8.*

Centralized State Consumer Response Unit. *Health & Safety Code § 1419.*

Citations. *Health & Safety Code §§ 1424, 1424.5.*

Quality assurance program. *Health & Safety Code § 1424.1.*

Respite care services. *Health & Safety Code §§ 1418.1, 1599.60, 1599.64.*

Resident and family councils. *Health & Safety Code §§ 1418.2, 1418.4, 1512.5, 1569.157-1569.159.*

Licensing and inspection of community care facilities. *Health & Safety Code § 1509.*

Residential care facilities for persons with chronic, life-threatening illness. *Health & Safety Code §§ 1568.01-1568.092.*

Residential Care Facilities for the Elderly Act. *Health & Safety Code § 1569 et seq.*

Definitions. *Health & Safety Code § 1569.2.*

Regulations. *Health & Safety Code § 1569.30.*

Required services. *Health & Safety Code § 1569.312.*

Transfer and eviction procedures. *Health & Safety Code §§ 1769.682, 1769.683.*

Offenses. *Health & Safety Code §§ 1569.40-1569.495.*

Communication of special services. *Health & Safety Code § 1569.628.*

Preadmission fees and rate increases. *Health & Safety Code §§ 1569.651, 1569.655, 1569.657.*

Skilled nursing and intermediate care facility Patients' Bill of Rights. *Health & Safety Code §§ 1599-1599.4.*

Contents of admission contracts for long-term health care facilities. *Health & Safety Code § 1599.60 et seq.*

Readmittance to nursing facilities pursuant to signed statement modifying original contract. *Health & Safety Code §§ 1599.651, 1599.652.*

Continuing Care Contracts. *Health & Safety Code § 1770 et seq.*

Legislative findings. *Health & Safety Code § 1770.*

"Continuing care contract" defined. *Health & Safety Code § 1771(c)(8).*

"Life care contract" defined. *Health & Safety Code § 1771(l).*

Residents' bill of rights. *Health & Safety Code § 1771.7.*

Continuing Care Advisory Committee of the State Social Services Advisory Board. *Health & Safety Code §§ 1777-1777.4.*

Application to accept deposited and for certificate of authority. *Health & Safety Code §§ 1779-1779.10.*

Certificates of authority. *Health & Safety Code §§ 1786-1786.2.*

Required contents of continuing care contracts. *Health & Safety Code § 1788(a).*

Required contents of life care contracts. *Health & Safety Code § 1788(b).*

Permissive contents of contracts. *Health & Safety Code § 1788(c).*

Notice of cancellation. *Health & Safety Code § 1788(h).*

Cancellation and refunds. *Health & Safety Code §§ 1788.2, 1788.4.*

Offenses and penalties. *Health & Safety Code § 1793.5 et seq.*

Continuing care retirement community closures. *Health & Safety Code §§ 1793.80-1793.84.*

Appointment of administrators. *Health & Safety Code § 1793.50 et seq.*

Family notification required within 24 hours after significant change in resident's health or mental status. *Health & Safety Code § 1795.*

Written materials for patients. *Health & Safety Code § 123222.1 et seq.*

Adult and Older Adult Mental Health System of Care Act. *Welf. & Inst. Code § 5800 et seq.*

"Long-term care" defined. *Welf. & Inst. Code § 9016.*

Medi-Cal Act. *Welf. & Inst. Code § 14000 et seq.*

Definitions. *Welf. & Inst. Code § 14002.5.*

Eligibility. *Welf. & Inst. Code §§ 14005-14005.42.*

Eligibility for health care services. *Welf. & Inst. Code § 14005.4.*

Income levels for maintenance. *Welf. & Inst. Code § 14005.12.*

Required notice regarding treatment of community property in determining eligibility, and eligibility of married applicants. *Welf. & Inst. Code §§ 14005.16, 14006.2-14006.7.*

Prohibition against requiring cosigner or security deposit for admission of Medi-Cal beneficiary to skilled nursing or intermediate care facilities. *Welf. & Inst. Code §§ 14110.8(b), 14110.9.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Public Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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Skilled nursing facilities. *22 Cal. Code Reg. § 72001 et seq.*

Definitions. *22 Cal. Code Reg. §§ 72001-72119.*

Licensing. *22 Cal. Code Reg. §§ 72201-72217.*

Required services. *22 Cal. Code Reg. §§ 72301-72389.*

Optional services. *22 Cal. Code Reg. §§ 72401-72475.*

Admission policies and procedures. *22 Cal. Code Reg. § 72521.*

Patient care policies and procedures. *22 Cal. Code Reg. § 72523.*

Patients' *Bill of Rights*. *22 Cal. Code Reg. § 72527.*

Residential care facilities for the elderly. *22 Cal. Code Reg. § 87100 et seq.*

Definitions. *22 Cal. Code Reg. § 87101.*

Licensing. *22 Cal. Code Reg. § 87105 et seq.*

Enforcement. *22 Cal. Code Reg. §§ 87758-87769.*

Patients' rights. *22 Cal. Code Reg. § 87468.*

Personal accommodations and assistance. *22 Cal. Code Reg. §§ 87307, 87608.*

Basic services. *22 Cal. Code Reg. § 87464.*

Resident councils. *22 Cal. Code Reg. § 87221.*

Incidental medical services. *22 Cal. Code Reg. § 87605 et seq.*

Resident request for review of health condition relocation order. *22 Cal. Code Reg. § 87638.*

Residential care facilities for chronically ill. *22 Cal. Code Reg. § 87800 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Public Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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§ 105.03 Federal Statutes

Definition of "nursing home care" for veterans. *38 U.S.C. § 101(28)*.

Nursing home care in Veterans Administration facility. *38 U.S.C. § 1710*.

Eligibility for transfer from Veterans Administration facility to private facility offering nursing home care. *38 U.S.C. § 1720*.

Federal Medicare program. *42 U.S.C. § 1395 et seq.*

Limitations of post-hospital extended care services. *42 U.S.C. § 1395d(b)(2)*.

Eligibility for benefits. *42 U.S.C. § 1395c*.

Coverage for post-hospital extended care services. *42 U.S.C. § 1395d(a)(2)*.

"Extended care services" defined. *42 U.S.C. § 1395x(h)*.

"Post-hospital extended care services" defined. *42 U.S.C. § 1395x(i)*.

"Skilled nursing facility" defined. *42 U.S.C. § 1395x(j)*.

Federal Medicaid program. *42 U.S.C. § 1396 et seq.*

Minimum requirements for state Medicaid plans. *42 U.S.C. § 1396a*.

Skilled nursing facility requirements. *42 U.S.C. § 1396a(a)(28)*.

Skilled nursing facility definitions included in definition of "medical assistance." 42 U.S.C. § 1396d(a)(4).

Intermediate care facility services included in definition of "medical assistance." 42 U.S.C. § 1396d(a)(15).

"Intermediate care facility" defined. 42 U.S.C. § 1396d(c).

"Intermediate care facility services" defined. 42 U.S.C. § 1396d(d).

"Skilled nursing facility" definition for Medicaid purposes. 42 U.S.C. § 1396d(f).

"Nursing facilities" defined. 42 U.S.C. § 1396r(a).

Legal Topics:

For related research and practice materials, see the following legal topics:

Public Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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§ 105.04 Federal Regulations

Eligibility of veterans for nursing care. *38 C.F.R. § 17.47 et seq.*

Use of private nursing home facilities for care of veterans. *38 C.F.R. § 17.51 et seq.*

Intermediate care facility services for Medicaid purposes. *42 C.F.R. § 440.150.*

Medicare and Medicaid facility standards. *42 C.F.R. § 483.1 et seq.*

Preadmission screening and annual review of mentally ill and mentally retarded individuals. *42 C.F.R. § 483.100 et seq.*

Appeals of discharges, transfers, and preadmission screening and annual resident review determinations. *42 C.F.R. §§ 483.200-483.206.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare
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§ 105.05 Law Reviews

Hughes, *The Ties that Bind: Life Care Contracts and Nursing Homes*, 8 *Am. J. Law & Med.* 153 (1982).

Note, *Liberty from Transfer Trauma: A Fundamental Life and Liberty Interest*, 9 *Hastings Const. L. Q.* 429 (1982).

Note, *The Supreme Court Limits the Due Process Rights of Nursing Home Residents to a Pre-Termination Hearing--O'Bannon v. Town Court Nursing Center*, 3 *Whittier L. Rev.* 569 (1981).

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Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare
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§ 105.06 Annotations

Annot., False Imprisonment in Connection With Confinement in Nursing Home or Hospital, 4 A.L.R.4th 449 (1981) .

Annot., Patient Tort Liability of Rest, Convalescent, or Nursing Homes, 83 A.L.R.3d 871 (1978) .

Annot., Right to Notice and Hearing Prior to Termination of Medicaid Payments to Nursing Home Under Medicaid Provisions of Social Security Act (42 USCS §§ 1369 et seq.), 37 A.L.R. Fed. 682 (1978) .

Annot., Payments Made in Connection With Placing Person in Home for the Aged Operated by Qualified Charitable Organization as Constituting Tax Deductible Charitable Contributions Under § 170 of Internal Revenue Code of 1954 (26 USCS § 170), 34 A.L.R. Fed. 840 (1977) .

Annot., Validity and Construction of Contract Under Which Applicant for Admission to Home for Aged or Infirm Turns Over His Property to Institution in Return for Lifetime Care, 44 A.L.R.3d 1174 (1972) .

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For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
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§ 105.07 Text References

California Legal Forms (Matthew Bender).

Ch. 66A, *Conservatorships* .

Ch. 72, *Irrevocable Trusts* .

Ch. 98, *Powers of Attorney* .

Ch. 104, *Health Care Transactions, Consents, and Directives* .

California Forms of Pleading and Practice (Matthew Bender).

Chs. 281- 290H, covering guardianships and conservatorships.

Ch. 527, *Social Services* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare

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§ 105.08 Pamphlets

Thinking About a Nursing Home?--A Consumer's Guide to Choosing a Long-Term Care Facility (American Health Care Association).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare

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33-105 California Legal Forms--Transaction Guide § 105.10

§ 105.10 Placement of the Elderly in Long-Term Care Facilities

As a general rule, the placement of an elderly person in a long-term care facility does not require any legal process. It is normally accomplished by family members or other persons responsible for the person to be placed. These people are usually assisted by the elderly person's attending physician (who is in the position to know best what level of medical care the elderly person requires) and by county social service agencies established under the Department of Health and Human Services. In addition, it is very important that the person to be placed in the facility participate to the fullest possible extent in all decisions bearing on his or her care.

However, an attorney's assistance may be valuable to clients in need of advice on this subject. An informed attorney can provide valuable advice regarding the client's options for paying the costs of long-term care, and can review long-term care contracts and advise clients on the legal aspects of admissions, transfers, and discharges.

An attorney's advice can be very important to the family of a long-term care facility resident who wishes to pursue a complaint against, or is wrongfully discharged from, the facility.

Attorneys are frequently consulted by relatives of elderly persons to establish conservatorships for those persons as a preparatory step toward placing them in long-term care facilities. For an analysis of conservatorship proceedings and related forms, see Ch. 66A, *Conservatorship*. For comprehensive coverage of those proceedings, see California Forms of Pleading and Practice, Chs. 281- 290H (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law
Family Protection & Welfare
Elderly Persons
General Overview
Public Health & Welfare
Law
Healthcare
Services for Disabled & Elderly Persons
General Overview
Public Health & Welfare
Law
Healthcare
Services for Disabled & Elderly Persons
Care Facilities
General Overview
Public Health & Welfare
Law
Healthcare
Services for Disabled & Elderly Persons
Care Facilities
Nursing Facilities



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33-105 California Legal Forms--Transaction Guide § 105.11

§ 105.11 Types of Long-Term Care Facilities

"Long-term care" facilities provide inpatient care to individuals over extended periods of time. Long-term care facilities that provide convalescent or rehabilitation services come within the statutory definition of "health facilities" [*see Health & Safety Code § 1250(c), (d)*] and, accordingly, are subject to the laws governing licensing and administration of health facilities. Long-term care facilities do not provide certain types of treatment available in acute care hospitals, such as surgery, anesthesia, radiology, and laboratory services [*see Health & Safety Code § 1250(a)*; *see also* Ch. 104, *Health Care Transactions, Consents, and Directives*].

In general, long-term care facilities are appropriate for persons who are elderly, chronically ill, or in need of extensive rehabilitative services. However, in some instances an individual's condition will require several levels of care. For example, a resident of a residential facility for the elderly [*see § 105.15*] may develop a condition that would mandate his or her transfer to an acute care hospital. If the condition were successfully treated, the hospital would then transfer the individual back to the residential facility for the elderly or, if indicated, to a skilled nursing facility [*see § 105.12*].

There are three generally recognized classifications of long-term care facilities:

- Skilled nursing facilities [*see § 105.12*].
- Intermediate care facilities [*see § 105.13*].
- Residential care facilities for the elderly [*see § 105.15*].

Skilled nursing facilities and intermediate care facilities are subject to the laws governing all health facilities as well as to the statutes and regulations specifically relating to long-term care [*see Health & Safety Code §§ 1250, 1418*]. Residential care facilities for the elderly are governed by the California Residential Care Facilities for the Elderly Act [*see Health & Safety Code §§ 1569-1569.71*]. However, for federal Medicare and Medicaid purposes, residential care facilities for the elderly are considered "community care facilities."

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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33-105 California Legal Forms--Transaction Guide § 105.12

§ 105.12 Skilled Nursing Facilities

A "skilled nursing facility" (also referred to as a "convalescent hospital") is a health facility or a distinct part of a hospital which provides continuous skilled nursing care and supportive care to patients whose primary need is for the availability of skilled nursing care on an extended basis. It provides 24-hour inpatient care and, at a minimum, includes physician, skilled nursing, dietary, pharmaceutical services and an activity program [see *Health & Safety Code § 1250(c)*]. Skilled nursing facilities are intended for persons who require assistance in performing most daily activities (e.g., walking, eating, bathing, and dressing) and/or who require complex or time-consuming treatments. In skilled nursing facilities, those persons are under the continuous observation of trained personnel who are under the direct supervision of a registered nurse or licensed vocational nurse [see *22 Cal. Code Reg. § 72309 et seq.*] and receive frequent medical attention.

In addition to the mandated level of care discussed above, skilled nursing facilities may provide intermediate care services. For an explanation of the services provided by intermediate care facilities, see § 105.13.

Special treatment programs for the mentally disordered may be included, as an option and with approval from the Department of Mental Health, as part of the supportive care rendered to mentally disordered patients requiring skilled nursing care [see *22 Cal. Code Reg. § 72443(a)*]. Skilled nursing facilities may provide certain other specialized treatment and services as part of their supportive care programs in order to meet the needs of patients. These optional services include physical therapy [see *22 Cal. Code Reg. §§ 72403-72411*], occupational therapy [see *22 Cal. Code Reg. §§ 72413-72421*], speech pathology and audiology [see *22 Cal. Code Reg. §§ 72423-72431*], and social services [see *22 Cal. Code Reg. §§ 72433-72441*].

The general federal definition of "skilled nursing and rehabilitative services" encompasses services that are ordered by a physician, require the skills of technical or professional personnel such as registered nurses, licensed practical (vocational) nurses, physical therapists, occupational therapists, speech pathologists and audiologists, and which are furnished by or under the supervision of those technical or professional personnel [42 C.F.R. § 409.31(a)(1)-(3)]. For federal purposes, services that qualify as skilled nursing services include intravenous or intramuscular injections, intravenous feeding, and enteral feeding that comprises at least 26 percent of daily calorie requirements and provides at least 501 milliliters of fluid per day [42 C.F.R. § 409.33(a)].

Specific examples of "skilled nursing services" include overall management and evaluation of a patient's care plan based on a physician's orders; observation and assessment of a patient's changing condition; and patient education services, if the use of technical or professional personnel is necessary to teach a patient self-maintenance [see 42 C.F.R. § 409.33(a)]. Other examples include intravenous, intramuscular, or subcutaneous injections and hypodermoclysis or intravenous feeding; levin tube and gastronomy feedings; insertion and sterile irrigation and replacement of suprapubic catheters; application of dressings involving prescription medications and aseptic techniques; treatment of extensive decubitus ulcers or other widespread skin disorders; heat treatments which have been specifically ordered by a physician as part of active treatment and which require observation by nurses to adequately evaluate the patient's progress; and rehabilitation nursing procedures, including the related teaching and adaptive aspects of nursing that are part of active treatment (e.g., the institution and supervision of bowel and bladder training programs) [42 C.F.R. § 409.33(b)].

For federal purposes, "skilled rehabilitation services" include the ongoing assessment of patient rehabilitation needs and potential; therapeutic exercises or activities; gait evaluation and training; range of motion exercises; maintenance therapy; ultrasound, short-wave, and microwave therapy treatment by a qualified physical therapist; hot pack, hydrocollator, infrared treatments, paraffin baths, and whirlpool; and services of a speech pathologist or audiologist when necessary for the restoration of function in speech or hearing [see 42 C.F.R. § 409.33(c)].

For purposes of determining eligibility under the federal Medicare program, skilled nursing facilities and intermediate care facilities are consolidated into one category called "nursing facilities" [42 U.S.C. § 1396r; see § 105.14]. In order to qualify for participation in the Medicare program, a nursing facility must meet specified standards for residents' rights, quality of care, level of professional services, and facility administration [see 42 C.F.R. § 483.1 *et seq.*].

Patients may be admitted to skilled nursing facilities only on a physician's orders, and no facility may accept or retain a patient for whom it cannot provide adequate care [Health & Safety Code §§ 1262.7, 1418.6; 22 Cal. Code Reg. § 72515; see 42 C.F.R. § 483.40]. Some patients remain in skilled nursing facilities only during periods of convalescence or rehabilitation, after which they are discharged. However, other patients stay in the facilities for the remainder of their lives.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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33-105 California Legal Forms--Transaction Guide § 105.13

§ 105.13 Intermediate Care Facilities

An "intermediate care facility" is a health facility that provides inpatient care to ambulatory or nonambulatory patients who have a recurring need for skilled nursing supervision and supportive care, but who do not require the availability of continuous skilled nursing care [*Health & Safety Code § 1250(d)*]. For these purposes, an "ambulatory patient" is a patient who is able to leave a building unassisted under emergency conditions [*22 Cal. Code Reg. § 72077(b)*]. The term "nonambulatory patient" includes, but is not limited to, persons who are unable to leave the building unassisted by mechanical aids (such as crutches, walkers, and wheelchairs) and includes profoundly or severely mentally retarded persons [*22 Cal. Code Reg. § 72077(c)*]. If a skilled nursing facility offers intermediate care, it must do so in a distinct part of the facility [*22 Cal. Code Reg. § 72301(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare
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33-105 California Legal Forms--Transaction Guide § 105.14

§ 105.14 Nursing Facilities

Federal law provides that Medicare and Medicaid coverage is available for care in "nursing facilities" rather than skilled nursing or intermediate care facilities. For purposes of determining Medicare and Medicaid eligibility, a nursing facility is an institution or a distinct part of an institution that is not primarily for the care and treatment of mental diseases and is primarily engaged in providing (1) skilled nursing care and related services for residents who require medical or nursing care; (2) rehabilitation services for injured, disabled, or sick persons; or (3) regular health-related care and services for persons who because of their mental or physical condition require care and services above the level of room and board, which can be made available to them only through institutional facilities, and must meet certain additional requirements [42 U.S.C. § 1396r(a)(1); see 42 U.S.C. § 1396r(a)(2), (3), (b)-(d) (additional requirements)].

This definition is similar to the California definitions of skilled nursing facilities and intermediate care facilities [see *Health & Safety Code* § 1250(c), (d)]. The term "nursing facility" as used in California (generally, in statutes and regulations pertaining to the federal law) means a health facility that is certified to participate as a provider of care either as a skilled nursing facility in the federal Medicare program or as a nursing facility in the federal Medicaid program, or both, and is licensed under *Health & Safety Code* § 1250 et seq. [*Health & Safety Code* § 1250(k); *Welf. & Inst. Code* § 14002.5(f)]. Residential care facilities for the elderly are not considered "nursing facilities" under either federal or state law [42 U.S.C. § 1396r; *Welf. & Inst. Code* § 14002.5(f)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law
Family Protection & Welfare
Elderly Persons
General Overview
Public Health & Welfare
Law
Healthcare Services for Disabled & Elderly Persons
General Overview
Public Health & Welfare
Law
Healthcare Services for Disabled & Elderly Persons
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33-105 California Legal Forms--Transaction Guide § 105.15

§ 105.15 Residential Care Facilities for the Elderly

[1] Nature and Governing Law

[a] Definition

A "residential care facility for the elderly" is a housing arrangement chosen voluntarily by persons 60 years of age or older, or their authorized representatives, but including younger persons with compatible needs. These facilities provide varying levels and intensities of care and supervision, protective supervision, personal care, and, contingent on the adoption by the Department of Social Services of relevant regulations, health-related services. The level and intensity of services provided to an individual resident is based on his or her needs as determined before admission to the facility and at certain intervals following admission [*Health & Safety Code § 1569.2(k), (l); see 22 Cal. Code Reg. § 87101(r)(5)*]. For purposes of the California Residential Care Facilities for the Elderly Act [*see Health & Safety Code § 1569 et seq.*], which governs the licensing and administration of these facilities, "health and related services" are services that are directly provided by an appropriate skilled professional, including a registered nurse, licensed vocational nurse, physical therapist, or occupational therapist [*Health & Safety Code § 1569.2(e)*].

[b] Levels of Care

The legislature has declared its intent to develop and implement a plan to establish three levels of care under the residential care facility for the elderly license, subject to budget appropriations and statutory authorization to implement the levels of care. Each level will be based on the services required by residents. Level I would include residents that require only minimum care and supervision. Residents with functional limitations and psychosocial needs who require frequent assistance with personal activities would be included in Level II. Level III would consist of residents who rely on the facility for extensive assistance with personal activities of daily living, including those who also require the occasional services of an appropriate skilled professional due to chronic health problems and those returning from illness or treatment in facilities providing higher levels of care [*Health & Safety Code § 1569.70*].

[c] Excluded Facilities and Arrangements

Certain types of facilities and arrangements are specifically excluded from coverage under the Act. The Act does not

apply to a facility conducted by and for the adherents of any well-recognized church or religious denomination for the purpose of providing facilities for the care and treatment of the sick who depend upon prayer or spiritual means for healing in the practice of their religion [*Health & Safety Code* § 1569.145(c)]. Nor does it apply to a health facility or to a clinic [*Health & Safety Code* § 1569.145(a), (b); see *Health & Safety Code* §§ 1250 ("health facility" defined), 1202 ("clinic" defined)]. Certain houses, institutions, or similar facilities that provide limited services such as meals or social activities and recovery houses that provide living arrangements but no care or supervision for persons recovering from alcoholism or drug addiction are also excluded under the Act [*Health & Safety Code* § 1569.145(d), (e)].

Other arrangements excluded from coverage under the Act are those in which a family member [see *Health & Safety Code* § 1569.145(i) ("family member" defined)] or a close friend provide for a person's care or supervision [see *Health & Safety Code* § 1569.145(f)]. An arrangement in which a close friend is the caregiver is exempt under the Act, however, only if the person or persons cared for are from only one family, the friendship existed before they became provider and recipient, the care is provided in a home or residence chosen by the recipient, and the arrangement is not of a business nature and occurs only as long as the needs of the recipient are adequately met [*Health & Safety Code* § 1569.145(f)(2)]. Also exempt is any housing occupied by elderly or disabled persons, or both, that meets specified federal requirements and in which supportive services are made available to residents at their option, but the project owner or operator does not contract to provide the supportive services [see *Health & Safety Code* § 1569.145(g)(1)(A)]. Also excluded from coverage under the Act is any housing that qualifies for a low-income housing credit under *I.R.C.* § 42 or that is subject to the requirements for rental dwellings for low-income families under 42 *U.S.C.* § 1437f, and that is occupied by elderly or disabled persons, or both, if supportive services are made available to residents at their option, as long as the project owner or operator does not contract for or provide the supportive services [*Health & Safety Code* § 1569.145(g)(1)(B); see *Health & Safety Code* § 1569.145(g)(2) (project owner may coordinate, or help residents gain access to, supportive services)]. A conservator of the person, estate of the person, or both, who provides care and supervision of a type regulated under the Act is not exempt from the Act's licensure requirements unless the conservator is otherwise exempt under any of the provisions discussed above [see *Health & Safety Code* § 1569.145(j)].

[d] Medical Care Limitations

Residential care facilities for the elderly, unlike skilled nursing facilities, are not primarily medically oriented. They meet the housing, social, and service needs of older persons and provide a home-like environment for individuals with a variety of care needs [*Health & Safety Code* § 1569.1(g)]. Because they are not primarily medical facilities, residential care facilities for the elderly may not admit or retain residents who require 24-hour skilled nursing or intermediate care or are bedridden [see *Health & Safety Code* § 1569.72(b)(1) ("bedridden" defined)] other than for a temporary illness (that is, an illness of less than 15 days duration) or for recovery from surgery [*Health & Safety Code* § 1569.72(a), (d)(1)]. A bedridden resident may be retained in excess of 14 days, however, if certain requirements concerning the giving of notice to the Department of Social Services and the protection of the resident's health and safety are satisfied [see *Health & Safety Code* § 1569.72(e)]. A residential care facility for the elderly may also permit incidental medical services to be provided through a home health agency if the facility has, in the judgment of the Department of Social Services, the ability to provide the supporting care and supervision appropriate to meet the needs of the resident receiving home health agency care, provided requirements concerning notice of regulations, protocol, and communication about services provided by the agency are satisfied [*Health & Safety Code* § 1569.725].

A residential care facility for the elderly may obtain a waiver from the Department to allow a resident who has been diagnosed as terminally ill to remain in the facility when certain conditions are satisfied, including the use of licensed hospice care for the resident [see *Health & Safety Code* § 1569.73(a)]. The same rules apply to allow a person who has been diagnosed as terminally ill to become a resident of the facility, if that person is already receiving hospice services and would continue to receive hospice services without disruption if he or she became a resident [see *Health & Safety Code* § 1569.73(a)].

[2] Resident and Family Councils

Residential care facilities for the elderly afford residents greater opportunities for involvement in determining the nature of their day-to-day lives than patients possess in skilled nursing and intermediate care facilities, where a higher level of care is provided. If a majority of the residents request it, the facility must assist them in establishing and maintaining a resident-oriented council. The council must be composed of residents and may include members of their families. Among other things, the council may make recommendations to facility administrators to improve the quality of daily living in the facility and may negotiate with the facility administrators to protect residents' rights [*Health & Safety Code § 1569.157(a)*; cf. *Health & Safety Code § 1771.8* (resident councils in continuing care retirement communities)].

A family council is a meeting of family members, friends, responsible parties, or agents [*see Welf. & Inst. Code § 14110.8*] of two or more residents to confer in private without facility staff [*Health & Safety Code § 1569.158(c)*]. No residential facility may prohibit the formation of a family council. In addition, the facility must provide a family council adequate space to post meeting notices, minutes, and newsletters on the facility bulletin board or other posting area and must permit a family council to meet in a common meeting room of the facility on the request of a member of a resident's family or a responsible party [*Health & Safety Code § 1569.158(a), (d)*]. Facilities are prohibited from regulating family councils so as to limit the right of residents and family members to meet independently with outside persons (including members of nonprofit or government organizations) or with facility personnel during nonworking hours [*Health & Safety Code § 1569.158(b)*].

[3] Responsible Party

Although residents in care facilities for the elderly are often capable of handling their own affairs to a large extent, most admission agreements and applications produced by the facility will contain references to the resident's responsible person or responsible party. A "responsible person" is the individual (or group of individuals) including a relative, or placement agency [*see 22 Cal. Code Reg. § 87101(p)(2)* (definition)], who assists the resident in placement or assumes varying degrees of responsibility for the resident's well-being [*22 Cal. Code Reg. § 87101(r)(6)*].

[4] Basic Services

Residential care facilities for the elderly must provide certain minimum basic services. Facilities must assume responsibility for, provide, or promise to provide in the future, ongoing assistance with activities of daily living without which resident physical health, mental health, safety, or welfare would be endangered. Assistance includes assistance with taking medications, money management, and personal care [*Health & Safety Code §§ 1569.312(a), 1569.2(b)*]. Facilities must provide assistance with the instrumental activities of daily living in the combinations that meet the needs of the residents [*Health & Safety Code § 1569.312(b)*]. Residents must be provided with help in gaining access to appropriate supportive services in the community [*Health & Safety Code § 1569.312(c)*]. For these purposes, "supportive services" are resources available to the residents in the community that help them maintain their functional abilities and meet their needs as identified in the individual resident assessment. Supportive services may include medical, dental, and other health care services; transportation; recreational and leisure activities; social services; and counseling services [*Health & Safety Code § 1569.2(n)*]. Although residents may travel independently in the community, the facility must be aware of their general whereabouts [*Health & Safety Code § 1569.312(d)*]. In order to ensure the general health, safety, and well-being of the residents, facilities must monitor their activities while they are under the supervision of the facility [*Health & Safety Code § 1569.312(e)*]. Facilities must encourage residents to maintain and develop their maximum functional abilities through participation in planned activities [*Health & Safety Code § 1569.312(f)*].

[5] Incidental or Special Medical Services

Residential care facilities for the elderly may provide incidental medical services to residents. However, if medical services constitute a substantial portion of the services provided by the community care facility, that facility must obtain

approval for the services under the laws governing clinics [see *Health & Safety Code § 1200 et seq.*] or health facilities [see *Health & Safety Code § 1250 et seq.*]. A residential care facility for the elderly may not require residents to purchase medications, or rent or purchase medical supplies or equipment, from any particular pharmacy or other source [Health & Safety Code § 1569.314].

A licensee of a residential care facility for the elderly that advertises or promotes special care, programming, or environments for persons with a health-related condition, except as specified in *Health & Safety Code § 1569.72* [see § 1][d], above], must provide to each prospective resident, prior to admission, an accurate written description of these services and programs [Health & Safety Code § 1569.628]. The licensee must make all reasonable efforts to communicate this information to a person who is unable to read it, including, but not limited to, reading the description out loud [Health & Safety Code § 1569.628].

[6] Resident's Participation in Decisions Regarding Care and Services

A resident of a residential health care facility, or a resident's representative, or both, have the right to participate in decision making regarding the care and services to be provided to the resident [Health & Safety Code § 1569.80(a)]. Accordingly, before or within two weeks after the resident's admission, the facility must coordinate a meeting with the resident, and his or her representative, if any, an appropriate member of the facility's staff, and if the resident is receiving home health services in the facility, a representative of the home health agency involved, and any other appropriate parties [Health & Safety Code § 1569.80(a); see Health & Safety Code § 1569.80(e) (restricted applicability of this section if residential care facility for the elderly is a continuing care retirement community)]. The facility must ensure that participants in the meeting prepare a written record of the care the resident will receive in the facility, and the resident's preferences regarding the services provided [Health & Safety Code § 1569.80(a)]. Once prepared, this written record must be used by the facility, and, if applicable, by a health home agency, to determine the care and services to be provided to the resident [Health & Safety Code § 1569.80(b); see Health & Safety Code § 1569.725 (circumstances under which residential care facility may permit incidental medical services through home health agency)]. If the resident has a regular physician, the written record must be sent by the facility to that physician. The written record must be reviewed and, if necessary, revised, at least once every 12 months, or on a significant change in the resident's condition, whichever occurs first [Health & Safety Code § 1569.80(c)].

[7] Preadmission Fees, Rate Increases, and Lump-Sum Assessments

If a licensee of a residential care facility for the elderly charges a preadmission fee, the licensee must provide the applicant or his or her representative with a written general statement describing all costs associated with the preadmission fee charges and stating that the fee is refundable [Health & Safety Code § 1569.651(b); see Health & Safety Code § 1569.651(e) ("preadmission fee" means any fee, however, designated, that is requested or accepted prior to admission)]. The statement must also describe the conditions for the refund, as specified by *Health & Safety Code § 1569.651(g)*. That section provides that if the applicant decides not to enter the facility before the facility's completion of a preadmission appraisal, or if the facility fails to provide full written disclosure of the preadmission fee charges and refund conditions, the applicant (or his or her representative) is entitled to a refund of 100 percent of the preadmission fee [Health & Safety Code § 1569.651(g)].

Unless *Health & Safety Code § 1569.651(g)* applies, preadmission fees in excess of five hundred dollars must be refunded to the applicant or his or her representative as follows [Health & Safety Code § 1569.651(h)(1)-(4)]:

- If the applicant does not enter the facility after a preadmission appraisal is conducted, a refund of at least 80 percent of the preadmission fee amount in excess of \$500.
- If the resident leaves the facility for any reason during the first month of residency, a refund of at least 80 percent of the preadmission fee amount in excess of \$500.

- If the resident leaves the facility for any reason during the second month of residency, a refund of at least 60 percent of the preadmission fee amount in excess of \$500.
- If the resident leaves the facility for any reason during the third month of residency, a refund of at least 40 percent of the preadmission fee amount in excess of \$500.

The facility may, but is not required to, make a refund of the preadmission fee for residents living in the facility for four or more months [*Health & Safety Code § 1569.651(h)(5)*].

Notwithstanding *Health & Safety Code § 1569.651(g)*, if a resident of a licensed residential care facility for the elderly is evicted as the result of forfeiture of the facility's license or a change in the use, in accordance with the Department's regulations [*see Health & Safety Code § 1569.682; § 105.222[2]*], the resident is entitled to a refund of, or credit for, paid preadmission fees in excess of \$500, on a sliding scale depending on when the preadmission fees were paid [*see Health & Safety Code § 1569.651(i)(1)*]. No preadmission refund is required if preadmission fees were paid 25 months or more before the notice of eviction [*Health & Safety Code § 1569.651(i)(2)*]. Any refund must be paid within 15 days of issuing the notice of eviction [*Health & Safety Code § 1569.651(i)(3)*].

A licensee may charge only a single preadmission fee [*Health & Safety Code § 1569.651(b)*].

A licensee is prohibited from collecting any preadmission fee from a recipient of benefits under the State Supplementary Program for the Aged, Blind and Disabled who applies for admission to the facility [*Health & Safety Code § 1569.651(a); Welf. & Inst. Code § 12200 et seq.* (State Supplementary Program)].

These rules do not apply to licensees of residential care facilities for the elderly that have obtained a certificate of authority to offer continuing care contracts [*Health & Safety Code § 1569.651(f)*, *see Health & Safety Code § 1771(c)(8)* ("continuing care contracts" defined); *§ 105.20[2]*].

If a licensee of a residential care facility for the elderly increases the rates of fees for residents or makes increases in any of its rate structures for services, the licensee must provide no less than 60 days prior written notice to the residents or the residents' representatives. The notice must include the amount of the increase, the reason for the increase, and a general description of the additional costs [*Health & Safety Code § 1569.655(a)*]. Written notice of rate increase does not apply to an increase in the rate due to a change in the level of care of the resident, or to optional services that are provided by individuals, professionals, or organizations under a separate fee-for-service arrangement with residents [*Health & Safety Code § 1569.655(a)*].

However, for any rate increase based on a change in the level of care of the resident, the licensee must provide the resident and the resident's representative, if any, written notice of the rate increase within two business days after initially providing services at the new level of care [*Health & Safety Code § 1569.657(a)*]. The notice must include a detailed explanation of the additional services to be provided at the new level of care and an accompanying itemization of the charges [*Health & Safety Code § 1569.657(a)*]. The following persons are exempt from these rules [*Health & Safety Code § 1569.657(b), (c)*]:

- Residents of the facility who are recipients of benefits under the State Supplementary Program for Aged, Blind and Disabled [*see Welf. & Inst. Code § 12200 et seq.*].
- Licensees of residential care facilities for the elderly that have obtained a certificate of authority to offer continuing care contracts [*Health & Safety Code § 1569.651(f)*, *see Health & Safety Code § 1771(8)(c)* ("continuing care contracts" defined); *§ 105.20[2]*].

A licensee is prohibited from charging nonrecurring lump-sum assessments, except for charges for specific goods or services provided to an individual resident [*Health & Safety Code § 1569.655(b)*]. "Nonrecurring lump-sum assessments" are rate increases due to unavoidable and unexpected costs that financially obligate the licensee [*Health & Safety Code § 1569.655(b)*]. Instead of a lump-sum payment, all increases in rates must be to the monthly rate amortized over a 12-month period. The notification requirements of *Health & Safety Code § 1569.655(a)*, discussed above, apply to increases in this context [*Health & Safety Code § 1569.655(b)*].

If a licensee increases rates for a recipient under the State Supplementary Program for the Aged, Blind and Disabled [*Welf. & Inst. Code § 12200 et seq.*], the licensee must meet the requirements for SSI/SSP rate increases, as prescribed by law [*Health & Safety Code § 1569.655(c)*].

These rules do not apply to licensees of residential care facilities for the elderly that have obtained a certificate of authority to offer continuing care contracts [*Health & Safety Code § 1569.655(d)*, see *Health & Safety Code § 1771(8)(c)* ("continuing care contracts" defined); § 105.20[2]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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§ 105.16 Specialized Long-Term Care Facilities

There are other types of specialized long-term care facilities in addition to those discussed above. Some specialized facilities provide care for persons afflicted with particular physical illnesses, such as tuberculosis. Others care for persons with mental disabilities. These facilities may be subject to specific regulations tailored to the type of care they offer. For example, intermediate care facilities for the mentally retarded are subject to different regulations than other intermediate care facilities [*see 42 C.F.R. § 483.440 et seq.*].

A detailed analysis of these specialized long-term care facilities is beyond the scope of this chapter. For additional information and a list of all licensed specialty facilities, interested parties should contact the nearest office of the California Department of Health Services.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Family Protection & Welfare Elderly Persons General Overview Public Health & Welfare
Law Healthcare Services for Disabled & Elderly Persons General Overview Public Health & Welfare
Law Healthcare Services for Disabled & Elderly Persons Care Facilities General Overview Public Health & Welfare
Law Healthcare Services for Disabled & Elderly Persons Care Facilities Nursing Facilities



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§ 105.17 Alternative Arrangements for Care of the Elderly

[1] In General

If the extent of services provided in long-term care facilities is not required for a particular elderly person, there are alternative arrangements which should be considered. A detailed analysis of all possible alternative arrangements is beyond the scope of this chapter. The more common alternatives are home health care and retirement residences.

[2] Home Health Care

If the family and the individual feel strongly that he or she should remain at home, it may be advisable to investigate a home health care arrangement or a day health care program [*see Health & Safety Code § 1570 et seq.* (California Adult Day Health Care Act)]. Whether or not the individual's medical requirements will permit home health care must be determined by his or her attending physician. Under some circumstances, home health care is a viable alternative if the family and patient are willing to make the effort (*e.g.*, installation of special devices such as ramps) and accept the responsibility that care entails. Any family wishing to explore this option should contact their county Department of Health and Human Services for the names of specific agencies providing home health services.

For federal purposes, "home health services" are any of the following services that are provided at the patient's place of residence under a physician's orders as part of a written plan of care reviewed by the physician every 60 days: nursing services provided by a home health agency or a registered nurse; home health aide services provided by a home health agency; medical supplies, equipment, and appliances suitable for use in the home; and physical therapy, occupational therapy, or speech pathology and audiology services provided by a home health agency or by a facility licensed by the state to perform the services [*see 42 C.F.R. § 440.70(a), (b)(1)-(4)*]. For these purposes, a patient's "place of residence" does not include a hospital, nursing facility, or intermediate care facility for the mentally retarded (except for home health services for the mentally retarded that are not required to be provided by the facility under *42 C.F.R. § 483.400 et seq.*) [*42 C.F.R. § 440.70(c)*].

[3] Respite Care Services

"Respite care services" are services provided to a frail elderly or functionally impaired person in a licensed skilled

nursing facility or intermediate care facility [see *Health & Safety Code* § 1250(c), (d); see also §§ 105.12, 105.13], on a temporary or periodic basis to relieve those who are providing home health care for that person [*Health & Safety Code* § 1418.1(e)]. For these purposes, "temporary or periodic" means a period of time not to exceed 15 consecutive days or a total of 45 days in any one year [*Health & Safety Code* § 1418.1(f)]. A skilled nursing or intermediate care facility may use no more than 10 percent of its total licensed bed capacity for the provision of respite care services in any one year, unless it obtains prior written approval of the State Department of Health Services to exceed this limit [*Health & Safety Code* § 1418.1(g)].

Contracts of admission to skilled nursing and intermediate care facilities for respite care services are known as "abbreviated contracts of admission." This is because they are not required to contain all of the provisions set forth by statute for skilled nursing and intermediate care facility admission contracts generally [*Health & Safety Code* § 1599.60(a); see § 105.205]. A skilled nursing or intermediate care facility providing respite care services may also implement an abbreviated resident assessment and care planning procedure for persons admitted for respite care, and is not required to update the procedure documents for every readmission of the same person to the facility for respite care services, unless the person's personal physician indicates that there has been a significant change in the person's medical condition. The abbreviated procedure must be consistent with the facility's obligation to protect the health and safety of residents and the general public, and must address the necessary care services required by the person admitted for respite care during the length of his or her respite care stay [*Health & Safety Code* § 1418.1(d)].

Persons receiving respite care services must be permitted to bring medication to the facility, if the contents have been examined and positively identified at the time of admission by the person's personal physician or a pharmacist retained by the facility [*Health & Safety Code* § 1418.1(a)]. The facility must permit the personal physician of any person receiving respite care services to issue advance orders for care and treatment for a period not to exceed 90 days from the date of the person's admission to the facility, based on the person's medical history, diagnosis, and physical assessment conducted upon admission. The facility may readmit the person for respite care services on the basis of these advance orders, unless the physician indicates that there has been a significant change in the person's medical condition. The advance orders may be used by the facility only during periods in which the person is receiving respite care services [*Health & Safety Code* § 1418.1(c)].

[4] Retirement Residences

Elderly persons who are in reasonably good health and who are self-sufficient might wish to explore retirement residences. Generally, individuals wishing to live in retirement residences must buy their apartments and, in addition, pay a monthly maintenance fee. Often, arrangements made between individuals and retirement residents are in the nature of life care ("continuing care") contracts [see § 105.20].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare
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§ 105.18 Financial Arrangements

[1] Issues and Options

An attorney should explore all available payment options when advising a client about placing a patient in a long-term care facility. Private funds, federal aid, and state medical assistance programs are options available to pay for long-term care and, in some circumstances, private insurance may help defray the costs of care for the elderly under "extended care" provisions. An attorney who is exploring the availability of Medicare or Medi-Cal payments to defray the cost of long-term care should contact an eligibility worker at the nearest office of the California Department of Health and Human Services, Medi-Cal division, and the federal Department of Health and Human Services. For checklists to be used in determining an individual's basic eligibility for medical assistance, see §§ 105.112, 105.122.

The quality and level of care received by patients is determined by their needs and by the type of license that the facility holds. Within a particular facility, the quality of care afforded patients should not depend upon the methods by which they pay for that care.

Facilities are not obligated to accept patients receiving medical assistance, even though the facilities are certified for Medicare and/or Medi-Cal participation. Nevertheless, each long-term care facility must reveal to all applicants for admission (or their designated representatives) both orally and in writing prior to admission, whether the facility participates in the Medi-Cal program and the circumstances under which the law permits a Medi-Cal patient to be transferred involuntarily [*Health & Safety Code § 1439.8*].

[2] Federal Medicare Program

The federal Medicare program covers post-hospital extended care services in a Medicare-certified facility for up to 100 days during any spell of illness, and, to the extent provided in 42 U.S.C. § 1395d(f), extended care services that are not post-hospital extended care services [42 U.S.C. § 1395d(a)(2)]. The Medicare program also covers extended care services that are not post-hospital services as long as that coverage does not increase the total payments under the program, and the services provided are of the type for which Medicare benefits are normally available [see 42 U.S.C. §§ 1395d(f), 1395x]. Coverage of post-hospital extended care services is limited to skilled nursing care (other than solely venipuncture for the purpose of obtaining a blood sample) [see discussion in § 105.12] or other skilled rehabilitation

care required by the patient because of a condition for which he or she was receiving inpatient hospital care before being transferred to the skilled nursing facility [see 42 U.S.C. § 1395f(a)(2)(C)]. The required level of care will be reflected in the specific orders of the attending physician.

For purposes of determining "inpatient" status and, thus, Medicare eligibility, both the nature of the services and the place where the patient resides are considered. A patient who resides in a skilled nursing facility but does not receive skilled nursing care is not entitled to Medicare payments for hospital services due to a spell of illness [*Levi by Levi v. Heckler* (1984) 736 F.2d 848, 849-850] .

It is unusual for anyone to be covered by Medicare for a full 100 consecutive days in a skilled nursing facility. The decision as to whether payment will be forthcoming is made by the responsible Medicare fiscal-intermediary insurance carrier based on physician diagnoses and claim forms submitted by the facility. Some facilities may request partial advance payments upon admission since they anticipate little reimbursement from Medicare through an assignment of benefits.

Individuals are eligible for Medicare benefits if they are (1) at least 65 years old and eligible for retirement benefits under Subchapter II of the Social Security Act (or would be eligible for such benefits if certain government employment were covered employment under Subchapter II) or under the railroad retirement system; or (2) under age 65 and have been entitled for not less than 24 months to disability benefits under Subchapter II (or would be eligible for such benefits if certain government employment were covered employment under Subchapter II) or under the railroad retirement system. Certain other individuals who do not meet these conditions but who are medically determined to have end-stage renal disease are also eligible for Medicare benefits [42 U.S.C. § 1395c].

[3] Medicaid and Medi-Cal Programs

The federal Medicaid program authorizes payment of federal funds to states that establish their own medical assistance programs [see 42 U.S.C. § 1396].

The Medi-Cal program is California's state medical assistance program for persons whose income and resources are insufficient to meet the costs of necessary medical services. One of its purposes is to provide medical assistance to aged persons who lack an annual income sufficient to meet their health care costs [see *Welf. & Inst. Code* § 14000]. Among other things, the Medi-Cal program covers outpatient physician, hospital, and clinic services [*Welf. & Inst. Code* § 14132(a)], inpatient hospital services [*Welf. & Inst. Code* § 14132(b)], and nursing facility services [*Welf. & Inst. Code* § 14132(c)].

The Department of Health Services, which administers the Medi-Cal program, must ensure that nursing facility applicants have access to assistance in identifying and securing the information necessary to complete the Medi-Cal application and to make the eligibility determination [*Welf. & Inst. Code* § 14110.05(a)]. The Department must also ensure that Medi-Cal applications for nursing facility residents are processed in a timely manner in accordance with state and federal laws and regulations [*Welf. & Inst. Code* § 14110.05(b)].

Medically needy persons must meet all eligibility criteria to receive health care services under the Medi-Cal program [*Welf. & Inst. Code* § 14005.7; see *Welf. & Inst. Code* § 14005]. Monthly income (in excess of the maintenance levels established by law), excluding any exempt income and amounts paid for Medicare and other health insurance premiums, will be the share of cost to be paid by the needy person [*Welf. & Inst. Code* § 14005.7(c); see *Welf. & Inst. Code* § 14005.9]. No medically needy person will be entitled to receive Medi-Cal health services during any month in which his or her share of cost has not been met [*Welf. & Inst. Code* § 14005.7(b)]. Amounts to be included in monthly income for purposes of determining Medi-Cal eligibility for medically needy persons are determined in accordance with Title XIX of the Social Security Act [*Welf. & Inst. Code* § 14005.7(c)-(e); see 42 U.S.C. § 1396]. In determining the income of a medically needy person residing in a licensed community care facility, any amount paid to the facility for

residential care and support that exceeds the amount needed for maintenance is considered unavailable for purposes of the Medi-Cal program [*Welf. & Inst. Code* § 14005.7(e)].

Ordinarily, Medi-Cal recipients are medically needy persons who are either receiving, or are eligible to receive, other forms of public assistance. A state agency must make certain deductions from the total income available to medically needy individuals in long-term care facilities. If the individual is married, the agency must deduct an amount for maintenance of the spouse at home [*see* 42 C.F.R. § 435.832(c)(1)-(4); *see also* *Granneman v. Myers* (1981) 115 Cal. App. 3d 846, 852, 171 Cal. Rptr. 583]. Special rules apply to eligibility determinations for married individuals, the inclusion of community property as available income, and transfers of community property between spouses when one spouse is admitted to a skilled nursing or intermediate care facility [*see* *Welf. & Inst. Code* § 14006.2; *see* § 105.202]. These rules recognize the validity of agreements between spouses dividing community property into equal shares of separate property, and provide that the separate property of an individual's spouse will not be considered in determining the individual's eligibility for Medi-Cal benefits, except when separate property owned by one spouse is actually made available to the other spouse [*Welf. & Inst. Code* § 14006.2(a)(1)].

The Department of Health Services, at the time either of application for Medi-Cal benefits or of the assessment of the resources of a married couple [*see* *Welf. & Inst. Code* § 14006.6; *see also* § 105.202[1]], and any nursing facility enrolled as a provider of the Medi-Cal program, before admitting any person, must provide a statement in writing, in a form and language specified by the Department, that explains the resource and income requirements of the Medi-Cal Program [*Welf. & Inst. Code* § 14006.3]. This statement must be provided to the person admitted and that person's spouse, legal representative, or agent, if any [*Welf. & Inst. Code* § 14006.3; *see* § 105.202].

A person living in a nonmedical out-of-home care facility may be entitled to an allowance for personal and incidental needs in addition to allowances for room, board, and care. These allowances are subject to the same rules and restrictions on cost-of-living adjustments applicable to other Medi-Cal payments [*Welf. & Inst. Code* §§ 13920, 13921; *see* *Welf. & Inst. Code* § 12201 (cost-of-living adjustments)].

Unlike Medicare, Medi-Cal payments are not dependant upon prior hospitalization in an acute care facility. If a medically needy person contemplates entry into a skilled nursing facility or an intermediate care facility, his or her physician must first consult with the state Department of Health Care Services in order to determine the level of care actually required. Once a Medi-Cal recipient has been admitted to a skilled nursing facility or an intermediate care facility, the Department will monitor the level of care required by the individual.

If a skilled nursing or intermediate care facility that is certified to provide benefits under the Medi-Cal program wishes to withdraw from the Medi-Cal program, it must file a notice of intent to withdraw with the Department of Health Services and continue to provide Medi-Cal service to Medi-Cal patients who were residing in the facility at the time the notice was filed [*Welf. & Inst. Code* § 14022.4(a), (d)]. When all of those residents have left the facility, it may formally withdraw from the program [*Welf. & Inst. Code* § 14022.4(d)]. Between the time that the notice is filed and the time that the facility formally withdraws from the Medi-Cal program, it will not be required to accept new Medi-Cal patients [*Welf. & Inst. Code* § 14022.4(a)(3)(B)].

[4] Veterans Benefits

A veteran may be eligible to receive long-term hospital and nursing home care in a facility operated by the Department of Veterans Affairs or, following treatment in a Department facility, in a non-Department facility at government expense [*see* 38 U.S.C. §§ 1710, 1720]. Care in a non-Department facility is generally limited to six months unless the care is required because of a service-connected disability or other unusual circumstances [*see* 38 C.F.R. §§ 17.51(b)(4), 17.51a]. Veterans' benefits are generally available to any person who has served in the active military, naval, or air service, and who was discharged or released under conditions other than dishonorable [38 U.S.C. § 101(2) (definition of "veteran")].

[5] Private Payment**[a] Payment Arrangements**

Patients whose long-term care is not covered by a governmental medical assistance program are referred to as "private patients." Individual facilities have varying payment programs available to private patients. These generally include month-to-month contracts as well as life care contracts, [see "Life Care Contracts--In General," and subsequent headings, *below*]. An inter vivos trust may be established to assure that fee payments will be made. For a discussion of the law governing these trusts and a representative declaration of trust, see § 105.233.

[b] Private Insurance

Occasionally a private health insurance plan will include care in a skilled nursing facility under a provision relating to "extended care." Usually, coverage under a private health policy will be limited to specific services. Few, if any, private health insurance plans will cover any costs incurred in a residential care facility for the elderly. All health insurance plans covering the individual to be placed in a long-term care facility should be carefully scrutinized for potential coverage. Specialized insurance plans covering long-term care may be available.

[c] Tax Considerations

Facilities sometimes encourage substantial donations from prospective patients who are financially able to make gifts as well as meet the regular costs of care. If a prospective patient or the relative of a prospective patient considers making a financial contribution to the facility, the attorney advising that person should determine the income tax consequences to the donor. A contribution to a nonprofit nursing home or residential care facility for the elderly may qualify as a charitable deduction for the donor [see *I.R.C. §§ 170, 501(c)(3)*; see also *Treas. Reg. §§ 1.170A-1-1.170A-10*; *Rev. Rul. 72-124, 1972-1 C.B. 145*; *Wardwell's Estate v. (8th Cir. 1962) 301 F.2d 632, 638*; but see *Sedam v. United States (7th Cir. 1975) 518 F.2d 242, 245*]. For a detailed discussion of the income, gift, and estate tax consequences of charitable contributions, see the Legal Background to Ch. 69, *Charitable Dispositions*.

If a lump sum payment is made to the facility on behalf of the prospective patient under a life care contract, the attorney advising the payor should determine the deductibility of the portion of that payment designated for medical care [see *I.R.C. § 213*; see also *Rev. Rul. 75-302, 1975-2 C.B. 86*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare
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33-105 California Legal Forms--Transaction Guide § 105.19

§ 105.19 Admissions

[1] In General

The long-term care facility admission agreement is a contract between the facility and the individual (or other authorized individual, such as a conservator or guardian) to be admitted specifying the terms and conditions under which the individual will be admitted, the financial arrangements, and the level of care that the individual will receive. The agreement will normally be executed at or shortly before the time of admission. For representative admission agreements, see § 105.200 (skilled nursing facility) and § 105.222 (residential care facility for the elderly).

If a person, or the person's legal representative, responsible person, or agent, has previously executed a contract of admission to a skilled nursing or intermediate care facility, the person may under certain circumstances be readmitted pursuant to a signed written statement detailing any modifications to the original contract, rather than having to execute a new contract [*Health & Safety Code §§ 1599.651, 1599.652*]. For a representative form containing this statement, see § 105.206.

A facility may not admit or discharge an individual on the basis of that individual's race, color, religion, or national origin. However, if the facility is a nonprofit religious, fraternal, or charitable organization, it may establish admission policies that give preference to its own members if it does not do so in order to evade the anti-discrimination provisions of the law [*see 22 Cal. Code Reg. §§ 72521(c)(3) (skilled nursing facilities), 87128 (residential care facilities for the elderly)*].

[2] Skilled Nursing and Intermediate Care Facilities

A skilled nursing facility may admit a patient only on the orders of a physician. Patients may not be admitted to a facility that is unable to provide care adequate for their needs [*see 22 Cal. Code Reg. § 72515; see also 42 C.F.R. § 409.31(a)(1)*].

Admission contracts must meet specific legal requirements with respect to format and content [*see Health & Safety Code § 1599.60 et seq.; for discussion of these requirements, see § 105.200[1]*]. *Health & Safety Code § 1599.61*, adopted in 1997, required the Department of Long Term Care to develop a standard admission agreement to be used by

all skilled nursing and intermediate care facilities, and a short form agreement for patients whose length of stay is anticipated to be 14 days or less. By statute, all such facilities were required to use such an agreement by January 1, 2000 [*Health & Safety Code § 1599.61(a), (b)(2)*]. Deviations from the standard agreement are permitted only when authorized by the Department [*Health & Safety Code § 1599.61(b)*]. The Department was also required to develop a standardized version of the Patients' *Bill of Rights* for residents of these facilities, to be included as an attachment to all admission agreements [*Health & Safety Code § 1599.61(d)*; *see § 105.22*]. Development of these standardized forms has proven to be a difficult and controversial process, however, and as of January 2009, the Department has not finalized regulations containing the new forms. Department sources have advised that there is no anticipated date for final implementation of these regulations. Accordingly, the Department is advising operators to continue to use their current agreement forms.

Skilled nursing and intermediate care facilities must make copies of the admission contracts available to the public, at cost [*Health & Safety Code § 1599.63(a)*]. In addition, each facility must conspicuously post either a complete copy of its admission contract or notice of its availability on the premises [*Health & Safety Code § 1599.63(b)*].

Skilled nursing facilities must establish written administration and management policies concerning certain aspects of admission procedures [*see 22 Cal. Code Reg. § 72521(a)*]. For example, facilities must maintain a set of written policies and procedures for patient admissions, leaves of absence, transfers, passes and discharges, categories of patients accepted and retained, rate of charge for services included in the basic rate, types of services offered, charges for extra services, limitations on services, and causes for termination of services and policies relating to refunds upon termination of services [*22 Cal. Code Reg. § 72521(c)(2)*].

Federal regulations require skilled nursing facilities and intermediate care facilities certified for the Medicare and Medicaid programs to establish written policies and procedures governing the admission of patients [*see 42 C.F.R. §§ 483.10(b), 483.12*; *see also 42 C.F.R. § 483.5* ("facility" defined to include skilled nursing and immediate care facilities)]. Before or at the time of admission, the facility must inform the patient (both orally and in writing, in a language that the patient understands) of the patient's rights and of all the rules and regulations governing patient conduct and responsibilities during the stay in the facility [*42 C.F.R. § 483.10(b)*; *see 42 C.F.R. § 483.12* (additional notification requirements)]. In addition, the facility must provide written notice to each resident who is entitled to Medicaid benefits at the time of admission, or when the patient becomes eligible for Medicaid, of the items and services that are covered by Medicaid and those for which the patient may be separately charged, including the amount of the additional charges [*42 C.F.R. § 483.10(b)(5)*; *see 42 C.F.R. § 483.10(b)(6)*]. Further, the facility must provide information about how to apply for and use Medicare and Medicaid benefits [*42 C.F.R. § 483.10(b)(10)*], and must furnish a written description of the patient's legal rights, including the manner of protecting the patient's personal funds [*42 C.F.R. § 483.10(b)(7)*; *see 42 C.F.R. § 483.10(c)*; *see also § 105.22* (residents' rights)].

When a patient is admitted to a skilled nursing facility, an admission record containing personal and medical information on the patient, as well as an inventory of any personal property he or she brings into the facility (including, but not limited to, items of jewelry, items of furniture, radios and other appliances, prosthetic and orthopedic devices, and other valuable items identified by the patient, family, or authorized representative), must be completed [*see 22 Cal. Code Reg. § 72545*]. The patient will be provided with a wristband identification tag that must be worn at all times, unless the attending physician notes in the patient's health records that his or her condition precludes wearing the wristband. The wristband must contain, at a minimum, the patient's name and name of the facility [*22 Cal. Code Reg. § 72555*].

[3] Admission of Medi-Cal Beneficiaries

The Department of Health Services must ensure that nursing facility applicants have access to assistance in identifying and obtaining the information necessary to complete the Medi-Cal application and make a determination of eligibility for the Medi-Cal program [*Welf. & Inst. Code § 14110.05(a)*]. Nursing facilities, including skilled nursing and

intermediate care facilities cannot require Medi-Cal beneficiaries to have a responsible party [see *Welf. & Inst. Code* § 14110.8(a)(4) (definition)] sign or cosign the admissions agreement as a condition of admission [see *Welf. & Inst. Code* § 14110.8(b)]. However, if a resident has an agent [see *Welf. & Inst. Code* § 14110.8(a)(3) (definition)], the facility may require, as a condition of admission, that the agent sign or cosign the admissions agreement and agree to distribute to the facility promptly when due any charges not paid for by the Medi-Cal program that the patient or the agent has agreed to pay [see *Welf. & Inst. Code* § 14110.8(c)]. A new agent who did not sign or cosign the admissions agreement must distribute funds in accordance with the agreement [see *Welf. & Inst. Code* § 14110.8(c)].

No facility may require a security deposit from a Medi-Cal beneficiary who applies for admission [see *Welf. & Inst. Code* § 14110.9]. When a resident on non-Medi-Cal status converts to Medi-Cal coverage, any security deposit paid to the facility by the resident or on the resident's behalf as a condition of admission must be returned; the obligations and responsibilities of the resident or responsible party during the period when the resident is covered by Medi-Cal are limited to those provided for under the Medi-Cal program [see *Welf. & Inst. Code* § 14110.8(d)]. If the resident becomes ineligible for Medi-Cal coverage subsequent to converting to that coverage, the resident or responsible party is bound by the terms of the original admission agreement or any admission agreement in effect at the time the resident's Medi-Cal coverage began [see *Welf. & Inst. Code* § 14110.8(d)]. When a resident converts to Medi-Cal coverage, the facility must make a reasonable attempt to assist the resident in contacting the county to obtain an estimate of the share of the resident's cost [see *Welf. & Inst. Code* § 14110.8(e)]. A resident or his or her agent must pay to the facility the share of the cost for which he or she is responsible under the Medi-Cal program, unless otherwise exempted by law [see *Welf. & Inst. Code* § 14110.8(f); see *Welf. & Inst. Code* § 14110.8(g) (fee disputes)].

Any agent who willfully violates these requirements is guilty of a misdemeanor punishable by a fine, imprisonment, or both [see *Welf. & Inst. Code* § 14110.8(h)].

Special statutory requirements apply to contracts for the admission of Medi-Cal and Medicare recipients to long-term health care facilities [see *Health & Safety Code* §§ 1599.69, 1599.70]. These requirements are discussed in § 105.200[1][g].

[4] Residential Care Facilities

The class of persons admitted to a particular residential care facility for the elderly may be limited [see 22 *Cal. Code Reg.* §§ 87455(c), 87609, 87615]. If a restrictive license is issued, only the number of persons specified under the terms of that license may be admitted to the facility [see 22 *Cal. Code Reg.* § 87158(b)].

Residential care facilities for the elderly may only admit individuals who have undergone a pre-admission appraisal [see 22 *Cal. Code Reg.* § 87457] of their functional capabilities [see 22 *Cal. Code Reg.* § 87459], mental condition [see 22 *Cal. Code Reg.* § 87461], social needs and abilities [see 22 *Cal. Code Reg.* § 87462], and medical condition [see 22 *Cal. Code Reg.* § 87458].

Persons with active communicable tuberculosis, or who require inpatient care in a health facility, may not be admitted to residential care facilities for the elderly [22 *Cal. Code Reg.* §§ 87455(c), 87609, 87615]. For a list of the specific persons who may and may not be admitted to residential care facilities for the elderly, see § 105.120.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law
Family Protection & Welfare
Elderly Persons
General Overview
Public Health & Welfare
Law
Healthcare
Services for Disabled & Elderly Persons
General Overview
Public Health & Welfare
Law
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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART II. LEGAL BACKGROUND

33-105 California Legal Forms--Transaction Guide § 105.20

§ 105.20 Continuing Care and Life Care**[1] In General**

Continuing care retirement communities are an alternative for the long-term residential, social, and health care needs of elderly residents [*Health & Safety Code* § 1770(a)]. Elderly residents often expend a significant portion of their savings in order to purchase continuing care, and expect to receive lifelong care at their continuing care retirement community in return. Because of the tragic consequences that can result in this situation if the care provider becomes insolvent or unable to provide responsible care, the legislature has imposed detailed minimum requirements on any entity that offers or provides continuing care [*Health & Safety Code* §§ 1770(b), (c), (f); see *Health & Safety Code* § 1775(e) (requirements to be liberally construed for protection of those attempting to obtain or receiving continuing care); see also *Health & Safety Code* § 1771.3 (circumstances in which chapter does not apply)]. These requirements concern, among other matters, the issuance of certificates of authority to enter into continuing care contracts [*Health & Safety Code* §§ 1771.2(b), 1786, 1786.2; see [3], below], contents of continuing care contracts [*Health & Safety Code* §§ 1787, 1788; see §§ 105.123, 105.230], and business and financial matters [see, e.g., *Health & Safety Code* §§ 1779.4, 1790, 1792-1793]. These requirements are enforced by the Department of Social Services, assisted by the Continuing Care Contracts Advisory Committee of the Department of Social Services [*Health & Safety Code* §§ 1777(a), 1777.2, 1793.23(a)].

[2] Statutory Terms and Definitions

Entities that provide continuing care (that is, care for life or for more than one year), make a continuing care promise, or propose to promise to provide continuing care are known as *providers* [*Health & Safety Code* § 1771(p)(10); see *Health & Safety Code* § 1771(c)(8), (10) ("continuing care contract" and "continuing care promise" defined)]. "Provider" also includes any entity that controls an entity that provides continuing care, makes a continuing care promise, or proposes to promise to provide continuing care [*Health & Safety Code* § 1771(p)(10)]. However, no homeowner's association, cooperative, or condominium association may be a provider [*Health & Safety Code* § 1771(p)(10)]. A person who transfers, or promises to transfer, consideration in exchange for care and related services under a continuing care contract or proposed continuing care contract, for the benefit of another is called a *transferor* [*Health & Safety Code* § 1771(t)(3)]. A transferor has the same rights to cancel and obtain a refund as the depositor under the deposit agreement or the resident under a continuing care contract [*Health & Safety Code* § 1771(t)(3); see [5], below]. A person who

receives services pursuant to a continuing care contract, including care, board, or lodging, is called a "resident" [*Health & Safety Code § 1771(r)(5)*]. Often, but not always, the transferor and the resident are the same person.

[3] Authority to Provide Continuing Care

A licensee may not enter into any continuing care contract with any person without approval by the Department of Social Services in accordance with *Health & Safety Code § 1770 et seq.* [22 *Cal. Code Reg. § 87507(i)*]. The Department will not issue a provisional certificate of authority or a certificate of authority to an applicant until the applicant has obtained licenses for the entire continuing care retirement community, including a license to operate the residential living and assisted living units [see *Health & Safety Code § 1569 et seq.*] and, if a skilled nursing facility is on the premises, as a health facility [*Health & Safety Code § 1771.5*; see *Health & Safety Code §§ 1250 et seq.* (health facilities), 1569.2(n) ("supportive services" defined), 1569.312 (basic services required of each licensed residential care facility for the elderly), 1771(a)(4) ("applicant" defined), 1771(c)(5) ("certificate" defined); see also § 105.15[4], above, for discussion of services required to be provided to residents of residential care facilities for the elderly generally].

In addition to holding all appropriate licenses for the type of care to be provided, any provider who executes a continuing care contract [see [4], below] must have a current and valid provisional or final certificate of authority issued by the Department of Social Services before it may enter into a continuing care contract [*Health & Safety Code §§ 1771.2(b)*, 1779(a); see *Health & Safety Code §§ 1779-1779.8* (application procedure), 1779.10 (causes for denial of application), 1786 (issuance of provisional certificate), 1786.2 (issuance of final certificate)]. If an entity enters into an agreement to provide care for life or for more than one year to a person under 60 years of age in return for consideration, and the agreement includes the provision of services to that person after the age of 60, the promising entity must comply with all the requirements imposed by *Health & Safety Code § 1770 et seq.* when that person reaches age 60 [*Health & Safety Code § 1771.2(d)*]. Generally, if a provider subcontracts or assigns to another entity the responsibility to provide continuing care, the other entity must have a current and valid certificate of authority. However, a provider with a current and valid certificate of authority may contract for the provision of a particular aspect of continuing care, such as medical care, with another entity that does not have a certificate of authority, if (1) the other entity is appropriately licensed under California law to provide that care, and (2) the provider has not paid in advance for more than one year for the care [*Health & Safety Code § 1771.2(c)*].

Once issued, a final certificate of authority remains in force until forfeited by operation of law [see *Health & Safety Code § 1793.7*], inactivated [see *Health & Safety Code § 1793.8*], or suspended, or revoked by the Department of Social Services [*Health & Safety Code § 1786.2(b)*; see *Health & Safety Code § 1793.21* (suspension or revocation)]. A certificate of authority is forfeited by operation of law when:

- The provider surrenders to the Department its residential care facility for the elderly license, the permit to accept deposits, provisional certificate of authority, or certificate of authority for a continuing care retirement community [*Health & Safety Code § 1793.7(b)*].
- The provider sells or otherwise transfers all or part of the continuing care retirement community [*Health & Safety Code § 1793.7(c)*; see *Health & Safety Code § 1773* (approval of Department of Social Services required for transfer of facility ownership)].
- A change occurs in the majority ownership of the continuing care retirement community or the certificate of authority holder [*Health & Safety Code § 1793.7(d)*].
- The provider merges with another entity [*Health & Safety Code § 1793.7(e)*].
- The provider moves the continuing care retirement community from one location to another without the Department's prior approval [*Health & Safety Code § 1793.7(g)*].

- The provider abandons the continuing care retirement community or its obligations under the continuing care contracts [*Health & Safety Code § 1793.7(h)*].
- The provider is evicted from the continuing care retirement community premises [*Health & Safety Code § 1793.7(i)*].

Executing a continuing care contract without holding a current and valid provisional certificate of authority or certificate of authority is a misdemeanor [*Health & Safety Code § 1793.5(c)*]. However, a certificate of authority is not required for the care of a person by a relative, or for the care of a person or persons from one family by a friend [*Health & Safety Code § 1771.3(a)*]. In addition, the requirements imposed by *Health & Safety Code § 1770 et seq.* do not apply to admission or residence agreements offered by residential communities for the elderly or residential care facilities for the elderly that promise residents preferred access to assisted living services or nursing care, provided specified conditions are satisfied [see *Health & Safety Code § 1771.3(b)*; see *Health & Safety Code § 1771.3(c)-(e)* (application for letter of exemption); see *Health & Safety Code § 1771.6* (application for letter of nonapplicability)].

[4] Continuing Care Contracts

[a] Definitions

A "continuing care contract" is a contract that includes a continuing care promise made in exchange for an entrance fee, the payment of periodic charges, or both types of payments [*Health & Safety Code § 1771(c)(8)*]. A continuing care contract may consist of one agreement or a series of agreements and other writings incorporated by reference [*Health & Safety Code § 1771(c)(8)*]. A "continuing care promise" is an express or implied promise by a provider to provide one or more elements of care to an elderly resident for the duration of his or her life or for a term in excess of one year [*Health & Safety Code § 1771(c)(10)*; see *Health & Safety Code § 1771(e)(1)* ("elderly" means an individual who is 60 years or older)]. A continuing care promise includes any such promise or representation, written or oral, whether it is part of a continuing care contract, other agreement, or series of agreements, or contained in any advertisement, brochure, or other material [*Health & Safety Code § 1771(c)(10)*]. A life care contract is a continuing care contract that includes a promise to provide or pay for routine services at all levels of care, including acute care and physicians and surgeons' services, to the extent not covered by public or private insurance benefits, to a resident for the duration of his or her life [*Health & Safety Code § 1771(l)*; see *Health & Safety Code § 1771(r)(5)* ("resident" defined)].

[b] Requirements

All continuing care contracts must be in writing and contain specified information [*Health & Safety Code § 1787(a)*; see *Health & Safety Code §§ 1788, 1793.80-1793.83* (contents of contract); see also § 105.123]. All continuing care contract forms, including all addenda, exhibits, and any other related documents incorporated in the contract, as well as any modification to these items, must be approved prior to their use by the Department of Social Services [*Health & Safety Code § 1787(b)*].

[c] Disclosure Statement

Before executing a deposit agreement or a continuing care agreement, or receiving any payment from a depositor or prospective resident, a provider must deliver to the other parties in the continuing care agreement a disclosure statement in the form prescribed by the department [*Health & Safety Code § 1789.1(a)*; see *Health & Safety Code § 1789.1(b)* (information to be disclosed); *Health & Safety Code § 1789.1(d)* (form)].

[5] Cancellation Rights and Refunds

[a] Ninety-Day Cancellation Right

A continuing care contract may be canceled without cause by either party within 90 days from the date of the resident's initial occupancy [*Health & Safety Code § 1788.2(a)*]. Cancellation must be made by written notice [*Health & Safety Code § 1788.2(a)*]. Unless the contract specifically provides otherwise, death before or during the cancellation period will constitute a cancellation [*Health & Safety Code § 1788.2(b)*]. If a resident cancels the contract before or during the 90-day period and returns possession of the living unit in a continuing care retirement community that is not an equity continuing care retirement to the provider in substantially the same condition as when received, the provider may charge the resident only a reasonable fee to cover costs and the reasonable value of any services rendered pursuant to the canceled contract [*Health & Safety Code § 1788.2(d)(1)*]. Equity project providers may impose a resale fee on sellers [*Health & Safety Code § 1788.2(d)(2)*; see *Health & Safety Code § 1788.2(e)* (limitation on resale fees)]. The cancellation period and associated refund obligations apply to all executed continuing care contracts regarding a unit in a continuing care retirement community that is not an equity continuing care retirement community, as well as to continuing care contracts executed in conjunction with a purchase of an equity interest from a provider [*Health & Safety Code § 1788.2(c)(1), (2)*]. However, the cancellation period and associated refund obligations do not apply to continuing care contracts executed in conjunction with sales of an equity interest by one resident to another [*Health & Safety Code § 1788.2(c)(2)*; see [6], below].

[b] Payment of Refunds

During the cancellation period, the provider must pay all refunds owed to a resident within 14 calendar days after a resident makes possession of the living unit available to the provider [*Health & Safety Code § 1788.4(a)*; see *Health & Safety Code § 1771(c)(2)* ("cancellation period" is 90-day period beginning when resident physically moves into continuing care retirement community, during which resident may cancel contract)]. After the cancellation period, any refunds due to a resident under a continuing care contract must be paid within 14 calendar days after a resident makes possession of the living unit available to the provider, or 90 calendar days after death or receipt of notice of termination, whichever is later [*Health & Safety Code § 1788.4(b)*]. If a resident has paid additional amounts for upgrades, special features, or modifications to the living unit and the provider terminates the resident's continuing care contract, the provider must amortize those additional amounts at the same rate as the entrance fee and must refund the unamortized balance [*Health & Safety Code § 1788.4(d)*].

[c] Amount Refunded

In nonequity projects, if the continuing care contract is canceled by either party during the cancellation period or terminated by the provider after the cancellation period, the resident must be refunded the difference between the total amount of entrance, monthly, and optional fees paid and the amount used for care of the resident [*Health & Safety Code § 1788.4(c)*; see *Health & Safety Code § 1771(e)(6)* ("equity project" defined)].

A lump sum payment to a resident after termination of a continuing care contract that is conditioned upon resale of a unit may not be considered to be a refund and may not be characterized or advertised as a refund. The lump sum payment must be paid to the resident within 14 calendar days after resale of the unit [*Health & Safety Code § 1788.4(e)*].

[d] Other Terms and Conditions

In addition to the refund provisions discussed above, the law provides that any transfer of money or property pursuant to a continuing care contract found by the Department of Social Services to be executed in violation of the statutes governing continuing care contracts is voidable at the option of the resident or the transferor for 90 days from the execution of the transfer [*Health & Safety Code § 1793.11(a)*]. Any deed or other instrument of conveyance must contain a recital that the transaction is made pursuant to rescission by the resident or transferor within 90 days from the date of the first occupancy [*Health & Safety Code § 1793.11(b)*]. With respect to real property, this right of

disaffirmance or rescission is conclusively presumed to have terminated if a notice of intent to rescind is not recorded with the county recorder of the county in which the real property is located within 90 days after the date of first occupancy of the residential living unit [*Health & Safety Code § 1793.11(d)*]. No action may be brought for the reasonable value of any services rendered between the date of transfer and the date that the resident disaffirms the contract [*Health & Safety Code § 1793.11(c)*]. The law also provides that any transfer of money or property to anyone pursuant to a continuing care contract that was not approved by the Department of Social Services [*see Health & Safety Code § 1787(b)*] is voidable at the option of the Department, the transferor, or the transferor's assigns or agents [*Health & Safety Code § 1793.11(e)*]. In addition, any transaction determined by the Department of Social Services to be in violation of the laws governing continuing care contracts [*Health & Safety Code § 1770 et seq.*] is voidable at the option of the resident or the resident's assigns or agents [*Health & Safety Code § 1793.11(f)*].

[6] Transfer Fees and Restrictions Applicable to Equity Projects

An "equity project" is a continuing care retirement community where residents receive an equity interest in the continuing care retirement community property [*Health & Safety Code § 1771(e)(6)*]. "Equity interest" means an interest held by a resident in a continuing care retirement community that consists of either an ownership interest in any part of the continuing care retirement community property or a transferable membership that entitles the holder to reside at the continuing care retirement community [*Health & Safety Code § 1771(e)(5)*].

A provider for a continuing care retirement community may restrict or abridge the right of any resident, whether or not the resident owns an equity interest, to sell, lease, encumber, or otherwise convey any interest in the resident's unit [*Health & Safety Code § 1775(b)*]. A provider also may require that the resident only sell, lease, or otherwise convey the interest to persons approved by the provider [*Health & Safety Code § 1775(b)*]. Provider approval may be based on factors which include, but are not limited to, age, health status, insurance risk, financial status, or burden on the provider's personnel, resources, or physical facility [*Health & Safety Code § 1775(b)*]. The provider must record any restrictions on a real property interest [*Health & Safety Code § 1775(b)*].

Equity project providers may impose a resale fee on sellers [*Health & Safety Code § 1788.2(d)(2)*]. On the cancellation of a continuing care contract entered into after January 1, 1996 and executed in conjunction with the purchase of an equity interest from the provider, the provider may charge a resale fee not to exceed the excess of the gross resale price of the equity interest over the purchase price paid by, or on behalf of, the resident for the interest [*Health & Safety Code § 1788.2(d)(2)*]. No resale fee may exceed the sum of 10 percent of either the original or resale price of the equity interest and 100 percent of the excess if any, of the gross resale price of the equity interest over the purchase price paid by or on behalf of the resident, if the continuing care contract involved the purchase of an equity interest from the provider and is terminated after the cancellation period [*Health & Safety Code § 1788.2(e)(1)*; *see Health & Safety Code § 1788.2(f)* ("gross resale price" defined)]. The same rule applies if the continuing care contract involved the purchase of an equity interest from another resident and is terminated at any time [*Health & Safety Code § 1788.2(e)(2)*]. These restrictions do not limit the provider's ability to withhold delinquent periodic fees, late charges, accrued interest, or assessments from the sale proceeds, as provided by the continuing care contract or the real estate documents governing the equity continuing care retirement community [*Health & Safety Code § 1788.2(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART II. LEGAL BACKGROUND

33-105 California Legal Forms--Transaction Guide § 105.21

§ 105.21 Deposit Agreements

[1] Definition

A "deposit agreement" is an agreement made between any entity accepting a deposit and a depositor [*Health & Safety Code § 1771(d)(3)*]. Deposit agreements for deposits received by an applicant before the release of funds by the Department of Social Services from the deposit escrow account are subject to the requirements of *Health & Safety Code § 1780.4* (discussed in [2], *below*) [*Health & Safety Code § 1771(d)(3)*]. An entity must apply for and hold a currently valid permit to accept deposits before it may enter into a deposit agreement or accept a deposit [*Health & Safety Code § 1771.2(a)*; *see Health & Safety Code § 1771(e)(2)* ("entity" defined); *Health & Safety Code §§ 1779-1779.8* (application procedure), *1779.10* (causes for denial of application)].

[2] Statutory Requirements

All deposit agreements must be in writing and must contain specified information [*Health & Safety Code § 1780.4(a)*; *see Health & Safety Code § 1780.4(d)* (required format); *Health & Safety Code § 1780.4(e)-(i)* (required contents)]. All deposit agreement forms must be approved by the Department of Social Services before their use [*Health & Safety Code § 1780.4(b)*], and all changes to a deposit agreement, or to a deposit escrow account agreement, must be submitted to and approved by the Department before use by the applicant [*Health & Safety Code § 1781.6*]. All deposits, excluding processing fees, must be placed in an escrow account [*Health & Safety Code § 1781(a)*; *see Health & Safety Code §§ 1781.2, 1781.8* (requirements for deposit accounts); *see also Health & Safety Code § 1793.5(b)* (misdemeanor to fail to place deposit in escrow account)]. All terms governing the deposit escrow account must be approved in advance by the Department [*Health & Safety Code § 1781(a)*; *see Health & Safety Code § 1781(b)-(f)* (requirements for deposit escrow accounts); *Health & Safety Code § 1781.4* (required contents of deposit escrow account agreement)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law
Family Protection & Welfare
Elderly Persons
General Overview
Public Health & Welfare
Law
Healthcare Services for Disabled & Elderly Persons
General Overview
Public Health & Welfare
Law
Healthcare Services for Disabled & Elderly Persons
Care Facilities
General Overview
Public Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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PART II. LEGAL BACKGROUND

33-105 California Legal Forms--Transaction Guide § 105.22

§ 105.22 Residents' Rights

[1] Guaranteed by Law

Residents of skilled nursing and intermediate care facilities in California are entitled to certain fundamental human rights [see *Health & Safety Code* §§ 1599, 1771.7; see also *Health & Safety Code* § 1250(c), (d)(6) (definitions)], which may be denied or limited only if otherwise authorized by law and the reasons for denial or limitation are documented in the resident's health record [22 *Cal. Code Reg.* §§ 72527(b) (skilled nursing facilities), 73523(b) (intermediate care facilities)]. This "Patients' Bill of Rights" is set forth by statute and regulation [see *Health & Safety Code* §§ 1599.1-1599.4; 22 *Cal. Code Reg.* §§ 72527 (skilled nursing facilities), 73523 (intermediate care facilities)]. Residents in California residential care facilities for the elderly are accorded slightly different rights [see 22 *Cal. Code Reg.* § 87468]. Facilities must encourage and assist residents in exercising their rights as residents and citizens, including the right to assert grievances without reprisal by the facility [22 *Cal. Code Reg.* §§ 72527(a)(7) (skilled nursing facilities), 73523(a)(7) (intermediate care facilities), 87468(a)(4) (residential care facilities)].

Facilities that are certified under federal Medicare and Medicaid plans must also protect and promote residents' rights. Residents in Medicare-certified and Medicaid-certified facilities are entitled to "a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility" [42 *C.F.R.* § 483.10] and have other, more specific rights similar to those guaranteed under California law [see 42 *C.F.R.* §§ 483.10-483.75]. This discussion focuses mainly on California law, but citations to parallel provisions in the federal regulations are included and should be consulted if the facility participates in the Medicare or Medicaid programs. Many, if not most, skilled nursing and intermediate care facilities in California do participate in either the Medicare or the Medicaid programs.

Effective July 1, 2007 [see 2006 Stat., Ch. 530, § 1], the following federal regulations, as in effect on July 1, 2006, apply to skilled nursing facilities and intermediate care facilities, regardless of a resident's payment source or the Medi-Cal or Medicare certification status of the facility in which the resident resides [*Health & Safety Code* § 1599.1(i)]:

- 42 *C.F.R.* § 483.10 (resident rights) [see §§ 105.19[2], 105.22[2], [6]-[9], 105.24].

- 42 C.F.R. § 483.12 (admission, transfer, and discharge rights) [see §§ 105.19[2], 105.22[10], 105.23[2], [4]].
- 42 C.F.R. § 483.13 (facility practices and staff treatment of residents; reporting alleged violations) [see §§ 104.206[2], 105.22[7]].
- 42 C.F.R. § 483.15 (care to enhance resident's quality of life) [see §§ 105.22[5], [7], [8]].

However, a noncertified facility need not provide notice of Medicaid or Medicare benefits, covered services, or eligibility procedures [*Health & Safety Code* § 1599.1(i)].

Skilled nursing facilities and intermediate care facilities are consolidated into one category, called "facilities," for the purposes of determining residents' rights and other conditions of Medicare and Medicaid eligibility [see 42 C.F.R. § 483.5; see also Pub. L. No. 100-203, § 4211, 101 Stat. 1330-183 (amending 42 U.S.C. § 1396r as of October 1, 1990)].

[2] Required Disclosures

California skilled nursing facilities and intermediate care facilities must establish written policies regarding patients' rights and facility rules governing patient conduct and must make these written policies available to patients, patients' guardians, next of kin, sponsoring agencies, representative payees, and members of the public [*Health & Safety Code* § 1599.1; 22 *Cal. Code Reg.* §§ 72527(a) (skilled nursing facilities), 73523(a) (intermediate care facilities)]. Before or at the time of admission, each patient must be informed of these rights and must acknowledge in writing that he or she has been informed [*Health & Safety Code* § 1599.74(c); 22 *Cal. Code Reg.* §§ 72527(a)(1) (skilled nursing facilities), 73523(a)(1) (intermediate care facilities)].

Contracts for admission to skilled nursing and intermediate care facilities must include copies of the Patients' *Bill of Rights* as set forth by the California statutory and regulatory provisions, and information regarding the facility's grievance procedure and the resident's right to contact state officials regarding grievances [*Health & Safety Code* §§ 1599.74, 1599.75; see § 105.200[1][m]]. *Health & Safety Code* § 1599.61, adopted in 1997, required the Department of Long Term Care to develop a standard comprehensive version of the Patients' *Bill of Rights* to be a mandatory attachment to the standardized admission agreements that all skilled nursing and intermediate care facilities were required to use by January 1, 2000 [*Health & Safety Code* § 1599.61(a),(d); see discussion in § 105.19[2]]. The Department was also required to develop Spanish, Chinese, and other translations of the Patients' *Bill of Rights* as needed to provide copies to members of any ethnic group that represents at least 1 percent of the state's skilled nursing facility, intermediate care facility, and nursing facility population [*Health & Safety Code* § 1599.61(e)]. Development of the standardized admission forms has proven to be a difficult and controversial process, however, and as of January 2009, the Department has not finalized regulations containing the new forms. Department sources have advised that there is no anticipated date for final implementation of these regulations. Accordingly, the Department is advising operators to continue to use their current agreement forms.

The patient has the right to know what services are available in the facility, the charges for those services, and the charges for any services not covered by either federal programs or under the facility's per diem rate [22 *Cal. Code Reg.* §§ 72527(a)(2) (skilled nursing facilities), 73523(a)(2) (intermediate care facilities); see 42 C.F.R. § 483.10(b)(5), (6)]. The facility must disclose any significant beneficial interest existing between it and any ancillary health service facility or provider, and must advise residents of their right to choose different ancillary facilities or providers for needed services [*Health & Safety Code* § 1599.1(g)(1)]. This disclosure is not required if a resident receives services under a prepaid payment or premium plan [*Health & Safety Code* § 1599.1(g)(2)].

At the time of admission residential care facilities for the elderly must personally advise each resident and his or her

responsible person or conservator of the resident's rights. A copy of these rights, signed by the resident and his or her responsible person or conservator, must be included in the resident's record [22 *Cal. Code Reg.* § 87468(b)].

Prior to or at the time of a resident's admission, Medicare-certified and Medicaid-certified facilities must inform the resident, both orally and in writing in a language that the resident understands, of his or her rights as a resident and of all the rules and regulations governing resident conduct and responsibilities. The resident must acknowledge receipt of this information, and of any amendments to it, in writing [42 *C.F.R.* § 483.10(b)(1)].

At or before the time of admission to a continuing care retirement community, the provider must provide the resident with a copy of the residents' *bill of rights* provided for by *Health & Safety Code* § 1771.5, in addition to any statutory or regulatory *bill of rights* required to be provided to residents of residential care facilities or skilled nursing facilities [Health & Safety Code § 1771.5(c); see § 105.230[2], Exhibit H].

[3] Format Requirements for Printed Materials

Specified printed materials that are provided to a patient by an employee or authorized agent of a skilled nursing facility [Health & Safety Code § 1250(c)], intermediate care facility [Health & Safety Code § 1250(d)], nursing facility [Health & Safety Code § 1250(k)], or residential care facility for the elderly [Health & Safety Code § 1569.2(l)], must be printed in at least a 12-point font that is clear and legible [Health & Safety Code § 123222.1(a)]. These materials include [Health & Safety Code § 123222.1(b)]:

- Admission and discharge papers and forms from skilled nursing facilities, intermediate care facilities, and nursing facilities.
- Medical and therapeutic instructions prepared by the facility specifically for an individual upon his or her discharge from a skilled nursing facility, an intermediate care facility, or a nursing facility.
- Any contract for consent for hospitalization, or agreement to assume financial responsibility between a patient and a skilled nursing facility, an intermediate care facility, or a nursing facility.
- Instructions and forms for advance health care directives [see *Prob. Code* § 4605 (definition); see also *Ch. 104, Health Care Transactions, Consents, and Directives*, §§ 104.31, 104.230 et seq.].
- Information produced by the facility regarding the rights and responsibilities of patients or residents while receiving care at the facility, and regarding grievances and appeals, including forms and instructions.
- Correspondence written, printed, or produced by skilled nursing facilities, intermediate care facilities, nursing facilities, or a residential care facilities for the elderly.

The facility's policies and procedures are specifically excluded from these requirements [Health & Safety Code § 123222.1(d)].

Skilled nursing facilities, intermediate care facilities, nursing facilities, and any residential care facility for the elderly, may continue to use their supply of materials that exists on January 1, 2003, until that supply is exhausted or until January 1, 2006, whichever occurs first. Effective January 1, 2006, the facility must comply with the requirements enumerated above [Health & Safety Code § 123222.1(c)].

On admission of a patient to a skilled nursing, intermediate care, or nursing facility, the facility must ask if the patient wishes specified information regarding patients' rights and responsibilities to be provided to the patient's next of kin or

agent under a durable power of attorney for health care [*Health & Safety Code § 123222.2(a)(1)*]. The facility must provide that information, if the patient so directs [*Health & Safety Code § 123222.2(a)(1)*]. The materials provided must include a comprehensive Patients' *Bill of Rights*, as described in *Health & Safety Code § 1599.61(d)* [*Health & Safety Code § 123222.2(a)(1)*; see [1], [2], *above*, and § 105.200[2], Exhibit C]. At a minimum, until *Health & Safety Code § 1599.61(d)* is fully implemented [see [2], *above*], the Patients' *Bill of Rights* provided in accordance with this law must include all of the following [*Health & Safety Code § 123222.2(a)(2)(A)*; see [1], [2], *above*]:

- The rights contained in *Health & Safety Code §§ 1599-1599.89* (Skilled Nursing and Intermediate Care Facility Patients' *Bill of Rights*).
- The resident rights applicable to skilled nursing facilities, contained in *22 Cal. Code Reg. § 72527*.
- The resident rights applicable to intermediate care facilities, contained in *22 Cal. Code Reg. § 73523*.
- The resident rights applicable to long-term care facilities under *42 C.F.R. §§ 483.10-483.25*.

The facility may also provide written materials regarding the facility's expectations of patients and patients' responsibilities while the patient is receiving care at the facility [*Health & Safety Code § 123222.2(a)(2)(B)*].

On the request of the patient, or of the patient's next of kin or agent under a durable power of attorney for health care, a representative of any facility providing patients' rights information or other documentation described above must explain the materials provided [*Health & Safety Code § 123222.2(c)*].

Similar requirements exist for general acute care hospitals [see *Health & Safety Code § 123222.2(b)*; see also *Health & Safety Code § 1250(a)* ("acute care hospital" defined); *Ch. 104, Health Care Transactions, Consents, and Directives, § 104.11*].

[4] Services to Be Provided

The facility must employ adequate personnel to carry out its functions, and an adequately staffed activities program to meet the needs and interests of its residents [*Health & Safety Code § 1599.1(a), (d)*]. Good personal hygiene must be provided to all residents, including care for the prevention of bedsores and the reduction of incontinence [*Health & Safety Code § 1599.1(b)*]. The facility must be kept clean, sanitary, and in good repair at all times [*Health & Safety Code § 1599.1(e)*]. Nurses' call systems must be maintained in all nursing units, and extension cords must be available to reach each resident's bed [*Health & Safety Code § 1599.1(f)*]. The facility must provide food that meets the residents' needs, in accordance with physicians' orders [*Health & Safety Code § 1599.1(c)*].

[5] Resident Councils

Residential care, skilled nursing, and intermediate care facilities must establish and maintain resident councils. Each council must include the residents of the facility and may include family members of residents, advocates or ombudsman groups interested in residents of health facilities, and facility personnel [*Health & Safety Code § 1418.2(a)*; see *42 C.F.R. § 483.15(c)*]. Family members of residents must be invited to council meetings [*Health & Safety Code § 1418.2(a)*]. In addition, facilities must permit the formation of family councils composed of residents' family members and permit these councils to meet and post meeting notices, minutes, newsletters, or other information pertaining to the operation or interest of the family council on facility premises [*Health & Safety Code § 1418.4*; see *Health & Safety Code § 1569.158*; *Welf. & Inst. Code § 14110.8*; for further discussion, see § 105.15[2]].

[6] Medical and Personal Matters

Every resident of a skilled nursing or intermediate care facility has the right to be fully informed of his or her total health status and to be afforded the opportunity to participate on an immediate and ongoing basis in the total plan of care, including the identification of medical, nursing, and psychosocial needs and the planning of related services. The resident also has the right to consent to or to refuse any treatment or procedure or participation in experimental research and to receive all information that is material to his or her decision to accept or refuse any proposed treatment or procedure [22 *Cal. Code Reg.* §§ 72527(a)(3)-(5) (skilled nursing facilities), 73523(a)(3)-(5) (intermediate care facilities); *see* 42 *C.F.R.* § 483.10(b)(4), (8), (d)].

In recognition of these rights, a facility must abide by regulatory and other laws governing "informed consent" [*see* 22 *Cal. Code Reg.* §§ 72528 (skilled nursing facilities), 73524 (intermediate care facilities)]. Specific disclosures and other requirements are required for the proposed administration of psychotherapeutic drugs or physical restraints or the prolonged use of a device that may lead to the inability to regain use of a normal bodily function [22 *Cal. Code Reg.* §§ 72527(a)(5), (23), 72528(b) (skilled nursing facilities), 73523(a)(5), (23), 73524(b) (intermediate care facilities)]. As part of its policies and procedures relating to patients' rights, a facility must include how it will, in consultation with a patient's physician, identify who may serve as a patient's representative [*see* 22 *Cal. Code Reg.* §§ 72527(d), 73523(d)] when an incapacitated patient has no conservator or attorney in fact under a valid durable power of attorney for health care [22 *Cal. Code Reg.* §§ 72527(e)(2) (skilled nursing facilities), 73523(e)(2) (intermediate care facilities)]. In cases when informed consent for a proposed non-emergency medical procedure is required, but the attending physician determines that the resident lacks the capacity to make decisions concerning his or her health care and there is no person with legal authority to make those decisions on behalf of the resident, an interdisciplinary team must review the proposed procedure on behalf of the patient [*Health & Safety Code* § 1418.8].

The resident's medical and personal records must be treated confidentially. He or she has the right to refuse or approve the release of those records to any individuals outside of the facility, except as may be otherwise authorized by law [22 *Cal. Code Reg.* §§ 72527(a)(10) (skilled nursing facilities), 73523(a)(10) (intermediate care facilities); *see* 42 *C.F.R.* § 483.10(e)].

[7] Safety and Personal Dignity

Residents of residential care, skilled nursing, and intermediate care facilities have a right to be treated with consideration, respect, and dignity [22 *Cal. Code Reg.* §§ 72527(a)(11) (skilled nursing facilities), 73523(a)(11) (intermediate care facilities), 87468(a)(1) (residential care facilities); *see* 42 *C.F.R.* §§ 483.10, 483.15(a)]. Skilled nursing and intermediate care facilities may not require residents to perform services for the facility except for therapeutic purposes pursuant to a resident's care plan [22 *Cal. Code Reg.* §§ 72527(a)(12) (skilled nursing facilities), 73523(a)(12) (intermediate care facilities); *see* 42 *C.F.R.* § 483.10(h)]. Residents have a right to be free from mental and physical abuse; they also have the right to be free from psychotherapeutic drugs and physical restraints used for the purpose of patient discipline or staff convenience and to be free from psychotherapeutic drugs used as a chemical restraint except in very limited, emergency situations [22 *Cal. Code Reg.* §§ 72527(a)(9), (23) (skilled nursing facilities), 73523(a)(9), (23) (intermediate care facilities); *see* 22 *Cal. Code Reg.* § 87468(a)(3) (residential care facilities); 42 *C.F.R.* § 483.13].

Residents must be permitted to retain and use their personal clothing and possessions as space permits, unless doing so is medically contraindicated or disruptive of the rights of the other residents [22 *Cal. Code Reg.* §§ 72527(a)(15) (skilled nursing facilities), 73523(a)(15) (intermediate care facilities), 87468(a)(12) (residential care facilities); *see* 42 *C.F.R.* § 483.10(l)]. Residents of residential care facilities must also be provided with access to individual storage for private use [22 *Cal. Code Reg.* § 87468(a)(13)].

[8] Privacy and Association

Facilities must respect the residents' rights to privacy in treatment, care for their personal needs, and oral and written

communications with persons inside and outside the facility [*Health & Safety Code § 1418.3(a)*; 22 *Cal. Code Reg. §§ 72527(a)(11), (13), (20), (21)* (skilled nursing facilities), 73523(a)(11), (13), (20), (21) (intermediate care facilities), 87468(a)(11), (14), (15) (residential care facilities); see 42 *C.F.R. § 483.10(e), (i)-(k)*]. Facilities must establish daily visiting hours and must permit visits at other hours in certain situations [22 *Cal. Code Reg. §§ 72527(a)(17)-(20)* (skilled nursing facilities), 73523(a)(17)-(20) (intermediate care facilities), 87468(a)(10), (11) (residential care facilities); see 42 *C.F.R. § 483.10(j), (k)*]. Residents must be permitted to meet with and participate in the activities of any social, religious, and/or community group [22 *Cal. Code Reg. §§ 72527(a)(14)* (skilled nursing facilities), 73523(a)(14) (intermediate care facilities), 87572(a)(5) (residential care facilities); see 42 *C.F.R. § 483.15(b), (d)*].

Married residents must be assured privacy for spousal visits. Spouses who are both living in the same facility must be permitted to share a room unless medically contraindicated [22 *Cal. Code Reg. §§ 72527(a)(16)* (skilled nursing facilities), 73523(a)(16) (intermediate care facilities); see 42 *C.F.R. § 483.10(m)*].

[9] Financial Affairs

Residents of skilled nursing and intermediate care facilities have the right to manage their personal financial affairs. If a resident voluntarily delegates this responsibility to the facility, the facility must provide the resident at least quarterly with an accounting of the transactions made on his or her behalf [22 *Cal. Code Reg. §§ 72527(a)(8)* (skilled nursing facilities), 73523(a)(8) (intermediate care facilities); see 42 *C.F.R. § 483.10(b)(7)(i), (c)*]. For further discussion of the regulations governing a resident's delegation of financial management responsibilities to a facility, see §§ 105.24, 105.122.

Residents of residential care facilities for the elderly are entitled to keep and spend their own money [22 *Cal. Code Reg. § 87572(a)(12)*].

[10] Right to Remain in Facility

Skilled nursing and intermediate care facilities may only transfer or discharge a resident for medical reasons, either for the welfare of the resident or for the welfare of the other residents, or for nonpayment. Reasonable advance notice must be given to assure orderly transfer or discharge [22 *Cal. Code Reg. §§ 72527(a)(6)* (skilled nursing facilities), 73523(a)(6) (intermediate facilities); see 42 *C.F.R. § 483.12*].

If the resident of a long-term health care facility has been hospitalized in an acute care hospital and asserts his or her rights to readmission under bed hold provisions or readmission rights of either state or federal law, and the facility refuses to admit him or her, the resident may appeal the facility's refusal [*Health & Safety Code § 1599.1(h)(1)*]. This refusal is treated as if it were an involuntary transfer under federal law, and the rights and procedures that apply to appeals of transfers and discharges of nursing facility residents apply to the resident's appeal under *Health & Safety Code § 1599.1(h)* [*Health & Safety Code § 1599.1(h)(2)*]. If the resident who appeals is eligible under Medi-Cal, the resident must remain in the hospital, and the hospital may be reimbursed at the administrative day rate, pending the final determination, unless the resident agrees to placement in another facility [*Health & Safety Code § 1599.1(h)(3)*]. If the resident who appeals is not eligible under Medi-Cal, the resident must remain in the hospital if other payment is available, pending final determination, unless the resident agrees to placement in another facility [*Health & Safety Code § 1599.1(h)(4)*]. If the resident is not eligible under Medi-Cal and has no other source of payment, the hearing and final determination must be made within 48 hours [*Health & Safety Code § 1599.1(h)(5)*].

For further discussion of the regulations governing transfers and discharges, and the additional requirements applicable to Medicare and Medicaid-certified facilities, see § 105.23.

[11] Rights of Incompetent Residents

If a resident of a skilled nursing or intermediate care facility is judged incompetent, found by his or her physician to be medically incapable of understanding his or her rights, or exhibits a communication barrier, certain of the resident's rights pass to his or her authorized representative [see 22 *Cal. Code Reg.* §§ 72527(c)-(e), 72528 (skilled nursing facilities), 73523(c)-(e), 73524 (intermediate care facilities); see 42 *C.F.R.* § 483.10(a)(3)].

[12] Additional Rights of Residents in California Residential Care Facilities

Individuals in California residential care facilities for the elderly have additional rights. These rights are broader than the rights afforded patients in skilled nursing facilities and intermediate care facilities, and generally are not limited by medical considerations. Prior to admission, an individual is entitled to visit the residential care facility for the elderly with his or her family and responsible persons [22 *Cal. Code Reg.* § 87572(a)(7)]. He or she has the right to be informed by the facility regarding complaints and the procedures for registering complaints confidentially, including the address and telephone number of the complaint receiving unit of the Department of Health Services, Division of Licensing and Certification for Hospitals and Convalescent Homes [22 *Cal. Code Reg.* § 87572(a)(4)]. If the facility has seven or more residents, it must post a notice, in areas accessible to residents and their relatives, that describes the procedures for filing confidential complaints and also contains a copy of the patients' rights, or, in lieu of a posted copy, instructions on how to obtain additional copies of those rights. If a significant number of the residents in the facility do not read English, this notice must be posted in a language that they can read [22 *Cal. Code Reg.* § 87468(c), (d)].

Residents of residential care facilities for the elderly are entitled to safe, healthful, and comfortable living accommodations and must be free to leave the facility at any time and to move out of the facility [22 *Cal. Code Reg.* § 87468(a)(2), (6), (18)]. A residential care facility for the elderly may not subject a resident to corporal or unusual punishment, humiliation, intimidation, mental abuse, or other actions of a punitive nature, such as the withholding of monetary allowances or interfering with daily living functions such as eating, sleeping, or elimination [22 *Cal. Code Reg.* § 87468(a)(3)]. The facility must keep the resident's family or responsible persons regularly informed of activities related to the resident's care or services and must promptly and appropriately respond to communications from the resident's family or responsible persons [22 *Cal. Code Reg.* § 87468(a)(8), (9)]. Facilities must also provide residents with assistance in exercising their right to vote [22 *Cal. Code Reg.* § 87468(a)(17)].

[13] Residents' Remedies

In addition to any other remedy provided by law, a resident or patient of a skilled nursing facility or an intermediate care facility may sue the licensee of a facility that violates the rights of any patient or resident as set forth in the *Patients' Bill of Rights*. The licensee is liable for up to \$500 as well as costs and attorneys' fees, and may be enjoined from permitting the violation to continue. The licensee will be liable for the acts of its employees in any matter involving a violation of the *Patients' Bill of Rights*. An agreement by a patient or resident of a skilled nursing facility or intermediate care facility to waive his or her rights to sue the facility is contrary to public policy and void [*Health & Safety Code* § 1430(b), (c)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare
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DIVISION VII: PERSONAL TRANSACTIONS
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33-105 California Legal Forms--Transaction Guide § 105.23

§ 105.23 Transfers and Discharges

[1] Legal Restrictions on Transfers and Discharges

Transfer or discharge from a long-term care facility may have an adverse psychological impact, known as "transfer trauma," upon an elderly resident. Certain federal and state statutes and regulations are aimed at limiting transfer trauma by restricting the grounds upon which patients may be transferred or discharged.

[2] Skilled Nursing and Intermediate Care Facilities

A skilled nursing facility must maintain written transfer agreements with nearby health facilities in order to assure that those services will be available to facilitate the transfer of patients. When a patient is transferred from one facility to another, that patient's health record must reflect his or her condition at the time of transfer, the date and time the transfer took place, and the reason for the transfer. Unless the transfer is carried out in an emergency situation, the health record must also reflect the informed written or telephonic acknowledgment of the patient or the patient's guardian or other authorized representative [22 *Cal. Code Reg.* § 72519; *see* 42 *C.F.R.* § 483.12]. Intermediate care facilities must also maintain written transfer agreements with nearby health facilities when appropriate [22 *Cal. Code Reg.* § 73503; *see* 42 *C.F.R.* § 483.12].

[3] Residential Care Facilities for the Elderly

A resident of a residential care facility for the elderly may be evicted only for specified cause and only upon 30 days notice or if the resident's behavior constitutes a threat to his or her health or safety, or the health and safety of others in the facility, on three days notice [22 *Cal. Code Reg.* § 87224(a), (b); *see* § 105.130]. A resident of a residential care facility may be relocated because the resident has a health condition which cannot be cared for within the limits of the license of the facility or which requires inpatient care in a licensed health facility [22 *Cal. Code Reg.* §§ 87223, 87612].

[4] Transfer and Discharge of Medi-Cal and Medicare Patients

Regulations governing the transfer and discharge of patients from Medicare- and Medicaid-certified facilities are found at 42 *C.F.R.* § 483.12.

Problems may arise if a facility is decertified for Medi-Cal or Medicaid participation. Since a decertified facility can no longer obtain reimbursement for care provided under those programs, Medicare or Medi-Cal recipients in a decertified facility must be transferred [see [5], below]. These patients have no constitutional right to a hearing before the facility is decertified since they have no enforceable expectation of benefits to pay for care in an institution that has been determined to be unqualified [*O'Bannon v. Town Court Nursing Center* (1980) 447 U.S. 773, 785, 100 S. Ct. 2467, 65 L. Ed. 2d 506] .

[5] Transfer Pursuant to Licensing Changes or Due to Earthquakes, Fires, and Other Causes

When patients are transferred due to changes in the status of the license or operations of a facility, including a facility closure or voluntary or involuntary termination of Medi-Cal or Medicare certification, the facility must take reasonable steps to protect the residents' safety and minimize transfer trauma [*Health & Safety Code* § 1336.2(a)]. The facility must give residents who will be affected, or their representatives, 30 days' written notice of the change, unless the change is due to an action by the Department of Health Services to revoke or suspend the facility's license [*Health & Safety Code* § 1336]. Thirty days written notice of the transfer services that the facility is legally obligated to provide must also be given, except in cases in which the change is due to a temporary license suspension under *Health & Safety Code* § 1296 [*Health & Safety Code* § 1336.2(c), (d)].

Before residents are transferred, the health facility, at a minimum, must do all of the following [see *Health & Safety Code* § 1336.2(a)]:

- Be responsible for ensuring that the resident's attending physician, if available, or a facility medical director, if available, completes the medical assessment of the resident's condition and susceptibility to adverse health consequences, including psychosocial effects, recommendations for counseling, follow-up visits, and other recommended services by designated health professionals, and recommendations for preventing or ameliorating potential adverse health consequences in the event of transfer, before written notice of transfer is given to the resident.
- Be responsible for ensuring that the facility nursing staff and activity director complete an assessment of the social and physical functioning of the resident based on the relevant portions of the minimum data set [see *Welf. & Inst. Code* § 14110.15], including recommendations for preventing or ameliorating potential adverse health consequences in the event of transfer, before written notice of transfer is given to the resident.
- Be responsible for evaluating the relocation needs of the resident, including proximity to the resident's representative, and determine the most appropriate and available type of future care and services for the resident before written notice of transfer is given to the resident or the resident's representative. This evaluation and medical assessment must be discussed with the resident or the resident's representative and made a part of the medical records for transfer.
- At least 30 days in advance of the transfer, inform the resident or the resident's representative of alternative facilities that are available and adequate to meet resident and family needs.
- Arrange for appropriate future medical care and services, unless the resident or resident's representative has otherwise made these arrangements. This requirement does not obligate a facility to pay for future care and services.

A resident has the right to remain in the facility for up to 60 days after the approved written notice of the facility's intent to transfer the resident, if an appropriate placement based on the relocation assessment and relocation recommendations

has not been made [*Health & Safety Code § 1336.2(h)*]. The facility must maintain an appropriate level of staffing in order to ensure the well-being of all the residents as they continue to reside in the facility [*Health & Safety Code § 1336.2(h)*].

Similar services must be provided when transfers are made necessary, or adverse health consequences are caused by emergencies such as earthquakes, fires, or floods [*Health & Safety Code § 1336.3*]. If 10 or more residents are likely to be transferred due to any voluntary or involuntary change in the facility's status or operation, the facility must submit a relocation plan to the Department of Social Services at least 15 days prior to the written transfer notification given to any resident or resident's representative [*see Health & Safety Code § 1336.2(g)*].

If residents of a residential care facility for the elderly are transferred from the facility due to a temporary suspension of the facility's license for the residents' protection, the Department of Social Services must make every effort to minimize the residents' transfer trauma. The Department must seek the services of medical personnel and any local agency having placement or advocacy responsibility to assist it in locating alternative placement sites, contacting relatives responsible for the residents' care, and evaluating and transferring the residents. The Department may also require the licensee to prepare and submit a written plan for the relocation of the facility's residents, and to provide other information as necessary [*Health & Safety Code § 1569.525*].

The Department may determine that even though suspension of a facility's license is not called for, the facility is not equipped to care for a resident with a particular health condition. On making such a determination, the Department may order the licensee to remove the resident [*Health & Safety Code § 1569.54(a)(1)*; *see Health & Safety Code § 1569.54(b)* (notice and review requirements)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
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33-105 California Legal Forms--Transaction Guide § 105.24

§ 105.24 Handling of Patients' Funds

Patients in long-term care facilities are often unable to handle their financial affairs competently. In order to protect patients from the potential abuses inherent in these situations, a facility that manages a patient's funds must comply with certain restrictions and reporting requirements.

A patient is entitled to manage his or her own financial affairs [*see § 105.22[5], [8]*] and must be advised of that right in writing upon admission to the facility [*see § 105.19[1] above; see also § 105.122 for the alternative methods by which patients' funds may be handled*]. However, the patient may delegate this management right to the facility. The applicable regulations prescribe standards governing the form and limits of this delegation [*see 22 Cal. Code Reg. §§ 72527(a)(8), 72529 (skilled nursing facilities), 73523(a)(8), 73557 (intermediate care facilities); see also 42 C.F.R. § 483.10(c) (facilities certified for Medicare and Medicaid)*].

The delegation to the facility of the right to manage a patient's personal funds must be made in writing [*22 Cal. Code Reg. §§ 72527(a)(8) (skilled nursing facilities), 73523(a)(8) (intermediate care facilities)*]. Once a facility has assumed the responsibility for managing a patient's funds, it must comply with detailed management, reporting, and record keeping requirements, including the submission of quarterly statements [*see 22 Cal. Code Reg. §§ 72527(a)(8), 72529 (skilled nursing facilities), 73523(a)(8), 73557 (intermediate care facilities)*]. The facility may not use patients' funds as its own, or commingle its funds with patients' funds. Patients' funds must be kept separate, intact, and free from any liability the facility incurs in the use of its own funds [*see 22 Cal. Code Reg. §§ 72529(a)(1) (skilled nursing facilities), 73557(a)(1) (intermediate care facilities)*]. Facilities that are certified for Medicare and Medicaid may not commingle patients' funds with those of any person other than another patient [*see 42 C.F.R. § 483.10(c)(4)(i)*].

When a patient is discharged, his or her funds must be surrendered in exchange for a signed receipt. Funds kept within the facility must be surrendered upon demand, and funds deposited elsewhere must be made available within three normal banking days [*22 Cal. Code Reg. §§ 72529(a)(8) (skilled nursing facilities), 73557(a)(6) (intermediate care facilities)*]. Upon the death of a patient, except in a coroner or medical examiner case, his or her funds must be surrendered within 30 days to the executor or administrator of the estate, or to the patient's responsible party, in exchange for a signed receipt [*22 Cal. Code Reg. §§ 72529(a)(9) (skilled nursing facilities), 73557(a)(7) (intermediate care facilities)*].

For a detailed list of a long-term care facility's responsibilities for the handling of patients' funds, see § 105.122.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare

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33-105 California Legal Forms--Transaction Guide § 105.25

§ 105.25 Prevention of Theft and Loss of Patients' Belongings

Skilled nursing and intermediate care facilities must make reasonable efforts to safeguard the property of their residents. A facility that fails to do so must reimburse residents for lost or stolen property at its current value [*Health & Safety Code § 1289.3(a)*]. Every skilled nursing and intermediate care facility must implement a program to protect residents' valuables and prevent theft and loss of their belongings [*Health & Safety Code § 1289.4*; see *Health & Safety Code §§ 1569.152-1569.154* (similar procedures required for residential care facilities)]. The program must include the following features [*Health & Safety Code § 1289.4*]:

- Establishment and posting of the facility's theft and investigation procedures.
- Orientation to the facility's theft policies and investigation procedures for all facility employees.
- Reports to the Department of Health Services, the county health department, law enforcement agencies, and the Office of the Long-Term Care Ombudsman [see *Welf. & Inst. Code §§ 9700, 9710*; see also *§ 105.26[4]*] regarding lost or stolen property of a resident valued at \$25 or more, and reports to the local law enforcement agency within 36 hours of notice to the administrator of the suspected theft of any property valued at \$100 or more.
- Preparation of a written personal property inventory for each resident on admission, and updating of the inventory as needed [see *§ 105.200[2]*, Exhibit D; *§ 105.222[2]*, Exhibit A].
- Inventory and surrender, by signed receipt, of each resident's personal effects and valuables on discharge or death, or immediate notification to the public administrator of any resident who dies without next of kin known [see *Prob. Code § 7600.5*; see also *§ 105.200[2]*, Exhibit D; *§ 105.222[2]*, Exhibit A].
- Semiannual documentation of the facility's efforts to control loss and theft.
- Establishment of a method of marking residents' personal property items for identification.

- Maintenance of a secured area for the safekeeping of residents' property, and the availability of locks for residents' bedside drawers or cabinets.

- Notification to all current residents, and to new residents on admission, of the facility's theft and loss policies and procedures [see §§ 105.200[2], P 16 (notice on admission), § 105.204[2] (notice to current residents)].

Copies of *Health & Safety Code* §§ 1289.3, 1289.4, and 1289.5, which set forth these requirements, must be given to all residents and their responsible parties, and made available to prospective residents and their responsible parties on request [*Health & Safety Code* § 1289.4(k)]. A facility must be cited by the Department of Health Services for failure to implement a theft and loss program or failure to include the required features in its program [*Health & Safety Code* § 1289.3(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
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33-105 California Legal Forms--Transaction Guide § 105.26

§ 105.26 Inspection of Facility and Patient Complaints

[1] Centralized Consumer Response Unit

The Department of Health Services, Licensing and Certification Division is required by law to establish a Centralized Consumer Response Unit within the Division to respond to consumer inquiries and complaints [*Health & Safety § 1419(a)*]. On receipt of consumer inquiries, the Response Unit must offer assistance to consumers in resolving concerns about the quality of care and the quality of life in long-term health care facilities [*Health & Safety § 1419(b)*]. This assistance may include, but is not limited to, all of the following [*Health & Safety § 1419(b)*]:

- Offering to provide to consumers education and information about state licensing and federal certification standards, resident rights, name and address of facilities, referral to other entities as appropriate, and facility compliance history.
- Offering to participate in telephone conference calls between consumers and providers to resolve concerns within the scope of the authority of the Department. If the inquiry or concern is determined to warrant an on site investigation, the inquiry or concern must be considered a complaint and handled in accordance with the complaint investigation process set forth in *Health & Safety Code § 1420*.
- Initiating on site investigations in response to oral or written complaints made in accordance with *Health & Safety Code § 1419* [see [2], below], if the Response Unit determines that there is a reasonable basis to believe that the allegations in the complaints describe one or more violations of state law by a long-term care facility.

Nothing in *Health & Safety Code § 1419(a)* or *(b)*, discussed above, precludes the Department from taking any enforcement action available under state or federal law [*Health & Safety § 1419(c)*].

[2] Right to Request Inspection

Any person, including a member of the general public, may request an inspection of a long-term health care facility by notifying the State Department of Health Services, Division of Licensing for Hospitals and Convalescent Homes, of an

alleged violation of any applicable laws. The complainant's notice may be in writing signed by the complainant and must set forth the alleged violation in reasonable detail. The complaint may also be made by telephone or personal visit. If the complaint is oral, it will be reduced to writing by the Department [*Health & Safety Code § 1419(d)*]. Neither the names of the complainant nor of any persons mentioned in the complaint will appear in the original, any copy of the complaint, or any record that is published, released, or otherwise made available to the facility, unless the complainant requests the release of names or the matter results in a judicial proceeding. However, the name of any authorized officer, employee, or agent of the Department conducting the investigation or inspection is not protected from disclosure [*Health & Safety Code § 1419(e)*; see *Jongepier v. Lopez* (1983) 142 Cal. App. 3d 535, 538-539, 191 Cal. Rptr. 131] .

The Bureau of Medi-Cal Fraud, which operates under the authority of the Office of the Attorney General, reviews, investigates, and prosecutes patient complaints of abuse, neglect, and discrimination occurring in facilities that receive payments under the Medi-Cal plan [*Gov. Code § 12528(a), (b)*]. The Bureau also investigates charges of fraud in the administration of the Medi-Cal program (fraud by beneficiaries is handled by the Audits and Investigations Branch of the Department of Health Services) [*Gov. Code § 12528(a)*]. The Bureau collects information regarding abuse and neglect cases in Medi-Cal facilities, and disseminates this information to local law enforcement agencies [*Gov. Code § 12528(j)*]. Reports prepared by the Bureau are kept confidential until they become matters of public record [*Gov. Code § 12528(g)*].

[3] Disclosure of Licensing Reports

Residential care facilities must place in a conspicuous place copies of all licensing reports issued by the California Department of Social Services within the preceding 12 months, and all licensing reports issued by the department resulting from the department's most recent annual visit to the facility [*Health & Safety Code § 1569.38*]. This requirement, however, does not apply to any portion of a licensing report referring to a complaint that was found by the department to be unfounded or unsubstantiated [*Health & Safety Code § 1569.38*]. During the admission process, the facility must inform the resident and the resident's responsible person in writing that the licensing reports are available for review at the facility and that copies of these reports and other documents pertaining to the facility are available from the appropriate district office of the department. The facility also must provide the telephone number and address of the appropriate district office [*Health & Safety Code § 1569.38*].

[4] Office of State Long-Term Care Ombudsman

To encourage community contact and involvement with elderly patients in long-term care facilities and to encourage those patients to effectively exercise their civil and human rights [see § 105.22], California has established an office of the State Long-Term Care Ombudsman within the Department of Aging [see *Welf. & Inst. Code § 9700*; see also *Welf. & Inst. Code §§ 9710-9719*].

Representatives of the office have the right to enter long-term care facilities to hear, investigate, and resolve complaints of elderly patients, and to render advice to them [*Welf. & Inst. Code § 9722(a)*]. The office will investigate and attempt to resolve any complaints and concerns that it receives from or on behalf of patients in long-term care facilities [*Welf. & Inst. Code § 9720(a)*]. The office of the ombudsman may refer any complaint it receives to the appropriate state agency, such as the Board of Examiners for Nursing Home Administration, or the Board of Medical Quality Assurance, and any complaint alleging an immediate threat to the patient's health and safety may be given first priority [see *Welf. & Inst. Code § 9721*].

[5] Retaliation for Complaints

A long-term health care facility that retaliates or discriminates against a patient who pursues a grievance is subject to a civil penalty of no more than \$500. If a facility against which a complaint has been filed by or on behalf of a patient,

attempts to expel or discriminates against that patient within 180 days after the complaint is filed, there will be a rebuttable presumption that the facility took that action in retaliation for the filing of the complaint [see *Health & Safety Code § 1432(a), (b)*].

[6] Classes of Violations

[a] Types of Citations and Burden of Proof

Violations for which long-term health care facilities may be cited fall into three classes: Class "AA," Class "A" and Class "B" violations [see *Health & Safety Code § 1424*]. A licensee that is cited for a Class "A," "AA," or "B" violation has the burden of proving that it did what might reasonably be expected of a long-term health care facility licensee, acting under similar circumstances, to comply with the subject regulation. If the licensee sustains this burden, the citation must be reduced or dismissed [*Health & Safety Code § 1424(c), (d), (e)*].

No citations will be issued to facilities if all of the following conditions are met [*Health & Safety Code § 1424.1(a)(1)-(4)*]:

- The facility maintains an ongoing quality assurance program.
- The violation was not willful and resulted in no actual harm to a patient or guest.
- The violation was first discovered by the facility and was promptly and accurately recorded in the quality assurance log prior to discovery by the Department.
- Promptly upon discovery, the facility implemented remedial action satisfactory to the Department to correct the violation and prevent a recurrence.

Relevant facts considered by the California Department of Health Services in determining the amount of the civil penalty for a violations must be documented by the Department on an attachment to the citation and available in public record [*Health & Safety Code § 1424(b)*].

[b] Class "A" Violations

Class "A" violations are those that present an imminent danger of death or serious harm to the patients or residents or present the substantial probability of death or serious physical harm. Class "A" violations, which may include physical conditions and practices at the facility, must be eliminated immediately unless the state allows the facility a specific period of time to make the correction. The basic civil penalty for each class "A" violation is \$1,000 to \$10,000 [*Health & Safety Code § 1424(d)*]. However, in the case of skilled nursing and intermediate care facilities, the civil penalty for Class "A" citations is increased to \$2,000 to \$20,000 for each and every citation [*Health & Safety Code § 1424.5(a)(2)*].

[c] Class "AA" Violations

Class "AA" violations are violations that meet the criteria for a Class "A" violation and which the Department determines to have been a direct proximate cause of death of a patient or resident of a long-term health care facility. The basic civil penalty for each Class "AA" violation is \$5,000 to \$25,000 [*Health & Safety Code § 1424(c)*]. However, in the case of skilled nursing and intermediate care facilities, the civil penalty for Class "A" citations is increased to \$25,000 to \$100,000 for each and every citation [*Health & Safety Code § 1424.5(a)(1)*].

In any action to enforce a class "AA" citation, the department must prove that the violation was a direct proximate cause of the patient's or resident's death, that the death resulted from the type of occurrence that the regulation was designed to prevent, and that the patient or resident was among the class of persons for whose protection the regulation was adopted

[*Health & Safety Code § 1424(c)*]. The department must consider suspending or revoking the facility's license for each Class "AA" citation within a 12-month period that has become final. For a third or subsequent Class "AA" citation in a facility within that 12-month period that has been sustained following a citation review conference, the department is *required* to commence action to suspend or revoke the facility's license [*Health & Safety Code § 1424(c)*; *see Health & Safety Code § 1294(c)*]. In addition, if a skilled nursing facility or intermediate care facility receives a second or subsequent Class "AA" citation within a 24-month period, the department must commence action to suspend or revoke the facility's license [*Health & Safety Code § 1424.5(a)(1)*; *see Health & Safety Code § 1294(c)*].

[d] Payment of Uncontested Class "AA" or "A" Citations

A licensee who elects not to contest a Class "AA" or "A" citation can pay the department the minimum amount specified by law for that type of citation, or 65 percent of the amount specified in the citation, whichever is greater, for each violation, within 30 business days after the citation is issued [*Health & Safety Code § 1424.5(b)*].

[e] Class "B" Violations

Class "B" violations are those that have a direct or immediate relationship to the health, safety, or security of the patients or residents. Unless otherwise determined to be a Class "A" violation, any violation of a patient's rights [*see 22 Cal. Code Reg. §§ 72527, 73523*] that is determined by the department to cause (or under circumstances likely to cause) significant humiliation, indignity, anxiety, or other emotional trauma to a patient is a Class "B" violation. The citation for a Class "B" violation must specify the amount of time in which the violation must be corrected. If the correction is made within that time, the facility will not be fined if the violation was the only one in the preceding 12 or 13-month period. Otherwise, each Class "B" violation subjects the facility to a civil penalty of \$100 to \$1,000 [*Health & Safety Code § 1424(e)*].

[f] Willful Falsification of Health Records

Any willful material falsification or willful material omission in the health record for a patient of a long-term health care facility also is a violation subject to a monetary penalty [*see Health & Safety Code § 1424(f)* (all facilities); *Health & Safety Code § 1424.5(a)(3)* (skilled nursing and intermediate care facilities)].

[7] Related Remedies

A resident or patient of a skilled nursing facility or an intermediate care facility may also sue the licensee of a facility that violates the rights of any patient or resident as set forth in the Patients' *Bill of Rights* [*see 22 Cal. Code Reg. § 72527*]. For additional discussion of this right, *see § 105.22[1]*. A contract for admission to a skilled nursing facility or an intermediate care facility cannot contain any clause purporting to alter the statutory period for filing an action against the facility [*Health & Safety Code § 1599.82*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART II. LEGAL BACKGROUND

33-105 California Legal Forms--Transaction Guide § 105.27

§ 105.27 Family Notification of Change in Resident's Status

A skilled nursing facility [*Health & Safety Code § 1250(c)*], an intermediate care facility [*Health & Safety Code § 1250(d), (e), (g), (h)*], or a congregate living facility [*Health & Safety Code § 1250(i)*] must make reasonable efforts to contact the person named in the resident's admission agreement as the resident's contact person, or the resident's responsible person, within 24 hours after a significant change in the resident's health or mental status [*Health & Safety Code § 1795(a)*].

This rule also applies to residential care facilities for the elderly [*Health & Safety Code § 1795(b)*; see *Health & Safety Code § 1569.2(l)* (definition)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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33-105 California Legal Forms--Transaction Guide §§ 105.28-105.99

[Reserved]

§§ 105.28[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

33-105 California Legal Forms--Transaction Guide § 105.100

§ 105.100 Facts

1. Client's name, address, and telephone number.
2. Personal data on individual requiring long-term care, including:
 - a. Name, address, and telephone number.
 - b. Age.
 - c. Social Security number.
 - d. Capacity:
 - (1) Competent adult.
 - (2) Incompetent adult.
 - (3) Minor.
 - (4) If individual is or may be incompetent:
 - (a) Whether a conservator or guardian has been appointed to handle his or her affairs.
 - (b) If so, name, address, and telephone number of that person.
 - (c) If not, names, addresses, and telephone numbers of next of kin or other authorized representative.

e. Marital status.

f. If individual is a veteran, Veterans Administration claim number.

NOTE:

The individual's military record is important in determining eligibility for coverage of long-term care under veterans' benefits programs [*see* § 105.18[4]; *see also* § 105.112].

g. Claim numbers for Medicare and/or Medi-Cal if individual has been determined eligible to receive benefits under those programs.

3. Medical information on person requiring long-term care, including:

a. Name, address, and telephone number of attending physician.

b. Person's general condition and requirements [*see* § 105.110].

NOTE:

Consultation with the individual's physician is necessary in order to determine the level of care that the patient will require. However, the answers to the following questions will aid the attorney in understanding the individual's general condition and in eliminating obviously impractical alternatives.

(1) Is individual presently hospitalized or recuperating from hospitalization?

(2) Is individual ambulatory?

NOTE:

For most purposes, an "ambulatory" patient is one who can leave a building unassisted under emergency conditions. A "nonambulatory" person includes, but is not limited to, persons who depend upon mechanical aids such as crutches, walkers and wheelchairs [*see* 22 Cal. Code Reg. § 72077(b), (c)].

(3) Is individual mentally disabled, and, if so, what is nature of disability?

(4) Is individual mentally alert and capable of conversing coherently?

(5) Does individual require regular assistance with meals, grooming, and/or other daily personal activities?

(6) Does individual have tuberculosis or other infectious or communicable disease?

(7) Does individual's primary need result from mental disorder giving rise to ongoing disruptive behavior?

4. Financial information.

a. Assets of person requiring care.

NOTE:

In compiling a list of the individual's assets, be sure to verify the form of ownership (*i.e.*, joint tenancy, tenant in common, etc.).

- (1) Real property, including home.
- (2) Personal savings.
- (3) Securities.
- (4) Business interests, if any.
- (5) Pension or other retirement benefits.
- (6) Other personal property.

b. Other sources of funds.

- (1) Relatives, family, or friends willing and able to help with individual's costs.
 - (a) Names, addresses, and telephone numbers.
 - (b) Relationship to individual.
 - (c) Amounts they are willing to contribute.
- (2) Social Security benefits to which individual is entitled.
- (3) Medicare, Medicaid, or Medi-Cal benefits.
- (4) Private insurance coverage.

NOTE:

Some private insurance may help defray the costs of care in skilled nursing or intermediate care facilities under "extended care" provisions. Private health insurance policies ordinarily do not cover either home health services or the cost of a residential care facility for the elderly [*see* § 105.18[5][b]].

c. Outstanding obligations of individual.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
 LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
 LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare
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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

33-105 California Legal Forms--Transaction Guide § 105.101

§ 105.101 Documents

1. Authorization, if any, for third party to act on behalf of person requiring care.
 - a. Court order appointing guardian or conservator.
 - b. General or specific powers of attorney.
 - c. Advance health care directive, if any, including durable power of attorney for health care [see Ch. 104, *Health Care Transactions, Consents, and Directives*].
2. Prior determinations, if any, regarding individual's eligibility for:
 - a. Public medical assistance.
 - b. Veterans' benefits.
3. Prior agreements, if any, relating to long-term care.
4. Specimen copies of any private insurance policies, including all:
 - a. Endorsements.
 - b. Declaration sheets.
5. Consumer guidelines obtained from Department of Health and Human Services.

NOTE:

The Department of Health and Human Services produces a brochure that includes guidelines highlighting health and safety issues to be considered in the selection of a residential care facility for the elderly, locations of licensing offices where facility records may be reviewed, types of local organizations that may have additional information on specific facilities, and a list of recommended inquiries to be made in the selection of a residential care facility for the elderly [*see Health & Safety Code § 1535(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Family Protection & Welfare Elderly Persons General Overview Public Health & Welfare

Law Healthcare Services for Disabled & Elderly Persons General Overview Public Health & Welfare

Law Healthcare Services for Disabled & Elderly Persons Care Facilities General Overview Public Health & Welfare

Law Healthcare Services for Disabled & Elderly Persons Care Facilities Nursing Facilities



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A. Client Interview--Facts and Documents

33-105 California Legal Forms--Transaction Guide §§ 105.102-105.109

[Reserved]

§§ 105.102[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

33-105 California Legal Forms--Transaction Guide § 105.110

§ 105.110 General Determinations

1. Should conservator or guardian be appointed to handle individual's affairs?

NOTE:

For a basic discussion of conservatorship proceedings, see Ch. 66, ***Guardianship and Conservatorship Planning***, Pt. B. For comprehensive coverage of this subject, see California Forms of Pleading and Practice, Chs. 281- 290H (Matthew Bender).

2. What type of health care does individual require?

- a. What is individual's physical condition?

- b. What is individual's mental condition?

- c. Based on extent of individual's daily care requirements, in what type of facility should he or she be placed?

NOTE:

The medical facts obtained during the client interview [*see* § 105.100] will give the attorney a general idea regarding the individual's requirements. However, the actual decision regarding the level of care that the individual will require is a medical decision and must be made by the individual's attending physician. Skilled nursing facilities will admit patients only upon the orders of a physician [22 *Cal. Code Reg. § 87458(a)*; *see* 42 *C.F.R. § 483.40*]. An applicant for admission to a residential care facility for the elderly must have had a physical examination within one year from the date of admission [*see* 22 *Cal. Code Reg. § 87458(a)*]. A complete physical examination prior to admission is always advisable in order to determine any nonapparent health problems that may require

special medical attention.

(1) Skilled nursing facility if individual requires continuous skilled nursing care and supportive care on extended basis [*see Health & Safety Code § 1250(c); see also § 105.12*].

(2) Intermediate care facility if individual has recurring need for skilled nursing supervision and needs supportive care but does not require continuous skilled nursing care [*see Health & Safety Code § 1250(d); see also § 105.13*].

(3) Residential care facility for the elderly if individual requires nonmedical residential care [*see Health and Safety Code §§ 1569.72, 1569.312; § 105.15*].

(4) If individual does not require any of the foregoing levels of care, is individual interested in obtaining home health services [*see § 105.17[2]*]?

(5) If individual is relatively healthy and financially self-sufficient, would he or she be interested in exploring available retirement residences [*see § 105.17[4]*]?

3. Is individual likely to require care permanently, or only on temporary basis?

4. If individual is married, will his or her spouse also reside in facility?

5. What, if any, opinions and feelings does individual have concerning his or her future care?

6. What are preferred activities in which individual is able to participate?

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare
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B. Preliminary Determinations

33-105 California Legal Forms--Transaction Guide § 105.111

§ 105.111 Selecting Particular Facility

NOTE:

Careful selection of a long-term care facility for an elderly person is extremely important since it is usually in an individual's best interests to remain in the facility where he or she was originally placed. Alternative facilities should be examined in order to assure that the best possible alternative is selected.

1. Based on desires of individual, relatives, guardian and other involved persons, in what geographical area should long-term care facility be located?
2. What facilities are available in selected area?
 - a. Does individual's physician recommend particular facility?
 - b. Obtain names and addresses of facilities from state Department of Health Services.

NOTE:

In order to obtain a list of the skilled nursing, intermediate care, and residential care facilities for the elderly in a particular area, contact the County Department of Health and Human Services Ombudsman Program.

3. If desired, call toll-free telephone hotline established by State Ombudsman for referral (1-800-231-4024) [*see Welf. & Inst. Code § 9726*].

NOTE:

This hotline is open 24 hours a day, seven days a week. The telephone number must be posted in a conspicuous place in the facility [*Welf. & Inst. Code § 9726*].

4. Which facilities offer services and programs meeting individual's needs?

5. Does administrator have current valid license issued by state?

NOTE:

The American Health Care Association cautions that a facility should not be used if the administrator does not hold a current valid license [*see* Thinking About a Nursing Home?--A Consumer's Guide to Choosing a Long-Term Care Facility (American Health Care Association)].

6. Which facilities under consideration are licensed to provide level of care required by individual?

NOTE:

The American Health Care Association cautions that facilities should not be used if they do not have current valid licenses from the state [*see* Thinking About a Nursing Home?--A Consumer's Guide to Choosing a Long-Term Care Facility (American Health Care Association)]. Some facilities are licensed to provide more than one level of care. For example, one facility may be licensed as both a skilled nursing facility and an intermediate care facility [*see* 22 Cal. Code Reg. § 72301(c)]. In addition, acute care hospitals may designate distinct parts of their facilities as skilled nursing facilities [*see* 22 Cal. Code Reg. § 72103]. If it is likely that the individual will require increased care in the future, it may be best to place him or her in a facility with multiple licenses since that facility could provide the increased level of care when needed, thereby avoiding potential transfer trauma.

7. If individual is a minor or suffers from mental dis-ability or tuberculosis, does facility hold special license to provide necessary services?

8. Based on answers to following questions, is facility suitable for individual?

a. Do facility director and chief registered nurse appear sympathetic and concerned with patients as individuals?

(1) Do they know the patients by name?

(2) Are they accessible for discussion of problems and answering questions?

b. What training have medical director and director of nursing services received?

NOTE:

The personnel of certain facilities must have minimum levels of training and experience. For example, the director of nursing services must be a registered nurse and must have had at least one year of experience in nursing supervision within the last five years [22 Cal. Code Reg. § 72327(b)]. Directors who are trained in gerontology or geriatric nursing may be better able to meet the special needs of aged patients.

(1) Is licensed registered nurse on duty 24 hours a day?

(2) Are there trained nurses' aides and orderlies on duty and, if so, what is patient/aide ratio and what is extent of care provided?

NOTE:

It is important that support personnel are not charged with performing services that should be performed by licensed nursing staff.

(3) Is nursing staff required to participate in programs of continuing education?

(4) Are staff members friendly and respectful toward patients or residents?

c. Is facility certified for participation in federal Medicare or state Medi-Cal programs?

NOTE:

It will be important to know exactly what course will be available if and when the financial resources of the patient are exhausted.

d. What do following people think of facility?

(1) Administrator and social worker of hospital that has transfer agreements with long-term care unit.

(2) Individual's physician.

(3) Clergy who visit patients in facility.

(4) Families of current facility patients.

(5) Community volunteers working with residents of facility.

e. Does medical director have a conflict of interest, such as part ownership in facility?

NOTE:

A medical director of a skilled nursing facility should be able to exercise independent judgment, since his or her role is important to the overall level of care provided in the facility. The medical director is responsible for the standards, coordination, surveillance, and planning for improvement of the medical care in the facility [*see 22 Cal. Code Reg. § 72305(a)*]. He or she acts as a liaison between the facility and the physicians attending patients, and as a consultant to the director of nursing services in matters relating to patient care services [*see 22 Cal. Code Reg. § 72305(b)(1), (3)*].

f. Does administrative staff seem likely to maintain contact with patient's family regarding patient's condition?

g. Are pharmaceutical services available and, if so:

(1) Are all drugs readily available or are there frequent delays in providing them?

(2) Does pharmacist keep records on patient drug programs?

h. Are following aspects of medical attention ensured?

(1) Regular medical attention.

(2) Availability of alternative physician if regular physician is unavailable in an emergency.

(3) Confidentiality of medical records.

- (4) Maintenance of medical records and plan of care.
- (5) Patient involvement, to extent possible, in plan of care and treatment.
- (6) Arrangement with acute care hospital if transfer of patient or resident becomes necessary.
- (7) Availability of emergency transportation to acute care hospital.

i. Do adult social worker(s) and group of community volunteers regularly visit facility?

j. What are the bedroom arrangements?

- (1) How many people share a room?
- (2) How does facility decide who will share rooms?

NOTE:

The facility should take some care to ensure that persons with compatible conditions, interests, and/or abilities (i.e., mental state and competence) are assigned to share rooms.

- (3) May patient or resident bring own furniture into room?

NOTE:

Subject to space limitations and the rights of other residents, residents have a right to bring personal furnishings with them to the facility unless medically contraindicated [22 *Cal. Code Reg. §§ 72527(a)(15)* (skilled nursing facilities), 73523(a)(15) (intermediate care facilities); *see* 42 *C.F.R. § 483.10(l)*].

- (4) Are rooms well lighted?
- (5) Do rooms have windows?
- (6) Is there a call buzzer or light by bed?
- (7) Do beds have side rails?
- (8) Do rooms open into hallway?
- (9) Are rooms large enough for wheelchairs to be used in them?
- (10) Are there adequate facilities for patients' or residents' clothes?
- (11) Is there at least one comfortable chair for use by each patient assigned to the room?
- (12) How much privacy will patient have in room (i.e., are there draw drapes or screens available for each bed)?

k. What bathroom facilities are available?

- (1) How many residents or patients share bathroom?
- (2) Are bathrooms in locations convenient to bedrooms?
- (3) Are they equipped for use by patients in wheelchairs?
- (4) Are there call lights or bells that patients may use in case they need assistance?
- (5) Is bathroom equipped with hand-grips?
- (6) Do bath tubs have non-slip surfaces?

l. What optional programs does facility offer?

NOTE:

A skilled nursing facility must provide, at a minimum, physician and skilled nursing services as well as dietary, pharmaceutical and activity programs [22 Cal. Code Reg. § 72301(a)]. However, facilities may offer certain optional services, such as physical therapy [see 22 Cal. Code Reg. §§ 72403-72411], occupational therapy [see 22 Cal. Code Reg. §§ 72413-72421], speech pathology and audiology [see 22 Cal. Code Reg. §§ 72423-72431], social services [see 22 Cal. Code Reg. §§ 72433-72441], and special treatment [see 22 Cal. Code Reg. § 72443 et seq.]. Optional services are regulated as to matters such as staff, space, and equipment.

m. Do patients appear well cared-for?

- (1) Are they out of bed?
- (2) Are they occupied?
- (3) Are those who are out of bed wearing day clothing that is both neat and clean?
- (4) Do they appear well-groomed and comfortable?
- (5) Are there arrangements for barbers and cosmetologists to provide patient services?
- (6) Is maintenance of neat and clean appearance encouraged?

n. Does staff appear to be competent and positive?

- (1) Are there ongoing training and educational programs for nurses and aides?
- (2) How do staff members greet patients?
- (3) Are staff members friendly and happy?

NOTE:

An obviously unfriendly or negative staff may indicate that the facility does not have adequate personnel to handle all necessary work.

o. Are following aspects of physical facility satisfactory?

NOTE:

A skilled nursing or residential care facility for the elderly should be as pleasant, cheerful and comfortable as possible since it will be the home of the patient or resident. At the very least, all facilities must comply with certain safety zoning and building clearance regulations [*see* 22 *Cal. Code Reg.* § 72205].

- (1) Is facility located in an area that will enable relatives to visit frequently?
- (2) Does physical arrangement of facility appear safe?
- (3) How often does facility conduct fire drills?
- (4) Does facility have sprinklers, sensing devices, and alarms that ring automatically at nearest fire department?
- (5) Is there a floor plan and written emergency evacuation plan posted throughout the facility?
- (6) Is facility free of underfoot obstacles?
- (7) Are hallways and other common areas well lighted?

p. Does facility afford reasonable degree of privacy to patients for receiving visits and making and receiving telephone calls?

q. What are facility's policies with respect to discharge and transfer of patients?

NOTE:

Skilled nursing facilities must have written policies and procedures covering transfer and discharge of patients [*see* § 105.23[1]]. If the facility provides services under continuing care contracts, it is subject to special reporting and reserve requirements designed to safeguard residents from transfer trauma by ensuring that the facility remains financially solvent [*see Health & Safety Code* §§ 1770(a), (b), 1789-1793].

r. Is facility clean and neat upon visual inspection, and free of unpleasant odors?

NOTE:

It is a very negative reflection on a facility if it smells offensive, since this may indicate that incontinent patients do not receive the attention they need.

s. What recreational and entertainment programs does facility offer?

- (1) Are families encouraged to take patients out for rides?
- (2) What activities are planned?
- (3) Does facility provide entertainment?
- (4) Is there television in patients' rooms?

(5) Are there religious activities?

(6) Are there separate rooms for patient activities?

(7) Is there activity equipment (for example, cards, board games, etc.) and, if so, does it appear to be used by the residents?

t. What services are included in basic rate charged by facility?

NOTE:

Skilled nursing and intermediate care facilities must maintain written policies and procedures concerning charges for services included in the basic rate of the facility and charges for extra services [22 *Cal. Code Reg. §§ 72521(c)(2)* (skilled nursing facilities), 73519(a)(2) (intermediate care facilities)]. The facility must review these policies and procedures annually, and make them available to residents and members of the public [22 *Cal. Code Reg. §§ 72521(b)*, (skilled nursing facilities), 73519(a)(2) (intermediate care facilities)].

u. What services and/or items are treated as "extras" and what rate of charge is applied to them?

NOTE:

Residential care facilities must either include in their admissions agreement a list showing additional services available but not included in the facility's basic rate and the charges for these services, or post such a list in a location accessible to residents [22 *Cal. Code Reg. § 87507(c), (d)*].

v. What payment options does facility offer?

(1) Month-to-month or other plan providing for billing on periodic basis.

NOTE:

This is the most common arrangement for payment and is the only practical method if the individual who will remain a patient in the facility for a limited period of time, such as a person recovering from an acute illness, requires continuous nursing care during the period of recovery. Individual facilities may offer daily, monthly, or quarterly plans.

(2) Continuing care contract [see §§ 105.20[4], 105.230].

NOTE:

The primary drawback to continuing care contracts is that the patient may be left without a source of payment for continuing care if the facility ceases operating during his or her lifetime. Accordingly, the attorney should investigate the facility's reputation and financial condition before advising a client to enter into a continuing care contract.

(3) Inter vivos trust arrangement [see § 105.233].

NOTE:

An inter vivos trust can provide a desirable alternative to a continuing care contract since a provision can be included calling for termination of the trust should the facility cease to operate.

9. What information can residents, facility, and state licensing agency provide concerning facility's operations?

a. What are results of recent inspections and investigations?

b. Have any complaints been filed?

NOTE:

Residential care facilities must place in a conspicuous place copies of all licensing reports issued by the California Department of Social Services within the preceding 12 months, and all licensing reports issued by the department resulting from the department's most recent annual visit to the facility [*Health & Safety Code* § 1569.38]. This requirement, however, does not apply to any portion of a licensing report referring to a complaint that was found by the department to be unfounded or unsubstantiated [*Health & Safety Code* § 1569.38]. During the admission process, the facility must inform the resident and the resident's responsible person in writing that the licensing reports are available for review at the facility and that copies of these reports and other documents pertaining to the facility are available from the appropriate district office of the department. The facility also must provide the telephone number and address of the appropriate district office [*Health & Safety Code* § 1569.38; *see also* § 105.222[2], EXHIBIT C]. Records of complaints and investigation results are contained in the public file of the Department of Health Services, Licensing and Certification Division (50 D Street, Suite 230, Santa Rosa, California 95404-4759; Telephone (707) 576-2210). Any member of the public who wishes to do so may go to the nearest office of that agency and view the records contained there, after signing a written request. There is a charge of 15 cents per copy for any material that the agency reproduces. The agency will not mail out information of this nature [*see Health & Safety Code* §§ 1422.5, 1439.5(b)]. In evaluating these records, an attorney should consider the number of complaints that have been made against the facility as well as the severity of the matters complained of.

c. Is facility financially stable?

NOTE:

This question is of particular concern if the prospective resident plans to enter the facility pursuant to a continuing care contract, since purchasers of continuing care often transfer all or nearly all of their resources in exchange for a facility's promise to provide care for life [*see Health & Safety Code* § 1770(b)]. Under the California Public Records Act [*Gov. Code* § 6250 *et seq.*] and the Information Practices Act of 1977 [*Civ. Code* § 1798 *et seq.*], the following documents are public information and must be provided by the Department of Social Services on request: audited financial statements, annual reports and accompanying documents, compliance or noncompliance with reserve requirements, whether an application for a permit to accept deposits and certificate of authority has been filed, whether a permit or certificate has been granted or denied, and the type of care offered by the provider [*Health & Safety Code* § 1776.6(a)].

10. If facility is certified for participation in Medicare and Medi-Cal programs, will it:

a. Handle individual's application for medical benefits?

b. Provide care under temporary payment arrangement pending approval of individual's application for medical assistance benefits?

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

33-105 California Legal Forms--Transaction Guide § 105.112

§ 105.112 Sources of Payment

NOTE:

If long-term care is indicated, the source of payment for that care is a very important consideration. The extent of potential Medicare coverage should be discussed with the patient's attending physician and the Director of Nurses at the skilled nursing facility prior to admission.

Even if private funds are available to pay for the individual's care, the individual may be eligible to receive Medicare, Medi-Cal, or federal Veterans Administration benefits. The level and quality of care a patient receives in a given facility will not depend on the source of the funds with which the individual pays for the care.

The Department of Aging, in consultation with the California Commission on Aging, operates a statewide Health Insurance Counseling and Advocacy Program to provide Medicare beneficiaries with counseling and advocacy in Medicare, private health insurance, and related health care coverage plans [*see Welf. & Inst. Code §§ 9540, 9541*].

1. Does individual have private funds sufficient for costs of institutional long-term care?
2. Will funds from federal Medicare program be available?
 - a. Is individual eligible for program benefits [*see 42 U.S.C. § 1395c*]?
 - (1) Is individual age 65 or over and either:
 - (a) Entitled to retirement benefits under Subchapter II of Social Security Act [*see 42 U.S.C. §§ 401-431*];
 - (b) Would be entitled to benefits under Subchapter II of Social Security Act if certain

federal employment were covered employment under the Act [42 U.S.C. § 1395c]; or

(c) Entitled to retirement benefits under railroad retirement system [see 45 U.S.C. §§ 231-231v]?

(2) Is individual 65 years of age or under and entitled to retirement benefits for at least 24 months due to disability under above statutes?

(3) Is individual medically determined to have end stage renal disease?

b. Does Medicare cover type of care required by individual?

(1) Does individual require either [42 U.S.C. § 1395d(a)(2)(A), (B)]:

(a) Post-hospital extended care services for up to 100 days during any spell of illness [see 42 U.S.C. § 1395x ("post-hospital extended care services" and "spell of illness" defined)]; or

(b) Extended care services that are not post-hospital services?

NOTE:

Extended care services that are not post-hospital services are covered only to the extent the Secretary of Health and Human Services determines that such coverage will not result in any increase in total Medicare payments or any alteration in the acute care nature of the benefits provided [42 U.S.C. § 1395d(a)(2)(B)].

(2) Does individual require any of following types of care [see 42 U.S.C. § 1395x(h)]?

NOTE:

The following types of care are specifically included within the definition of "extended care services" covered by the Medicare program [42 U.S.C. § 1395x(h)].

(a) Nursing care provided by or under supervision of registered professional nurse, and/or bed and board connected with that care.

(b) Physical, occupational, or speech therapy furnished by or under arrangements with skilled nursing facility.

(c) Medical social services.

(d) Drugs, biologicals, supplies, appliances, and equipment ordinarily furnished by skilled nursing facilities in treatment and care of inpatients.

(e) Medical services provided by intern or resident in training of hospital with which facility has transfer agreement in effect under teaching program.

(f) Other services normally provided by skilled nursing facilities or by others under arrangements with them made by the facility and necessary to patients' health.

3. Is individual eligible for health care services under Medi-Cal program?

NOTE:

Ordinarily, individuals who are eligible for Medi-Cal assistance are receiving or are eligible for other forms of public assistance for the aged, blind, or disabled, or for aid to dependent children [*see Welf. & Inst. Code § 14005*]. The attorney exploring eligibility for benefits under the Medi-Cal program should contact the Medi-Cal division of the state Department of Health and Human Services, which will assist in making the actual computation necessary to determine eligibility.

a. Is individual's monthly income, over the amount required for maintenance [*see Welf. & Inst. Code § 14005.12*] insufficient to provide for the costs of health care or coverage less any amount by which the value of his or her other resources [*see Welf. & Inst. Code § 14006*] exceeds the value established in *Welf. & Inst. Code § 14006* [*Welf. & Inst. Code §§ 14005.4, 14005.7(a)*; *see Welf. & Inst. Code §§ 14005.16, 14005.17* (eligibility of institutionalized spouses)]?

b. Is individual "medically needy" [*see Welf. & Inst. Code § 14051(a)*]?

NOTE:

In the context of this discussion, a "medically needy person" is an aged, blind, or disabled person who could qualify as public assistance recipient except for income and resources, but whose income and resources are insufficient to provide the costs of health care coverage [*see Welf. & Inst. Code § 14051(a)(1)*].

c. Does individual require nursing facility care of type and level covered by Medi-Cal [*Welf. & Inst. Code § 14132(c)*]?

NOTE:

For purposes of determining Medi-Cal eligibility, a nursing facility is a facility that is certified to participate as a provider of care either as a skilled nursing facility in the federal Medicare program or as a nursing facility in the federal Medicaid program, or both, and is licensed under Division 2, Chapter 2 of the Health & Safety Code [*Health & Safety Code § 1250(k)*; *see Health & Safety Code § 1250 et seq.*].

(1) Physician, nurse practitioner, or podiatry services.

(2) Prescribed drugs [*see Welf. & Inst. Code § 14132(d)*].

(3) Physical therapy.

(4) Occupational therapy.

(5) Speech therapy.

(6) Audiology services.

(7) Respiratory care.

4. Will long-term care benefits under veterans' program be available to individual?

a. Is individual a veteran?

NOTE:

A person who has served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable may be eligible to receive hospital care, medical services, and nursing home care in a facility operated by the Department of Veterans Affairs or, following treatment in a Department facility, in a non-Department facility at government expense [*see* 38 U.S.C. §§ 1710, 1720; *see also* 38 U.S.C. § 101(2) ("veteran" defined)]. A veteran who comes within any of the classifications in PP b through h, **below**, is entitled to care [38 U.S.C. § 1710(a)(1), (2)]. Other veterans may be entitled to receive care to the extent resources and facilities are available [38 U.S.C. § 1710(a)(3)].

b. Does individual have service-connected disability?

NOTE:

The Department of Veterans Affairs must furnish needed hospital care and medical services, and may furnish needed nursing home care, to veterans with service-connected disabilities [38 U.S.C. § 1710(a)(1)(A), (B), (2)(A)]. Moreover, medical services may be furnished to correct or treat any non-service-connected disability while any veteran is receiving hospital care or nursing home care in any Department facility, if the veteran is willing and the services are reasonably necessary to protect the veteran's health [38 U.S.C. § 1710(c)].

c. Was individual discharged or released from service for disability incurred or aggravated in line of duty?

NOTE:

The Department of Veterans Affairs must furnish hospital care, and may furnish needed nursing home care, to a veteran who was discharged or released from active service because of a disability incurred or aggravated in the line of duty. The disability for which the veteran needs treatment need not be the disability for which the veteran was discharged or released from active service [38 U.S.C. § 1710(a)(2)(B)].

d. Is individual entitled to receive disability compensation?

NOTE:

A veteran who is receiving disability compensation or who would, but for 38 U.S.C. § 1151 (benefits for persons disabled by treatment or vocational rehabilitation), be entitled to receive such compensation is entitled to needed hospital and nursing care [38 U.S.C. § 1710(a)(2)(C)].

e. Was individual a prisoner of war?

NOTE:

A veteran who is a former prisoner of war is entitled to treatment for any disability [38 U.S.C. § 1710(a)(1)(D)].

f. Was veteran exposed to toxic substance or radiation or other conditions in Vietnam or during Persian

Gulf War [38 U.S.C. § 1710(a)(2)(F)]?

NOTE:

A Vietnam era herbicide-exposed or radiation-exposed veteran is eligible for hospital care, medical services, and nursing home care for any disability, even if there is insufficient evidence to conclude that the disability may be associated with that exposure [38 U.S.C. § 1710(e)(1)(A), (B); *see* 38 U.S.C. § 1710(e)(2)(A), (3)(A) (limitations)]. A veteran who served on active duty in the southwest Asia theater of operations during the Persian Gulf War is also eligible for hospital care, medical services, and nursing home care for any disability, even if there is insufficient evidence to conclude that the disability may be associated with that exposure [38 U.S.C. § 1710(e)(1)(C); *see* 38 U.S.C. § 1710(e)(2)(B), (3)(B) (limitations)].

g. Is individual veteran of Mexican border period or World War I?

NOTE:

A veteran of the Mexican border period or World War I is entitled to treatment for any disability [38 U.S.C. § 1710(a)(2)(E)].

h. Is individual with non-service-connected disability unable to defray expenses of necessary care?

NOTE:

A veteran with a non-service-connected disability is entitled to care if he or she cannot defray the expenses of necessary care [38 U.S.C. § 1710(a)(2)(G); *see* 38 U.S.C. § 1722(a) (determination of inability to defray expenses)].

i. Does individual need protracted nursing home care following hospital or nursing home care in Department facility?

NOTE:

The Department of Veterans affairs may transfer a veteran who has received hospital or nursing home care in a Department facility to a non-Department nursing home for care at government expense if the veteran needs a protracted period of nursing home care and has received maximum benefits from care in the Department facility [38 U.S.C. § 1720(a)(1)]. The non-Department facility must meet Department of Veterans Affairs standards [38 U.S.C. § 1720(b)].

5. If individual is ineligible for government-sponsored programs, which of following sources will be used to pay for individual's care?

- a. Individual's personal assets.
- b. Other private funds from such sources as friends and relatives.
- c. Health, hospital, or other insurance coverage.

NOTE:

Health or hospital insurance often will not cover long-term care. However, the individual's policies should be read carefully in order to determine whether coverage exists under an "extended care" provision.

d. Private charitable or religious organizations.

e. Fraternal or other organizations.

6. Is individual competent and willing to manage his or her own financial affairs?

NOTE:

Residents of skilled nursing, intermediate care, and residential care facilities have the right to manage their personal financial affairs [22 *Cal. Code Reg.* §§ 72527(a)(8) (skilled nursing facilities), 73523(a)(8) (intermediate care facilities), 87468(a)(12) (residential care facilities); *see* 42 *C.F.R.* § 483.10(b)(7)(i), (c)].

7. If individual will not manage his or her own finances, will it be necessary to:

a. Appoint conservator or guardian?

NOTE:

For a discussion of the law governing and forms relating to conservatorship and guardianship proceedings, see Ch. 66, ***Guardianship***, and Ch. 66A, ***Conservatorships***; *see also* California Forms of Pleading and Practice, Chs. 280- 290H (Matthew Bender).

b. Designate another person, in writing, to manage his or her funds?

c. Authorize facility, in writing, to manage his or her funds [*see* 22 *Cal. Code Reg.* §§ 72527(a)(8), 72529 (skilled nursing facilities), 73523(a)(8), 73557 (intermediate care facilities); *see* 42 *C.F.R.* § 483.10(b)(7)(i), (c)].

NOTE:

A facility that takes on the responsibility of managing a resident's finances must comply with detailed accounting and reporting requirements [*see* 22 *Cal. Code Reg.* §§ 72529 (skilled nursing facilities), 73557 (intermediate care facilities)]. Medicare and Medicaid-certified facilities must also comply with federal requirements concerning the management of a resident's funds [*see* 42 *C.F.R.* § 483.10(c)]. When a person is admitted to a Medicare-certified or Medicaid-certified facility, the facility must provide him or her with a written statement that, among other things, details the facility's manner of protecting a resident's personal funds [42 *C.F.R.* § 483.10(b)(7)(i); *see* § 105.122].

8. Should individual create revocable inter vivos trust to pay for facility's charges [*see* § 105.233]?

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
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33-105 California Legal Forms--Transaction Guide §§ 105.113-105.119

[Reserved]

§§ 105.113[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
 CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
 PART III. TRANSACTION GUIDE
 C. Procedural Guide for Admission to Long-Term Care Facilities

33-105 California Legal Forms--Transaction Guide § 105.120

§ 105.120 Admission Procedures

1. If individual requires skilled nursing care, contact Department of Social Services for county in which the individual will be placed and request list of skilled nursing facilities within that area.
2. Arrange for appointment of conservator if required.

NOTE:

For the steps involved in commencing a proceeding to appoint a guardian or conservator, see Ch. 66, **Guardianships**, and Ch. 66A, **Conservatorships**; **see also** California Forms of Pleading and Practice, Ch.280, **Guardianship and Conservatorship: Appointment of Guardians**, and Ch. 281, **Guardianship and Conservatorship: Appointment of Conservators** (Matthew Bender).

3. If individual to be placed in residential care facility for the elderly has no guardian, conservator, or other person willing to act as his or her responsible person, contact County Welfare Department, Adult Protective Services, or other placement agency [see 22 Cal. Code Reg. § 87101(p)(2) (definition)], which will then act in that capacity [see 22 Cal. Code Reg. § 87101(r)(6)].

NOTE:

For purposes of residential care facilities for the elderly, a "responsible person" is an individual (or group of individuals), including a relative, or placement agency, who assists the resident in placement or assumes varying degrees of responsibility for the resident's well-being [22 Cal. Code Reg. § 87101(r)(6)].

4. Arrange pre-admission interview if required by facility.

NOTE:

Even if the facility does not suggest a pre-admission interview, one should be requested by or on behalf of the individual. An individual who is considering entering a residential care facility for the elderly has the right to visit that facility with his or her family prior to admission, and a pre-admission interview of the prospective resident and his or her responsible person, if any, is mandatory [22 *Cal. Code Reg.* § 87457(a)].

5. Make necessary financial arrangements.

a. If patient is private patient:

(1) Establish inter vivos trust to ensure payment of facility's charges; or

(2) Make any necessary financial arrangement with third party.

b. If individual will receive public medical assistance:

(1) Prepare and have individual or duly appointed conservator or guardian execute application for benefits.

(2) If eligibility has not yet been determined, contact appropriate agency (for example, state Department of Social Services for Medi-Cal benefits) to ensure processing of application with minimum delay.

(3) If facility will handle application on individual's behalf, verify that application was made and is being processed in timely fashion.

6. Make necessary medical arrangements, including:

a. Pre-admission medical examination.

b. If individual will enter residential care facility for the elderly and has had physical examination within the past year, make sure that there is written evidence of that examination and that it [22 *Cal. Code Reg.* § 87458(b)];

(1) Establishes whether there are findings of communicable tuberculosis, other infectious or contagious diseases or other medical conditions that would preclude placing patient in facility.

(2) Contains documentation of prior medical services and history and current medical status including, but not limited to, height, weight, and blood pressure.

(3) Provides a record of current prescribed medications and an indication of whether they should be centrally stored [see 22 *Cal. Code Reg.* § 87465(c)(1)].

(4) Identifies person's physical limitations to determine his or her capability to participate in programs provided by facility, including any medically necessary diet limitations.

(5) Reflects a determination of person's ambulatory status [see 22 *Cal. Code Reg.* § 87101(a)(6) (definition)], and bedridden status [see 22 *Cal. Code Reg.* § 87455(d) (definition)].

(6) Provides information applicable to the required pre-admission appraisal [see 22 Cal. Code Reg. §§ 87457-87462; see also P 7, *below*].

c. Release of individual's medical record for use by facility [see Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.223[2]].

d. Inform individual's physician of individual's new residence.

7. If individual will enter a residential care facility for the elderly, make sure that facility does all of the following in conducting its pre-admission appraisal [see 22 Cal. Code Reg. § 87457]:

NOTE:

Before admitting an individual to a residential care facility for the elderly, the person responsible for admissions must meet with the applicant for admission and his or her responsible person, if any [22 Cal. Code Reg. § 87457(a)]. The facility will use the information elicited in this appraisal to determine whether the applicant is suitable for admission in light of the criteria established by applicable regulations [see 22 Cal. Code Reg. § 87455; see also PP 8, 9, *below*].

a. Provides sufficient information about facility and its services to enable all persons involved in placement of individual to consider the plan fully.

b. Elicits information on applicant's desires regarding entrance to facility and information on his or her background, including:

(1) Specific service needs.

(2) Medical background.

(3) Functional limitations.

c. Whether person (or his or her responsible person) agrees and consents to enter facility.

NOTE:

A facility may not admit an individual without this consent [22 Cal. Code Reg. § 87457(b)].

8. If individual seeks to enter residential care facility for the elderly, make sure that he or she is a person who [22 Cal. Code Reg. § 87455(a), (b)]:

a. Is capable of administering own medication.

b. Is capable of receiving medical care and treatment outside facility or receives needed medical care from a visiting nurse.

c. May require assistance in taking medication normally prescribed for self-administration.

d. May have mild problems, such as

(1) Forgetfulness.

- (2) Wandering.
- (3) Confusion.
- (4) Irritability.
- (5) Inability to manage money.

e. May have mild temporary emotional disturbance resulting from personal loss or change in living arrangement.

f. If under 60 years of age, has care needs compatible with those of other residents of facility.

NOTE:

A licensee may provide care for residents who have any of the following restricted health conditions or require any of the following health services [22 Cal. Code Reg. § 87612]:

- Administration of oxygen [see 22 Cal. Code Reg. § 87618].
- Indwelling urinary catheter care [see 22 Cal. Code Reg. § 87623].
- Colostomy or ileostomy care [see 22 Cal. Code Reg. § 87621].
- Contactures [see 22 Cal. Code Reg. § 87626].
- Diabetes [see 22 Cal. Code Reg. § 87628].
- Fecal impaction removal, enemas, and/or suppositories [see 22 Cal. Code Reg. § 87622].
- Managed incontinence [see 22 Cal. Code Reg. § 87625].
- Injections, as specified [see 22 Cal. Code Reg. § 87629].
- Intermittent positive pressure breathing (IPPB) machine [see 22 Cal. Code Reg. § 87619].
- Stage-1 and stage-2 pressure sores [see 22 Cal. Code Reg. § 87631(a)(3)].
- Wound care, as specified [see 22 Cal. Code Reg. § 87631].

9. If individual seeks to enter residential care facility for the elderly, make sure that he or she is not a person who [Health & Safety Code § 1569.72(a); 22 Cal. Code Reg. § 87455(c)]:

- a. Has active communicable tuberculosis.
- b. Requires inpatient care in a health facility.
- c. Is not elderly and who either:

(1) Has needs that conflict with other residents or the program of services offered; or

(2) Requires more care and supervision than other residents.

d. Has primary need for care because of either:

■ (1) Mental disorder that results from on-going behavior that would upset the general resident group and would require greater amount of supervision than other residents; or

■ (2) Dementia, unless requirements of 22 *Cal. Code Reg. § 87724* (care of persons with dementia) are met.

e. Cannot generally benefit from program of services available at facility.

f. Requires 24-hour skilled nursing or intermediate care.

g. Is bedridden, other than for temporary illness (that is, illness of less than 15 days duration) [*Health & Safety Code § 1569.72(d)(1)*] or recovery from surgery [*see Health & Safety Code § 1569.72(e)*] (circumstances under which bedridden resident may be retained in excess of 14 days); *see also Health & Safety Code § 1569.725* (circumstances under which residential care facility may permit incidental medical services through home health agency)].

h. Has stage-3 and stage-4 pressure sores [22 *Cal. Code Reg. § 87615(a)(1)*].

i. Needs gastrostomy care [22 *Cal. Code Reg. § 87615(a)(2)*].

j. Has nasogastric tube [22 *Cal. Code Reg. § 87615(a)(3)*].

k. Has staph infection or other serious infection [22 *Cal. Code Reg. § 87615(a)(4)*].

l. Depends on others to perform all activities of daily living, as listed in 22 *Cal. Code Reg. § 87459* [22 *Cal. Code Reg. § 87615(a)(5)*].

m. Has tracheotomy [22 *Cal. Code Reg. § 87615(a)(6)*].

10. Arrange for transfer, storage, or disposition of personal effects that individual will not bring to facility.

11. If individual will be entering skilled nursing or intermediate care facility for respite care, do all of following:

a. Ascertain that facility follows its resident assessment and care planning procedure for persons admitted for respite care [*see Health & Safety Code § 1418.1(d)*].

NOTE:

Skilled nursing and intermediate care facilities may use an abbreviated assessment and care planning procedure for persons admitted for respite care, and are not required to update the procedure documents for every readmission of the same person for respite care services unless the person's personal physician indicates that there has been a significant change in the person's medical condition. The abbreviated procedure must be consistent with the facility's obligation to protect the health and safety of residents and the general public, and must address the necessary care services required by the person admitted for

respite care during the length of his or her respite care stay [*Health & Safety Code § 1418.1(d)*].

b. Arrange to have one of following persons examine and positively identify any medication that admittee will bring to facility [*Health & Safety Code § 1418.1(a)*]:

(1) Admittee's personal physician and surgeon; or

(2) Pharmacist retained by facility.

c. If necessary, obtain advance orders for care and treatment of admittee from admittee's personal physician [*see Health & Safety Code § 1418.1(c)*].

NOTE:

A facility may readmit a person for respite care services on the basis of prior advance orders issued by the person's personal physician, unless the physician indicates that there has been a significant change in the person's medical condition. The advance orders may be used by the facility only during periods in which the person is receiving respite care services [*Health & Safety Code § 1418.1(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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C. Procedural Guide for Admission to Long-Term Care Facilities

33-105 California Legal Forms--Transaction Guide § 105.121

§ 105.121 Admission Agreement

1. Review written agreement.

NOTE:

The agreement for admission to a skilled nursing, intermediate care, or residential care facility for the elderly should always be written [22 *Cal. Code Reg. § 87507(a)* (residential care facilities)]. The statutory requirements for the contents of agreements for admission to skilled nursing and intermediate care facilities [*see Health & Safety Code §§ 1599.60-1599.84*] are discussed in § 105.200[1][b]. The requirements for agreements pertaining to the admission of persons to skilled nursing and intermediate care facilities for respite care services [*see Health & Safety Code §§ 1418.1, 1599.60, 1599.64*] are discussed in § 105.205[1].

Health & Safety Code § 1599.61, adopted in 1997, required the Department of Long Term Care to develop a standard admission agreement to be used by all skilled nursing and intermediate care facilities, and a short form agreement for patients whose length of stay is anticipated to be 14 days or less. By statute, all such facilities were required to use such an agreement by January 1, 2000 [*Health & Safety Code § 1599.61(a),(b)(2)*]. Deviations from the standard agreement are permitted only when authorized by the Department [*Health & Safety Code § 1599.61(b)*]. The Department was also required to develop a standardized version of the Patients' *Bill of Rights* for residents of these facilities, to be included as an attachment to all admission agreements [*Health & Safety Code § 1599.61(d); see § 105.22*]. Development of these standardized forms has proven to be a difficult and controversial process, however, and as of January 2009, the Department has not finalized regulations containing the new forms. Department sources have advised that there is no anticipated date for final implementation of these regulations. Accordingly, the Department is advising operators to continue to use their current

agreement forms.

2. Arrange for execution of agreement by:

- a. Individual if he or she is competent to enter into contracts.
- b. Legal guardian or conservator if individual has been declared legally incompetent or is unable to understand and sign agreement because of medical condition [*see Health & Safety Code § 1599.65(a)*].
- c. Third party, if any, assuming all or part of financial responsibility for individual's care.

NOTE:

No skilled nursing or intermediate care facility may require a Medi-Cal beneficiary to have a responsible party sign or cosign the admission agreement as a condition of admission to the facility [*Welf. & Inst. Code § 14110.8(b)*; **see** § 105.19[3]].

3. Ensure that individual has received written copies of:

- a. Applicable statutory sections regarding procedures for preventing and handling theft and loss of residents' belongings [*Health and Safety Code §§ 1289.4(k)* (skilled nursing and intermediate care facilities), 1569.153(k) (residential care facilities); *see Health & Safety Code §§ 1289.3-1289.5* (skilled nursing and intermediate care facilities), 1569.152-1569.154 (residential care facilities)].
- b. Facility's charges for services.
- c. Notice specified in *Welf. & Inst. Code § 14006.4* (relating to Medi-Cal eligibility and community property agreements), if individual is being admitted to any nursing facility enrolled as a provider in the Medi-Cal program [*Welf. & Inst. Code § 14006.3*; *see Health & Safety Code § 1250(k)* ("nursing facility" defined); *see also § 105.202*].

4. If individual is entering residential care facility for elderly, make sure that agreement specifies [*see 22 Cal. Code Reg. § 87507(c)*]:

- a. Basic services to be made available.

NOTE:

If the residents may purchase additional services (such as cosmetology) through the facility that are not specified in the admission agreement, a list of those services and the corresponding charges must be posted in a place accessible to the residents [*22 Cal. Code Reg. § 87507(d)*].

- b. Optional services available.
- c. Payment provisions, including:

- (1) Basic service rate, including any exempt-income allowance if resident agrees to such a charge.
- (2) Costs of optional services.

(3) Identity of payor.

(4) Date when payment is due.

(5) Funding source (provided that resident may refuse to disclose this information).

d. Conditions under which agreement may be modified, including required provision for at least 30 days prior written notice to the resident of any basic rate change, or for SSI/SSP rate changes as soon as facility is notified.

NOTE:

Agreements involving persons whose care is funded at government-prescribed rates may specify that operative dates of government modifications will be considered operative dates for basic service rate modifications [22 Cal. Code Reg. § 87507(c)(4)(A)].

e. Refund conditions.

NOTE:

If the Department orders relocation of a resident because of the resident's health condition [see 22 Cal. Code Reg. § 87612(a)], the resident may not be held responsible for meeting any advance notice requirement imposed by the facility in the admission agreement. The facility must refund any money to which the resident would have been entitled had notice been given as required by the admission agreement [22 Cal. Code Reg. § 87507(c)(5)(A)].

f. That state department or licensing agency has authority to examine residents' records as part of their evaluation of facility.

g. The general facility policies designed to make it possible for residents to live together.

h. Those actions, circumstances, or conditions [see 22 Cal. Code Reg. § 87224(a), (b)] that may result in eviction of residents from facility.

NOTE:

Except for general facility policies, the grounds for eviction specified in 22 Cal. Code Reg. § 87224(a)(3) are not subject to modification [22 Cal. Code Reg. § 87507(c)(8)].

i. Other conditions under which agreement may be terminated.

NOTE:

It is crucial that an attorney representing a prospective patient or resident in a long-term care facility clearly understand the exact circumstances under which that person may be forced to leave the facility. A displaced person is in an extremely vulnerable position, since he or she will obviously require immediate placement in another facility. The exigencies of time involved may force the displaced patient to be placed in a substandard facility.

j. Facility's policy concerning family visits and other communications with residents [Health & Safety Code § 1569.313; 22 Cal. Code Reg. § 87507(c)(9)].

k. Other conditions under which the agreement may be terminated [22 Cal. Code Reg. § 87507(c)(10)].

5. If individual is entering residential care facility for elderly and that facility has *not* obtained a certificate of authority to offer continuing care contracts [*see Health & Safety Code § 1569.888(b)*], ensure that agreement also contains all of following [*see Health & Safety Code § 1569.880 et seq.*]:

NOTE:

In addition to the requirements noted in P 4, **above** [*see 22 Cal. Code Reg. § 87507*], *Health & Safety Code §§ 1569.880 et seq.* establish requirements relating to the format [*see P 8, below*] and content [*see PP 5, 6, below*] of admission agreements for residential care facilities for the elderly. The law also provides procedural rules [*see P 7, below*]. These requirements are intended to be in addition to, and not exclusive of, any other requirements established by state law or regulation [*Health & Safety Code § 1569.888(a)*]. Although some of these requirements may duplicate those contained in other laws and regulations, the requirements of *Health & Safety Code § 1569.880 et seq.* are listed below in their entirety.

The requirements listed in *Health & Safety Code § 1569.880 et seq.* are inapplicable to licensees of residential care facilities for the elderly who have obtained a certificate of authority to offer continuing care contracts [*Health & Safety Code § 1569.888(b)*; *see Health & Safety Code § 1771(c)(5)* ("continuing care contracts" defined)].

a. Comprehensive description of any items and services provided under single fee, such as monthly fee for room, board, and other items and services [*Health & Safety Code § 1569.884(a)*].

b. Comprehensive description of, and fee schedule for, all items and services not included in single fee [*Health & Safety Code § 1569.884(b)*].

c. Statement that resident will receive monthly statement itemizing all separate charges incurred [*Health & Safety Code § 1569.884(b)*].

NOTE:

A facility may assess a separate charge for an item or service only if that separate charge is authorized by the admission agreement [*Health & Safety Code § 1569.884(c)*]. If additional services are available through the facility to be purchased by the resident that were not available at the time the admission agreement was signed, a list of these services and charges must be provided to the resident or the resident's representative [*Health & Safety Code § 1569.884(c)*]. A statement acknowledging the acceptance or refusal to purchase the additional services must be signed and dated by the resident or the resident's representative and attached to the admission agreement [*Health & Safety Code § 1569.884(c)*].

d. Explanation of use of third-party services within facility that are related to resident's service plan [*see Health & Safety Code § 1569.884(d)*].

NOTE:

These services include, but are not limited to, ancillary, health, and medical services, how they may be arranged, accessed, and monitored, any restrictions on third-party services, and who is financially responsible for the third-party services [*Health & Safety Code § 1569.884(d)*].

e. Comprehensive description of billing and payment policies and procedures [*Health & Safety Code § 1569.884(e)*].

f. Conditions under which rates may be increased in accordance with *Health & Safety Code § 1569.655* (preadmission fees and rate increases) [*Health & Safety Code § 1569.884(f)*; see § 105.15[7] (preadmission fees)].

g. Facility's policy concerning family visits and other communication with residents, in accordance with *Health & Safety Code § 1569.313* [*Health & Safety Code § 1569.884(g)*].

h. Facility's policy concerning refunds [*Health & Safety Code § 1569.884(h)*].

i. Conditions under which agreement may be terminated [*Health & Safety Code § 1569.884(i)*].

j. Statement of licensee's responsibilities and resident's rights when facility evicts residents resulting from forfeiture of facility's license or change in the use, in accordance with Department regulations [see *Health & Safety Code §§ 1569.884(j)* 1569.682; see also § 105.222[2]].

k. Statement that facility rules must be reasonable and that there is facility procedure for suggesting changes to rules [*Health & Safety Code § 1569.885(a)*].

NOTE:

This statement must appear in the agreement when it refers to the resident's obligation to observe facility rules [*Health & Safety Code § 1569.885(a)*].

l. Statement that copy of facility grievance procedure for resolution of resident complaints about facility practices must be made available to resident or his or her representative [*Health & Safety Code § 1569.885(b)*].

m. Statement that resident has right to contact State Department of Social Services, long-term care ombudsman, or both, regarding grievances against facility [*Health & Safety Code § 1569.885(c)*].

n. List of justifications for eviction permissible under state law or regulation, exactly as they are worded in applicable law or regulation [*Health & Safety Code § 1569.886(b)*].

o. Explanation of resident's right to notice prior to involuntary transfer, discharge, or eviction, process by which resident may appeal that decision, and description of relocation assistance offered by facility [*Health & Safety Code § 1569.886(c)*].

6. If individual is entering residential care facility for elderly, ensure that agreement does *not* include:

a. Any grounds for involuntary transfer or eviction of resident, unless those grounds are specifically enumerated under state law or regulation [*Health & Safety Code § 1569.886(a)*; see P 5(m), above].

b. Any written attachment containing any revision that is prohibited from being included in admission agreement itself [*Health & Safety Code § 1569.880(b)*].

c. Unlawful waivers of facility liability for health and safety or personal property of residents [*Health & Safety Code § 1569.883(a)*].

d. Any provision that facility knows or should know is deceptive, or unlawful understate or federal law [Health & Safety Code § 1569.883(b)].

7. If individual is entering residential care facility for elderly, ensure that following procedural requirements relating to admission agreement are satisfied:

a. Make blank complete copies of admission agreement available to public immediately, subject to time required for copying or mailing, at cost, on request [Health & Safety Code § 1569.881(a)].

b. Post conspicuously in location accessible to public view within facility either [Health & Safety Code § 1569.881(b)]:

(1) Complete copy of admission agreement, or

(2) Notice of its availability from facility.

c. Ensure that admission agreement is signed and dated, acknowledging contents of document, by resident or resident's representative [Health & Safety Code § 1569.887(a)].

d. Ensure that original signed and dated initial agreement and all subsequent modifications are retained in resident's file [Health & Safety Code § 1569.887(b)].

e. Provide copy of signed and dated admission agreement to resident or resident's representative [Health & Safety Code § 1569.887(c)].

f. Review admission agreement at time of compliance visit and in response to complaint involving agreement [Health & Safety Code § 1569.887(d)].

8. If individual is entering residential care facility for elderly, ensure that admission agreement satisfies following format and attachment requirements:

a. Agreement is printed in black type of not less than 12-point type size, on plain white paper [Health & Safety Code § 1569.882(a)].

b. Print appears on one side of the paper only [Health & Safety Code § 1569.882(a)].

c. Language of agreement is clear, coherent, and unambiguous, using words with common and everyday meanings [Health & Safety Code § 1569.882(b)].

d. Agreement is appropriately divided, and each section appropriately captioned [Health & Safety Code § 1569.882(b)].

e. Copy of any applicable resident's rights specified by law or regulation is attached to all admission agreements [Health & Safety Code § 1569.885(d)].

NOTE:

The statement of residents' rights attached to admissions agreements by a residential care facility for the elderly must include information on the reporting of suspected or known elder and dependent adult abuse [Health & Safety Code § 1569.885(e)]. The Licensing Division of the Department of Social Services must provide, on the personal rights form it

makes available to residential care facilities for the elderly, a statement regarding procedures for reporting abuse, including a toll-free number for the State Long-Term Care Ombudsman's CRISISline and a blank space for the telephone number for the nearest approved organization for long-term care ombudsperson activities. The residential care facility must insert in the form's blank space the telephone number of that nearest approved organization [*Health & Safety Code § 1569.889*].

9. Have resident and representative or conservator execute required written acknowledgment of notification of resident's rights [see *Health & Safety Code §§ 1599.1, 1599.74; 22 Cal. Code Reg. §§ 72527(a)(1)* (skilled nursing facilities), *73523(a)(1)* (intermediate care facilities), *87468(b)* (residential care facilities); see also *42 C.F.R. § 483.10(b)(1)*].

NOTE:

For agreements for admission to skilled nursing and intermediate care facilities, the acknowledgment regarding the Patients' *Bill of Rights* must be made in the agreement next to the clause regarding these rights, or on a separate document. A signature appearing elsewhere on the agreement and acknowledging receipt of the agreement as a whole does not satisfy this requirement [*Health & Safety Code § 1599.74(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART III. TRANSACTION GUIDE

C. Procedural Guide for Admission to Long-Term Care Facilities

33-105 California Legal Forms--Transaction Guide § 105.122

§ 105.122 Resident's Financial Affairs

1. Arrange for management of individual's financial affairs by one of following:

a. Individual.

NOTE:

Residents of skilled nursing and intermediate care facilities and residential care facilities for the elderly have the right to manage their own financial affairs [22 *Cal. Code Reg.* §§ 72527(a)(8) (skilled nursing facilities), 73523(a)(8) (intermediate care facilities), 87468(a)(12) (residential care facilities)].

b. Individual's authorized representative [see 22 *Cal. Code Reg.* §§ 72527(d) (skilled nursing facilities), 73523(d) (intermediate care facilities)].

c. Facility.

2. If individual will delegate responsibility for managing personal funds to facility, have individual execute written delegation [see 22 *Cal. Code Reg.* §§ 72527(a)(8) (skilled nursing facilities), 73523(a)(8) (intermediate care facilities)].

3. Confirm that facility complies with following safeguards for handling money and valuables [22 *Cal. Code Reg.* §§ 72529 (skilled nursing facilities), 73557] (intermediate care facilities):

NOTE:

Facilities are prohibited from commingling their own funds with residents' personal funds or spending residents' funds as their own. Residents' funds must be safeguarded and kept separate, intact, and free from any liability the facility incurs in the use of its own funds [22 *Cal. Code Reg.* §§ 72529(a)(1), (2) (skilled nursing facilities), 73557(a)(1), (2) (intermediate care facilities)]. Facilities that are certified for

Medicare or Medi-Cal may not commingle residents' funds with those of any person other than another resident [42 C.F.R. § 483.10(c)(4)(i)].

a. Funds not kept in facility must be deposited in a patient trust fund account as follows [22 Cal. Code Reg. §§ 72529(a)(3) (skilled nursing facilities), 73557(a)(3) (intermediate care facilities)]:

(1) For any facility, in demand trust account with local bank insured by FDIC and authorized to do business in California, or:

(2) For skilled nursing facilities, in federally insured bank or savings and loan association under plan approved by Department of Health Services, or:

(3) For facility operated by county, with County Treasurer, or:

(4) For skilled nursing facilities operated by state of California, with State Treasurer.

b. If total amount of patients' funds kept in facility exceeds \$500, funds must be kept in fireproof safe [22 Cal. Code Reg. §§ 72529(a)(7) (skilled nursing facilities), 73557(a)(5) (intermediate care facilities)].

NOTE:

If the facility maintains a safe for the protection of patients' money and valuables, the facility may disclaim liability for items not deposited in the safe, to the extent allowed by *Health and Safety Code Sections 1289.3-1289.5* [see § 105.25], on notice as set forth by *Civ. Code § 1860* [22 Cal. Code Reg. §§ 72529(a)(7) (skilled nursing facilities), 73557(a)(5) (intermediate care facilities)].

c. Facility must keep accurate records of patients' funds, including [22 Cal. Code Reg. §§ 72529(a)(2)(A), (B) (skilled nursing facilities), 73557(a)(2)(A),(B) (intermediate care facilities)]:

(1) Detailed inventory;

(2) Accounting of financial transactions made on patient's behalf (at least on quarterly basis); and

(3) Copy of receipts furnished to patient or patient's authorized representative.

d. For funds maintained in drawing account, facility must maintain current records of [22 Cal. Code Reg. §§ 72529(a)(2)(A) (skilled nursing facilities), 73557(a)(2)(A) (intermediate care facilities)]:

(1) Control account for all receipts and expenditures.

(2) Account for each patient.

(3) Supporting vouchers filed in chronological order.

e. Operators of two or more facilities must keep separate accounts and records for each facility's patient fund [22 Cal. Code Reg. §§ 72529(a)(6) (skilled nursing facilities), 73557(a)(2), (4) (intermediate care facilities)].

f. Upon patient's discharge, his or her funds must be surrendered in exchange for signed receipt [22 Cal. Code Reg. §§ 72529(a)(8) (skilled nursing facilities), 73557(a)(6) (intermediate care facilities)]:

(1) On demand, for funds kept in facility.

(2) Within three normal banking days, for funds kept elsewhere.

f. On patient's death, facility must [22 *Cal. Code Reg.* §§ 72529(a)(9) (skilled nursing facilities), 73557(a)(7) (intermediate care facilities)]:

(1) Surrender patient's funds within 30 days to executor, administrator, or responsible party in exchange for signed receipt, except in coroner or medical examiner cases.

(2) Give written notice to public administrator as specified by *Prob. Code* § 7600.5, if patient dies without known next of kin, and:

(a) For intermediate care facilities, file copy of notice with Department of Health Services.

(b) For skilled nursing facilities, make copy of notice available in facility for review by Department.

g. On change in ownership of facility [22 *Cal. Code Reg.* §§ 72529(a)(10) (skilled nursing facilities), 73557(a)(8) (intermediate care facilities)]:

(1) Old owner must turn funds over to new owner in exchange for signed receipt.

(2) Public accountant must provide written verification of all patients' funds transferred.

4. For skilled nursing facility, ensure that facility also complies with following:

a. Facility must maintain all banking records relating to patients' funds for three years following date of transaction [22 *Cal. Code Reg.* § 72529(a)(3)].

b. Identification as patient trust fund account must be clearly printed on checks and bank statements of each patient's account [22 *Cal. Code Reg.* § 72529(a)(3)].

c. Facility must maintain separate list for all checks from patient funds that are or have been outstanding for 45 days or more as reflected on most recent statement [22 *Cal. Code Reg.* § 72529(a)(4)].

d. Bank statements must be reconciled monthly with copies of reconciliation maintained by facility [22 *Cal. Code Reg.* § 72529(a)(4)].

e. Checks written off or uncashed must result in additions to each patient's account [22 *Cal. Code Reg.* § 72529(a)(4)].

f. Expenditures from a patient's account may only be made for immediate benefit of that patient, and may not exceed patient's drawing right on account [22 *Cal. Code Reg.* § 72529(a)(5)].

NOTE:

A balance of less than zero may not be permitted in any patient's drawing account [22 *Cal. Code Reg.* § 72529(a)(2)(A)].

g. Facility may receive no more than one month's advance payment for care from any patient's account [22 *Cal. Code Reg.* § 72529(a)(5)].

h. On closure of facility [22 *Cal. Code Reg.* § 72529(a)(11)]:

(1) Written verification of patients' funds must be obtained from public accountant and made available for review by Department of Health Services.

(2) Each patient's funds must be transferred with resident.

i. If patient trust funds are used to purchase property for use by more than one patient [22 *Cal. Code Reg.* § 72529(b)]:

(1) Facility must obtain written agreement between all patients whose funds are used, or their authorized representatives.

(2) Written agreement must expressly acknowledge consent of all parties and provide for disposition of property in event of disagreements, discharge, transfer, or death.

j. No licensee [see 22 *Cal. Code Reg.* § 72061 (definition)], owner, administrator [see 22 *Cal. Code Reg.* § 72007 (definition)], or employee of facility, or representative or immediate relative of such a person, may act as authorized representative of patient's funds, unless related to patient within second degree of consanguinity [22 *Cal. Code Reg.* § 72529(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare
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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART III. TRANSACTION GUIDE

C. Procedural Guide for Admission to Long-Term Care Facilities

33-105 California Legal Forms--Transaction Guide § 105.123

§ 105.123 Reviewing Continuing Care Contracts

1. Make sure that provider is entitled to enter into continuing care contract [*see § 105.20[3]*]:
 - a. Entire facility is licensed as residential care facility for the elderly [*see Health & Safety Code § 1771(r)(6)* ("residential care facility for the elderly" defined)], including license to operate residential living and assisted living units pursuant to *Health & Safety Code § 1569 et seq.* [*Health & Safety Code § 1771.5*].
 - b. If skilled nursing facility [*see Health & Safety Code § 1250(c)* (definition)] is on facility premises, facility is licensed as health facility pursuant to *Health & Safety Code § 1250 et seq.* [*Health & Safety Code § 1771.5*].
 - c. Provider has current and valid provisional or final certificate of authority issued by Department of Social Services [*Health & Safety Code §§ 1771.2(b), 1779(a)(1), (2)*].
 - d. Provider has met required liquid reserve requirements [*see Health & Safety Code § 1792(a)*; *see also Health & Safety Code § 1792 et seq.* (computing reserve requirement; qualifying assets)].
2. Ensure that contract form has been approved by Department of Social Services [*Health & Safety Code § 1787(b), (c)*].
3. Ensure that entire contract is in writing and printed in at least 10-point typeface to highlight terms and conditions as required [*Health & Safety Code § 1787(a), (f)*].
4. Make sure that contract contains all of following provisions [*Health & Safety Code § 1788(a)*; *see §*

105.230]:

NOTE:

In addition to satisfying the requirements listed below, continuing care contracts under which care will be provided in residential care facilities for the elderly must contain other specific provisions [see 22 Cal. Code Reg. § 87718]. For a list of these requirements, see § 105.121; see also § 105.222[1]. For a contract that satisfies both sets of requirements, see § 105.230. Only the skilled nursing admission agreement sections of continuing care contracts which cover long-term health care facility services are subject to *Health & Safety Code § 1599.60 et seq.* [Health & Safety Code § 1787(j); see Health & Safety Code § 1599.60 et seq.]. The provider must use a skilled nursing admission agreement that complies with the requirements of *Health & Safety Code § 1599.85 et seq.* [Health & Safety Code § 1787(j); see Health & Safety Code § 1599.85 et seq.].

a. Each provider's legal name and address.

NOTE:

Entities that provide continuing care (that is, care for life or for more than one year), make a continuing care promise, or propose to promise to provide continuing care are known as "providers" [Health & Safety Code § 1771(p)(10); see Health & Safety Code § 1771(a)(8), (9) ("continuing care contract" and "continuing care promise" defined)]. "Provider" also includes any entity that controls an entity that provides continuing care, makes a continuing care promise, or proposes to promise to provide continuing care [Health & Safety Code § 1771(p)(10)]. No homeowner's association, cooperative, or condominium association may be a provider [Health & Safety Code § 1771(p)(10)].

b. Facility's name and address.

NOTE:

The facility is the place or accommodation where the provider undertakes to provide the resident with care or related services pursuant to the continuing care contract [Health & Safety Code § 1771(f)].

c. Resident's name and identity of unit resident will occupy.

d. If transferor and resident are not same person, transferor's name and address.

NOTE:

If there is a transferor other than the resident, the transferor must be a party to the contract, and the transferor's name and address must be specified [Health & Safety Code § 1788(a)(4)].

e. Conspicuous statement that clearly informs resident of lack of financial and contractual obligations of any or all of following, as applicable:

(1) Any charitable, religious, or nonprofit organization that is not responsible for provider's financial and contractual obligations or obligations specified in continuing care contract, if provider used organization's name in its title before January 1, 1979, and continues to do so [Health & Safety Code § 1788(a)(5)].

NOTE:

If the provider has used the name of any charitable or religious or nonprofit organization in its title before January 1, 1979, continues to use that name, and that organization is not responsible for the financial and contractual obligations of the provider or the obligations specified in the continuing care

contract, the provider must include in every continuing care contract a conspicuous statement which clearly informs the resident that the organization is not financially responsible [*Health & Safety Code* § 1788.5(a)(5)].

(2) Any entity that impliedly sponsors, guarantees, or assures performance of continuing care contract, based on statements or implications in any report, circular, public announcement, certificate, financial statement, or any other printed matter or advertising material, or oral representation [*see Health & Safety Code* § 1772(c)].

NOTE:

Any implication that an entity may be financially responsible for these contracts may be rebutted by a conspicuous statement, in all continuing care contracts and marketing materials, that clearly discloses to prospective residents and all transferors that the entity is not financially responsible [*Health & Safety Code* § 1772(c)]. Thus, it is ordinarily advisable to include such a statement as a matter of course.

In general, no report, circular, public announcement, certificate, financial statement, or any other printed matter or advertising material, or oral representation, that states or implies that an entity sponsors, guarantees, or assures the performance of any continuing care contract, may be published or presented to any prospective resident [*Health & Safety Code* § 1772(a)]. A limited exception to this prohibition exists for entities that are subject to P 1, **above**, and that file written declarations with the Department of Social Services accepting full financial responsibility for each continuing care contract. The filing entity also is subject to the application requirements set forth in *Health & Safety Code* § 1779 *et seq.*, must be a coobligor for the contracts, and must be a coprovider on the applicable provisional certificate of authority and certificate of authority [*Health & Safety Code* § 1772(a)]. Implied sponsorship includes the use of the entity's name for the purpose of implying that the entity's reputation may be relied upon to ensure the performance of the continuing care contract [*Health & Safety Code* § 1772(b)].

(3) Any affinity group, for which Department of Social Services has granted exemption from *Health & Safety Code* § 1772 based on written appeal to Department and good cause shown [*see Health & Safety Code* § 1772(d)].

NOTE:

An "affinity group" means a grouping of entities sharing a common interest, philosophy, or connection. For the latter requirements, the statute gives the examples of military officers and religion [*Health & Safety Code* § 1771(a)(1)].

f. Date contract signed by resident and, if applicable, any other transferor.

g. Duration of contract.

NOTE:

The term of a continuing care contract may be the life of the resident or a term in excess of one year [*see Health & Safety Code* § 1771(c)(10)].

h. List of services that will be made available to resident as required to provide appropriate level of care.

NOTE:

The list of services to be provided by a skilled nursing facility must include the services required as a condition for licensure as a residential care facility for the elderly [*Health & Safety Code* § 1788(a)(8)]. These services are enumerated in *Health & Safety Code* § 1788(a)(8). The minimum basic services that a continuing care provider must provide to residents in order to obtain and maintain licensure as a residential care facility for the elderly also are set forth by statute [*Health & Safety Code* § 1569.312; *see also* § 105.20[3]].

- i. Itemization of services that are included in monthly fee and services that are available at an extra charge.

NOTE:

The provider must attach a current fee schedule to the continuing care contract *Health & Safety Code* § 1788(a)(8)].

- j. Procedures and conditions under which resident may be voluntarily and involuntarily transferred from designated living unit, including provisions addressing all of following circumstances under which transfer may be authorized [*Health & Safety Code* § 1788(a)(10)]:

(1) Continuing care provider must transfer resident under following conditions, taking into account appropriateness and necessity of transfer and goal of promoting resident independence [*Health & Safety Code* § 1788(a)(10)(A)]:

- (a) Resident is nonambulatory [*see Health & Safety Code* § 13131 (definition)].

NOTE:

The statutory definition of "nonambulatory" must either be stated in full in the contract or be cited, with a copy of it made available, either as an attachment or by specifying that it will be provided on request. If a nonambulatory resident occupies a room that has a fire clearance for nonambulatory residence, transfer will not be necessary [*Health & Safety Code* § 1788(a)(10)(A)(i)].

- (b) Resident develops physical or mental condition that endangers health, safety, or well-being of resident or another person.

(c) Resident's conditions or needs require transfer to assisted living unit or skilled nursing facility [*see Health & Safety Code* § 1771(a)(6) ("assisted living unit" defined)], because level of care required by resident exceeds that which may be lawfully provided in resident's living unit.

- (d) Resident's conditions or needs require transfer to nursing facility, hospital, or other facility is required and provider has no facilities available to provide that level of care.

(2) Before resident is transferred under any of conditions listed in P (1), *above*, continuing care provider must satisfy all of following requirements [*Health & Safety Code* § 1788(a)(10)(B)]:

NOTE:

If the resident does not have impairment of cognitive abilities, the resident may request that his or her responsible person not be involved in the transfer process [*Health & Safety Code* § 1788(a)(10)(B)(iv)].

- (a) Involve resident and resident's responsible person [*see 22 Cal. Code Reg. § 87101(r)* (definition)], and on request, involve family members, or resident's physician or other appropriate health professional, in assessment process forming basis for provider's level of care transfer decision.

- (b) Before sending formal notification of transfer, conduct care conference explaining reasons for transfer.

- (c) Give written notice to resident and resident's responsible person of reasons for transfer.

(d) Give notice of transfer at least 30 days before transfer is expected to occur, except when health or safety of the resident or other residents is in danger, or transfer is required by resident's urgent medical needs.

NOTE:

When there are health and safety concerns, or urgent medical needs, the written notice must be given as soon as practicable before the transfer [*Health & Safety Code § 1788(a)(10)(B)(v)*].

(e) Ensure that written notice contains:

(i) Reasons for the transfer

(ii) Effective date.

(iii) Designated level of care or location to which resident will be transferred.

(iv) Statement of resident's right to review of transfer decision at care conference [*see Health & Safety Code § 1788(a)(10)(C)*], and if transfer decision is disputed, right to review by Continuing Care Contracts Branch of State Department of Social Services [*see Health & Safety Code § 1788(a)(10)(D)*].

NOTE:

The resident has the right to review the transfer decision at a subsequent care conference that must include the resident, the resident's responsible person, and on the resident's or responsible person's request, family members, the resident's physician or other appropriate health care professional, members of the provider's interdisciplinary team, and the local ombudsperson [*Health & Safety Code § 1788(a)(10)(C)*].

For disputed transfer decisions, the decision of the Department's Continuing Care Contracts Branch must be in writing and must determine whether the provider failed to comply with the transfer process pursuant to *Health & Safety Code § 1788(a)(10)(A)-(C)* (discussed in this P at (j)). Pending the decision of the Continuing Care Contracts Branch, the provider must specify any additional care the provider believes is necessary in order for the resident to remain in his or her unit. The resident may be required to pay for the extra care, as provided in the contract [*Health & Safety Code § 1788(a)(10)(D)*].

(v) Name, address, and telephone number of Department's Continuing Care Contracts Branch.

(f) Provide sufficient preparation and orientation to resident to ensure safe and orderly transfer and to minimize trauma.

(3) When second resident must be transferred due to termination of shared accommodation arrangement.

k. Provisions describing any changes in resident's monthly fee or entrance fee refund payable to resident when resident transfers from any unit.

l. Provider's obligations, if any, in event resident is transferred from continuing care retirement community to any other facility.

m. Provider's continuing obligations if any, to resume care on resident's return after transfer from continuing care retirement community.

n. Provider's obligations to provide services to resident while resident is absent from continuing care retirement community.

o. Conditions under which resident permanently releases his or her living unit.

p. All real and personal property transferred, their value, and how value was ascertained.

NOTE:

An itemized receipt that includes this information is acceptable, if incorporated as a part of the contract [Health & Safety Code § 1788(a)(16)(A)]. Failure to comply with the requirements concerning the listing of transferred property will not affect the validity of title to real property transferred pursuant to a continuing care contract [Health & Safety Code § 1788(a)(16)(C)].

q. If any real property is or will be transferred pursuant to contract, statement that deed or other instrument of conveyance will specify that real property is conveyed pursuant to continuing care contract and may be subject to rescission by transferor within 90 days from date that resident first occupies residential unit [see Health & Safety Code § 1788(a)(16)(B)].

NOTE:

The failure to comply with this requirement does not affect the validity of title to real property transferred pursuant to a continuing care contract [Health & Safety Code § 1788(a)(16)(C)].

r. Amount of entrance fee.

s. Description of how any refund of entrance fees is allocated, in event that two parties have jointly paid entrance fee or other payment that allows them to occupy unit.

t. Amount of any processing fee.

NOTE:

A processing fee is a payment to cover administrative costs of processing the application of a depositor or prospective resident [Health & Safety Code § 1771(p)(6)].

u. Amount of any monthly care fee.

NOTE:

A monthly care fee is the fee charged to a resident in a continuing care contract on a monthly or other periodic basis for current accommodations and services including care, board, or lodging. Periodic entrance fee payments or other prepayments are not monthly care fees [Health & Safety Code § 1771(m)(1)].

v. For contracts that require monthly care fee or other periodic payment, all of following:

(1) Statement that occupancy and use of accommodations by resident is contingent on regular payment of fee;

(2) Regular rate of payment agreed on (per day, week, or month);

(3) Provision specifying whether payment will be made in advance or after services have been provided;

(4) Provision specifying that provider will adjust monthly care fees for resident's support, maintenance, board, or lodging for periods when resident requires medical attention while away from continuing care retirement community; and

(5) Provision specifying whether credit or allowance is to be given when resident is absent from facility or from meals, and, when applicable, that credit may be permitted at discretion or by special permission of provider.

(6) Statement of billing practices, procedures, and timelines.

NOTE:

A provider must allow a minimum of 14 days between the date a bill is sent and the date payment is due. A charge for a late payment may only be assessed if the amount and any condition for the penalty is stated on the bill [*Health & Safety Code § 1788(a)(21)(F)*].

w. In all continuing care contracts that include monthly care fees, either of following provisions, addressing changes in monthly care fees:

(1) For prepaid contracts that include monthly care fees, one of following methods:

(a) Fees not subject to change during lifetime of agreement.

(b) Fees not to be increased by more than specified number of dollars in any one year and not more than specified number of dollars during lifetime of agreement.

(c) Fees not to be increased in excess of specified percentage over preceding year and not more than specified percentage during lifetime of agreement.

(2) For monthly fee contracts, changes in monthly care fees to be based on projected costs, prior year per capita costs [*see Health & Safety Code § 1771(p)(1)* ("per capita costs" defined)], and economic indicators.

x. Provision requiring that provider give written notice to resident at least 30 days in advance of any change in resident's monthly care fees or in price or scope of any component of care or other services.

y. Provision indicating whether resident's rights under contract include any proprietary interests in assets of provider, facility, or both.

z. If continuing care retirement community property is encumbered by a security interest that is senior to any claims residents may have to enforce continuing care contracts, provision advising residents that any claims they may have under continuing care contract are subordinate to rights of secured lender.

NOTE:

For equity projects, the continuing care contract must specify the type and extent of the equity interest and whether any entity holds a security interest [*Health & Safety Code § 1788(a)(22)*].

aa. Notice that living units are licensed as residential care facilities for elderly and, as a result, any duly authorized agent of Department of Social Services may, upon proper identification and upon stating purpose of visit, enter and inspect entire premises at any time, without advance notice.

bb. Conspicuous statement, in at least 10-point boldface type in immediate proximity to space reserved for signatures of the resident and, if applicable, the transferor, concerning transferor's cancellation rights.

NOTE:

The wording of this statement is prescribed by statute [*Health & Safety Code § 1788(a)(27)*; *see § 105.230[2]*].

cc. Notice that contract may be canceled on 30 days written notice by provider without cause, or that provider waives this right [*see Health & Safety Code § 1788.2* (cancellation)].

dd. Terms and conditions under which contract may be terminated after cancellation period by either party, including any health or financial conditions.

ee. Statement that, after cancellation period, provider may unilaterally terminate continuing care contract only if provider has good and sufficient cause.

NOTE:

Any continuing care contract that contains a clause that provides for a contract to be terminated for "just cause," "good cause," or other similar provision, must also include a provision that none of the following activities by the resident, or on behalf of the resident, constitutes "just cause," "good cause," or otherwise activates the termination provision: (1) filing or lodging a formal complaint with the department or other appropriate authority; (2) participating in an organization or affiliation of residents, or other similar lawful activity. The provision must also state that the provider may not discriminate or retaliate in any manner against any resident of a continuing care retirement community for contacting the Department of Social Services, or any other state, county, or city agency, or any elected or appointed government official to file a complaint or for any other reason, or for participation in a residents' organization or association [*Health & Safety Code § 1788(a)(30)*].

ff. Statement that at least 90 days written notice to resident is required for unilateral termination of continuing care contract by provider.

gg. Statement concerning length of notice resident is required to give provider to voluntarily terminate continuing care contract after 90-day cancellation period [*see Health & Safety Code § 1788.2* (cancellation)].

hh. Policy or terms for refunding any portion of entrance fee in event of cancellation, termination, or death.

NOTE:

Every continuing care contract that provides for a refund of all or a part of the entrance fee also must do all of the following [*Health & Safety Code § 1788(a)(33)(A), (B)*]:

- Specify the amount, if any, the resident has paid or will pay for upgrades, special features, or modifications to the resident's unit.

- State that if the continuing care contract is canceled or terminated by the provider, the provider must do both of the following:

- Amortize the specified amount at the same rate as the resident's entrance fee.

- Refund the unamortized balance to the resident at the same time the provider pays the resident's entrance fee refund.

- Refund policies are set forth by statute for some situations [*Health & Safety Code § 1788.4; see § 105.20[5]*].

ii. Statutory notice strongly encouraging transferor and resident to seek financial and legal advice prior to signing contract [*see § 105.230*].

NOTE:

This notice must appear at the bottom of the signatory page [*Health & Safety Code § 1788(a)(34)*].

jj. This statement: "Nothing in this continuing care contract limits either the provider's obligation to provide adequate care and supervision for the resident or any liability on the part of the provider which may result from the provider's failure to provide this care and supervision." [*Health & Safety Code § 1788(a)(35)*].

NOTE:

A provider may not attempt to absolve itself in the continuing care contract from liability for its negligence by any statement to that effect [*Health & Safety Code § 1788(a)(35)*].

kk. Provisions describing how provider will proceed in event of closure, including explanation of how provider will comply with *Health & Safety Code §§ 1793.80, 1793.81, 1793.82, and 1793.83*, governing continuing care retirement community closures [*Health & Safety Code § 1788(a)(36); see § 105.230[2] P 37*].

5. Ensure that contract has following attachments:

a. Copy of residents' *bill of rights* as described in *Health & Safety Code § 1771.7* [*Health & Safety Code § 1788(d); see § 105.230*].

NOTE:

The *bill of rights* prescribed by *Health & Safety Code § 1771.7* must be provided to each resident at the time of, or before, the resident signs a continuing care contract, and at any time when the resident is proposed to be moved to a different level of care [*Health & Safety Code § 1771.7(e); see Health & Safety Code § 1771.7(f)* (posting requirements)]. This *bill of rights* is in addition to any other statutory or regulatory *bill of rights* required to be provided to residents of residential care facilities to the elderly or skilled nursing facilities [*Health & Safety Code § 1771.7(e)*].

b. Copy of provider's current audited financial statement [*Health & Safety Code § 1788(e); see Form § 105.230*].

c. If provider's current financial statement does not accurately reflect provider's financial ability fulfill continuing care contract obligations, attached financial statement must include all of following [*Health & Safety Code § 1788(e)*]:

(1) Disclosure that reserve requirement has not yet been determined or met, and that entrance fees will not be held in escrow.

(2) Disclosure that provider's ability to provide services promised in continuing care contract will depend on successful compliance with approved financial plan.

(3) Copy of approved financial plan for meeting reserve requirements.

(4) Any other supplemental statements or attachments necessary to accurately represent provider's financial ability to fulfill its continuing care contract obligations.

d. Schedule of average monthly care fees charged to residents for each type of residential living unit for each of five years preceding execution of continuing care contract [*Health & Safety Code § 1788(f)*; see § 105.230].

NOTE:

The provider must update this schedule annually at the end of each fiscal year. If the continuing care retirement community has not been in existence for five years, the information must be provided for each of the years the continuing care retirement community has been in existence [*Health & Safety Code § 1788(f)*].

e. If any continuing care contract provides for a health insurance policy for benefit of resident, binder complying with *Ins. Code §§ 382 and 382.5* [*Health & Safety Code § 1788(g)*].

f. Completed form in duplicate, captioned "Notice of Cancellation" and containing statutory cancellation notice [*Health & Safety Code § 1788(h)*; see § 105.234].

NOTE:

The provider must attach to every continuing care contract the statutory cancellation notice, captioned "Notice of Cancellation." The notice must be easily detachable, and contain the statutory statement in at least 10-point boldface type [*Health & Safety Code § 1788(g)*].

6. Make sure contract contains all of following optional provisions desired by parties [*Health & Safety Code § 1788(c)*]:

NOTE:

Continuing care contracts may include any of the following types of provisions [*see Health & Safety Code § 1788(c)*].

a. Provision for resident who becomes financially unable to pay for his or her monthly care fees at some future date to be subsidized, which may include any of following [*see § 105.232*]:

(1) Resident must apply for any public assistance or other aid for which he or she is eligible and that provider may apply for assistance on resident's behalf.

(2) Provider's decision will be final and conclusive regarding any adjustments to be made or any action to be taken regarding any charitable consideration to be extended to any of its residents.

(3) Provider is entitled to payment for actual costs of care out of any property acquired by resident subsequent to any adjustment extended to the resident under *Health & Safety*

Code § 1788(c)(1) [see (a), above], or from any other property of resident that resident failed to disclose.

(4) Provider may pay monthly premium of resident's health care coverage under Medicare to ensure that those payments will be made.

(5) Provider may receive assignment from resident of right to apply for and receive Medicare benefits, for and on behalf of resident.

(6) Provider is not responsible for costs of furnishing resident with any services, supplies, and medication when reimbursement is reasonably available from any governmental agency or any private insurance.

b. Provisions that limit responsibility for costs associated with treatment or medication of ailment or illness existing prior to date of admission.

NOTE:

Any medical or surgical exceptions as disclosed by the medical entrance examination must be listed in the contract or in the medical report, attached to and made a part of the contract [*Health & Safety Code § 1788(c)(2)*].

c. Legal remedies that may be applied if resident has made any material misrepresentation or omission pertaining to resident's assets or health.

d. Clause restricting transfer or assignment of resident's rights and privileges under contract due to personal nature of contract.

e. Clause to protect provider's ability to waive resident's breach of terms or provisions of continuing care contract in specific instances without relinquishing its right to insist on full compliance by resident with all contract's terms or provisions.

f. Provision that resident must reimburse provider for any uninsured loss or damage to resident's unit, beyond normal wear and tear, resulting from resident's carelessness or negligence.

g. Provision that resident agrees to observe off-limit areas of continuing care retirement community designated by provider for safety reasons.

NOTE:

The provider may not include any provision in a continuing care contract that absolves the provider from liability for its negligence [*Health & Safety Code § 1788(c)(7)*].

h. Provision for subrogation to provider of resident's rights in case of injury to resident caused as result of third party's act or negligence.

i. Provision for lien on any judgment, settlement, or recovery for any additional expense incurred by provider in caring for resident as result of injury.

j. Provision requiring resident's cooperation and assistance in assisting in diligent prosecution of any claim or action against any third party.

k. Provision for appointment of conservator or guardian by court with jurisdiction in event resident becomes unable to handle his or her personal or financial affairs.

l. Provision that, in event provider whose property is tax exempt is required to pay property taxes, or in-lieu taxes, these taxes will be charged to resident on pro rata basis.

m. Any other provisions approved by Department of Social Services.

6. Ensure that resident, and any transferor, is furnished, at time continuing care contract is executed, copy of continuing care contract that satisfies all of following requirements [*Health & Safety Code § 1787(g)*]:

a. Is clearly legible.

b. Is executed by each provider named on provisional certificate of authority or certificate of authority, the resident, and any transferor

c. Includes all required or optional attachments.

7. If resident and transferor are not same individual, make sure transferor receives copy of executed contract that satisfies requirements listed in P 6, *above*, within 10 calendar days after contract is executed [*Health & Safety Code § 1787(g)*].

8. Make sure that provider receives written acknowledgment of receipt of executed copy of contract and attachments from [*Health & Safety Code § 1787(h)*]:

a. Resident; and

b. Any transferor who is not a resident.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART III. TRANSACTION GUIDE
C. Procedural Guide for Admission to Long-Term Care Facilities

33-105 California Legal Forms--Transaction Guide §§ 105.124-105.129

[Reserved]

§§ 105.124[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures

33-105 California Legal Forms--Transaction Guide § 105.130

§ 105.130 Involuntary Transfers and Discharges

1. If facility is certified for Medicare or Medicaid participation, make certain that:

a. Resident is transferred or discharged only because [42 C.F.R. § 483.12(a)(2)]:

NOTE:

For purposes of the requirements that apply to a facility that is certified for Medicare or Medicaid participation, "transfer and discharge" of a resident includes movement of a resident to a bed outside of the certified facility whether that bed is in the same physical plant or not. The term does not refer to movement of a resident to a bed within the same certified facility [42 C.F.R. § 483.12(a)(1)].

(1) Resident's needs cannot be met in facility and transfer or discharge is necessary for resident's welfare.

(2) Resident's health has improved sufficiently so that resident no longer needs facility's services.

(3) Health or safety of individuals in facility is endangered.

(4) Resident has failed, after reasonable and appropriate notice, to pay for stay at facility or to have such payment made under Medicare or Medicaid.

NOTE:

If a resident becomes eligible for Medicaid after admission to a facility, the facility may charge the resident only allowable charges under Medicaid [42 C.F.R. § 483.12(a)(2)(v)].

(5) Facility ceases to operate.

b. Transfer or discharge and reason for it are documented by physician in resident's clinical record, unless resident is transferred because facility ceases to operate [42 C.F.R. § 483.12(a)(2)(vi)].

NOTE:

If the resident is transferred for the reasons set forth under (a)(1) or (a)(2), **above**, documentation must be made by resident's own physician [42 C.F.R. § 483.12(a)(3)(i)].

c. Facility provides proper written notice to resident and family member or legal representative (if known) prior to transfer or discharge [42 C.F.R. § 483.12(a)(4)(i), (5), (6)].

d. If resident is transferred to hospital or goes on therapeutic leave from facility, facility provides written notice concerning its bed-hold policy [42 C.F.R. § 483.12(b)(1)].

2. If individual is in residential care facility for the elderly, make certain that:

a. If resident is evicted, that [22 Cal. Code Reg. § 87224]:

(1) Resident was given 30 days notice of eviction.

NOTE:

If the facility obtains prior written approval from its licensing agency, it may evict a resident on three days written notice for good cause. "Good cause" exists if the resident is engaging in behavior that is a threat to his or her mental and/or physical health or safety or that of other residents of the facility [22 Cal. Code Reg. § 87224(b)].

(2) Action is taken for one of following reasons [22 Cal. Code Reg. § 87224(a)]:

(a) Nonpayment of rate for basic services within 10 days of due date.

(b) Failure to comply with laws after being notified of necessity of compliance.

(c) Noncompliance with general policies of facility.

(d) Determination by person conducting postadmission reappraisal of resident [see 22 Cal. Code Reg. § 87463], pursuant to determination that resident has previously unidentified need, that facility is not appropriate for resident.

(e) Change of use of facility.

(3) Facility mails notice or copy of notice to resident's responsible person, if any [22 Cal. Code Reg. § 87224(c)].

(4) Facility states reasons for eviction, including specific facts relating to date, place, witnesses, and circumstances [22 Cal. Code Reg. § 87224(d)].

b. If resident is transferred because of temporary suspension of facility's license pursuant to *Health & Safety Code* § 1569.50 (protection of residents), that Department of Social Services consults with medical personnel and local

agencies having placement and advocacy responsibility for residents concerning transfer, and otherwise makes every effort to minimize resident's transfer trauma [*Health & Safety Code § 1569.525*].

c. If resident is transferred because Department of Social Services determines that resident has health condition that cannot be cared for within limits of facility's license or requires inpatient care, that [*Health & Safety Code § 1569.54(b)*]:

(1) Department has given notice of transfer to resident and, if appropriate, to resident's legal representative.

(2) Notice includes deadline for submission of written plan for relocation, including measures to minimize resident's transfer trauma.

NOTE:

Specific requirements for the relocation plan, including its content and submission to the Department of Social Services, and related duties of the facility in relocating a resident are prescribed by regulation [*see 22 Cal. Code Reg. §§ 87223, 87612*].

(3) Notice informs resident of his or her right to review and determination on transfer order prior to actual transfer [*see Health & Safety Code § 1569.34*].

NOTE:

If the resident requests a review and determination within three working days after receipt of notice, these proceedings must be completed within 30 days from the date that the resident was initially informed of the need to relocate [*Health & Safety Code § 1569.54(b)*]. Notwithstanding the right to review and determination, the Department may require an immediate transfer if necessary to protect the resident's health and safety. Prior to carrying out such a transfer, the Department must consult with a physician or other medical professional about the transfer and ways in which the resident's transfer trauma can be minimized [*Health & Safety Code § 1569.54(a)(2), (c)*].

3. If transfer is due to any change in licensing or operation status of skilled nursing or intermediate care facility (including termination of Medi-Cal or Medicare certification), make certain that facility performs, and gives 30-days notice to patient of, its obligations to [*Health & Safety Code § 1336.2(a), (c)*]:

NOTE:

The facility is not obligated to provide 30-days notice of the transfer if the transfer is necessitated by a temporary license suspension under *Health & Safety Code § 1296* [*Health & Safety Code § 1336.2(d)*].

If 10 or more residents are likely to be transferred due to any voluntary or involuntary change in the status of the license or operation of the facility, it must submit, in addition to the requirements set forth below, a proposed relocation plan to the State Department of Health Services for approval at least 15 days before the written transfer notification given to any resident or resident's representative [*Health & Safety Code § 1336.2(g)*].

a. Be responsible for ensuring that resident's attending physician or facility medical director completes medical assessment of resident's condition and susceptibility to adverse health consequences, including psychosocial effects, before written notice of transfer is given to the resident.

NOTE:

The assessment will not be considered complete unless it provides, in accordance with the assessments, recommendations for counseling, followup visits, and other recommended services by designated health professionals, and recommendations for preventing or ameliorating potential adverse health consequences in the event of transfer [Health & Safety Code § 1336.2(a)(1)].

b. Be responsible for ensuring that facility nursing staff and activity director complete assessment of resident's social and physical functioning, based on relevant portions of minimum data set, as described in *Welf. & Inst. Code § 14110.15*, before written notice of transfer is given to the resident.

NOTE:

The assessment will not be considered complete unless it provides recommendations for preventing or ameliorating potential adverse health consequences in the event of transfer [Health & Safety Code § 1336.2(a)(2)].

c. Be responsible for evaluating resident's relocation needs, including proximity to resident's representative and determine most appropriate and available type of future care and services for resident, before written notice of transfer is given to resident or resident's representative.

NOTE:

This evaluation and medical assessment must be discussed with the resident or the resident's representative and made a part of the medical records for transfer [Health & Safety Code § 1336.2(a)(3)].

d. At least 30 days in advance of transfer, inform resident or resident's representative of alternative facilities that are available and adequate to meet resident and family needs.

e. Arrange for appropriate future medical care and services, unless resident or resident's representative has otherwise made these arrangements.

NOTE:

The facility is not obligated to pay for future care or services that it arranges [Health & Safety Code § 1336.2(a)(5)].

4. If transfer is due to earthquake, fire, flood, or other emergency that threatens safety of skilled nursing or intermediate care patients, make certain that facility performs obligations set forth under PP 3a-3e, *above* [Health & Safety Code § 1336.3(a)(2)].

5. If desired, request investigation of circumstances leading to eviction of resident from residential care facility for the elderly by:

a. Contacting Long Term Care Ombudsman Office for county in which facility is located; or

b. If efforts to contact that office fail, by calling Long Term Care Ombudsman hotline (1-800-231-4024).

6. Make sure facility returns all property held for patient upon discharge or transfer of patient [see 22 Cal. Code Reg. §§ 72529(a)(8) (skilled nursing facilities), 73557(a)(6) (intermediate care facilities)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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DIVISION VII: PERSONAL TRANSACTIONS
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PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures

33-105 California Legal Forms--Transaction Guide § 105.131

§ 105.131 Refunds

1. If individual wishes to cancel continuing care contract:

NOTE:

The cancellation period and the associated refund obligations apply to all executed continuing care contracts regarding a unit in a continuing care retirement community that is not an equity continuing care retirement community, and to continuing care contracts executed in conjunction with a purchase of an equity interest from a provider [*Health & Safety Code § 1788.2(c)(1), (2)*]. The cancellation and refund provisions do not apply to continuing care contracts executed in conjunction with sales of an equity interest by one resident to another [*Health & Safety Code § 1788.2(c)(2)*].

a. Mail or deliver notice of cancellation [*see § 105.234*] to provider within 90 calendar days after date of resident's initial occupancy [*Health & Safety Code § 1788.2(a)*; *see Health & Safety Code § 1788(h)* (notice)].

b. Secure refund of money or property transferred to facility, less [*Health & Safety Code §§ 1788(h), 1788.2(d)(1)*]:

NOTE:

During the cancellation period, the provider must pay all refunds owed to a resident, any refunds due pursuant to the cancellation must be paid within 14 calendar days after the resident makes possession of the living unit available to the provider [*Health & Safety Code § 1788.4(a)*; *see Health & Safety Code § 1788(h)*].

(1) Reasonable fee to cover costs;

(2) Reasonable value of services rendered pursuant to canceled contract; and

(3) If living unit is not returned to provider in substantially same condition as when received, amount necessary to restore unit to that condition.

2. If provider discharges or transfers resident, secure any refund due:

a. All property held for resident discharged or transferred from skilled nursing facility [22 *Cal. Code Reg. § 72529(a)(8)*].

b. Any refunds due resident [see *Health & Safety Code § 1788.4(c), (d)*]:

NOTE:

All refunds due to a resident under a continuing care contract after the cancellation must be paid within 14 calendar days after a resident makes possession of the living unit available to the provider, or 90 calendar days after death or receipt of notice of termination, whichever is later [*Health & Safety Code § 1788.4(b)*].

(1) Difference between the total amount of entrance, monthly, and optional fees paid and amount used for care of the resident.

(2) If a resident has paid additional amounts for upgrades, special features, or modifications to living unit, unamortized balance of those additional amounts, which must be amortized at same rate as entrance fee.

NOTE:

A lump-sum payment to a resident after termination of a continuing care contract that is conditioned upon resale of a unit may not be considered to be a refund and may not be characterized or advertised as a refund. The lump sum payment must be paid to the resident within 14 calendar days after resale of the unit [*Health & Safety Code § 1788.4(e)*].

3. On termination of care arrangement, make sure provider returns any negotiable instrument executed by transferor and otherwise takes any necessary action to restore title to any property transferred to provider under arrangement [see *Health & Safety Code § 1788(f)* (continuing care contracts); 22 *Cal. Code Reg. § 72529(a)(8)* (skilled nursing facilities)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Performance General Overview Family Law Family Protection & Welfare Elderly Persons General Overview Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons General Overview Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons Care Facilities General Overview Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons Care Facilities Nursing Facilities



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures

33-105 California Legal Forms--Transaction Guide § 105.132

§ 105.132 Complaints Against Facilities

1. If patient, family, guardian, conservator, or other interested member of public is dissatisfied with treatment of patients or conditions at facility, consider filing complaint.

NOTE:

A facility is prohibited from retaliating against any complainant or patient because of the filing of a grievance or complaint or because of any cooperation in an investigation or proceeding by a governmental entity relating to care, services, or conditions at the facility [*Health & Safety Code § 1432(a)*; *see Health & Safety Code § 1432(i)* ("complainant" is any person who has filed a complaint as defined in *Health & Safety Code § 1420*)].

2. File complaint with Department of Health Services, Licensing and Certification Division for Hospitals and Convalescent Homes:

- a. In person; or
- b. By telephone; or
- c. In writing signed by complainant.

NOTE:

Complaints against long-term care facilities may be anonymous. The Department of Health Services will investigate all complaints, regardless of whether or not the complainant divulges his or her name.

3. If crisis is observed in long-term care or licensed residential care facility for the elderly, call toll-free telephone hotline established by Office of Long-Term Care Ombudsman (1-800-231-4024) [*see Welf. & Inst. Code § 9726*].

NOTE:

This hotline is open 24 hours a day, seven days a week. The telephone number must be posted in a conspicuous place in the facility [*Welf. & Inst. Code § 9726*].

4. Make certain that representative of Department of Health Services gives named complainant opportunity to accompany representative on official investigation.

NOTE:

After the representative has conducted the investigation, he or she will dictate a report of its outcome. The investigator will then notify all named complainants of the results.

5. Call Bureau of Medi-Cal Fraud, in California Attorney General's Office, if facility receives payments under Medi-Cal plan, and patient has been abused, neglected, or discriminated against by facility [*Gov. Code § 12528*].

NOTE:

Gov. Code § 12528 does not require that the party requesting an investigation by the Bureau of Medi-Cal Fraud be a Medi-Cal beneficiary.

Legal Topics:

For related research and practice materials, see the following legal topics:

Healthcare Law Actions Against Facilities Facility Liability General Overview Healthcare Law Actions Against Facilities Facility Liability Nursing Facilities Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons Care Facilities Nursing Facilities



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DIVISION VII: PERSONAL TRANSACTIONS
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33-105 California Legal Forms--Transaction Guide § 105.133

§ 105.133 Readmission to Same Facility

1. Determine whether individual may be readmitted pursuant to signed statement detailing modifications to original contract rather than pursuant to new contract [*Health & Safety Code §§ 1599.651, 1599.652*]:

NOTE:

A written readmission statement cannot be used if the admittee has been declared legally incompetent subsequent to the time he or she signed the original contract of admission, or if the admittee's physician has determined that the admittee is unable to understand and sign the written statement because of his or her medical condition [*Health & Safety Code §§ 1599.651, 1599.652*].

- a. Is individual seeking readmittance for same type of care (that is, regular care or respite care) provided under original contract [*see Health & Safety Code § 1599.64(f)*]?
- b. Does prior executed contract of admission, signed by individual or his or her legal representative, responsible party [*see 22 Cal. Code Reg. § 87101(r)(6)* (definition)] or agent in accordance with *Health & Safety Code § 1599.60 et seq.*, exist?

2. If readmittance pursuant to signed statement is permissible under (1), *above*, examine statement provided by facility to determine that it satisfies following requirements [*Health & Safety Code §§ 1599.651, 1599.652*]:

- a. Lists all modifications to original contract.
- b. Does not contain any provision that is prohibited from being included in contracts of admission to skilled nursing or intermediate care facilities.

3. Have statement executed by individual, legal representative, responsible party, or agent prior to or at time of readmission [*Health & Safety Code* §§ 1599.651, 1599.652].
4. Ascertain that statement includes date signed [*Health & Safety Code* §§ 1599.651, 1599.652].
5. Ascertain that facility files statement with original contract of admission [*Health & Safety Code* §§ 1599.651, 1599.652].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures

33-105 California Legal Forms--Transaction Guide §§ 105.134-105.199

[Reserved]

§§ 105.134[Reserved]



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART IV. FORMS

A. Long-Term Health Care Facilities for the Elderly

33-105 California Legal Forms--Transaction Guide § 105.200

§ 105.200 Admission Contract for Skilled Nursing or Intermediate Care Facility

[1] Comment

[a] Use of Form

This form is an admission and consent agreement to be used when placing an elderly individual in a skilled nursing facility or intermediate care facility. *Health & Safety Code § 1599.61*, adopted in 1997, required the Department of Long Term Care to develop a standard admission agreement to be used by all skilled nursing and intermediate care facilities, and a short form agreement for patients whose length of stay is anticipated to be 14 days or less. By statute, all such facilities were required to use such an agreement by January 1, 2000 [*Health & Safety Code § 1599.61(a), (b)(2)*]. Deviations from the standard agreement are permitted only when authorized by the Department [*Health & Safety Code § 1599.61(b)*]. The Department was also required to develop a standardized version of the Patients' *Bill of Rights* for residents of these facilities, to be included as an attachment to all admission agreements [*Health & Safety Code § 1599.61(d)*; see § 105.22]. Development of these standardized forms has proven to be a difficult and controversial process, however, and as of January 2009, the Department has not finalized regulations containing the new forms. Department sources have advised that there is no anticipated date for final implementation of these regulations. Accordingly, the Department is advising operators to continue to use their current agreement forms. An attorney counseling a client who is either entering or placing an individual in a long-term health care facility should carefully review the admission agreement used by the facility.

[b] Statutory Requirements for Form and Contents of Agreement

Detailed statutory requirements govern the form and contents of contracts for admission to long-term health care facilities [see *Health & Safety Code § 1326* (definition)] entered into after 1987 [see *Health & Safety Code § 1599.60 et seq.*]. All contracts for admission must be printed on white paper, in black type of not less than 10-point type size, with print appearing on only one side of the paper [*Health & Safety Code § 1599.64(a)*].

All contracts for admission also must be written in clear, coherent, and unambiguous language, using words with common and everyday meanings, and must be divided into captioned sections [*Health & Safety Code § 1599.64(b)*].

This form complies with the statutory requirements as to the contents of admission contracts, which are discussed in the remainder of this comment.

A skilled nursing facility contract must have an attachment, placed before any other attachment, that discloses the name of the owner and licensee and the name and contact information of a single entity that is responsible for all aspects of patient care and the operation of the facility [*Health & Safety Code § 1599.64(c)*].

Long-term health care facilities are not required to execute new admission contracts for residents who entered their facilities before 1988, to comply with the statutory provisions set forth in *Health & Safety Code § 1599.60 et seq.* However, residents must be given notice of the changes made by those sections [*Health & Safety Code § 1599.84; see § 105.203*].

[c] Parties to Agreement

This form is designed to be executed by three parties: the resident, the facility, and a third party who will be responsible for the resident, such as next of kin, a guardian, or a conservator. The facility must make reasonable efforts, prior to or at the time of admission, to explain the content of the contract to the prospective resident and obtain his or her signature on the contract [*Health & Safety Code § 1599.65(a)*]. The resident's signature must be obtained unless he or she has been declared legally incompetent or is unable to sign because of a medical condition [*Health & Safety Code § 1599.65(a)*]. If the resident cannot sign the contract, the reason must be documented in his or her medical record by the admitting physician [*Health & Safety Code § 1599.65(a)*].

The third party to the agreement acts primarily as a guarantor of payment and, accordingly, is designated as "guarantor." The term normally applied to this individual by health care providers is "responsible party" [*see Welf. & Inst. Code § 14110.8(a)(4)*]. Skilled nursing facilities and intermediate care facilities cannot require as a condition of admission that Medi-Cal beneficiaries have a responsible party sign or cosign an admission agreement in order to guaranty payment [*Welf. & Inst. Code § 14110.8(b)*]. This fact must appear, in bold capital letters of not less than 10-point type, in the admission contract of facilities certified to be reimbursed by Medi-Cal [*Health & Safety Code § 1599.65(b)*].

If a resident has an agent, the facility, as a condition of admission, may require that the agent sign or cosign the admissions agreement and agree to distribute to the facility promptly when due any charges not paid for by the Medi-Cal program that the resident or the agent has agreed to pay [*Health & Safety Code § 1599.65(b)*]. For this purpose, an "agent" is a person who manages, uses, or controls those funds or assets that legally are required to be used to pay the resident's share of cost and other charges not paid for by the Medi-Cal program [*Welf. & Inst. Code § 14110.8(a)(3)*].

[d] Medical Services Provided

Skilled nursing facilities must provide 24-hour inpatient care and, at a minimum, physician, skilled nursing, dietary, and pharmaceutical services and an activity program [22 *Cal. Code Reg. § 72103; see § 105.12*]. Intermediate care facilities must provide skilled nursing supervision and supportive care [22 *Cal. Code Reg. § 73051; see § 105.13*]. Admission contracts to long-term health care facilities may require residents to consent to routine nursing care as provided by the facility, and to emergency care. A contract cannot require a resident to consent to all treatment ordered by any physician [*Health & Safety Code § 1599.72*]. Furthermore, it must contain a clause informing the resident of his or her right to consent or to refuse any treatment or procedure or participation in experimental research and to receive all information that is material to the patient's decision of whether to accept or refuse any proposed treatment or procedure [*Health & Safety Code § 1599.72; see 22 Cal. Code Reg. §§ 72527(a)(4), (5), 72528 (skilled nursing facilities), 73523(a)(4),(5), 73524 (intermediate care facilities); see also [2], P 2(c), below*]. Specific information must be disclosed for the administration of psychotherapeutic drugs or physical restraints or the prolonged use of a device that may lead to the inability to regain use of a normal bodily function [*see 22 Cal. Code Reg. §§ 72527(a)(5), (23), 72528(b) (skilled*

nursing facilities), 73523(a)(5), (23), 73524(b) (intermediate care facilities)].

A general medical consent provision in a contract for admission (such as the one in this form) may only encompass consent for routine nursing care or emergency care [see [2], P 2(d), *below*]. For this purpose, "routine nursing care" means a treatment or procedure that does not involve the administration of a psychotherapeutic drug or physical restraint, or the prolonged use of a device that may lead to the inability of the patient to regain use of a normal bodily function [see 22 Cal. Code Reg. §§ 72528(b) (skilled nursing facilities), 73524(b) (intermediate care facilities)] or that is determined by the physician not to require the disclosure of information material to the individual patient. "Routine nursing care" includes, but is not limited to, care that does not require the order of a physician. The use of informed consent forms for any specific treatment or procedure at the time of admission or at any other time is not prohibited, but all consent provisions or forms must indicate that the patient or incapacitated patient's representative may revoke his or her consent at any time [22 Cal. Code Reg. §§ 72528(g) (skilled nursing facilities), 73524(g) (intermediate care facilities)]. For further discussion of resident rights regarding the issue of informed consent, see § 105.22[5]; see also Ch. 104, *Health Care Transactions, Consents, and Directives*.

[e] Financial Provisions

Long-term health care facilities generally charge a basic daily rate, which covers room, board, and ordinary services provided by the facility. The admission contract must state clearly what services and supplies are covered by the basic daily rate, and indicate that residents will receive itemized monthly statements of charges incurred by them [*Health & Safety Code* § 1599.67(a)]. This form sets forth a month-to-month payment schedule, which is the most common payment period used by long-term health care facilities [see P 6 of this form].

Skilled nursing facilities and intermediate care facilities must provide at least 30 days written notice of any increase in the basic room rate or charges for optional services, except in certain cases in which a delay in fee adjustment would adversely affect the facility's ability to obtain full Medi-Cal reimbursement [*Health & Safety Code* § 1288]. This fact is indicated in this contract [see P 4 of this form], as required by law [*Health & Safety Code* § 1599.67(c)].

[f] Delinquent Accounts

This form imposes a late charge on past due accounts [see [2], P 7, *below*]. If a facility imposes late charges on residents' accounts, the admission contract must state the rate of interest charged and the method of computation [*Health & Safety Code* § 1599.68]. This form also includes an attorneys' fee clause [see [2], P 7, *below*]. Any clause in an admission contract providing for attorneys' fees must state that the prevailing party in any action arising under the contract will be entitled to attorneys' fees [*Health & Safety Code* § 1599.83; see *Civ. Code* § 1717; see also Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.252].

[g] Medi-Cal and Medicare

The admission contract must state clearly whether the facility participates in the Medi-Cal program [*Health & Safety Code* § 1599.66; see § 105.18[3]]. A resident may not be required to pay privately for any period during which he or she has been approved for payment by Medi-Cal, or to remain in private pay status for a specified period of time as a condition of admission to a Medi-Cal certified facility [*Health & Safety Code* § 1599.69(a)]. The facility must also reimburse residents for any amounts paid by them for which the facility is later reimbursed by Medi-Cal [*Welf. & Inst. Code* § 14019.3]. These matters must be stated, in at least 10-point type, in the contract [*Health & Safety Code* § 1599.69(a)].

If the facility provides services under Medicare and/or Medi-Cal, the contract must state that optional and covered services may be different for residents in these programs than for private pay residents [*Health & Safety Code* § 1599.67(b); see [2], P 6, *below*]. Residents who convert to Medi-Cal from private pay or Medicare must be given a form

listing Medi-Cal optional and covered services [*Health & Safety Code § 1599.67(b)*]. The admission contract may not require that a resident give notice of his or her intent to convert to Medi-Cal status prior to the date of the resident's Medi-Cal application, although a facility may request such notice from a resident who has been admitted [*Health & Safety Code § 1599.69(b)*].

Prior to the admission of any resident, the facility must provide the prospective resident, his or her spouse, legal representative, or agent, if any, with a standard form explaining the standards for Medi-Cal eligibility, including how Medi-Cal eligibility requirements affect separate and community property interests [*Welf. & Inst. Code § 14006.3*; see § 105.202[2]].

[h] Deposits and Refunds

Paragraph 9 of this form provides that a security deposit will be collected by the facility at the time the contract is executed. Any security deposit paid by a private pay resident must be returned within 14 days of the closing of the resident's account, or first Medi-Cal payment, whichever is later. No deduction for administration or handling charges is permitted [*Health & Safety Code § 1599.70(b)*]. Residents who are Medi-Cal beneficiaries and apply to the facility as Medi-Cal patients cannot be required to pay a security deposit [*Health & Safety Code § 1599.70(a)*].

Paragraph 10 of this form contains the required provisions for the refund of monthly payments after the death of the resident [see 22 *Cal. Code Reg. § 72531*], and similar provisions for refunds to be made upon the resident's transfer or discharge. A contract for admission cannot require the resident to pay for days beyond his or her death or involuntary discharge [*Health & Safety Code § 1599.71(a)*]. If a resident is voluntarily discharged less than three days after being admitted, the facility may charge the resident for a maximum of three days at their basic room rate [*Health & Safety Code § 1599.71(a)*].

[i] Release of Medical Information

Residents of long-term health care facilities have the right to confidential treatment of their medical information [see *Civ. Code § 56.10(a)*], and Paragraph 11 of this form acknowledges this, as required by law [*Health & Safety Code § 1599.73(a)*]. Paragraph 11 also informs the resident of the circumstances under which the facility will disclose medical information concerning him or her. The language of the form complies with the provisions of *Civ. Code § 56.10(c)*, which governs the disclosure of medical information by providers of health care.

The contract also includes, as Exhibit B, the required separate attachment by which a resident may authorize disclosure of information to other specific persons [*Health & Safety Code § 1599.73(b)*]. This authorization must appear in at least 14-point type [*Civ. Code § 56.11(a)*]. The authorization conforms to the specifications for the release of medical information set forth under *Civ. Code § 56.11*. For a discussion of the Confidential Medical Information Act [see *Civ. Code § 56 et seq.*] and authorizations for release of medical information, see *Ch. 104, Health Care Transactions, Consents, and Directives, § 104.223*.

Skilled nursing facilities and intermediate care facilities must encourage residents having capacity to make health care decisions, after their admission, to execute an advance health care directive, in the event that they become unable to give consent for disclosure [*Health & Safety Code § 1599.73(b)*].

[j] Termination of Agreement by Resident

Paragraph 13 of this form provides that the resident may terminate the agreement on 30 days written notice. A resident cannot be required to give advance notice prior to voluntarily leaving the facility [*Health & Safety Code § 1599.71(b)*].

[k] Termination of Agreement by Facility

This form lists grounds for the resident's involuntary transfer or discharge [see [2], P 13(b), *below*]. The admission contract cannot list any grounds for transfer or discharge that are not specifically provided for by law [*Health & Safety Code* § 1599.76(a)]. For a summary of permissible grounds for discharge, see § 105.23. Admission contracts must state that except in an emergency a resident cannot be involuntarily transferred or discharged without reasonable written notice specifying the reason for the transfer or discharge, and discharge planning [*Health & Safety Code* § 1599.78].

A facility that participates in the Medi-Cal program cannot transfer or seek to evict a resident solely because the resident switches from private pay to Medicare or Medi-Cal, and the admission contract must state this [*Health & Safety Code* § 1599.76(b)]. Contracts that state that residents may be discharged for financial misrepresentation under *Health and Safety Code* § 1439.7 must specify that only material or fraudulent misrepresentation will be grounds for discharge [*Health & Safety Code* § 1599.77(a)], and all contracts must state that the resident may file a complaint with the long-term care ombudsman [see *Welf. & Inst. Code* § 9710 *et seq.*] or the State Department of Health Services regarding any notice of discharge for misrepresentation [*Health & Safety Code* § 1599.77(b); see § 105.26[2], [4]].

[l] Transfer of Resident

Paragraph 14 of this form reserves the facility's right to move the resident from one room to another or out of the facility when medically indicated, when payments are not kept current, or when the resident breaches the rules of the facility [see §§ 105.23, 105.130; see also 22 *Cal. Code Reg.* § 72519].

This form also states, as required by law, that if the resident is transferred from the facility to an acute care hospital, the facility will hold the resident's bed for up to seven days on the request of the resident or his or her personal representative and that, if the facility fails to follow this procedure, it will offer the next appropriate available bed to the resident [*Health & Safety Code* § 1599.79; 22 *Cal. Code Reg.* § 72520; see [2], P 14(d), *below*]. At the time of an actual transfer, the facility must again notify the resident, or his or her representative, of the bedhold right, and allow 24 hours for the request to be made [*Health & Safety Code* § 1599.79].

[m] Facility's Policies and Patients' Bill of Rights

Paragraph 15 of this form lists the facility's rules of resident conduct. Upon admission to a skilled nursing or intermediate care facility, the resident must be fully informed regarding his or her rights and all effective rules and regulations governing resident conduct and responsibilities [see 22 *Cal. Code Reg.* §§ 72527(a)(1), 73523(a)(1); see also § 105.22[1], [2]]. The admission contract must indicate that the facility will impose only reasonable rules, and that residents may obtain copies of the facility's grievance procedure and may also contact the State Department of Health Services and/or the long-term care ombudsman [see *Welf. & Inst. Code* § 9710 *et seq.*] regarding grievances against the facility [*Health & Safety Code* § 1599.75; see § 105.26[2], [4]].

The admission contract must include copies of both the statutory and regulatory Patients' *Bill of Rights* [see *Health & Safety Code* §§ 1599.1, 1599.2; 22 *Cal. Code Reg.* §§ 72527, 73523], in print of at least 12-point type [*Health & Safety Code* § 1599.74(b)]. Non-English-speaking residents must be given copies in their language, if a translation has been provided to the facility by the State Department of Health Services [*Health & Safety Code* § 1599.74(a), (b)]. Ordinarily, the Patients' *Bill of Rights* is not incorporated into the admission agreement. It is printed on a separate sheet of paper and is discussed with and given to the resident and the guarantor at the time of admission. Exhibit C, which appears as an attachment to this form, contains the required preamble [see *Health & Safety Code* § 1599.2] and acknowledgment by the resident that he or she has been informed of and received a copy of the Patients' *Bill of Rights* [*Health & Safety Code* § 1599.74(c)]. For a summary of the rights of residents of skilled nursing and intermediate care facilities under the Patients' *Bill of Rights* [*Health & Safety Code* § 1599.1; 22 *Cal. Code Reg.* §§ 72527, 73523], see § 105.22.

Health & Safety Code § 1599.61, adopted in 1997, required the Department of Long Term Care to develop a standard

comprehensive version of the Patients *Bill of Rights* to be a mandatory attachment to the standardized admission agreements that all skilled nursing and intermediate care facilities were required to use by January 1, 2000 [*Health & Safety Code* § 1599.61(a), (d); see discussions in [a], above, and § 105.19[2]]. The Department was also required to develop Spanish, Chinese, and other translations of the Patients' *Bill of Rights* as needed to provide copies to members of any ethnic group that represents at least 1 percent of the state's skilled nursing facility, intermediate care facility, and nursing facility population [*Health & Safety Code* § 1599.61(e)]. Development of the standardized admission forms has proven to be a difficult and controversial process, however, and as of January 2009, the Department has not finalized regulations containing the new forms. Department sources have advised that there is no anticipated date for final implementation of these regulations. Accordingly, the Department is advising operators to continue to use their current forms.

[n] Personal Property Inventory and Liability for Theft or Loss

A facility must make reasonable efforts to safeguard the property of its residents, and must implement a theft and loss program as specified by law [*Health & Safety Code* §§ 1289.3(a), 1289.4, 1418.7; see § 105.25]. The admission contract must not state or imply that the facility has a lesser responsibility for residents' personal property than that stated by law [*Health & Safety Code* § 1289.5]. Paragraph 16 of this form includes a statement of the facility's policy regarding the safekeeping, theft, and loss of residents' property. Exhibit D contains a personal property inventory sheet, which should be updated as necessary during the resident's stay, and a provision for the surrender of the resident's personal belongings upon signed receipt when the resident is discharged or dies. These contract features are required by law [*Health & Safety Code* § 1289.4(d)-(f), (l)].

Facilities must provide copies of *Health & Safety Code* §§ 1289.3-1289.5 to all residents and their responsible parties [see *Welf. & Inst. Code* § 14110.8(a)(4) (definition)], and to prospective residents and their responsible parties upon request [*Health & Safety Code* § 1289.4(k)]. A form for this purpose is provided as Exhibit E to this Form.

[o] Disclaimers

An admission contract cannot include any unlawful waiver of the facility's liability, or any other provisions that the facility knows or should know to be deceptive or unlawful [*Health & Safety Code* § 1599.62(a)]. In this form, the facility disclaims responsibility for loss of or damage to the resident's personal possessions that are not listed in the inventory of personal belongings, and items that could have been deposited for safekeeping but were not [see [2], P 16, below]. It also disclaims responsibility for any consequences suffered by a resident who leaves the facility prior to being discharged by his or her attending physician [see [2], P 15(f), below].

Any language in a contract that purports to alter the statutory period for filing an action against the facility is illegal [*Health & Safety Code* § 1599.82].

[p] Residents' Funds

Paragraph 17 of this form sets forth the resident's rights regarding the management of his or her personal funds, and lists various options for the handling of those funds. Residents of skilled nursing and intermediate care facilities have the right to manage their own financial affairs; however, they may delegate this responsibility to the facility [22 *Cal. Code Reg.* §§ 72527(a)(8) (skilled nursing facilities), 73523(a)(8) (intermediate care facilities)]. For a general discussion of the formalities required for a delegation of the rights and responsibilities of financial management by a resident to a facility, see the discussion in § 105.24. For a detailed list of the obligations of long-term care facilities relating to the handling of residents' funds, see § 105.122.

[q] Arbitration

This form includes, as Exhibit F, an optional arbitration clause. An arbitration clause must appear as a separate

attachment to the admission contract, and the contract must state that agreement to arbitration is not a precondition to medical treatment or admission to the facility [*Health & Safety Code § 1599.81(a), (b)*]. The arbitration clause includes a space for the resident's signature, or that of his or her responsible party, and notice that the resident may not waive the ability to sue for violation of the Patients' *Bill of Rights* [*Health & Safety Code §§ 1430, 1599.81(b)*]. This notice is required by law [*Health & Safety Code § 1599.81(d)*].

[2] FORM

Admission Contract for Skilled Nursing or Intermediate Care Facility

[Form must be printed in at least 10-point type, with print appearing on only one side of each page. Certain provisions must be printed in capitals and/or boldface type, as indicated (Health & Safety Code § 1599.60 et seq.).]

AGREEMENT FOR ADMISSION TO _____ [*name of facility*]

Admission to Facility

1. _____ [*Name of resident*] ("Resident"), [_____ (*name of conservator, guardian, or other responsible party*) ("Guarantor"),] and _____ [*name of facility*], ("Facility"), agree that Resident shall be admitted to Facility on _____ [*date*], under the terms and conditions set forth in this Agreement.

Medical Treatment

2. (a) Resident is under the medical care of Dr. _____ [*name of physician*], _____ [*address of physician*], [*telephone number of physician*] ("Attending Physician"). Attending Physician will instruct Facility regarding any particular treatment required by Resident. Facility shall follow the instructions of Attending Physician in providing care to Resident, provided that Attending Physician observes all applicable rules and regulations of Facility as well as any applicable federal and/or state agency regulations. Facility shall have the authority to contact Attending Physician at any time that, in the opinion of the medical director of Facility, Resident requires the attention of that physician.

(b) Facility shall have the authority, in the event that Attending Physician is unavailable during an emergency medical situation, to contact another licensed physician to attend Resident or, if it appears necessary in the opinion of the medical director, to transfer Resident to an acute care hospital.

(c) Resident has the right to consent to or to refuse any medical treatment or procedure or participation in experimental research and to receive all information that is material to Resident's decision to accept or refuse any proposed treatment or procedure. Resident may, at any time, revoke any consent previously given.

(d) Facility provides routine nursing care, and Resident authorizes and consents to the providing of this care. If Resident requires special duty nursing care, that care must be arranged for by Resident, Resident's authorized representative, and/or Resident's physician. Facility shall not be liable for the failure of Resident or Resident's attending physician to arrange for any special duty nursing care required by Resident.

(e) Resident [and/or Guarantor] shall be responsible for the payment of all charges for services provided by Attending

Physician and all emergency medical services provided by other physicians selected by Facility under the terms of this Paragraph.

Basic Daily Rate

3. Facility shall provide, and Resident [and Guarantor] shall accept and pay for, those services set forth in Paragraph 5 of this Agreement. The basic daily rate for the services listed in Paragraph 5 is \$_____. On admission of Resident to Facility, one month's basic daily rate shall be prorated, and that amount shall be paid to Facility. Thereafter, one month's basic daily rate must be paid in advance on or before the first day of each month. Facility shall provide Resident [or Guarantor] with itemized monthly statements of charges incurred by Resident.

Changes in Rates Charged for Services

4. Facility's basic daily rate as set forth in Paragraph 3, and the rates for optional services and supplies set forth in Paragraph 6, are subject to change only upon 30-days written notice to Resident, except as permitted by *Health and Safety Code Section 1288*. If Resident does not agree to pay any rate change instituted by Facility, Resident shall leave Facility no later than the day before the rate increase becomes effective. If Resident does not vacate Facility in the time specified in this Paragraph 4, Resident [and Guarantor] shall be deemed to have consented to the rate increase.

Services Included in Basic Daily Rate

5. The basic daily rate includes the following:

(a) [*Specify, Private or Semi-private or other appropriate description of number of persons to share room*] room.

(b) Three daily meals, or the number of meals prescribed by Resident's Attending Physician.

[*EITHER, if facility is to provide skilled nursing care:*]

(c) Skilled nursing care and treatment for 24 hours per day, seven days per week, including regular assessment of Resident's needs and development of written care plan by nursing staff.

[*OR, if facility is to provide intermediate care:*]

(c) Skilled nursing supervision and supportive care as needed, including regular assessment of Resident's needs and development of written care plan by nursing staff.

[*Continue with the following:*]

(d) Medical supervision of Resident, including prompt notification of Resident's Attending Physician, of any conditions or events for which notice is required by law.

(e) Maintenance of detailed medical records on Resident's condition, including diagnoses and medications.

(f) Activity programs.

[Add, if facility is to provide skilled nursing care:]

(g) Complete dietary services, including preparation and service of specialized meals.

(h) Pharmaceutical services.

Services and Supplies Excluded From Basic Daily Rate

6. The basic daily rate does not include the following services and supplies. Facility will, upon request of Resident, arrange for these services and supplies to be provided. Charges for these services and supplies shall be at the rate set forth in Exhibit A, which is attached to and incorporated into this Agreement. Facility shall provide Resident [or Guarantor] with an itemized monthly billing for services performed under this Paragraph 6, which shall be payable by Resident [or Guarantor] within _____ days of its receipt. The rates specified in Exhibit A may be adjusted on a periodic basis under the terms set forth in Paragraph 4 of this Agreement.

(a) Special duty nursing charges.

(b) Personal laundry.

(c) Physical therapy.

(d) Speech and occupational therapy.

(e) Audiology.

(f) Social work.

(g) Private telephone service.

(h) Grooming items, cosmetology, and barber services.

(i) Laboratory and x-ray charges prescribed by physician.

(j) Any other items, including equipment for Resident's permanent use, ordered by Attending Physician.

All services excluded from Facility's basic daily rate shall be billed to Resident's account according to the rate schedule in effect at the time the services are provided.

[Add, if facility takes Medi-Cal and Medicare recipients:]

Optional and covered services for Medicare and Medi-Cal recipients may be different from those described herein. Medicare and Medi-Cal recipients may be entitled to receive at no extra charge supplies, equipment, and other materials that are not included in the basic daily rate of Facility but that are covered by the Medicare or Medi-Cal program.

Delinquent Accounts

7. Any sums not paid when due as set forth under Paragraphs 3 and 6 of this Agreement shall accrue interest at the rate of _____ percent for each 30 days or part thereof that a balance due remains outstanding. In any suit brought by Facility to collect any sums due on Resident's account, or any other suit arising out of this Agreement, the prevailing party shall be entitled to have reasonable attorneys' fees paid by the other party.

Medi-Cal Participation

8. Facility presently [participates or does not participate] in the Medi-Cal program. *[If facility does participate in the Medi-Cal program, add: The participation of Facility in the Medi-Cal program is strictly voluntary. Facility shall have the right to terminate participation in the Medi-Cal program at any time, after giving Resident 60-days notice of its intent to do so. If, at the time of termination, Resident is a beneficiary under the Medi-Cal program, he or she shall either make the arrangements necessary to ensure payment of the private rate charged by Facility or shall terminate his or her residence. If Resident has an agent who manages, uses, or controls those funds that legally may be used to pay Resident's share of costs and other charges not paid for by the Medi-Cal program, that agent shall distribute those funds to Facility promptly when due. **RESIDENT MAY NOT BE REQUIRED TO PAY PRIVATELY FOR ANY PERIOD DURING WHICH HE OR SHE HAS BEEN APPROVED FOR PAYMENT BY MEDI-CAL, OR TO PROMISE EITHER ORALLY OR IN THIS CONTRACT TO REMAIN IN PRIVATE PAY STATUS FOR A SPECIFIED PERIOD OF TIME AS A CONDITION OF ADMISSION TO FACILITY. FACILITY MUST REIMBURSE RESIDENT FOR ANY AMOUNTS PAID BY RESIDENT FOR WHICH FACILITY IS LATER REIMBURSED BY MEDI-CAL.]***

[The following provision may not be used if resident is a Medi-Cal beneficiary:]

Security Deposit

9. Resident shall pay to Facility the sum of \$_____ at the time of the execution of this Agreement, as a security deposit. This deposit shall be refunded, less any sums outstanding and due to Facility, within 14 days after the closing of Resident's account. If Resident becomes a recipient of Medi-Cal payments, this deposit shall be refunded within 14 days after the first Medi-Cal payment or the closing of Resident's account, whichever occurs first.

Refunds and Collections

10.(a) Upon discharge or transfer from Facility, Resident shall receive a refund based on unused days minus any sums outstanding and due to Facility. There will be a charge equal to Facility's basic rate for three days, for any voluntary discharge less than three days after Resident's admittance to Facility. All refunds shall be paid by Facility to Resident within ten business days after Resident is transferred or discharged. If Resident does not vacate Facility by 12:00 noon on the day of discharge, Resident shall be responsible for payment of the basic daily rate for that day.

(b) In the event of Resident's death or involuntary discharge, neither Resident nor Resident's heirs, legatees, or personal representative shall be liable for any amounts due under this agreement for accommodations beyond the date upon which Resident dies or is discharged. Any advance payment shall be returned to Resident or to Resident's heirs, legatees, or personal representatives no later than two weeks after the death or discharge of Resident. The provisions of this Paragraph 10(b) shall not be subject to modification or waiver.

Release of Medical Information

11. Facility shall respect Resident's right to confidential treatment of Resident's medical information. For the duration of Resident's stay at Facility, Facility may release information in its records regarding the nature, diagnoses, or treatment of Resident's physical condition, and all medical, dental, laboratory, and hospital records that it maintains on Resident only as follows:

- (a) In the case of Resident's transfer to another facility, to the extent necessary for Resident's treatment by that facility.
- (b) As set forth in Resident's Authorization for Release of Information From Medical Records.
- (c) As required by law or by any third party payment contract executed by Resident.

Release of Financial Information

12. Resident authorizes Facility to disclose all or any part of Resident's financial records to any agency or entity that is or may be responsible for any or all of the cost of care provided to Resident by Facility.

Termination of Agreement

13. (a) Resident may terminate this Agreement upon 30-days written notice to Facility. Resident shall be liable for any adverse consequences if he or she terminates this Agreement and/or leaves Facility prior to being discharged by an attending physician.

(b) Except in an emergency situation, Facility may discharge or transfer Resident only upon 60-days written notice and must provide discharge planning to Resident prior to the discharge or transfer. Resident may be discharged or transferred only for cause. For the purposes of this agreement, "cause" shall mean

- (1) Resident requires a level of care not available in Facility;
- (2) Resident endangers the health and welfare of other residents in Facility;
- (3) Resident disturbs other residents in Facility;
- (4) Resident fails to comply with the Facility's rules of resident conduct as set forth in Paragraph 15 of this Agreement;
- (5) Resident loses federal and/or state health care benefits and fails to pay private rate charged by Facility, or
- (6) Within 90 days of Resident's admission, Facility discovers that Resident made a material misrepresentation of his or her financial condition, and the misrepresentation was relied upon by Facility in agreeing to admit Resident.

[Add, if facility takes Medi-Cal recipients:]

(c) Facility may not transfer or seek to evict any resident solely as a result of the resident changing his or her manner of purchasing Facility's services from private payment or Medicare to Medi-Cal.

Transfer and Bedhold Policy

14. (a) Facility shall have the right to move Resident to a different room when, in the opinion of the medical director, the move is necessary or desirable.

(b) Facility shall have the right to transfer Resident to an acute care hospital with which it has a transfer agreement if, in the opinion of the medical director or Resident's attending physician, Resident requires services that are available in the hospital and that Facility is not equipped to provide.

(c) Except in the case of a medical emergency, prior to moving or transferring Resident under the provisions of this Paragraph, Facility shall provide at least 24 hours notice to Resident [and/or Guarantor]. At the time of notification, Facility shall provide Resident [and/or Guarantor] with a written explanation of the reasons for the proposed move or transfer.

(d) In the event that Resident is transferred from Facility to an acute care hospital, Facility shall hold Resident's bed for up to seven days, at Facility's basic daily rate, on the written request of Resident or Resident's personal representative. *[If facility participates in the Medi-Cal program, add: Medi-Cal recipients may have this cost paid by Medi-Cal.]* The bedhold request must be made within 24 hours of receipt by Resident or Resident's personal representative of the bedhold notice given by Facility at the time of the transfer. If the procedure described in this Paragraph 14(d) is not followed, Facility shall offer Resident the next appropriate bed available following Resident's discharge from the hospital.

Rules of Resident Conduct

15. Resident agrees to observe the following rules of Facility, and other reasonable rules that may be adopted by Facility on [e.g., 30] days' written notice to Resident. Facility shall not adopt unreasonable rules, and Resident may suggest changes in the rules, file a grievance regarding the rules, or file a grievance with the State Department of Health Services or the Long-term Care Ombudsman at any time. A copy of Facility's grievance procedure may be obtained from _____[*name of title of appropriate person*].

(a) Food or beverages may be brought into Facility or otherwise provided to Resident only if authorized by, and subject to any limitations imposed by, Resident's physician. Any food or beverage brought into Facility must be approved by authorized Facility personnel before being given to Resident. Smoking materials and alcoholic beverages may be kept on the premises only with the prior permission of the Administrator and Resident's physician, and must be kept in the custody of authorized Facility personnel at all times.

(b) Only Resident's physician and authorized Facility personnel may provide medicines, medications, or treatments to Resident. Neither Resident nor any of Resident's visitors or guests shall bring any drugs or medications onto the premises of Facility unless they have been prescribed by a licensed physician attending Resident and have been ordered through Facility.

(c) Resident shall not bring any furniture or appliances on the premises of Facility without first obtaining the approval of the Administrator. Within the limitations imposed by space, Facility shall make every effort to accommodate Resident's wishes regarding his or her personal effects.

(e) Resident and Resident's visitors and guests shall abide by Facility's rules with respect to visiting hours. Regular visiting hours at Facility are [*specify visiting hours, e.g., 11:00 A.M. to 9:00 P.M.*] daily. Resident or Resident's relatives or Guarantor may make special arrangements for visits at other times by obtaining the Administrator's consent

in advance. Except in cases involving medical emergency, the Administrator may deny such a request if it would unduly disturb, inconvenience, or invade the privacy of other residents. Members of the clergy, upon request of Resident, may visit at any time.

(f) Upon request of Resident, Resident's family, or Guarantor, Resident shall be free to leave Facility at any time and for any purpose. However, if the Administrator or the Medical Director believes that Resident's well-being will be endangered by a departure from Facility, Resident's physician will be consulted and Facility shall not be liable for any ill effects suffered by Resident as a result of the departure.

Theft And Loss Policy

16. It is the policy of Facility to provide reasonable protection against the loss of Residents' personal belongings and valuables. Resident may obtain a lock for his or her bedside cabinet or drawer by contacting _____ [name, title, and telephone extension or office number of appropriate facility employee]. Resident may also deposit money (subject to Paragraph 17) and other valuable items of personal property with Facility for safekeeping. Facility shall not be liable for the loss or theft of any items not listed on the Inventory of Personal Belongings (attached to this Agreement as Exhibit D) or any valuables that Resident could have deposited but failed to deposit with Facility. Facility reserves the right to refuse to allow items of personal property that are valued at \$ _____ or more and are not necessary for Resident's health or reasonable comfort to be kept on the premises if, in the opinion of the Administrator, adequate safekeeping cannot be provided for them.

Resident's Personal Funds

17. (a) Resident shall not be obligated to deposit any funds with Facility. Resident shall have the right to select the manner in which his or her personal funds shall be handled, including but not limited to any options set forth in this Agreement.

(b) Resident or Resident's legal guardian may receive, retain, and manage Resident's personal funds.

(c) Resident may apply to the Social Security Administration to have a representative payee designated for purposes of receiving federal or state benefits to which Resident is entitled.

(d) Unless a representative payee has been appointed by the Social Security Administration, Resident may designate, in writing, another person to manage his or her personal funds.

(e) Facility shall be obligated, on Residents' written authorization, to hold, safeguard, and account for Resident's funds under Title 22, Section _____ [for a skilled nursing facility: 72529 or, for an intermediate care facility: 73557] of the California Code of Regulations. Any charge for holding, safeguarding, and accounting for Resident's funds is included in the basic rate of Facility.

(f) Facility shall be allowed to accept Resident's funds to hold, safeguard, and account for only upon written authorization of Resident or of his or her representative, or if Facility is appointed as Resident's representative payee. If Resident becomes incapable of managing his or her personal funds and does not have a representative, Facility shall assume management of Resident's funds and shall manage the funds in accordance with the requirements of Title 22, Section _____ [for a skilled nursing facility: 72529 or, for an intermediate care facility: 73557] of the California Code of Regulations.

Nondiscrimination

18. Facility shall not discriminate against Resident on the basis of race, religion, political affiliation, or the source from which Resident receives funds for payment of services provided by Facility.

Executed at _____ [city], California, on _____ [date].

RESIDENT

_____ [signature of resident]
[typed name]

[Add, if facility is certified for Medi-Cal reimbursement:]

NOTICE:

**NO FACILITY MAY REQUIRE OR SOLICIT AS A CONDITION OF ADMISSION THAT A
MEDI-CAL BENEFICIARY HAVE A RESPONSIBLE PARTY SIGN THE CONTRACT FOR
ADMISSION TO THE FACILITY**

[Continue with the following:]

GUARANTOR

_____ [signature]
[typed name]

[Include in skilled nursing facility contract:]

EXHIBIT A

_____ [Name of owner]
_____ [Name of licensee]
_____ [Name of single entity responsible for all aspects of patient care and operation of skilled nursing facility]
_____ [Contact information for responsible entity]

EXHIBIT [A or, for skilled nursing facility contract, A(1)]

CHARGES FOR SERVICES EXCLUDED FROM BASIC DAILY RATE

Service	Charge
Special duty nursing	\$_____ per hour
Personal laundry	\$_____ per item

Speech therapy	\$_____ per hour
Occupational therapy	\$_____ per hour
Audiology	\$_____ per hour
Private telephone service	cost to Facility
Grooming items	cost to Facility
Cosmetology	cost to Facility
Barber services	cost to Facility
Laboratory charges	cost to Facility
X-ray charges	cost to Facility
Equipment for Resident's permanent use	[cost]
<i>[Specify other items excluded from basic daily rate]</i>	

EXHIBIT B

AUTHORIZATION FOR RELEASE OF INFORMATION FROM MEDICAL RECORD

I, the undersigned, hereby authorize _____ [*name of facility*] to provide from my medical record [or from the medical record of _____ (*name of resident*), for whom I am authorized to serve as conservator under order no. _____ of the Superior Court of _____ County] the information specified below to _____ [*names of persons or entities to whom information may be released*] for the purpose of [*specify purpose*]. The information supplied is to be restricted to [*specify medical condition or injury, or time period to be covered, or other type of information*]. Release or transfer of the specified information to any person or entity not specified herein is prohibited. An additional written consent must be obtained for a proposed new use of the information or for its transfer to persons or entities not specified herein.

This authorization shall expire on _____ [*date*].

Dated: _____.

_____ [*signature of resident or conservator*]

NOTICE TO RESIDENT

You have the right to receive a copy of this authorization.

EXHIBIT C

PATIENTS' BILL OF RIGHTS

The following is a list of the legal rights of patients and the legal obligations of this facility. Patients have the right to voice grievances regarding these rights and obligations to facility personnel without reprisal, and can submit complaints to the State Department of Health Services or its representative. Further obligations of this facility are set forth in the Health and Safety Code, and in Title 22 of the California Code of Regulations. Willful or repeated violations of either code may subject a facility and its personnel to civil or criminal proceedings.

[Insert complete copies of Patients' Bill of Rights, both as set forth in Health & Safety Code §§ 1599.1 and 1599.2 and in 22 Cal. Code Reg. § 72527 (for skilled nursing facilities) or 73523 (for intermediate care facilities).]

I, the undersigned, acknowledge that I have received a copy of the Patients' *Bill of Rights* as set forth above.

Dated: _____.

_____ *[signature of resident or resident's authorized representative]*

[title of authorized representative, if appropriate]

EXHIBIT D**INVENTORY OF PERSONAL BELONGINGS****Inventory**

1. The following is a complete list of Resident's valuables and personal belongings to be kept on Facility's premises. Facility will not be responsible for any items that are not listed on this sheet or that are deleted from this sheet by Resident. It is the responsibility of Resident and his or her responsible party to ensure that this inventory is updated to include any valuables or personal belongings brought into Facility subsequent to its execution. This inventory may be updated by contacting _____ *[name, title, and telephone extension or location of appropriate facility employee]*.

Furnishings: *[list and specifically describe]*

Jewelry: *[list and specifically describe]*

Please Note: Jewelry and other valuables may be deposited with Facility for safekeeping, by contacting _____ *[name, title, and telephone extension or location of appropriate facility employee]*. Facility will not be liable for the loss or theft of any valuables that Resident could have deposited if Resident fails to do so.

Personal Effects: *[list and specifically describe; e.g., one pair of dentures, engraved with Resident's social security number]*

Clothing: *[list and specifically describe]*

Miscellaneous: *[list and specifically describe]*

Removal From Facility

2. The following items may be removed from facility from time to time, for regular cleaning or the like, and shall not for that reason be deemed to be removed from this inventory: *[list generally, e.g., everyday clothing described above]*

I acknowledge that I have received a copy of this Inventory of Personal Belongings.

Dated: _____.

_____ *[signature of resident or resident's authorized representative]*

[title of authorized representative, if appropriate]

TO BE COMPLETED ON RETURN OF RESIDENTS' BELONGINGS:

Receipt of Surrender

I acknowledge receipt from _____ *[name of facility]* of the items listed in the above Inventory of Personal Belongings.

Dated: _____.

_____ *[signature of resident or, if resident has died, his or her heir or personal representative]*

[title of heir or personal representative, if appropriate]

EXHIBIT E

CALIFORNIA STATUTES GOVERNING THEFT AND LOSS OF RESIDENTS' PERSONAL PROPERTY FROM LONG-TERM HEALTH CARE FACILITIES

[Insert copies of Health & Safety Code §§ 1289.3-1289.5.]

EXHIBIT F**ARBITRATION AGREEMENT**

I, the undersigned, agree that if there is any dispute regarding a charge for services under this Agreement, that dispute shall be submitted to arbitration and Facility shall not be entitled to terminate this Agreement unless the arbitrator has found in its favor, and, thereafter, Resident has failed to pay the amount awarded by the arbitrator. I understand that I am under no obligation to sign this Arbitration Agreement, and that Facility cannot refuse admission or treatment to [me or Resident] because I choose not to sign it. I understand that I am not, and cannot, waive the right to sue for violation of the Patients' *Bill of Rights* under *Health and Safety Code Section 1430* by signing this Arbitration Agreement.

Dated: _____.

_____ *[signature of resident or resident's authorized representative]*
[title of authorized representative, if appropriate]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART IV. FORMS

A. Long-Term Health Care Facilities for the Elderly

33-105 California Legal Forms--Transaction Guide § 105.201

§ 105.201 Delegation of Power to Handle Personal Funds

[1] Comment

[a] Use of Form

This form is a delegation of the power to handle the personal funds of a patient in a skilled nursing home or intermediate care facility. It may be used at the time an individual is admitted to the facility or at some later point when the patient or responsible person has decided that it is in the best interests of the patient to either fully delegate this responsibility or to request assistance.

[b] Right to Manage Financial Affairs

Patients in skilled nursing and intermediate care facilities have the right to manage their own financial affairs [22 *Cal. Code Reg. §§ 72527(a)(8)* (skilled nursing facilities), 73523(a)(8) (intermediate care facilities)]. For an explanation of the standards to which facilities must conform in managing patients' personal funds, see the discussion under "Handling of Patients' Funds" in the Legal Background. For a detailed list of the obligations of long-term care facilities regarding the handling of patients' funds, see § 105.122.

[2] FORM

Authorization of Power to Manage Personal Financial Affairs

AUTHORIZATION OF POWER TO MANAGE PERSONAL FINANCIAL AFFAIRS

_____[*Name of patient*], "Patient," pursuant to the state and federal requirements governing the management of the personal financial affairs of patients in skilled nursing facilities, authorizes _____[*name of facility*], "Facility," to manage _____[his or her] personal financial affairs.

This authorization applies to Patient's personal funds deposited in [*specify identity and branch of bank, savings and loan, or other entity holding patient's funds*] under account number [*specify*]. Facility is authorized to hold, safeguard, and account for these funds. Facility is further authorized to receive any amounts due to Patient from any sources and to hold, safeguard, and account for the funds so received.

This authorization shall remain in effect until such time as Patient makes a written revocation or is transferred (other than a temporary transfer due to change in medical needs) or discharged from the Facility.

_____ [*signature of patient*]
 [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsServicesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART IV. FORMS

A. Long-Term Health Care Facilities for the Elderly

33-105 California Legal Forms--Transaction Guide § 105.202

§ 105.202 Notice Regarding Standards for Medi-Cal Eligibility

[1] Comment

[a] Use of Form

This form is a statutory statement that explains the resource and income requirements of the Medi-Cal program, including certain exempt resources, certain protections against spousal impoverishment, and certain circumstances under which a home may be transferred without affecting Medi-Cal eligibility.

Before admitting any person to a nursing facility enrolled as a provider of the Medi-Cal program, the facility must provide the prospective resident, his or her spouse, legal representative, or agent, if any, with a copy of this statement [*Welf. & Inst. Code § 14006.3*; *see Health & Safety Code § 1250(k)*; *Welf. & Inst. Code § 14002.5(f)* ("nursing facility" defined for purposes of California law); *see also 42 U.S.C. § 1396r* ("nursing facility" defined for purposes of federal law)]. This notice requirement is not restricted to Medi-Cal recipients or married persons, but applies to all residents of nursing facilities enrolled as providers of the Medi-Cal program [*see Welf. & Inst. Code § 14006.3*].

Any facility that fails to comply with these requirements is guilty of a Class "B" citation [*Welf. & Inst. Code § 14006.4(c)*; *see Health & Safety Code § 1424* (Class "B" citation defined); *see also § 105.26[6][e]*].

[b] Contents of Statement

This statement reiterates the resource and income requirements of the Medi-Cal program contained in *Welf. & Inst. Code § 14006.2* and related provisions. *Welf. & Inst. Code § 14006.2*, among other things, recognizes the validity of agreements between spouses dividing community property into equal shares of separate property, and provides that the separate property of an individual's spouse will not be considered in determining the individual's eligibility for Medi-Cal benefits, except when separate property owned by one spouse is actually made available to the other spouse [*Welf. & Inst. Code § 14006.2(a)(1)*]. For discussion of transmutation agreements changing the character of separate or community property of the spouses [*see Fam. Code §§ 850-853*; *see Ch. 109, Postnuptial Agreements*].

[c] Form of Statement

The form of this statement is prescribed by statute [*see Welf. & Inst. Code § 14006.4(a)*]. The statement must appear in at least 10-point type, and must be clearly separate from any other document or writing. It must be signed by the person to be admitted to the facility, and that person's spouse, and legal representative, if any [*Welf. & Inst. Code § 14006.4(b)*].

[d] Assessment and Documentation of Total Value of Spousal Resources

Until Congress amends Title XIX of the federal Social Security Act to authorize the consideration of state community property law in determining Medi-Cal eligibility, or the federal government authorizes California to apply community property laws in making that determination [*Welf. & Inst. Code § 14006.6(e)*], on the request of a community spouse or an institutionalized spouse [*see Welf. & Inst. Code § 14002.5(b), (f)* (definitions)], and on receipt of relevant documentation of resources, the Department of Health Services must promptly assess and document the total value of the couple's resources to the extent either the institutionalized spouse or the community spouse has an ownership interest. On completion of the assessment and documentation, the Department must provide a copy of the assessment and documentation to each spouse and retain a copy of the assessment [*Welf. & Inst. Code § 14006.6(a)*]. If the assessment is not part of an application for Medi-Cal, the Department may require payment of a fee for this service in an amount not to exceed the reasonable expenses of providing and documenting the assessment [*Welf. & Inst. Code § 14006.6(b)*]. The Department must notify the couple, on providing them with a copy of the assessment, that either spouse has a right to a fair hearing concerning the assessment to the extent required by federal law [*Welf. & Inst. Code § 14006.6(d)*].

[2] FORM**Notice Regarding Standards for Medi-Cal Eligibility****NOTICE REGARDING STANDARDS FOR MEDI-CAL ELIGIBILITY**

If you or your spouse is in or is entering a nursing facility, read this important message!

You or your spouse do not have to use all your resources, such as savings, before Medi-Cal might help pay for all or some of the costs of a nursing facility.

You should be aware of the following to take advantage of these provisions of the law:

UNMARRIED RESIDENT

An unmarried resident is financially eligible for Medi-Cal benefits if he or she has less than (insert amount of individual's resource allowance) in available resources. A home is an exempt resource and is not considered against the resource limit, as long as the resident states on the Medi-Cal application that he or she intends to return home. Clothes, household furnishings, irrevocable burial plans, burial plots, and an automobile are examples of other exempt resources.

If an unmarried resident is financially eligible for Medi-Cal reimbursement, he or she is allowed to keep from his or her monthly income a personal allowance of (insert amount of personal needs allowance) plus the amount of health insurance premiums paid monthly. The remainder of the monthly income is paid to the nursing facility as a monthly deductible called the "Medi-Cal share of cost."

MARRIED RESIDENT

If one spouse lives in a nursing facility, and the other spouse does not live in a nursing facility, the Medi-Cal program will pay some or all of the nursing facility costs as long as the couple together does not have more than (insert amount of Community Spouse Resource Allowance plus individual's resource allowance) in available assets. The couple's home will not be counted against this \$[*amount of Community Spouse Resource Allowance plus individual's resource allowance*], as long as one spouse or a dependent relative, or both, lives in the home, or the spouse in the nursing facility states on the Medi-Cal application that he or she intends to return to the couple's home to live.

If a spouse is eligible for Medi-Cal payment of nursing facility costs, the spouse living at home is allowed to keep a monthly income of at least his or her individual monthly income or (insert amount of Minimum Monthly Maintenance Needs Allowance), whichever is greater. Of the couple's remaining monthly income, the spouse in the nursing facility is allowed to keep a personal allowance of \$[*amount of personal needs allowance*] plus the amount of health insurance premiums paid monthly. The remaining money, if any, generally must be paid to the nursing facility as the Medi-Cal share of cost. The Medi-Cal program will pay remaining nursing facility costs.

Under certain circumstances, an at-home spouse can obtain an order from an administrative law judge that will allow the at-home spouse to retain additional resources or income. Such an order can allow the couple to retain more than \$[*amount of Community Spouse Resource Allowance plus individual's resource allowance*] in available resources, if the income that could be generated by the retained resources would not cause the total monthly income available to the at-home spouse to exceed \$[*amount of Monthly Maintenance Needs Allowance*]. Such an order also can allow the at-home spouse to retain more than \$[*amount of Monthly Maintenance Needs Allowance*] in monthly income, if the extra income is necessary "due to exceptional circumstances resulting in significant financial duress."

An at-home spouse also may obtain a court order to increase the amount of income and resources that he or she is allowed to retain, or to transfer property from the spouse in the nursing facility to the at-home spouse. You should contact a knowledgeable attorney for further information regarding court orders.

The paragraphs above do not apply if both spouses live in a nursing facility and neither previously has been granted Medi-Cal eligibility. In this situation, the spouses may be able to hasten Medi-Cal eligibility by entering into an agreement that divides their community property. The advice of a knowledgeable attorney should be obtained prior to the signing of this type of agreement.

Note:

For married couples, the resource limit \$ _____ [*amount of Community Spouse Resource Allowance plus individual's resource allowance*] in _____ [*current year*] and income limit \$ _____ [*amount of Minimum Monthly Maintenance Needs Allowance*] in _____ [*current year*] generally increase a slight amount on January 1 of every year.

TRANSFER OF HOME FOR BOTH A MARRIED AND AN UNMARRIED RESIDENT

A transfer of a property interest in a resident's home will not cause ineligibility for Medi-Cal reimbursement if either of the following conditions is met:

(a) At the time of transfer, the recipient of the property interest states in writing that the resident would have been allowed to return to the home at the time of the transfer, if the resident's medical condition allowed him or her to leave the nursing facility. This provision shall only apply if the home has been considered an exempt resource because of the resident's intent to return home.

(b) The home is transferred to one of the following individuals:

- (1) The resident's spouse.
- (2) The resident's minor or disabled child.
- (3) A sibling of the resident who has an equity interest in the home, and who resided in the resident's home for at least one year immediately before the resident began living in institutions.
- (4) A son or daughter of the resident who resided in the resident's home at least two years before the resident began living in institutions, and who provided care to the resident that permitted the resident to remain at home longer.

This is only a brief description of the Medi-Cal eligibility rules, for more detailed information, you should call your county welfare department. You will probably want to consult with the local branch of the state long-term care ombudsman, an attorney, or a legal services program for seniors in your area.

I have read the above notice and have received a copy.

Dated: _____.

_____ [signature]
[printed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Public Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing FacilitiesPublic Health & Welfare LawSocial SecurityMedicaidProvidersTypesNursing FacilitiesPublic Health & Welfare LawSocial SecurityMedicaidState PlansGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART IV. FORMS

A. Long-Term Health Care Facilities for the Elderly

33-105 California Legal Forms--Transaction Guide § 105.203

§ 105.203 Notice of Legislation Affecting Admission Contracts to Long-Term Care Facilities

[1] Comment

[a] Use of Form

This form notifies a resident of a long-term health care facility who executed an admission contract with the facility before 1988 that his or her rights under that contract may be broader than indicated by the contract. The contents of agreements for admission to long-term care facilities [*see Health & Safety Code § 1326* (definition); *see also § 105.11*] that are entered into on or after January 1, 1988, are set forth specifically by statute [*see Health & Safety Code § 1599.60 et seq.*; *see also § 105.200[2]*]. Facilities are not required to execute new contracts to comply with these specifications for residents who were admitted before January 1, 1988 [*Health & Safety Code § 1599.84*]. However, those residents must be given notice of the post-1988 laws governing the contents of admission contracts, and that provisions in their contracts that conflict with those laws are unenforceable [*Health & Safety Code § 1599.84*].

[b] Contents of Notice

The statute imposing this notice requirement merely states that patients must "be given notice of changes in admission contracts" pursuant to the 1987 legislation [*Health & Safety Code § 1599.84*]. It does not establish any further requirements for the form or content of the required notice, or set a date by which the notice must be given. This form states that portions of a previously executed contract may be unenforceable, and that additional rights of the resident and responsibilities of the facility may exist under the law that are not identified in the contract. It also identifies the relevant statutes and directs the resident to a knowledgeable facility representative for further information. This information would appear to satisfy the literal statutory requirement that residents be given notice of changes in admission contracts. However, it is uncertain whether the Department of Health Services will interpret the statute to require a notice that is more specifically detailed to each contract used by a given facility prior to 1988. Ideally, the notice should be tailored to the actual contract and should identify specific clauses that are unenforceable and specific rights of the resident and responsibilities of the facility that are set forth by statute and not addressed in the contract.

[c] Penalty for Violation of Notice Requirement

Failure to comply with the notice requirement set forth by *Health & Safety Code § 1599.84* may result in a Class "B" citation or a deficiency from the Department of Health Services [*Health & Safety Code § 1599.62(b)*]; see § 105.26[6][a],[e].

[2] FORM

Notice of Legislation Affecting Admission Contracts to Long-Term Care Facilities

NOTICE OF CHANGES IN ADMISSION CONTRACT

[_____ (Name of resident and/or responsible party)]

[_____ (address, if somewhere other than facility)]

Laws governing the contents of admission agreements to long-term health care facilities were enacted by the State of California in 1987. These laws can be found in *Health and Safety Code Sections 1599.60-1599.84*. The contract that you signed upon your admission to _____ [name of facility] on _____ [date of admission or date contract signed, if different from admission date] may contain incomplete or inaccurate statements of your rights and the responsibilities of _____ [name of facility] under these laws.

Any portions of your contract that are inconsistent with these laws are unenforceable by _____ [name of facility].

[Add, if portions of existing contract are seriously at variance with the law:]

Specifically, Section [appropriate section number or other designation of portion of contract affected] of your contract, which provides that [summarize affected provision] is unenforceable [or enforceable only to the extent that [describe limitations on enforcement under the 1987 laws].

[Continue with the following:]

For further information about how these laws may have affected your contract, please contact _____ [name and title of appropriate facility employee] at [telephone extension or office number].

[typed name of facility]

Acknowledgment of Receipt

I acknowledge that I have received a copy of the Notice set forth above.

Dated: _____.

_____ [signature of resident]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsExecuted ContractsFamily LawFamily Protection & WelfareElderly
PersonsServicesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral
OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing
Facilities



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A. Long-Term Health Care Facilities for the Elderly

33-105 California Legal Forms--Transaction Guide § 105.204

§ 105.204 Notice of Facility's Theft and Loss Policy

[1] Comment

[a] Use of Form

This form is a notice to existing residents of long-term care facilities [see *Health & Safety Code § 1418* (definition)] or residential health care facilities [see *Health & Safety Code § 1569.2* (definition)] of the facility's theft and loss policy. It should be given to each resident whose admission contract does not contain a statement of that policy. If a resident is unable to understand the notice and provide a list of his or her belongings, the notice should be given to his or her authorized representative.

Long-term health care facilities and residential care facilities must implement policies and procedures for preventing theft and loss of residents' belongings, and inform residents of those policies and procedures [*Health & Safety Code § 1289.4(l)* (long-term care facilities); *Health & Safety Code § 1569.153(a), (l)* (residential care facilities)]. Copies of the relevant statutory provisions must be given to all residents and their responsible parties, and made available to prospective residents and their responsible parties upon request [*Health & Safety Code § 1289.4(k)* (long-term care facilities); *Health & Safety Code § 1569.153(k)* (residential care facilities)]. For a more complete explanation of these requirements, see the discussions in §§ 105.24 and 105.200[1][n].

[b] Inventory of Personal Belongings

This form includes an inventory of personal belongings, which is to be filled out by the resident and returned to the facility. It also includes a provision for the surrender of the resident's personal belongings upon signed receipt when the resident is discharged or dies. For similar provisions in admission contracts, see § 105.200, Exhibit D; § 105.222, Exhibit A.

[2] FORM

Notice of Facility's Theft and Loss Policy

NOTICE OF THEFT AND LOSS POLICY

Policy Statement

1. It is the policy of Facility to provide reasonable protection against loss of Residents' personal belongings and valuables.

Procedures for Safekeeping Available to Residents

2. Residents may obtain a lock for their bedside cabinet or drawer by contacting _____ [name, title, and telephone extension or office number of appropriate facility employee]. Residents may also deposit money (subject to the provisions of the admission contract) and other valuable items of personal property with Facility for safekeeping.

Limitation of Liability

3. Facility shall not be liable for the loss or theft of any items not listed on the Inventory of Personal Belongings, which is attached to this notice as Exhibit A, or any valuables that Resident could have deposited but failed to deposit with Facility. The Inventory of Personal Belongings must be filled out, signed, and delivered to _____ [name, title, and telephone extension or office number of appropriate facility employee] by _____ [date]. To obtain assistance in filling out the Inventory of Personal Belongings, please contact _____ [name, title, and telephone extension or office number of appropriate facility employee]. Facility reserves the right to refuse to allow items of personal property that are valued at \$_____ or more and are not necessary for Resident's health or reasonable comfort to be kept on the premises if, in the opinion of the administrator, adequate safekeeping cannot be provided for them.

I acknowledge that I have received a copy of the above notice of the theft and loss policy of _____ [name of facility].

Dated: _____.

_____ [signature of resident or resident's authorized representative]
[title of authorized representative, if appropriate]

[Insert, or add as a separate exhibit, copies of the complete text of Health & Safety Code §§ 1289.3-1289.5 (for long-term care facilities) or 1569.152-1569.154 (for residential care facilities).]

EXHIBIT A**INVENTORY OF PERSONAL BELONGINGS****Inventory**

1. The following is a complete list of the valuables and personal belongings of _____ [name of resident], "Resident," which are presently being kept on the premises of _____ [name of facility],

"Facility." Facility will not be responsible for any items that are not listed on this sheet or that are deleted from this sheet by Resident. It is the responsibility of Resident and his or her responsible party to ensure that this inventory is updated to include any valuables or personal belongings brought into Facility subsequent to its execution. This inventory may be updated by contacting _____ [name, title, and telephone extension or location of appropriate facility employee].

Furnishings: [list and specifically describe]

Jewelry: [list and specifically describe]

Please Note: Jewelry and other valuables may be deposited with Facility for safekeeping, by contacting _____ [name, title, and telephone extension or location of appropriate facility employee]. Facility will not be liable for the loss or theft of any valuables that Resident could have, but failed to, so deposit.

Personal Effects: [list and specifically describe; e.g., one pair of dentures, engraved with Resident's social security number]

Clothing: [list and specifically describe]

Miscellaneous: [list and specifically describe]

Removal of Items From Facility

2. The following items may be removed from facility from time to time, for regular cleaning or the like, and shall not for that reason be deemed to be removed from this inventory: [list generally, e.g., everyday clothing, as described above]

I acknowledge that I have received a copy of this Inventory of Personal Belongings.

Dated: _____.

_____ [signature of resident or resident's authorized representative]
[title of authorized representative, if appropriate]

TO BE COMPLETED ON RETURN OF RESIDENT'S BELONGINGS:

Receipt of Surrender

I acknowledge receipt from _____ [name of facility] of the items listed in the above Inventory of Personal Belongings.

Dated: _____.

_____ [signature of resident or, if resident has died, his or her heir or personal representative]
[title of heir or personal representative, if appropriate]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare
LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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DIVISION VII: PERSONAL TRANSACTIONS
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PART IV. FORMS

A. Long-Term Health Care Facilities for the Elderly

33-105 California Legal Forms--Transaction Guide § 105.205

§ 105.205 Abbreviated Contract of Admission for Respite Care Services

[1] Comment

[a] Use of Form

This form is an admission agreement to be used when placing a frail elderly or functionally impaired person in a licensed skilled nursing facility or intermediate care facility [see *Health & Safety Code § 1250(c), (d)*], on a temporary or periodic basis to relieve those who are providing home health care for that person [see *Health & Safety Code § 1418.1(f)* ("temporary or periodic" defined as a period of time not to exceed 15 consecutive days or a total of 45 days in any one year)]. This type of care is known as respite care [*Health & Safety Code § 1418.1(e)*]. For a discussion of the law applicable to respite care generally, see *§ 105.17[3]*.

Contracts of admission to skilled nursing and intermediate care facilities for respite care services are known as "abbreviated contracts of admission." This is because they are not required to contain all of the provisions set forth by statute for skilled nursing and intermediate care facility admission contracts generally [*Health & Safety Code § 1599.60(a)*; see [b], *below*].

[b] Provisions Not to Be Included in Agreement

An abbreviated contract of admission is not required to contain any of the following provisions [*Health & Safety Code § 1599.60(a)*]:

- A prohibition against the facility's requiring or soliciting as a condition of admission that a Medi-Cal beneficiary have a responsible party sign or cosign the admission contract [*Health & Safety Code § 1599.65(b)*; see *Welf. & Inst. Code § 14110.8(b)*].
- A statement that optional and covered services may be different for residents covered by Medicare or Medi-Cal than for private residents [*Health & Safety Code § 1599.67(b)*].

- A statement that (1) neither the prospective resident, nor his or her representative, may be required to pay privately for any period during which the resident has been approved for payment by Medi-Cal, (2) upon presentation of the Medi-Cal card or other proof of eligibility, the facility must submit a Medi-Cal claim for reimbursement, and (3) no certified facility may require as a condition of admission, either in its contract of admission or by oral promise prior to signing the contract, that residents remain in private pay status for a specified period of time [*Health & Safety Code § 1599.69(a)*; see *Welf. & Inst. Code § 14019.3*].

- A statement that the facility may not transfer or seek to evict any resident as a result of the resident changing his or her manner of purchasing the services from private payment or Medicare to Medi-Cal [*Health & Safety Code § 1599.76(b)*].

- Statements concerning the facility's bedhold policy [*Health & Safety Code § 1599.79*; see *22 Cal. Code Reg. § 72520*]. Skilled nursing and intermediate care facilities are not generally required to provide a bedhold for a person receiving respite care services when the person is transferred to a general acute care hospital [*Health & Safety Code § 1418.1(b)*; see *Health & Safety Code § 1250(a)*].

Abbreviated contracts also are not subject to the prohibition against requiring, as a term of the contract, notice of a resident's intent to convert to Medi-Cal status prior to the date of the resident's application for Medi-Cal status [*Health & Safety Code §§ 1599.60(a), 1599.69(b)*].

For discussion of the required provisions for skilled nursing and intermediate care contracts, see § 105.200[1].

[c] Provisions to Be Included in Agreement

Except as specified in [b], *above*, abbreviated contracts of admission to skilled nursing or intermediate care facilities for respite care services must conform to the statutory form and content requirements generally applicable to contracts of admission to these types of facilities [*Health & Safety Code § 1599.60(a)*; see *Health & Safety Code §§ 1599.60-1599.84*]. These requirements are discussed in § 105.200[1]. Abbreviated contracts of admission must also include all of the following provisions:

- For a skilled nursing facility contract (or abbreviated contract), an attachment, placed before any other attachment, that discloses the name of the owner and licensee and the name and contact information of a single entity that is responsible for all aspects of patient care and the operation of the facility [*Health & Safety Code § 1599.64(c)*].

- A statement indicating that the respite care provided by the facility is not a Medi-Cal covered service and can only be provided by the facility on a private-pay or third-party payor basis, unless the person is participating in a Medicaid waiver program pursuant to 42 U.S.C. § 1396n, or other respite care service already covered by the Medi-Cal program [*Health & Safety Code § 1599.64(d)*].

- The discharge date agreed to upon admission by the facility and the person being admitted or his or her representative. This discharge date will be binding as a ground for discharge in addition to any other ground for discharge pursuant to federal or state law and regulations [*Health & Safety Code § 1599.64(e)*; see § 105.23].

- A statement informing the person being admitted for respite care services that the contract is designed specifically for the provision of respite care services and cannot be used for any other type of admission to the facility [*Health & Safety Code § 1599.64(f)*].

This form complies with the statutory requirements as to the contents of abbreviated contracts for admission to skilled nursing or intermediate care facilities for respite care services.

[d] Documents to Be Provided to Admittee

At the time a patient is admitted to a skilled nursing or intermediate care facility, the facility must provide the following:

- Copies of *Health & Safety Code* §§ 1289.3, 1289.4, and 1289.5 (§ 105.200[2], Exhibit E) [*Health & Safety Code* § 1289.4(k)].
- The notice concerning Medi-Cal eligibility and community property agreements specified in *Welf. & Inst. Code* § 14006.4 (§ 105.202) [*Welf. & Inst. Code* §§ 14006.2(b), 14006.3].
- The Patients' *Bill of Rights* as set forth by statute and regulation (§ 105.200[2], Exhibit C) [*Health & Safety Code* § 1599.1].

In addition, the admittee or his or her legal representative or responsible party should receive copies of the executed admission contract and the facility's list of charges for services.

[e] Subsequent Admissions of Same Person

A person who has once been admitted to a skilled nursing or intermediate care facility for respite care services pursuant to an abbreviated contract of admission executed in accordance with the applicable statutory requirements and signed by that person, or his or her legal representative or responsible party [*see 22 Cal. Code Reg. § 87101(r)(6)* (definition)], does not need to execute a new abbreviated contract of admission for a subsequent admission to the same facility for respite care services. Instead, at the time of the subsequent admission the person, or his or her legal representative or responsible party, may sign a written statement prepared by the facility that lists the modifications to the prior abbreviated contract of admission. The statement must indicate the date it was signed by the person or his or her legal representative or responsible party. The facility must file the statement with the previously executed abbreviated contract of admission [*Health & Safety Code* § 1599.652].

This procedure may not be used if the person seeking admission has been declared legally incompetent subsequent to the time he or she signed the original abbreviated contract of admission, or if the person's physician has determined that the person is unable to understand and sign the written statement because of his or her medical condition [*Health & Safety Code* § 1599.652].

[2] FORM

Abbreviated Contract of Admission for Respite Care Services

[Form must be printed in at least 10-point type, with print appearing on one side of each page only (*Health & Safety Code* § 1599.64(a)). Form must comply with *Health & Safety Code* §§ 1599.60-1599.84.]

ABBREVIATED CONTRACT OF ADMISSION TO _____ [name of facility] FOR RESPITE CARE SERVICES

Admission to Facility

1. _____ [Name of patient] ("Patient"), [_____ (name of conservator, guardian, or other responsible party),] and _____ [name of facility], ("Facility"), agree that Patient shall be admitted to Facility on _____ [date] for respite care services under the terms and conditions set forth in this Agreement. This Agreement is designed specifically for the provision of respite care services, and cannot be used for any other type of admission to Facility.

Medical Treatment

2. (a) Patient is under the medical care of Dr. _____ [name of physician], _____ [address of physician], [telephone number of physician] ("Patient's Attending Physician"). Patient's Attending Physician may issue advance orders for Patient's care and treatment for a period not to exceed 90 days from the date of Patient's admission to Facility, based on Patient's medical history, diagnosis, and physical assessment conducted upon admission. Facility may readmit Patient for respite care services on the basis of these advance orders, unless Patient's Attending Physician indicates that there has been a significant change in Patient's medical condition. The advance orders shall be used by Facility only during periods in which Patient is receiving respite care services. Facility shall follow the advance orders of Patient's Attending Physician in providing care to Patient, provided that Patient's Attending Physician observes all applicable rules and regulations of Facility as well as any applicable federal and state agency regulations. Facility shall have the authority to contact Patient's Attending Physician at any time that, in the opinion of the Medical Director of Facility, Patient requires the attention of that physician.

(b) Facility shall have the authority, in the event that Patient's Attending Physician is unavailable during an emergency medical situation, to contact another licensed physician to attend Patient or, if it appears necessary in the opinion of the Medical Director of Facility, to transfer Patient to an acute care hospital.

(c) Patient has the right to refuse treatments to the extent permitted by law, and to be informed of the medical consequences of his or her refusal.

(d) Facility provides general duty nursing care, and Patient hereby authorizes and consents to the providing of the care. If Patient requires special duty nursing care, that care must be arranged for by Patient, Patient's authorized representative, and/or Patient's Attending Physician. Facility shall not be liable for the failure of Patient or Patient's Attending Physician to arrange for any special duty nursing care required by Patient.

(e) Patient [and/or Guarantor] shall be responsible for the payment of all charges for services provided by Patient's Attending Physician and all emergency medical services provided by other physicians selected by Facility under the terms of this Paragraph.

Basic Daily Rate

3.(a) Facility shall provide those services set forth in Paragraph 4 of this Agreement for the duration of Patient's stay. The basic daily rate for the services listed in Paragraph 4 is \$_____.

(b) Facility's basic daily rate as set forth in this Paragraph, and the rates for optional services and supplies set forth in Paragraph 5 of this Agreement, are subject to change only upon 30 days written notice to Patient, except as permitted by *Health and Safety Code Section 1288*. If Patient does not agree to pay any rate change instituted by Facility, Patient shall leave Facility no later than the day before the rate increase becomes effective. If Patient does not vacate Facility in the time specified in this Paragraph, Patient [and Guarantor] shall be deemed to have consented to the rate increase.

Services Included in Basic Daily Rate

4. The basic daily rate includes the following:

(a) [Private or Semi-private or other appropriate description of number of persons to share room] room.

(b) Three daily meals, or the number of meals prescribed by Patient's Attending Physician.

[EITHER, if facility is to provide skilled nursing care:]

(c) Skilled nursing care and treatment for 24 hours per day, seven days per week, including regular assessment of Patient's needs and development of written care plan by nursing staff.

[OR, if facility is to provide intermediate care:]

(c) Skilled nursing supervision and supportive care as needed, including regular assessment of Patient's needs and development of written care plan by nursing staff.

[Continue with the following:]

(d) Medical supervision of Patient, including prompt notification of Patient's Attending Physician of any conditions or events for which notice is required by law.

(e) Maintenance of detailed medical records on Patient's condition, including diagnoses and medications.

(f) Activity programs.

[Add, if facility is to provide skilled nursing care:]

(g) Complete dietary services, including preparation and service of specialized meals.

(h) Pharmaceutical services.

Services and Supplies Excluded From Basic Daily Rate

5. The basic daily rate does not include the following services and supplies. Facility will, upon request of Patient, arrange for these services and supplies to be provided. Charges for these services and supplies shall be at the rate set forth in Exhibit A, which is attached to and incorporated into this Agreement. The rates specified in Exhibit A may be adjusted on a periodic basis under the terms set forth in Paragraph 3 of this Agreement.

(a) Special duty nursing charges.

(b) Personal laundry.

(c) Physical therapy.

- (d) Speech and occupational therapy.
- (e) Audiology.
- (f) Social work.
- (g) Private telephone service.
- (h) Grooming items, cosmetology, and barber services.
- (i) Laboratory and x-ray charges prescribed by physician.
- (j) Any other items, including equipment for Patient's permanent use, ordered by Patient's Attending Physician.

All services excluded from Facility's basic daily rate shall be billed to Patient's account according to the rate schedule in effect at the time the services are provided.

Payment for Services

6. (a) Patient [or Guarantor] shall pay to Facility, on or before _____ [date], the sum of \$[*basic daily rate multiplied by length of stay in days*] as payment in full for Facility's provision of the services listed in Paragraph 5 of this Agreement from _____ [admission date] through the discharge date specified in Paragraph 17 of this Agreement.

(b) Facility shall provide Patient [or Guarantor] with an itemized statement of charges incurred by Patient for services other than those covered by Facility's basic daily rate, within _____ days of Patient's actual discharge date. Patient [or Guarantor] shall, within _____ days after receipt of this statement, pay to Facility the amount due in full.

(c) Any sums not paid when due as set forth under this Paragraph shall accrue interest at the rate of _____ percent for each 30 days or part thereof that a balance due remains outstanding. In any suit brought by Facility to collect any sums due on Patient's account, or any other suit arising out of this Agreement, the prevailing party shall be entitled to have reasonable attorneys' fees paid by the other party.

Refunds and Collections

7. (a) On discharge or transfer from Facility, Patient shall receive a refund based on unused days minus any sums outstanding and due to Facility. There will be a charge, equal to Facility's basic rate for three days, for any voluntary discharge less than three days after Patient's admission to Facility. All refunds shall be paid by Facility to Patient within ten business days after Patient is transferred or discharged. If Patient does not vacate Facility by 12:00 noon on the day of discharge as specified in Paragraph 17 of this Agreement, Patient shall be responsible for payment of the basic daily rate for that day.

(b) In the event of Patient's death or involuntary discharge, neither Patient nor Patient's heirs, legatees, or personal representative shall be liable for any amounts due under this Agreement for accommodations beyond the date on which Patient dies or is discharged. Any advance payments shall be returned to Patient or to Patient's heirs, legatees, or personal representatives no later than two weeks after the death or discharge of Patient. The provisions of this Paragraph

shall not be subject to modification or waiver.

Medi-Cal

8. (a) Patient understands that respite care services, as defined by *Health and Safety Code Section 1418.1*, provided by Facility are not Medi-Cal covered services and can only be provided by Facility on a private-pay or third-party payor basis, unless Patient is participating in a Medicaid waiver program pursuant to *42 United States Code Section 1396n*, or other respite care service already covered by the Medi-Cal program.

(b) Facility presently [participates or does not participate] in the Medi-Cal program. [*If facility does participate in the Medi-Cal program, add: The participation of Facility in the Medi-Cal program is strictly voluntary. Facility shall have the right to terminate participation in the Medi-Cal program at any time, after giving Patient 60 days notice of its intent to do so.*]

Release of Medical Information

9. Facility shall respect Patient's right to confidential treatment of Patient's medical information. For the duration of Patient's stay at Facility, Facility may release information in its records regarding the nature, diagnoses, or treatment of Patient's physical condition, and all medical, dental, laboratory, and hospital records that it maintains on Patient only as follows:

(a) In the case of Patient's transfer to another facility, to the extent necessary for Patient's treatment by that facility.

(b) As set forth in Patient's Authorization for Release of Information From Medical Records, which is attached to and incorporated into this Agreement as EXHIBIT B.

(c) As required by law or by any third party payment contract executed by Patient.

Release of Financial Information

10. Patient authorizes Facility to disclose all or any part of Patient's financial records to any agency or entity that is or may be responsible for any or all of the cost of care provided to Patient by Facility.

Termination of Agreement

11. (a) Patient may terminate this Agreement upon 30 days written notice to Facility. Patient shall be liable for any adverse consequences if he or she terminates this agreement and/or leaves Facility prior to being discharged by Patient's Attending Physician.

(b) Except in an emergency situation, Facility may discharge or transfer Patient only upon 60 days written notice and must provide discharge planning to Patient prior to the discharge or transfer. Patient may be discharged or transferred only for cause. For the purpose of this Agreement, "cause" shall mean

(1) Patient requires a level of care not available in Facility;

(2) Patient endangers the health and welfare of other patients or residents in Facility;

- (3) Patient disturbs other patients or residents in Facility;
- (4) Patient fails to comply with Facility's rules of patient conduct as set forth in Paragraph 13 of this Agreement;
- (5) Patient loses federal and/or state health care benefits and fails to pay the private rate charged by Facility; or
- (6) Within 90 days of Patient's admission, Facility discovers that Patient made a material misrepresentation of his or her financial condition, and the misrepresentation was relied on by Facility in agreeing to admit Patient.

Transfer Policy

12. (a) Facility shall have the right to move Patient to a different room when, in the opinion of the Medical Director of Facility, the move is necessary or desirable.
- (b) Facility shall have the right to transfer Patient to an acute care hospital with which it has a transfer agreement if, in the opinion of the Medical Director of Facility or Patient's Attending Physician, Patient requires services that are available in the hospital and that Facility is not equipped to provide.
- (c) Except in the case of a medical emergency, prior to moving or transferring Patient under the provisions of this Paragraph, Facility shall provide at least 24 hours notice to Patient [and/or Guarantor]. At the time of notification, Facility shall provide Patient [and/or Guarantor] with a written explanation of the reasons for the proposed move or transfer.

Rules of Patient Conduct

13. Patient agrees to observe the following rules of Facility, and other reasonable rules that may be adopted by Facility upon [e.g., 30] days written notice to Patient. Facility shall not adopt unreasonable rules, and Patient may suggest changes in the rules, file a grievance regarding the rules, or file a grievance with the State Department of Health Services or the Long-term Care Ombudsman at any time. A copy of Facility's grievance procedure may be obtained from _____[*name and title of appropriate person*].

- (a) Food or beverages may be brought into Facility or otherwise provided to Patient only if authorized by, and subject to any limitations imposed by, Patient's physician. Any food or beverage brought into Facility must be approved by authorized Facility personnel before being given to Patient. Smoking materials and alcoholic beverages may be kept on the premises only with the prior permission of Patient's Attending Physician and the Administrator, and must be kept in the custody of authorized Facility personnel at all times.
- (b) Patient may bring medication to Facility only if the contents have been examined and positively identified at the time of Patient's admission by Patient's Attending Physician or Facility's pharmacist.
- (c) Patient shall not bring any furniture or appliances on the premises of Facility without first obtaining the approval of the Administrator. Within the limitations imposed by space, Facility shall make every effort to accommodate Patient's wishes regarding his or her personal effects.
- (d) Patient and Patient's visitors and guests shall abide by Facility's rules with respect to visiting hours. Regular visiting hours at Facility are [*specify, e.g., 11:00 A.M to 9:00 P.M.*] daily. Patient or Patient's relatives [*or Guarantor*] may make special arrangements for visits at other times by obtaining the Administrator's consent in advance. Except in cases

involving medical emergency, the Administrator may deny such a request if it would unduly disturb, inconvenience, or invade the privacy of other patients or residents of Facility. Members of the clergy, upon Patient's request, may visit at any time.

(e) Upon Patient's request or the request of Patient's family [or Guarantor], Patient shall be free to leave Facility at any time and for any purpose. However, if the Administrator or Medical Director of Facility believes that Patient's well-being will be endangered by a departure from Facility, Patient's physician will be consulted and Facility shall not be liable for any ill effects suffered by Patient as a result of the departure.

Theft and Loss Policy

14. It is the policy of Facility to provide reasonable protection against the loss of Patients' personal belongings and valuables. Patient may obtain a lock for his or her bedside cabinet or drawer by contacting _____ [name, title, and telephone extension or office number of appropriate facility employee]. Patient may also deposit money (subject to Paragraph 15 of this Agreement) and other valuable items of personal property with Facility for safekeeping. Facility shall not be liable for the loss or theft of any items not listed on the Inventory of Personal Belongings attached to and incorporated into this Agreement as EXHIBIT D or any valuables that Patient could have deposited but failed to deposit with Facility. Facility reserves the right to refuse to allow items of personal property that are valued at \$ _____ or more and are not necessary for Patient's health or reasonable comfort to be kept on the premises if, in the opinion of the Administrator, adequate safekeeping cannot be provided for them.

Patient's Personal Funds

15. (a) Patient shall not be obligated to deposit any funds with Facility. Patient shall have the right to select the manner in which his or her personal funds shall be handled, including but not limited to any options set forth in this Paragraph.

(b) Patient or Patient's legal guardian may receive, retain, and manage Patient's personal funds.

(c) Patient may apply to the Social Security Administration to have a representative payee designated for purposes of receiving federal or state benefits to which Patient is entitled.

(d) Unless a representative payee has been appointed by the Social Security Administration, Patient may designate, in writing, another person to manage his or her personal funds.

(e) Facility shall be obligated, upon Patient's written authorization, to hold, safeguard, and account for Patient's funds under Title 22, Section _____ [for a skilled nursing facility: 72529 or, for an intermediate care facility: 73557] of the California Code of Regulations. Any charge for holding, safeguarding, and accounting for Patient's funds is included in the basic rate of Facility.

(f) Facility shall be allowed to accept Patient's funds to hold, safeguard, and account for only upon written authorization of Patient or of his or her representative, or if Facility is appointed as Patient's representative payee. If Patient becomes incapable of managing his or her personal funds and does not have a representative, Facility shall assume management of Patient's funds and shall manage the funds in accordance with the requirements of Title 22, Section _____ [for a skilled nursing facility: 72529 or, for an intermediate care facility: 73557] of the California Code of Regulations.

Nondiscrimination

16. Facility shall not discriminate against Patient on the basis of race, religion, political affiliation, or the source from which Patient receives funds for payment of services provided by Facility.

Discharge Date

17. Patient will be discharged from Facility on _____[*date*]. This discharge date shall be binding as a ground for discharge in addition to any other grounds stated in this Agreement or provided by state or federal law.

Executed at _____[*city*], California, on _____[*date*].

PATIENT

_____ [*signature of patient*]

[*typed name*]

[*Add, if applicable:*]

GUARANTOR

_____ [*signature of guarantor*]

[*typed name*]

[*Continue with the following:*]

FACILITY

By _____ [*name of signatory for facility*]

[*typed name and title*]

[*Add Exhibits A-E and, if desired, Exhibit F, from form in § 105.200[2], changing "Resident" to "Patient" as necessary.*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsServicesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART IV. FORMS

A. Long-Term Health Care Facilities for the Elderly

33-105 California Legal Forms--Transaction Guide § 105.206

§ 105.206 Readmission Statement Modifying Prior Admission Contract

[1] Comment

[a] Use of Form

This form is a statement concerning readmission to a skilled nursing or intermediate care facility [*see Health & Safety Code § 1250(c), (d)* (definitions)] of a person previously admitted to the facility pursuant to a written contract of admission. It may be used either by a person previously admitted pursuant to a regular contract of admission [*see § 105.200*], or by a person previously admitted pursuant to an abbreviated contract of admission for respite care [*see § 105.205*]. However, it may only be used if the person is seeking readmittance for the same type of care (that is, regular care or respite care) provided under the original contract [*see Health & Safety Code §§ 1599.64(f), 1599.651, 1599.652*].

[b] Requirements for Readmission Statements

A person who seeks to be admitted to a skilled nursing or intermediate care facility is not required to execute a contract of admission if both of the following requirements are satisfied [*Health & Safety Code §§ 1599.651, 1599.652*]:

- There exists a prior executed contract of admission for the type of care sought (that is, regular care or respite care), signed by the admittee or his or her legal representative, responsible party [*see 22 Cal. Code Reg. § 87101(r)(6)* (definition); *see also § 105.15[3]*], or agent in accordance with *Health & Safety Code § 1599.60 et seq.*
- The admittee, or his or her legal representative, responsible party, or agent, signs a written statement prepared by the facility that lists the modifications to that contract.

The written statement may not contain any provision that is prohibited from being included in a contract of admission to a skilled nursing or intermediate care facility [*Health & Safety Code § 1599.651*].

The written statement must be signed prior to or at the time of readmission. It must indicate the date on which the

signature of the admittee, legal representative, responsible party, or agent was obtained. The facility must keep the written statement on file with the admittee's previously signed contract of admission [*Health & Safety Code §§ 1599.651, 1599.652*].

[c] Situations in Which Readmittance Statements Are Not Used

A written readmission statement cannot be used if the admittee has been declared legally incompetent after the time that he or she signed either the original or abbreviated contract of admission, or if the admittee's physician and surgeon has determined that the admittee is unable to understand and sign the written statement because of his or her medical condition [*Health & Safety Code §§ 1599.651, 1599.652*].

A written readmittance statement or a new contract of admission need not be signed by the admittee, legal representative, responsible party, or agent in order to readmit to a skilled nursing or intermediate care facility a person transferred during a bedhold period [*Health & Safety Code § 1599.651; see Health & Safety Code § 1599.79; 22 Cal. Code Reg. § 72520; see also § 105.200[1][1]*].

[2] FORM

Readmission Statement

READMISSION STATEMENT FOR _____ [*name of facility*]

This Statement provides for the readmittance of _____ [*name of admittee*] ("Admittee") to _____ [*name of facility*] ("Facility") [for respite care services].

(1) Admittee was previously admitted to Facility on _____ [*date*], pursuant to a written [contract of admission or abbreviated contract of admission for respite care services] executed in accordance with all applicable state and federal laws and regulations and signed by _____ [Admittee or _____ (*name of signatory*)] as Admittee's _____ (legal representative or responsible party or agent) on _____ [*date*], a copy of which is attached to this Readmission Statement].

(2) Admittee shall be readmitted to Facility [for respite care services] on _____ [*date*], under the terms specified in the [contract of admission or abbreviated contract of admission for respite care services] identified in Paragraph (1) of this Readmission Statement, except that the following modifications are made to that contract:

[*List modifications, identifying paragraph or section numbers of previous contract as appropriate.*]

Dated: _____.

[signature of admittee, legal representative,
responsible party, or agent]
[typed name and capacity]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions General Overview Family Law Family Protection & Welfare Elderly Persons General Overview Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons General Overview Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons Care Facilities General Overview Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons Care Facilities Nursing Facilities



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART IV. FORMS
A. Long-Term Health Care Facilities for the Elderly

33-105 California Legal Forms--Transaction Guide §§ 105.207-105.219

[Reserved]

§§ 105.207[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART IV. FORMS

B. Residential Care Facilities for the Elderly

33-105 California Legal Forms--Transaction Guide § 105.220

§ 105.220 Application for Admission to Nonprofit Residential Care Facility for the Elderly

[1] Comment

[a] Use of Form

This form is an application for admission to a nonprofit residential facility for the elderly. It is included here to illustrate the types of questions that appear on applications for admission to those facilities. Residential care facilities for the elderly provide their own admission applications and agreements. An attorney counseling a client who is either entering or placing an individual in a such a facility should carefully review the application and admission agreement used by the facility. For an admission agreement between an individual and a residential care facility for the elderly, see § 105.222. For a representative statement of admission policies, see § 105.221. For an analysis of the level of care provided by residential care facilities for the elderly, see § 105.15.

[b] Admission to Residential Care Facilities for the Elderly

Residential care facilities for the elderly may only admit certain classes of persons [22 *Cal. Code Reg.* §§ 87455(c), 87609, 87615; see *Health & Safety Code* § 1569.2(k), (l)]. For a complete list of these classes, see § 105.120.

Residential care facilities for the elderly generally may not maintain discriminatory admissions policies [see 22 *Cal. Code Reg.* § 87118(a)]. However, nonprofit facilities established and operated for members of a particular group, such as fraternal organizations, cultural or ethnic groups, or individuals involved in a particular profession or occupation, may limit admission to members of that group [see 22 *Cal. Code Reg.* § 87118(b)]. For an analysis of the nondiscrimination regulations applicable to residential care facilities for the elderly, see § 105.221[1][b].

[c] Pre-Admission Appraisal

Before a community care facility may accept an applicant, it must conduct an interview with the applicant and his or her responsible person, if any, perform a pre-admission appraisal, obtain and evaluate a recent medical assessment, and execute an admission agreement [22 *Cal. Code Reg.* § 87457]. The pre-admission appraisal is designed to ensure that

the facility will be able to offer services that will benefit the particular individual. For a complete list of the factors that must be considered in a pre-admission appraisal, see § 105.120.

[2] FORM

Application for Admission to Residential Care Facility for the Elderly

APPLICATION FOR ADMISSION TO RESIDENTIAL CARE FACILITY FOR THE ELDERLY

GENERAL INFORMATION

Basic Eligibility

1. Residence in _____ [*name of facility*] is open to all senior citizens regardless of race, color, or creed provided that they meet the eligibility regulations of the Department of Housing and Urban Development. These regulations require that single residents and one spouse of married residents be at least 62 years of age. The _____ [*name of facility*] is intended to serve senior citizens with low fixed incomes. Therefore, the maximum annual income is \$[*specify, e.g., 6,400*] for a married couple, \$[*specify, e.g., 5,500*] for a single resident living alone, and \$[*specify, e.g., 4,300*] each for two single residents sharing an apartment.

Independent Living

2. All residents must be able to maintain their own households and carry on independent living.

Rates and Subsidies

3. _____ [*Name of facility*] is a nonprofit project. Rental rates are set to cover the cost of operation and must meet the loan repayment obligations to the federal government. Rental rates include all utilities and services except for telephones. Carpeting, drapes, range, and refrigerator are furnished. Residents provide the balance of furnishings. A refundable cleaning deposit of \$10 is required.

Policy of Acceptance

4. It is the policy of the sponsor to accept all eligible applicants subject to space limitations and regardless of the sources used for payment of the rental.

Confidentiality of Information

5. All personal data will be kept strictly confidential.

Admissions Determinations

6. All applications are subject to the Admission Committee of the Board of Directors. Priorities for admission are

determined by a point system based on time on waiting list, need, urgency, and availability of suitable accommodations.

PERSONAL INFORMATION

1. Name of Applicant: _____ Date of Birth: _____
 Name of Spouse: _____ Date of Birth: _____
2. Social Security Numbers: _____ Applicant: _____
 Spouse: _____
3. Present Address: _____
 Telephone: _____
4. Legal Residence:
 City _____
 County _____
 County _____
 State _____
5. Marital Status: ☐ Married ☐ Single
☐ Widow(er) ☐ Separated
6. Next of Kin or Person to Be Notified in Emergency:
 Name _____ Relationship _____
 Address _____ Telephone _____
7. Religious Affiliation:
 Denomination _____
 Congregation _____
 Priest, Minister, or Rabbi: _____
 Address _____
8. Name of Family Physician: _____
 Address _____
 Telephone _____
9. Health Insurance:
 S.S. Medicare: ☐ Yes ☐ No
☐ Hospital ☐ Medical
 Other Commercial Insurance: ☐ Yes ☐ No
☐ Hospital ☐ Medical
 Name of Commercial Insurance Carrier or Agent _____

Address _____

Telephone _____

10. Type of Accommodations Desired (Please check one):

- ☐ Efficiency Apartment \$_____ per month
- ☐ One-Bedroom Apartment \$_____ per month
- ☐ Two-Bedroom Apartment \$_____ per month

11. References (Not Relatives):

Name _____

Address _____

Name _____

Address _____

Name _____

Address _____

I [or We] have read the rules for residents (rules of residency) of _____ [name of facility] and agree to abide by them without exception.

I [or We] agree that, when, in the opinion of the Board of Directors and medical advisor of _____ [name of facility], I am [or we are] no longer able to maintain independent living, I [or we] will arrange for more suitable living arrangements.

Dated: _____.

_____ [signature(s) of applicant(s)]
[typed name(s)]

[Click here to view image.](#)

FINANCIAL INFORMATION

1. Income

(a) From Employment (annual amount) \$_____

(b) From Social Security (annual amount) \$_____

(c) From Pension (annual amount) \$_____

Source: ☐ State OAS ☐ RR Retirement

☐ Company ☐ Government

(d) From investments (annual amount) \$_____

(e) Family assistance (annual amount)	_____	\$ _____

TOTAL ANNUAL INCOME		\$ _____

2. Financial Statement		
(a) Assets		
(1) Real Estate (Value of property or equity)		\$ _____

(2) Stocks and bonds (cash value)		\$ _____

(3) Life insurance (cash value)		\$ _____

(4) Cash savings		\$ _____

(5) Other assets		\$ _____

TOTAL ASSETS		\$ _____

(b) Liabilities		
(1) Real estate mortgages (total amount)		\$ _____

(2) Personal loans and chattel mortgages		\$ _____

(3) Other obligations		\$ _____

TOTAL LIABILITIES		\$ _____

NET VALUE OF ESTATE		\$ _____

I certify that the above information is correct to the best of my knowledge.

_____ [signature of applicant]
 [typed name]

NOTE

If the financial situation of the applicants should change, or if their address or telephone number should change prior to admission, they are requested to keep the home informed of that change.

AUTHORIZATION FOR RELEASE OF INFORMATION

I hereby authorize my physician, Dr. _____, _____[*address*],
 _____[*city and state*] to release to the management of _____[*name of facility*] such
 information as is requested, for the purpose of determining my ability for compatible, independent living in
 apartment-type accommodations.

_____[*signature of applicant*]
 [typed name]

_____[*signature of applicant*]
 [typed name]

NOTE

If there is more than one applicant, both must sign the above release.

CERTIFICATION OF HEALTH STATUS

[*To be completed by applicant's physician:*]

Name of Applicant: _____

1. Can applicant walk the equivalent of a city block unassisted?
☐ Yes ☐ No
2. Could applicant evacuate apartment quickly and safely in event of emergency?
☐ Yes ☐ No
3. Can applicant bathe and dress himself or herself?
☐ Yes ☐ No
4. Does applicant require the services of a Home Health Aide or Home Care Nursing?
☐ Yes ☐ No
5. Is applicant capable of preparing nutritious meals safely in own kitchen?
☐ Yes ☐ No
6. Does applicant have any history of alcoholism?
☐ Yes ☐ No
 Mental illness?
☐ Yes ☐ No
7. Is applicant's mental and emotional stability normal for his or her age and physicals
☐ Yes ☐ No

I certify that to the best of my knowledge, the above-named applicant is physically, mentally, and socially able to maintain his or her own household and to carry on independent living in apartment-type accommodations.

Remarks: _____

Dated: _____.

_____ [signature of physician]
[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART IV. FORMS

B. Residential Care Facilities for the Elderly

33-105 California Legal Forms--Transaction Guide § 105.221

§ 105.221 Admission Policy of a Residential Facility for the Aged

[1] Comment

[a] Use of Form

This form is a sample admission policy of a charitable residential facility for the aged. The admission policy of the facility is generally attached to the application for admission [see § 105.220] or the admission agreement [see § 105.222]. For a complete list of persons who may and may not be admitted to residential facilities for the aged, see § 105.120. Since these facilities provide varying levels of medical and/or rehabilitative services beyond the services they must provide [see 22 Cal. Code Reg. § 87605 et seq.], it is advisable to ascertain whether the residential facility is associated with a skilled nursing facility and an acute care hospital in case the resident requires a higher level of care following admission.

[b] Policy of Nondiscrimination

A residential facility for the elderly must admit persons on a nondiscriminatory basis according equal treatment and services without regard to age, sex, race, religion, color, political affiliation, national origin, disability, marital status, actual or perceived sexual orientation, or ancestry [22 Cal. Code Reg. § 87118(a)]. However, any bona fide nonprofit religious, fraternal, or charitable organization that can demonstrate to the satisfaction of the Department of Health that its primary or substantial purpose is not to evade this requirement, may establish reception policies limiting or giving preference to its own members or adherents [22 Cal. Code Reg. § 87118(c)(1)]. Membership must be nondiscriminatory, however, and the policy must not be construed as a violation of the nondiscrimination requirement. To the extent that nonmembers or nonadherents are admitted, their admission is subject to the nondiscrimination requirement [22 Cal. Code Reg. § 87118(b), (c)(2)].

[2] FORM

Admission Policy of Residential Facility for Aged

ADMISSION POLICY OF _____ [*name of facility*]

_____ [*Name of facility*] (the "Facility") provides comprehensive sheltered care, including room and board, medical, social, health, and nursing care services to persons _____ years of age or over, who have resided in _____ [*city or county*] for a minimum of _____ consecutive years prior to making application. Various levels of care are provided for the nearly self-sufficient to the totally dependent, with the exception of acute hospital care and care for those whose mental condition and behavior will endanger themselves or others.

Need is the primary consideration for admission to the Facility. The need may be health, personal, social, or financial, and is usually a combination of several of these factors. Priority is given to those with little or no financial resources, and to persons alone or with little contact in the community.

Applicants and/or relatives are called upon to assist to the best of their abilities. The Facility does not require an applicant to turn over all assets upon admission.

Financial arrangements are made with applicants and relatives, with each case reviewed and administered in light of its unique aspects and circumstances, such as: age and health of applicant; financial status of applicant and relatives; applicant's present and future needs; and applicant's desire to provide for his or her survivors.

Capital gifts from applicants and relatives are welcome and solicited as the Facility requires funds for capital improvement such as remodeling and modernization of its main building and for future expansion.

The Facility provides services on a nondiscriminatory basis, and accepts applicants without regard to race, color, religion, national origin, or ancestry [*or the Facility accepts only (or gives preference in admission to) applicants who are members of _____ (name of bona fide nonprofit religious, fraternal, or charitable organization), but provides services to all admitted residents on a nondiscriminatory basis without regard to race, color, religion, national origin, or ancestry*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Family Protection & Welfare Elderly Persons General Overview Public Health & Welfare
 Law Healthcare Services for Disabled & Elderly Persons General Overview Public Health & Welfare
 Law Healthcare Services for Disabled & Elderly Persons Care Facilities General Overview Public Health & Welfare
 Law Healthcare Services for Disabled & Elderly Persons Care Facilities Nursing Facilities



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART IV. FORMS

B. Residential Care Facilities for the Elderly

33-105 California Legal Forms--Transaction Guide § 105.222

§ 105.222 Admission Agreement--Licensed Residential Facility for the Elderly

[1] Comment

[a] Use of Form

This form is an admission agreement between a licensed residential facility and an elderly person. As a prerequisite to admission of a resident, a residential facility for the elderly must, among other things, complete a written, dated, executed admission agreement with the resident and his or her designated representative [22 *Cal. Code Reg.* § 87507(a), (e)]. The facility must retain the original agreement and provide copies to the resident, his or her responsible person, or conservator, if any [22 *Cal. Code Reg.* § 87507(f)]. The resident or the responsible person must date and sign the admission agreement no later than seven days following admission to the facility [22 *Cal. Code Reg.* § 87507(e)]. Attachments to these admission agreements may be employed provided that they are dated and signed [see 22 *Cal. Code Reg.* § 87507(e)].

Every residential care facility for the elderly is required to make blank complete copies of its admission agreement available to the public immediately, subject to time required for copying or mailing, at cost, upon request [*Health & Safety Code* § 1569.881(a)]. In addition, every residential care facility for the elderly must conspicuously post, in a location accessible to the public view within the facility, either a complete copy of the admission agreement or a notice of its availability from the facility [*Health & Safety Code* § 1569.881(b)].

[b] Content of Admission Agreement--In General

Various statutory and regulatory requirements govern the format and content of admission agreements to residential care facilities for the elderly. These requirements overlap to some extent and the absence of a single comprehensive scheme can make drafting or review of an admission agreement for compliance with the applicable requirements confusing. *Health & Safety Code* § 1569.880 *et seq.*, enacted in 2003, list various detailed requirements for these regulations [see [c], *below*]. The requirements imposed by *Health & Safety Code* § 1569.880 *et seq.* relating to admission agreements for residential care facilities for the elderly are intended to be in addition to, and not exclusive of, any other requirements established by state law or regulation [*Health & Safety Code* § 1569.888(a)]. In addition, the

general administrative regulations of the Department of Social Services governing community care facilities also specify requirements for the admission agreement [see 22 Cal. Code Reg. § 87507, discussed in [d], *below*]. These various requirements are also discussed in § 105.121.

The requirements imposed by *Health & Safety Code § 1569.880 et seq.* are inapplicable to licensees of residential care facilities for the elderly that have obtained a certificate of authority to offer continuing care contracts [*Health & Safety Code § 1569.888(b)*; see *Health & Safety Code § 1771(c)(5)* (continuing care contract defined); see also § 105.230].

[c] Content of Admission Agreement--Statutory Requirements

For purposes of the requirements imposed by *Health & Safety Code § 1569.880 et seq.*, "admission agreement" is not limited merely to the contract of admission, but also encompasses all documents that a resident or his or her representative must sign at the time of, or as a condition of, admission to a residential care facility [*Health & Safety Code § 1569.880(a)*].

The admission agreement must be written in clear, coherent, and unambiguous language, using words with common and everyday meanings [*Health & Safety Code § 1569.882(b)*]. It must be printed in black type of not less than 12-point type size, on plain white paper, printed on one side of the paper only [*Health & Safety Code § 1569.882(a)*]. It must be appropriately divided, and each section must be appropriately captioned [*Health & Safety Code § 1569.882(b)*].

The admission agreement must not include any provision that the facility knows or should know is deceptive, or unlawful under state or federal law [*Health & Safety Code § 1569.883(b)*]. It may not include unlawful waivers of facility liability for the health and safety or personal property of residents [*Health & Safety Code § 1569.883(a)*]. The admission agreement must not include any written attachment containing any provision that is prohibited from being included in the admission agreement [*Health & Safety Code § 1569.880(b)*].

In addition to these basic requirements, the admission agreement must also include all of the following provisions [*Health & Safety Code § 1569.884*]:

- A comprehensive description of any items and services provided under a single fee, such as a monthly fee for room, board, and other items and services [see [2], Paragraphs 2(a), 4].
- A comprehensive description of, and the fee schedule for, all items and services not included in a single fee. In addition, the agreement must indicate that the resident will receive a monthly statement itemizing all separate charges incurred by the resident [see [2], Paragraph 5]. A facility may assess a separate charge for an item or service only if that separate charge is authorized by the admission agreement. Note that if additional services that were not available at the time the admission agreement was signed are available through the facility to be purchased by the resident, a list of these services and charges must be provided to the resident or the resident's representative, and a statement acknowledging the acceptance or refusal to purchase the additional services must be signed and dated by the resident or the resident's representative and attached to the admission agreement.
- An explanation of the use of third-party services within the facility that are related to the resident's service plan, including, but not limited to, ancillary, health, and medical services, how they may be arranged, accessed, and monitored, any restrictions on third-party services, and who is financially responsible for the third-party services [see [2], Paragraphs 8-11].
- A comprehensive description of billing and payment policies and procedures [see [2], Paragraph 2(a), (b)].

- The conditions under which rates may be increased [see *Health & Safety Code § 1569.655*; see also [2], Paragraph 13].
- The facility's policy concerning family visits and other communication with residents [see *Health & Safety Code § 1569.313*; see also [2], Paragraph 16].
- The facility's policy concerning refunds [see [2], Paragraph 3].
- Conditions under which the agreement may be terminated [see [2], Paragraphs 11, 12, 15].
- An explanation of the facility's responsibility to prepare a relocation evaluation for each resident and a closure plan and to provide notice in the case of an eviction under *Health & Safety Code § 1569.682* [*Health & Safety Code § 1569.886(d)*; see *Health & Safety Code § 1569.682* (eviction resulting from facility's forfeiture of license or change in use, in accordance with the Department regulations); see also [2], Paragraph 12A].

When referring to a resident's obligation to observe facility rules, the admission agreement must indicate that the rules must be reasonable and that there is a facility procedure for suggesting changes in the rules [*Health & Safety Code § 1569.885(a)*; see [2], Paragraph 7].

The admission agreement must specify that a copy of the facility grievance procedure for resolution of resident complaints about facility practices will be made available to the resident or his or her representative [*Health & Safety Code § 1569.885(b)*; see [2], Paragraph 19]. It must also inform the resident of the right to contact the State Department of Social Services, the long-term care ombudsman, or both, regarding grievances against the facility [*Health & Safety Code § 1569.885(c)*; see [2], Paragraph 19].

A copy of any applicable resident's rights specified by law or regulation must be an attachment to all admission agreements [*Health & Safety Code § 1569.885(d)*; see §§ 105.22, 105.121, 105.200[2], see also [2], Exhibit H].

The admission agreement may not include any ground for involuntary transfer or eviction of the resident unless those grounds are specifically enumerated under state law or regulation [*Health & Safety Code § 1569.886(a)*]. The agreement must list the justifications for eviction permissible under state law or regulation, exactly as they are worded in the applicable law or regulation [*Health & Safety Code § 1569.886(b)*; see [2], Paragraph 12 (note that the grounds as listed in Paragraph 12 contain minor nonsubstantive grammar and format changes to achieve stylistic consistency with the rest of the agreement)]. Finally, it must include an explanation of the resident's right to notice prior to an involuntary transfer, discharge, or eviction, the process by which the resident may appeal the decision, and a description of the relocation assistance offered by the facility [*Health & Safety Code § 1569.886(c)*; see [2], Paragraph 12(e)].

[d] Content of Admission Agreement--Regulatory Requirements

In addition to the statutory requirements listed above, 22 *Cal. Code Reg. § 87507(c)* imposes regulatory requirements for such agreements. These requirements overlap with the statutory requirements listed in [c], *above*, and cover many of the same manners, but in different language and in a manner that is not coextensive. For this reasons, they are listed below in their entirety. Specifically, the regulation requires that admission agreements must specify the following [22 *Cal. Code Reg. § 87507(c)*]:

- Basic services to be made available [see [2], Paragraph 4].
- Optional services which are available [see [2], Paragraph 5].

- Payment provisions, including the following [see [2], Paragraphs 2, 5]:
 - Basic services rate, including any exempt-income-allowance, if the resident agrees to such charge.
 - Optional services costs.
 - Payor.
 - Due date.
 - Funding source, provided that the resident may refuse to disclose the source.
- Modification conditions, including requirement for provision of at least 30 days prior written notice to the resident of any basic rate change, or for SSI/SSP rate changes, as soon as the facility is notified [see [2], Paragraph 13]. Agreements involving persons whose care is funded at government-prescribed rates may specify that operative dates of government modifications will be considered operative dates for basic service rate modifications.
- Refund conditions [see [2], Paragraph 3]. When the DSS orders relocation of a resident because the resident has a health condition that cannot be treated at the facility [see 22 Cal. Code Reg. §§ 87612(a), 87637], the resident may not be held responsible for meeting any advance notice requirement imposed by the licensee in the admission agreement. The licensee must refund any money to which the resident would have been entitled had notice been given as required by the admission agreement [see [2], Paragraph 3(c)].
- That the department or licensing agency has the authority to examine residents' records as a part of their evaluation of the facility [see [2], Paragraph 17].
- General facility policies which are for the purpose of making it possible for residents to live together [see [2], Paragraph 7].
- Those actions, circumstances, or conditions specified in 22 Cal. Code Reg. § 87224 which may result in the resident's eviction from the facility [see [2], Paragraph 12]. Except for changes in the general facility policies [see 22 Cal. Code Reg. § 87224(a)(3)], the eviction provisions may not be modified [see [2], Paragraph 14].
- The facility's policy concerning family visits and other communication with residents [see [2], Paragraph 16; see also Health & Safety Code § 1569.313].
- Other conditions under which the agreement may be terminated [see [2], Paragraph 15].

If additional services are available through the facility to be purchased by the residents, such as cosmetology, and these are not specified in the admission agreement, a list of these services and charges must be posted in a location accessible to residents [22 Cal. Code Reg. § 87507(d); compare Health & Safety Code § 1569.884(c)]. This form contains a specification of additional services [see [2], Paragraph 5].

[e] Personal Property Inventory and Liability for Theft or Loss

Residential care facilities must make reasonable efforts to safeguard residents' property, and must implement theft and

loss programs as specified by law [*Health & Safety Code* §§ 1569.152, 1569.153; see § 105.25]. No provision of a contract of admission, which includes all documents that a resident or representative is required to sign at the time of, or as a condition to, admission to a residential care facility for the elderly may require or imply that the facility has a lesser responsibility for residents' personal property than that imposed by law [*Health & Safety Code* § 1569.154]. Paragraph 18 of this agreement includes a statement of the facility's policy regarding the safekeeping, theft, and loss of residents' property. Exhibit A contains a personal property inventory sheet, which should be updated as necessary during the resident's stay, and a provision for the surrender of the resident's personal belongings upon signed receipt when the resident is discharged or dies. These contract features are required by law [*Health & Safety Code* § 1569.153(d)-(f)].

Residential care facilities must provide copies of *Health & Safety Code* §§ 1569.152-1569.154 to all residents and their responsible parties [see *Welf. & Inst. Code* § 14110.8(a)(4) (definition)] and to prospective residents and their responsible parties on request [*Health & Safety Code* § 1569.153(k)]. A form for this purpose is provided as Exhibit B to this form.

[f] Displaying Licensing Reports

Residential care facilities must place in a conspicuous place copies of all licensing reports issued by the California Department of Social Services within the preceding 12 months, and all licensing reports issued by the department resulting from the department's most recent annual visit to the facility [*Health & Safety Code* § 1569.38]. This requirement, however, does not apply to any portion of a licensing report referring to a complaint that was found by the department to be unfounded or unsubstantiated [*Health & Safety Code* § 1569.38]. During the admission process, the facility must inform the resident and the resident's responsible person in writing that the licensing reports are available for review at the facility and that copies of these reports and other documents pertaining to the facility are available from the appropriate district office of the department. The facility also must provide the telephone number and address of the appropriate district office [*Health & Safety Code* § 1569.38].

[g] Termination of Agreement on Death of Resident

The agreement must be automatically terminated by the death of the resident, whose relatives may not be liable for any payment beyond that due at the date of death unless agreed to in writing or ordered by the court [22 *Cal. Code Reg.* § 87507(h)].

[h] Termination of Agreement on Eviction of Resident

The agreement must specify the actions, circumstances, or conditions that may result in the resident's eviction from the facility [22 *Cal. Code Reg.* § 87507(c)(8)]. With the exception of a revision of general facility policies [see 22 *Cal. Code Reg.* § 87224(a)(3)], the eviction provision of the admission agreement may not be modified [22 *Cal. Code Reg.* § 87507(c)(8)]. Eviction of a resident may occur in either of the two ways discussed below.

In general, on 30 days written notice to the resident, the facility may evict the resident for one or more of the following reasons [22 *Cal. Code Reg.* § 87224(a)]:

- Nonpayment of rate for basic services within 10 days of the due date.
- Failure to comply with laws after being notified of the necessity of compliance.
- Noncompliance with the general policies of the facility.
- If, after admission, it is determined that the resident has a need not previously identified, a reappraisal [see 22 *Cal. Code Reg.* § 87463] is conducted, and the facility and person who performed the

reappraisal believe the facility is not appropriate for the resident.

- The use of the facility changes.

There is one exception to the 30-day written notice requirement. If the facility obtains prior written approval from its licensing agency, it may evict a resident on three days written notice for good cause. "Good cause" exists if the resident is engaging in behavior which is a threat to the mental and/or physical health or safety of himself or herself or the other residents of the facility [22 *Cal. Code Reg.* § 87224(b)].

The facility must mail notice or a copy of notice to the resident's responsible person, if any. The notice must state the reasons for eviction, including specific facts relating to date, place, witnesses, and circumstances. The resident or responsible person may request an investigation into the circumstances leading to the eviction [see 22 *Cal. Code Reg.* § 87224(c)-(e)].

[i] Relocation of Resident for Health Reasons

If the Department orders relocation of a resident because of the resident's health condition [see 22 *Cal. Code Reg.* § 87612(a)], the resident may not be held responsible for meeting any advance notice requirement imposed by the facility in the admission agreement. The facility must refund any money to which the resident would have been entitled had notice been given as required by the admission agreement [22 *Cal. Code Reg.* § 87507(c)(5)(A)].

[j] Miscellaneous Admission Agreement Requirements

Any optional services not specified in the admission agreement (for example, cosmetology), and the charges for those services, must be listed and posted in a place accessible to residents [22 *Cal. Code Reg.* § 87507(d)]. The facility may not enter into any written or oral agreement with any person that releases the licensee or its employees from responsibility for providing the person with safe and healthful facilities, equipment, and accommodations [22 *Cal. Code Reg.* § 87507(g)]. No licensee may enter into any continuing care contract with any person without approval by the Department in accordance with *Health & Safety Code* § 1770 *et seq.* [22 *Cal. Code Reg.* § 87507(i); see generally § 105.230].

If the owner of the facility intends to sell the facility and the sale will result in a new license being issued for the facility [see *Health & Safety Code* § 1569.19(a)], prospective residents or their legal representatives must be informed of that fact prior to entering into an admission agreement [*Health & Safety Code* § 1569.191(a)(2)].

[k] Execution and Retention Requirements

The admission agreement must be signed and dated, acknowledging the contents of the document, by the resident or the resident's representative [*Health & Safety Code* § 1569.887(a); 22 *Cal. Code Reg.* § 87507(e)] no later than seven days following admission [22 *Cal. Code Reg.* § 87507(e)]. Attachments to the agreement may be utilized as long as they are also dated and signed [22 *Cal. Code Reg.* § 87507(e)]. The facility must provide a copy of the signed and dated admission agreement to the resident and the resident's responsible person or conservator, if any [*Health & Safety Code* § 1569.887(c); 22 *Cal. Code Reg.* § 87507(f)(1)].

The facility must retain in the resident's file the original signed and dated initial agreement and all subsequent modifications [*Health & Safety Code* § 1569.887(b); 22 *Cal. Code Reg.* § 87507(f)]. The admission agreement will be reviewed at the time of the compliance visit and in response to a complaint involving the admission agreement [*Health & Safety Code* § 1569.887(d)].

[2] FORM

Admission Agreement for Residential Facility

AGREEMENT FOR ADMISSION TO _____ [name of facility]

Parties

1. _____ [name of resident] ("resident") is admitted to _____ [name of facility] ("facility") on the terms and conditions specified in this agreement.

FINANCIAL ARRANGEMENTS**Rates and Delinquent Accounts**

2. (a) The resident [and/or guarantor] _____ [name] shall pay the sum of \$ _____ per month in advance [from _____ (funding source, if resident agrees to reveal source)] for general care of the resident, commencing on _____ [date]. Payment thereafter shall be due on the first day of each month [or specify other due date]. This monthly rate is subject to adjustment as provided in Paragraph 13(a).

(b) Any sums not paid when due, as set forth in Paragraph 2(a) will accrue interest at the rate of _____ percent for each 30 days, or part thereof, that a balance due remains outstanding.

(c) Upon signing this agreement, the resident shall pay to the facility a processing fee of \$ _____ to cover the direct and indirect costs of processing the resident's application and performing a pre-admission assessment. This processing fee is nonrefundable and is in addition to the regular monthly fee specified in Paragraph 2(a). The processing fee is not a security deposit.

(d) In any suit brought by the facility to collect any sums due on Resident's account, or any other suit arising out of this Agreement, the prevailing party will be entitled to have reasonable attorneys' fees paid by the other party.

Refunds

3. (a) In the event the resident voluntarily terminates his or her residency on advance notice to the administrator of the facility as provided in Paragraph 11, the resident shall receive a pro-rata refund of the portion of the monthly rate specified in Paragraph 2, above, equal to the portion of the month remaining after the resident has completely vacated the facility and removed all of his or her property.

(b) Except as provided in (c), below, if the resident voluntarily terminates his or her residency for any reason, including transfer to another facility, without giving the administrator of the facility advance notice as provided in Paragraph 11, the resident will be subject to a charge equal to the facility's basic daily rate for _____ days. The facility's basic daily rate for purposes of this charge will be deemed to be one-thirtieth of the monthly rate specified in Paragraph 2(a), above. Any balance of the resident's monthly rate remaining after application of this charge shall be refunded to the resident.

(c) If the Department of Social Services orders relocation of the resident under the provisions of *Title 22, Section 87612(a) of the California Code of Regulations*, the resident shall not be held responsible for meeting the advance notice requirement imposed by Paragraph 11, and shall receive a full pro-rata refund of any portion of the resident's

monthly rate as specified in Paragraph 2 remaining after the resident has completely vacated the facility and removed all of his or her property.

(d) In the event of resident's death or involuntary discharge, neither resident nor resident's heirs, legatees, or personal representatives will be liable for any amounts due under this agreement for accommodations beyond the date on which resident dies or is discharged, except as ordered by a court of competent jurisdiction. The provisions of this paragraph (d) are not subject to modification or waiver.

(e) If resident does not fully vacate the facility by 12:00 noon on the date of discharge, resident shall be responsible for payment of the facility's basic daily rate for that day.

(f) All refunds will be paid by the facility to the resident or resident's legal representative within 10 business days after the resident is transferred or discharged.

SERVICES

Regular Services

4. The monthly fee specified in Paragraph 2(a), above, includes the following basic services:

[Specify as applicable, e.g.,]

(a) Lodging in Unit [or Room or Apartment] Number _____.

(b) Three regular meals per day, including physician-prescribed diets.

(c) Utilities, except *[specify, e.g., cable television and local and long distance telephone service]*.

(d) Regular weekly housekeeping service.

(e) Assistance in arranging transportation to medical and dental appointments.

(f) Limited personal care, including assistance with personal hygiene and grooming, and assistance with taking medication, but not including medical care and the cost of prescriptions or medications, as specified in Paragraph 10.

(g) Social, recreational, and religious activities as provided by facility.

(h) Twenty-four hour emergency call monitoring and assistance by facility staff.

(i) Free use of facility's washer and dryer facilities for laundry.

[Continue with the following:]

Extra Services Provided at Additional Cost

5. The following extra services will be provided at additional cost as indicated:

Services	Cost to Guest
_____	\$ _____
_____	_____
_____	\$ _____
_____	_____
_____	\$ _____
_____	_____
_____	\$ _____
_____	_____

These charges are subject to periodic adjustment as provided in Paragraph 13(b).

The resident will receive a monthly statement itemizing all separate charges incurred by the resident for the above services, or for any other additional services subsequently made available to the resident and not included in the regular services provided to the resident as specified in Paragraph 4, above. Charges for services listed in this paragraph are due and payable on receipt of the monthly statement, and will be past due [30 or other number] days after the statement date. Past due amounts will accrue interest as provided in Paragraph 2(b).

Nondiscrimination

6. The facility shall provide all services to residents without regard to age, race, color, national origin, ancestry, religion, or sex.

Policies, Rules, and Regulations of Facility

7. Resident acknowledges that he or she was provided with a copy of the general policies, rules and regulations of the facility. A current and complete copy of those policies, rules, and regulations, as provided to resident, is attached to this Agreement as Exhibit D. Resident acknowledges that he has read those policies, rules, and regulations, that he or she understands them, and that Resident agrees to abide by them during his or her stay at the facility. Resident also understands that the facility's rules and regulations are required by law to be reasonable, that they may not violate Resident's rights as set forth in this agreement or in the applicable law or government regulations governing the operation of the facility, and that the facility has a procedure for residents to suggest changes in the rules.

MEDICAL CARE

Attending Physician

8. Resident is under the medical care of Dr. _____ [name of resident's attending physician], ("attending physician"), of _____ [address], telephone [specify telephone number]. Facility shall be entitled to contact attending physician on resident's behalf when, in the opinion of the Administrator, resident requires medical care and/or treatment.

Emergencies

9. In case of an emergency in which resident, in the opinion of the Administrator, requires immediate medical attention, the facility shall attempt to contact the attending physician identified in Paragraph 8 of this agreement. If the attending physician is unavailable for any reason, facility shall be entitled to contact a licensed physician of its choice to attend to resident's needs.

Payment for Medical Services

10. Resident and/or his or her responsible person shall be solely liable for payment of all charges for the medical care and/or treatment, including any medications, drugs, devices, or other treatments for any medical condition.

TERMINATION OF RESIDENCY**Voluntary**

11. The resident may terminate his or her residency at the facility at any time by giving the administrator _____ days advance written notice of the resident's intent to do so. The facility shall not be responsible for any adverse medical, psychological, or social consequences of resident's voluntary termination of his or her residency at the facility.

Involuntary Evictions Under *Health & Safety Code § 1569.886*

[List grounds for eviction permissible under state law or regulation, in involuntary transfer, exactly as they are worded in law or regulation (Health & Safety Code § 1569.886(b); see [1][c], above.)]

12. (a) The facility may, upon 30 days written notice to the resident, evict the resident for one or more of the following reasons:

- (1) Nonpayment of the rate for basic services within 10 days of the due date.
- (2) Failure of the resident to comply with state or local law after receiving written notice of the alleged violation.
- (3) Failure of the resident to comply with general policies of the facility. Said general policies must be in writing, must be for the purpose of making it possible for residents to live together and must be made part of the admission agreement.
- (4) If, after admission, it is determined that the resident has a need not previously identified and a reappraisal has been conducted pursuant to 22 *California Code of Regulations Section 87463*, and the facility and the person who performs the reappraisal believe that the facility is not appropriate for the resident.
- (5) Change of use of the facility.

(b) The facility may, upon obtaining prior written approval from the Department of Social Services, evict the resident

upon three days written notice to quit. The Department of Social Services may grant approval for the eviction upon a finding of good cause. Good cause exists if the resident is engaging in behavior which is a threat to the mental and/or physical health or safety of himself or herself or to the mental and/or physical health or safety of others in the facility.

(c) Any notice of eviction from the Administrator shall be served on both the resident and the resident's designated representative or placement agency [or _____ (other person or agency involved in the placement of the resident)].

(d) Upon the receipt of an eviction notice as described in (a) or (b), above, the resident or resident's representative may request the Department of Social Services to investigate the reasons given for the eviction, in accordance with the Department's standard procedures.

(e) In the event of an eviction, the facility will offer relocation assistance to the resident as follows: [describe relocation assistance offered by facility].

Involuntary Evictions Under *Health & Safety Code § 1569.682*

[List facility's responsibilities to resident and resident's rights when facility evicts residents under *Health & Safety Code § 1569.682* (*Health & Safety Code § 1569.886(d)*); see *Health & Safety Code § 1569.682* (eviction resulting from facility's forfeiture of license or change in use)); [1][c], above].

12A. (a) In the event of an eviction under *Health & Safety Section 1569.682*, the facility must:

(1) Take all reasonable steps to transfer affected residents safely and to minimize possible transfer trauma.

(2) At a minimum, do all of the following:

(a) Prepare, for each resident, a relocation evaluation of the needs of that resident, which includes both:

(i) Recommendations on the type of facility that would meet the needs of the resident based on the current service plan; and

(ii) A list of facilities, within a 60-mile radius of the resident's current facility, that meet the resident's present needs.

(b) Provide each resident or the resident's responsible person with a written notice no later than 60 days before the intended eviction, including all of the following:

(i) The reason for the eviction, with specific facts to permit a determination of the date, place, witnesses, and circumstances concerning the reasons.

(ii) A copy of the resident's current service plan.

(iii) The relocation evaluation.

(iv) A list of referral agencies.

(v) The right of the resident or resident's legal representative to contact the Department to investigate the reasons given for the eviction under *Health & Safety Code § 1569.35*, governing complaint procedures.

(c) Discuss the relocation evaluation with the resident and his or her legal representative within 30 days of issuing the notice of eviction.

(d) Refund any paid preadmission fees in excess of five hundred dollars (\$500) to which the resident is entitled, within 15 days of issuing the eviction notice, as follows:

NOTE:

In lieu of the refund, the resident may request that the licensee provide a credit toward the resident's monthly fee obligation in an amount equal to the preadmission fee refund due.

(i) A 100-percent refund if preadmission fees were paid within six months of notice of eviction.

(ii) A 75-percent refund if preadmission fees were paid more than six months but not more than 12 months before notice of eviction.

(iii) A 50-percent refund if preadmission fees were paid more than 12 months but not more than 18 months before notice of eviction.

(iv) A 25-percent refund if preadmission fees were paid more than 18 months but less than 25 months before notice of eviction.

NOTE:

No preadmission refund is required if preadmission fees were paid 25 months or more before the notice of eviction.

(e) Refund to the resident or his or her legal representative a proportional per diem amount of any prepaid monthly fees, if the resident gives notice five days before leaving the facility, or pay the refund within seven days from the date that the resident leaves the facility and the unit is vacated.

MODIFICATION OF AGREEMENT

Rates

13. (a) The basic monthly rate specified in Paragraph 2 of this agreement may be changed by the Administrator upon at least 60 days prior written notice of the change to the resident. A rate increase may be due to additional costs, a change in the level of the resident's care, or unavoidable and unexpected costs that financially obligate the facility.

(b) The charges for additional services listed in Paragraph 5 of this agreement are subject to periodic adjustment. Upon adjustment of any charge or upon the addition or deletion of the available services, a revised list of the available additional services and corresponding charges shall be posted in a location of the facility accessible to all residents.

Evictions

14. The eviction provisions of this agreement shall not be subject to modification; provided, however, that the general policies of the facility, a violation of which will be grounds for eviction, may be modified by the facility from time to time.

Termination on Death of Resident

15. This agreement shall terminate automatically upon the death of the resident.

VISITORS AND COMMUNICATIONS

16. (a) It is the facility's policy to encourage visits and communication between residents and family members and participation of family members in the facility's activities.

(b) Regular visiting hours at the facility are [*specify visiting hours, e.g., 11:00 A.M. to 9:00 P.M.*] daily. The resident and/or his or her family members may make special arrangements for visits at other times by obtaining the Administrator's consent in advance. Except in cases involving medical emergency, the Administrator may deny his or her consent for visits at other times if such visits would unduly disturb, inconvenience, or invade the privacy of other residents.

(c) The resident shall be permitted to visit with family members and use the telephone in privacy, and to send and receive sealed mail.

EXAMINATION OF RECORDS

17. Resident acknowledges that the State Department of Social Services has the authority to examine Resident's medical, financial, and other records on file with the Facility.

THEFT AND LOSS POLICY

18. It is the policy of Facility to provide reasonable protection against the loss of Residents' personal belongings and valuables. Resident may obtain a lock for his or her bedside cabinet or drawer by contacting _____ [*name, title, and telephone extension or office number of appropriate facility employee*]. Resident may also deposit money and other valuable items of personal property with Facility for safekeeping. Facility shall not be liable for the loss or theft of any items not requested to be included on, or deleted from, the Inventory of Personal Belongings (attached to this Agreement as Exhibit A) or any valuables that Resident could have deposited but failed to deposit with Facility. Facility reserves the right to refuse to allow items of personal property that are valued at \$_____ or more and are not necessary for Resident's health or reasonable comfort to be kept on the premises if, in the opinion of the Administrator, adequate safekeeping cannot be provided for them.

GRIEVANCE PROCEDURES

19. A copy of the facility grievance procedure for resolution of resident complaints about facility practices has been made available to Resident or his or her representative. Resident also has the right to contact the State Department of Social Services, the long-term care ombudsman, or both, regarding grievances against the facility.

Dated: _____.

RESIDENT

_____ [*signature of resident*]

[typed name]

RESIDENT'S AUTHORIZED REPRESENTATIVE

_____ [signature of authorized representative, if any]

[typed name]

FACILITY

_____ [name of facility]

By _____ [signature]

[typed name and title]

EXHIBIT A**INVENTORY OF PERSONAL BELONGINGS****Inventory**

1. The following is a complete list of Resident's valuables and personal belongings to be kept on Facility's premises. Facility will not be responsible for any items that are not listed on this sheet. It is the responsibility of Resident and his or her responsible party to ensure that this inventory is updated to include any valuables or personal belongings brought into Facility subsequent to its execution. This inventory may be updated by contacting _____ [name, title, and telephone extension or location of appropriate facility employee].

Furnishings: [list and specifically describe].

Jewelry: [list and specifically describe].

Please Note: Jewelry and other valuables may be deposited with Facility for safekeeping, by contacting _____ [name, title, and telephone extension or location of appropriate facility employee]. Facility will not be liable for the loss or theft of any valuables that Resident could have deposited if Resident fails to do so.

Personal Effects: [list and specifically describe; e.g., one pair of dentures, engraved with Resident's social security number].

Clothing: [list and specifically describe].

Miscellaneous: [list and specifically describe].

Removal From Facility

2. The following items may be removed from Facility from time to time, for regular cleaning or the like, and shall not for that reason be deemed to be removed from this inventory: [list generally, e.g., everyday clothing described above].

I acknowledge that I have received a copy of this Inventory of Personal Belongings.

Dated: _____.

_____ [signature of resident or resident's authorized representative]

[title of authorized representative, if appropriate]

TO BE COMPLETED ON RETURN OF RESIDENT'S BELONGINGS:

Receipt of Surrender

I acknowledge receipt from _____ [name of facility] of the items listed in the above Inventory of Personal Belongings.

Dated: _____.

_____ [signature of resident or, if resident has died, his or her heir or personal representative]
[title of heir or personal representative, if appropriate]

EXHIBIT B

CALIFORNIA STATUTES GOVERNING THEFT AND LOSS OF RESIDENTS' PERSONAL PROPERTY FROM
RESIDENTIAL CARE FACILITIES

[Insert copies of Health & Safety Code §§ 1569.152-1569.154.]

EXHIBIT C

ACCESS TO RECENT LICENSING REPORTS ISSUED BY THE STATE DEPARTMENT OF SOCIAL SERVICES

Conspicuous Placement of Report Copies

1. This facility places in a conspicuous place copies of all licensing reports issued by the California Department of Social Services within the preceding 12 months, and all licensing reports issued by the department resulting from the department's most recent annual visit to the facility. These copies are located [describe location] and may be reviewed during normal business hours.

Copies of Licensing Reports and Other Documents Pertaining to Facility

2. Copies of these licensing reports are available for review at this facility. Copies of the reports and other documents pertaining to this facility are available from the district office of the Department. That office is located at _____ [address of appropriate district office]. Its telephone number is _____.

EXHIBIT D

POLICIES, RULES, AND REGULATIONS OF _____ [*name of facility*]

[*Attach copy of facility's policies, rules and regulations*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions General Overview Family Law Family Protection & Welfare Elderly
Persons General Overview Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons General
Overview Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons Care Facilities General
Overview Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons Care Facilities Nursing
Facilities



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART IV. FORMS
B. Residential Care Facilities for the Elderly

33-105 California Legal Forms--Transaction Guide §§ 105.223-105.229

[Reserved]

§§ 105.223[Reserved]



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART IV. FORMS
C. Continuing Care Contracts

33-105 California Legal Forms--Transaction Guide § 105.230

§ 105.230 Admission and Continuing Care Contract for Residential Facility

[1] Comment

[a] Use of Form

This form is a care contract and admission agreement for a residential care facility for the elderly [see *Health & Safety Code § 1771(c)(8)* ("continuing care contract" defined); *Health & Safety Code § 1771(r)(6)* ("residential care facility for the elderly" defined)]. It contains the provisions required for a life care contract [see *Health & Safety Code § 1771(l)* ("life care contract" defined)]. This type of contract is appropriate for an elderly person [see *Health & Safety Code § 1771(e)(1)* (definition)] who is self-sufficient, has no serious medical problems, and wishes to live for the duration of his or her life or a period in excess of one year in a structured environment where some services and supervision are provided.

All continuing care contract forms, including all addenda, exhibits, and any other related documents incorporated in the contract, as well as any modification to these items, must be approved by the Department of Social Services prior to their use [*Health & Safety Code § 1787(b)*]. The statutes governing continuing care contracts [*Health & Safety Code § 1770 et seq.*] and residential care facilities for the elderly [*Health & Safety Code § 1569 et seq.*] are the basis for approval of contract forms by the Department [*Health & Safety Code § 1787(c)*]. To the extent that *Health & Safety Code § 1770 et seq.*, governing continuing care contracts, conflicts with *Health & Safety Code § 1569 et seq.*, governing residential care contracts, *Health & Safety Code § 1770 et seq.* will prevail [*Health & Safety Code § 1787(c)*]. Neither this form nor the forms in §§ 105.231 and 105.232 have been approved by the Department. They are presented here for illustrative purposes, to familiarize transferors, residents, and their attorneys with the contents and organization of continuing care contracts generally.

This form should not be used if the continuing care contract is executed in conjunction with the purchase of an equity interest in an equity continuing care retirement community. Additional fee and refund provisions apply to this type of contract [*Health & Safety Code § 1788.2(d)(2), (e), (e)(2)*; see § 105.20[5]].

This form should not be used for admissions to long-term health care facilities, such as skilled nursing and intermediate

care facilities [see 22 Cal. Code Reg. §§ 72103, 73051 (definitions)]. A combination continuing care contract and agreement for admission to a skilled nursing or intermediate care facility must satisfy the statutory requirements for the contents of admission contracts for long-term health care facilities [see *Health & Safety Code § 1599.60 et seq.*; see also § 105.200], as well as those set forth for continuing care contracts [see [h], below; see also § 105.123]. Continuing care contracts are most commonly used in arrangements involving residential facilities for the elderly, as opposed to skilled nursing or intermediate care facilities, although they can be used in connection with those facilities as well.

[b] Cancellation Notice

A statutory notice describing the transferor's right to cancel this contract within 90 days after entering into it must be attached to this form in duplicate [*Health & Safety Code § 1788(h)*]. The notice must be easily detachable, and must contain, in at least 10-point boldface type, the statement prescribed by statute [see *Health & Safety Code § 1788(h)*]. It should be attached as Exhibit F. For a copy of this notice, see § 105.234. For an explanation of the cancellation right, see §§ 105.20[5], 105.234.

[c] "Continuing Care Contract" Defined

A "continuing care contract" is a contract that includes a continuing care promise made, in exchange for an entrance fee, the payment of periodic charges, or both types of payments [*Health & Safety Code § 1771(c)(8)*]. A continuing care contract may consist of one agreement or a series of agreements and other writings incorporated by reference [*Health & Safety Code § 1771(c)(8)*]. A "continuing care promise" is a promise, expressed or implied, by a provider to provide one or more elements of care to an elderly resident for the duration of his or her life or for a term in excess of one year [*Health & Safety Code § 1771(c)(10)*; see *Health & Safety Code § 1771(e)(1)* ("elderly" means an individual who is 60 years or older)]. A continuing care promise includes any such promise or representation, written or oral, whether it is part of a continuing care contract, other agreement, or series of agreements, or contained in any advertisement, brochure, or other material [*Health & Safety Code § 1771(c)(10)*]. A life care contract is a continuing care contract that includes a promise to provide or pay for routine services at all levels of care, including acute care and physicians and surgeons' services, to the extent not covered by public or private insurance benefits, to a resident for the duration of his or her life [*Health & Safety Code § 1771(l)(1)*; see *Health & Safety Code § 1771(r)(5)* ("resident" defined); see also [e], below].

[d] Transfer of Assets to Facility

Continuing care arrangements frequently require the elderly person to transfer most, if not all, of his or her assets to the facility that will provide care. Consequently, some individuals may not wish to enter into this type of agreement. One alternative approach to ensuring care for the duration of an elderly person's life without requiring an irrevocable commitment of property to the facility is the execution of a revocable inter vivos trust to ensure payment of monthly care and incidental fees. For a representative trust designed for this purpose, see § 105.233. For a detailed explanation of inter vivos trusts, see the Legal Background to Ch. 70, *Complete Revocable Trust Forms*.

[e] Resident Distinguished From Transferor

This form contains references to both the "resident" and the "transferor." Often, but not always, the resident and transferor will be the same person. The "resident" is the person who enters into a continuing care contract with a provider, or who is designated in a continuing care contract to be a person being provided or to be provided services, including care, board, or lodging [*Health & Safety Code § 1771(r)(5)*]. The "transferor" is the person who transfers, or promises to transfer, consideration in exchange for care and related services under a continuing care contract or proposed continuing care contract, for the benefit of another [*Health & Safety Code § 1771(t)(3)*]. A transferor has the same rights to cancel and obtain a refund as the depositor under the deposit agreement or the resident under a continuing care contract [*Health & Safety Code § 1771(t)(3)*; see § 105.20[5]].

[f] Entrance Fee

An "entrance fee" is the sum of any initial, amortized, or deferred transfer of consideration made or promised to be made by, or on behalf of, a person entering into a continuing care contract for the purpose of ensuring care or related services pursuant to that contract or as full or partial payment for the promise to provide care for the term of the continuing care contract [*Health & Safety Code § 1771(e)(3)*]. An entrance fee includes the purchase price of a condominium, cooperative, or other interest sold in connection with a promise of continuing care [*Health & Safety Code § 1771(e)(3)*]. An initial, amortized, or deferred transfer of consideration that is greater in value than 12 times the monthly care fee is presumed to be an entrance fee [*Health & Safety Code § 1771(e)(3)*].

Usually the entrance fee is deposited in the resident's account and charges for additional services, damages caused by resident, and other incidental charges are offset against that amount. Paragraph 19 of this form specifies the amount of the entrance fee to be paid by the resident or transferor, and Paragraph 33 specifies the conditions under which part of that fee will be refunded.

[g] Authority to Provide Continuing Care

A licensee may not enter into any continuing care contract with any person without approval by the Department of Social Services in accordance with *Health & Safety Code § 1770 et seq.* [22 Cal. Code Reg. § 87507(i)]. The Department will not issue a provisional certificate of authority or a certificate of authority to an applicant until the applicant has obtained licenses for the entire continuing care retirement community, including a license to operate the residential living and assisted living units [see *Health & Safety Code § 1569 et seq.*] and, if a skilled nursing facility is on the premises, as a health facility [*Health & Safety Code § 1771.5*; see *Health & Safety Code § 1250 et seq.* (health facilities)]. In addition to holding all appropriate licenses for the type of care to be provided, any provider who executes a continuing care contract must have a current and valid provisional or final certificate of authority issued by the Department of Social Services before it may enter into a continuing care contract [*Health & Safety Code §§ 1771.2(b), 1779(a)*; see *Health & Safety Code §§ 1779-1779.8* (application procedure), 1779.10 (causes for denial of application), 1786 (issuance of provisional certificate), 1786.2 (issuance of final certificate)].

If an entity enters into an agreement to provide care for life or for more than one year to a person under 60 years of age in return for consideration, and the agreement includes the provision of services to that person after age 60, the promising entity must comply with all the requirements imposed by *Health & Safety Code § 1770 et seq.* when the person reaches age 60 [*Health & Safety Code § 1771.2(d)*]. Generally, if a provider subcontracts or assigns to another entity the responsibility to provide continuing care, the other entity must have a current and valid certificate of authority. However, a provider with a current and valid certificate of authority may contract for the provision of a particular aspect of continuing care, such as medical care, with another entity that does not have a certificate of authority, if (1) the other entity is appropriately licensed under California law to provide that care, and (2) the provider has not paid in advance for more than one year for the care [*Health & Safety Code § 1771.2(c)*].

Before executing a continuing care agreement or receiving any payment from a depositor or prospective resident, a provider must deliver to the other parties in the continuing care agreement a disclosure statement in the form prescribed by the department [*Health & Safety Code § 1789.1(a)*; see *Health & Safety Code § 1789.1(b)* (information to be disclosed); *Health & Safety Code § 1789.1(d)* (form)].

Executing a continuing care contract without holding a current and valid provisional or final certificate of authority is a misdemeanor [*Health & Safety Code § 1793.5(c)*]. However, a certificate of authority is not required for the care of a person by a relative, or for the care of a person or persons from one family by a friend [*Health & Safety Code § 1771.3(a)*]. In addition, the requirements imposed by *Health & Safety Code § 1770 et seq.* do not apply to admission or residence agreements offered by residential communities for the elderly or residential care facilities for the elderly that promise residents preferred access to assisted living services or nursing care, provided specified conditions are satisfied

[see *Health & Safety Code* § 1771.3(b); see *Health & Safety Code* § 1771.3(c)-(e) (application for letter of exemption); *Health & Safety Code* § 1771.6 (application for letter of nonapplicability)].

[h] Contents of Agreement

All continuing care contracts must be in writing [*Health & Safety Code* § 1787(a)]. *Health & Safety Code* § 1788 requires that continuing care contracts contain provisions covering specific matters, and *Health and Safety Code Sections 1569.152-1569.153* require residential care facilities to execute certain documents relating to theft and loss of residents' property and to provide residents with copies of these documents [see *Health & Safety Code* §§ 1569.152-1569.154; see also § 105.222[1][c]]. In addition, the State Department of Social Services has developed detailed regulations governing the contents of contracts for admission to residential care facilities [see 22 *Cal. Code Reg.* § 87718]. *Health & Safety Code* §§ 1793.80-1793.84 contain requirements and specific provisions relating to how a provider of a continuing care retirement community must proceed in the event of closure [*Health & Safety Code* § 1788(a)(36); *Health & Safety Code* §§ 1793.80-1793.84]. This form contains all of the provisions required by statute and regulation to be included in continuing care contracts for residential care facilities, as well as various optional provisions. For a complete list of the required provisions as well as the format requirements imposed by statute and regulation on life care contracts and contracts for admission to residential care facilities, see §§ 105.121, 105.123. For a contract of admission to a residential care facility that is not also a life care contract, see § 105.222.

[i] Execution of Agreement

The continuing care contract must be executed by each provider named on the provisional certificate of authority or the certificate of authority, the resident, and any transferor [see *Health & Safety Code* § 1787(g)].

[j] Required Copies and Acknowledgments

A clearly legible, executed copy of the continuing care contract, must be furnished with all required or included attachments to the resident at the time the continuing care contract is executed [*Health & Safety Code* § 1787(g); see [i], above]. A copy must also be furnished within 10 calendar days to any transferor who is not a resident [*Health & Safety Code* § 1787(g)].

The provider must require a written acknowledgment from the resident (and any transferor who is not a resident) that the executed copy of the continuing care contract and attachments have been received [*Health & Safety Code* § 1787(h)].

[k] Appointment of Guardian or Conservator

Paragraph 27 of this form contains a provision allowing for the commencement of conservatorship proceedings if the resident becomes incompetent. For an explanation of the law governing conservatorships, see Ch. 66, *Guardianship and Conservatorship Planning*, Pt. B. For an explanation of conservatorship proceedings, see California Forms of Pleading and Practice, Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* (Matthew Bender).

[l] Benefits From Government Agencies

Paragraph 18 covers the resident's entitlement to government health benefits and the involvement of the provider in obtaining those benefits. A provider may pay the monthly premium on a resident's health insurance coverage under Medicare to ensure that the required payments will be made and the coverage will be available when needed [*Health & Safety Code* § 1788(c)(1)(D); see [2], P 18(d), below]. The resident may then assign his or her right to apply for and receive Medicare benefits to the provider [see *Health & Safety Code* § 1788(c)(1)(E)]. The provider may include a provision in the contract to the effect that it will not be responsible for the cost of furnishing the resident with any services, supplies, or medication for which reimbursement is reasonably available from a government agency or any

private insurance [*Health & Safety Code § 1788(c)(1)(F)*; see [2], P 18(b), *below*].

[m] Misrepresentations

A continuing care contract may contain a provision identifying the legal remedies that may be available to the provider if the resident makes any material misrepresentation or omission pertaining to the resident's assets or health [*Health & Safety Code § 1788(c)(3)*]. Paragraph 24 of this form contains this type of provision.

[n] Advertisements for Continuing Care Services

As a general rule, no report, circular, public announcement, certificate, financial statement, or any other printed matter or advertising material, or oral representation, that states or implies that an entity sponsors, guarantees, or assures the performance of any continuing care contract, may be published or presented to any prospective resident [*Health & Safety Code § 1772(a)*]. However, this prohibition does not apply if both of the following conditions have been met:

- First, *Health & Safety Code § 1788(a)(5)* must apply and the requirements of that provision must have been satisfied [*Health & Safety Code § 1772(a)(1)*]. *Health & Safety Code § 1788(a)(5)* specifies that if the provider has used the name of any charitable or religious or nonprofit organization in its title before January 1, 1979, and continues to use that name, and that organization is not responsible for the financial and contractual obligations of the provider or the obligations specified in the continuing care contract, the provider must include in every continuing care contract a conspicuous statement that clearly informs the resident that the organization is not financially responsible [*Health & Safety Code § 1788(a)(5)*]. In light of the second requirement stated immediately below--that the entity accept full financial responsibility for each continuing care contract--this requirement of a conspicuous statement that the organization is *not* financially responsible does not seem logical in this situation, but that is what the statute provides.

- Second, the entity must have filed with the Department of Social Services a written declaration that it accepts full financial responsibility for each continuing care contract [*Health & Safety Code § 1772(a)(2)*]. The filing entity is subject to the application requirements set forth in *Health & Safety Code § 1779 et seq.* [*Health & Safety Code § 1772(a)(2)*]. The filing entity must be a coobligor for the contracts, and must be a coprovider on the applicable provisional certificate of authority and certificate of authority [*Health & Safety Code § 1772(a)(2)*].

An affinity exemption may be granted for good cause by the Department of Social Services [*Health & Safety Code § 1772(d)*]. If an exemption is granted, every continuing care contract must include a conspicuous statement that clearly discloses to prospective residents and all transferors that the affinity group entity is not financially responsible. [*Health & Safety Code § 1772(d)*]. Any implication that the entity may be financially responsible for these contracts may be rebutted by a conspicuous statement, in all continuing care contracts and marketing materials, that clearly discloses to prospective residents and all transferors that the entity is not financially responsible [*Health & Safety Code § 1772(c)*]. Implied sponsorship includes the use of the entity's name for the purpose of implying that the entity's reputation may be relied on to ensure the performance of the continuing care contract [*Health & Safety Code § 1772(b)*]. For an optional statement that a such an entity is not financially responsible for the provider, see Paragraph 34 of this form.

If the name of an entity, including, but not limited to, a religion, is used in connection with the development, marketing, or continued operation of a continuing care retirement community, but that entity does not actually own, control, manage, or otherwise operate the continuing care retirement community, the provider must clearly disclose the absence of that affiliation, involvement, or association with the continuing care retirement community in the continuing care contract [*Health & Safety Code § 1772(e)*]. This form includes such a statement as an optional provision [see P 34 of this form].

All printed advertising materials, including brochures, circulars, public announcements, and similar publications pertaining to continuing care or a continuing care retirement community must specify the number on the provider's provisional certificate of authority or certificate of authority [*Health & Safety Code § 1772.2(a); see Health & Safety Code § 1772.2(b)*] (requirements for advertising materials when provider has not been issued certificate of authority). Similarly, residential care facilities must include their current license number in any public advertisement or correspondence [*Health & Safety Code § 1569.68*].

[2] FORM

Admission and Continuing Care Contract

CONTINUING CARE CONTRACT AND AGREEMENT FOR ADMISSION TO _____ [*name of facility*]

[All text in form must be printed in at least 10-point typeface to highlight terms and conditions as required by law (Health & Safety Code § 1787(f)). Various notices relating to continuing care contracts must be in boldface. These include the schedule of monthly estimated care fees in a deposit agreement (see Health & Safety Code § 1780.4(i)); the statement in a continuing care contract, placed in immediate proximity to the space reserved for the signatures of the resident and, if applicable, the transferor, that the resident, and, if applicable, the transferor, has the right to cancel the contract (see Health & Safety Code § 1788(a)(27)); and the notice of cancellation (see Health & Safety Code §§ 1788(a)(34); § 105.234).]

Admission to Facility

[EITHER, if resident and transferor are same person:]

1. _____ [*name and address of resident*], "Resident," and _____ [*legal name and address of provider*], "Provider," agree that Resident will be admitted to _____ [*name and address of facility*], "Facility," on _____ [*date*] under the terms and conditions set forth in this continuing care contract, "Contract." As used in this Contract, the terms "Resident" and "Transferor" refer interchangeably to _____ [*name of resident*].

[OR, if resident and transferor are not same person:]

1. _____ [*name and address of transferor*], "Transferor," and _____ [*legal name and address of provider*], "Provider," agree that _____ [*name and address of resident*], "Resident," will be admitted to _____ [*name and address of facility*], "Facility," on _____ [*date*] under the terms and conditions set forth in this continuing care contract, "Contract."

[Continue with the following:]

Term of Contract

2. The Contract will be in effect, and care will be provided under it for the duration of the Resident's life, unless this

Contract is canceled or terminated by the Provider during the cancellation period or after the cancellation period for good cause.

General Obligations of Provider

3. Provider will furnish Resident with the board, room, medical care, clothing, services, and incidentals specified in Paragraphs 3 through 11 of this Contract for the duration of this Contract, provided that Resident remains in Facility and performs his or her obligations under this Contract.

Lodging

4. Provider will furnish Resident living accommodations in a private, single occupancy [*specify nature of accommodation, e.g., room or apartment*] in Facility. Resident will not be removed from or in any way required to leave his or her accommodations in Facility except as provided in this Contract.

Utilities

5. (a) Provider will furnish Resident with the utilities reasonably required in connection with his or her occupancy of the accommodations at Facility. Utilities furnished by Provider shall include water, heat, cooling, and electricity.

(b) Provider will not be obligated to furnish telephone service to Resident.

Furnishings

6. (a) Provider will supply Resident's room(s) with the following furnishings: wall-to-wall carpeting, draperies, overhead light fixtures, one floor lamp, [*specify any other furniture or items of home furnishing that will be provided by the facility, e.g., one twin bed; and one chest of drawers*].

(b) Resident may bring furnishings to his or her room(s) provided that he or she obtains advance approval of those furnishings from Provider's Administrator. Resident will be solely responsible for all costs associated with moving furnishings other than those supplied by Provider.

Meals

7. (a) Provider will provide a minimum of three nutritionally balanced meals every day. All meals will be served in the dining room of Facility. Meals may from time to time be served to Resident in his or her room(s) if, in the opinion of the staff physician, Resident's health makes his or her attendance at meals in the dining room inadvisable.

(b) Special diets will be provided only upon order of the staff physician.

(c) If the staff physician deems it necessary, Provider will monitor Resident's food intake or special diet provided pursuant to (b).

(d) No credit or allowance will be given for meals missed by Resident when Resident is absent from Facility.

Laundry

8. Laundry services will be provided each week for all bed and bath linen furnished by Provider. Convenient laundry facilities will be made available free of charge for Resident's personal laundry use.

Housekeeping

9. (a) Resident will maintain his or her room(s) in a clean, sanitary, and orderly condition. Provider will make available to Resident all supplies reasonably necessary for Resident to perform the usual light housekeeping necessary to maintain his or her accommodations.

(b) Provider shall perform all heavy housecleaning tasks at least once a week or more frequently if, in the opinion of the Administrator, more frequent cleaning is required to maintain Resident's accommodations in a clean and sanitary manner. Provider shall conduct all heavy housecleaning between 9:00 A.M. and 5:00 P.M.

Assisted Living Services

10. (a) Provider will observe Resident's physical and mental condition on a regular basis, and will make arrangements as necessary to meet Resident's health needs, including arranging transportation. Provider will provide assistance to Resident in carrying out the instructions of physicians, including storing, distributing, and reminding Resident to take prescribed medications.

(b) Provider will provide Resident with assisted living services, including such things as personal assistance, as needed and requested, in bathing, dressing, hair care, shaving, eating, care of clothing, personal shopping, and incidental services. Personal assistance with hygiene will be provided in Resident's own living accommodation.

Social and Recreational Activities

11. In order to meet the spiritual, physical, social, and companionship needs of Resident, Provider shall provide a program of activities, including opportunities for involvement in events of interest in the community where Facility is located, library and chapel facilities, nondenominational services, and facilities for mild physical exercise under the supervision of Facility staff members.

Visitors and Communications

12.(a) It is Provider's policy to encourage visits and communication between residents and family members and participation by family members in Provider's activities.

(b) Regular visiting hours at Facility are [*specify visiting hours, e.g., 11:00 A.M. to 9:00 P.M.*] daily. Resident and/or his or her family members may make special arrangements for visits at other times by obtaining the Administrator's consent in advance. Except in cases involving medical emergency, the Administrator may deny his or her consent for visits at other times if those visits would unduly disturb, inconvenience, or invade the privacy of other residents.

(c) Resident will be permitted to visit with family members and use the telephone in privacy, and to send and receive sealed mail.

Medical Care and Costs

13. (a) All levels of care, include acute care and physicians' and surgeons' services, will be provided to the Resident.
- (b) Provider employs the services of a physician licensed to practice medicine in California ("Staff Physician") and two registered nurses. The services of these medical professionals will be made available to Resident.
- (c) Resident will be free to engage the services of any licensed physician, surgeon, or other medical professional. However, Provider will not be responsible for the charges of any physician or other medical professional not regularly employed by Provider. If special care or treatment on Facility premises is prescribed by an outside physician, it must be authorized by the Staff Physician.
- (d) If, in the opinion of the Staff Physician and/or the Administrator of Facility, Resident requires medical attention that is available only through a transfer of the Resident to another facility, the Administrator will attempt to contact and consult Resident's personal physician, if any, before making the transfer or terminating this Contract for medical reasons and will document all attempts at making that contact in Resident's file maintained by Facility.
- (e) Provider will not be responsible for the cost of drugs, medicines, vitamins, or other dietary supplements, dental work, glasses, hearing aids, orthopedic appliances, treatment of mental illness, any chronic condition from which Resident suffered before executing this Contract, or any contagious, infectious, or incurable disease contracted prior to the execution of this Contract.
- (f) Provider will not provide the following health care services: dentistry, ophthalmology, chiropractic, osteopathy, or chiropody.

Transfer From Living Unit

14. (a) Provider will have the right to change the unit originally occupied by Resident to a unit that has a fire clearance for nonambulatory residence if, in the opinion of the Administrator, a physician, or appropriate specialist, or licensing official in consultation with the resident and appropriate representative, if any, Resident becomes nonambulatory as that term is defined by *Health and Safety Code Section 13131*. Provider will provide a copy of this definition to Resident or Transferor upon request. Resident's monthly rate and entrance fee refund will be adjusted due to a transfer under this Paragraph 14(a) only if the monthly rate for the new unit is lower than the monthly rate for Resident's original unit.
- (b) If two Residents occupy a two-person suite and one of them dies, terminates the shared accommodation arrangement, or is transferred from Facility, the remaining Resident may elect to be transferred to a unit designed for single occupancy when one becomes available and pay the then current monthly rate for that unit. However, the remaining Resident will have the right and first option to remain in sole possession and occupancy of the two-person unit by the payment of three-fourths of the then current monthly rate for double occupancy.
- (c) Provider will have the right to change the unit originally occupied by Resident to another unit of comparable character for any reason not specified in this Agreement that, in the opinion of the Administrator, renders a change of accommodations necessary or desirable. Resident's monthly rate and entrance fee refund will be adjusted due to a transfer under this Paragraph 14(b) only if the monthly rate for the new unit is lower than the monthly rate for Resident's original unit.
- (d) Resident may request a change in accommodations from one unit to another by submitting a written request to the

Administrator. Such requests will be honored on a first-come, first-served basis, subject to availability of units and contingent upon Resident's payment of the then current monthly rate for the new accommodations. Resident may change accommodations pursuant to this Paragraph 14(d) no more than once per calendar year.

Transfer From Facility

15. (a) Provider will have the right to transfer Resident to a skilled nursing facility, assisted living unit, nursing home, or hospital, if, in the opinion of the Administrator, a physician, appropriate specialist, or a licensing official of the Department of Social Services, in consultation with the resident and appropriate representative, any of the following occurs:

(1) Resident develops a physical or mental condition that endangers the health, safety, or well-being of the resident or another person.

(2) Resident's condition or needs require the resident's transfer to an assisted living care unit or skilled nursing facility, because the level of care required by the resident exceeds that which may be lawfully provided in the living unit.

(3) Resident's condition or needs require the resident's transfer to a nursing facility, hospital, or other facility, and the Provider has no facilities available to provide that level of care. In that event, Resident will continue to pay all fees required under this Contract and Provider shall pay for the other accommodations. If, in the opinion of the Staff Physician, the condition requiring the change of accommodations is not a temporary condition, Provider will not be required to provide services to the Resident while the Resident is absent from the continuing care community. Provider also will not be required to resume care of Resident, and the unit previously occupied by Resident will be released for other occupancy. No credit on fees paid will accrue to Resident when he or she is removed to another institution pursuant to this Paragraph 15(a).

(b) Provider has a transfer agreement in effect with _____ [*name of acute care hospital*], where Resident will be admitted upon the instruction of the Staff Physician and/or Resident's privately engaged physician.

(c) Emergency hospitalization outside a _____-mile radius from Facility, but within the United States, will be furnished or compensated for by Provider.

(d) Unless medically contraindicated in the opinion of the attending physician, accommodations at an acute care hospital will be semi-private. If private room accommodations are available and desired by Resident, and in the judgment of the attending physician private accommodations are not necessary, Resident will be obligated to pay the difference between the cost of semi-private accommodations and private accommodations. The term "semi-private accommodations" as used in this Paragraph 15(d) means a hospital room accommodating more than one, but not more than six, persons.

Examination of Premises and Records

16. (a) Resident acknowledges that the State Department of Social Services has the authority to examine Resident's medical, financial, and other records on file with Provider or Facility.

(b) Resident acknowledges that Facility's living units are licensed as residential care facilities for the elderly and, as a result, any duly authorized agent of the State Department of Social Services may, upon proper identification and upon stating the purpose of his or her visit, enter and inspect the entire premises at any time, without advance notice.

Disposition of Remains

17. On Resident's death, Provider will be responsible for making all necessary arrangements incident to the disposition of Resident's remains. Within 60 days after entering Facility, Resident will execute a Will containing instructions to Provider concerning the details that Resident wishes observed concerning his or her death.

Medical Payments

18. (a) Resident will take the action and execute the forms necessary to secure payment to any hospital, extended care facility, or other provider of services, including Provider (if payment is made by it), of all amounts payable for services rendered to Resident and for which benefits are available under the federal Medicare program or any public assistance or aid program for which Resident is eligible.

(b) Hospital, medical, or similar services for which reimbursement from a government agency is available will be paid for by the agency involved and excluded from the services provided by Provider under this Contract. Any and all other services will continue to be provided and paid for by Provider as specified in this Contract.

(c) Any benefits from federal and/or state sources will be credited in the following manner: first against any charge otherwise due from Resident for hospital, medical, or other services; next, as reimbursement for any payment made by Resident for the service involved; and the balance, if any, as reimbursement to Provider for any payment made by it or for application on the account of the Resident.

(d) Provider will pay, or make arrangements for payment of, any premium or other charge required to qualify Resident for benefits under federal and/or state medical assistance programs. Any charge of this nature paid directly by Resident will be reimbursed to Resident by Provider or credited by Provider as an offset against Resident's monthly rate.

(e) The effect of federal and/or state medical benefits upon the cost to Provider of furnishing continuing care benefits under this Contract shall be taken into account by Provider in determining any adjustment of the monthly or other rates, with due regard to maintenance of a high quality of service and operation.

(f) Resident shall be required to make and deliver to Provider a power of attorney for the purpose of permitting and instructing Provider to act as Resident's agent in handling all matters relating to any federal and/or state benefits.

Fees

19. (a) Provider acknowledges receipt from Transferor of a processing fee in the sum of \$_____. The processing fee covers clerical and related costs for processing the application and is not refundable.

(b) Transferor shall pay to Provider the sum of \$_____ [from _____ (*funding source, if resident agrees to reveal source*)] as an entrance fee, upon execution of this Contract. *[If two parties have jointly paid entrance fee allowing them to occupy unit, add the following:* This fee shall be allocated between _____ (*name of first party*) and _____ (*name of second party*) as follows: _____.] Any deposit made by Transferor at the time Transferor submitted an application to Provider, except for the processing fee, shall be credited against this amount.

(c) On Resident's admission to Facility, Transferor will be obligated to pay a monthly care fee in the amount of \$_____, which will be due in full on the first of each month and will cover the costs of care provided

by Provider pursuant to this Contract for that month. Resident's occupancy and use of the accommodations provided pursuant to this Contract are contingent upon the timely payment of this fee. The Provider will adjust monthly care fees for the Resident's support, maintenance, board, or lodging, when a Resident requires medical attention while away from the continuing care retirement community. A schedule of the average monthly care fees charged to residents for each type of residential living unit for each of the five years preceding execution of the continuing care contract is attached to this Contract as EXHIBIT A.

(d) Optional services that are not included in the monthly care fee are available at the rates set forth in EXHIBIT A to this Contract.

(e) Provider will notify Resident in writing at least 30 days in advance of any changes in the Resident's monthly care fees or in the scope or price of any component of care or other services provided under this Contract.

Changes in Monthly Care Fees

[EITHER, for prepaid contracts that include monthly care fees:]

20. Monthly care fees will not be changed based on the resident's level of care or service. The monthly care fee specified in Paragraph 19(c) of this Contract will [not be subject to change during the lifetime of this Contract or not be increased by more than \$_____ in any one year and not more than \$_____ during the lifetime of this Contract or not be increased in excess of _____ percent over the preceding year and not more than _____ percent during the lifetime of this Contract].

[OR, for monthly fee contracts:]

20. Monthly care fees will not be changed based on the resident's level of care or service. However, Provider may adjust the monthly care fee specified in Paragraph 19(c) of this Contract from time to time. Any adjustments will be based on projected costs, prior year per capita costs, and economic indicators.

Property Transfer

[EITHER, if one or two items of property are to be transferred:]

21. (a) In addition to paying the fees specified in Paragraph 19 of this Contract, Transferor will transfer to Provider the following property: *[description of property or, if real property, legal description]*, currently valued at \$_____ as determined by *[specify method of ascertaining value]*.

[OR, if several items of property are to be transferred:]

(a) In addition to paying the fees specified in Paragraph 19 of this Contract, Transferor will transfer to Provider the property described in EXHIBIT K, which is attached to this Contract and incorporated by reference.

[Continue with the following:]

(b) With respect to the transfer of any real property, the deed or other instrument of conveyance must specify that the real property is conveyed pursuant to a continuing care contract and may be subject to rescission by the Transferor within 90 days from the date that the Resident first occupies the residential unit.

Assistance Programs

22. (a) If Resident's income is reduced to the extent that Resident is eligible to receive public assistance or other aid, including, but not limited to, California Old Age Assistance, Aid to the Blind, Veterans' Pension, or Medi-Cal, Resident agrees that he or she will apply for and diligently seek those benefits.

(b) If Resident obtains public assistance benefits, the monthly care fee specified in Paragraph 19(c) of this Contract will be adjusted so that it does not exceed the maximum monthly public assistance grant for the aid program, less the amount which that program permits Resident to retain.

Policies, Rules, and Regulations

23. Resident will abide by the rules and regulations of Facility, as they exist now and as they may reasonably be amended, modified, added to, deleted from, and changed by Facility's Board of Directors. A copy of the rules and regulations of Facility in effect as of the date of this Contract are set forth in EXHIBIT C, which is attached to and made a part of this Contract.

Representations

24. It is understood and agreed that Resident's age, application forms, statement of finances, health history, personal interview, and final record are a part of this Contract and any misrepresentation or material omissions made by Resident on any of those forms will render this Contract voidable at the option of Provider.

Admissions and Dismissals

25. Provider will be the final and conclusive decision-maker as to arrangements concerning the admission and dismissal of residents, and any adjustments to be made or any action to be taken regarding any charitable consideration to be extended to any of its residents. Resident will not have the right to object to admission, terms of admission, or dismissal of any other resident.

Obligations of Resident

26. (a) Resident will provide his or her own clothing and personal necessities at his or her own expense. Provider will not be responsible or liable for any expense incurred, or debt or obligation of any nature contracted by Resident on his or her own account.

(b) When Resident is absent from Facility for purposes other than receiving medical attention as provided in this Contract, he or she will be responsible for all payments for his or her own lodging, meals, and incidentals. Resident will remain responsible for payment of the monthly care fee(s) and any other fees charged by Provider during any absence from Facility and will not be entitled to any offset or credit against those fees.

Theft and Loss Policy

27. It is the policy of Provider and Facility to provide reasonable protection against the loss of Residents' personal belongings and valuables. Resident may obtain a lock for his or her bedside cabinet or drawer by contacting _____[*name, title, and telephone extension or office number of appropriate facility employee*].

Resident may also deposit money and other valuable items of personal property with Facility for safekeeping. Neither Provider nor Facility will be liable for the loss or theft of any items not requested to be included on, or deleted from, the Inventory of Personal Belongings (attached to this Agreement as EXHIBIT D) or any valuables that Resident could have deposited but failed to deposit with Facility. Provider and Facility reserve the right to refuse to allow items of personal property that are valued at \$_____ or more and are not necessary for Resident's health or reasonable comfort to be kept on the premises if, in the opinion of the Administrator, adequate safekeeping cannot be provided for them.

A copy of California statutes governing theft and loss of resident's personal property from residential care facilities is attached to this Agreement as Exhibit E.

Disposition of Property on Death of Resident

28. (a) If Resident dies, Provider will use ordinary care in safeguarding his or her personal property and will have the right to immediately remove and store that property pending instructions as to its disposition.

(b) Resident will execute a will within 60 days after entering Facility and, in that will, provide instructions concerning the final disposal of his or her personal property and for the payment associated with any services and the disposition of his or her remains.

Incompetency of Resident

29. If Resident becomes unable to handle his or her personal or financial affairs, Provider will have the right to contact Resident's nearest relative and request that individual to commence proceedings for the establishment of a conservatorship of the person of Resident. If Provider is unable to locate any of Resident's relatives, it will have the right to contact the appropriate county agency for purposes of commencing conservatorship proceedings.

Damages Caused by Resident

30. Resident will reimburse Provider and Facility for any loss or damage suffered by them (beyond normal wear and tear) as a result of the carelessness or negligence of Resident, except for loss due to perils insured against by Provider or Facility.

Lien for Medical Care

31. (a) Provider will not be responsible for the expenses of medical, surgical, nursing, or additional care required by Resident as a result of injury caused to him or her by a third party.

(b) If Resident is injured by a third party, Resident may instruct Provider to arrange the medical or other care required by Resident as a result of that injury. In that event, Provider will make all payments due for that care and Resident will

assign to Provider a lien against any recovery Resident may obtain from the third party as compensation for those injuries. The lien will be enforceable against Resident's property and, if Resident dies before Provider has been reimbursed, against Resident's estate.

(c) Resident or Resident's legal representative will diligently pursue any claim for compensation due from third parties for injury to Resident and will cooperate with Provider in collecting that compensation and reimbursing Provider for the cost of care furnished Resident by or through arrangements made by Provider.

(d) If Provider is satisfied that Resident or Resident's legal representative has diligently pursued claims for compensation against third parties and that no compensation will be received or that the net amount paid to Provider will be insufficient to fully compensate Provider, then the unpaid balance will be canceled.

Limitations on Rights of Resident

32. (a) The Rights of Resident under this Contract do not include any proprietary interest in the properties or assets of Provider or Facility.

(b) Pursuant to the requirements of any bona fide lender and/or the Federal Housing Administration, Resident's rights under this Contract will at all times be subordinate to the rights of the secured lender under any existing mortgage or deed of trust now or hereafter executed by Provider or Facility, or any extension, renewal, or substitute for the mortgage or deed of trust, up to the amount of the original mortgage or deed of trust, and relating to property of Provider or Facility in which Resident receives care or service. Resident will execute, acknowledge, and deliver any subordination agreement the lender may require in order to establish the priority of the mortgage or deed of trust as a lien against property of Provider or Facility.

(c) After the payment of the fees specified in Paragraph 19 of this Contract, Resident will not be required to pay any further sums to Provider or Facility except those amounts that constitute reimbursement of sums advanced by Provider or Facility on Resident's behalf under Paragraphs 18, 30, and 31 of this Contract. Provider will have the right and power to apply for and receive any financial or other aid from federal, state, or municipal sources to which it may be entitled, and to donations made in any manner by corporations or private persons, and Resident will have no right, title, or interest in any amounts so received or any right to an accounting for those amounts.

Termination of Agreement

33. This Contract will be terminated as follows:

(a) There will be a cancellation period of 90 days during which this Contract may be canceled by either party without advance notice or cause, and regardless of Resident's health. Resident's death before or during the cancellation period will constitute a cancellation. Cancellation by Resident during this 90-day cancellation period will be by telegram or by written notice of cancellation to Provider at _____ [address where notice of cancellation is to be delivered], which will be effective when given or, if mailed, when deposited in the mail properly addressed and with postage prepaid (see EXHIBIT F, Notice of Cancellation). If Resident cancels, Resident must return possession of any living unit delivered to the Resident under this Contract to the Provider in substantially the same condition as when the Resident took possession. Possession of the living unit must be made available to the Provider within 20 calendar days of the Resident's notice of cancellation. During the cancellation period, the Provider will pay all refunds owed to the Resident within 14 calendar days after the Resident makes possession of the living unit available to the Provider. During the cancellation period, the Provider may cancel the continuing care contract upon 30 days' written notice by the Provider without cause. If this Contract is canceled by either party during the cancellation period, the Resident will be

refunded the difference between the total amount of entrance, monthly, and optional fees paid and the amount used for care of the Resident. If the Resident has paid additional amounts for upgrades, special features, or modifications to the living unit and the Provider terminates this Contract, the Provider will amortize those additional amounts at the same rate as the entrance fee and will refund the unamortized balance to the Resident.

(b) This Contract will terminate upon the death of Resident. If the Resident's death occurs after the initial 90-day cancellation period, Provider will retain the full amount of all payments made by Resident to Provider prior to his or her death. Amounts transferred to Provider by Resident before his or her death will not be subject to claim by Resident's estate or heirs. If the Resident's death occurs before or during the cancellation period, the provision of Paragraph 33(a) will apply.

(c) After the cancellation period, Provider will have the right to unilaterally terminate this Contract upon 90 days' written notice to Resident. Termination shall be only for good and sufficient cause. Good and sufficient cause will be deemed to exist under the following circumstances: (1) Resident engages in behavior that is a threat to the mental and/or physical health or safety of himself or herself or others in Facility; (2) Resident is diagnosed with a medical condition that Facility is not equipped to treat, or is determined to have a need not previously identified that makes his or her residence at Facility inappropriate; (3) Resident fails to abide by the rules and regulations of Facility or any state or local law after being notified of the necessity of compliance; or (4) Resident fails to pay the monthly care fee or the fee for additional services specified in EXHIBIT A within 10 days following the due date.

None of the following activities by the Resident, or on behalf of the Resident, constitutes "just cause," "good cause," or otherwise activates this termination provision:

- (1) Filing or lodging a formal complaint with the department or other appropriate authority.
- (2) Participation in an organization or affiliation of residents, or other similar lawful activity.

The Provider may not discriminate or retaliate in any manner against any Resident for contacting the Department of Social Services, or any other state, county, or city agency, or any elected or appointed government official to file a complaint or for any other reason, or for participation in a residents' organization or association.

If the provider terminates this Contract after the cancellation period, pursuant to this Paragraph 33(c), any refunds due to the Resident under this Contract shall be paid within 14 calendar days after the resident makes possession of the living unit available to the Provider or 90 calendar days after death or receipt of notice of termination, whichever is later. If this Contract is terminated by the provider after the cancellation period, the Resident will be refunded the difference between the total amount of entrance, monthly, and optional fees paid and the amount used for care of the Resident. If the Resident has paid additional amounts for upgrades, special features, or modifications to the living unit and the Provider terminates this Contract, the Provider will amortize those additional amounts at the same rate as the entrance fee and will refund the unamortized balance to the Resident.

(d) This Contract may be terminated voluntarily by Resident at any time after the initial 90-day cancellation period by giving 90 days' written notice to Provider at _____ [address where notice is to be delivered]. Termination of this Contract by Resident will not be effective until 90 days after notice is personally delivered or, if mailed, 90 days after notice is deposited in the mail properly addressed and with postage prepaid. Until termination, Resident will be responsible for paying the monthly fee and all other charges provided for under this Contract. After the cancellation period, any refunds due to the Resident under this Contract will be paid within 14 calendar days after the Resident makes possession of the living unit available to the Provider or 90 calendar days after receipt of notice of termination. The Resident will be refunded the difference between the total amount of entrance, monthly, and optional fees paid and the amount used for care of the Resident.

Financial Condition

34. The financial condition as of the last annual audit of Provider is set forth in the current audited financial statement attached as EXHIBIT B to this Contract. Upon request, Resident will be provided with Provider's subsequent annual audit reports, which will include full details on per capita costs of operation and the status of reserves.

[Add, if provider uses name of any charitable or religious or nonprofit organization in its title, and that organization is not responsible for Provider's financial and contractual obligations:]

[Resident **or** Transferor] understands and acknowledges that neither _____ **[organization named]** nor any other person, organization, company, society, or group, is in any way financially responsible for Provider's financial or contractual obligations.

Waiver of One Breach Not a Waiver of Any Other

35. The failure of Provider in any one or more instances to insist upon Resident's strict performance, observance of or compliance with any one of the terms or provisions of this Contract or its waiver of Resident's breach of those terms or provisions will not be construed to be a waiver of its right to insist upon Resident's strict compliance with all of the terms and provisions of this Contract.

Prohibition Against Assignment

36. The rights and privileges of Resident under this Contract are personal to him or her and will not be transferred or assigned by Resident either by his or her own act, by any proceeding at law, or otherwise.

Procedure in Event of Provider's Closure of Continuing Care Retirement Community

[Describe closure and relocation plan that complies with requirements of Health & Safety Code §§ 1793.80-1793.83:.]

37. As required by *Health & Safety Code § 1793.80*, no less than 120 days prior to the intended date of the permanent closure of this continuing care retirement community facility, Provider will provide written notice, in no less than 12-point type, in the language prescribed by statute, to the affected residents and their designated representatives.

As required by *Health and Safety Code Section 1793.81*, 90 days prior to the permanent closure of this Continuing Care Retirement Community, Provider will provide Resident and Resident's designated representative, a written closure and relocation plan.

The plan will contain all of the following information:

- (a) The number of affected residents at each level of care in the continuing care retirement community facility.
- (b) Assessment of unique service and care needs, if applicable, for all of the following:
 - (1) Affected residents in skilled nursing and special care.

- (2) Affected residents in assisted living units.
- (3) Affected residents in the residential living units who require assistance with three or more activities of daily living, and other residents on request.
- (c) An explanation on how comparable care, if applicable, and comparable replacement housing will be provided.
- (d) A detailed description of the services Provider will provide to Resident to assist him or her in relocating, including, but not limited to, reasonable costs of moving, storage, if applicable, and transportation that will be arranged by Provider in consultation with Resident and his or her designated representative, and paid for directly by Provider.
- (e) The names and addresses of other continuing care retirement communities operated by Provider and whether there are openings available to Resident.
- (f) The names and addresses of other continuing care retirement communities within 30 miles of this closing continuing care retirement community facility that provide comparable replacement housing and care, if applicable, to those offered at this facility, and whether the facilities have immediate openings available to residents of this facility.
- (g) A description of how the facility will comply with *Health & Safety Code Section 1793.82*, requiring Resident to be offered the choice of the following four options: relocation to another facility owned or operated by Provider, if available; relocation to a continuing care facility that is owned by Provider; monetary compensation equal to the remainder of the value of Resident's contract with Provider; or a mutually agreed on alternative arrangement. This plan will describe or identify the replacement facility or facilities and the procedure by which Resident can select a replacement facility.
- (h) A statement regarding the availability of a licensed medical or geriatric professional to advise Resident, the resident's representative, and Provider regarding the Resident's transfer.

As required by *Health and Safety Code Section 1793.83*, within 30 days of submitting the relocation plan to the California Department of Social Services, Provider will fund a reserve, set up a trust fund, or secure a performance bond to ensure the fulfillment of the obligations and commitments associated with the relocation plan.

[Add, as required by *Health & Safety Code § 1788(a)(35)* :].

Nothing in this continuing care contract limits either the provider's obligation to provide adequate care and supervision for the resident or any liability on the part of the provider which may result from the provider's failure to provide this care and supervision.

Executed on _____[date].

[Repeat, as required, for each provider:]

PROVIDER

_____ [legal name of provider]

By _____ [signature]

[typed name and title]

_____ [address]

[EITHER, if Transferor and Resident are same party:]

TRANSFEROR AND RESIDENT

_____ [signature]

[typed name]

[OR, if Transferor and Resident are different parties:]

RESIDENT

_____ [signature]

[typed name]

TRANSFEROR

_____ [signature]

[typed name]

[Continue with the following:]

_____ [Identity of unit Resident will occupy]

[The following statement must be printed in at least 10-point boldface type (Health & Safety Code § 1788(a)(27):]

You, the Resident or Transferor, may cancel the transaction without cause at any time within 90 days from the date you first occupy your living unit. See the attached notice of cancellation form for an explanation of this right.

[The following notice must appear at the bottom of the signatory page:]

NOTICE

_____ [date]

This is a continuing care contract as defined by paragraph (8) of subdivision (c), or subdivision (I) of Section 1771 of the California Health and Safety Code. This continuing care contract form has been approved by the State Department of Social Services as required by subdivision (b) of Section 1787 of the California Health and Safety Code. The basis for this approval was a determination that _____ [provider name] has submitted a contract that complies with the minimum statutory requirements applicable to continuing care contracts. The Department does not approve or disapprove any of the financial or health care coverage provisions in this contract. Approval by the Department is NOT a guaranty of performance or an endorsement of any continuing care contract provisions. Prospective transferors and residents are strongly encouraged to carefully consider the benefits and risks of this continuing care contract and to seek financial and legal advice before signing.

Nothing in this continuing care contract limits either the provider's obligation to provide adequate care and supervision for the resident or any liability on the part of the provider which may result from the provider's failure to provide this care and supervision.

Acknowledgment of Receipt of Executed Contract and Attachments

The persons signing below acknowledge that each has received a clearly legible, executed copy of the continuing care contract, with all required or included attachments.

[EITHER, if Transferor and Resident are the same parties:]

TRANSFEROR AND RESIDENT

_____ [signature]

[typed name]

[OR, if Transferor and Resident are the different parties:]

RESIDENT

_____ [signature]

[typed name]

TRANSFEROR

_____ [signature]

[typed name]

EXHIBIT A

Charges for Optional Services

Service	Charge
[Specify extra services available through Provider and for which Resident will be charged separately]	\$ _____ per hour [or] cost to Provider

EXHIBIT B

Current Audited Financial Statement

[Attach current audited financial statement of provider. If provider is a new provider unable to furnish a current audited financial statement that will accurately reflect its financial ability to fulfill the continuing care contract obligations, also attach any supplemental statements that provider has submitted to the Department of Social Services after the date of the audited financial statement, together with an additional attachment that (1) discloses that the reserve requirement has not yet been determined or met, but that entrance fees shall be held in escrow until the requirements of Health & Safety Code § 1783.2 have been met; (2) discloses that the ability to provide the services promised in the contract will depend on successful compliance with the approved financial plan; (3) includes a copy of the approved financial plan for meeting the reserve requirements; and (4) includes any other supplemental statements or attachments necessary to accurately represent the provider's financial ability to fulfill its continuing care contract obligations (Health & Safety Code § 1788(e)).]

EXHIBIT C

Rules and Regulations of Facility

[Attach current copy of rules and regulations of Facility.]

I acknowledge that I have read and understand the foregoing rules and regulations of the Facility and agree to abide by them as they now exist or may be amended in the future.

_____ [signature of Resident]
[typed name]

EXHIBIT D

INVENTORY OF PERSONAL BELONGINGS

Inventory

1. The following is a complete list of Resident's valuables and personal belongings to be kept on Facility's premises. Provider will not be responsible for any items that are not listed on this sheet. It is the responsibility of Resident and his or her responsible party to ensure that this inventory is updated to include any valuables or personal belongings brought into Facility subsequent to its execution. This inventory may be updated by contacting _____ [name, title, and telephone extension or location of appropriate facility employee].

Furnishings: [list and specifically describe].

Jewelry: [list and specifically describe].

Please Note: Jewelry and other valuables may be deposited with Provider for safekeeping, by contacting _____ [name, title, and telephone extension or location of appropriate facility employee]. Provider will not be liable for the loss or theft of any valuables that Resident could have deposited if Resident fails to do so.

Personal Effects: [list and specifically describe; e.g., one pair of dentures, engraved with Resident's social security number].

Clothing: [list and specifically describe].

Miscellaneous: [list and specifically describe].

Removal From Facility

2. The following items may be removed from Facility from time to time, for regular cleaning or the like, and shall not for that reason be deemed to be removed from this inventory: [list generally, e.g., everyday clothing described above].

I acknowledge that I have received a copy of this Inventory of Personal Belongings.

Dated: _____.

_____ [signature of resident or resident's authorized representative]
[title of authorized representative, if appropriate]

TO BE COMPLETED ON RETURN OF RESIDENT'S BELONGINGS:

Receipt of Surrender

I acknowledge receipt from _____ [*name of provider*] of the items listed in the above Inventory of Personal Belongings.

Dated: _____.

_____ [*signature of resident or, if resident has died, his or her heir or personal representative*]
[*title of heir or personal representative, if appropriate*]

EXHIBIT E

CALIFORNIA STATUTES GOVERNING THEFT AND LOSS OF RESIDENTS' PERSONAL PROPERTY FROM
RESIDENTIAL CARE FACILITIES

[*Insert copies of Health & Safety Code §§ 1569.152-1569.154.*]

EXHIBIT F

NOTICE OF CANCELLATION

[*Insert Notice of Cancellation (see § 105.234) here. The Notice of Cancellation must be easily detachable and must be printed in at least 10-point boldface type, in duplicate (Health & Safety Code § 1788(h)).*]

EXHIBIT G

ACCESS TO COMPLAINTS, CITATIONS, INVESTIGATIONS, AND SURVEYS

Complaints and Citations

1. Provider posts every substantiated complaint and citation against Provider or Facility as follows: [*describe location of posting, e.g., on the bulletin board in the recreation room*] for six months. Substantiated complaints and citations more than six months old are kept on file for public access and review and may be reviewed during Provider's normal business hours.
2. Copies of the results of Department of Health Services investigations and surveys of Facility are available from the district office of that Department. That office is located at _____ [*address of appropriate district office*]. Its telephone number is _____.

EXHIBIT H

RESIDENTS' *BILL OF RIGHTS*

(Health & Safety Code Section 1771.7)

No resident of any continuing care retirement community shall be deprived of any civil or legal right, benefits, or privileges guaranteed by law, by the California Constitution, or by the United States Constitution solely by reason of status as a resident of a community. In addition, because of the discretely different character of residential living unit programs that are a part of continuing care retirement communities, this Residents' *Bill of Rights* will augment Chapter 3.9 (commencing with Section 1599), *Section 73523 of Title 22 of the California Code of Regulations*, and applicable federal law and regulations.

All residents in independent living programs have all of the following rights:

- (1) To live in an attractive, safe, and well maintained physical environment.
- (2) To live in an environment that enhances personal dignity, maintains independence, and encourages self-determination.
- (3) To participate in activities that meet individual physical, intellectual, social, and spiritual needs.
- (4) To expect effective channels of communication between residents and staff, and between residents and the administration or board of directors.
- (5) To receive a clear and complete written contract that establishes the mutual rights and obligations of the resident and the continuing care retirement community.
- (6) To manage his or her financial affairs.
- (7) To be assured that all donations, contributions, gifts, or purchases of provider-sponsored financial products shall be voluntary, and may not be a condition of acceptance or of ongoing eligibility for services.
- (8) To maintain and establish ties to the local community.
- (9) To organize and participate freely in the operation of independent resident organizations and associations.

In addition, a continuing care retirement community shall maintain an environment that enhances the residents' self-determination and independence. The provider shall:

- (1) Encourage the formation of a resident association by interested residents, provide space and post notices for meetings, and provide assistance in attending meetings for those residents who request it. In order to promote a free exchange of ideas, at least part of each meeting shall be conducted without the presence of any continuing care retirement community personnel. The association may, among other things, make recommendations to management regarding resident issues which impact their quality of life, quality of care, exercise of rights, safety and quality of the physical environment, concerns about the contract, fiscal matters, or other issues of concern to residents. The

management shall respond, in writing, to a written request or concern of the resident association within 20 working days of receiving the written request or concern. Meetings shall be open to all residents to attend as well as present issues when prearranged with the council president. Executive sessions of the council shall be for attendance only by council members.

(2) Establish policies and procedures that promote the sharing of information, dialogue between residents and management and access to the provider's governing body. The provider must conduct biennially a resident satisfaction survey that must be available to the resident association or its governing body, or, if neither exists, to a committee of residents at least 14 days prior to the next semiannual meeting of residents and the governing board of the provider required by *Health & Safety Code Section 1771.8*. A copy of the survey must be posted in a conspicuous location at each facility.

The resident has the right to freely exercise all rights pursuant to *Health & Safety Code § 1771.7*, in addition to political rights, without retaliation by the provider.

EXHIBIT I

[Attach schedule of average monthly fees charged to residents for each type of residential living unit for each of five years preceding execution of continuing care contract (Health & Safety Code § 1788(e)). The provider must update this schedule annually at the end of each fiscal year. If the continuing care retirement community has not been in existence for five years, the information must be provided for each of the years the continuing care retirement community has been in existence (Health & Safety Code § 1788(f)).]

EXHIBIT J

[If any continuing care contract provides for a health insurance policy for the benefit of the resident, attach a binder under Ins. Code §§ 382 and 382.5 (Health & Safety Code § 1788(g)).]

[Add this exhibit if several items of property are to be transferred to Provider pursuant to Paragraph 21 of this contract]

EXHIBIT K

ITEMIZED RECEIPT OF PROPERTY TRANSFERRED PURSUANT TO CONTRACT

Pursuant to Paragraph 21 of this Contract, Provider acknowledges receipt of the following items of property from Transferor:

Description of Property	Value	Method of Ascertaining Value
_____	_____	_____
_____	_____	_____
_____	_____	_____

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART IV. FORMS
C. Continuing Care Contracts

33-105 California Legal Forms--Transaction Guide § 105.231

§ 105.231 Alternative Medical Care Provisions for Continuing Care Contract

[1] Comment

[a] Use of Form

This form is a medical care provision for use in a continuing care contract executed by an elderly person and a facility that is authorized to provide both residential care and skilled nursing care. It provides that, in the event that the elderly person requires a higher level of medical care than that provided as a basic service of the residential facility, he or she will be transferred to the skilled nursing section of the facility. It also provides for transfer to an acute care hospital if the person requires a higher level of care than that available in the skilled nursing section of the facility. It sets forth payment arrangements for treatments and services that are not covered by the life care contract, and/or that may be covered by private insurance or government benefit programs. For an explanation of the level of care provided by skilled nursing facilities, see § 105.12.

[b] Contents of Agreement

The contents of contracts for admission to skilled nursing facilities are governed by statute [*see Health & Safety Code § 1599.60 et seq.*]. The contents of continuing care contracts are governed by the regulations of the State Department of Social Services, as well as by statute [*see 22 Cal. Code Reg. § 89700 et seq.; Health & Safety Code §§ 1787, 1788*]. For a complete list of the provisions that must be included in continuing care contracts, see § 105.123. For a representative continuing care contract for admission to a residential facility, containing the necessary information but not the necessary provisions for agreements for admission to skilled nursing facilities, see § 105.222. The required contents of agreements for admission to skilled nursing facilities and other long-term health care facilities [*see Health & Safety Code § 1326 (definition)*] are discussed in § 105.200[1].

[2] FORM

Alternative Medical Care Provisions for Continuing Care Contract

Alternative Medical Care Provisions for Continuing Care Contract Medical, Surgical, Hospital, and Nursing Care

(a) Resident shall be seen at least once every 30 days by a Staff Physician employed by Provider. Provider shall provide Resident with the medical care and medical or surgical services directed by the Staff Physician or by other health care professionals authorized by Staff Physician. When, in the opinion of the Staff Physician, Resident requires a higher level of care than that provided as a basic service pursuant to this Contract, Resident shall be transferred to the skilled nursing section of the Facility for the period during which that care is required. Transfer to an acute care hospital with which facility has a transfer agreement shall be made when, in the opinion of the Staff Physician, the condition of the Resident requires hospitalization.

(b) Unless the Staff Physician recommends otherwise, hospital accommodations shall be in a ward consisting of more than one but not more than four beds. If Resident desires a private room and if, in the judgment of the Staff Physician, private accommodations are unnecessary, the Resident shall pay the difference between the cost of ward accommodations and private accommodations.

(c) General nursing care shall be provided while the Resident is hospitalized. Resident shall be provided with all medication, treatment, therapy, and other related services authorized by the Staff Physician.

(d) Provider shall be responsible for payment of Resident's hospitalization and treatment and/or surgery in an acute care hospital only after any privately owned insurance held by Resident has been applied to the cost of those services.

(e) Provider shall compensate Resident for emergency hospitalization while outside a _____-mile radius from the Facility (but within the United States) up to \$_____, to the extent of the normal daily rate for accommodations in the institution where the care is provided.

(f) Resident shall, from time to time as appropriate, take all action and execute all forms reasonably necessary to secure the payment to any acute care hospital, extended care facility, physician, or other provider of health services, of any and all amounts payable for services rendered to Resident and for which benefits are available under Medicare or similar federal or state legislation.

(g) Hospital, medical, or other health care services for which federal or state health benefits are paid, shall be understood to be compensated for by the federal or state source involved, and shall be excluded from the services provided by Provider.

(h) Any health benefits paid from federal or state sources shall, as between the Provider and Resident, be credited first against any charge otherwise due from the Resident for the services involved; next, to reimburse to the Resident any payment he or she made for the service involved; and any balance to reimburse to the Provider for any payment made by it for the service involved.

(i) Provider shall not pay or arrange to pay to the federal and/or state government any charges required to qualify Resident for benefits under health programs. Resident shall pay any charges of that nature (including any deduction, e.g., from his or her Social Security) and the amount of the payment shall be reimbursed to the Resident by Provider or allowed by Provider as an offset against Resident's monthly rate under this agreement.

(j) Resident shall execute and deliver to Provider a power of attorney for the purpose of permitting Provider to act as Resident's agent in handling all matters relating to any reimbursable health benefits from federal or state resources.

(k) Provider does not assume any present or future responsibility or obligation to render medical, surgical, hospital, nursing or other care for conditions listed as medical or surgical exceptions. Resident assumes full responsibility for, and shall pay all expenses incurred in connection with, the care or treatment of any listed medical or surgical exception,

whether provided by Provider or by an outside institution.

(l) Notwithstanding Paragraph _____ of this Contract, if medical or nursing care may be provided at no additional expense to Provider (as determined by the Administrator) for conditions listed as medical or surgical exceptions, that care shall be provided.

(m) Provider shall not pay for care or treatment of the eyes or refractions of the eyes, glasses, or for treatment of cataracts; care or treatment of hearing defects, or for hearing aids; care or treatment for the teeth, or for dentistry, dentures, or inlays; conditions affecting the mind or psychotherapy; osteopathic, chiropractic, or chiropody treatments; or orthopedic appliances.

(n) The following medical and/or surgical conditions of Resident disclosed by entrance examination are exceptions to the obligations of Provider under this agreement: *[list exceptions]*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
PART IV. FORMS
C. Continuing Care Contracts

33-105 California Legal Forms--Transaction Guide § 105.232

§ 105.232 Optional Provision for Subsidized Resident

[1] Comment

[a] Use of Form

This form is an optional provision that should be included in a continuing care contract by any facility that will subsidize the care of a resident who becomes unable to meet his or her financial obligations under a life care contract. It may be added to the complete continuing care contract in § 105.230 and the remaining provisions of that form renumbered accordingly. For a complete list of other optional continuing care provisions specifically permitted by statute [*see Health & Safety Code § 1788(c)*], see § 105.123.

[b] Subsidy of Costs for Resident Care

A life care contract may provide for a resident who becomes unable to pay for his or her monthly care fees at some future date. If it does include this provision, it may, as does this form, stipulate that the resident must apply for any public assistance or other aid for which he or she is eligible and that the provider may apply for that aid on behalf of the resident [*Health & Safety Code § 1788(c)(1)(B)-(G)*].

This form also contains the following provisions, each of which is authorized by statute [*see Health & Safety Code § 1788(c)(1)*]:

- The provider's decision is final and conclusive regarding any adjustments to be made or any action to be taken regarding any charitable consideration extended to any of its residents.
- The provider is entitled to payment for the actual costs of care out of any property acquired by the resident subsequent to any adjustment extended to subsidize the resident's monthly care fees, or from any other property of the resident that the resident failed to disclose.
- The provider may pay the monthly premium of the resident's health insurance coverage under

Medicare to ensure that those payments will be made.

- The provider may receive an assignment from the resident of the right to apply for and to receive the benefits, for and on behalf of the resident.

- The provider is not responsible for the costs of furnishing the resident with any services, supplies, and medication, when reimbursement is reasonably available from any governmental agency, or any private insurance.

- Any refund due to the resident at the termination of the continuing care contract may be offset by any prior subsidy to the resident by the provider.

[2] FORM

Optional Provision for Subsidized Resident

Subsidized Residence

1. (a) If at a future time, Resident becomes financially unable to meet the costs of his or her care at Facility, Provider has the discretion to either subsidize Resident's care or terminate this Contract. The decision to subsidize or to not subsidize, in whole or part, the cost of Resident's care at Facility, is subject to Provider's sole and arbitrary discretion, and the decision made by Provider is final and conclusive.

(b) In the event Provider agrees at any time to subsidize in whole or in part the cost of Resident's care at Facility, the following provisions apply:

(1) Resident must apply for any public assistance or other aid for which he or she is eligible and Provider may apply on Resident's behalf.

(2) On request of Provider, Resident will assign to Provider the right to apply for and to receive on behalf of Resident, any benefits to which Resident is entitled.

(3) Provider may pay the monthly premium of the Resident's health insurance coverage under Medicare to ensure that those payments will be made.

(4) Provider has no responsibility for the costs of furnishing Resident with any services, supplies, or medication, when reimbursement is reasonably available from any governmental agency or any private insurance.

(5) Provider is entitled to payment for the actual costs of care out of any property acquired by the resident subsequent to any adjustment extended to the Resident to subsidize a resident who becomes financially unable to pay his or her monthly care fees. Provider is also entitled to payment from any other property of the Resident that the resident failed to disclose.

(6) If Provider subsidizes Resident under this Contract, then, upon Resident's death, his or her estate is liable to Provider for an amount equal to the difference between the sums actually paid by Resident to Provider and the cost of care rendered by Provider. Resident agrees not to make any gift of real or personal property in contemplation or subsequent to the execution of this contract which would diminish his or her estate or Provider's claim.

(7) Any refund due to the Resident at the termination of this continuing care contract may be offset by any prior subsidy to the Resident by the Provider.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsGeneral
OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic
Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic
Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
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33-105 California Legal Forms--Transaction Guide § 105.233

§ 105.233 Inter Vivos Revocable Declaration of Trust for Payment of Charges to a Long-Term Care Facility

[1] Comment

[a] Use of Form

This form is a revocable inter vivos trust for the payment of monthly charges in a long-term care facility. It provides an elderly person with a firm basis for the payment of his or her monthly care fees and any other amounts necessary for maintenance. If the elderly person does not object to transferring all of his or her property to the facility, an alternative arrangement for ensuring a continued source of maintenance is a continuing care contract [see § 105.230].

This form is designed for use in situations involving an individual trustee. If the trustee will be an institution such as a bank, the pronouns relating to the trustee should be changed to a gender neutral form.

The payment and distribution provisions of this trust are not designed to preserve any entitlement that the beneficiary might have to government assistance benefits. So-called "special needs trusts," designed to preserve a trust beneficiary's entitlement to government benefits to the maximum extent possible, require special provisions and are beyond the scope of this chapter. For a detailed discussion of special needs trusts, see California Wills and Trusts, Ch. 118, *Special Needs Trusts* (Matthew Bender). For illustrative special needs trusts, see California Wills and Trusts Forms, Division 1, *Complete Inter Vivos Trusts*, Trust 3, Section 5.05 (special needs trust provisions for one beneficiary of revocable trust) and Trust 43 (irrevocable special needs trust) (Matthew Bender).

For an explanation of revocable trusts in general, see the Legal Background to Ch. 70, *Complete Revocable Trust Forms*. For a discussion of the basic income and estate tax considerations applicable to trusts and other estate planning devices, see Ch. 60, *Estate Planning*. For detailed coverage of the federal estate, gift, and income tax laws in the context of trust planning, see California Wills and Trusts, Ch. 2, *Overview of Tax Laws Affecting the Disposition of Estates*, Ch. 3, *Selecting the Proper Estate Planning Devices*, and Ch. 82, *Basic Tax Considerations in Trust Planning* (Matthew Bender).

[b] Source of Payments to Facility

Paragraph 3.01(a) of this form requires the trustee to make regular payments, from income produced by the trust estate, to a designated facility for the care of the settlor. It requires the addition of any excess income to the principal of the trust estate.

[c] Revocability

Unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable by the settlor [*Prob. Code § 15400*]. Paragraph 2.02(a) of this form expressly makes the trust agreement revocable upon written notice from the settlor to the trustee.

The trust agreement is irrevocable upon the death of the settlor [*see P 2.02(b)*]. At that time, the trust estate will be distributed by the trustee. The effect of this provision is to render this form a will substitute as to the assets contained in the trust estate.

[d] Disposition of Trust Estate on Death of Settlor

Upon the death of the settlor, the trust estate will be divided equally among beneficiaries designated by the settlor in Paragraph 3.02(b). Paragraph 4.02 provides that, among the beneficiaries named in Paragraph 3.02(b), allocations of principal and income will be made in accordance with the provisions of the Legal Estates Principal and Income Law [*see Civ. Code §§ 731-731.15*].

[e] Effect of Subsequent Conservatorship

It is possible that if the settlor becomes incompetent, he or she will be placed under a conservatorship. A conservator of the person may be appointed for an adult who is unable to provide properly for his or her needs for personal health, food, clothing, or shelter, and a conservator of the estate may be appointed for any adult who is substantially unable to manage his or her own financial resources or to resist fraud or undue influence [*Prob. Code §§ 1800.3, 1801; see "--Inability to Manage Finances or Resist Fraud or Undue Influence" in the Legal Background to Ch. 66, Guardianship and Conservatorship Planning, Pt. B*]. For an explanation of conservatorship proceedings, see *California Forms of Pleading and Practice*, Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* (Matthew Bender).

If a conservator is eventually appointed for the settlor, that conservator will have the power to exercise the settlor's right to revoke this trust agreement [*see Prob. Code § 2580(b)(11)*].

[2] FORM

Revocable Inter Vivos Trust for Payment of Charges to a Long-Term Care Facility

TRUST AGREEMENT

This trust agreement is entered into by _____ [*name of settlor*], a resident of _____ County, California, "Settlor," and _____ [*name of trustee*], of _____ County, California, "Trustee."

ARTICLE 1 TRUST ESTATE

Transfer of Trust

Section 1.01. The Settlor has transferred and delivered to the Trustee, without consideration, the property described in

Exhibit A, which is attached to and made a part of this Agreement and receipt of which is acknowledged by the Trustee. That property and all property subsequently added to this trust shall comprise the trust estate and shall be held, managed, administered, and distributed by the Trustee as provided in this Agreement.

Additions to Trust Estate

Section 1.02. Any person, including the Settlor, or organization may add to this trust any property acceptable to the Trustee. All additional property added to this Trust shall become a part of the trust estate and shall be held, managed, administered, and distributed by the Trustee as provided in this Agreement.

ARTICLE 2 RIGHTS RESERVED TO THE SETTLOR

Amendments

Section 2.01. The Settlor shall have the right at any time to amend any of the provisions of this Agreement by an instrument in writing executed by the Settlor and delivered to the Trustee.

Revocability

Section 2.02. (a) The Settlor may revoke this Agreement at any time by delivery of notice to that effect to the Trustee. The Trustee's powers, rights, and obligations under this Agreement shall terminate immediately upon receipt of notice of revocation by the Settlor.

(b) On the death of the Settlor, this trust shall become irrevocable.

ARTICLE 3 DISTRIBUTIONS BY THE TRUSTEE

Lifetime Distributions

Section 3.01. During the life of the Settlor or until Settlor notifies Trustee in a signed writing to discontinue _____ [his or her] performance under this Agreement, the Trustee shall apply and distribute the net income and principal of the trust estate in the following manner:

(a) Trustee shall pay to _____ [name of facility], _____ [address of facility], monthly payments commencing on the date of this Agreement, of not less than \$_____, together with all additional sums that may, in the sole discretion of the Trustee, be necessary or proper for the care and maintenance of the Settlor.

(b) If at any time the Settlor is declared by a court of competent jurisdiction to be incompetent, or if Settlor for any reason becomes unable to act upon _____ [his or her] own behalf, the Trustee, in _____ [his or her] sole discretion, may pay to or apply for the benefit of the Settlor all amounts, up to the whole, of the principal of the trust estate, as the Trustee deems necessary for the reasonable support, care, and comfort of Settlor.

Distribution of Trust Estate Upon Death of Settlor

Section 3.02. On the death of the Settlor, the Trustee shall apply and distribute the trust estate in the following manner:

(a) Trustee shall pay the expenses of Settlor's last illness, if any, funeral and burial expenses, and any taxes or other incidental obligations which may become due in connection with the trust estate.

(b) Settlor shall distribute the residue of the trust estate in equal shares to the following beneficiaries:

_____ [*identify beneficiaries, e.g., Jane Doe of 111 Oak Street, San Francisco, California; Richard Roe of 1376 Shannon Lane, City of Costa Mesa, Orange County, California*]. Any expenses incurred by the Trustee in carrying out the provisions of this Article shall be charged equally against the shares of each beneficiary named in this paragraph. Trustee shall prorate taxes and other current expenses of administering the trust estate to the date of termination.

(c) The Trustee shall apply payments for the benefit of any beneficiary, or may make payments to any beneficiary under disability to the guardian or conservator of the person of that beneficiary or to the parent or person having legal custody of the beneficiary, if a minor. Trustee may pay sums necessary for care, support, comfort, and education directly to minor beneficiaries who, in the judgment of the Trustee, have attained sufficient age and discretion to render it probable that those sums will be properly used. The Trustee may also deposit income or principal payable under this Article to the credit of the beneficiary to whom it is due in any bank account the beneficiary designates.

Method of Distribution

Section 3.03. On any division or partial or final distribution of the trust estate, the Trustee shall have the power to partition, allot, and distribute the trust estate in undivided interests or in kind, or partly in money and partly in kind, at valuations determined by the Trustee, and to sell any property the Trustee deems necessary to make the appropriate division or distribution.

Change in Status of Beneficiaries

Section 3.04. Until the Trustee receives written notice of any birth, marriage, death, or other event upon which the right to payments from this trust may depend, the Trustee shall incur no liability to persons whose interest may have been affected by that event for disbursement made in good faith.

ARTICLE 4 DUTIES AND POWERS OF THE TRUSTEE

Delivery of Agreement

Section 4.01. The Trustee shall supply to the _____ [*name of facility*] within a reasonable time after execution of this Agreement, a true copy of this Agreement, including any and all amendments and Exhibits affecting it.

Allocation of Principal and Income

Section 4.02. The Trustee shall have the power to determine what is principal or income of the trust estate and apportion and allocate in _____ [*his or her*] discretion receipts and expenses as between the principal and income accounts. Except insofar as the Trustee exercises this discretion, and except as otherwise provided in this Agreement, matters concerning the rights of beneficiaries among themselves as to principal and income shall be governed by the provisions of the Legal Estates Principal and Income Law.

Trustee's Powers

Section 4.03. The Trustee shall carry out the purposes of this trust and, subject to any limitation stated elsewhere in this Agreement, shall have the following powers, in addition to any additional powers now or later conferred by law:

- (a) To acquire an asset or any interest in an asset, for cash or on credit, at public or private sale or by gift, exchange, partition, division, or change of character.
- (b) To sell or convey, at public or private sale, for cash or credit; to exchange; to divide; to grant options; or to abandon a trust asset or any interest in a trust asset.
- (c) To lease for terms within or extending beyond the duration of this Agreement for any purpose, including exploration for and removal of gas and oil or other minerals, and to enter into community oil and/or gas leases.
- (d) To retain income-producing property [*insert if trustee is a corporation*], including stock of the corporate Trustee, and to invest and reinvest as provided by law, including investments in any collective investment fund or common trust fund now or hereafter established by the corporate Trustee.
- (e) To borrow, pledge, place, replace, renew, or extend any encumbrance upon any real property.
- (f) To participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations and in connection with that participation, to deposit securities with and transfer title to any protective or other committee that Trustee may deem advisable.
- (g) To purchase, sell, or exercise stock subscription or conversion rights and warrants.
- (h) To insure the assets of the trust against damage or loss, and the Trustee against liability to third persons for actions carried out in performance of duties and obligations under this Agreement.
- (i) To advance money for the protection of the trust estate, and for all expenses, losses, and liabilities sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances, with any interest, the Trustee shall have a lien on the trust assets.
- (j) To pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise; to release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible; and to institute, compromise, and defend actions and proceedings.
- (k) To continue or participate in any business or other enterprise constituting an asset of the trust estate and to effect incorporation, dissolution, or other change in the form of organization of such a business or enterprise.
- (l) To employ any agents necessary to the administration of the trust and to pay them a reasonable compensation.
- (m) To make ordinary or extraordinary repairs or alterations to buildings or other trust property; demolish any improvements; and raze existing, or erect new, party walls or buildings.
- (n) To subdivide, develop, or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; adjust differences in valuation on exchange or partition by giving or receiving consideration; and dedicate easements to public use without consideration.

(o) To make loans at prevailing rates of interest to the legal representative of a Settlor's estate on any terms and conditions.

(p) To purchase, at any time within 15 months after the death of Settlor, and retain as assets of this trust, any real or personal property in the Settlor's probate estate at the fair market value of that property on the date of purchase.

No Limitation on General Powers

Section 4.04. The enumeration of certain powers of the Trustee shall not limit _____ [his or her] general powers, the Trustee subject to the discharge of _____ [his or her] fiduciary obligations, being vested with and having all the rights, powers, and privileges which an absolute owner of the same property would have.

ARTICLE 5 ADMINISTRATIVE PROVISIONS

Trust Additions

Section 5.01. With the consent of the Trustee, any person may add property to this trust by will or otherwise.

Spendthrift Provision

Section 5.02. The interests of the beneficiaries named in Section 3.02(b) of this Agreement in principal or income shall not be subject to claims of their creditors or others nor to legal process, and shall not be voluntarily or involuntarily alienated or encumbered.

ARTICLE 6 RESIGNATION AND COMPENSATION OF TRUSTEE

Resignation

Section 6.01. The Trustee shall have the right to resign at any time. In the event of that resignation, a successor may be appointed by Settlor; otherwise the successor shall be appointed by a court of competent jurisdiction upon the petition of the resigning Trustee or of any person interested in the trust.

Compensation

Section 6.02. The Trustee shall receive as compensation for _____ [his or her] services under this Agreement [*specify compensation to be paid trustee*].

ARTICLE 7 CONSTRUCTION OF TRUST

Law for Construction of Trusts

Section 7.01. The trust created by this Agreement has been accepted by the Trustee in the State of California. This Agreement shall be administered by the Trustee in California. The validity, construction, and all rights under this Agreement shall be governed by the laws of the State of California.

Severability

Section 7.02. Should any provision of this Agreement be or become invalid or unenforceable, the remaining provisions shall continue in full force and effect.

Notices

Section 7.03. All notices or other communication required or permitted by this Agreement to be delivered to or served on the Trustee shall be deemed properly delivered to, served on, and received by the Trustee when personally delivered to the Trustee, or in lieu of personal service, when deposited in the United States mail, certified mail with postage prepaid, addressed to the Trustee at _____[*trustee's mailing address*].

EXECUTED on _____[*date*], at _____ County, California.

TRUSTEE

_____ [*signature of trustee*]

[*typed name*]

SETTLOR

_____ [*signature of settlor*]

[*typed name*]

Approved:

_____ [*signature of attorney*]

[*typed name*]

Attorney for Settlor

[*Optional*]

[*Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):*]

State of California)
County of _____)

On _____[*date*], before me, _____[*name and title of officer taking acknowledgment*], personally appeared [*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument and acknowledged to me that _____[*he or she or they*] executed the same in _____[*his or her or their*] authorized _____[*capacity or capacities*], and that by _____[*his or her or their*] signature[s] on the instrument the person[s], or the entity upon behalf of which the person [s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____[*Seal*]

Consent of Settlor's Spouse

I, _____ [name], certify:

1. I am the spouse of _____ [name of settlor], the person named as Settlor in the foregoing Trust Agreement executed on _____ [date] by _____ [name of trustee];

2. I have read this Trust Agreement and understand all of its provisions;

3. I approve this Trust Agreement in all particulars and consent that all property originally or hereafter conveyed to the named or successor Trustee to be held under its provisions, including my share of any community property or quasi-community property, shall be held, administered, and distributed by the Trustee as provided in this Trust Agreement or any amendment thereto.

4. I expressly join with my spouse in transferring to the trust created by this Trust Agreement any and all community property of my spouse and myself described in the inventory attached to this Trust Agreement and marked Exhibit "A."

EXECUTED on _____ [date] at _____ County, California.

_____ [signature of settlor's spouse]
[typed name]

Acknowledgment by Settlor's Spouse

[For an acknowledgment by the settlor's spouse, use the acknowledgment form set forth in Civ. Code § 1189(a) (see above).]

SCHEDULE "A"

The following property shall comprise the trust estate of the Trust Agreement to which this Exhibit is attached:

1. Cash in the sum of \$_____.

2. The following personal property:

(a) [describe property, e.g., Chinese porcelain collection consisting of 3 twelve-inch Ming vases purchased by settlor on January 3, 1942].

3. The following real property:

(a) [provide legal description of real property].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts General Overview Family Law Family Protection & Welfare Elderly Persons General Overview Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons General Overview Public Health & Welfare Law Healthcare Services for Disabled & Elderly Persons Care Facilities General Overview Public

Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities



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DIVISION VII: PERSONAL TRANSACTIONS
 CHAPTER 105 NURSING HOMES AND CARE FOR THE ELDERLY
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33-105 California Legal Forms--Transaction Guide § 105.234

§ 105.234 Transferror's Notice of Cancellation of Continuing Care Contract Within 90-Day Probationary Period

[1] Comment

[a] Use of Form

This form is a statutory notice of cancellation of a continuing care contract by the transferor [*Health & Safety Code § 1788(h)*]. This notice must be included or attached, in duplicate, to every continuing care contract executed in California [*Health & Safety Code § 1788(h)*; see *Health & Safety Code § 1771(c)(8), (l)* ("continuing care contract" and "life care contract" defined)]. The notice must be easily detachable from the contract, and must be printed in at least 10-point boldface type [*Health & Safety Code § 1788(h)*]. The contract itself must also include a conspicuous statement, in at least 10-point boldface type in immediate proximity to the space reserved for the signatures of the resident and, if applicable, the transferor, that provides as follows: "You, the resident or transferor, may cancel the transaction without cause at any time within 90 days from the date you first occupy your living unit. See the attached notice of cancellation form for an explanation of this right." [*Health & Safety Code § 1788(a)(27)*; see § 105.230].

This notice serves the dual functions of providing notice of the right to cancel a continuing care contract and providing a form by which to effect such a cancellation.

[b] Cancellation Rights

A continuing care contract may be canceled without cause by either party, by providing written notice to the other party within 90 days after the resident's initial occupancy [*Health & Safety Code § 1788.2(a)*; see *Health & Safety Code § 1788(a)(28)* (provider's right to cancel during cancellation period on 30 days written notice)]. Unless the contract specifically provides otherwise, death before or during the cancellation period constitutes a cancellation [*Health & Safety Code § 1788.2(b)*].

[c] Fees and Refunds

If possession of the living unit in a continuing care retirement community that is not an equity continuing care

retirement community is returned to the provider in substantially the same condition as when received, the resident's only obligations is to pay a reasonable fee to cover costs and to pay the reasonable value of services rendered under the canceled contract [*Health & Safety Code § 1788.2(d)(1)*]. Equity project providers may impose a resale fee on sellers [*Health & Safety Code § 1788.2(d)(2)*; see *Health & Safety Code § 1788.2(e)* (limitation on resale fees)].

The cancellation period [see *Health & Safety Code § 1771(c)(2)* ("cancellation period" is 90-day period beginning when resident physically moves into continuing care retirement community, during which resident may cancel contract) and associated refund obligations apply to all executed continuing care contracts regarding a unit in a continuing care retirement community that is not an equity continuing care retirement community, as well as to continuing care contracts executed in conjunction with a purchase of an equity interest from a provider [*Health & Safety Code § 1788.2(c)(1), (2)*]. However, the cancellation period and associated refund obligations do not apply to continuing care contracts executed in conjunction with sales of an equity interest by one resident to another [*Health & Safety Code § 1788.2(c)(2)*]. During the cancellation period, the provider must pay all refunds owed to a resident within 14 calendar days after a resident makes possession of the living unit available to the provider [*Health & Safety Code § 1788.4(a)*].

[2] FORM

Notice of Cancellation of Continuing Care Contract Within 90-Day Probationary Period

[The following notice must be printed in at least 10-point boldface type, in duplicate (Health & Safety Code § 1788(h)).]

NOTICE OF CANCELLATION

_____ [*date*]

Your first date of occupancy under this contract is _____ [*date*].

You may cancel this transaction, without any penalty within 90 calendar days from the above date.

If you cancel, any property transferred, any payments made by you under the contract, and any negotiable instrument executed by you will be returned within 14 calendar days after making possession of the living unit available to the provider. Any security interest arising out of the transaction will be canceled.

If you cancel, you are obligated to pay a reasonable processing fee to cover costs and to pay for the reasonable value of the services received by you from the provider up to the date you canceled or made available to the provider the possession of any living unit delivered to you under this contract, whichever is later.

If you cancel, you must return possession of any living unit delivered to you under this contract to the provider in substantially the same condition as when you took possession.

Possession of the living unit must be made available to the provider within 20 calendar days of your notice of cancellation. If you fail to make the possession of any living unit available to the provider, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, or send a telegram

to _____ [*name of provider*]

at _____ [*address of provider's place of business*]

not later than midnight of _____ [*date*].

I hereby cancel this transaction.

_____ [*signature of Resident or Transferor*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsGeneral
OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic
Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic
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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 106 ANATOMICAL GIFTS

33-106 California Legal Forms--Transaction Guide 106.syn

§ 106.syn Synopsis to Chapter 106: ANATOMICAL GIFTS

§ 106.01 California Statutes

§§ 106.02-106.04 [Reserved]

§ 106.05 Annotations

§ 106.06 Text References

[1] Matthew Bender Sources

§§ 106.07-106.09 [Reserved]

§ 106.10 Anatomical Gifts

[1] In General

[2] Hospital Protocols

[3] Criminal Offenses

[4] Determination of Death

[5] Cremation of Remains After Use

[a] In General

[b] After Scientific Study

§ 106.11 Uniform Anatomical Gift Act

[1] In General

[2] Gift by Donor or Donor's Agent

[3] Donate Life California Organ and Tissue Donor Registry

[4] Anatomical Gift by Third Party

[5] Validity of Document of Gift

[6] When Gift is Effective

[7] When There Are Indications of Religious Objections

[8] Amendment or Revocation of Anatomical Gift by Donor or Donor's Agent

[9] Refusal to Make Anatomical Gift

[10] Permissible Donees and Purposes

[11] Reasonable Search

[12] Duties and Responsibilities of Hospitals, Physicians, and Procurement Organizations

[13] Liability Under the Act

[14] No Determination of Ultimate Recipient

[15] Removal of Part or Body

[16] Duties of Coroner

[17] Inquest

[18] Conflict with Health Care Directive

§§ 106.12-106.99 [Reserved]

§ 106.100 Facts

Scope

§ 106.101 Documents

Scope

§§ 106.102-106.109 [Reserved]

§ 106.110 Preliminary Determinations for Donor

Scope

§§ 106.111-106.119 [Reserved]

§ 106.120 Preparation of Documents

Scope

§ 106.121 Procedures for Making Anatomical Gifts

Scope

§§ 106.122-106.129 [Reserved]

§ 106.130 Amendment or Revocation of Anatomical Gift

Scope

§§ 106.131-106.199 [Reserved]

§ 106.200 Nontestamentary Document of Gift

[1] Comment

[a] Use of Form

[b] Anatomical Gifts

[c] Form of Gift Document

[d] Execution and Attestation

[e] Designation of Specific Donee

[f] Confirmation of Gift in Will

[g] Printed Forms

[2] FORM

Nontestamentary Document of Gift

§ 106.201 Donor Cards

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[b] Anatomical Gift Made by Donor Card

[c] Department of Motor Vehicles Registration

[i] In General

[ii] Process

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[v] Additional Information

[d] Uniform Donor Card

[e] Card Indicating That Anatomical Gift Was Made in Another Instrument

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[2] FORM: Uniform Donor Card

Uniform Donor Card

[3] FORM: Card Indicating Existence of Anatomical Gift Instrument

Card Indicating Existence of Anatomical Gift Instrument

§ 106.202 Gift of Entire Body to State Curator of Northern California

[1] Comment

[a] Use of Form

[b] Role of State Curators

[c] Dealing With Schools Directly

[d] Official Instructions Accompanying Forms

[e] Individual Documents-Instructions for the Disposition of Remains

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[2] FORM

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Medical Information Form

Release of Claim

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§ 106.210 Will Provision for Anatomical Gift

[1] Comment

[a] Use of Form

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[c] Specification of Donee and Other Conditions of Gift

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[2] FORM

Will Provision for Anatomical Gift

§ 106.211 Will Provision Confirming Nontestamentary Anatomical Gift

[1] Comment

[a] Use of Form

[2] FORM

Will Provision Confirming Nontestamentary Anatomical Gift

§§ 106.212-106.219 [Reserved]

§ 106.220 Anatomical Gift by Third Party

[1] Comment

[a] Use of Form

[b] Anatomical Gifts by Third Parties

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[2] FORM

Anatomical Gift by Third Party

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§ 106.230 Revocation of Anatomical Gift

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[c] Revocation of Testamentary Instrument Making Anatomical Gift

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Scope

Scope

This chapter covers anatomical gifts under the Uniform Anatomical Gift Act [*Health & Safety Code §§ 7150-7151.40*]. The Legal Background discusses the requirements of the Act and the practical considerations in making anatomical gifts. The Transaction Guide contains a guide to the procedures for making anatomical gifts. The forms include various instruments for making anatomical gifts, including donor registration donor cards, and testamentary provisions. A revocation of an anatomical gift is also included.

Anatomical gifts may also be made by means of an advance health care directive (durable power of attorney for health care) [*see Prob. Code § 4701*] under the Uniform Health Care Decisions Act [*Prob. Code § 4670 et seq.*], which is part of California's Health Care Decisions Law [*Prob. Code § 4600 et seq.*]. For discussion of these statutes, and forms for advance health care directives, see Ch. 104, *Health Care Transactions, Consents, and Directives* .



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§ 106.01 California Statutes

Authority of coroner to take possession of body. *Gov. Code §§ 27491.4, 27491.43-27491.47.*

Right to control disposition of decedent's remains. *Health & Safety Code § 7100.*

Written instructions for dispositions of remains. *Health & Safety Code § 7100.1.*

Uniform Anatomical Gift Act. *Health & Safety Code §§ 7150-7151.40.*

Uniform Determination of Death Act. *Health & Safety Code § 7180.*

Confirmation of death. *Health & Safety Code §§ 7181-7184.5.*

Health Care Decisions Law. *Prob. Code § 4600 et seq.*

Uniform Health Care Decisions Act. *Prob. Code § 4670 et seq.*

Advance health care directive. *Prob. Code § 4701.*

Department of Motor Vehicle forms for anatomical gifts. *Veh. Code §§ 12811(b), 13005(b).*

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Anatomical Gifts Healthcare Law Treatment Blood & Organ Donations General Overview



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§ 106.05 Annotations

Annot., Enforcement of Preference Expressed by Decedent as to Disposition of His Body After Death, 54 A.L.R.3d 1037 (1973).

Annot., Transplantation: Power of Parent, Guardian, or Committee to Consent to Surgical Invasion of Ward's Person for Benefit of Another, 35 A.L.R.3d 692 (1971).

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 106.06 Text References

[1] Matthew Bender Sources

CALIFORNIA LEGAL FORMS (Matthew Bender).

Ch. 104, *Health Care Transactions, Consents, and Directives* .

CALIFORNIA WILLS & TRUSTS (Matthew Bender).

Ch. 41, *Funeral and Burial Arrangements*.

Ch. 150, *Durable Powers of Attorney for Health Care*.

CALIFORNIA WILLS & TRUSTS FORMS (Matthew Bender).

Div. IV, Part 90, §§ 90.70 (direction regarding autopsy), 90.80 (anatomical gift provision).

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 106.10 Anatomical Gifts

[1] In General

An anatomical gift is a donation of all or part of a human body to take effect on or after the donor's death [*Health & Safety Code § 7150.10(a)(3)*]. In California, anatomical gifts are subject to the Uniform Anatomical Gift Act [*Health & Safety Code §§ 7150-7151.40*; see § 106.11 et seq.].

An anatomical gift may be made by a card, by a statement attached to or imprinted on a driver's license, by a will, or by some other writing signed or authorized by the donor [*Health & Safety Code § 7150.20, (c)*; see also *Health & Safety Code § 7151.10(a)(6)* ("document of gift" defined)]. An anatomical gift may also be made directly through the Donate Life California Organ and Tissue Donor Registry Internet web site at www.donatelifecalifornia.org [*Health & Safety Code § 7150.20(a)(2)*, see 106.11[3]]. Unless there are indications of religious objections [see *Health & Safety Code § 7150.30(e)*; see also § 106.11[7]], a deceased person's attorney-in-fact, guardian, conservator, or next-of-kin may, under circumstances specified in the Act, make anatomical gifts of all or part of the person's body [*Health & Safety Code § 7150.40*; see § 106.11[4]].

[2] Hospital Protocols

Every general acute care hospital in California is required to develop a protocol for identifying potential organ and tissue donors [*Health & Safety Code § 7184(a)*]. The protocol must establish a procedure under which questions are asked of the potential donor's next of kin or other individuals, and the next of kin or other individuals are advised of the option to donate organs and tissues pursuant to the Uniform Anatomical Gift Act [*Health & Safety Code § 7184(a), (c)*].

The protocol may require the hospital itself to ask the necessary questions and provide the requisite information [*Health & Safety Code § 7184(a)*], or may delegate that responsibility to an organ or tissue procurement organization [*Health & Safety Code § 7184(c)*]. If the hospital asks the questions and provides the information, the protocol must require that any deceased individual's next of kin or other individual [see *Health & Safety Code § 7151.40*] be asked at or near the time of notification of death if the deceased was an organ donor, or if the family is a donor family. If not, the family must be informed of the option to donate organs and tissues under the Uniform Anatomical Gift Act. With the approval of the designated next of kin or other individual, the hospital then must notify an organ and tissue procurement

organization and cooperate in the procurement of the anatomical gift or gifts [*Health & Safety Code § 7184(a)*]. If the hospital's protocol delegates the responsibility for asking the necessary questions and providing the necessary information to an organ and tissue procurement organization, the protocol must require the hospital to contact the organization at the time a potential organ and tissue donor is identified and provide for the trained personnel of the organization to ask the required questions of the deceased individual's next of kin or other individual [*Health & Safety Code § 7184(c)*].

The protocol must encourage reasonable discretion and sensitivity to the family circumstances in all discussions regarding donations of organs and tissues. The protocol may take the deceased individual's religious beliefs or obvious nonsuitability for organ and tissue donation into account. If there is no organ and tissue procurement organization in a region, the hospital must contact an organ or a tissue procurement organization, as appropriate. Laws pertaining to notification of the coroner must be complied with in all cases of reportable deaths [*Health & Safety Code § 7184(a)*].

A hospital may not participate in the Medi-Cal program unless it complies with the protocol requirements of the Uniform Anatomical Gift Act [*Health & Safety Code § 7184(b)*].

[3] Criminal Offenses

The sale or transfer of body parts or human organs for purposes of transplantation is a felony under both the Health and Safety Code and the Penal Code [*Health & Safety Code § 7150; Penal Code § 367f*]. The Health and Safety Code prohibits the knowing purchase or sale, for valuable consideration, of a body part for transplantation, therapy, or reconditioning, if removal of the part is intended to occur after death [*Health & Safety Code § 7150.75(a)*]. The Penal Code prohibits any person from knowingly acquiring, receiving, selling, transferring, or promoting the transfer of any human organ for valuable consideration and for purposes of transplantation [*Penal Code § 367f(a)*].

The Penal Code defines "valuable consideration" to mean financial gain or advantage [*Penal Code § 367f(c)(2)*]. Both the Penal Code and the Health and Safety Code exclude from "valuable consideration" reasonable costs or payments associated with the removal, transplantation, or disposal of the body part or human organ [*Health & Safety Code § 7150.75(b); Penal Code § 367f(c)(2)*].

The Penal Code provision does not apply to the person from whom the organ is removed [*Penal Code § 367f(e)*], nor does it apply to the person who receives the transplant, or the next of kin of either the donor or the donee if they assist in obtaining the organ for purposes of transplantation [*Penal Code § 367f(e)*]. The Penal Code provides that a physician who transplants a human organ that has been sold or transferred for valuable consideration is not criminally liable if the transplant is performed under emergency and life-threatening conditions [*Penal Code § 367f(f)*]. Finally, the Penal Code provision has no application to the nonsale donation of organs or other nonsale conduct pursuant to or in furtherance of the purposes of the Uniform Anatomical Gift Act [*Penal Code § 367f(d); see Health & Safety Code §§ 7150-7151.40* (Uniform Anatomical Gift Act)].

[4] Determination of Death

The Uniform Anatomical Gift Act [*Health & Safety Code §§ 7150-7151.40*] requires that the time of the donor's death be determined by a physician or surgeon [*Health & Safety Code § 7151.40*]. The Uniform Determination of Death Act [*Health & Safety Code § 7180*] sets forth standards for determining when a death has occurred and requires that the determination be made in accordance with accepted medical standards [*Health & Safety Code § 7180*]. When a part of the donor is used for direct transplantation pursuant to the Uniform Anatomical Gift Act and the death of the donor is determined under standards set forth in the Uniform Determination of Death Act, there must be an independent confirmation of the death by another physician [*Health & Safety Code § 7182*]. For discussion of the rights and duties of physicians attending the donor at the time of death or certifying (or confirming) the fact of the donor's death, see § 106.11[12].

[5] Cremation of Remains After Use

[a] In General

Except with the express written permission of the person entitled to control the disposition of the remains, it is unlawful to cremate the remains of more than one person at the same time in the same cremation chamber, or to introduce the remains of a second person into a cremation chamber until incineration of any preceding remains has been terminated and reasonable efforts have been employed to remove all fragments of the preceding remains. However, the fact that there is residue in the cremation chamber or other equipment or any container used in a prior cremation is not a violation [*Health & Safety Code § 7054.7(a)(1)*].

There is an additional exception, to allow the cremation of commingled parts of several donated bodies after scientific study, which is discussed in [b], *below*. That exemption from the statutory requirement for individual cremation does not apply to private cremations, where the decedent's remains have not been subject to study, and where the decedent's family may reasonably expect that the remains they receive will be those of their relative and not those of a stranger. Outside of a willed-body program or similar scientific use, the statute requiring individual cremations must be enforced [*Bennett v. Regents of Univ. of Cal. (2005) 133 Cal. App. 4th 347, 357, 34 Cal. Rptr. 3d 579*] .

[b] After Scientific Study

Notwithstanding any other provision of law, following the conclusion of scientific use, recognizable anatomical parts, human tissues, anatomical human remains, or any material or article that has been, or may have been, exposed to contagious or infectious disease (infectious waste), must be disposed of by interment, incineration, or any other method determined by the Department of Health Services to protect the public health and safety [*Health & Safety Code § 7054.4*].

That statute is a legislative acknowledgment of the practical impossibility of providing individual cremation for a human body that has been subjected to scientific study. The statute permits a practice common at medical schools: remains of various dissected bodies will be gathered in bundles, which will be wrapped in shrouds and cremated several at a time. "It would be unduly burdensome to require a medical school to label and account for a willed-body donor's dissected tissue, organs, sinew and bones, and to ensure that all of the components are retrieved and cremated together, assuming that it is even possible to do so" [*Bennett v. Regents of Univ. of Cal. (2005) 133 Cal. App. 4th 347, 356, 34 Cal. Rptr. 3d 579*] .

In addition, the Medical Waste Management Act [*Health & Safety Code § 117600 et seq.*] authorizes educational and research facilities to dispose of their "medical waste"--including recognizable human anatomical parts--by incineration [*Health & Safety Code §§ 118215(a), 118220*], and there is no requirement that separate waste containers be maintained for each individual's tissue or body parts. On the contrary, human remains may even be consolidated into a common container with nonorganic material such as needles prior to incineration [*Health & Safety Code § 118275(h)*]. As a cadaver is gradually reduced for study over the course of weeks or months, the Medical Waste Management Act sensibly allows tissue and other no-longer-needed remains to be disposed of periodically, and exempts scientific facilities from any requirement that dissected tissue and recognizable human anatomical parts be kept together in separate containers. If the law allows remains to be commingled during study, then by logical extension, the law also allows commingling to sterilize the remains [*Bennett v. Regents of Univ. of Cal. (2005) 133 Cal. App. 4th 347, 356, 357, 34 Cal. Rptr. 3d 579*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Anatomical Gifts Healthcare Law Treatment Blood & Organ Donations General

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§ 106.11 Uniform Anatomical Gift Act

[1] In General

The Uniform Anatomical Gift Act ("the Act") [*see Health & Safety Code §§ 7150-7151.40*] has been adopted in all 50 states and the District of Columbia.

[2] Gift by Donor or Donor's Agent

An anatomical gift is a donation of all or part of a human body to take effect after the donor's death for the purpose of transplantation, therapy, research, or education [*Health & Safety Code § 7150.10(a)(3)*]. A person, who is at least 18 years of age, or an emancipated minor, may make an anatomical gift [*Health & Safety Code § 7150.15(a)*]. A person who is between 15 and 18 years of age may also make an anatomical gift with the express written consent of a parent or guardian [*Health & Safety Code § 7150.15(a)*]. An agent of the donor can also make an anatomical gift of a donor's body or part during the donor's lifetime provided that a power of attorney for health care, or other record appointing the agent, expressly permits the agent to make an anatomical gift [*Health & Safety Code § 7150.15(b)*].

A person who wishes to make an anatomical gift can do so by any of the following [*Health & Safety Code § 7150.20(a)*]:

- 1) By authorizing a statement or symbol indicating that the donor has made an anatomical gift to be imprinted on the donor's driver's license or identification card and included on a donor's database registry;
- 2) Directly through the Donate Life California Organ and Tissue Donor Registry Internet Web site at www.donatelifecalifornia.org ;
- 3) In a will;
- 4) During a terminal illness or injury of the donor, by any form of communication that clearly expresses the donor's wish, address to at least two adults, at least one of whom is a disinterested witness, where the

witnesses memorialize the donor's communication in a signed and dated writing.

Additionally, a donor or donor's agent (as authorized under *Health & Safety Code § 7150.15(b)*), can make an anatomical gift by a donor card or other record signed by the donor or donor's agent or by authorizing a statement or symbol, indicating that the donor has made an anatomical gift and to be included on a donor registry [*Health & Safety Code § 7150.20(b)*, *see also* § 7150.10(a)(6) ("Document of gift" defined as a donor card or other record used to make an anatomical gift, including a statement recorded on the Donate Life California Organ and Tissue Donor Registry or other donor registry)]. A "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form [*Health & Safety Code § 7150.10(a)(25)*]. If the donor or donor's agent is physically unable to sign a record, the record may be signed by another individual at the direction of the donor or donor's agent provided the record is witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the request of the donor or donor's agent, and the record states that it has been signed in compliance with these requirements [*Health & Safety Code § 7150.20(b)*].

[3] Donate Life California Organ and Tissue Donor Registry

The Donate Life California Organ and Tissue Donor Registry ("Donate Life California") contains information regarding persons who have identified themselves as organ and tissue donors [*Health & Safety Code § 7150.90(a)*]. The registry is made available to the federally designated organ procurement organizations in California and the state licensed tissue and eye banks [*Health & Safety Code § 7150.90(b)*]. A person can make an anatomical gift directly through the Donate Life California Organ & Tissue Donor Registry website at www.donatelifecalifornia.org or www.doneVIDAcalifornia.org. A donor is able to limit an anatomical gift to specific organs and tissues by either updating their profile on the registry website or contacting Donate Life California. Registration with Donate Life California serves as a "document of gift" under the Act [*Health & Safety Code § 7150.10(a)(6)*]. Upon online registration, a donor will receive confirmation of registration along with a donor identification number, which should be kept in a secure location.

The DMV's driver's license and ID card application and renewal process also provides an applicant the option to make an anatomical gift by registering with Donate Life California [*Veh. Code §§ 12811(b), 13005(b)*]. The DMV application forms ask the applicant if they wish to be an organ and tissue donor, and if they consent, they will be directed to read a statement on the back of the application that provides:

If you marked on the front of the application that you want to be an organ and tissue donor upon death, your consent shall serve as a legally binding document as outlined under the California Uniform Anatomical Gift Act. Except in the case where the donor is under the age of 18, the donation does not require the consent of any other person. For donors under the age of 18, the legal guardian of the donor shall make the final decision regarding the donation. If you want to change your decision to consent in the future, or if you want to limit the donation to specific organs, tissues, or research, you must contact Donate Life California by mail at 1760 Creekside Oaks Drive, #220, Sacramento, CA 95833, or online at www.donateLIFecalifornia.org, or www.doneVIDAcalifornia.org. [*Veh. Code § 12811(b)(1)*].

By providing consent, the DMV is authorized to collect information on the donor and will print the word "DONOR" or other appropriate designation on the face of the driver's license or identification card [*Veh. Code § 12811(b)(3)-(b)(4)*]. The DMV will transmit, on a weekly basis, relevant information on every applicant who has indicated his or her willingness to participate in the organ donation program to Donate Life California [*Veh. Code § 12811(b)(5)*]. Enrollment in the registry is a legal document and is binding after the donor's death despite any express desires of next of kin opposed to the donation [*Veh. Code § 12811(b)(8)*]. In addition to registering directly with Donate Life California, the DMV will make available to all applicants of a new or renewed identification card, a standardized form to be filled out by any person who desires to enroll in the Donate Life California with instructions for mailing the

completed form [*Veh. Code § 13005(b)(1)*].

If a donor signed up with Donate Life California at the DMV, and wishes to revoke his or her gift, the donor will need to remove themselves from the registry and have the pink dot removed from their driver's license or identification card. By visiting Donate Life California's website, a donor can update their profile, and remove their name from the list of donors. A pink donor dot will remain on the driver's license or identification card until a new one is issued, but the dot is never used to identify someone as a legal organ or tissue donor, and verification of donor designation is only done through the Donate Life California Registry database. If desired, an individual can have the pink donor dot removed prior to renewal a driver's license or identification card by contacting the DMV.

The DMV donor cards and other donor cards will continue to grant authorization for organ and/or tissue recovery, but due to the suddenness surrounding the circumstances, a donor card is rarely available at the time a family is approached regarding donation. It is advisable for an individual wishing to make an anatomical gift, to register with Donate Life California either through the DMV or the registry's website. Every donor's desire to make an anatomical gift is stored in a secure, confidential database which is readily available to authorized organ and tissue recovery personnel.

Additional information on Donate Life California can be obtained at www.dmv.ca.gov , or www.donatelife.org

[4] Anatomical Gift by Third Party

The Act also authorizes an anatomical gift, of a decedent's body or part, to be made by a third person from the following classes of persons in the below order of priority [*Health & Safety Code § 7150.40(a)*]:

- (1) An agent of the decedent at the time of death who could have made an anatomical gift under *Health & Safety Code § 7150.15(b)* immediately before the decedent's death [*see § 106.11[2]*];
- (2) The spouse or domestic partner of the decedent;
- (3) Adult children of the decedent;
- (4) Parents of the decedent;
- (5) Adult siblings of the decedent;
- (6) Adult grandchildren of the decedent;
- (7) Grandparents of the decedent;
- (8) An adult who exhibited special care and concern for the decedent during the decedent's lifetime;
- (9) The persons who were acting as the guardians or conservators of the person of the decedent at the time of death;
- (10) Any other person having the authority to dispose of the decedent's body, including, but not limited to, a coroner, medical examiner, or hospital administrator, provided that reasonable effort has been made to locate and inform persons listed in (1) to (9), above, of their option to make, or object to making, an anatomical gift.

For purposes of paragraph 10 above, a reasonable effort is deemed to have been made when a search for the persons has been underway for at least 12 hours and includes a check of local police missing persons records, examination of

personal effects, and the questioning of any persons visiting the decedent before his or her death or in the hospital, accompanying the decedent's body, or reporting the death, in order to obtain information that might lead to the location of any persons listed [Health & Safety Code § 7150.40(a)(10)(B)].

Should there be more than one member of a class listed in (1), (3), (4), (5), (6), (7), or (9) above, entitled to make an anatomical gift, an anatomical gift may be made by a member of that class unless that member or a donee to which the gift may pass under Health & Safety Code § 7150.50 knows of an objection by another member of the class [Health & Safety Code § 7150.40(b)]. If an objection is known, the gift may be made only by a majority of the members of the class who are reasonably available [Health & Safety Code § 7150.40(b)]. A person shall not make an anatomical gift if, at the time of the decedent's death, a person in a prior class under subdivision (a) is reasonably available to make, or to object to the making of, an anatomical gift [Health & Safety Code § 7150.40(c)].

A third person authorized to make an anatomical gift may do so by document of gift signed by the third person making the gift or by that person's oral communication that is electronically recorded or is contemporaneously reduced to a record and signed by the individual receiving the oral communication. [Health & Safety Code § 7150.45(a)].

An anatomical gift by a third person may be amended or revoked orally or in a record by any member of a prior class who is reasonably available [Health & Safety Code § 7150.45(b)]. If more than one member of the prior class is reasonably available, the gift made by a person authorized under Health & Safety Code § 7150.40 may be amended only if a majority of the reasonably available members agree to the amending of the gift or revoked only if a majority of the reasonably available members agree to the revoking of the gift or if they are equally divided as to whether to revoke the gift [Health & Safety Code § 7150.45(b)]. A revocation under Health & Safety Code § 7150.45(b) is effective only if the procurement organization, transplant hospital or physician or technician knows of the revocation prior to an incision being made to remove a part from the donor's body or before invasive procedures have begun to prepare the recipient [Health & Safety Code § 7150.45(c)].

[5] Validity of Document of Gift

A document of gift need not be delivered during the donor's lifetime to be effective [Health & Safety Code § 7150.60(a)]. Upon or after an individual's death, a person in possession of a document of gift or a refusal to make an anatomical gift with respect to the individual shall allow examination and copying of the document of gift or refusal by a person authorized to make or object to the making of an anatomical gift with respect to the individual or by a person to which the gift could pass under Section 7150.50 [Health & Safety Code § 7150.60(b)].

A document of gift is valid if executed in accordance with any of the UAGA, the laws of the state or country where executed, or the laws of the state or country where the person making the anatomical gift was domiciled, has a place of residence, or was a national at the time the document of gift was executed [Health & Safety Code § 7150.85(a)]. If a document of gift is valid, the law of California governs the interpretation of the document of gift [Health & Safety Code § 7150.80(b)]. A person may presume that a document of gift or amendment of an anatomical gift is valid unless that person knows that it was not validly executed, or that it was revoked [Health & Safety Code § 7150.80(c)].

[6] When Gift is Effective

An anatomical gift takes effect after the donor's death [Health & Safety Code § 7150.10(a)(3)]. An anatomical gift made by will takes effect upon the donor's death, regardless of whether the will is probated [Health & Safety Code § 7150.20(d)] and invalidation of a donor's will after the donor's death does not invalidate the gift [Health & Safety Code § 7150.20(d)].

[7] When There Are Indications of Religious Objections

Notwithstanding any other provision of the Act, only an individual can make an anatomical gift of all or part of that individual's body or pacemaker, if it is known that the individual at the time of death, was a member of a religion, church, sect, or denomination that relies solely upon prayer for healing of disease or that has religious tenants that would be violated by the disposition of the human body or parts or pacemakers for the purposes of transplantation, therapy, research, or education [*Health & Safety Code § 7150.30(e)*].

[8] Amendment or Revocation of Anatomical Gift by Donor or Donor's Agent

A donor or donor's agent, as authorized under *Health & Safety Code § 7150.15*, may amend or revoke an anatomical gift by a record signed by the donor, donor's agent, or individual acting at the direction of donor or donor's agent, recorded in a donor registry database, or a later executed document of gift that amends or revokes the previous anatomical gift or portion of an anatomical gift, express expressly or by inconsistency [*Health & Safety Code § 7150.25(a)*]. A record signed by an individual acting at the direction of donor or donor's agent must be witness by at least two witnesses, at least one of whom is a disinterested witness, who have signed at the request of the donor or donor's agent, and reduced to a signed and dated writing [*Health & Safety Code § 7150.25(b)*]. A donor who makes an anatomical gift in a will may also amend or revoke the gift in the manner provided for amendment or revocation of wills [*Health & Safety Code § 7150.25(e)*].

Subject to exceptions provided in *Health & Safety Code § 7150.35* (discussed below), a donor or donor's agent, authorized under *Health & Safety Code § 7150.15*, may revoke an anatomical gift by the destruction of the document of gift or cancellation of the document of gift on a donor database registry, or the portion of the document of gift used to make the gift, with the intent to revoke the gift [*Health & Safety Code § 7150.25(c)*]. Additionally, a donor may amend or revoke an anatomical gift that was not made in a will by any form of communication during a terminal illness or injury addressed to at least two adult, at least one of whom is a disinterested witness, which is then memorialized in a signed and dated writing [*Health & Safety Code § 7150.25(d)*].

In the absence of an express, contrary indication by the donor, a person other than the donor is barred from making, amending, or revoking an anatomical gift of a donor's body or part if the donor made an anatomical gift of the donor's body or part or an amendment to an anatomical gift of the donor's body or part [*Health & Safety Code § 7150.35(a)*]. However, a donor's revocation of an anatomical gift of the donor's body or part is not a refusal and does not bar another authorized person from making an anatomical gift of the donor's body or part under *Health & Safety Code §§ 7150.20, 7150.45* [*Health & Safety Code § 7150.35(b)*]. If a person other than the donor makes an unrevoked anatomical gift of the donor's body or part or an amendment to an anatomical gift of the donor's body or part, another person may not make, amend, or revoke the gift of the donor's body or part under *Health & Safety Code § 7150.45* [*Health & Safety Code § 7150.35(c)*]. A revocation of an anatomical gift of a donor's body or part by a person other than the donor does not bar another person from making an anatomical gift of the body or part [*Health & Safety Code § 7150.35(d)*]. In the absence of an express contrary indication by the donor or donor's authorized agent, an anatomical gift of a part is neither a refusal to give another part nor a limitation on the making of an anatomical gift of another part at a later time by the donor or another person [*Health & Safety Code § 7150.35(e)*]. In the absence of an express, contrary indication by the donor or donor's authorized agent, an anatomical gift of a part for one or more of the purposes specified in *Health & Safety Code § 7150.15* is not a limitation on the making of an anatomical gift of the part for any of the other purposes by the donor or any other authorized person [*Health & Safety Code § 7150.35(f)*]. An individual who is between 15 and 18 years of age may make an anatomical gift for any authorized purpose, may limit an anatomical gift to one or more of those purposes, may refuse to make an anatomical gift, or may amend or revoke an anatomical gift, only upon the written consent of the parent or guardian [*Health & Safety Code § 7150.35(g)*]. If a donor who is an unemancipated minor dies, a parent of the donor who is reasonably available may revoke or amend an anatomical gift of the donor's body or part [*Health & Safety Code § 7150.35(g)*].

On the death of a donor who executed and did not revoke an enforceable document of gift to donate his or her body [see § 106.200], the right to dispose of the donor's body passes to the beneficiary of that gift, exclusive of all other persons

who could otherwise claim that right; and the beneficiary may dispose of the body in any lawful manner, subject only to any limitation in the donation document [*Conroy v. Regents of Univ. of Cal.* (2009) 45 Cal. 4th 1244, 1255, 91 Cal. Rptr. 3d 532, 203 P.3d 1127 (at issue was effect of unrevoked agreement to donate body to Willed Body Program at University of California at Irvine; agreement was governed by former *Health & Safety Code* § 7150.5(h), which provided that "an anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor's death"); see Revised Uniform Anatomical Gift Act (2006), § 8, Comment ("Section 8 [enacted as *Health & Safety Code* § 7150.35] is designed to state firmly the rule that a donor's autonomous decision regarding the making of an anatomical gift is to be honored and implemented and is not subject to change by others. Section 8 not only continues the policy of making lifetime donations irrevocable but also is restated to take away from families the power, right, or authority to consent to, amend, or revoke donations made by donors during their lifetimes.")].

[9] Refusal to Make Anatomical Gift

An individual can refuse to make an anatomical gift by: 1) a record signed by the individual, or another individual acting at the direction of the individual if the individual is physically unable to sign; 2) the individual's will; or 3) any form of communication made by the individual during the individual's terminal illness or injury addressed to at least two adults, at least one of whom is a disinterested witness, which is memorialized in a signed and dated writing by the witnesses [*Health & Safety Code* § 7150.30(a)]. If a record of refusal is signed by an individual acting at the direction of the individual making the refusal, the record must be witnessed by at least two adults, at least one of whom is a disinterested witness, who have signed at the direction of the individual, and reduced to a signed writing stating as such [*Health & Safety Code* § 7150.30(b)].

An individual who has made a refusal may amend or revoke the refusal: 1) in the same manner for making a refusal [*Health & Safety Code* § 7150.30(a), see discussion above]; 2) by subsequently making an anatomical gift under *Health & Safety Code* § 7150.20 [see § 106.11[2]] that is inconsistent with the refusal; or 3) by destroying or cancelling the record evidencing the refusal, or the portion of the record used to make the refusal, with the intent to revoke the refusal [*Health & Safety Code* § 7150.30(c)].

In the absence of an express, contrary indication by the individual set forth in the refusal, an individual's unrevoked refusal to make an anatomical gift of the individual's body or part bars all other persons from making an anatomical gift of the individual's body or part [*Health & Safety Code* § 7150.30(d)].

[10] Permissible Donees and Purposes

An anatomical gift may be made to: 1) a hospital, accredited medical school, dental school, college, university, or organ procurement organization for research or education; 2) an individual designated by the person making the anatomical gift if the individual is the recipient of the part; or 3) an eye bank, or tissue bank [*Health & Safety Code* § 7150.50(a)].

If an anatomical gift is made in a document of gift that does not specify an individual designated as the recipient, but identifies the purpose for which an anatomical gift may be used, the following rules shall apply [*Health & Safety Code* § 7150.50(c)]:

- If the part is an eye and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate eye bank.
- If the part is tissue and the gift is for the purpose of transplantation or therapy, the gift passes to the appropriate tissue bank.
- If the part is an organ and the gift is for the purpose of transplantation or therapy, the gift passes to

the appropriate organ procurement organization as custodian of the organ.

- If the part is an organ, an eye, or tissue and the gift is for the purpose of research or education, the gift passes to the appropriate procurement organization.

If a document of gift provides for more than one purpose but the purposes are not set forth in any priority, the gift shall be used for transplantation or therapy [*Health & Safety Code § 7150.50(d)*] and if the gift cannot be used for transplantation or therapy, the gift may be used for research or education [*Health & Safety Code § 7150.50(d)*].

If an anatomical gift to an individual is unable to be transplanted into the individual, or if a document of gift does not specify an individual designated as a recipient and does not identify a purpose for the gift, or if document of gift specifies only a general intent to make an anatomical gift by words such as "donor," "organ donor," or "body donor," or by a symbol or statement of similar import the following rules apply [*Health & Safety Code § 7150.50(b)(e)(f)(g)*]:

- If the part is an eye, the gift passes to the appropriate eye bank.
- If the part is tissue, the gift passes to the appropriate tissue bank.
- If the part is an organ, the gift passes to the appropriate organ procurement organization as custodian of the organ.

An anatomical gift of an organ for transplantation or therapy passes to the organ procurement organization as custodian of the organ [*Health & Safety Code § 7150.50(h)*]. If an anatomical gift is not used for transplantation, therapy, research, or education, custody of the body or part passes to the person under obligation to dispose of the body or part [*Health & Safety Code § 7150.50(i)*]. An anatomical gift cannot be accepted by a person if the person knows that the gift was not effectively made, or if the person knows that the decedent made a refusal that was not revoked [*Health & Safety Code § 7150.50(j)*].

[11] Reasonable Search

A reasonable search for a document of gift or other information identifying an individual as a donor must be made by a law enforcement officer, firefighter, paramedic, or other emergency rescuer finding the individual, or if no other source of the information is immediately available, a hospital, as soon as practical after the individual's arrival at the hospital [*Health & Safety Code § 7150.55(a)*]. Should a document of gift or a refusal to make an anatomical gift be located in the search and the individual or deceased individual is taken to a hospital, the person responsible for conducting the search must send the document of gift or refusal to the hospital [*Health & Safety Code § 7150.55(b)*]. A person is not subject to criminal or civil liability for failing to discharge the duties imposed by this section, but may be subject to administrative sanctions [*Health & Safety Code § 7150.55(c)*].

[12] Duties and Responsibilities of Hospitals, Physicians, and Procurement Organizations

Each hospital must enter into agreements or affiliations with procurement organizations for coordination of procurement and use of anatomical gifts [*Health & Safety Code § 7150.70*]. When a procurement organization gets a referral from a hospital that an individual is at or near death, the organization must make a reasonable search of the records of the Donate Life California and any donor registry that it knows exists for the geographical area in which the individual resides to determine whether the individual made an anatomical gift [*Health & Safety Code § 7150.65(a)*]. Upon such referral, the procurement organization must make a reasonable search for any person listed provided in *Health & Safety Code § 7150.40* [see § 106.11[4]] having priority to make an anatomical gift on behalf of a prospective donor [*Health & Safety Code § 7150.65(g)*]. If a procurement organization receives information that an anatomical gift to any other person was made, amended, or revoked, it shall promptly advise the other person of all relevant information [*Health &*

Safety Code § 7150.65(g)]. If the donor was a minor, the procurement organization must, unless the procurement organization knows the minor is emancipated, conduct a reasonable search for the parents of the minor and provide the parents an opportunity to revoke or amend an anatomical gift, or revoke a refusal of gift [*Health & Safety Code § 7150.65(f)*].

The procurement organization shall be allowed reasonable access to information in the records of Donate Life California to ascertain whether an individual who is at or near death is a donor [*Health & Safety Code § 7150.65(b)*]. Personally identifiable information on a donor registry about a donor shall not be used or disclosed without the express consent of the donor or the person that made the anatomical gift for any purpose other than to determine, at or near death of the donor or a prospective donor, whether the donor or prospective donor has made, amended, or revoked an anatomical gift [*Health & Safety Code § 7150.65(b)*]. A procurement organization shall not sell the information obtained from the donor registry [*Health & Safety Code § 7150.65(b)*]. A procurement organization shall also comply with all state and federal laws with respect to the protection of a donor's or prospective donor's personally identifiable information [*Health & Safety Code § 7150.65(b)*].

The procurement organization may conduct any reasonable examination necessary to ensure the medical suitability of a part that is or could be the subject of an anatomical gift for transplantation, therapy, research, or education from a donor or a prospective donor [*Health & Safety Code § 7150.65(c)*]. During the examination period, measures necessary to ensure the medical suitability of the part may not be withdrawn unless the hospital or procurement organization knows that the individual expressed a contrary intent [*Health & Safety Code § 7150.65(c)*]. Unless prohibited by law, at any time after a donor's death, the person to whom a part passes may conduct any reasonable examination necessary to ensure the medical suitability of the body or part for its intended purpose [*Health & Safety Code § 7150.65(d)*]. Such examination may include an examination of all medical and dental records of the donor or prospective donor [*Health & Safety Code § 7150.65(e)*].

A document of gift may designate a particular physician to carry out the recovery procedures [*Health & Safety Code § 7150.20(e)*]. In the absence of such a designation, or if the designee is not available or is deemed by the organ procurement organization not to be qualified to perform the required procedure, the organ procurement organization will authorize another physician or technician to carry out the recovery [*Health & Safety Code § 7150.20(e)*]. A physician or technician may remove a donated part from the body of a donor that the physician or technician is qualified to remove [*Health & Safety Code § 7150.20(e)*]. With the exception of *Health & Safety Code § 7150.20(e)*, neither the physician who attends the decedent at death nor the physician who determines the time of decedent's death may participate in the procedures for removing or transplanting a part from the decedent [*Health & Safety Code § 7150.65(i)*].

The rights of the person to which a part passes are superior to the rights of all others with respect to the part [*Health & Safety Code § 7150.65(h)*]. The person may accept or reject an anatomical gift in whole or in part [*Health & Safety Code § 7150.65(i)*]. Subject to the terms of the document of gift and the Act, a person that accepts an anatomical gift of an entire body may allow embalming, burial, or cremation, and use of remains in a funeral service [*Health & Safety Code § 7150.65(i)*]. If the gift is of a part, the person to which the part passes, upon the death of the donor and before embalming, burial, or cremation, shall cause the part to be removed without unnecessary mutilation [*Health & Safety Code § 7150.65(i)*].

[13] Liability Under the Act

A person who, for valuable consideration, knowingly purchases or sells a part for transplantation or therapy, if removal of a part from an individual is intended to occur after the individual's death, is guilty of a felony and is subject to a fine not exceeding \$50,000, or imprisonment not exceeding five years, or both [*Health & Safety Code § 7150.75(a)*]. A person may charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation, or disposal of a part [*Health & Safety Code § 7150.75(b)*].

A person who acts in accordance with the UAGA or with the applicable anatomical gift law of another state, or attempts in good faith to do so, is not liable for the act in a civil action or criminal prosecution [*Health & Safety Code* § 7150.80(a)]. Neither the person making an anatomical gift nor the donor's estate is liable for any injury or damage that results from the making or use of the gift [*Health & Safety Code* § 7150.80(a)]. In determining whether an anatomical gift has been made, amended, or revoked under this chapter, a person may rely upon representations of an individual specified in *Health & Safety Code* § 7140(a)(2)-(8) relating to the individual's relationship to the donor or prospective donor, unless the person knows that the representation is untrue [*Health & Safety Code* § 7150.80(c)].

[14] No Determination of Ultimate Recipient

No hospital, physician and surgeon, procurement organization, or other person shall determine the ultimate recipient of an anatomical gift based upon a potential recipient's physical or mental disability, except to the extent that the physical or mental disability has been found by a physician and surgeon, following a case-by-case evaluation of the potential recipient, to be medically significant to the provision of the anatomical gift [*Health & Safety Code* § 7151.35(a)].

[15] Removal of Part or Body

After a determination of death by a physician and surgeon, if there has been an anatomical gift, a technician may remove any donated parts and an enucleator may remove any donated eyes or parts of eyes [*Health & Safety Code* § 7151.40(a)]. Following the final disposition of the remains of the donor and upon request of a person specified in *Health & Safety Code* § 7100, the donee shall return the cremated remains of the donor at no cost, unless the donor has previously designated otherwise in the document of gift [*Health & Safety Code* § 7151.40(b)]. Any person who knowingly returns the cremated remains of a person other than the donor to the specified person will be punished by imprisonment for up to one year [*Health & Safety Code* § 7151.40(b)].

Any residual anatomical materials and human remains donated to hospitals, organ procurement organizations, accredited medical schools, dental schools, colleges, or universities for educational, research, transplantation, or therapeutic use that are no longer useful or needed for those purposes, may be disposed of by those entities through cremation, in the same manner as medical waste, and without additional burial permit requirements only if the donor has specifically waived a return of remains under *Health & Safety Code* § 7151.40(b) [*Health & Safety Code* § 7151.40(c)].

[16] Duties of Coroner

A county coroner shall cooperate with procurement organizations to maximize the opportunity to recover anatomical gifts for the purpose of transplantation, therapy, research, or education [*Health & Safety Code* § 7151.15(a)]. If a county coroner receives notice from a procurement organization that an anatomical gift might be available or was made with respect to a decedent whose body is under the jurisdiction of the coroner and a post mortem examination is going to be performed, the coroner or designee shall conduct a post mortem examination of the body or the part in a manner and within a period compatible with its preservation for the purposes of the gift [*Health & Safety Code* § 7151.15(b)]. A part shall not be removed from the body of a decedent under the jurisdiction of a coroner for transplantation, therapy, research, or education unless the part is the subject of an anatomical gift [*Health & Safety Code* § 7151.15(c)]. The body of a decedent under the jurisdiction of the coroner shall not be delivered to a person for research or education unless the body is the subject of an anatomical gift [*Health & Safety Code* § 7151.15(c)].

[17] Inquest

On request from a qualified procurement organization, the county coroner may permit the removal of organs that constitute an anatomical gift from a decedent who died under circumstances requiring an inquest by the coroner [*Health & Safety Code* § 7151.20(a)]. If no autopsy is required, the organs to be removed may be released to the qualified

procurement organization [*Health & Safety Code § 7151.20(b)*]. If an autopsy is required and the county coroner determines that the removal of the organs will not interfere with the subsequent course of an investigation or autopsy, the organs may be released for removal and the autopsy shall be performed following the removal of the organs [*Health & Safety Code § 7151.20(c)*]. If a county coroner is considering withholding one or more organs of a potential donor for any reason, the county coroner, or his or her designee, upon request from a qualified organ procurement organization, shall be present during the procedure to remove the organs [*Health & Safety Code § 7151.20(d)*]. The county coroner, or his or her designee, may request a biopsy of those organs or deny removal of the organs if necessary [*Health & Safety Code § 7151.20(d)*]. If the county coroner, or his or her designee, denies removal of the organs, the county coroner may do any of the following [*Health & Safety Code § 7151.20(d)*]:

- 1) In the investigative report, explain in writing the reasons for the denial;
- 2) Provide the explanation to the qualified organ procurement organization;

If the county coroner, or his or her designee, is present during the removal of the organs, the qualified procurement organization requesting the removal of the organ shall reimburse the county of the coroner, or his or her designee, for the actual costs incurred if reimbursement is requested by the county coroner [*Health & Safety Code § 7151.20(e)*]. The payment shall be applied to the additional costs incurred by the county coroner's office in performing the services [*Health & Safety Code § 7151.20(e)*]. The health care professional removing organs from a decedent who died under circumstances requiring an inquest shall file with the county coroner a report detailing the condition of the organs removed and their relationship, if any, to the cause of death [*Health & Safety Code § 7151.20(f)*].

[18] Conflict with Health Care Directive

If a prospective donor has a declaration (record signed by a prospective donor specifying the circumstances under which a life-support system may be withheld or withdrawn from the prospective donor [*Health & Safety Code § 7151.10(a)(2)*]) or advance health care directive (a power of attorney for health care or a record signed by a prospective donor containing the prospective donor's direction concerning a health care decision for the prospective donor [*Health & Safety Code § 7151.10(a)(1)*]) and the terms of the declaration or directive and the express or implied terms of a potential anatomical gift are in conflict with regard to the administration of measures necessary to ensure the medical suitability of a part for transplantation or therapy, the prospective donor's attending physician and prospective donor shall confer to resolve the conflict [*Health & Safety Code § 7151.10(b)*]. If the prospective donor is incapable of resolving the conflict, an agent acting under the prospective donor's declaration or directive, or, if none, or the agent is not reasonably available, another person authorized by law other than this chapter to make health care decisions on behalf of the prospective donor, shall act for the donor to resolve the conflict [*Health & Safety Code § 7151.10(b)*]. The conflict shall be resolved as expeditiously as possible [*Health & Safety Code § 7151.10(b)*]. Information relevant to the resolution of the conflict may be obtained from the appropriate procurement organization and any other person authorized to make an anatomical gift for the prospective donor *Health & Safety Code § 7150.40* [*Health & Safety Code § 7151.10(b)*]. Before resolution of the conflict, measures necessary to ensure the medical suitability of the part shall not be withheld or withdrawn from the prospective donor if withholding or withdrawing the measures is not contraindicated by appropriate end-of-life care [*Health & Safety Code § 7151.10(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Anatomical Gifts Healthcare Law Treatment Blood & Organ Donations General Overview Healthcare Law Treatment Blood & Organ Donations Uniform Anatomical Gift Act



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 106 ANATOMICAL GIFTS

PART II. LEGAL BACKGROUND

33-106 California Legal Forms--Transaction Guide §§ 106.12-106.99

[Reserved]

§§ 106.12[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 106 ANATOMICAL GIFTS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

33-106 California Legal Forms--Transaction Guide § 106.100

§ 106.100 Facts

1. Name and address of donor.

NOTE:

As used in the Uniform Anatomical Gift Act [*Health & Safety Code §§ 7150-7151.40*] and this chapter, the word "donor" means any individual whose body or part is the subject of an anatomical gift [*Health & Safety Code § 7150.10(a)(7)*].

2. Date of donor's birth.

NOTE:

Anatomical gifts may be made by persons at least 18 years of age, or by persons between 15 and 18 years of age with the written consent of a parent or guardian. [*Health & Safety Code § 7150.15(a), (m)*; *see § 106.11[2]*].

3. Identity of person who will make gift, either:

- a. Donor personally; or
- b. Donor's Agent as authorized under *Health & Safety Code § 7150.15(b)*
- c. Other person legally qualified to make gift in behalf of donor.

NOTE:

Certain classes of persons are authorized by statute to make or object to anatomical gifts of all or part of a decedent's body [*Health & Safety Code § 7150.40(a)*]. Members of these classes may make or object to such gifts in the order of priority set forth in the statute [

Health & Safety Code § 7150.40(a); for discussion, **see** § 106.11[4]].

- (1) Name, address, and age of other person.
- (2) Relationship of other person to donor.
- (3) Present condition of donor's health (e.g., deceased or near death).

4. Names, addresses, and other data relating to actual or potential survivors of donor, including [*see Health & Safety Code § 7150.40(a)*] (classes of persons who may make anatomical gift of all or part of decedent's body):

a. Agent under power of attorney for health care;

NOTE:

An agent under a power of attorney for health care or other record that expressly permits the agent to make an anatomical gift can make an anatomical gift during the donor's lifetime [**see** *Health & Safety Code § 7150.15*; **see also** § 106.11[2]]. An agent who has authority under *Health & Safety Code § 7150.15* also has priority over other persons in making or refusing to make an anatomical gift of all or part of a decedent's body [**see** *Health & Safety Code § 7150.40*; **see also** § 106.11[4]].

- b. Spouse or domestic partner.
- c. Adult children.
- d. Parents.
- e. Adult brothers and sisters.
- f. Adult grandchildren.
- g. Grandparents.
- h. An adult who exhibited special care and concern for the decedent during the decedent's lifetime.
- i. Guardian or conservator of donor's person.
- j. Person or persons authorized or obligated to dispose of donor's remains after death.

NOTE:

After removal of a part of the body, custody of the remainder of the donor's body vests in the persons named in *Health & Safety Code § 7100* [*Health & Safety Code § 7151.40(a)*]. For discussion, see § 106.11[15].

5. Subject matter of anatomical gift; either [*Health & Safety Code § 7150.10(a)(3)*]:

- a. Donor's entire body.
- b. Specific parts or organs from donor's body.

6. Name, address, and telephone number, if a specific donee has been determined.

NOTE:

An anatomical gift may be made to a designated donee, or without designating a donee [*Health & Safety Code § 7150.50*]. If a donee is not designated, is unavailable, or rejects the gift, the gift may be accepted by the appropriate organization [*Health & Safety Code § 7150.50*]. For discussion, see § 106.11[10].

7. Name and address of physician or surgeon, if any, who will be authorized to perform removal or transplantation procedures.

NOTE:

A document of gift may designate a particular physician or surgeon to carry out the appropriate procedures [*Health & Safety Code § 7150.20(e)*]. A physician or surgeon who attends the donor at death or who determines the time of death, however, may be barred from participating in the procedures for removing or transplanting a part [*Health & Safety Code §§ 7150.65(1), 7182; see also §§ 106.10[4], 106.11[12]*].

Except when the gift is made in contemplation of a specific procedure (e.g., transplantation of an organ to a specific donee), it is usually inadvisable to specify a particular physician or surgeon, since the designated physician or surgeon, for reasons unanticipated at the time the document of gift is executed, may be unable or unwilling to carry out the procedures at the time the removal or transplantation is made. In the absence of a designation, or if the designee is not available, the donee or other person authorized to accept the anatomical gift may employ or authorize any physician, surgeon, or technician, to carry out the procedures [*Health & Safety Code § 7150.20*].

8. Purpose or purposes for which gift is to be made [*see Health & Safety Code § 7150.50; see also § 106.11[10]*].

9. If gift is of less than donor's entire body, how remains are to be disposed of.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Anatomical Gifts Healthcare Law Treatment Blood & Organ Donations General
Overview Healthcare Law Treatment Blood & Organ Donations Uniform Anatomical Gift Act



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 106 ANATOMICAL GIFTS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

33-106 California Legal Forms--Transaction Guide § 106.101

§ 106.101 Documents

1. Any previous documents under which donor has made any type of anatomical gift.
2. Donor's will (and codicils to will), if any.
3. Contracts or other documents relating to burial, cremation, or other disposition of donor's remains, including:
 - a. Pre-need funeral contracts;
 - b. Cemetery lot purchase contracts;
 - c. Funeral or burial instructions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawAnatomical GiftsHealthcare LawTreatmentBlood & Organ DonationsGeneral
OverviewHealthcare LawTreatmentBlood & Organ DonationsUniform Anatomical Gift Act



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 106 ANATOMICAL GIFTS

PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

33-106 California Legal Forms--Transaction Guide §§ 106.102-106.109

[Reserved]

§§ 106.102[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 106 ANATOMICAL GIFTS

PART III. TRANSACTION GUIDE

B. Preliminary Determinations

33-106 California Legal Forms--Transaction Guide § 106.110

§ 106.110 Preliminary Determinations for Donor

1. If gift is to be made by donor personally, verify that either:

NOTE:

The Uniform Anatomical Gift Act [*Health & Safety Code §§ 7150-7151.40*] requires only that the donor be at least 18 years of age or, if the donor is between the ages of 15 and 18, that the donor has the written consent of the donor's parent or guardian [*Health & Safety Code § 7150.15(a)*; *see § 106.11[2]*].

a. Donor is at least 18 years old; or

b. Donor is between ages of 15 and 18 and donor's parent or guardian will consent to gift.

2. If gift is to be made by donor's agent, verify that agent has express power to make anatomical gift under durable power of attorney for health care or other record [*see Health & Safety Code § 7150.15(b)*; *see also § 106.11[2]*].

3. If gift is to be made by third party, determine whether:

a. Third party is member of class of persons authorized by statute to make anatomical gift of all or part of body of decedent [*see Health & Safety Code § 7150.40(a)*; *see also § 106.11[4]*] according to following order of priorities [*Health & Safety Code § 7150.40(a)*]:

(1) Agent under power of attorney for health care or other record.

NOTE:

An agent under a power of attorney for health care or other record that expressly permits the agent to make an anatomical gift can make an anatomical gift during the donor's lifetime [*see Health & Safety Code § 7150.15; see also § 106.11[2]*]. An agent who has authority under *Health & Safety Code § 7150.15* also has priority over other persons in making or refusing to make an anatomical gift of all or part of a decedent's body [*see Health & Safety Code § 7150.40; see also § 106.11[4]*].

- (2) Donor's spouse or domestic partner.
- (3) Adult son or daughter of donor.
- (4) Either parent of donor.
- (5) Adult brother or sister of donor.
- (6) Adult grandchildren of donor.
- (7) Grandparent of donor.
- (8) An adult who exhibited special care and concern for the decedent during the decedent's lifetime.
- (9) Guardian or conservator of donor at time of death.

(10) Any other person having the authority to dispose of the decedent's body, including but not limited to, a coroner, medical examiner, or hospital administrator, provided that a reasonable effort has been made to locate and inform the persons listed in (1) - (9) above.

b. Third party actually has right to make gift because:

- (1) He or she is member of highest class of persons entitled to make gift according to order of priorities set forth in 3(a), *above*; and
- (2) All members of classes having higher priority are likely to be unavailable at time of donor's death;

NOTE:

An anatomical gift may not be made by any of the persons listed in 3(a), *above*, if a person in a higher class is available at the time of death to make the gift [*Health & Safety Code § 7150.40*].

c. Third party knows of no objections to gift by donor, members of higher classes, or members of third party's own class;

NOTE:

No third party may make an anatomical gift if he or she knows of a refusal or contrary indications by the donor, or an objection by a member of a higher class or a member of the person's own class [*Health & Safety Code § 7150.40(b), (c)*]; for classes in order of priority, *see* 3(a), *above*; *see also § 106.11[4]*].

d. Donor is or was member of religious group that relies solely on faith healing or has tenets that would be violated by anatomical gift [*Health & Safety Code § 7150.30(e)*].

NOTE:

Only the donor may make an anatomical gift if he or she is a member of such a group at the time of his or her death [*Health & Safety Code § 7150.30(e)*; for discussion, *see § 106.11[7]*].

3. If gift is to be made by donor personally, determine whether gift should be made by:

a. Will [*Health & Safety Code §§ 7150.20(a)(3)* ("document of gift" includes will), 7150.10(a)(6)];

NOTE:

It is inadvisable to attempt to make an anatomical gift solely by will. This is because the medical and surgical procedures necessary to carry out an anatomical gift must be completed within a very short time--generally no more than an hour or two after the donor's death. Wills are not usually located and consulted so quickly. It is generally preferable for a client to make an anatomical gift in a nontestamentary instrument and then confirm the gift in his or her will. This minimizes the likelihood that the gift will not be discovered until it is too late to carry it out and eliminates the possibility that the gift may be viewed as inconsistent with any funeral, burial, or other interment instructions set forth in the donor's will. For a will provision confirming an anatomical gift made in a nontestamentary instrument, *see § 106.211*.

b. Card.

NOTE:

An anatomical gift may be made by card [*see Health & Safety Code § 7150.10(a)(6)* ("document of gift" defined)]. This will ordinarily be a wallet-sized card carried on the person of the donor. The card must, however, meet all the requirements of more lengthy documents of gift. [*see P c, below*].

c. Registration with Donate Life California Organ and Tissue Donor Registry

NOTE:

An anatomical gift can be made directly though the Donate Life California Organ & Tissue Donor Registry's website at www.donatelifecalifornia.org. A person can also register with the Donate Life California Organ & Tissue Donor Registry through the DMV when they apply for or renew their driver's license or identification card [*Health & Safety Code § 7150.20, Veh. Code §§ 12811, 13005*]. By doing so, the donor is automatically enrolled in the registry and the donor dot is pre-printed onto the person's driver's license or identification card. [*see § 106.11[3]; see also § 106.201[1][c]*].

d. Advance health care directive (durable power of attorney) under the Uniform Health Care Decisions Act [*Prob. Code § 4670 et seq.; see Ch. 104, Health Care Transactions, Consents, and Directives*].

NOTE:

The statutory form for an advance health care directive contains space for making anatomical gifts [*see Prob. Code § 4671* (statutory form)]. If the donor plans to execute an advance health care directive, this may present a convenient opportunity to address anatomical gift issues as well. A donor who executes such a directive still may wish to carry an anatomical gift card on his or her person, since otherwise the advance health care directive may not be discovered in time for the gift to be made. For detailed discussion of advance health care directives, see Ch. 104, *Health Care Transactions, Consents, and*

Directives].

4. Determine whether document of gift should designate donee.

NOTE:

An anatomical gift may be made to a designated donee or without designating a donee [*Health & Safety Code* § 7150.50]. Permissible donees include hospitals, physicians, surgeons, procurement organizations, accredited medical or dental schools, colleges, or universities, designated individuals, [*Health & Safety Code* § 7150.50].

Anatomical gifts are rarely made to designated individuals. The medical and surgical procedures necessary to carry out the terms of an anatomical gift must be made promptly after the death of the donor, and the delay necessitated by efforts to find a designated individual may defeat the gift entirely.

If a donee is not designated, is unavailable, or rejects the gift, the gift may be accepted by the appropriate organization [*Health & Safety Code* § 7150.50]. The names and addresses of organizations that accept anatomical gifts are set forth in §§ 106.201[1], 106.202[1].

5. Determine whether prospective donee, if any, has specific forms that must be used or specific procedures that must be adhered to in making gift.

NOTE:

Some procurement organizations have specific procedures or forms that must be adhered to in making anatomical gifts. The State Curator for Northern California, for example, provides forms for anatomical gifts and prescribes procedures that must be met before it will accept a gift [*see* § 106.202[1], [2]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawAnatomical GiftsHealthcare LawTreatmentBlood & Organ DonationsGeneral OverviewHealthcare LawTreatmentBlood & Organ DonationsUniform Anatomical Gift Act



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DIVISION VII: PERSONAL TRANSACTIONS

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B. Preliminary Determinations

33-106 California Legal Forms--Transaction Guide §§ 106.111-106.119

[Reserved]

§§ 106.111[Reserved]



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33-106 California Legal Forms--Transaction Guide § 106.120

§ 106.120 Preparation of Documents

1. Draft document of gift or obtain and complete appropriate printed form for gift, as follows:

- a. Draft document of gift [*see* (2), (3), *below*]; or
- b. Obtain donor card or form to be carried with driver's license, chauffeur's license, or personal identification card issued by Department of Motor Vehicles;

NOTE:

The Department of Motor Vehicles is required to provide a form by which the licensees or cardholders may indicate their willingness and intent to make anatomical gifts under the Uniform Anatomical Gift Act [*Veh. Code §§ 12811(b), 13005(b); see Health & Safety Code § 7150.20(c)*]. The DMV forms comply with all of the requirements of the Act and afford the simplest means for making anatomical gifts. If a license expires or is revoked, suspended, or canceled after an anatomical gift form is signed, the gift remains effective [*Health & Safety Code § 7150.20(c)*]. The DMV process and forms include registering with Donate Life California Organ & Tissue Donor Registry. When a person applies for or renews their driver's license or identification card, the DMV will ask if they wish to register [*see Health & Safety Code § 7150.20, Veh. Code §§ 12811, 13005; see also § 106.11[3]*]. By doing so, the donor is automatically enrolled in the registry and the pink 'DONOR' dot is pre-printed on the person's driver's license or identification card.

- c. Draft will provision [*see § 106.210*] or codicil to will.

NOTE:

It is theoretically possible to make an anatomical gift in a will [*Health & Safety Code § 7150.20(c)*]. In practice, however, a will is an unsuitable vehicle for an anatomical gift. This is because the medical and

surgical procedures necessary to complete an anatomical gift must be completed within a very short time (usually no more than an hour or two) after the donor's death, and wills are rarely located or consulted within this limited time frame [see discussion in § 106.210[1]].

2. If anatomical gift is to be made by donor, or donor's agent (as authorized under *Health & Safety Code § 7150.15*) by nontestamentary document of gift, include following in document of gift:

a. Name of donor.

b. Date of donor's birth.

NOTE:

The donor must be at least 18 years of age or between age 15 and 18 with the written consent of the donor's parent or guardian [*Health & Safety Code § 7150.15(a)*].

c. Words of gift.

d. Statement that gift is of one or more of following:

(1) Any needed body part(s) or organ(s).

(2) Only specifically identified part(s) or organ(s).

(3) Entire body.

e. Name of donee, if gift is to be to a designated donee [see § 106.100, P 6].

NOTE:

If a donee is specified, the donee should be clearly identified by name and address. Alternate donees may be specified at the option of the donor.

f. Purpose of gift [*Health & Safety Code § 7150.50*; see also § 106.11[10]].

g. Any conditions, limitations, or special directions, such as:

(1) Instructions regarding burial, embalming, or cremation of the donor's body.

(2) Name of physician or surgeon authorized to carry out the appropriate procedures.

NOTE:

For discussion of whether a specific physician or surgeon should be named in the document of gift, see § 106.100, P 7.

(3) Instruction that gift be limited to a particular person.

(4) Instructions for disposition of cremated remains if not to be returned to person in whom custody of remains vests [see *Health & Safety Code § 7100*; see also § 106.11[15]].

h. Date and place of execution.

i. Space for signature(s), as follows:

- (1) Space for signature of donor alone, if donor is able to sign own name.
- (2) Space for signature of donor's agent, if donor's agent is available to sign.
- (3) Space for signature of third party and two witnesses, if donor or donor's agent cannot sign.

j. If donor is between 15 and 18 years of age, include consent of parent or guardian and space for signature of parent or guardian [*Health & Safety Code § 7150.15(a)*].

NOTE:

If the donor cannot sign, the document of gift may be signed by another person and by two witnesses, all of whom have signed at the direction and in the presence of the donor and of each other. The document must state that it has been so signed [*Health & Safety Code § 7150.20(b)*].

3. If anatomical gift is to be made by third party, include following in document of gift:

- a. Name of donor.
- b. Date and place of donor's death.
- c. Facts showing that third party has right to make gift [*see Health & Safety Code § 7150.40; see also § 106.11[4]*].
- d. Words of gift.
- e. Statement that gift is of one or more of following:
 - (1) Any needed body parts or organs.
 - (2) Only specifically identified parts or organs.
 - (3) Entire body.
- f. Name of donee, if gift is to designated donee [*see § 106.100, P 6*].
- g. Purpose of gift.
- h. Any conditions, limitations, or special directions [*see P 2g, above*].
- i. Date and place of execution.
- j. Space for signature of person making gift.

4. If anatomical gift is to be made by will or codicil, include following in will provision or codicil:

- a. Information specified in PP 2a-2i, *above*;

NOTE:

The Uniform Anatomical Gift Act provides that, if the donor is unable to sign a document of gift, the document may be signed by another person and two witnesses [*Health & Safety Code § 7150.20; see P 2i(2), above*]. The Probate Code prescribes identical requirements for the execution of a will or codicil when the testator is unable to sign [*see Prob. Code § 6110(b)(2), (c); see Ch. 61, Will Drafting and Complete Will Forms, § 61.13*].

b. If donor's body is to be embalmed and buried after body part has been removed, directions for delivery of body to donee before embalming and burial.

5. If anatomical gift made by nontestamentary document [*see P 2, above*] is to be confirmed by donor's will [*see § 106.121, P 5*], draft will provision or codicil confirming gift [*see § 106.211*].

6. If anatomical gift is made by donor during a terminal illness or injury, any form of communication that clearly expresses the donor's wish addressed to at least two adults, at least one of whom is a disinterested witness satisfies the Act [*see Health & Safety Code § 7150.20; see also § 106.11[2]*]. The witness must memorialize the communication in a signed and dated writing.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Anatomical Gifts Healthcare Law Treatment Blood & Organ Donations General Overview Healthcare Law Treatment Blood & Organ Donations Uniform Anatomical Gift Act



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33-106 California Legal Forms--Transaction Guide § 106.121

§ 106.121 Procedures for Making Anatomical Gifts

1. Have document of gift executed:

- a. By donor alone, if donor is able to sign own name [*Health & Safety Code § 7150.20; see § 106.11[2]*].
- b. By donor's agent, if donor's agent is available to sign [*Health & Safety Code § 7150.20*].
- c. By another person and two witnesses, if donor or donor's agent is not able to sign own name [*Health & Safety Code § 7150.20(b)*]; for execution and attestation requirements, *see § 106.120, P (2)(i)(2); see also § 106.11[2]*].
- d. By third party, if gift is made by third party for donor [for requirements for anatomical gifts by third parties, *see § 106.11[4]*].
- e. By donor and two witnesses if gift is made by will or codicil to will [for execution and attestation requirements for wills and codicils, *see Prob. Code §§ 6110-6113; see also Ch. 61, Will Drafting and Complete Will Forms, § 61.13*].
- f. By two witnesses if gift made by any form of communication by donor to the witnesses during donor's terminal illness or injury [*Health & Safety Code § 7150.20, see § 106.11[2]*].

2. Advise donor to register anatomical gift direct through Donate Life California Organ & Tissue Donor Registry at www.donatelifecalifornia.org .

NOTE:

An anatomical gift can be made directly through the Donate Life California Organ & Tissue Donor Registry's website at www.donatelifecalifornia.org. A person can also register with the Donate Life California Organ & Tissue Donor Registry through the DMV when applying for or renewing a driver's license or identification card [*see Health & Safety Code § 7150.20, Veh. Code §§ 12811, 13005; see also § 106.11[3]*]. By doing so, the donor is automatically enrolled in the registry and the donor dot is pre-printed on the person's driver's license or identification card.

3. Instruct donor to carry donor card on person as evidence of gift.

NOTE:

The surgical and medical procedures necessary to carry out an anatomical gift must be made promptly after the donor's death. If the donor has not registered with Donate Life California or if some evidence of the anatomical gift is not carried on the donor's person, the fact that he or she has made a gift may not be discovered until it is too late to carry out the gift. For this reason, the donor should be advised to register with Donate Life California or carry a card or other form evidencing the gift. If the gift is made by some other document of gift, the donor should carry some other clear indication that he or she has executed the document and is a donor [*see, e.g., § 106.201 (third alternative)*].

4. Advise donor that necklace or bracelet may be worn.

NOTE:

A necklace or bracelet may be obtained from the Medic Alert Foundation International, Turlock, CA 94381-1009.

5. If gift is made by nontestamentary instrument, consider using will provision or codicil confirming gift.

NOTE:

If the gift is made by a nontestamentary document of gift, a will provision or codicil confirming the gift is recommended. This will make it clear to the executor of the will and other persons interested in the donor's estate that the gift has been made and has not been revoked. For a will provision confirming a nontestamentary anatomical gift, see § 106.211.

6. Advise donor to inform next of kin, executor named in will, guardian, conservator, or attorney-in-fact under durable power of attorney, if any, of following:

- a. Fact that gift has been made;
- b. Location of document of gift and person who will have custody of document; and
- c. Name of donee, if a donee is designated.

7. Review and inform donor as to procedures for completion of gift.

NOTE:

Completion of an anatomical gift following the death of the donor is ordinarily a medical matter that does not require the participation of the attorney. The case may be otherwise, however, if objections to the gift are made by relatives of the donor or if, as in some transplantation cases, there are legal questions regarding the confirmation of death or the rights or duties of physicians, surgeons procurement organization or donees [*see § 106.11[12]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawAnatomical GiftsHealthcare LawTreatmentBlood & Organ DonationsGeneral
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§§ 106.122[Reserved]



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PART III. TRANSACTION GUIDE

D. Related and Subsequent Procedures

33-106 California Legal Forms--Transaction Guide § 106.130

§ 106.130 Amendment or Revocation of Anatomical Gift

NOTE:

An anatomical gift may be amended or revoked by (1) a signed statement, (2) any form of communication during a terminal illness or injury addressed to a physician or surgeon, or (3) delivery of a signed statement to a specified donee to whom a document of gift had been delivered [*Health & Safety Code § 7150.25(a)*]. If the gift was made by will or a codicil to a will, it may also be amended or revoked by revoking the will [*Health & Safety Code § 7150.25(a)*]; for revocation of wills, *see Prob. Code §§ 6120-6124*. For a general discussion of amendments and revocations of anatomical gifts, see § 106.11[8].

1. Document of gift may be revoked or amended in any of the following methods [*Health & Safety Code § 7150.25(a), (b)*]:

a. A record signed by the donor, donor's agent under *Health & Safety Code § 7150.15*, or other person acting at the direction of the donor or donor's agent.

NOTE:

A record signed by an individual acting at the direction of donor or donor's agent must be witnessed by at least two witnesses, at least one of whom is a disinterested witness, who have signed at the request of the donor or donor's agent, and must memorialize such in a signed and dated writing [*see Health & Safety Code § 7150.25(b)*; *see also § 106.11[8]*].

b. A later-executed document of gift that amends or revokes a previous anatomical gift or portion of an anatomical gift, either expressly or by inconsistency.

2. Anatomical gift may be revoked by donor or donor's agent by [*Health & Safety Code § 7150.25(c)*]:

- a. Destruction of the document of gift.
- b. Cancellation of the document of gift on a donor database registry.

3. Anatomical gift, not made in a will, may be amended or revoked by donor by any form of communication during a terminal illness or injury.

NOTE:

Communication must be made to at least two adults, at least one of whom is a disinterested witness, and the witnesses must memorialize the communication in a signed and dated writing [*see Health & Safety Code § 7150.25(d)*; *see also § 106.11[8]*].

4. If original gift was made by will or codicil, amend or revoke gift as follows [*Health & Safety Code § 7150.25(e)*]:

- a. Use any means of amendment or revocation specified in (2), *above* [*Health & Safety Code § 7150.25(e)*]; or
- b. Execute subsequent will or codicil revoking or amending gift [*see Prob. Code § 6120(a)* (revocation of will); *see also Prob. Code § 88* ("will" includes codicil)]; or
- c. Burn, tear, cancel, obliterate, or destroy will or codicil that made gift.

NOTE:

A will or codicil may be revoked by being burned, torn, canceled, or obliterated with the intent and for the purpose of revoking it [*Prob. Code § 6120(b)* (revocation of will); *see Prob. Code § 88* ("will" includes codicil)]. This means of revocation should be relied on only when no other means is feasible, since it may be difficult after the donor's death to prove the necessary intent.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawAnatomical GiftsHealthcare LawTreatmentBlood & Organ DonationsGeneral OverviewHealthcare LawTreatmentBlood & Organ DonationsUniform Anatomical Gift Act



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D. Related and Subsequent Procedures

33-106 California Legal Forms--Transaction Guide §§ 106.131-106.199

[Reserved]

§§ 106.131[Reserved]



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PART IV. FORMS

A. Nontestamentary Instruments

33-106 California Legal Forms--Transaction Guide § 106.200

§ 106.200 Nontestamentary Document of Gift

[1] Comment

[a] Use of Form

This form is an inter vivos document of gift that may be used to make an anatomical gift pursuant to the Uniform Anatomical Gift Act [*Health & Safety Code §§ 7150-7151.40*]. For a form that may be used to make an anatomical gift by will or codicil, see § 106.210. For a form that may be used by a third party to make an anatomical gift on behalf of the donor, see § 106.220. For an advance health care directive containing anatomical gift provisions as well as provisions relating to the donor's health care, see *Ch. 104, Health Care Transactions, Consents, and Directives*, § 104.230.

[b] Anatomical Gifts

Any person who is 18 years of age or older may give all or any part of his or her body to any of certain specified persons or institutions for purposes generally relating to medical and dental treatment, therapy, and research [*Health & Safety Code §§ 7150.15(a)*]. If the donor is between 15 and 18 years of age, the written consent of the parent or guardian must be given [*Health & Safety Code § 7150.15(a)*]. Regardless of the form in which an anatomical gift is made [*see [c], below*], it will take effect only on the death of the donor [*Health & Safety Code § 7150.10(a)(3)*]. For a discussion of the persons and institutions to whom anatomical gifts may be made, and the purposes for which such gifts may be made under the applicable statutes, see § 106.11[10].

[c] Form of Gift Document

The Uniform Anatomical Gift Act [*Health & Safety Code §§ 7150-7151.40*] provides that a donor may make an anatomical gift by signing a "document of gift" [*Health & Safety Code § 7150.15*]. A "donor" is an individual who makes an anatomical gift of all or part of his or her body [*Health & Safety Code § 7150.10(a)(7)*]. A "document of gift" is a donor card or other record used to make an anatomical gift and includes a statement recorded on the Donate Life California Organ and Tissue Donor Registry or other donor registry [*Health & Safety Code § 7150.10(a)(6)*].

Although it is simpler to make an anatomical gift by donor registry card [see § 106.201] than by a formally drafted and executed document, donor registry's and cards may have certain limitations. First, it ordinarily does not have enough space to designate a specific donee [see [e], *below*]; second, it may not a suitable form in which to set forth any conditions or limitations that the donor may wish to apply to the gift. This form, which may be as long or as short as is necessary to accomplish the donor's purpose, may designate one or several specific donees and may set forth any conditions or limitations that the donee wishes to impose on the gift.

When this form is used to make an anatomical gift, the donor should carry on his or her person some indication that the gift has been made. Anatomical gifts must be completed very soon (in most cases within an hour) after the donor's death. If the intention to make an anatomical gift is not made known promptly, the gift may be frustrated. A typewritten card such as that illustrated in the third alternative of the form in § 106.201 may be carried by a donor who has also executed a more formal gift instrument.

[d] Execution and Attestation

If the donor will make the gift by an inter vivos document, the document must be signed by the donor [*Health & Safety Code § 7150.20(a)*]. If the donor is unable to sign personally, the document must be signed by another person and by two witnesses, all of whom must sign at the direction and in the presence of the donor and of each other [*Health & Safety Code § 7150.20(b)*].

If the anatomical gift is to be made by will or codicil, the instrument must comply with the requirements relating to the execution and attestation of wills.

[e] Designation of Specific Donee

An anatomical gift may be made to a designated donee, or without designating a donee [*Health & Safety Code § 7150.50*]. If a donee is not designated, is unavailable, or rejects the gift, the gift may be accepted by the appropriate organization [*Health & Safety Code § 7150.50*; see § 106.11[10]]. Since most donors are concerned only that their gifts will actually benefit some person, designation of a specific donee usually is unnecessary.

Every prospective donor should understand that a gift which, by its terms, can be given only to a specified donee, may be delayed while physicians, hospital personnel, or other persons make efforts to locate the donee. Many donors would prefer not to risk the failure of the gift by limiting it to a specific donee.

[f] Confirmation of Gift in Will

In any case in which an anatomical gift is made by a nontestamentary instrument, it is recommended that the gift also be confirmed in the donor's will. The form in § 106.211 may be used for this purpose. Testamentary confirmation will help to overcome any inference that some provision of the will (such as a direction for funeral or burial arrangements) was intended to act as a revocation of the anatomical gift. It may also help to eliminate disputes among the donor's next of kin over disposition of the donor's body.

[g] Printed Forms

Printed documents similar to this form are used by some institutions that regularly accept anatomical gifts. Printed documents sometimes include provisions or prescribe execution procedures that are peculiar to the institutions that prepare and use them [see, e.g., § 106.202]. If a prospective donor wishes to make a gift to a particular institution, the donor or the attorney should inquire whether the institution provides its own form for making such a gift and, if so, a copy should be acquired and used in making the gift.

[2] FORM**Nontestamentary Document of Gift****ANATOMICAL GIFT**

In the hope that I may help others, I, _____[*full name of donor*], hereby make this anatomical gift under the Uniform Anatomical Gift Act. If medically acceptable, this gift shall take effect immediately upon my death.

[*If gift is to be made to designated donee:*]

1. I give [*specify subject matter of gift, e.g.: my kidneys or my pacemaker or any needed organs or parts of my body or my entire body*] to _____[*name and address of donee*] (the "donee") for _____[*specify purpose or use of gift, e.g.: any use or uses that the donee shall deem appropriate with regard to all or any part of this gift or medical or dental education, research, advancement of medical or dental science, therapy, or transplantation or any use or uses permitted by the Uniform Anatomical Gift Act*]. [*If donor wishes to name alternate donee(s), add following: If, for any reason, the donee declines to accept this gift, then I direct that the gift may be received by _____ (the following individuals and institutions in the order stated: _____ or any institution of similar purpose that is authorized by law to accept this gift).*]

[*OR, if donee is not to be designated:*]

1. I give [*specify subject matter of gift, e.g.: my kidneys or any needed organs or parts of my body or my entire body*] to any qualified hospital, physician, surgeon, or procurement organization, or any accredited medical or dental school, college, or university for any of the uses or purposes permitted by the Uniform Anatomical Gift Act.

[*Continue with the following:*]

2. I direct that, [*add, if gift is of entire body: if the donee accepts this gift for the sole purpose of removal of specific parts or organs of my body, then*] upon completion of all necessary procedures, the donee shall deliver my body to my next of kin or other person having legal right to custody thereof, to be [*specify disposition of body, e.g.: buried in Broadlawn Cemetery, Smalltown, California or cremated and buried at sea according to directions in my Last Will and Testament*].

3. [*Add any other specific conditions or limitations on gift*].

[*EITHER*]

4. I am at least 18 years of age.

[*OR*]

4. I am between 15 and 18 years of age and am making this gift with the written consent of my parent or guardian, as set forth below.

[*Continue with the following:*]

Executed at _____ on _____ [date].

_____ [signature of donor]

[typed name]

[If donor is unable to sign his or her own name, the following signature and attestation clause should be used in place of the standard signature block set forth above:]

Executed at _____ on _____ [date].

_____ [name of donor as signed by another]

[typed name of donor]

On _____ [date], at the direction and in the presence of _____ [name of donor], and in the presence of the two witnesses who names and signatures are set forth below, I, _____ [name of person signing donor's name], signed the name of _____ [name of donor], who was unable by reason of [specify reason, e.g.: illness or physical paralysis] to sign _____ [his or her] own name to this document of gift.

_____ [signature of person signing donor's name]

[typed name]

On _____ [date], we, the undersigned, each being present at the same time, witnessed the signing of this document of gift by _____ [name of person signing donor's name], who signed the name of _____ [name of donor] thereto, at _____ [his or her] request and in _____ [his or her] presence. [Optional: At that time, _____ (name of donor) appeared to us to be of sound mind and, to the best of our knowledge, was not acting under fraud, duress, menace, or undue influence.] We now sign this document in the presence of _____ [name of person signing donor's name] and _____ [name of donor].

_____ [signature of witness]

[typed name]

_____ [signature of witness]

[typed name]

Consent of Parent or Guardian

I, _____ [name], am the [parent or guardian] of _____ [name of donor], who was a minor between 15 and 18 years of age on the date _____ [he or she] executed this instrument. I hereby consent to _____ [name of minor] making an anatomical gift on the terms and conditions described in this instrument.

_____ Dated:

_____ [signature of parent or guardian]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawAnatomical GiftsHealthcare LawTreatmentBlood & Organ DonationsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 106 ANATOMICAL GIFTS

PART IV. FORMS

A. Nontestamentary Instruments

33-106 California Legal Forms--Transaction Guide § 106.201

§ 106.201 Donor Cards

[1] Comment

[a] Use of Form

This form illustrates three kinds of donor cards (or forms designed to be affixed to or carried with cards) that may be used to make gifts under the Uniform Anatomical Gift Act [*Health & Safety Code §§ 7150-7151.40*]. The three examples illustrated are:

- The form issued by the California Department of Motor Vehicles and designed to be affixed to and carried with a California driver's license or identification card [*see [c] and succeeding headings, below*].
- The Uniform Donor Card issued by the National Kidney Foundation [*see [d], below*].
- A card indicating that an anatomical gift has been made by another instrument [*see [e], below*].

Note that these cards do not contain space for the signed consent of a minor's parent or guardian, which is required for a valid anatomical gift if the donor is between 15 and 18 years old [*Health & Safety Code § 7150.15(a)*]. Thus, they should not be used for minor donors without appropriate modification.

[b] Anatomical Gift Made by Donor Card

The Uniform Anatomical Gift Act permits donors to make anatomical gifts by card or by attaching a statement to their driver's license or identification card [*Health & Safety Code § 7150.20(a)*; *see Veh. Code §§ 12811(b), 13005(b)*]. When an anatomical gift is made by a card, the card must be signed by the donor or donor's agent [*Health & Safety Code §§ 7150.15, 7150.20*]. If the donor or donor's agent cannot sign, however, the card must be signed by another person and by two witnesses, all of whom must sign at the direction of the donor or donor's agent [*Health & Safety Code § 7150.20(b)*]. Delivery of the card is not essential to the validity of the gift, which becomes effective only on the death of holder [*Health & Safety Code § 7150.10(a)(3), 7150.60*].

[c] Department of Motor Vehicles Registration**[i] In General**

The Department of Motor Vehicles is required to provide a process for individuals who indicate their willingness and intent to make an anatomical gift [*Veh. Code* §§ 12811(b), 13005(b)]. The DMV is required to present a form to each applicant for license or identification card at the time of application or renewal, and to explain its use [*Veh. Code* §§ 12811(b), 13005(b)]. The DMV applications and processes meet the requirements of the Act [*see Health & Safety Code* § 7150-7151.40; *see also* § 106.11 et seq.].

[ii] Process

The DMV's driver's license and ID card application and renewal forms now provide an applicant the option make an anatomical gift by registering with Donate Life California [*Veh. Code* §§ 12811(b), 13005(b)]. The DMV forms ask the applicant if they wish to be an organ and tissue donor, and if they consent, they will be directed to read a statement on the back of the application that provides:

If you marked on the front of the application that you want to be an organ and tissue donor upon death, your consent shall serve as a legally binding document as outlined under the California Uniform Anatomical Gift Act. Except in the case where the donor is under the age of 18, the donation does not require the consent of any other person. For donors under the age of 18, the legal guardian of the donor shall make the final decision regarding the donation. If you want to change your decision to consent in the future, or if you want to limit the donation to specific organs, tissues, or research, you must contact Donate Life California by mail at 1760 Creekside Oaks Drive, #220, Sacramento, CA 95833, or online at www.donateLIFecalifornia.org or www.doneVIDAcalifornia.org . [*Veh. Code* § 12811(b)(1)].

By providing consent, the DMV will collect donor information on the application for a new or renewed driver's licenses and identification cards, and will print the word "DONOR" or other appropriate designation on the face of the driver's license or identification card [*Veh. Code* § 12811(b)(3)-(b)(4)]. The DMV will transmit on a weekly basis relevant information on every applicant who has indicated his or her willingness to participate in the organ donation program to Donate Life California [*Veh. Code* § 12811(b)(5)]. Enrollment in the registry is a legal document and is binding after the donor's death despite any express desires of next of kin opposed to the donation [*Veh. Code* § 12811(b)(8)]

In addition to registering directly with Donate Life California, the DMV will make available to all applicants for a new or renewed identification card, a standardized form to be filled out by a person who desires to enroll in the Donate Life California with instructions for mailing the completed form [*Veh. Code* § 13005(b)(1)].

The DMV donor cards, and other donor cards, will continue to grant authorization for organ and/or tissue recovery, but due to the suddenness surrounding the circumstances, a donor card is rarely available at the time a family is approached regarding donation and it is advisable for an individual wishing to make an anatomical gift, they register with Donate Life California either through the DMV, or the registry's website. Every donor's desire to make an anatomical gift is stored in a secure, confidential database which is readily available to authorized organ and tissue recovery personnel.

[iii] Limitations on Use

Although it is quite simple to make an anatomical gift by registering through the DMV, or directly through Donate Life California, or using the DMV donor cards, there are some limitations. First, there is no place to designate a specific donee. Additionally, there is no place to indicate whether an anatomical gift has been made by another instrument. The third alternative card [*see* [e], *below*] is intended to serve that purpose.

[iv] Revocation

If a donor signed up with Donate Life California at the DMV, and wishes to revoke his or her gift, the donor will need to remove themselves from the registry and have the pink dot removed from their driver's license or identification card. By visiting Donate Life California's website, a donor can update their profile, and remove their name from the list of donors. A pink donor dot will remain on the driver's license or identification card until a new one is issued, but the dot is never used to identify someone as a legal organ or tissue donor, and verification of donor designation is only done through the Donate Life California Registry database. If desired, an individual can have the pink donor dot removed prior to renewal a driver's license or identification card by contacting the DMV.

[v] Additional Information

Additional information regarding Donate Life California and the DMV donor program may be obtained by contacting any of the following:

Donate Life California
1760 Creekside Oaks Drive, Suite 220
Sacramento, CA 95833
(866) 797-2366
www.donatelifecalifornia.org

Department of Motor Vehicles
1-800-777-0133
www.dmv.ca.gov

[d] Uniform Donor Card

The alternative illustrated is the Uniform Donor Card. The Uniform Donor Card was developed in 1969 by the Ad Hoc Committee on Medical Legal Problems, reporting to the National Academy of Sciences-National Research Council Committee on Tissue Transplantation. Committee participants included numerous organizations involved in the field of transplantation. The card was also reviewed by individual physicians and transplant surgeons and by committees of the American Medical Association and the American Bar Association. The version shown here is issued by and may be obtained from the National Kidney Foundation and is available on the Foundation's website at www.kidney.org. It is copyrighted by the National Kidney Foundation and reprinted here with permission. Many other organizations have issued substantially identical versions of the card for use by prospective donors. This card should be carried by the donor at all times, preferably in close proximity to his or her driver's license and in a manner that will render it clearly visible to anyone who might examine the driver's license.

The Uniform Donor Card is a self-contained legal document which, when properly executed, provides all of the documentation necessary to make a valid anatomical gift.

If the donor wishes to designate a specific donee, or to specify any limitations or conditions which will apply to the gift, a limited space is provided on the Uniform Donor Card for that purpose. It may be difficult or impossible, however, to include complete conditions or limitations, or other information, such as the donee's complete address and telephone number. If the card does not contain adequate space for addition of the desired conditions or limitations, a more formal instrument may be used. This may be either a will or codicil [see § 106.210] or an inter vivos document of gift [see § 106.200]. The formalities for execution of the Uniform Donor card are the same as for all gifts made under the Act, the donor or donor's agent as authorized under *Health & Safety Code § 7150.15* must sign the card, and if the donor or donor's agent can't sign, an individual may sign at their direction, provided it is witnessed by two adults, at least one of whom is a disinterested witness, and then memorialized in a signed and dated writing [see *Health & Safety Code § 7150.20*; see also § 106.11[2]].

[e] Card Indicating That Anatomical Gift Was Made in Another Instrument

An additional alternative illustrated in this form is a card that may be carried by a donor to indicate that he or she has executed a separate instrument making an anatomical gift. This does not constitute a document of gift in itself. It is merely evidence of the existence of another document that does make such a gift. Thus, it should be used only in conjunction with another instrument that actually makes the gift.

Because this card is not a self-contained gift instrument, it is not subject to any of the formal requirements of the Uniform Anatomical Gift Act. For the importance of carrying such a card when another type of instrument has been used to make the gift, see discussions in § 106.200[1][c], [e].

This type of card may be prepared by the attorney in typewritten form when the gift instrument is executed. The donor should carry it at all times, preferably in close proximity to his or her driver's license and in a manner that will render it clearly visible to anyone who might examine the license.

[f] Confirmation of Gift in Will

If an anatomical gift is made by registration with a donor registry, a card, or some other nontestamentary instrument, it is good practice to confirm the gift in the donor's will. Testamentary confirmation will help to overcome any inference that some provision of the will (e.g., a direction for funeral or burial arrangements) was intended as a revocation of the anatomical gift. It may also help to eliminate disputes among the donor's next of kin over disposition of the donor's body. The form in § 106.211 may be used for this purpose.

[2] FORM: Uniform Donor Card**Uniform Donor Card**

[Click here to view image.](#)

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[3] FORM: Card Indicating Existence of Anatomical Gift Instrument**Card Indicating Existence of Anatomical Gift Instrument****ANATOMICAL GIFT CARD****IMPORTANT INFORMATION--PLEASE READ CAREFULLY**

This card indicates that I have previously executed a document making an anatomical gift pursuant to the Uniform Anatomical Gift Act. The original document evidencing this gift is now in the custody of: _____

_____ [name and address of institution]

TELEPHONE NO: (_____)

_____ - _____

THE ABOVE INSTITUTION SHOULD BE CONTACTED IMMEDIATELY IN THE EVENT OF MY DEATH

_____ [*signature of donor*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawAnatomical GiftsHealthcare LawTreatmentBlood & Organ DonationsGeneral
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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 106 ANATOMICAL GIFTS

PART IV. FORMS

A. Nontestamentary Instruments

33-106 California Legal Forms--Transaction Guide § 106.202

§ 106.202 Gift of Entire Body to State Curator of Northern California

[1] Comment

[a] Use of Form

This form may be used by an individual to dispose of his or her entire body to the State Curator of Northern California for the purpose of medical study and research. The illustrated material actually consists of three separate documents: an information sheet to be completed by the prospective donor and returned to the curator, a document authorizing the gift, to be executed by the donor, and a release form to be executed by the donor's next of kin. Following completion and review of these documents, the donor will be notified whether the gift will be acceptable. Copies of these forms, together with applicable instructions, are available upon request from the curator's office at the address listed below.

Use of these forms is not absolutely essential. The Curator has indicated that a gift made by another type of instrument, such as a will, will still be accepted if it meets all the other criteria for an acceptable donation. However, the Curator prefers that these forms be used by prospective donors.

[b] Role of State Curators

The state curators are the entities charged with supervision of dead bodies and remains. There are two curators, one for Northern California and the other for Southern California. Their addresses are as follows:

State Curator for Northern California
University of California Medical Center
San Francisco, CA 94143-0902
Telephone: (415) 476-1981

State Curator for Southern California
University of Southern California School of Medicine
Los Angeles, CA 90033

Telephone: (213) 222-0231

The State Curator for Northern California accepts donations of bodies for redistribution to all authorized higher education anatomy programs in Northern California. The documents illustrated in this form are those used by the Curator for Northern California. In Southern California, the Curator deals only with the disposition of unclaimed bodies, and the individual anatomy departments in the various medical schools make their own direct arrangements for donations of bodies. In either event, the above institutions accept only donations of whole bodies for teaching and research purposes.

[c] Dealing With Schools Directly

It is not absolutely necessary that an individual who wishes to make a gift of his or her entire body name the Curator as the recipient of the gift. As noted above, the anatomy departments of the various California medical schools in both Northern and Southern California have their own anatomical gift programs. The attorney or prospective donor should make individual inquiry at local medical schools for information about such programs and should determine whether any special forms or procedures are required. The form in § 106.200 is a general anatomical gift form that may be used to make a donation of an entire body, as well as for other types of anatomical gifts.

If the donor wishes to donate his or her body to a particular school, it is especially important that the school be contacted in advance. Most schools have a policy of not accepting more bodies than they can presently use. This means that a body cannot even be donated to the school unless that school's program is currently open. Even if the program is open at the time the gift instrument is executed, the school may still reject the donation at the time of the donor's death if it is not required at that time. It is important that the individual school be contacted because programs may be closed for long periods.

[d] Official Instructions Accompanying Forms

The forms provided by the Curator are accompanied by official instructions outlining the Curator's policies. These instructions are reproduced below essentially verbatim:

1. The Curator reserves the right not to accept registered donated remains if by doing so he will exceed the number required for scientific and educational needs.
2. The Curator cannot accept the remains of registered donors after autopsy or embalming, or if the remains have become so affected by injury, disease, operation, or obesity that preservation for scientific and educational purposes is not possible.
3. The donation is for the entire body, not parts thereof. The Curator is not associated with eye, organ, tissue, or gland banks, and is not able to arrange for donations of parts of the body. The donation of the entire body is compatible with eye donations, but is not compatible with organ, tissue, or gland donations.
4. No payment of money can be made at any time in connection with a donation. This policy is in accordance with State laws and all institutions accepting human remains comply with it.
5. The expense for transportation of a donated body is not assumed by the Curator. The family or estate of a donor must be willing to pay the transportation charges. If the family or estate are unwilling to assume this expense, the Curator would have to relinquish all claim to the remains. Donated bodies are usually transported by a limousine service or by one's local funeral director.
6. The Curator will determine which of the institutions authorized to conduct scientific and educational studies will

utilize each donated body.

7. The institution utilizing the body for study will assume the expense for preparation and final disposition. When studies have been completed, remains are cremated. Ashes are not returned. Reports on examination findings are not issued to the next-of-kin.

8. Your next-of-kin, who at present is responsible under the law for disposing of your remains, must sign the "Release of Claim" form. You should show this information sheet to your next of kin and make sure that your wishes are clearly understood. On the few occasions when the next-of-kin has expressed regret about a donation following a donor's death, the Curator has relinquished all claim to the remains if so requested.

9. If you are accepted as a registered donor, a registration card will be sent to you. You must place the following statement on the reverse side of your card: "In the event of my death outside the Northern California area, please make my remains available to the nearest medical school."

[e] Individual Documents-Instructions for the Disposition of Remains

This document is the operative instrument making the gift. It must be signed by the donor or donor's agent [*Health & Safety Code § 7150.20(a)*]. If the donor cannot sign, the instrument must be signed by another individual and by two witnesses, all of whom have signed at the direction of the donor or donor's agent and of each other, and state that it has been so signed [*Health & Safety Code § 7150.20(b)*]. The donor should return one copy to the State Curator at the address listed above, retain one copy with his or her personal records, and give a third copy to next-of-kin, attorney, or physician.

[i] Medical Information Form

This document requests some simple medical information about the prospective donor to help determine whether the gift will be acceptable and to obtain basic relevant information for research purposes. One copy of this form should be completed by the donor and returned to the Curator at the office listed above.

Under the Information Practices Act of 1977 [*Civ. Code §§ 1798-1798.78*], state agencies that collect personal or confidential information from individuals are required to provide certain notices to those individuals. These notices must be provided at the time the information is collected from the individuals, unless the information required to be in the notice is contained in the form completed by the individual or the individual has received the same information within the preceding year [*Civ. Code § 1798.17*]. The notice must notify the individual, among other things, of the name of the agency that is requesting the information, the legal authority (whether granted by statute, regulation, or executive order) for maintaining the information, whether submission of the requested information is mandatory or voluntary, the consequences, if any, of not providing all or any part of the requested information, the principal purpose for which the information is to be used, and any known or foreseeable disclosures which may be made of the information [*Civ. Code § 1798.17*; see *Civ. Code § 1798.24(e), (f)* (to whom information may be disclosed)].

The State Curator for Northern California complies with the above requirement by providing a form to potential donors which, in substance, makes the following representations:

The principal purpose for requesting the information is to collect medical history for research purposes. University of California policy authorizes maintenance of the information. Furnishing all information requested on the donor forms is mandatory. Failure to provide that information will delay or may even prevent completion of the action for which the forms are being filled out. Information furnished on the forms may be used by various departments of the University of California for research purposes, and will be transmitted to the state and federal governments if required by law. Individuals have the right to review their own records in accordance with the Information Practices Act and University

Policy. The person responsible for maintaining the information is: Curator, Department of Anatomy, 1487 4th Avenue, University of California, San Francisco, CA 94143.

[ii] Release of Claim by Next of Kin

This form must be executed by the donor's next of kin who, at the time of execution of the other documents mentioned above, would be responsible for disposition of the donor's remains in the event of the donor's death [see discussion in [d] P 8, *above*].

[2] FORM

Gift of Entire Body to State Curator of Northern California

Instructions for the Desposition of Remains

[Click here to view image.](#)

Medical Information Form

Medical Information Form

[To be completed by prospective donor]

[Click here to view image.](#)

Release of Claim

Release of Claim

[To be executed by prospective donor's next of kin]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawAnatomical GiftsHealthcare LawTreatmentBlood & Organ DonationsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 106 ANATOMICAL GIFTS

PART IV. FORMS

A. Nontestamentary Instruments

33-106 California Legal Forms--Transaction Guide §§ 106.203-106.209

[Reserved]

§§ 106.203[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 106 ANATOMICAL GIFTS

PART IV. FORMS

B. Testamentary Gifts

33-106 California Legal Forms--Transaction Guide § 106.210

§ 106.210 Will Provision for Anatomical Gift

[1] Comment

[a] Use of Form

This form is a will provision that may be used to make an anatomical gift. In appropriate cases, the provision may also be used in a codicil. If properly executed and witnessed, the will or codicil embodying this provision will satisfy the requirements of both the Uniform Anatomical Gift Act [*Health & Safety Code §§ 7150-7151.40*] and the Probate Code [*see Prob. Code §§ 6100-6390* (wills); *see also Prob. Code § 88* ("will" includes codicil)].

Any person who is at least 18 years of age may make an anatomical gift under the Uniform Anatomical Gift Act [*Health & Safety Code § 7150.15*]. (In addition, persons between 15 and 18 years of age may make an anatomical gift on written consent of a parent or guardian [*Health & Safety Code § 7150.15*].) A person who is 18 or more years of age and who is of sound mind is legally qualified to make a will or codicil [*Prob. Code § 6100(a)*; *see Prob. Code § 88* ("will" includes codicil)]. For discussion of the persons and institutions to whom anatomical gifts may be made, and permissible purposes of such gifts, see § 106.11[8]. For discussion of the formal requirements of execution and attestation of wills and codicils, see *Ch. 61, Will Drafting and Complete Will Forms*, § 61.13.

An anatomical gift made by will or codicil, like an anatomical gift made in some other form, becomes effective only on the death of the donor [*Health & Safety Code § 7150.20(d)*]. Such a gift is effective whether or not the will is probated [*Health & Safety Code § 7150.20(d)*]. If, after the death of the donor, the will is declared invalid for testamentary purposes, the validity of the anatomical gift is unaffected [*Health & Safety Code § 7150.20(d)*].

If the testator has previously made an anatomical gift by means of a nontestamentary document of gift [*see §§ 106.200-106.202*], this form should not be used. Instead, the previous gift should be confirmed by a will provision or codicil. The form in § 106.211 may be used for this purpose.

[b] Impracticality of Making Anatomical Gift by Will

It is generally inadvisable to attempt to make an anatomical gift solely by will. The medical and surgical procedures necessary to complete an anatomical gift must be completed within a very short time--usually no more than an hour or two after the donor's death. If the donor's will is not located and consulted within this time frame, the gift will be frustrated.

Many attorneys prefer to make the gift by a nontestamentary instrument and then confirm it in the donor's will. For example, the client may register with the statewide donor registry, Donate Life California or execute a donor card [see § 106.201] to be carried on his or her person and also execute a will confirming the fact that the gift has been made [see § 106.211]. This procedure will achieve two purposes: First, it will minimize the likelihood that the gift will not be discovered until it is too late to carry it out. Second, it will minimize the possibility that any funeral, burial, or other interment instructions set forth in the donor's will may be viewed as inconsistent with the anatomical gift.

[c] Specification of Donee and Other Conditions of Gift

An anatomical gift may be made to a designated donee, or without designating a donee [*Health & Safety Code* § 7150.50]. If a donee is not designated, is unavailable, or rejects the gift, the gift may be accepted by the appropriate organization [*Health & Safety Code* § 7150.50]. This form includes a provision that may be used to designate a donee and an alternate provision that may be used if a specific donee is not to be designated.

Subject to the limitations on permissible purposes set forth in the Uniform Anatomical Gift Act [*Health & Safety Code* § 7150.50; see also *Health & Safety Code* §§ 7150-7151.40 (Uniform Anatomical Gift Act); for discussion, see § 106.11[10]] and other provisions of law, a donor is free to limit or condition an anatomical gift as he or she sees fit. Conditions or limitations may include limitations on the organs donated, the donees who may receive them, and funeral or burial arrangements for the remainder of the body. It should be kept in mind, however, that if conditions or limitations on a gift are too onerous, the gift will be rejected.

[d] Designation of Specific Physician or Surgeon

The donor may also specify a physician or surgeon to carry out the appropriate procedures [*Health & Safety Code* § 7150.20(e)]. A physician or surgeon who attends the donor at death or who determines the time of death may be barred, however, from participating in the procedures for removing or transplanting a part [see *Health & Safety Code* §§ 7150.65(i), 7182; see also §§ 106.10[4] and 106.11[12]]. Except when the gift is made in contemplation of a specific procedure (transplantation of an organ to a specific donee), it is usually inadvisable to specify a particular physician or surgeon, since the designated physician or surgeon, for reasons unanticipated at the time the document of gift is executed, may be unable or unwilling to carry out the procedures at the time the removal or transplantation is made.

[2] FORM

Will Provision for Anatomical Gift

Anatomical Gift

[If gift is to be made to designated donee:]

I give [specify subject matter of gift, e.g.: my kidneys or any needed organs or parts of my body or my entire body] to _____ [name and address of donee] (the "donee") for _____ [specify purpose or use of gift, e.g.: any use or uses that the donee shall deem appropriate with regard to all or any part of this gift or medical or dental education, research, advancement of medical or dental science, therapy, or transplantation or any use or uses permitted by the Uniform Anatomical Gift Act]. *[If donor wishes to name alternate donees, add following: If, for any reason, the donee declines to accept this gift, then I direct that the gift may be received by _____ (the*

following individuals and institutions in the order stated: _____ or any institution of similar purpose that is authorized by law to accept this gift)].

[*Or, if donee is not to be designated:*]

I give [*specify subject matter of gift, e.g.: my kidneys or any needed organs or parts of my body or my entire body*] to any qualified hospital, physician, surgeon, or procurement organization, or any accredited medical or dental school, college, or university for any of the uses or purposes permitted by the Uniform Anatomical Gift Act.

[*Optional provision governing funeral arrangements*]

I further direct that, following removal of any parts or organs, custody of my body shall be returned to my next of kin as provided by law and that my body shall be disposed of in the manner provided for elsewhere in this will [*or substitute specific description of preferred arrangements*].

[*Optional provision designating specific physician*]

I hereby designate _____ [*name of physician*] as the person authorized to perform the appropriate procedures to effect this gift.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawAnatomical GiftsEstate, Gift & Trust LawWillsGeneral OverviewHealthcare
LawTreatmentBlood & Organ DonationsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 106 ANATOMICAL GIFTS

PART IV. FORMS

B. Testamentary Gifts

33-106 California Legal Forms--Transaction Guide § 106.211

§ 106.211 Will Provision Confirming Nontestamentary Anatomical Gift

[1] Comment

[a] Use of Form

This form is a will provision that may be used to confirm an anatomical gift made by a nontestamentary documents of gift. In appropriate cases, the provision may also be used in a codicil. For nontestamentary documents of gift, see §§ 106.200-106.202. For the execution and attestation requirements for wills and codicils [*Prob. Code* §§ 6110-6113; see *Prob. Code* § 88 ("will" includes codicil)], see the discussion in *Ch. 61, Will Drafting and Complete Will Forms*, § 61.13 et seq. A donor who wishes to make an anatomical gift in a will or codicil without also making the gift in a nontestamentary document of gift should use the form in § 106.210 instead of this form.

Although failure to confirm a nontestamentary anatomical gift in a will or codicil ordinarily will not affect the validity of the gift, a testamentary confirmation of the gift will effectively preclude any post-death claim that execution of the will or codicil without mention of the gift was intended as a revocation of the gift. Confirmation will also help prevent post-death disputes over disposition of the donor's body.

[2] FORM

Will Provision Confirming Nontestamentary Anatomical Gift

Confirmation of Anatomical Gift

[If nontestamentary gift was made to designated donee:]

I hereby confirm that I have made a nontestamentary anatomical gift of [*specify subject matter of gift, e.g.: my kidneys or my pacemaker or any needed organs or parts of my body or my entire body*] to _____ [*name and address of donee*] (the "donee") for _____ [*specify purpose or use of gift, e.g.: any use or uses that the*

donee shall deem appropriate with regard to all or any part of this gift *or* medical or dental education, research, advancement of medical or dental science, therapy, or transplantation *or* any use or uses permitted by the Uniform Anatomical Gift Act]. That gift was made by _____ [*describe document of gift, e.g.: registration with Donate Life California, a written statement or a Uniform Donor Card*] dated _____, [*add, if desired: which is now being held for safekeeping by _____ (name) at _____ (address)*]. I direct that immediately on my death and before [*add appropriate words, e.g.: embalming and burial of my body or cremation of my remains*], my executor, attending physician, or next of kin shall notify the donee so that appropriate procedures may be undertaken to complete this gift at the earliest possible time.

[*Or, if donee was not designated in nontestamentary gift:*]

I hereby confirm that I have made a nontestamentary anatomical gift of [*specify subject matter of gift, e.g.: my kidneys or any needed organs or parts of my body or my entire body*] to any qualified hospital, physician, surgeon, or procurement organization, or any accredited medical or dental school, college, or university for any of the uses or purposes permitted by the Uniform Anatomical Gift Act. That gift was made by _____ [*describe document of gift, e.g.: a written statement or a Uniform Donor Card*] dated _____, [*add, if desired: which is now being held for safekeeping by _____ (name) at _____ (address)*]. I direct that immediately on my death and before [*add appropriate words, e.g.: embalming and burial of my body or cremation of my remains*], my executor, attending physician, or next of kin shall promptly take such action as is necessary and appropriate to see that the gift is carried out at the earliest possible time.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law
 Anatomical Gifts
 Estate, Gift & Trust Law
 Wills
 General Overview
 Healthcare
 Law
 Treatment
 Blood & Organ Donations
 General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 106 ANATOMICAL GIFTS

PART IV. FORMS

B. Testamentary Gifts

33-106 California Legal Forms--Transaction Guide §§ 106.212-106.219

[Reserved]

§§ 106.212[Reserved]



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CHAPTER 106 ANATOMICAL GIFTS

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C. Gifts by Third Parties

33-106 California Legal Forms--Transaction Guide § 106.220

§ 106.220 Anatomical Gift by Third Party

[1] Comment

[a] Use of Form

This form may be used by a legally authorized third party to make an inter vivos anatomical gift of all or part of a decedent's body. It is an all-purpose form that may be used to make an anatomical gift to any legally permissible donee. When properly executed, the gift will be as effective as an anatomical gift made by the donor himself or herself.

Anatomical gifts by third parties typically are made in emergency conditions, when the donor is critically ill or near death. They are usually executed on short notice and with no direct participation by an attorney. For this reason, forms for third-party gifts are typically preprinted forms with blank spaces that may be filled in as appropriate. Printed copies of this type of form may be obtained from hospitals, procurement organizations, medical schools, and registry offices.

[b] Anatomical Gifts by Third Parties

Under the Uniform Anatomical Gift Act [*Health & Safety Code §§ 7150-7151.40*], members of the following classes of persons, in the order stated below, may make anatomical gifts of all or any part of a decedent's body [*Health & Safety Code § 7150.40(a)*]:

- (1) An agent of the decedent at the time of death who would could have made an anatomical gift under *Health & Safety Code § 7150.15* immediately before the decedent's death.
- (2) The decedent's spouse or domestic partner.
- (3) An adult son or daughter of the decedent.
- (4) Either parent of the decedent.

- (5) An adult brother or sister of the decedent.
- (6) Adult grandchildren of the decedent.
- (7) A grandparent of the decedent.
- (8) An adult who exhibited special care and concern for the decedent during the decedent's lifetime.
- (9) A guardian or conservator of the person of the decedent at the time of death.
- (10) Any other person having the authority to dispose of the decedent's body, including but not limited to, a coroner, medical examiner, or hospital administrator, provided that a reasonable effort has been made to locate and inform the persons listed in (1) - (9) above.

The authority of the persons listed above to make anatomical gifts of all or any part of a decedent's body is subject to significant limitations. First, a gift may not be made by any of the above persons if the decedent, at the time of death, has made an unrevoked refusal to make the gift [*Health & Safety Code § 7151.30(c)*; see *Health & Safety Code § 7150.30* (refusal to make anatomical gift); see also § 106.11[9]]. Second, a person in any of the classes listed above may not make a gift if a person in a prior class is available at the time of death to make the gift [*Health & Safety Code § 7150.40(c)*], or if the person proposing to make the gift knows of an objection to making an anatomical gift by a member of the person's class or a prior class [*Health & Safety Code § 7150.40(b)(c)*]. Finally, no person may make an anatomical gift of all or part of a decedent's body if there are indications that the decedent had religious objections to the gift [*Health & Safety Code § 7150.30(e)*; see § 106.11[7]].

[c] Execution and Delivery of Documents

An anatomical gift by a third party may be made by a document of gift [*Health & Safety Code § 7150.10(a)(6)*] ("document of gift" defined; see also § 106.11[4]) signed by the third party [*Health & Safety Code § 7150.45(a)*]. Alternatively, it may be made by a telegraphic, recorded telephonic, or other recorded message, or any other form of communication that is contemporaneously reduced to writing and signed by the recipient [*Health & Safety Code § 7150.45(c)*]. There is no requirement that the third party's signature on a document of gift be witnessed. It is recommended, however, that the signatures of witnesses be obtained unless it would require undue hardship to do so, because proof of the due execution of the document will be facilitated if there are witnesses. Similarly, there is no requirement that the document be delivered [7150.60]. An institution that accepts an anatomical gift, however, normally will require a copy of the document of gift for its own records.

[2] FORM

Anatomical Gift by Third Party

ANATOMICAL GIFT

I hereby make this anatomical gift from the body of _____ [*name of decedent*], ("the decedent") who died on _____ [*date*], in _____ [*city*], _____ [*state*].

The marks and words entered in the blanks below indicate my relationship to the decedent according to the following order of priority, as set forth in the Uniform Anatomical Gift Act, and indicate my desires with respect to the gift.>

1. My relationship to the decedent is as follows:

_____ Agent of the decedent at the time of death was authorized under *Health & Safety Code § 7150.15* immediately

before the decedent's death to make an anatomical gift.

_____ Spouse or domestic partner

_____ Adult son or daughter.

_____ Parent.

_____ Adult brother or sister.

_____ Adult grandchild of the decedent.

_____ Grandparent.

_____ An adult who exhibited special care and concern for the decedent during the decedent's lifetime.

_____ Guardian or conservator of the person of the decedent at the time of death.

2. I give:

_____ Any needed organs or parts.

_____ The following organs or parts (specify):

_____ The entire body of the decedent.

3. To the following persons or institutions:

[insert names and addresses of one or more physicians, hospitals, research or educational institutions, procurement organizations, or other entities qualified to accept anatomical gifts].

4. For the following purposes:

_____ Any purpose authorized by law.

_____ Transplantation.

_____ Therapy.

_____ Medical research and education.

I am at least 18 years of age. To the best of my knowledge and belief, no person who has a higher order of priority than I to make this gift (in the order set out in Paragraph 1, above) is available at this time. To the best of my knowledge and belief, the decedent had not refused to make an anatomical gift during his or her lifetime, nor said or done anything that would indicate that he or she objected to the making of such a gift. Furthermore, to the best of my knowledge, no person who has a higher order of priority than I to make this gift, nor anyone equally entitled to make this gift (in the order set

out in Paragraph 1 above), has objected to making an anatomical gift of all or part of the decedent's body.

To the best of my knowledge and belief, the decedent, at the time of death, was not a member of a religion, church, sect, or denomination that relies solely on prayer for the healing of disease, or that has religious tenets that would be violated by the disposition of the human body or parts thereof for transplantation, therapy, medical or dental education, research, or the advancement of medical or dental science.

I certify that all statements made in this document of gift are true and correct.

_____ Dated:

_____ [signature of survivor]

[typed name]

[Optional signature block for witnesses (although not required, witnesses are recommended):]

WITNESSES:

_____ [signature] _____ [address]

[typed name]

_____ [signature] _____ [address]

[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawAnatomical GiftsHealthcare LawTreatmentBlood & Organ DonationsGeneral Overview



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C. Gifts by Third Parties

33-106 California Legal Forms--Transaction Guide §§ 106.221-106.229

[Reserved]

§§ 106.221[Reserved]



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CHAPTER 106 ANATOMICAL GIFTS

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D. Revocation or Amendment of Anatomical Gift

33-106 California Legal Forms--Transaction Guide § 106.230

§ 106.230 Revocation of Anatomical Gift

[1] Comment

[a] Use of Form

This form is a notice revoking a previous nontestamentary instrument making an anatomical gift. It should be used when a prospective donor, having previously executed and delivered a gift instrument, decides for any reason that he or she no longer wishes to make an anatomical gift.

Execution and delivery of an instrument revoking the gift is necessary only if the gift instrument was previously delivered to the donee or to some other party. If there was no previous delivery of the gift instrument, use of a revoking instrument is unnecessary since the gift may be revoked simply by destroying, canceling, or mutilating the original instrument and all executed copies.

[b] Revocation of Anatomical Gift

A donor or donors agent may amend or revoke an anatomical gift at any time before the gift has become irrevocable [see *Health & Safety Code § 7150.25* (gift not revoked by donor before death is irrevocable)]. Any anatomical gift (whether made by will or in some other way) may be amended or revoked by one or more of the following [Health & Safety Code § 7150.25]:

- A record signed by the donor, donor's agent, or individual acting at the direction of donor or donor's agent, recorded in a donor registry database.
- A later executed document of gift that amends or revokes the previous anatomical gift or portion of an anatomical gift, either expressly or by inconsistency.
- Destruction of the document of gift or cancellation of the document of gift on a donor database registry.

- By any form of communication during a terminal illness or injury addressed to at least two adults, at least one of whom is a disinterested witness, which is then memorialized in a signed and dated writing.

[c] Revocation of Testamentary Instrument Making Anatomical Gift

If an anatomical gift was made by will, it may be revoked by any of the methods specified under [b], *above*. It may also be revoked in the manner provided in the Probate Code for amendment or revocation of wills [*Health & Safety Code § 7150.25(e)*; *see Prob. Code §§ 6120-6124* (revocation of wills); *see also § 61.19*]. The most usual and convenient method for amending or revoking a will or codicil is making a subsequent will that revokes the prior will or codicil expressly or by inconsistency [*Prob. Code § 6120(a)*].

If a will or codicil making an anatomical gift was never delivered to the donee or any third party, it is recommended that, to avoid confusion and uncertainty, the gift be revoked by subsequent will or codicil rather than by executing and delivering a special statement of revocation like this form. If a copy of the first will or codicil was delivered to the donee or a third party, the gift may be revoked by a subsequent will or codicil, but this form should be modified to refer to the subsequent will or codicil and, as modified, executed and delivered to any person who has previously been given a copy of the first will or codicil.

If the donor has registered with a donor database registry, or carries a donor card or other evidence of the original anatomical gift, he or she should be instructed to remove himself or herself from the donor database registry and remove any card or other evidence and destroy it.

[2] FORM

Revocation of Anatomical Gift

To: _____ [*name of institution*]
 _____ [*address*]
 _____ [*city, state*]

PLEASE TAKE NOTICE:

On _____ [*date original document of gift was executed*], I, _____ [*donor's name exactly as it appears on original instrument*], executed a document authorizing an anatomical gift of [*subject matter of gift, e.g., my kidney or my entire body or any needed bodily parts or organs*] to _____ [*name of donee, if one is specified in original instrument*]. This gift was to have taken effect upon my death. The original of that document was delivered to and is now in the custody of _____ [*name and address of institution having custody of original instrument*].

I hereby revoke that document, effective immediately, and declare that henceforth it shall be of no force or effect. I further declare that I no longer wish to make an anatomical gift on the terms and conditions expressed in that instrument, or on any other terms and conditions whatsoever.

You are hereby requested to destroy any copies of the document now in your possession or records, or to mark each copy clearly on its face to indicate that it has been revoked.

_____ Dated:

_____ [*signature of donor*]
 _____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawPerformanceGeneral OverviewEstate, Gift & Trust LawAnatomical Gifts



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Chapters 107-109 [Reserved]

33-107 California Legal Forms--Transaction Guide Chapters 107-109

[Reserved]

Chapters 107[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 110 NONMARITAL COHABITATION AGREEMENTS AND RELATED TRANSACTIONS

33-110 California Legal Forms--Transaction Guide 110.syn

§ 110.syn Synopsis to Chapter 110: NONMARITAL COHABITATION AGREEMENTS AND RELATED TRANSACTIONS

§ 110.01 California Statutes

§ 110.02 Federal Statutes

§§ 110.03-110.04 [Reserved]

§ 110.05 Law Reviews and Periodicals

§ 110.06 Annotations

§ 110.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 110.08-110.09 [Reserved]

§ 110.10 Validity and Purpose of Nonmarital Cohabitation Agreements

[1] Validity of Cohabitation Agreements in General

[a] Property-Related Provisions

[b] Support-Related Provisions

[c] Attorneys' Fees and Costs

[2] Types of Agreements

[3] Inapplicability of Family Law Statutes

§ 110.11 Requirements for Express Agreement

[1] Desirability and Need for Written Agreement

[a] Reasons for Written Agreement

[b] Applicability of Statute of Frauds

[c] Estoppel to Assert Statute of Frauds

[2] Consideration and Object of Agreement

[a] Consideration Other Than Money

[b] Sexual Services as Consideration

[3] Need for Fair Dealing Between Parties

[a] General Advantages of Disclosure

[b] Existence of Confidential or Fiduciary Relationship

[i] Confidential Relationship

[ii] Fiduciary Relationship

[c] Effect of Confidential or Fiduciary Relationship

[d] Representation by Independent Counsel

§ 110.12 Related Considerations in Drafting Agreement

[1] Tax Consequences

[a] Income Tax Consequences

[i] Transfers of Earnings and Other Property in General

[ii] Return Filing and Claiming Dependency Exemption

[iii] Gifts Distinguished From Income

[b] Gift Tax Consequences

[c] Estate Tax Consequences

[2] Effect of Marriage to Third Party on Agreement Between Unmarried Parties

[3] Effect of Parties' Subsequent Marriage to Each Other

§§ 110.13-110.49 [Reserved]

§ 110.50 Registration Requirements

[1] Authorization for Domestic Partnerships

[a] State and Local Registration

[b] Revised Procedures Operative January 1, 2005

[c] Availability of Marriage for Same-Sex Couples

[2] Eligibility for State Registration and Definitions

[2A] Election to Change Names

[3] Registration with Secretary of State

[4] Need for Agreement Between Partners

[5] Termination of Domestic Partnership On or Before December 31, 2004

[a] Acts Constituting Termination

[b] Notice to Secretary of State Required

[c] Notice to Third Parties Required

[6] Termination of Domestic Partnership On or After January 1, 2005

[a] Dissolution Proceeding Usually Necessary

[b] Termination Without Court Proceedings

[i] Eligibility for Nonjudicial Termination

[ii] Effectiveness of Nonjudicial Termination

[iii] Action to Set Aside Nonjudicial Termination

§ 110.51 Legal Effects of Registered Domestic Partnership

[1] Joint Responsibility for Basic Living Expenses

[2] Interest in Shared Property

[3] Hospital Visitation

[4] Application of Other Laws

[5] No Obligations Incurred after Termination

[6] Wrongful Death

[7] Negligent Infliction of Emotional Distress

[8] Adoption and Parentage of Children

[9] Administration of Estate and Intestate Succession

[a] Administration of Estate

[b] Intestate Succession

[10] Health Benefits, Conservatorship, Tax Treatment, and Other Effects

§ 110.52 State Preemption of Local Domestic Partnership Laws

§ 110.100 Drafting Guide to Support Provisions

Scope

§ 110.101 Drafting Guide to Property Provisions

Scope

§ 110.102 Drafting Guide to Provisions Regarding Living Accommodations

Scope

§ 110.103 Drafting Guide to Miscellaneous Provisions

Scope

§§ 110.104-110.199 [Reserved]

§ 110.200 Agreement to Share Residence, Earnings, and Accumulated Property--With Support Provisions

[1] Comment

[a] Use of Form

[b] Provisions for Support of Party

[2] FORM

Agreement to Share Residence, Earnings, and Accumulated Property--With Support Provisions

§ 110.201 Agreement to Share Residence, Earnings, and Accumulated Property--Without Support Provisions

[1] Comment

[2] FORM

Agreement to Share Residence, Earnings, and Accumulated Property--Without Support Provisions

§ 110.202 Agreement to Share Residence--Earnings and Property Acquired From Earnings to Remain Separate

[1] Comment

[2] FORM

Agreement to Share Residence--Earnings and Property Acquired From Earnings to Remain Separate

§ 110.203 Agreement for Joint Purchase of Residence

[1] Comment

[2] FORM

Agreement for Joint Purchase of Residence

§ 110.204 Buy-Sell Provision for Cohabiting Individuals Who Have or Plan to Have Children

[1] Comment

[2] FORM

Buy-Sell Provision for Cohabiting Individuals Who Have or Plan to Have Children

§§ 110.205-110.219 [Reserved]

§ 110.220 Declaration of Domestic Partnership (Form DP-1)

[1] Comment

[a] Use of Form

[b] Return of Registration Form

[c] Registration Violation Is Misdemeanor Offense

[2] FORM

§ 110.221 Notice of Termination of Domestic Partnership--Official Form (Form DP-2)

[1] Comment

[a] Use of Form

[b] Cessation of Further Obligations

[2] FORM

Notice of Termination of Domestic Partnership--Official Form (Form DP-2)

§ 110.222 Notice of Termination of Domestic Partnership--Notice to Third Party

[1] Comment--Use of Form

[2] FORM

Notice of Termination of Domestic Partnership--Notice to Third Party

§ 110.223 Revocation of Termination of Domestic Partnership--Official Form (Form DP-3)

[1] Comment--Use of Form

[2] FORM

Revocation of Termination of Domestic Partnership--Official Form (Form DP-3)



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DIVISION VII: PERSONAL TRANSACTIONS CHAPTER 110 NONMARITAL COHABITATION AGREEMENTS AND RELATED TRANSACTIONS

33-110 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter discusses the considerations involved in preparing a written agreement between unmarried persons who wish to live together and contract with respect to their rights and obligations regarding property, support, and related matters, and contains forms for use in drafting the agreement. This chapter also discusses the registration of domestic partnerships with the California Secretary of State, and the rights and obligations of registered domestic partners. The Legal Background discusses the elements of an express cohabitation agreement, and provisions applicable to the registration of domestic partnerships. The Transaction Guide sets forth a checklist of potential provisions. Forms include complete cohabitation agreements as well as optional provisions that may be appropriate in some cases. Forms also include domestic partnership registration and termination forms for filing with the California Secretary of State, and forms for notifying third parties of the termination of a domestic partnership.

For a discussion of drafting premarital agreements and forms for those agreements, see Ch. 111, *Premarital Agreements* . For coverage of drafting postnuptial agreements, see Ch. 112, *Postnuptial Agreements* . For provisions that may be adapted for use in the agreements presented in this chapter, see Chapters 120- 125. For additional coverage of issues relating to nonmarital cohabitation agreements, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 1, *Legal Effects of Cohabitation* ; Ch. 2, *Enforcement of Rights Under Cohabitation Agreements* ; Ch. 10, *Validity and Legal Effects of Marriage* ; and Ch. 11, *Putative Marriage* (Matthew Bender).

For a discussion of wills, including provisions concerning registered domestic partners and the effect of terminating domestic partnerships, see Ch. 60, *Estate Planning* , Ch. 61, *Will Drafting and Complete Will Forms* , and Ch. 63, *Will Provisions* . For a discussion of the effect of registered domestic partnerships and their termination on provisions for conservatorship, see Ch. 66A, *Conservatorships* . For additional coverage of issues relating to unmarried cohabitants, including registered domestic partners, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 1, *Legal Effects of Cohabitation* (Matthew Bender).



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A. Primary Sources

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§ 110.01 California Statutes

Contracts.

Capacity. *Civ. Code §§ 1556-1559.*

Consent. *Civ. Code §§ 1565-1590.*

Consideration. *Civ. Code §§ 1605-1615.*

Statute of frauds. *Civ. Code § 1624.*

Domestic Partnerships.

Damages recoverable by domestic partner for negligent infliction of emotional distress. *Civ. Code § 1714.01.*

Right of domestic partner to bring wrongful death cause of action. *Code Civ. Proc. § 377.60.*

Domestic partnership defined. *Fam. Code § 297.*

Rights and responsibilities of registered domestic partners. *Fam. Code § 297.5.*

Right to bring stepparent adoption. *Fam. Code § 9000(b).*

Health coverage under Public Employees' Medical and Hospital Care Act. *Gov. Code § 22775.*

Death benefits in certain counties. *Gov. Code § 31780.2* (applicable only if death occurred before Jan. 1, 2009).

Group health-care service plan as required to offer coverage to employer for registered domestic partner of employee or subscriber. *Health & Safety Code § 1374.58.*

Group disability insurance policies as required to offer coverage to employer for registered domestic partner of employee, insured, or policyholder. *Ins. Code § 10121.7.*

Employee sick leave to attend family member, including domestic partner. *Lab. Code § 233.*

"Surviving domestic partner" defined. *Prob. Code § 37.*

Right of domestic partner to nominate conservator, petition for conservatorship, be entitled to preference in appointment, and to attend hearing. *Prob. Code §§ 1811, 1812, 1813.1, 1820, 1821, 1822, 1829.*

Right of domestic partner to petition to terminate conservatorship and appear at hearing on petition. *Prob. Code §§ 1861, 1863.*

Right of domestic partner to petition to give informed consent to medical treatment and to appear at hearing on petition. *Prob. Code §§ 1891, 1895.*

Rights of conservatee to provide for basic living expenses of domestic partner, and to petition to modify court orders authorizing certain transactions by conservatee. *Prob. Code §§ 1871, 1873, 1874.*

Restrictions imposed on domestic partner regarding transactions concerning ward's or conservatee's property. *Prob. Code § 2111.5.*

Provisions regarding conservatorship and guardianship. *Prob. Code §§ 1460, 2212, 2213, 2357, 2359, 2403, 2423, 2430, 2504, 2572, 2580, 2614.5, 2622, 2651, 2653, 2681, 2682, 2687, 2700, 2803, 2805.*

Authority to make health-care decisions for incapacitated domestic partner. *Prob. Code § 4716.*

Revocation of will by operation of law on termination of domestic partnership. *Prob. Code §§ 6122, 6122.1.*

Right of surviving domestic partner, on and after July 1, 2003, to intestate share of deceased domestic partner's separate property. *Prob. Code § 6401.*

Intestate share of heirs other than surviving spouse or surviving domestic partner, on and after July 1, 2003. *Prob. Code § 6402.*

Administration of will, including preference of domestic partner in appointment as administrator. *Prob. Code §§ 8461, 8462, 8465.*

Domestic partner treated as spouse for limited income tax purposes relating to medical expenses. *Rev. & Tax. Code § 17021.7(a).*

Domestic partner generally treated as spouse for purposes of franchise and income taxes. *Rev. & Tax. Code § 17021.7(b).*

Unemployment insurance issues involving domestic partners. *Unemp. Ins. Code §§ 1030, 1032, 1256, 2705.1.*

Uniform Fraudulent Transfer Act. *Civ. Code § 3439 et seq.*

Right to custody of minor child. *Fam. Code § 3020 et seq.*

Prevention of domestic violence. *Fam. Code § 6200 et seq.*

Uniform Parentage Act. *Fam. Code § 7600 et seq.*

Duty of loyalty in confidential relationship. *Prob. Code § 16002.*

Duty to avoid conflict of interest in confidential relationship. *Prob. Code § 16004.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawCohabitationGeneral OverviewFamily LawCohabitationAgreementsGeneral Overview



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33-110 California Legal Forms--Transaction Guide § 110.02

§ 110.02 Federal Statutes

Treatment of proceeds of life insurance. *I.R.C. § 2042.*

Transfers for insufficient consideration. *I.R.C. § 2043.*

Transfers subject to gift tax. *I.R.C. § 2501.*

Annual gift tax exclusion. *I.R.C. § 2503(b).*

Valuation of gifts. *I.R.C. § 2512.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawCohabitationGeneral OverviewFamily
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[Reserved]

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B. Secondary Sources

33-110 California Legal Forms--Transaction Guide § 110.05

§ 110.05 Law Reviews and Periodicals

Roddy, *Drafting Cohabitation Agreements*, 5 Divorce Litigation 189 (1993).

Oliver, *Contracting for Cohabitation: Adapting the California Statutory Marital Contract to Life Partnership Agreements Between Lesbian, Gay or Unmarried Heterosexual Couples*, 23 Golden Gate University L. Rev. 899 (1993).

Comment, *Nonmarried Participant Must Be Provided Adequate Notice and Must Give Written Consent Before Lump Sum Distribution (Franklin v. Thornton)*, 21 Tax Management Compensation Planning Journal 61 (1993).

Bullock, *Applying Marvin v. Marvin to Same-Sex Couples: A Proposal for a Sex-Preference Neutral Cohabitation Contract Statute*, 25 U.C. Davis L. Rev. 1029 (1992).

Comment, *Health Benefits to Non-Spouse May Be Excludable*, 73 The Journal of Taxation 375 (1990).

Note, *Good Faith and the Fraudulent Conveyance Act (Ninth Circuit Survey)*, 17 Golden Gate University L. Rev. 149 (1987).

Munroe, *Marvin v. Marvin: 5 Years Later*, 65 Marq. L. Rev. 389 (1982).

Blumberg, *Cohabitation Without Marriage: A Different Perspective (Symposium: New Directions in Family Law)*, 28 UCLA. L. Rev. 1125 (1981).

Bromsen, *Cohabitation After Marvin v. Marvin*, 6 Women Rights L. Rep. 15 (1979-1980).

Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 Cal. L. Rev. 1169 (1974).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawCohabitationGeneral OverviewFamily
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Parental Rights of Man Who Is Not Biological or Adoptive Father of Child but Was Husband or Cohabitant of Mother When Child Was Conceived or Born, 84 A.L.R. 4th 655 (1991).

Stepparent's Postdivorce Duty to Support Stepchild, 44 A.L.R. 4th 520 (1986).

Order Awarding Temporary Support or Living Expenses Upon Separation of Unmarried Partners Pending Contract Action Based on Services Relating to Personal Relationship, 35 A.L.R. 4th 409 (1985).

Property Rights Arising From Relationship of Couple Cohabiting Without Marriage, 3 A.L.R. 4th 13 (1981).

Communication Between Unmarried Couple Living Together as Privileged, 4 A.L.R. 4th 422 (1981).

Recovery for Services Rendered by Persons Living in Apparent Relation of Husband and Wife Without Express Agreement for Compensation, 94 A.L.R. 3d 552 (1979).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawCohabitationGeneral OverviewFamily LawCohabitationAgreementsGeneral Overview



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§ 110.07 Text References

[1] Matthew Bender Sources

California Forms of Pleading and Practice(Matthew Bender).

Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* .

Ch. 359, *Marriage* .

Ch. 387, *Nonmarital Cohabitation* .

Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed. (Matthew Bender).

Ch. 1, *Legal Rights of Cohabitation*.

Ch. 2, *Enforcement of Rights Under Cohabitation Agreements*.

Ch. 200, *Nonmarital Cohabitation Agreements*.

[2] Additional Text References

Witkin, Summary of California Law, vol. 11, *Community Property* (10th ed. 2005).

The California Family Lawyer (Cal. CEB 1961), Ch. 5, *Marital Contracts Before and After Marriage*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawCohabitationGeneral OverviewFamily
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§ 110.10 Validity and Purpose of Nonmarital Cohabitation Agreements

[1] Validity of Cohabitation Agreements in General

[a] Property-Related Provisions

Nonmarital partners in California may lawfully contract to pool earnings and funds, and to share in property that is jointly accumulated during the period of their nonmarital relationship, so long as their agreement is not otherwise invalid [*see Marvin v. Marvin* (1976) 18 Cal. 3d 660, 665, 681, 134 Cal. Rptr. 815, 557 P.2d 106 ; *Vallera v. Vallera* (1943) 21 Cal. 2d 681, 685, 134 P.2d 761 ; *Trutalli v. Meraviglia* (1932) 215 Cal. 698, 700-701, 12 P.2d 430 ; *Whorton v. Dillingham* (1988) 202 Cal. App. 3d 447, 451, 248 Cal. Rptr. 405] . An express agreement to pool earnings and share equally in joint accumulations of property does not require that *both* parties contribute property or earnings. One or both may contribute household or other services [*see Marvin v. Marvin* (1976) 18 Cal. 3d 660, 670 n.5, 134 Cal. Rptr. 815, 557 P.2d 106 ; *Taylor v. Taylor* (1954) 66 Cal. App. 2d 390, 398, 152 P.2d 480 (dealing with putative marriage)].

Because parties to a nonmarital relationship are neither actually nor putatively married, the provisions of the former Family Law Act (from which the current Family Code is derived) are inapplicable to the distribution of property acquired during the relationship [*Marvin v. Marvin* (1976) 18 Cal. 3d 660, 665, 681, 134 Cal. Rptr. 815, 557 P.2d 106 ; *see* [3], *below*].

In general, the foregoing principles, and those discussed elsewhere in this chapter, apply equally to both heterosexual couples and same-sex couples. In *In re Marriage Cases*, the California Supreme Court held that differential treatment of opposite-sex and same-sex couples in California's marriage statutes violated the California Constitution's guarantees of privacy, due process, and equal protection [*In re Marriage Cases*, (2008) 43 Cal. 4th 757, 784, 847-856, 76 Cal. Rptr. 3d 683, 183 P.3d 384] . That holding was superseded in part by the subsequent adoption of Proposition 8, which amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California [*see Cal. Const. art. I, § 7.5*]. The Supreme Court upheld Proposition 8 against a constitutional challenge, but in doing so the Court emphasized that only the official designation of the term "marriage" was removed by Proposition 8. Thus, same-sex couples continue to enjoy the constitutional right to "choose one's life partner and enter

with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage" [*Strauss v. Horton* (2009) 46 Cal. 4th 364, 387-388, 412, 93 Cal. Rptr. 3d 591, 207 P.3d 48 (quoting *In re Marriage Cases* (2008) 43 Cal. 4th 757, 829, 76 Cal. Rptr. 3d 683, 183 P.3d 384)]. Nor did Proposition 8 fundamentally alter the meaning and substance of state constitutional equal-protection principles as articulated in *In re Marriage Cases* [*Strauss v. Horton* (2009) 46 Cal. 4th 364, 412, 93 Cal. Rptr. 3d 591, 207 P.3d 48 ("In sum, although Proposition 8 changes the state Constitution ... to provide that restricting the family designation of 'marriage' to opposite-sex couples only, and withholding that designation from same-sex couples, no longer violates the state Constitution, in all other respects same-sex couples retain the same substantive protections embodied in the state constitutional rights of privacy and due process as those accorded to opposite-sex couples and the same broad protections under the state *equal protection clause* that are set forth in the majority opinion in [*In re*] *Marriage Cases*, including the general principle that sexual orientation constitutes a suspect classification and that statutes according differential treatment on the basis of sexual orientation are constitutionally permissible only if they satisfy the strict scrutiny standard of review.")].

Therefore, the general principles underlying the Court's decision in *In re Marriage Cases*--including the fact that state law governing registered domestic partners reflects a policy of providing same-sex couples all of the significant legal rights and obligations associated with marriage--remain applicable in assessing the rights of unmarried heterosexual couples and same-sex couples. Moreover, the Court's holding in the *Marvin* case (which expressly recognized the enforceability of nonmarital cohabitation agreements between opposite-sex partners) appears applicable to the enforcement of agreements between same-sex partners [see *Marvin v. Marvin* (1976) 18 Cal. 3d 660, 675-676, 682, 134 Cal. Rptr. 815, 557 P.2d 106] . Specific recognition of cohabitation agreements by nonmarital partners of the same sex has occurred at the court of appeal level [see, e.g., *Whorton v. Dillingham* (1988) 202 Cal. App. 3d 447, 454, 248 Cal. Rptr. 405 (court upheld express oral cohabitation agreement between two men, finding that allegations that one party provided other with services as chauffeur, bodyguard, secretary, and business partner stated contractual cause of action supported by consideration independent of sexual services)]. For further discussion of this issue, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 2, *Enforcement of Rights Under Cohabitation Agreements* (Matthew Bender).

For discussion of limitations on the consideration for an express cohabitation agreement regarding property, see § 110.11[2].

[b] Support-Related Provisions

The California Supreme Court has suggested that an otherwise valid agreement between nonmarital partners regarding property, earnings and expenses, may be coupled with an agreement for the support of a party, even with respect to support that extends after the parties' relationship has ended [see *Marvin v. Marvin* (1976) 18 Cal. 3d 660, 674-675, 134 Cal. Rptr. 815, 557 P.2d 106 ; see also *Cochran v. Cochran* (1997) 56 Cal. App. 4th 1115, 1120, 66 Cal. Rptr. 2d 337 ; *Byrne v. Laura* (1997) 52 Cal. App. 4th 1054, 1063, 60 Cal. Rptr. 2d 908] . Unlike spousal support, which is governed by statute [see *Fam. Code* §§ 4300, 4303, 4330], support of a nonmarital partner is not statutorily required. A court's power to order support to a nonmarital partner in the absence of an agreement, particularly after a period of cohabitation has ended, is presently doubtful [see *Marvin v. Marvin* (1976) 18 Cal. 3d 660, 685 n.26, 134 Cal. Rptr. 815, 557 P.2d 106 (court reserved issue of whether post-separation support is available to nonmarital partner in absence of agreement); *Friedman v. Friedman* (1993) 20 Cal. App. 4th 876, 884-890, 24 Cal. Rptr. 2d 892 (under circumstances, court found that award of *pendente lite* "spousal support" was abuse of discretion in action founded on purported implied contract, but declined to address issue of whether award of support is proper absent express or implied contract); cf. *In re Doyle* (9th Cir. B.A.P. 1986) 16 C.B.C. 2d 761, 764, 15 B.C.D. 700 (Bankruptcy Court was unwilling to consider stipulated judgment between nonmarital partners as support obligation or alimony for purposes of applying federal statute to discharge judgment)]. An agreement expressly providing for support is the only certain method of assuring that this type of financial security will be available to one or both parties.

For a form of agreement that includes support provisions, see § 110.200. For discussion of legal theories on which a nonmarital partner might seek an award of support after separation in the absence of an express agreement, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 2, *Enforcement of Rights Under Cohabitation Agreements* (Matthew Bender). For related tax discussion, see § 110.12[1].

[c] Attorneys' Fees and Costs

Parties to an otherwise valid nonmarital cohabitation agreement may also include provisions for the payment of attorneys' fees and costs in the event of litigation at the end of the relationship [see *Civ. Code* § 1717]. Generally, neither party to a lawsuit can recover attorneys' fees in the absence of a special agreement, statutory provision, or exceptional circumstances [*Code Civ. Proc.* § 1021; *Prentice v. North American Guar. Corp.* (1963) 59 Cal. 2d 618, 620, 30 Cal. Rptr. 821, 381 P.2d 645] but, even in the absence of an agreement, a prevailing party may recover costs in any action or proceeding, except as otherwise expressly provided by statute [see *Code Civ. Proc.* § 1032]. A provision with regard to costs and attorneys' fees is included in the sample agreement in § 110.200.

[2] Types of Agreements

In the landmark case of *Marvin v. Marvin*, the Supreme Court suggested that nonmarital partners could make the following valid and enforceable agreements [*Marvin v. Marvin* (1976) 18 Cal. 3d 660, 674 , & n.10, 134 Cal. Rptr. 815, 557 P.2d 106 ; see *Whorton v. Dillingham* (1988) 202 Cal. App. 3d 447, 450, 454, 248 Cal. Rptr. 405 (express oral agreement for lifetime support, sharing of property acquired, opening and maintaining of bank accounts, and charge account privileges)].

- To pool their earnings and hold all property acquired during the relationship in accord with the law governing community property;
- To keep each partner's earnings and the property acquired from those earnings as the separate property of the earning partner;
- To keep their earnings and property separate, but to compensate one party for services which benefit the other;
- To pool only part of their earnings or property;
- To form a partnership or joint venture;
- To hold property acquired as joint tenants or tenants in common; and
- To establish "any other such arrangement."

An agreement for pooling of assets and sharing of accumulations may legitimately be coupled with a support agreement that extends even after the end of the relationship [see *Marvin v. Marvin* (1976) 18 Cal. 3d 660, 674-675, 134 Cal. Rptr. 815, 557 P.2d 106] .

Parties may also wish to contract with regard to other matters, such as the following [see Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 Cal. L. Rev. 1169 (1974), cited in *Marvin v. Marvin* (1976) 18 Cal. 3d 660, 674 n.10, 134 Cal. Rptr. 815, 557 P.2d 106] :

- If the parties intend to rent a dwelling, such matters as how the rent will be divided, who will be responsible for payment, whose name is to go on the lease, and who has the right to stay in the dwelling

if the parties separate.

- Provisions relating to inheritance rights, such as mutual promises to make wills, or provision with regard to acquisition of joint tenancy property, life insurance, or the creation of inter vivos trusts.
- Agreement about whether the couple will acquire any joint savings, checking, or credit accounts, or whether all such accounts will remain separate.
- Provisions for the division of jointly acquired property in the event of separation.
- Provisions for renegotiation and modification of the agreement.
- Provisions relating to custody of children, provided that the parties are aware that such agreements are subject to the discretion of the court as to the best interests of the children.
- Provisions relating to support of children of one of the parties by a former marriage, provided that the parties understand that a child's parents may not waive their duty to support the child.

[3] Inapplicability of Family Law Statutes

Prior to the repeal of the Family Law Act and its replacement by the Family Code, the California Supreme Court clarified that distribution of property acquired during a nonmarital relationship is not governed under the Family Law Act. The Court found that nothing in the language of the Act addressed the property rights of nonmarital partners, and nothing in its legislative history suggested that the Legislature considered nonmarital relationships [*Marvin v. Marvin* (1976) 18 Cal. 3d 660, 681, 134 Cal. Rptr. 815, 557 P.2d 106] . Thus, property rights arising within nonmarital relationships are not governed under statutory family law principles. A party who brings suit on the basis of a cohabitation agreement will be subject to a judicial determination of his or her rights under the agreement without respect to community property law and the law relating to spouses in general [*Velez v. Smith* (2006) 142 Cal. App. 4th 1154, 1174-1176, 48 Cal. Rptr. 3d 642 (claim brought under *Marvin v. Marvin* (1976) 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 , is civil action that will be heard according to procedural rules applicable to civil litigation and not according to family law rules and procedures)].

The consequences of the inapplicability of family law statutes to nonmarital relationships are significant in terms of the drafting considerations for nonmarital cohabitation agreements. Some parties may desire to establish a relationship with rights and privileges identical to those of a married couple. If so, the agreement must be specifically tailored to accomplish that objective.

Although the marital property and spousal support laws do not apply to nonmarital relationships, provisions of the Family Code that deal with child custody [see *Fam. Code* § 3020 *et seq.*], support of a child by a parent [see *Fam. Code* § 3900 *et seq.*], domestic violence prevention [see *Fam. Code* § 6200 *et seq.*], and establishment of the parental relationship [see *Fam. Code* § 7600 *et seq.*] do apply to nonmarital partners [see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chs. 31- 33, 35, 40- 42, and 96 (Matthew Bender)]. In addition, provisions concerning registration of unmarried persons who meet the statutory criteria of "domestic partners" are governed by the Family Code, as discussed in § 110.50 *et seq.* [see *Fam. Code* § 297 *et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 110.11 Requirements for Express Agreement

[1] Desirability and Need for Written Agreement

[a] Reasons for Written Agreement

Parties to a cohabitation agreement should make and sign a written contract for two primary reasons. First, as discussed in [b], *below*, the agreement may fall within the purview of a statute requiring that it be in writing; if so, an oral agreement will be unenforceable unless estoppel can be asserted (*see* [c], *below*).

Second, and most important, putting the parties' agreement in writing will help to avoid later misunderstandings and enlighten each party regarding the actual intentions and expectations of the other with regard to property, support, and other financial matters.

It is advisable that cohabitants have their written agreement reviewed by their respective attorneys.

[b] Applicability of Statute of Frauds

Unlike premarital agreements, which must ordinarily be in writing and signed by both parties in order to be valid [*see Fam. Code § 1611* (Uniform Premarital Agreements Act; applicable to agreements executed on or after January 1, 1986); *see also* discussion in Ch. 111, *Premarital Agreements*], agreements between unmarried cohabitants are not subject to formal requirements for their validity unless a writing is otherwise required by the statute of frauds [*see Marvin v. Marvin* (1976) 18 Cal. 3d 660, 673-674, 134 Cal. Rptr. 815, 557 P.2d 106 (construing former Civ. Code §§ 5133-5137)]. Unless the statute of frauds applies, an express cohabitation agreement may be oral or written.

The statute of frauds requires the following agreements to be written [*Civ. Code § 1624*]:

- An agreement that by its terms is not to be performed within a year from its making;
- A special promise to answer for the debt, default, or miscarriage of another, except in the cases

provided for in *Civ. Code* § 2794 (relating to exception of original obligation);

- An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein;
- An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate where the lease is for a longer period than one year, for compensation or a commission;
- An agreement that by its terms is not to be performed during the lifetime of the promisor;
- An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust on the property purchased, unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property; and
- A contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than \$100,000, not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit.

For example, if one unmarried cohabitant agrees to transfer to the other an interest in real property, the agreement would have to be in writing [see *Civ. Code* § 1624(c)]. Furthermore, many statutes other than the general statute of frauds require contracts to be in writing [see, e.g., *Lab. Code* § 300 (requiring an assignment of wages to be in writing)]. If the subject of the cohabitation agreement falls within the purview of one of these statutes, a written agreement is required.

[c] Estoppel to Assert Statute of Frauds

Although a cohabitation agreement is generally not required to be in writing, if a written agreement is required by statute because of the particular subject matter [see [b], *above*], the defendant may be estopped from asserting the invalidity of the agreement based on a violation of the statute of frauds. Estoppel to assert the statute of frauds is available for the following reasons [*Cline v. Festersen* (1954) 128 Cal. App. 2d 380, 387, 275 P.2d 149 ; see *Whorton v. Dillingham* (1988) 202 Cal. App. 3d 447, 456, 248 Cal. Rptr. 405 (estoppel argument prevailed)]:

- To prevent fraud that would result from denying enforcement of a contract after one party has been induced by the other seriously to change his or her position in reliance on the contract; or
- When unjust enrichment would result if a party who received benefits of the other's performance were allowed to rely on the statute.

Apart from the foregoing estoppel grounds, there may be occasions when traditional *exceptions* to the statute of frauds apply. For a summary of these exceptions in the context of premarital agreements, see Ch. 111, *Premarital Agreements* . For a general discussion of enforcing cohabitation agreements, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Ch. 2, *Enforcement of Rights Under Cohabitation Agreements* .

[2] Consideration and Object of Agreement

[a] Consideration Other Than Money

As noted in § 110.10[1][a], an express agreement to pool earnings and share equally in joint accumulations of property

does not require that both partners contribute money. One or both partners may contribute household or other services as part or all of his or her consideration [see *Bridges v. Bridges* (1954) 125 Cal. App. 2d 359, 361, 270 P.2d 69 ; *Garcia v. Venegas* (1951) 106 Cal. App. 2d 364, 366-368, 235 P.2d 89] ; those services need not be presumed to be a gift. The opinion in *Marvin* reaffirmed this point [*Marvin v. Marvin* (1976) 18 Cal. 3d 660, 670 n.5, 134 Cal. Rptr. 815, 557 P.2d 106] .

[b] Sexual Services as Consideration

Agreements between nonmarital partners are unenforceable to the extent that they rest on a consideration of sexual services [*Marvin v. Marvin* (1976) 18 Cal. 3d 660, 670-671, 134 Cal. Rptr. 815, 557 P.2d 106] . For example, a contract for pooling of property and earnings will be invalid and unenforceable if sexual acts are explicitly made an inseparable part of the agreement [*Marvin v. Marvin* (1976) 18 Cal. 3d 660, 672, 134 Cal. Rptr. 815, 557 P.2d 106 ; *Whorton v. Dillingham* (1988) 202 Cal. App. 3d 447, 451, 454, 248 Cal. Rptr. 405 (services as chauffeur, bodyguard, secretary, and business partner were supported by consideration independent of sexual services); *Milian v. De Leon* (1986) 181 Cal. App. 3d 1185, 1193, 226 Cal. Rptr. 831 ; *Taylor v. Fields* (1986) 178 Cal. App. 3d 653, 661, 665, 224 Cal. Rptr. 186 (noncohabiting lover's role as confidante, friend, and travel companion was indistinguishable from role as "paramour"); *Jones v. Daly* (1981) 122 Cal. App. 3d 500, 507-508, 176 Cal. Rptr. 130 (cohabitation agreement was unenforceable because sexual services were part of consideration, and demurrer to complaint alleging agreement was properly sustained)]. Recognizing, however, that an agreement between nonmarital partners will usually be made in contemplation of a common living arrangement, the Court has ruled that, even if sexual services are part of the contractual consideration, any severable portion of the contract supported by independent consideration will be enforced. The fact that the parties live together without marriage and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses. Neither is such an agreement invalid merely because the parties may have contemplated the creation or continuation of a nonmarital relationship when they entered into it [*Marvin v. Marvin* (1976) 18 Cal. 3d 660, 672, 134 Cal. Rptr. 815, 557 P.2d 106 ; see *Hill v. Estate of Westbrook* (1952) 39 Cal. 2d 458, 460, 247 P.2d 19] .

For further discussion of enforceability of cohabitation agreements and permissible consideration for such agreements, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed. (Matthew Bender), Chapter 2.

[3] Need for Fair Dealing Between Parties

[a] General Advantages of Disclosure

To ensure that neither party can claim that he or she was induced to transfer property or make any other promises without adequate knowledge of all relevant facts, each party should make a full, fair, and complete disclosure to the other of (1) property, assets, and expectancies, and (2) intentions and expectations regarding the relationship. If the parties happen to be in a confidential or fiduciary relationship, complete disclosure is an essential prerequisite to the validity of their agreement (see [b], below).

[b] Existence of Confidential or Fiduciary Relationship

[i] Confidential Relationship

A confidential relationship exists between two persons when one has gained the confidence of the other and purports to act with the other's interest in mind [see generally *Vai v. Bank of America* (1961) 56 Cal. 2d 329, 337, 15 Cal. Rptr. 71, 364 P.2d 247] . Parties who are not married are not generally presumed to share a confidential relationship, and if they contract with each other with regard to property, earnings, and expenses, they are presumed to be dealing at arm's length [see *In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 355, 131 Cal. Rptr. 3, 551 P.2d 323 (discussing premarital agreements); *Nelson v. Nevel* (1984) 154 Cal. App. 3d 132, 139, 141 n.7, 201 Cal. Rptr. 93 (no presumption

that confidential relationship exists between unmarried persons; none may be required to request equitable remedy such as constructive or resulting trust); *see also* *Fernandez v. Fernandez* (1961) 194 Cal. App. 2d 782, 790, 15 Cal. Rptr. 374 (case involving premarital contract)]. However, in some instances, a confidential relationship may arise between nonmarital partners, and in those instances economic transactions between them should be governed by the principles applicable to such relationships [*see Marvin v. Marvin* (1976) 18 Cal. 3d 660, 682 n.22, 134 Cal. Rptr. 815, 557 P.2d 106] . For further discussion of the existence and possible effects of a confidential relationship, *see* Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Chapter 2.

[ii] Fiduciary Relationship

A fiduciary relationship may exist between nonmarital partners if one of the partners has control over the property of the other [*Vai v. Bank of America* (1961) 56 Cal. 2d 329, 338, 15 Cal. Rptr. 71, 364 P.2d 247] , even when there is no confidential relationship. The key factor in the existence of a fiduciary relationship is control by one person over the property of another. While it may be clear that the partners do not repose trust and confidence in each other, one partner may be in possession of the other partner's property, and as to that property he or she will be a fiduciary.

[c] Effect of Confidential or Fiduciary Relationship

The concepts of confidential and fiduciary relationships are similar. When unmarried partners assume a relationship of personal confidence with each other, they may be subject to the general rules governing trusts [*cf. Prob. Code* §§ 16002 (duty of loyalty), 16004 (duty to avoid conflict of interest)]. If one party obtains an advantage over the other with respect to the other's property, an agreement conferring that advantage will likely raise issues such as undue influence and inadequate consideration [*see Prob. Code* § 16004. Unlike former *Civ. Code* § 2235 (repealed July 1, 1987), § 16004 contains no language relating to presumption of insufficient consideration or undue influence, but instead provides that transaction between trustee and beneficiary, which occurs during existence of trust, or while trustee's influence on beneficiary remains, and by which trustee obtains advantage from beneficiary, is presumed to violate trustee's fiduciary duties]. An advantage has been obtained in a transaction whenever a person improves his or her position, obtains a favorable opportunity, or otherwise gains, benefits, or profits [*see Rader v. Thrasher* (1962) 57 Cal. 2d 244, 250, 18 Cal. Rptr. 736, 368 P.2d 360 ; *Main v. Merrill, Lynch, Pierce, Fenner, & Smith, Inc.* (1977) 67 Cal. App. 3d 19, 31, 136 Cal. Rptr. 378] .

Disclosure between the parties is an important aspect of assuring that one party cannot later claim to have been misled by someone who took unfair advantage.

[d] Representation by Independent Counsel

Representation by independent counsel during the drafting and execution of a cohabitation agreement is another factor that may support the validity of the agreement in the face of subsequent challenges. Charges of fraud, misrepresentation, or overreaching by a trusted partner are harder to sustain if, at the time the agreement was signed, each party had the agreement scrutinized by his or her own counsel who explained its legal significance in detail.

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 110.12 Related Considerations in Drafting Agreement

[1] Tax Consequences

[a] Income Tax Consequences

[i] Transfers of Earnings and Other Property in General

If nonmarital partners make an enforceable agreement under which one partner promises to share earnings with the other, to compensate the other for services, or to support the other, the agreement may have potentially adverse income tax consequences. The funds used to make the payments between partners will first be taxed as income to the earning partner, and then taxed again as income to the partner who received payments under the contract. Under the rule of *Lucas v. Earl*, an agreement under which one taxpayer acquires an enforceable right to share in the future earnings of another taxpayer does not prevent the entire amount from being taxed as income to the earning taxpayer [*Lucas v. Earl* (1930) 281 U.S. 111, 114-115, 50 S. Ct. 241, 74 L. Ed. 731] . Accordingly, income taxable to both nonmarital partners may arise if they commingle their earnings (for example, by making deposits into joint bank accounts), and if pooling of funds is combined with a sharing of services. The party contributing the lesser amount of funds might be treated as having received either income or the value of services up to an equal share in the pooled funds [see I.R.C. § 61 (a); Treas. Reg. § 1.61-2(a), (d); see also *Lucas v. Earl* (1930) 281 U.S. 111, 114-115, 50 S. Ct. 241, 74 L. Ed. 731] .

The tax liability of one nonmarital partner will not necessarily be imputed to the other partner, depending on the circumstances. In one case, one nonmarital partner, who had incurred a tax deficiency, transferred his interest in a residence he purchased to his nonmarital partner at the time of their separation, in payment for her services rendered to him in his medical practice. The transferee partner was issued a notice of transferee liability under *Internal Revenue Code Section 6901(a)*, which allows the Internal Revenue Service to collect taxes owed by a taxpayer from a person to whom the taxpayer has transferred property without fair consideration. The Tax Court found the transfer was without fair consideration, focusing on whether the transferee had proven an enforceable *Marvin* claim, and held the transferee liable for the transferor's tax liability [see *Marvin v. Marvin* (1976) 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106] . The Ninth Circuit Court of Appeals held that the Tax Court had erred in holding the transferee liable, and that the

relevant issue was not whether the transferee *actually* had an enforceable *Marvin* claim against the transferor, but whether the parties believed in good faith that the transferee had an enforceable right and the transfer was made to satisfy it, or in exchange for her forbearance from enforcement. The court found that the parties did have a good faith belief that the transferee had an enforceable claim and that the transfer was therefore for a fair consideration [*Mayors v. C.I.R.* (9th Cir. 1986) 785 F.2d 757, 759-762] .

Capital gains is another consideration in the cohabitation context [see *I.R.C.* § 61(a)(3)]. Although transfers between spouses generally are not taxable events [see *I.R.C.* § 1041], a property transfer between *nonmarital partners* is a taxable event, and the transferring party is required to report the gain as income [see *I.R.C.* §§ 61(a); 1001]. The transferee may also be required to report the fair market value of the property received as income [see *I.R.C.* § 61(a)(1), (3)].

PRACTICE TIP:

Nonmarital partners can help avoid imputation of income issues and potential double taxation by maintaining separate bank accounts and by not commingling earnings or other income from whatever source derived (for example, receipt of an inheritance). It may, in any case, be advisable for the cohabitants early on to enter into a written agreement that there is *no* intention to pool earnings or other income, and that each cohabitant has no interest in the future earnings or other income of the other, from whatever source derived. *Commentary by Publisher's Editorial Staff*

PRACTICE TIP:

There is a gradually developing body of law regarding cohabitation agreements. In the arena of tax law, generally the same rules apply to nonmarital partners as to any other parties entering into contracts and transactions. While nonmarital partners have some of the same tax benefits as married couples (such as, for example, dependency exemptions for qualifying individuals and the annual exclusion for gifts up to \$10,000), many benefits remain the exclusive domain of the married, such as joint return filing, the unlimited marital deduction for interspousal gifts in any amount, and the presumption that only one-half of property jointly held with the surviving spouse is taxed in the decedent's estate (see [ii]-[iii], [b]-[c], *below*). Sensitivity to drafting, however, can still help ensure that nonmarital partners get the maximum advantages within the limits recognized by law. To the extent that this area of law is unsettled, counsel can resort to analogous areas, including premarital and even postnuptial agreements (see Chs. 111, 112). Counsel should pay particular attention to certain considerations. First, complete disclosure of all material facts is necessary, including full disclosure of all assets (see § 110.11[3][a]). Counsel should never attempt dual representation, but instead urge the parties to obtain independent counsel (see § 110.11[3][d]). This not only avoids ethical conflict of interest problems, but increases the likelihood that the agreement will not be judicially set aside based on accusations of fraud or overreaching. Any cohabitation agreement should include provisions related to the parties' later marriage (see [3], *below*). The agreement should protect the parties' rights and interests acquired during the nonmarital cohabitation without unduly interfering with their rights and interests after marriage. Alternatively, the more conservative approach is for the agreement to expressly state that it applies only to the period of nonmarital cohabitation and that the agreement will not apply after marriage. *Commentary by Publisher's Editorial Staff*

[ii] Return Filing and Claiming Dependency Exemption

An unmarried, cohabiting couple cannot file a joint income tax return [see *I.R.C.* § 6013]. Nevertheless, under some circumstances a nonmarital partner who supports the other partner may be entitled to claim a dependency exemption. In general, a taxpayer can claim a dependency exemption for the other cohabitant, and apparently any child of the other cohabitant, if the supported individuals live in the taxpayer's home, are members of the taxpayer's household for the entire year, and the taxpayer provided more than one-half of the individuals' total support during the taxable year [*I.R.C.*

§ 152(d)(2)(H); *Treas. Reg. 1.152-1(b)*]. The dependent's gross income for the taxable year in which the taxpayer claims the dependent must be less than the exemption amount [*I.R.C. § 152(d)(1)(B)*]. The dependency exemption is not allowed, however, if the cohabitation relationship is violative of local laws [*I.R.C. § 152(f)(3)*]. Note that counsel should ascertain whether any other person is entitled by a marital settlement agreement or otherwise to claim a dependency exemption for a child that is now living with a custodial parent and his or her nonmarital partner. For related provisions, see Chapter 123.

PRACTICE TIP:

The "violation of local law" limitation has essentially no present significance in California, which does not criminalize cohabitation between consenting adults. If, as in California, the state law does not in some manner criminalize cohabitation, the taxpayer is normally permitted the dependency exemption for a supported cohabitant. *Commentary by Publisher's Editorial Staff*

Payments made pursuant to a contract may be classified as compensation for *services* rather than support, thus preventing the paying partner from claiming a dependency deduction with respect to the recipient partner [*see W. T. Hamilton (1960) 34 T.C. 927, 928-929 ; see also Angstadt v. Commissioner (1968) 27 T.C.M.693*]. Designating the payments as being for something other than services, such as support, will not necessarily determine the nature of the payments. The overall facts and circumstances may control over the parties' labelling of payments [*see Jones v. Commissioner (1977) 36 T.C. M. 1323* (payments construed as compensation for sexual services); *Brizendine v. Commissioner (1957) 16 T.C.M. 149* (payments for companionship)]. The fact that a cohabitant performs some of the same services as a housekeeper, for example, will not prevent that person from being claimed as a dependent, if the evidence reveals that the relationship between the parties is not one of housekeeper and employer [*see Kieffer v. Commissioner (1987), T.C. Memo 1987-213* (cohabitant may be former spouse of taxpayer, assuming that other requirements for dependency are met)].

PRACTICE TIP:

The courts have made it clear that designation of payments, such as for support versus services, is not determinative. A "facts and circumstances" test applies. However, the parties can nonetheless strengthen their position that any payments from one cohabitant to the other are for support by so stating ahead of time in a written agreement. This should increase the likelihood that the payor cohabitant's dependency exemption will be permitted. A cohabitant's receipt of income for *services* from the other cohabitant can have harsh consequences to both cohabitants. First, the dependency exemption will be lost to the payor cohabitant for what might have otherwise been support payments to the other cohabitant. Moreover, as discussed above, each party may incur income taxes owed on the same dollars, perhaps significantly reducing the household's net spendable income. *Commentary by Publisher's Editorial Staff*

[iii] Gifts Distinguished From Income

Gifts are not taxed as income to the recipient [*see I.R.C. § 102(a)*]. However, a gift for income tax purposes (as opposed to a gift for gift tax purposes, discussed in [b], *below*) must be a transfer resulting from the "detached and disinterested generosity" of the transferor [*Commissioner v. Duberstein (1960) 363 U.S. 278, 285, 80 S. Ct. 1190, 4 L. Ed. 2d 1218*]. Under this test, the payment of money or the transfer of property pursuant to an enforceable contract between nonmarital partners is not a gift for income tax purposes.

[b] Gift Tax Consequences

A transfer of property or funds is a gift subject to gift tax to the extent that the property is transferred for less than an adequate and full consideration in money or money's worth [*I.R.C. § 2512(b)*]. In other words, the taxable gift is the difference between the value of the gift and the consideration received [*I.R.C. § 2512(b)*]. The transferor pays the tax [*see I.R.C. § 2502(c)*]. However, the first \$10,000 in value of gifts to any one donee during a calendar year--an amount that is indexed for inflation for gifts made in calendar years after 1998--is excluded from taxation [*I.R.C. § 2503(b)*]. If

property is transferred to a nonmarital partner pursuant to a contract for less than a full and adequate consideration in money or money's worth, gift tax may be payable.

The gift tax marital deduction [I.R.C. § 2523], which is unlimited for interspousal gifts made after December 31, 1981, does not apply to transfers between nonmarital partners.

PRACTICE TIP:

The practical advantages of treating payments or property transfers as gifts rather than as income are obvious. If a gift of \$10,000 or less per year is involved, no taxable event between the parties occurs due to the transferor's use of the annual exclusion. If gifts of over \$10,000 are involved, the transferor is taxed only on the excess over \$10,000, after taking into account any applicable statutory indexing of that amount for inflation. Unfortunately, the unlimited marital deduction for any amount of gifts made between spouses during the calendar year is, of course, unavailable to nonmarital cohabitants. For a related discussion in the estate tax context, see [c], *below*. *Commentary by Publisher's Editorial Staff*

[c] Estate Tax Consequences

The marital deduction is not available to nonmarital partners, and therefore does not apply to bequests to a nonmarital partner so as to reduce the decedent partner's taxable estate [see I.R.C. § 2056(a)]. If the parties held title to property as tenants-in-common, only the decedent's one-half interest is included in the decedent's estate [see I.R.C. § 2033]. If a deed or other document of title does not identify the survivor's interest, and he or she seeks a judicial determination of this interest, the surviving nonmarital partner may be required to report the value of the property interest as income [see I.R.C. § 61(a)]. If the claimed interest is based on a promise to share made in exchange for services, the exchange would render the property interest taxable compensation [see I.R.C. § 61(a)(1); *Treas. Reg. § 1.61-1*].

Another problem arises if the parties held title as joint tenants. In this situation, the entire value of jointly held property is included in the decedent's estate, minus any contributions by the surviving nonmarital partner that he or she can establish through tracing [see I.R.C. § 2040(a)]. In contrast, had the parties been married, only one-half of the qualified joint interest would be included in the decedent's estate [see I.R.C. § 2040(b)]. If the nonmarital partners had always pooled funds and made purchases with pooled funds, the survivor may in many cases be unable to trace the individual investments fully. If so, this means that the entire value of the jointly held property must be included in the decedent's estate for tax purposes, with no reduction in value for contributions by the cohabitant.

PRACTICE TIP:

The inability to trace a surviving nonmarital partner's contributions to jointly held property can result in up to twice as much tax payable by the decedent partner's estate with regard to the property involved. Nonmarital partners should keep complete and detailed bank records and all other documents related to income and substantiation of any significant transactions. As in many problem areas concerning nonmarital partners, the best preventive medicine, and the cleanest of record-keeping, may lie in the parties both (1) maintaining separate bank and other financial institution accounts and (2) scrupulously avoiding any commingling of funds. *Commentary by Publisher's Editorial Staff*

[2] Effect of Marriage to Third Party on Agreement Between Unmarried Parties

In general, a cohabitation agreement is not invalid simply because one of the cohabitants remains legally married to another person, at least if the married parties have separated. Once a married couple has separated, subsequent earnings of each spouse are separate property, and the other spouse cannot assert any interest in those earnings [Fam. Code § 771], although they may be subject to court-ordered support obligations [see Fam. Code § 4338]. However, if a cohabitation agreement attempts to transfer property in which the other spouse has an assertable interest (for example, community property), the transfer may be voidable, in which case the aggrieved spouse may have it set aside [*Marvin v. Marvin* (1976) 18 Cal. 3d 660, 673, 134 Cal. Rptr. 815, 557 P.2d 106] . It is unclear whether a cohabitation

agreement would be enforced if one of the parties to the agreement has not separated from his or her current spouse, because there is at least the possibility that such an agreement might be held to violate public policy as promoting dissolution and impairing community property rights [see *Feldman v. Nassi* (1980) 111 Cal. App. 3d 881, 884-887, 169 Cal. Rptr. 9] .

For further discussion of this issue, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 2, *Enforcement of Rights Under Cohabitation Agreements* (Matthew Bender). For a general discussion of the effects of cohabitation on the legal relations of one of the cohabitants and his or her estranged spouse, see Ch. 1, *Legal Effects of Cohabitation* , in that publication, and for a discussion of the rights of a spouse in community property assets transferred by the other spouse, including any right of reimbursement to the community, see Chapters 20- 24 of that publication.

[3] Effect of Parties' Subsequent Marriage to Each Other

Marriage of the parties to an express cohabitation agreement to each other does not preclude enforcement of the agreement, at least with regard to property interests the parties acquired pursuant to their agreement before marriage. However, other matters may affect enforcement of the agreement, such as the statute of limitations, as discussed further in Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 2, *Enforcement of Rights Under Cohabitation Agreements* (Matthew Bender).

If parties to a cohabitation agreement marry and wish to continue to be bound by the terms of their cohabitation agreement, enforcement of some terms of the agreement may be difficult. Unlike premarital agreements [see Ch. 111, *Premarital Agreements*], cohabitation agreements are not ordinarily entered into in contemplation of marriage. It is unlikely that a nonmarital cohabitation would be held to constitute a waiver of any rights acquired through marriage, such as community property rights. However, one court of appeal has upheld after marriage a cohabitation agreement that created, rather than waived, rights that would arise by marriage [*In re Marriage of Stitt* (1983) 147 Cal. App. 3d 579, 584-585, 195 Cal. Rptr. 172 ; see *Watkins v Watkins* (1983) 143 Cal. App. 3d 651, 653, 192 Cal. Rptr. 54] .

From a planning standpoint, parties to a cohabitation agreement who later decide to marry should review their agreement to determine what, if any, changes are appropriate. For further discussion of this issue, and a related discussion concerning consolidation of causes of action arising from nonmarital cohabitation with a family law proceeding, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 2, *Enforcement of Rights Under Cohabitation Agreements* (Matthew Bender). For coverage of premarital agreements, see Ch. 111, *Premarital Agreements* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawCohabitationGeneral OverviewFamily LawCohabitationAgreementsGeneral OverviewTax LawFederal Tax Administration & ProcedureGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 110 NONMARITAL COHABITATION AGREEMENTS AND RELATED TRANSACTIONS
PART II. LEGAL BACKGROUND
A. Nonmarital Cohabitation Agreements

33-110 California Legal Forms--Transaction Guide §§ 110.13-110.49

[Reserved]

§§ 110.13[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 110 NONMARITAL COHABITATION AGREEMENTS AND RELATED TRANSACTIONS
PART II. LEGAL BACKGROUND
B. Domestic Partner Registration

33-110 California Legal Forms--Transaction Guide § 110.50

§ 110.50 Registration Requirements

[1] Authorization for Domestic Partnerships

[a] State and Local Registration

An increasing number of California communities permit unmarried couples to register with a local city or county clerk as "domestic partners." Registration has varying effects depending on the terms of the local ordinance, such as eligibility to participate in health care benefits as a beneficiary of a partner who is employed by the city or county. In addition, state statute permits registration of "domestic partnerships" with the State of California [*Fam. Code § 297 et seq.*]. The following discussion concerns the requirements for, and effects of, statewide registration, which generally preempts local laws on domestic partnerships on and after July 1, 2000 (*see § 110.52*) [*see Fam. Code § 299.6(a)*].

[b] Revised Procedures Operative January 1, 2005

The California Domestic Partner Rights and Responsibilities Act of 2003 expanded the rights and responsibilities of registered domestic partners [Stats. 2003, ch. 421]. Most of the changes made by the Act become operative on January 1, 2005 [Stats. 2003, ch. 421, § 14]. To obtain the benefits of the Act, domestic partners must comply with the formal registration requirements under the Act [*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal. 4th 824, 845, 31 Cal. Rptr. 3d 565, 115 P.3d 1212 ; *Velez v. Smith* (2006) 142 Cal. App. 4th 1154, 1165, 48 Cal. Rptr. 3d 642 ; but see *Ellis v. Arriaga* (*In re Domestic P'ship of Ellis*) (2008) 162 Cal. App. 4th 1000, 1008, 76 Cal. Rptr. 3d 401 (person's reasonable, good-faith belief that his or her domestic partnership was validly registered with Secretary of State entitles that person to rights and responsibilities of registered domestic partner, even if registration never took place)].

Under the Act, domestic partners registered with the Secretary of State generally have the same rights, protections, and benefits, and are subject to the same responsibilities, obligations, and duties, that apply to spouses [*Fam. Code § 297.5(a)* (operative January 1, 2005)]. However, domestic partners who registered their partnership with the Secretary of State before January 1, 2005, may elect to have their partnership governed by an agreement complying with the Uniform Premarital Agreement Act, provided that the agreement is fully executed and in force as of June 30, 2005 [*Fam. Code § 297.5(k)(2)* (operative January 1, 2005); *see Fam. Code § 1600 et seq.*; *see also* [4], *below*].

The Act changes the procedure for terminating domestic partnerships; in most cases, termination will require the filing of a dissolution proceeding in superior court [*see Fam. Code § 299* (operative January 1, 2005); *see* [6], *below*].

The Act also provides that a legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership as defined under California law, will be recognized as a valid domestic partnership in California, regardless of whether it bears the name "domestic partnership" [*Fam. Code § 299.2* (operative January 1, 2005)].

The Act required the Secretary of State, in 2004, to send a letter to all registered domestic partners, generally describing the changes made by the Act. The letter also was required to advise that registered domestic partners who do not wish to be subject to the new rights and responsibilities (such as the possible need to initiate judicial proceedings to terminate the partnership) must terminate their partnership before January 1, 2005 [*Fam. Code § 299.3(a)*] (letter to be sent on or before June 30, 2004; on or before December 1, 2004; and again on or before January 31, 2005)].

The discussion in this chapter describes the procedures applicable both before and after the operative date of the major changes made by the California Domestic Partner Rights and Responsibilities Act of 2003. The pre-January 1, 2005, requirements may be relevant for those domestic partners who registered their partnership prior to that date and have elected to have their partnership governed by an agreement enforceable in the same manner as a premarital agreement [*see Fam. Code § 297.5(k)(2)* (operative January 1, 2005); *see also* [4], *below*].

[c] Availability of Marriage for Same-Sex Couples

Until 2008, the only option available to a same-sex couple who sought to establish an officially recognized family relationship was to form a registered domestic partnership; they were barred by statute from marrying [*see Fam. Code §§ 300* (defining "marriage" as personal relation between "a man and a woman"), 308.5 (enacted by Proposition 22, providing that "[o]nly marriage between a man and a woman is valid or recognized in California")]. In *In re Marriage Cases*, the California Supreme Court declared these statutes unconstitutional [*In re Marriage Cases* (2008) 43 Cal. 4th 757, 785, 855-857, 76 Cal. Rptr. 3d 683, 183 P.3d 384]. That holding was superseded by the subsequent adoption of Proposition 8, which amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California [*see Cal. Const. art. I, § 7.5* (eff. Nov. 5, 2008)]. The Supreme Court upheld Proposition 8 against a constitutional challenge, but in doing so the Court reaffirmed the continuing validity of same-sex marriages entered into before November 5, 2008, the effective date of Proposition 8 [*Strauss v. Horton* (2009) 46 Cal. 4th 364, 470-474, 93 Cal. Rptr. 3d 591, 207 P.3d 48 (estimating 18,000 same-sex marriages lawfully entered into before Proposition 8 took effect)]. Thus, although some pre-existing same-sex marriages remain valid, entering into a marriage on and after November 5 is no longer an option for a same-sex couple. The California Domestic Partner Rights and Responsibilities Act of 2003 remains in effect, however, and registering as domestic partners continues to be an option for same-sex couples who meet the requirements of the Act [*see Fam. Code § 297*; *see also* [2], *below*].

[2] Eligibility for State Registration and Definitions

Under the Family Code, two unmarried adults who "have chosen to share one another's lives in an intimate and committed relationship of mutual caring" may establish a domestic partnership [*Fam. Code § 297(a)*]. A domestic partnership is established by filing a Declaration of Domestic Partnership with the Secretary of State, if all of the following requirements are met [*Fam. Code § 297(b)*]:

- Both persons have a common residence.
- Neither person is married to someone else or is a member of another existing domestic partnership.

- The two persons are not related by blood in a way that would prevent them from being married to each other in California.
- Both persons are at least age 18.
- Either (1) both persons are members of the same sex; or (2) if the persons are of opposite sexes, at least one of them is over age 62 and qualifies for old-age benefits under Title II of the Social Security Act or benefits for aged individuals under Title XVI of the Social Security Act.
- Both persons are capable of consenting to the domestic partnership.

For this purpose, having a "common residence" means that both domestic partners share the same residence. It is not necessary that the legal right to possess the common residence be in both of their names. If one partner leaves the residence it is still a common residence so long as that person intends to return. Moreover, one or both domestic partners may have additional residences while having a common residence [*Fam. Code* § 297(c)].

In addition to the foregoing, through December 31, 2004, domestic partners must have agreed to be jointly responsible for each other's basic living expenses incurred during the domestic partnership [*Fam. Code* § 297(b)(2) (operative through December 31, 2004)]. "Joint responsibility" means that each partner agrees to provide for the other partner's basic living expenses if the partner is unable to provide for herself or himself [*Fam. Code* § 297(e) (operative through December 31, 2004)]. "Basic living expenses" means shelter, utilities, and all other costs directly related to the maintenance of the common household of the common residence of the domestic partners. It also means any other cost, such as medical care, if some or all of the cost is paid as a benefit because a person is another person's domestic partner [*Fam. Code* § 297(d) (operative through December 31, 2004)].

Beginning January 1, 2005, the specific requirement that domestic partners agree to be responsible for each other's basic living expenses is repealed [*Fam. Code* § 297 (operative January 1, 2005); *see* Stats. 2003, ch. 421, § 3; *see also* § 110.51[1]]. Beginning at that time, domestic partners' mutual responsibilities, obligations, and duties will be the same as those imposed by law on spouses [*Fam. Code* § 297.5(a) (operative January 1, 2005)], unless the domestic partners have registered their partnership before January 1, 2005, and have elected to have their partnership governed by an agreement enforceable in the same manner as a premarital agreement [*see Fam. Code* § 297.5(k)(2) (operative January 1, 2005); *see also* [4], *below*].

[2A] Election to Change Names

The Name Equality Act of 2007 [*see* 2007 Stats., ch. 567] allows persons entering into a domestic partnership to change their middle or last names by making an appropriate election in the Declaration of Domestic Partnership form, without the need to petition the superior court for a change of name [*Fam. Code* § 298.6; *see Code Civ. Proc.* § 1275 *et seq.* (superior court proceedings for change of name)]. The Act grants similar rights to persons entering into marriage, who may change their names by making an election on the forms for marriage licenses and marriage certificates [*see Fam. Code* § 306.5].

Parties to a registered domestic partnership are not required to have the same name, and neither party is required to change his or her name. A person's name does not change upon registration as a domestic partner unless that person elects to change his or her name as follows [*Fam. Code* § 298.6(a)].

If there is no intent to defraud, any party to a registered domestic partnership may elect to change the middle or last names by which he or she wishes to be known after registration of the domestic partnership by entering the new name in the space provided on the Declaration of Domestic Partnership form [*Fam. Code* § 298.6(b)(1); *see* [2], *below*; *see also* § 110.220]. The party may adopt any of the following middle or last names [*Fam. Code* § 298.6(b)(2)]:

- The current last name of the other domestic partner.
- The last name of either domestic partner given at birth.
- A name combining into a single last name all or a segment of the current last name or the last name of either domestic partner given at birth.
- A hyphenated combination of last names.

An election by a person to change his or her name on registration of a domestic partnership will serve as a record of the name change. A certified copy of the Certificate of Registered Domestic Partnership containing the new name, or retaining the former name, constitutes proof that the use of the new name or retention of the former name is lawful [*Fam. Code* § 298.6(b)(3)(A)]. Thus, a certified copy of a Certificate of Registered Domestic Partnership must be accepted as identification establishing a true, full name for purposes of obtaining a driver's license [*Fam. Code* § 298.6(b)(3)(B); see *Veh. Code* § 12800.7 (verification of name and address for purposes of issuance of driver's license); see also *Fam. Code* § 298.6(b)(3)(C) (true, full name for purposes of *Veh. Code* § 12800.7 may also be established by other documents, such as substantial equivalent of Certificate of Domestic Partnership issued by other state or by local jurisdiction)].

The adoption of a new name, or the choice not to adopt a new name, by means of a Declaration of Domestic Partnership does not abrogate either party's common-law right to change his or her name, to adopt a different name through usage at a future date, or to petition the superior court for a change of name [*Fam. Code* § 298.6(b)(4),(c); see *Code Civ. Proc.* § 1275 *et seq.* (superior court proceedings for change of name)].

No person engaged in a trade or business of any kind, or in the provision of a service of any kind, may refuse to do business with a person, or provide service to a person, regardless of the person's marital status, because he or she has chosen to use or regularly uses his or her birth name, former name, or name adopted on solemnization of marriage or registration of domestic partnership [*Code Civ. Proc.* § 1279.6(a)]. Similarly, no person engaged in a trade or business of any kind, or in the provision of a service of any kind, may impose, as a condition of doing business with a person, or as a condition of providing the service to a person, a requirement that the person, regardless of his or her marital status, use a name other than his or her birth name, former name, or name adopted upon solemnization of marriage or registration of domestic partnership, if the person has chosen to use or regularly uses that name [*Code Civ. Proc.* § 1279.6(b)].

[3] Registration with Secretary of State

To register a domestic partnership at the state level, persons who meet the eligibility requirements for registration [see *Fam. Code* § 297; see also [2], above)] must file a completed Declaration of Domestic Partnership form with the Secretary of State [*Fam. Code* § 298.5(a)]. The form is promulgated by the Secretary of State and is available from the Secretary of State's office and website (<http://www.ss.ca.gov>) and county clerk offices [*Fam. Code* § 298(a), (b)(1); see § 110.220].

The Declaration of Domestic Partnership must require each person who wants to become a domestic partner to (1) state that he or she meets the eligibility requirements at the time the form is signed; (2) provide a mailing address; (3) sign the form with a declaration that representations made in it are true, correct, and contain no material omissions of fact to the best of his or her knowledge and belief; and (4) have a notary public acknowledge his or her signature [*Fam. Code* § 298(c)]. Also, beginning January 1, 2008, the form must include an optional section for either party or both parties to indicate a change in name, and any person indicating a name change must provide his or date of birth [*Fam. Code* § 298(d); see *Fam. Code* § 298.6; see also [2A], above].

In addition to the foregoing, beginning on January 1, 2005, the Declaration of Domestic Partnership must also require each person to state that he or she consents to the jurisdiction of the superior courts of California for the purpose of a proceeding to obtain a judgment of dissolution or nullity of the domestic partnership or for legal separation of the partners in the domestic partnership, or for any other proceeding related to the partners' rights and obligations, even if one or both partners ceases to be a resident of, or to maintain a domicile in, California [*Fam. Code § 298(c)(3)* (operative January 1, 2005)].

Both partners must sign one completed Declaration of Domestic Partnership form, and the form must then be transmitted to the Secretary of State, with the appropriate filing fee, in accordance with the instructions provided on the form [*Fam. Code § 298(b)(2), (c)*; see *Fam. Code § 298(b)(3)* (additional fee, earmarked to support training and grants to promote nonviolent relationships in lesbian, gay, bisexual, and transgender community, with fee not to be collected from persons of opposite sexes who are over age 62 and who qualify for registration pursuant to *Fam. Code § 297(b)(5)(B)* to obtain Social Security benefits)]. Intentionally filing a materially false Declaration of Domestic Partnership is punishable as a misdemeanor [*Fam. Code § 298(c)* (through December 31, 2004, "[v]iolations of this subdivision are punishable as a misdemeanor"; beginning January 1, 2005, "[f]iling an intentionally and materially false Declaration of Domestic Partnership shall be punishable as a misdemeanor")].

On accepting the Declaration, the Secretary of State will register it in a registry for domestic partnerships and will return a copy of the registered form to the domestic partners [*Fam. Code § 298.5(b)*]. For any Declaration filed on or after January 1, 2005, the Secretary of State will also issue a Certificate of Registered Domestic Partnership [*Fam. Code § 298.5(b)* (operative January 1, 2005)]. The Secretary of State will also provide the informational brochure that is distributed to applicants for marriage licenses [see *Fam. Code § 358(a)* (brochure to contain information about genetic defects and diseases, AIDS, and domestic violence)], unless the registered domestic partners are persons of opposite sexes who are over age 62 and who qualify for registration pursuant to *Fam. Code § 297(b)(5)(B)* to obtain Social Security benefits [*Fam. Code §§ 298.5(b), 358(b)*].

The filing of a Declaration of Domestic Partnership restricts the ability of the partners to enter a new domestic partnership or marriage. Through December 31, 2004, no person who has filed a Declaration of Domestic Partnership may file a new Declaration until at least six months after the filing of a Notice of Termination of Domestic Partnership [see *Fam. Code § 299(b)* (operative through December 31, 2004)] in connection with the termination of the most recent domestic partnership. This prohibition does not apply, however, if the previous domestic partnership ended because one of the partners died or married [*Fam. Code § 298.5(c)* (operative through December 31, 2004)].

Beginning on January 1, 2005, no person who has filed a Declaration of Domestic Partnership may file a new Declaration or enter a civil marriage with someone other than the registered domestic partner unless the most recent domestic partnership has been terminated or a final judgment of dissolution or nullity of the most recent domestic partnership has been entered. This prohibition does not apply, however, if the previous domestic partnership ended because one of the partners died [*Fam. Code § 298.5(c)* (operative January 1, 2005)].

[4] Need for Agreement Between Partners

Through December 31, 2004, to establish a domestic partnership eligible for state registration, the parties were required to have an agreement to be jointly responsible for each other's "basic living expenses" incurred during the partnership [*Fam. Code § 297(b), (d)* (operative through December 31, 2004); see [2], above].

Beginning January 1, 2005, the specific requirement that domestic partners agree to be responsible for each other's basic living expenses is repealed [*Fam. Code § 297* (operative January 1, 2005); see Stats. 2003, ch. 421, § 3; see also § 110.51[1]]. Beginning at that time, domestic partners' mutual responsibilities, obligations, and duties generally will be the same as those imposed by law on spouses [*Fam. Code § 297.5(a)* (operative January 1, 2005)].

However, domestic partners who registered their partnership with the Secretary of State before January 1, 2005, may elect to have their partnership governed by an agreement complying with the Uniform Premarital Agreement Act, provided that the agreement is fully executed and in force as of June 30, 2005 [*Fam. Code* § 297.5(k)(2) (operative January 1, 2005); *see Fam. Code* § 1600 *et seq.*]. For discussion of the requirements of the Uniform Premarital Agreement Act, see Ch. 111, *Premarital Agreements*. The Secretary of State is required to inform domestic partners registered before January 1, 2005, of their option to enter into such an agreement [*Fam Code* § 299.3(a) (Secretary of State to send letters to registered domestic partners)].

[5] Termination of Domestic Partnership On or Before December 31, 2004

[a] Acts Constituting Termination

Through December 31, 2004, the termination of a domestic partnership that had been established of record with the Secretary of State was complete on the happening of any of the following [*see Fam. Code* § 299(a) (operative through December 31, 2004)]:

- One partner giving, or sending to the other by certified mail, a written notice that he or she is terminating the partnership;
- The death of a partner;
- The marriage of a partner; or
- The cessation of the partners having a common residence.

[b] Notice to Secretary of State Required

On termination of a domestic partnership, at least one partner was required to file a Notice of Termination of Domestic Partnership (a form promulgated by the Secretary of State) with the office of the Secretary of State by certified mail [*see* § 110.221]. The date of receipt of the form by the Secretary of State is deemed the actual termination date of the domestic partnership, unless termination occurred because of one partner's marriage or death, in which case the date will be that listed on the termination form. The partner who filed the Notice of Termination of Domestic Partnership was required to send a copy of the notice to the last known address of the other partner filed [*see Fam. Code* § 299(b) (operative through December 31, 2004)]. The mandatory Notice of Termination of Domestic Partnership form is set forth in § 110.221[2].

[c] Notice to Third Parties Required

A former domestic partner who has given a copy of a Declaration of Domestic Partnership to any third party in order to qualify for any benefit or right must, within 60 days of termination of the partnership, give or send to that third party written notification of the termination at the third party's last known address. A third party who suffers a loss as a result of the failure by a domestic partner to send this notice is entitled to seek recovery from the partner who was obliged to send it for any actual resulting loss [*see Fam. Code* § 299(c) (operative through December 31, 2004)]. However, failure to notify a third party of the termination of a domestic partnership does not delay or prevent its termination [*see Fam. Code* § 299(d) (operative through December 31, 2004)]. For a form to notify a third party of the termination of a domestic partnership, see § 110.222[2].

[6] Termination of Domestic Partnership On or After January 1, 2005

[a] Dissolution Proceeding Usually Necessary

Beginning January 1, 2005, new procedures govern the termination of domestic partnerships [see Stats. 2003, ch. 421, §§ 7, 8, 14 (repealing and enacting *Fam. Code* § 299, operative January 1, 2005)]. Under the new procedures, a dissolution proceeding in court generally will be necessary to terminate a domestic partnership [*Fam. Code* § 299(d) (operative January 1, 2005)].

The judicial dissolution of a domestic partnership, nullity of a domestic partnership, and legal separation of partners in a domestic partnership generally are subject to the same procedures that apply to the dissolution of marriage, nullity of marriage, and legal separation of spouses [*Fam. Code* § 299(d) (operative January 1, 2005) (superior courts have jurisdiction over all proceedings relating to dissolution or nullity of domestic partnerships, and legal separation of domestic partners); see *Cal. Rules of Ct., Rule 5.28*]. Moreover, domestic partners in such proceedings generally have the same rights, protections, and benefits, and are subject to the same responsibilities, obligations, and duties, that apply in the dissolution of marriage, nullity of marriage, and legal separation of spouses [*Fam. Code* § 299(d) (operative January 1, 2005)].

However, in accordance with the consent acknowledged by domestic partners in the Declaration of Domestic Partnership form, proceedings for dissolution, nullity, or legal separation of a domestic partnership registered in California may be filed in a California superior court even if neither domestic partner is a resident or domiciliary of California at the time the proceedings are filed [*Fam. Code* § 299(d) (operative January 1, 2005)].

Compliance with the requirements for the formation of a domestic partnership under the Domestic Partner Rights and Responsibilities Act is a prerequisite to pursuing a dissolution action under the Act. Thus, if the partners have not attempted to register with the Secretary of State [see [3], *above*], registering only with a municipality or not at all, they may not pursue a dissolution under the Act [*Velez v. Smith* (2006) 142 Cal. App. 4th 1154, 1162-1169, 48 Cal. Rptr. 3d 642 (no "putative registered domestic partner" protection for those who never attempted to register with Secretary of State)]. However, a person's reasonable, good-faith belief that his or her domestic partnership was validly registered with the Secretary of State entitles that person to the rights and responsibilities of a registered domestic partner, including the right to pursue dissolution under the Act, even if registration never actually took place [*Ellis v. Arriaga* (*In re Domestic P'ship of Ellis*) (2008) 162 Cal. App. 4th 1000, 1006-1008, 76 Cal. Rptr. 3d 401 (partner with reasonable but mistaken belief that partnership was properly registered is entitled to protection as putative registered domestic partner, similar to putative spouse under *Fam. Code* § 2251(a))].

Under limited circumstances, a domestic partnership may be terminated without the need for a judicial proceeding, by filing a Notice of Termination of Domestic Partnership with the Secretary of State [*Fam. Code* § 299(a) (operative January 1, 2005)]. For discussion of termination without judicial proceedings, see [b], *below*.

[b] Termination Without Court Proceedings

[i] Eligibility for Nonjudicial Termination

Beginning January 1, 2005, a domestic partnership may be terminated by the filing of a Notice of Termination of Domestic Partnership with the Secretary of State, without the need for a judicial dissolution proceeding, if all of the following conditions exist at the time of the filing [*Fam. Code* § 299(a) (operative January 1, 2005)]:

- The Notice of Termination of Domestic Partnership is signed by both domestic partners.
- There are no children of the relationship of the parties born before or after registration of the domestic partnership or adopted by the parties after registration of the domestic partnership, and neither of the domestic partners, to their knowledge, is pregnant.

- The domestic partnership is not more than five years in duration.
- Neither party has any interest in any real property, except the lease of a residence occupied by either party if (1) the lease does not include an option to purchase, and (2) the lease terminates within one year from the date of filing of the Notice of Termination of Domestic Partnership.
- There are no unpaid obligations in excess of the amount permissible for a summary dissolution of marriage [*see Fam. Code § 2400(a)(6), (b)*] incurred by either or both of the parties after registration of the domestic partnership, excluding the amount of any unpaid obligation with respect to an automobile.
- The total fair market value of community property assets, excluding all encumbrances and automobiles, including any deferred compensation or retirement plan, is less than the amount permissible for a summary dissolution of marriage [*see Fam. Code § 2400(a)(7), (b)*], and neither party has separate property assets, excluding all encumbrances and automobiles, in excess of that amount.
- The parties have executed an agreement setting forth the division of assets and the assumption of liabilities of the community property, and they have executed any documents, title certificates, bills of sale, or other evidence of transfer necessary to effectuate that agreement.
- Each party waives any right to support by the other domestic partner.
- The parties have read and understand a brochure prepared by the Secretary of State describing the requirements, nature, and effect of terminating a domestic partnership.
- Both parties desire that the domestic partnership be terminated.

[ii] Effectiveness of Nonjudicial Termination

A domestic partnership terminated by the filing of a Notice of Termination of Domestic Partnership with the Secretary of State will be terminated effective six months after the date of filing, provided that neither party has, before that date, filed a notice of revocation of the termination of the domestic partnership [*Fam. Code § 299(b)* (operative January 1, 2005)]. A notice of revocation must be on a form prescribed by the Secretary of State, and it must be sent to the other party by first-class mail, postage prepaid, at the other party's last known address [*Fam. Code § 299(b)* (operative January 1, 2005); *see § 110.223* (form)].

The termination of a domestic partnership by the filing of a Notice of Termination of Domestic Partnership has the same effect as, and will be treated for all purposes the same as, the entry of a judgment of dissolution of a domestic partnership [*Fam. Code § 299(b)* (operative January 1, 2005)].

[iii] Action to Set Aside Nonjudicial Termination

The termination of a domestic partnership by the filing of a Notice of Termination of Domestic Partnership does not prejudice or bar the rights of either party to institute an action in superior court to set aside the termination for fraud, duress, mistake, or any other ground recognized at law or in equity. A court may set aside the termination of domestic partnership and declare the termination of the domestic partnership null and void on proof that the parties did not meet the requirements for nonjudicial termination of the partnership at the time of the filing of the Notice of Termination of Domestic Partnership with the Secretary of State [*Fam. Code § 299(c)* (operative January 1, 2005); *see Fam. Code § 299(a)* (operative January 1, 2005) (eligibility for nonjudicial termination); *see also* [i], *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Cohabitation Domestic Partners General Overview Family Law Cohabitation Domestic Partners Registration



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 110 NONMARITAL COHABITATION AGREEMENTS AND RELATED TRANSACTIONS
PART II. LEGAL BACKGROUND
B. Domestic Partner Registration

33-110 California Legal Forms--Transaction Guide § 110.51

§ 110.51 Legal Effects of Registered Domestic Partnership

[1] Joint Responsibility for Basic Living Expenses

Through December 31, 2004, as a result of establishing a domestic partnership that was eligible for state registration, the partners were jointly responsible, pursuant to their agreement, for each other's "basic living expenses," as defined by statute [*Fam. Code § 297(b), (d)* (operative through December 31, 2004); *see § 110.50[2], [4]*]. In addition, persons to whom these "basic living expenses" are owed may enforce this responsibility if, in extending credit or providing goods or services, they relied on the existence of the domestic partnership and the agreement of the partners to be jointly responsible for those specific expenses [*see Fam. Code §§ 297(e), 299.5(a)* (operative through December 31, 2004)].

Beginning January 1, 2005, the specific requirement that domestic partners agree to be responsible for each other's basic living expenses is repealed [*Fam. Code § 297* (operative January 1, 2005); *see Stats. 2003, ch. 421, § 3*]. Beginning at that time, domestic partners' mutual responsibilities, obligations, and duties will be the same as those imposed by law on spouses [*Fam. Code § 297.5(a)* (operative January 1, 2005)], unless the domestic partners have registered their partnership before January 1, 2005, and have elected to have their partnership governed by an agreement enforceable in the same manner as a premarital agreement [*see Fam. Code § 297.5(k)(2)* (operative January 1, 2005); *see also [4], above*].

[2] Interest in Shared Property

Through December 31, 2004, any property or interest that the parties acquire during their partnership in which title is shared was held by them in "proportion of interest assigned to each partner at the time the property or interest was acquired unless expressly agreed in writing by both parties," and this principle governs any division of property on termination of the partnership [*see Fam. Code § 299.5(e)* (operative through December 31, 2004)].

Beginning January 1, 2005, domestic partners' rights in property acquired during the partnership will be determined under the same rules that apply to spouses' rights in property acquired during marriage [*Fam. Code § 297.5(a), (b)* (operative January 1, 2005)].

[3] Hospital Visitation

Under current law, health facilities must allow "a patient's domestic partner, the children of the patient's domestic partner, and the domestic partner of the patient's parent or child" to visit the patient, unless [see *Health & Safety Code* § 1261]:

- Visitors are otherwise not allowed;
- Visits by a particular person would endanger the health or safety of the patient, the staff, or another visitor, or would significantly be disruptive to the facility; or
- The patient has expressed a preference that a particular person not visit.

Health facilities, moreover, retain the right to establish reasonable restrictions on visitation. "Domestic partner" for these purposes has the same meaning as that given in *Fam. Code* § 297 (see § 110.50[2]) [see *Health & Safety Code* § 1261].

[4] Application of Other Laws

Through December 31, 2004, state registration as a domestic partner was not evidence of, and does not establish, any rights existing under law other than as expressly provided to domestic partners in *Fam. Code* § 297 *et seq.* [see § 110.50], and any provision of law specifically referring to domestic partners. The existence of specific statutes concerning domestic partners did not diminish any right under any other provision of law [see *Fam. Code* § 299.5(a) (operative through December 31, 2004)].

Through December 31, 2004, state registration did not of itself change the character of real or personal property or any interest in property owned by either partner or both of them before registering. State registration did not of itself create any interest in, or rights to, any real or personal property owned by one partner in the other partner, including, but not limited to, rights similar to community or quasi-community property [see *Fam. Code* § 299.5(c), (d) (operative through December 31, 2004)]. Moreover, the formation of a domestic partnership did not change the individual income or estate tax liability of each domestic partner before or during the partnership, unless otherwise provided by law [see *Fam. Code* § 299.5(f) (operative through December 31, 2004)].

Beginning January 1, 2005, domestic partners registered with the Secretary of State generally have the same rights, protections, and benefits, and will be subject to the same responsibilities, obligations, and duties, that apply to spouses [see *Fam. Code* § 297.5(a) (operative January 1, 2005); see *Fam. Code* § 297.5(k)(1) (operative January 1, 2005) (any statutory, regulatory, or other reference to date of marriage will be deemed to refer to date of registration of domestic partnership with the state)]. For example, registered domestic partners have the same rights regarding nondiscrimination as those provided to spouses [see *Fam. Code* § 297.5(f), (g) (operative January 1, 2005); see *Koebeke v. Bernardo Heights Country Club* (2005) 36 Cal. 4th 824, 837-850, 31 Cal. Rptr. 3d 565, 115 P.3d 1212 (business that extends benefits to spouses that it denies to registered domestic partners engages in marital-status discrimination proscribed by Unruh Civil Rights Act, *Civ. Code* § 51)]. Also, to the extent that provisions of California law adopt, refer to, or rely on, provisions of federal law in a way that otherwise would cause registered domestic partners to be treated differently than spouses, registered domestic partners generally will be treated by California law as if federal law recognized a domestic partnership in the same manner as California law [see *Fam. Code* § 297.5(e) (operative January 1, 2005)]. For example, California law permits registered domestic partners to file their state income tax returns jointly or separately on terms similar to those governing spouses [see *Rev. & Tax. Code* §§ 17024.5(h)(2)(B), 18521], even though federal law does not provide for the same treatment of registered domestic partners' federal tax returns [see, e.g., *I.R.C.* §§ 1(a), 7703].

[5] No Obligations Incurred after Termination

Through December 31, 2004, on termination of a registered domestic partnership, the partners, from that time forward, will incur none of the obligations to one another as domestic partners that are created in *Fam. Code* § 297 *et seq.* [see § 110.50] and any other provision of law specifically referring to domestic partners [see *Fam. Code* § 299.5(b) (operative through December 31, 2004)].

Beginning January 1, 2005, former registered domestic partners generally will have the same rights, protections, and benefits, and will be subject to the same responsibilities, obligations, and duties, that apply to former spouses [*Fam. Code* § 297.5(b) (operative January 1, 2005)], unless the domestic partners registered their partnership before January 1, 2004, and elected to have their partnership governed by an agreement enforceable in the same manner as a premarital agreement [see *Fam. Code* § 297.5(k)(2) (operative January 1, 2005); see also [4], above].

[6] Wrongful Death

Persons who have registered with the State of California as domestic partners have the statutory right to bring an action for damages for the wrongful death of the other partner [*Code Civ. Proc.* § 377.60(a), (f)]. The wrongful death action is purely statutory; and the statutes are strictly construed [see *Kunakoff v. Woods* (1958) 166 Cal. App. 2d 59, 62, 332 P.2d 773].

A person who is not entitled pursuant to statute to bring an action for wrongful death has no cause of action, regardless of how close he or she was to the decedent, or how much he or she depended on the decedent for support [*Garcia v. Douglas Aircraft Co.* (1982) 133 Cal. App. 3d 890, 893-895, 184 Cal. Rptr. 390 (action brought by decedent's fiancée; also holding that exclusion of nonmarital partners is not unconstitutional denial of equal protection)]. Thus, a nonmarital partner who does not qualify as a "domestic partner" under *Fam. Code* § 297--for example, because the partners did not formally register under *Fam. Code* § 298.5--does not have a cause of action for wrongful death [*Armijo v. Miles* (2005) 127 Cal. App. 4th 1405, 1414, 26 Cal. Rptr. 3d 623] . For a detailed discussion of bringing wrongful death actions, see California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions* (Matthew Bender).

[7] Negligent Infliction of Emotional Distress

Registered domestic partners may bring a cause of action for negligent infliction of emotional distress with respect to a domestic partner [*Civ. Code* § 1714.01]. For a detailed discussion of bringing such an action, see California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress* (Matthew Bender).

[8] Adoption and Parentage of Children

Registered domestic partners may be treated as a "stepparent" for purposes of filing a petition for adoption of a child of his or her domestic partner [*Fam. Code* § 9000(b), (g); see *Fam. Code* § 297.5(d) (operative January 1, 2005, rights of domestic partners with respect to child of either of them are same as rights of spouses)]. For a detailed discussion of petitioning for adoption as a stepparent, see California Forms of Pleading and Practice, Ch. 12B, *Adoptions: Unmarried Minors* (Matthew Bender).

In addition, under the Uniform Parentage Act [*Fam. Code* § 7600 *et seq.*] registered domestic partners may both be the presumed natural parents of a child born during their partnership. For example, the Supreme Court has held that a woman who agreed to raise children with her lesbian partner, supported her partner's artificial insemination using an anonymous donor, and received the resulting children into her home and held them out as her own was presumed to be the children's natural parent and had an obligation to support them [*Elisa B. v. Superior Court* (2005) 37 Cal. 4th 108, 119-125, 33 Cal. Rptr. 3d 46, 117 P.3d 660 ; see *Fam. Code* §§ 7611(d), 7650(a); see also *Charisma R. v. Kristina S.* (2006) 140 Cal. App. 4th 301, 308, 44 Cal. Rptr. 3d 332 (whether biological mother opposes presumed-parent status for former lesbian partner should not affect determination of that status under *Fam. Code* §§ 7611(d), 7650(a) and *Elisa B.*

v. Superior Court)). In another case, a woman supplied ova to impregnate her lesbian partner in order to produce children who would be raised in their joint home (they were registered domestic partners). Since a child's two parents may both be women, and there was no possible third parent (the sperm donor was anonymous), the Supreme Court found that both partners were mothers of the resulting children--one because she provided the ova, and the other because she gave birth [*K.M. v. E.G. (2005) 37 Cal. 4th 130, 142-143, 33 Cal. Rptr. 3d 61, 117 P.3d 673*]. For detailed discussion of parentage determinations under the Uniform Parentage Act, see Ch. 100, *Control, Custody, and Support of Minors* .

[9] Administration of Estate and Intestate Succession

[a] Administration of Estate

When domestic partners have registered with the State of California [*see § 110.50*], the surviving domestic partner is given first priority in being appointed administrator of a decedent partner's estate if the decedent died intestate or did not name an executor in the will [*Prob. Code §§ 8461, 8462; see Prob. Code § 37* (definitions of "domestic partner" and "surviving domestic partner"); *see also Fam. Code § 297.5(c)* (operative January 1, 2005, surviving registered domestic partner has same rights and duties as widow or widower)]. A nonmarital partner who is not a "domestic partner" as defined under *Fam. Code § 297*, unless related to his or her decedent partner and "entitled to succeed" to a portion of the decedent's estate as an heir, has no priority to administer the decedent partner's estate except under the eighteenth and last statutory category of "any other person" [*Prob. Code §§ 8461, 8462*]. For related discussion, see California Forms of Pleading and Practice, Ch. 442, *Probate: Initiating Probate Administration* (Matthew Bender).

[b] Intestate Succession

Operative July 1, 2003, if a registered domestic partner dies without a will, trust, or other estate plan, his or her surviving domestic partner [*see Prob. Code § 37*] will succeed to the deceased partner's separate property in the same manner as a surviving spouse [*Prob. Code § 6401; cf. Prob. Code § 6402* (operative July 1, 2003, providing for passage of intestate estate when there is no surviving spouse or domestic partner)]. For related discussion, see California Forms of Pleading and Practice, Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation* (Matthew Bender).

The California Secretary of State was required to inform all currently registered domestic partners of the intestacy provisions by letter (on or before March 1, 2003), and immediately provide a notice concerning those provisions with all requests for a declaration of domestic partnership form [Stats. 2003, ch. 421, § 13; Stats. 2002, ch. 447, § 3; *see* 110.220[2] (declaration form)].

[10] Health Benefits, Conservatorship, Tax Treatment, and Other Effects

The rights and obligations of persons who have registered with the State of California as domestic partners are additionally affected in the following areas:

- Continued health coverage for a domestic partner and his or her child under the Public Employees' Medical and Hospital Care Act, on the death of the employee or annuitant [*see Gov. Code § 22871.2*].
- The same right as a spouse to make health care decisions on behalf of an incapacitated domestic partner under certain circumstances [*see Prob. Code § 4716*; for discussion, *see* Ch. 104, *Health Care Transactions, Consents, and Directives*].
- Coverage under group health care service plans [*see Health & Safety Code § 1374.58*].
- Use of sick leave to attend to an ill domestic partner [*see Lab. Code § 233*; for related discussion, *see* Ch. 85, *Employment Agreements*].

- Conservatorship and guardianship [see *Prob. Code* § 1811, *et seq.*; for related discussion, see Ch. 66, *Guardianships* , and Ch. 66A, *Conservatorships*].
- Unemployment benefits that otherwise might be lost in following a domestic partner to a new location [see *Unemp. Ins. Code* §§ 1030, 1032, 1256, 2705.1].
- Claims for disability benefits on behalf of a domestic partner who is mentally unable to make the claim for benefits [see *Unemp. Ins. Code* § 2705.1].
- Revocation of a disposition of property made in a will to a former domestic partner on termination of a domestic partnership [see *Prob. Code* § 6122.1; for related discussion, see Ch. 61, *Will Drafting and Complete Will Forms* , and Ch. 63, *Will Provisions*].
- State tax benefits relating to an exclusion from gross income for certain amounts expended for medical care and employer-provided coverage under an accident or health plan, and with respect to a deduction for certain health-insurance costs of self-employed individuals, and regarding some group health plans [see *Rev. & Tax. Code* § 17021.7].
- The same property-tax treatment of transfers between domestic partners that applies to transfers between spouses [*Rev. & Tax. Code* §§ 62(p) (transfer between registered domestic partners is not change of ownership that triggers reassessment of value for purposes of property tax), 63 (transfer between spouses is not change of ownership that triggers reassessment of value for purposes of property tax); 18 *Cal. Code Reg.* § 462.240(k) (transfer between registered domestic partners by intestate succession is not change of ownership that triggers reassessment of value for purposes of property tax); see *Cal. Const. art. XIII A*, § 2; see also *Strong v. State Bd. of Equalization* (2007) 155 *Cal. App. 4th* 1182, 1190-1195, 66 *Cal. Rptr. 3d* 657 (upholding constitutionality of 18 *Cal. Code Reg.* § 462.240(k))].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Cohabitation Domestic Partners General Overview Family Law Cohabitation Domestic Partners Duties & Rights Family Law Cohabitation Domestic Partners Registration



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PART II. LEGAL BACKGROUND
B. Domestic Partner Registration

33-110 California Legal Forms--Transaction Guide § 110.52

§ 110.52 State Preemption of Local Domestic Partnership Laws

The provisions for state registration of domestic partners [see § 110.50] preempt any local ordinance regarding domestic partnership, on and after July 1, 2000. Any domestic partnership previously established under local ordinance remains valid, but since that date, such a partnership is governed by state law, provided that state registration occurs [see *Fam. Code § 299.6(a), (b)*].

Despite state preemption, however, local jurisdictions are expressly permitted to retain or adopt ordinances, policies, or laws that offer rights within that jurisdiction to domestic partners or that impose duties on third parties regarding domestic partners, as defined by *Fam. Code § 297 et seq.* or as more broadly defined by the local jurisdiction, that are in addition to those provided under state law. Those local rights may be conditioned on the partners' agreement to assume the additional obligations set forth in *Fam. Code § 297 et seq.* [see *Fam. Code § 299.6(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Cohabitation Domestic Partners General Overview Family Law Cohabitation Domestic Partners Duties & Rights Governments State & Territorial Governments General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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PART III. TRANSACTION GUIDE
A. Drafting Guide

33-110 California Legal Forms--Transaction Guide § 110.100

§ 110.100 Drafting Guide to Support Provisions

1. If agreement is to establish duty to support one party during relationship, set out details of that duty, particularly regarding generation of income and maintenance of household.
2. Regarding support of parties after relationship ends:
 - a. If parties so desire, provide for support of one or both parties following their separation or the death of one of them; or
 - b. If parties prefer, include provision waiving any claim for support payments between parties themselves after relationship terminates.
3. If desired, provide for support of existing children of one party from former relationship.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawCohabitationAgreementsPalimonyFamily LawCohabitationDomestic PartnersDuties & Rights



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 110 NONMARITAL COHABITATION AGREEMENTS AND RELATED TRANSACTIONS
PART III. TRANSACTION GUIDE
A. Drafting Guide

33-110 California Legal Forms--Transaction Guide § 110.101

§ 110.101 Drafting Guide to Property Provisions

1. List existing property interests on separate exhibit, indicating:
 - a. Nature of interest.
 - b. Whether title will be changed from separate to joint ownership, and how title will be transferred.
2. Specify treatment of property acquired during nonmarital relationship:
 - a. Some or all property to remain separate property.
 - b. Some or all property to become jointly owned property.
3. Specify whether debts and liabilities incurred prior to execution of agreement are individual responsibility of incurring party or will be shared.
4. Specify whether debts and obligations incurred during relationship will be individual responsibility of incurring party or will be shared, and if so, whether such debts will be:
 - a. Shared equally; or
 - b. Allocated between the parties based on income or some other criteria.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawCohabitationDomestic PartnersDuties & RightsFamily
LawCohabitationDomestic PartnersProperty



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DIVISION VII: PERSONAL TRANSACTIONS
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PART III. TRANSACTION GUIDE
A. Drafting Guide

33-110 California Legal Forms--Transaction Guide § 110.102

§ 110.102 Drafting Guide to Provisions Regarding Living Accommodations

1. If one party owns residence at time of execution of nonmarital cohabitation agreement, specify whether residence be conveyed to and held by both of the parties jointly and specify form of title and manner of transfer.
2. If residence is rented or leased by the parties specify whose name will be on lease or rental agreement and whether one or both parties are liable for rent payments.
3. Specify each party's contribution to household expenses and maintenance.
4. If parties will make joint purchase of residence:
 - a. Specify amounts of parties' respective contributions toward purchase and maintenance of house.
 - b. Specify events that will trigger sale of residence or one party's interest in residence.
 - c. Specify terms for payment if one party will be entitled to buy interest of other party.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawCohabitationGeneral OverviewFamily LawCohabitationAgreementsGeneral Overview



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PART III. TRANSACTION GUIDE
A. Drafting Guide

33-110 California Legal Forms--Transaction Guide § 110.103

§ 110.103 Drafting Guide to Miscellaneous Provisions

1. Specify events that will trigger termination of agreement.
2. If desired, include provisions regarding purchase of life insurance, property insurance, health insurance.
3. If desired, include provisions regarding estate planning.
4. If desired, include provision requiring payment of attorneys' fees and costs to prevailing party in the event of legal action to enforce the agreement.
5. If desired, include provision requiring arbitration of any disputes arising under the agreement.
6. If parties are or will be registered as domestic partners, specify that each agrees to be jointly responsible for each other's basic living expenses incurred during the partnership [*see §§ 110.50-110.52, 110.220*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawCohabitationGeneral OverviewFamily LawCohabitationAgreementsGeneral OverviewFamily LawCohabitationDomestic PartnersGeneral OverviewFamily LawCohabitationDomestic PartnersPartnership Termination



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A. Drafting Guide

33-110 California Legal Forms--Transaction Guide §§ 110.104-110.199

[Reserved]

§§ 110.104[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 110 NONMARITAL COHABITATION AGREEMENTS AND RELATED TRANSACTIONS
PART IV. FORMS
A. Nonmarital Cohabitation Agreements

33-110 California Legal Forms--Transaction Guide § 110.200

§ 110.200 Agreement to Share Residence, Earnings, and Accumulated Property--With Support Provisions

[1] Comment

[a] Use of Form

The form in [2], *below*, is an agreement by which two persons agree to cohabit without marriage and to share equally the property accumulated through their labor. It is designed for use by two persons who desire to establish and maintain a nonmarital cohabitation relationship in which one person financially supports the relationship and the other renders various homemaking services. Exhibits listing any assets currently owned and obligations currently owed by each party should be attached to the agreement [*see* Paragraph 3].

The form generally provides that the parties will jointly own any property acquired during the relationship [*see* Paragraph 4]. The form also contains an optional paragraph for use if one of the parties already owns a residence and the parties agree that any increase in value occurring during the relationship is to be shared [*see* Paragraph 5].

The form also contains an acknowledgment of the signatures of the parties by a notary public [*see Civ. Code §§ 1181, 1189*].

Related forms for agreements between two unmarried persons who either are both gainfully employed and intend to share jointly accumulated property or are both gainfully employed and intend to share only household and related expenses are *set forth in §§ 110.201, 110.202*. For alternative and additional provisions that may be appropriate for use in this form, see Chapters 111, 112, and 120- 125.

Counsel should consider the tax consequences to the parties in drafting a cohabitation agreement. Provisions for the payment of support and pooling of income and other property by the parties create the potential for certain adverse tax consequences, as discussed in § 110.12[1]. Accordingly, the benefits to the parties in utilizing the agreement presented in the form below must be evaluated in light of these consequences in determining whether it is appropriate to use the form in a particular case.

[b] Provisions for Support of Party

This form contains two alternative support provisions providing for the financial support of one party to the nonmarital relationship. One provision requires that the gainfully employed party support the other party after the relationship ends [see Paragraph 2, first alternative]. This provision protects a party who has, perhaps, foregone educational and career opportunities for the sake of the nonmarital relationship and who depends on the earnings of the other party to the relationship.

The second alternative provision also provides that the gainfully employed party is to provide the other party with support; however, the obligation to provide support is to continue only so long as the nonmarital relationship continues. The provision also provides that the parties disclaim any right to support after the relationship ends [see Paragraph 2, second alternative].

[2] FORM**Agreement to Share Residence, Earnings, and Accumulated Property--With Support Provisions****NONMARITAL COHABITATION AGREEMENT**

This Agreement is made on _____ [date] between _____ [name of first party] ("First Party" [or identify by name]) and _____ [name of second party] ("Second Party" [or identify by name]).

Recitals

The Parties are two unmarried adults who desire to live together in a nonmarital relationship in which First Party financially supports Second Party and Second Party renders services to First Party as companion, housekeeper, homemaker, and cook. The parties desire to combine their efforts and earnings and share equally the property accumulated through their individual or combined efforts.

The Parties therefore agree as follows:

Sharing of Earnings, Services, and Property

1. (a) First Party shall use best efforts through _____ [his or her] personal services and skills to generate earnings, salaries, commissions, or income sufficient to provide a standard of living acceptable to the parties.

(b) Second Party shall render services to First Party as companion, housekeeper, homemaker, and cook, and shall assume responsibility for related household tasks.

(c) The parties shall combine their efforts and earnings and shall share equally the property accumulated through their individual or combined efforts, as further provided in Paragraph 4.

Support

[If support is to continue after parties' permanent separation, use:]

2. First Party shall provide for all of Second Party's financial support, commencing as of the date of this Agreement and continuing _____ [specify period, e.g., for the rest of Second Party's life, notwithstanding or until _____ (specify period, e.g., one year) after] a permanent separation of the Parties as defined in Paragraph 9. This support obligation shall terminate on the first to occur of any of the following events: (a) the death of _____ [either Party or Second Party]; (b) the marriage of Second Party to a third person; or (c) the cohabitation of Second Party with a third person.

[OR, if support obligation is to cease on parties' permanent separation, use:]

2. First Party shall provide for all of Second Party's financial support for the duration of this Agreement. This support obligation shall cease as of the date of the termination of this Agreement pursuant to Paragraph 8. Each Party waives and disclaims any right to support from the other Party after the termination of this Agreement.

[Continue as follows:]

Disclosure of Present Assets and Obligations

3. Each Party has fully disclosed to the other Party the full extent of all assets presently owned and obligations presently owed by that Party, as set forth in the attached Exhibits_____, which are incorporated into this Agreement by reference.

Ownership of Jointly Owned Property

4. Except for the separately owned property listed in Exhibit(s)_____ to this Agreement, the Parties shall hold all property, including all property acquired during the period of their cohabitation under this Agreement, equally as _____ [tenants in common or joint tenants or tenants in common or joint tenants, as may be appropriate]. _____ [First Party or Second Party or Both Parties] shall have [equal] management and control of all jointly owned property.

[Optional provision:]

Sharing Increase in Value of Residence

5. _____ [First or Second] Party presently holds sole title to the real property described as _____ [describe, e.g., a single-family dwelling] located at _____ [address] , more specifically described in Exhibit_____. This property will remain _____ [First or Second] Party's sole and separate property. However, the Parties shall share _____ [equally or specify formula or percentage for sharing increase] in any increase in the value of this real property occurring on and after the date of this Agreement until the Agreement is terminated. On termination of the Agreement, _____ [Second or First] Party will be entitled to receive _____ [his or her] share in the increase in the value of this property, within _____ [specify period, or a reasonable time]. [Add if desired: The Parties agree that the present value of this real property is \$ _____ or _____ (First or Second) Party agrees to hire a competent appraiser to establish the value of this real property as of the date of this Agreement. The conclusions of that appraiser will be binding on both Parties, unless they agree otherwise.]

[Optional provision:]

Legal Names of Children of Relationship

6. The Parties agree that any minor child or children of the Parties who are their biological offspring, or are adopted by them, shall be given the surname_____.

[Optional provision:]

Support, Maintenance, and Education of Children of Previous Relationship

7. _____ [First Party or Second Party or Both Parties] shall provide the following with respect to _____ [name(s)] , _____ [a child or children] of a previous relationship between _____ [Second or First] Party and a third person: _____ [specify nature of support, e.g., all ordinary living expenses, including reasonable expenses for medical care, dental care, and education]. This support obligation shall continue _____ [specify duration of support obligation, e.g., as to each child named in this Paragraph until that child reaches the age of majority], _____ [notwithstanding a permanent separation of the Parties as defined in Paragraph 9 or unless this Agreement is terminated before that time pursuant to Paragraph 8].

Termination of Agreement

8. This Agreement shall terminate as to all unexecuted provisions on the first to occur of any of the following events: (a) on the written consent of the Parties, (b) on the marriage or cohabitation of either Party with a third person, or (c) [add if support is to extend beyond parties' permanent separation: except as otherwise provided in this Agreement regarding the obligation of either Party to support the other Party (add if appropriate: or to support any children of a previous relationship),] on a permanent separation of the Parties as defined in Paragraph 9.

Permanent Separation

9. As used in this Agreement, the "permanent separation" of the Parties means that the Parties have been regularly living apart in separate dwelling places for a period of at least _____ [specify period, e.g., six months] after one Party has notified the other in writing that he or she intends to cease cohabitation with that Party.

Division of Property

10. On termination of this Agreement, the Parties shall immediately divide their jointly owned property. The jointly held property shall be divided equally, unless otherwise agreed to by the Parties. [Add if appropriate: In addition, _____ (First or Second) Party shall be entitled to _____ (his or her) share in the increase in value of the real property described in Paragraph 4.] [Add if appropriate: If the Parties are unable to agree on a division of their property, the Parties agree to submit the valuation, characterization, and division of their property to binding arbitration, as further provided in Paragraph 11.]

[Optional provision:]

Arbitration of Disputes

11. If the Parties separate and are unable to agree on a division of their property or on any other right or obligation under this Agreement, they shall submit the matter for resolution by arbitration to be conducted in accordance with the provisions of this Paragraph. Each Party shall designate a person to act as an arbitrator. The two persons designated by the Parties shall then agree on a third person to act as an arbitrator, making up an arbitration panel of three persons. Each Party shall submit to the arbitration panel a written statement regarding all issues in dispute along with any relevant documents. In making its decision, the arbitration panel shall take into account all relevant facts and circumstances. The decision of the arbitrators shall be binding on both Parties. Each Party shall pay _____ [one-half or specify other percentage] of the fees, if any, charged by the arbitrators for their services. Notwithstanding this Paragraph, however, any issue regarding the custody, visitation, or support of any child born to the parties or adopted by them shall be submitted to a court of competent jurisdiction.

Representation by Independent Counsel

12. Each Party acknowledges that he or she has been represented by independent counsel in the negotiation of this Agreement, that the counsel was of his or her own choosing, that he or she has read this Agreement, and that the counsel has explained this Agreement's meaning and legal consequences to him or her.

Attorneys' Fees and Costs

13. If any legal action is necessary to enforce the terms of this Agreement, the prevailing Party shall receive reasonable attorneys' fees and costs, in addition to any other relief ordered.

Entire Agreement; Modification

14. This Agreement contains the entire agreement of the Parties. This Agreement supersedes any and all other agreements, either oral or in writing, between the Parties relating to their rights and liabilities arising out of their nonmarital relationship. This Agreement may be amended or modified only by a written instrument signed by the Parties.

Severability

15. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining portions shall continue in full force and effect.

Governing Law

16. This Agreement shall be governed by, and construed in accordance with, the laws of the State of California.

Executed at _____ [city] , California, on _____ [date] .

FIRST PARTY

SECOND PARTY

ACKNOWLEDGMENT

State of California,)
 County of _____)

On _____ [date] before me, _____ [name and title of officer taking acknowledgment], personally appeared _____ [names of persons signing instrument], who proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the persons executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____ (Seal)
 _____ [Name of officer]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawCohabitationAgreementsGeneral OverviewFamily LawCohabitationAgreementsPalimonyFamily LawCohabitationDomestic PartnersDuties & RightsFamily LawCohabitationDomestic PartnersProperty



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 110 NONMARITAL COHABITATION AGREEMENTS AND RELATED TRANSACTIONS
PART IV. FORMS
A. Nonmarital Cohabitation Agreements

33-110 California Legal Forms--Transaction Guide § 110.201

§ 110.201 Agreement to Share Residence, Earnings, and Accumulated Property--Without Support Provisions

[1] Comment

The form set forth in [2], *below*, is an agreement intended for use by two persons who desire to live together without marriage, to pursue their individual careers, and to share equally household responsibilities, their earnings, and accumulated property. Exhibits listing any assets currently owned and obligations currently owed by each party should be attached to the agreement [*see* Paragraph 3].

This agreement contains no provisions for one party to support the other. For a form of agreement including support provisions, see § 110.200. For alternative and additional provisions that may be appropriate for use in this form, see Chapters 111, 112, 120- 125.

Counsel should consider the tax consequences to the parties in drafting a cohabitation agreement. Provisions for the pooling of income and other property by the parties create the potential for certain adverse tax consequences, as discussed in § 110.12[1]. Accordingly, the benefits to the parties in utilizing the agreement presented in the form below must be evaluated in light of these consequences in determining whether it is appropriate to use the form in a particular case.

[2] FORM

Agreement to Share Residence, Earnings, and Accumulated Property--Without Support Provisions

NONMARITAL COHABITATION AGREEMENT

This Agreement is made on _____ [date] , by and between _____ [name of first party], ("First Party") and _____ [name of second party], ("Second Party"), who are collectively referred to in this Agreement as the "Parties."

Recitals

The Parties are two unmarried adults who desire to live together and to share property accumulated through their individual and combined efforts. The Parties are each gainfully employed and desire to pursue their respective careers during the course of their relationship.

The Parties therefore agree as follows:

Ownership and Management of Accumulated Property

1. The Parties shall share as tenants in common or joint tenants the property accumulated by and through their individual or combined efforts during their nonmarital relationship. _____ [First Party or Second Party or Both Parties] shall have [equal] management and control of the jointly owned property.

Debts of Parties

2. Any individual debts incurred by each of the Parties prior to the time of execution of this Agreement are and shall remain the individual debts of the Party who incurred them.

Disclosure of Present Assets and Obligations

3. Each Party has fully disclosed to the other Party the full extent of all assets presently owned and obligations presently owed by that Party, as set forth in the attached Exhibits_____, which are incorporated into this Agreement by reference.

Living Expenses

4. The Parties shall share _____ [*specify formula for sharing expenses, e.g., equally or in proportion to their respective incomes*] in the payment of rent, utilities, household maintenance expenses, and food.

Automobile and Transportation Expenses

5. _____ [Each Party shall be individually responsible for his or her own or The Parties shall share _____ (*specify formula for sharing expenses, e.g., equally or in proportion to their respective incomes*) in the payment of] expenses for loan payments, fuel, maintenance, and insurance of his or her own automobile or other vehicle, as well as for any other transportation expenses.

Clothing and Personal Grooming Expenses

6. _____ [Each Party shall be individually responsible for his or her own or The Parties shall share _____ (*specify formula for sharing expenses, e.g., equally or in proportion to their respective incomes*) in the payment of] expenses for clothing, laundry, and personal grooming.

Health Insurance and Expenses

7. _____ [Each Party shall be individually responsible for his or her own *or* The Parties shall share _____ (*specify formula for sharing expenses, e.g., equally or in proportion to their respective incomes*) in the payment of] expenses for medical, dental, psychiatric, visual, or other health care and for any premiums on any health insurance or other health care coverage.

Entertainment and Leisure Expenses

8. _____ [Each Party shall be individually responsible for his or her own *or* The Parties shall share _____ (*specify formula for sharing expenses, e.g., equally or in proportion to their respective incomes*) in the payment of] expenses for entertainment, recreation, travel, and other leisure activities.

Household Responsibilities

9. The Parties shall combine their efforts and share the responsibilities relating to the household tasks, and may agree as to any division of such household responsibilities.

Disclaimer of Support

10. Neither Party shall be liable for the support of the other Party [*add if desired: during or*] after termination of this Agreement.

[*Optional provision:*]

Legal Names of Children

11. The Parties agree that any child or children of the Parties shall be given the surname: _____.

[*Optional provision:*]

Support, Maintenance, and Education of Children of Previous Relationship

12. _____ [First Party *or* Second Party *or* Both Parties] shall provide the following with respect to _____ [*name(s)*] , _____ [a child *or* children] of a previous relationship between _____ [Second *or* First] Party and a third person: _____ [*specify nature of support, e.g., all ordinary living expenses, including reasonable expenses for medical care, dental care, and education*]. Notwithstanding a permanent separation of the Parties as defined in Paragraph 14, this support obligation shall continue _____ [*specify duration of support obligation, e.g., as to each child named in this Paragraph until that child reaches the age of majority*].

Termination of Agreement

13. This Agreement shall terminate as to all unexecuted provisions on the occurrence of any of the following, whichever occurs first: (a) on the written consent of the Parties, (b) on the marriage or cohabitation of either Party with a third person, or (c) *[add if support of children is to extend beyond parties' permanent separation: except as otherwise provided in this Agreement regarding the obligation of either Party to support children of the other Party from a previous relationship),]* on a permanent separation of the Parties as defined in Paragraph 14.

Permanent Separation

14. As used in this Agreement, the "permanent separation" of the Parties means that the Parties have been regularly living apart in separate dwelling places for a period of at least _____ *[specify period, e.g., six months]* after one Party has notified the other in writing that he or she intends to cease cohabitation with that Party.

Division of Property

15. On termination of this Agreement, the Parties shall immediately divide their jointly owned property. The jointly held property shall be divided equally, unless otherwise agreed to by the Parties. *[Add if desired: If the Parties are unable to agree on a division of their property, the Parties agree to submit the valuation, characterization, and division of their property to binding arbitration, as further provided in Paragraph 16.]*

[Optional provision:]

Arbitration of Disputes

16. If the Parties separate and are unable to agree on a division of their property or on any other right or obligation under this Agreement, they shall submit the matter for resolution by arbitration to be conducted in accordance with the provisions of this Paragraph. Each Party shall designate a person to act as an arbitrator. The two persons designated by the Parties shall then agree on a third person to act as an arbitrator, making up an arbitration panel of three persons. Each Party shall submit to the arbitration panel a written statement regarding all issues in dispute along with any relevant documents. In making its decision, the arbitration panel shall take into account all relevant facts and circumstances. The decision of the arbitrators shall be binding on both Parties. Each Party shall pay _____ *[one-half or specify other percentage]* of the fees, if any, charged by the arbitrators for their services.

Representation by Independent Counsel

17. Each Party hereby acknowledges that he or she has been represented by independent counsel in the negotiation of this Agreement, that the counsel representing each Party was of his or her own choosing, and that the Agreement has been read by the Parties and its meaning and legal consequences have been explained to them by such counsel.

Attorneys' Fees and Costs

18. If any legal action is necessary to enforce the terms of this Agreement, the prevailing Party shall receive reasonable attorneys' fees and costs, in addition to any other relief ordered.

Entire Agreement; Modification

19. This Agreement contains the entire agreement of the Parties. This Agreement supersedes any and all other agreements, either oral or in writing, between the Parties relating to their rights and liabilities arising out of their nonmarital relationship. This Agreement may be amended or modified only by a written instrument signed by the Parties.

Severability

20. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining portions shall continue in full force and effect.

Governing Law

21. This Agreement shall be governed by, and construed in accordance with, the laws of the State of California.

Executed at _____ [city] , California, on _____ [date] .

_____ [signature]
 _____ [typed name]

FIRST PARTY

_____ [signature]
 _____ [typed name]

SECOND PARTY

ACKNOWLEDGMENT [See form at end of § 110.200 [2].]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawCohabitationAgreementsGeneral OverviewFamily LawCohabitationDomestic PartnersDuties & RightsFamily LawCohabitationDomestic PartnersProperty



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PART IV. FORMS
A. Nonmarital Cohabitation Agreements

33-110 California Legal Forms--Transaction Guide § 110.202

§ 110.202 Agreement to Share Residence--Earnings and Property Acquired From Earnings to Remain Separate

[1] Comment

This form set out in [2], *below*, is an agreement for use by two unmarried persons who desire to share the same living accommodations and accompanying household responsibilities but agree that each party's earnings and property acquired from such earnings are to remain the separate property of the earning party. This type of agreement is for use when the parties will be sharing a residence that is or will be rented or leased from a third party or when the parties agree that one party will move into a residence already owned by the other party. When the parties wish to share a residence that they will be buying together, the form of agreement in § 110.203 should be used.

For forms of nonmarital cohabitation agreements between two unmarried persons who not only desire to live together but also desire to share earnings as well as property acquired during the relationship from earnings, see the forms set forth in §§ 110.200, 110.201.

[2] FORM

Agreement to Share Residence--Earnings and Property Acquired From Earnings to Remain Separate

NONMARITAL COHABITATION AGREEMENT

This Agreement is made on _____ [date] , by and between _____ [name of first party] ("First Party"), and _____ [name of second party] ("Second Party"), who are collectively referred to as the "Parties."

Recitals

The Parties are two adults who intend to live together and to share their homemaking expenses and responsibilities. The

Parties intend to keep their respective separately owned and acquired property and their individual earnings and income separate.

The Parties therefore agree as follows:

Earnings and Property

1. All earnings, income, salaries, and commissions generated by either of the Parties, and all property acquired with those funds, shall remain the separately owned property of that Party.

Sharing of Residence

[Choose one of the following provisions:]

2. The Parties shall lease for a period of _____ [specify, e.g., one (1) year] _____ [describe type of residence, e.g., a single-family dwelling], located at _____ [address] . All household expenses, including rent for the premises, security deposit, utilities, and food shall be shared by the Parties _____ [specify formula or percentage for sharing expenses, e.g., equally or in proportion to their respective incomes]. As used in this Agreement, "utilities" means services for electrical power, natural gas or propane, water, sewer, waste disposal or collection, telephone [except long-distance calls], and cable television. [Expenses for long-distance telephone calls shall be the responsibility of the Party placing the call.]

[OR]

2. First Party currently leases _____ [describe type of residence, e.g., a single-family dwelling], located at _____ [address] , from _____ [name of lessor], pursuant to a lease agreement, dated _____. [A copy of the lease agreement is attached to this Agreement as Exhibit _____.] First Party represents that the lease agreement contains a provision that permits two persons to occupy the leased premises. First Party agrees that Second Party shall have all the rights and privileges of First Party to use and enjoy the premises while this Agreement is in effect. Second Party agrees to abide by all the terms and conditions of the lease agreement and to do nothing that would impair the contractual relationship between First Party and _____ [name of lessor]. All household expenses, including rent for the above-described premises, security deposit, utilities, and food shall be shared by the Parties _____ [specify formula or percentage for sharing expenses, e.g., equally or in proportion to their respective incomes]. As used in this Agreement, "utilities" means services for electrical power, natural gas or propane, water, sewer, waste disposal or collection, telephone [except long-distance calls], and cable television. [Expenses for long-distance telephone calls shall be the responsibility of the Party placing the call.]

[OR]

2. First Party is the owner of _____ [describe type of residence, e.g., a single-family dwelling], located at _____ [address] . The Parties agree that Second Party shall move into the residence of First Party. Second Party shall have the right to occupy and enjoy the use of the premises as long as this Agreement is in effect. _____ [Specify Second Party's contributions, if any, to household expenses, e.g., First Party shall continue to pay all expenses of maintaining the residence, except that Second Party will reimburse First Party for any long-distance telephone calls placed by Second Party].

[Continue as follows:]

[Optional provision:]

Household Tasks

3. The responsibility for household tasks, such as cleaning and maintaining the household and cooking the meals, shall be shared as follows:_____ [specify allocation of household tasks].

Termination of Agreement

4. This Agreement shall terminate on_____ [specify period, e.g., thirty days'] written notice by either Party to the other [add if appropriate: or on the marriage of the Parties to each other]. [If first alternative Paragraph 2 is used, add the following: On termination of this Agreement,_____ (First or Second) Party shall be entitled to continued possession of the premises for the duration of the lease and shall be responsible for paying rent and other expenses pertaining to the leased property from the date of termination of the Agreement.]_____
[Second or First] Party shall vacate the premises no later than the date on which this Agreement terminates.

[Optional provision:]

Arbitration of Disputes

5. If the Parties separate and are unable to agree on any right or obligation under this Agreement, they shall submit the matter for resolution by arbitration to be conducted in accordance with the provisions of this Paragraph. Each Party shall designate a person to act as an arbitrator. The two persons designated by the Parties shall then agree on a third person to act as an arbitrator, making up an arbitration panel of three persons. Each Party shall submit to the arbitration panel a written statement regarding all issues in dispute along with any relevant documents. In making its decision, the arbitration panel shall take into account all relevant facts and circumstances. The decision of the arbitrators shall be binding on both Parties. Each Party shall pay_____ [one-half or specify other percentage] of the fees, if any, charged by the arbitrators for their services.

Attorneys' Fees and Costs

6. If any legal action is necessary to enforce the terms of this Agreement, the prevailing Party shall receive reasonable attorneys' fees and costs, in addition to any other relief ordered.

Entire Agreement; Modification

7. This Agreement contains the entire agreement of the Parties. This Agreement supersedes any and all other agreements, either oral or in writing, between the Parties relating to their rights and liabilities arising out of their nonmarital relationship. This Agreement may be amended or modified only by a written instrument signed by the Parties.

Severability

8. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining portions shall continue in full force and effect.

Governing Law

9. This Agreement shall be governed by, and construed in accordance with, the laws of the State of California.

Executed at _____ [city] , California, on _____ [date] .

[signature]

[typed name]

FIRST PARTY

[signature]

[typed name]

SECOND PARTY

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawCohabitationGeneral OverviewFamily
LawCohabitationAgreementsGeneral OverviewFamily LawCohabitationDomestic PartnersDuties & RightsFamily
LawCohabitationDomestic PartnersProperty



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
 CHAPTER 110 NONMARITAL COHABITATION AGREEMENTS AND RELATED TRANSACTIONS
 PART IV. FORMS
 A. Nonmarital Cohabitation Agreements

33-110 California Legal Forms--Transaction Guide § 110.203

§ 110.203 Agreement for Joint Purchase of Residence**[1] Comment**

The form set forth in [2], *below*, is an agreement between two unmarried individuals for the joint purchase of a residence. It may be used by parties who will contribute equally or unequally toward the down payment, mortgage, and incidental costs. If the parties want to make their joint purchase of a residence part of a comprehensive cohabitation agreement, this form can be incorporated into the forms set forth in §§ 110.200 and 110.201.

This form provides that in the event the parties separate, one party may buy the other party's interests on terms to be agreed on [see Paragraph 6(a)]. If neither party wishes to buy out the other party, or if the parties are unable to agree on the terms of sale, the agreement provides for the property to be sold and the proceeds distributed between the parties as specified in the agreement [see Paragraph 6(b)]. For an alternative provision for use if the parties have minor children, see § 110.204.

Unmarried cohabiting individuals who make a joint purchase of real property may hold that property as joint tenants, tenants in common, or partners [see *Civ. Code* § 682]. For further discussion of joint ownership of property by unmarried cohabitants, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Chapter 1.

[2] FORM**Agreement for Joint Purchase of Residence**

HOME PURCHASE AGREEMENT

This Agreement is made on _____ [date] between _____ [name of first party] ("First Party"), and _____ [name of second party] ("Second Party"), collectively referred to as the "Parties," for the purchase of the _____ [describe property, e.g., single-family house] located

at _____ [street address and city], California.

Purchase Price

[Choose one of the following provisions:]

1. The total purchase price of the property is \$ _____. Each Party shall contribute \$ _____ toward the down payment, for a total down payment of \$ _____. The Parties shall also equally share all closing costs incidental to the purchase of the property. Thereafter, each Party shall pay half of the monthly mortgage payments.

[OR]

1. The total purchase price of the property is \$ _____. The total down payment toward purchase of the property is \$ _____. First Party shall contribute \$ _____ toward the down payment, and Second Party shall contribute \$ _____ toward the down payment. The Parties shall share responsibility for payment of all closing costs incidental to the purchase of the property as follows: _____ [specify formula or percentage for sharing of costs, e.g., First Party will pay 65 percent of the closing costs and Second Party will pay 35 percent of the closing costs]. Thereafter, the Parties shall share responsibility for payment of the monthly mortgage payments as follows: _____ [specify formula or percentage for allocation of mortgage payments, e.g., each Party shall pay a percentage of the monthly mortgage payments that corresponds to his or her percentage contribution to the down payment].

[Continue as follows:]

Title

2. The Parties shall take title to the property as _____ [name] and _____ [name] , as _____ [specify form of title, e.g., joint tenants with right of survivorship or tenants in common].

Maintenance Costs

3. The Parties shall share the costs of maintaining the property, including but not limited to property taxes, insurance, and repairs, as follows: _____ [specify percentage or formula for determining share of costs, e.g., Each Party shall pay a percentage of the costs that corresponds to his or her proportional share of the Parties' combined income].

Improvements

4. The Parties shall mutually agree on the nature and extent of any improvements to be made to the property. The Parties shall share the costs of any mutually agreed-on improvements to the property as follows: _____ [specify formula or percentage for allocation of costs, e.g., each Party shall pay a percentage of the cost of any improvements that corresponds to his or her percentage contribution to the down payment].

Utilities

5. The Parties shall share the costs of any utilities for the property as follows:_____ [*specify percentage or formula for determining share of costs, e.g., Each Party shall pay a percentage of the costs that corresponds to his or her proportional share of the Parties' combined income*]. As used in this Agreement, "utilities" means services for electrical power, natural gas or propane, water, sewer, waste disposal or collection, telephone [except long-distance calls], and cable television. [Expenses for long-distance telephone calls shall be the responsibility of the Party placing the call.]

Sale of Property on Separation of Parties

6. (a) If the Parties separate and either Party wishes to assume sole ownership of the property following the separation, the Party who wishes to assume ownership may purchase the other Party's interest in the property on terms and conditions to be mutually agreed on by the Parties.

(b) If neither Party wishes to become sole owner of the property or if the Parties are unable to agree on terms for one Party to purchase the other Party's interest in the property, as provided in subparagraph (a), the Parties shall list the property for sale with a licensed real estate broker [within_____ (*specify time period, e.g., 60 days after the Parties separate*)]. The net proceeds of the sale shall be divided between the Parties as follows:_____ [*specify formula or percentage for allocation of proceeds, e.g., each Party shall receive a percentage of the net proceeds that corresponds to his or her percentage contribution to the down payment*]. For purposes of this Agreement, "net proceeds of the sale" means the total sales price of the property, minus (1) any sales commissions and other costs incurred incident to the sale of the property, and (2) any amounts paid to discharge any outstanding mortgages, liens, or other encumbrances on the property.

[*Optional provision:*]

Arbitration of Disputes

7. If the Parties separate and are unable to agree on any right or obligation under this Agreement, they shall submit the matter for resolution by arbitration to be conducted in accordance with the provisions of this Paragraph. Each Party shall designate a person to act as an arbitrator. The two persons designated by the Parties shall then agree on a third person to act as an arbitrator, making up an arbitration panel of three persons. Each Party shall submit to the arbitration panel a written statement regarding all issues in dispute along with any relevant documents. In making its decision, the arbitration panel shall take into account all relevant facts and circumstances. The decision of the arbitrators shall be binding on both Parties. Each Party shall pay_____ [*one-half or specify other percentage*] of the fees, if any, charged by the arbitrators for their services.

Attorneys' Fees and Costs

8. If any legal action is necessary to enforce the terms of this Agreement, the prevailing Party shall receive reasonable attorneys' fees and costs, in addition to any other relief ordered.

Entire Agreement; Modification

9. This Agreement contains the entire agreement of the Parties. This Agreement supersedes any and all other agreements, either oral or in writing, between the Parties relating to their rights and liabilities arising out of the purchase of the property described in this Agreement. This Agreement may be amended or modified only by a written instrument signed by the Parties.

Severability

10. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining portions shall continue in full force and effect.

Governing Law

11. This Agreement shall be governed by, and construed in accordance with, the laws of the State of California.

Executed at _____ [city] , California, on _____ [date] .

[signature]

[typed name]

FIRST PARTY

[signature]

[typed name]

SECOND PARTY

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawCohabitationAgreementsGeneral OverviewFamily LawCohabitationDomestic PartnersProperty



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33-110 California Legal Forms--Transaction Guide § 110.204

§ 110.204 Buy-Sell Provision for Cohabiting Individuals Who Have or Plan to Have Children

[1] Comment

This form is a buy-sell provision that may be used by parties who have or plan to have children, and who are going to execute an agreement for the joint purchase of a residence. It can be substituted for Paragraph 6 in the form set forth in § 110.203. This form is intended to give the party who retains primary custody of any minor children the option to retain ownership of the jointly purchased property.

[2] FORM

Buy-Sell Provision for Cohabiting Individuals Who Have or Plan to Have Children

Buy-Sell Provision

_____ (a) If the Parties separate and they have a minor child or minor children, the Party who will retain primary physical custody of that child or children shall have the option to purchase the non-custodial Party's interest in the property for a sum equal to the noncustodial Party's equity interest on terms and conditions to be mutually agreed on by the Parties.

(b) If neither Party wishes to become sole owner of the property or if the Parties are unable to agree on terms for the custodial Party to purchase the other Party's interest in the property, as provided in subparagraph (a), the Parties shall list the property for sale with a licensed real estate broker [within _____ (*specify time period, e.g., 60 days after the Parties separate*)]. The net proceeds of the sale shall be divided between the Parties as follows: _____ [*specify formula or percentage for allocation of proceeds, e.g., each Party shall receive a percentage of the net proceeds that corresponds to his or her percentage contribution to the down payment*]. For purposes of this Agreement, "net proceeds of the sale" means the total sales price of the property, minus (1) any sales commissions and other costs incurred incident to the sale of the property, and (2) any amounts paid to discharge any outstanding mortgages, liens, or other encumbrances on the property.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawCohabitationAgreementsGeneral OverviewFamily
LawCohabitationDomestic PartnersChildrenFamily LawCohabitationDomestic PartnersDuties & RightsFamily
LawCohabitationDomestic PartnersProperty



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33-110 California Legal Forms--Transaction Guide §§ 110.205-110.219

[Reserved]

§§ 110.205[Reserved]



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B. Domestic Partner Registration and Related Forms

33-110 California Legal Forms--Transaction Guide § 110.220

§ 110.220 Declaration of Domestic Partnership (Form DP-1)

[1] Comment

[a] Use of Form

The form in [2], *below*, is an illustrative reproduction of the mandatory form for statewide registration of a domestic partnership in California: a Declaration of Domestic Partnership (Form DP-1). This form is promulgated by the California Secretary of State, and may be obtained from that office (including via the Secretary of State's website, at <http://www.ss.ca.gov>), or from county clerk offices [*see Fam. Code § 298*; *see also § 110.50*].

The form recites that each partner meets the statutory requirements for statewide registration of a domestic partnership [*Fam. Code § 297*]. It provides spaces for the partners to set forth their common residence address, and a mailing address. It must be signed by each partner before a notary public. Although the form does not contain a declaration under penalty of perjury, it does contain a preprinted declaration that the "representations are true, correct, and contain no material omissions of fact to our best knowledge and belief" [*see Fam. Code § 298(c)*].

The completed form must be mailed to the office of the California Secretary of State at the address listed on the form. The form should be accompanied by the filing fee indicated on the form. In addition, unless the form is submitted by persons of opposite sexes who are over age 62 and who qualify for registration pursuant to *Fam. Code § 297(b)(5)(B)* to obtain Social Security benefits, an additional \$23 fee must accompany the form. This additional fee is earmarked to support training and grants to promote nonviolent relationships in the lesbian, gay, bisexual, and transgender community [*Fam. Code § 298(b)(3)*]. It is recommended that the form and fees be sent by certified mail, return receipt requested, although certified mail is not required for registration.

Beginning January 1, 2005, the statutory requirements for registration reflected in this form will no longer include a requirement that domestic partners agree to be responsible for each other's basic living expenses [*Fam. Code § 297* (operative January 1, 2005); *see Stats. 2003, ch. 421, § 3*; *see also § 110.51[1]*]. Beginning at that time, domestic partners' mutual responsibilities, obligations, and duties will be the same as those imposed by law on spouses [*Fam. Code § 297.5(a)* (operative January 1, 2005)]. For discussion of the eligibility criteria for unmarried couples to register

as domestic partners, see § 110.50. For discussion of the legal effects of registration, see § 110.51.

Beginning January 1, 2008, this form is required to include an optional section for either party or both parties to indicate a change in name, and any person indicating a name change will be required to provide his or date of birth [*Fam. Code* § 298(d); see *Fam. Code* § 298.6; see also § 110.50[2A]].

[b] Return of Registration Form

On accepting the Declaration, the Secretary of State will register it in a registry for domestic partnerships and will return a copy of the registered form to the domestic partners [*Fam. Code* § 298.5(b)]. For any Declaration filed on or after January 1, 2005, the Secretary of State will also issue a Certificate of Registered Domestic Partnership [*Fam. Code* § 298.5(b) (operative January 1, 2005); see § 110.50[3]]. The Secretary of State will also provide the informational brochure that is distributed to applicants for marriage licenses [see *Fam. Code* § 358(a) (brochure to contain information about genetic defects and diseases, AIDS, domestic violence, and options for name changes)], unless the registered domestic partners are persons of opposite sexes who are over age 62 and who qualify for registration pursuant to *Fam. Code* § 297(b)(5)(B) to obtain Social Security benefits [*Fam. Code* §§ 298.5(b), 358(b)].

[c] Registration Violation Is Misdemeanor Offense

Intentionally filing a materially false Declaration of Domestic Partnership is punishable as a misdemeanor [*Fam. Code* § 298(c) (through December 31, 2004, "[v]iolations of this subdivision are punishable as a misdemeanor"; beginning January 1, 2005, "[f]iling an intentionally and materially false Declaration of Domestic Partnership shall be punishable as a misdemeanor"); see § 110.50[3]].

[2] FORM

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Cohabitation Domestic Partners General Overview Family Law Cohabitation Domestic Partners Registration



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DIVISION VII: PERSONAL TRANSACTIONS
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PART IV. FORMS

B. Domestic Partner Registration and Related Forms

33-110 California Legal Forms--Transaction Guide § 110.221

§ 110.221 Notice of Termination of Domestic Partnership--Official Form (Form DP-2)

[1] Comment

[a] Use of Form

The form in [2], *below*, is an illustrative reproduction of the mandatory Notice of Termination of Domestic Partnership (Form DP-2), for use in notifying the California Secretary of State of the termination of a domestic partnership that has been registered in California [*see Fam. Code § 299; see also § 110.50[5]*]. The form, which is available through county clerk offices and the Secretary of State (including via the Secretary of State's website, at <http://www.ss.ca.gov>), may be completed by either of the former domestic partners, and must be signed by a notary public.

Beginning on January 1, 2005, a registered domestic partnership may be terminated by the filing of a Notice of Termination of Domestic Partnership with the Secretary of State, without the need for a dissolution proceeding, only under limited circumstances [*Fam. Code § 299(a)*]. For discussion of the circumstances under which a registered domestic partnership may be terminated without judicial proceedings, *see § 110.50[6][b]*.

For a form that may be used to revoke the Notice of Termination, *see § 110.223*.

[b] Cessation of Further Obligations

If a registered domestic partnership was terminated before January 1, 2005, the partners no longer incur the mutual obligations created in *Fam. Code § 297 et seq.* and any other relevant provision of law [*see Fam. Code § 299.5(b)*] (operative through December 31, 2004); *see also § 110.50[5], § 110.51[5]*].

Beginning January 1, 2005, former registered domestic partners generally will have the same rights, protections, and benefits, and will be subject to the same responsibilities, obligations, and duties, that apply to former spouses [*Fam. Code § 297.5(b)*] (operative January 1, 2005)].

[2] FORM

Notice of Termination of Domestic Partnership--Official Form (Form DP-2)

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Cohabitation Domestic Partners General Overview Family Law Cohabitation Domestic Partners Partnership Termination



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B. Domestic Partner Registration and Related Forms

33-110 California Legal Forms--Transaction Guide § 110.222

§ 110.222 Notice of Termination of Domestic Partnership--Notice to Third Party**[1] Comment--Use of Form**

The form in [2], *below*, is for use in notifying a third party, such as a creditor of a registered domestic partner, of the termination of the domestic partnership. Through December 31, 2004, a domestic partner who has given a copy of a Declaration of Domestic Partnership to any third party in order to qualify for any benefit or right must, within 60 days of termination of the partnership, give or send to that third party written notification of the termination, at the third party's last known address [*see Fam. Code § 299(c)* (operative through December 31, 2004)]. Although not required by statute, it is recommended that the signature of the notifying party be notarized and that the form be sent by certified mail, return receipt requested. For related discussion, see § 110.50[5].

[2] FORM**Notice of Termination of Domestic Partnership--Notice to Third Party****Notice of Termination of Domestic Partnership**

To: _____ [*specify name of person or entity to whom Declaration of Domestic Partnership was previously given to obtain any goods or services or other right or benefit*]

Address: _____ [*specify third party's last known mailing address*]

You are hereby notified that the domestic partnership that was established between _____ [*specify full names of both domestic partners*] and evidenced by a Declaration of Domestic Partnership that was registered with the California Secretary of State under File Number _____, a copy of which was previously furnished to you, has been terminated as of _____ [*date*], and therefore is no longer in effect. A Notice of Termination of Domestic Partnership _____ [*has been or will be*] filed with the California Secretary of State. Under no circumstances should you rely hereafter on the existence of a domestic partnership between the above listed persons

in extending any goods, services, or other right or benefit of any nature to either or both of these persons.

Dated: _____

_____ [*signature of domestic partner*]

[*If desired, add notarial acknowledgment.*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Cohabitation Domestic Partners General Overview Family Law Cohabitation Domestic Partners Partnership
Termination



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B. Domestic Partner Registration and Related Forms

33-110 California Legal Forms--Transaction Guide § 110.223

§ 110.223 Revocation of Termination of Domestic Partnership--Official Form (Form DP-3)

[1] Comment--Use of Form

The form in [2], *below*, is an illustrative reproduction of the Revocation of Termination of Domestic Partnership (Form DP-3), for mandatory use in revoking a previously filed Notice of Termination of Domestic Partnership [*see Fam. Code § 299(b)*; *see also § 110.221*]. The form is available through county clerk offices and the Secretary of State (including via the Secretary of State's website, at <http://www.ss.ca.gov>).

Ordinarily, a registered domestic partnership will be terminated six months after the date of filing of the Notice of Termination of Domestic Partnership with the Secretary of State [*Fam. Code § 299(b)*]. However, either party may, before that date, file with the Secretary of State a notice of revocation of the termination [*Fam. Code § 299(b)*]. The partner revoking the termination must also send the other party a copy of the notice of revocation by first-class mail, postage prepaid, at the other party's last known address [*Fam. Code § 299(b)*].

[2] FORM

Revocation of Termination of Domestic Partnership--Official Form (Form DP-3)

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 111 PREMARITAL AGREEMENTS

33-111 California Legal Forms--Transaction Guide 111.syn

§ 111.syn Synopsis to Chapter 111: PREMARITAL AGREEMENTS

§ 111.01 California Statutes

§ 111.02 Federal Statutes

§§ 111.03-111.04 [Reserved]

§ 111.05 Law Reviews and Periodicals

§ 111.06 Annotations

§ 111.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 111.08-111.09 [Reserved]

§ 111.10 Use of Term "Premarital Agreement"

§ 111.11 Controlling Law

§ 111.12 Summary of Requirements for Enforceable Agreements

§ 111.13 Revocation and Modification

§ 111.14 Enforcement Issues

[1] Date of Execution Determines Applicable Law

[2] Enforcement Proceedings and Statute of Limitations

[a] Determining Agreement's Validity in Dissolution Proceedings

[b] Civil Proceedings in General

[c] Statute of Limitations

[i] Tolling of Statute of Limitations During Marriage

[ii] Action for Breach of Contract

[iii] Action for Specific Performance

[iv] Action Based on Rescission

[3] Statute of Frauds (Writing Requirement)

[a] Effect of Failure to Reduce Premarital Agreement to Writing

[b] Circumstances Rendering Oral Premarital Agreement Enforceable

[c] Estoppel to Assert Statute of Frauds

[i] Fraud Preventing Reduction of Agreement to Writing

[ii] Unconscionable Injury or Unjust Enrichment

[4] Effect of Void Marriage

[5] Object of Agreement and Potential Remedy Problems

§§ 111.15-111.19 [Reserved]

§ 111.20 Essential Contractual Elements for Premarital Agreement

[1] Contractual Capacity

[2] Consent

[a] In General

[b] No Confidential Relationship Between Intended Spouses

[c] Undue Influence

[i] Definition

[ii] Evidence of Undue Influence

[iii] Effect of Undue Influence

[d] Voluntaryness and Unconscionability

[e] Validity of Waiver of Property Rights

[f] Advisability of Independent Counsel

[3] Lawful Object

[4] Need for Consideration

[a] No Consideration Under Current Law

[b] Promise of Marriage as Sufficient Under Prior Law

[c] Estoppel to Assert Invalidity of Marriage

§ 111.21 Writing Requirement

[1] In General

[2] Additional Circumstances When Writing May Be Required

§ 111.22 Acknowledgment, Proof, and Recording of Agreements

§§ 111.23-111.29 [Reserved]

§ 111.30 Validity of Premarital Contracts Relating to Property

§ 111.31 Limitations on Premarital Contracts Relating to Property--In General

§ 111.32 Prohibition Against Contracts Altering "Legal Relations" of Spouses

[1] Spousal Support

[a] Prohibition Against Waivers of Spousal Support

[b] Prohibition Against Provisions for Lump-Sum Payment in Lieu of Support

[c] Validity of Provisions Providing for Minimum Duration of Support

[d] Validity in California of Settlements Made in Other States in Lieu of Support

[2] Prohibition Against Promises to Pay for Spouse's Domestic Services

[a] Origin of Rule

[b] Severability of Provisions Obligating One Spouse to Care for Another

[c] Modern Implications

§ 111.33 Prohibition Against Provisions Encouraging or Promoting Dissolution

[1] In General

[2] Exception for Cases in Which Objects of Marriage Are Utterly Destroyed

[3] Determinative Nature of Contract Terms

[4] Validity of Provisions Making Earnings and Accumulations of Each Spouse Separate Property

§ 111.34 Prohibition Against Contracts to Defraud Creditors

[1] Premarital Creditors

[2] Marital Creditors

[a] Contract Creditors

[b] Tort Creditors

§ 111.35 Continuing Validity of Contracts Containing Void Provisions

§ 111.36 Tax Considerations in Drafting Property Provisions

[1] Federal Gift Taxes

[2] Federal Estate Taxes

[3] I.R.C. § 1041 "Nonrecognition Rule" Inapplicable to Premarital Transfers for Income Tax Purposes

§§ 111.37-111.49 [Reserved]

§ 111.50 Validity in General of Provisions Relating to Children

§ 111.51 Specific Provisions Concerning Children

[1] Provisions Regarding Custody of Children on Dissolution

[2] Provisions Regarding Education of Children

[3] Provisions Regarding Children From Spouse's Previous Relationship

[a] Agreements to Adopt Child From Previous Relationship

[b] Provisions Governing Religious Education of Child From Previous Relationship

[c] Provisions for Support of Minor Child From Prospective Spouse's Previous Relationship

[d] Provisions for Minor Child From Previous Relationship on Death of Natural Parent

[e] Provision for Separate Property of Prospective Spouse to Descend to Children of Former Relationship

§ 111.52 Agreements Regulating Personal Relationship

[1] General Considerations

[2] Public Policy Limitations

[a] In General

[b] Provision for Termination of Marriage Without Court Action

[3] Remedy Problems

§§ 111.53-111.99 [Reserved]

Scope

§ 111.100 Drafting Guide to Provisions Regarding Property and Spousal Support

Scope

§ 111.101 Drafting Guide to Provisions Regarding Children

Scope

§§ 111.102-111.199 [Reserved]

§ 111.200 Complete Premarital Agreement--Parties' Interests in Property Acquired After Marriage to Be Separate

[1] Comment

[a] Use of Form

[b] No Presumed Confidential or Fiduciary Relationship Between Prospective Spouses

[c] Purpose Clause

[d] Disclosure of Assets and Enforceability of Agreement

[e] Children of Each Party

[f] Mutual Release of Marital Rights

[g] Acknowledgment

[2] FORM

Complete Premarital Agreement--Parties' Interests in Property Acquired After Marriage to Be Separate

§ 111.201 Complete Premarital Agreement--Separate Property Owned Before Marriage Will Remain Separate After Marriage

[1] Comment

[2] FORM

Complete Premarital Agreement--Separate Property Owned Before Marriage Will Remain Separate After Marriage

§§ 111.202-111.209 [Reserved]

§ 111.210 Provision That Parties' Separate Assets Will Become Community Assets

[1] Comment

[2] FORM

Provision That Parties' Separate Assets Will Become Community Assets

§ 111.211 Provision That Income Derived From Parties' Separate Assets Will Become Community Property, With Separate Corpus Unchanged

[1] Comment

[2] FORM

Provision That Income Derived From Parties' Separate Assets Will Become Community Property, With Separate Corpus Unchanged

§ 111.212 Provision for Transfer of Property Immediately After Marriage

[1] Comment

[2] FORM

Provision for Transfer of Property Immediately After Marriage

§ 111.213 Provision Granting One Party Exclusive Management and Control of Community Property

[1] Comment

[2] FORM

Provision Granting One Party Exclusive Management and Control of Community Property

§ 111.214 Waiver of Reimbursement for Separate Property Contributions to Acquisition of Community Property

[1] Comment

[2] FORM

Waiver of Reimbursement for Separate Property Contributions to Acquisition of Community Property

§ 111.215 Waiver of Reimbursement for Separate Property Contributions to Acquisition of Other's Separate

Property

[1] Comment

[2] FORM

Waiver of Right to Reimbursement for Separate Property Contributions

§§ 111.215-111.219 [Reserved]

§ 111.220 Provisions Regarding Responsibility for Joint Living Expenses

[1] Comment

[2] FORM

Provisions Regarding Responsibility for Joint Living Expenses

§ 111.221 Provision for Support of Minor Stepchildren

[1] Comment

[2] FORM

Provision for Support of Minor Stepchildren

§ 111.222 Provision Requiring One Party to Provide Annuity for Other Party in Event of First Party's Death During Marriage

[1] Comment

[2] FORM

Provision Requiring One Party to Provide Annuity for Other Party in Event of First Party's Death During Marriage

§ 111.223 Provision Requiring One Party to Provide Annuity for Other Party, With Payments Immediately After Marriage

[1] Comment

[2] FORM

Provision Requiring One Party to Provide Annuity for Other Party, With Payments Immediately After Marriage

§ 111.224 Provision Requiring One Party to Purchase Life Insurance in Favor of Other Party

[1] Comment

[2] FORM

Provision Requiring One Party to Purchase Life Insurance in Favor of Other Party

§ 111.225 Provision Requiring One Party to Change Life Insurance Policy Beneficiary in Favor of Other Party

[1] Comment

[2] FORM

Provision Requiring One Party to Change Life Insurance Policy Beneficiary in Favor of Other Party

§ 111.226 Waiver of Reimbursement for Community Contributions to Education or Training of One Party

[1] Comment

[2] FORM

Waiver of Reimbursement for Community Contributions to Education or Training of One Party

§ 111.227 Waiver of Claims Arising Out of Nonmarital Cohabitation ("Marvin" Waiver)

[1] Comment

[2] FORM

Premarital Agreement Provisions

§ 111.228 Waiver of Right to Seek Spousal Support on Termination of Marriage or Legal Separation

[1] Comment

[2] FORM--Outright Waiver of Support With No Offsetting Property

Premarital Agreement Provisions

[3] FORM--Waiver of Support With Provision for Transfer of Money or Other Property on Marriage

Premarital Agreement Provisions

§§ 111.229-111.239 [Reserved]

§ 111.240 Provision for Private Annex to Premarital Agreement

[1] Comment

[2] FORM

Provision for Private Annex to Premarital Agreement



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 111 PREMARITAL AGREEMENTS

33-111 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter discusses agreements that are entered into between unmarried persons in contemplation of marriage, and presents forms of agreement by which they may delineate their rights to property and other matters. The Legal Background sets forth the major considerations that must be taken into account in drafting an enforceable premarital agreement under current law (the Uniform Premarital Agreement Act) and contains a general checklist of provisions. Forms include complete forms of agreement that cover property rights and personal relations, along with an extensive compilation of optional provisions that may be included in a premarital agreement.

For forms of agreement concerning property and other matters that may be used by unmarried cohabitants who have no intention of marrying, see Chapter 110. For forms of agreement entered into after marriage by spouses who are not engaged in litigation to terminate their marriage, see Chapter 112. Agreements made on termination of marriage are discussed in Chapters 120- 125.



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§ 111.01 California Statutes

Contracts.

Capacity. *Civ. Code §§ 1556-1559.*

Consent. *Civ. Code §§ 1565-1590.*

Consideration. *Civ. Code §§ 1605-1615.*

Statute of frauds. *Civ. Code § 1624.*

Uniform Fraudulent Transfer Act. *Civ. Code § 3439 et seq.*

Rights and obligations during marriage.

General provisions. *Fam. Code § 700 et seq.*

Characterization of marital property. *Fam. Code § 760 et seq.*

Liability of marital property. *Fam. Code § 900 et seq.*

Management and control of marital property. *Fam. Code § 1100 et seq.*

Premarital agreements.

General provisions. *Fam. Code §§ 1500-1503.*

Uniform Premarital Agreement Act. *Fam. Code §§ 1600-1617.*

Division of property. *Fam. Code § 2500 et seq.*

Custody provisions. *Fam. Code § 3000 et seq.*

Support provisions.

Agreements regarding child and spousal support. *Fam. Code §§ 3580-3593.*

Child support. *Fam. Code § 3900 et seq.*

Spousal support. *Fam. Code § 4300 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 111.02 Federal Statutes

Treatment of proceeds of life insurance. *I.R.C. § 2042.*

Transfers for insufficient consideration. *I.R.C. § 2043.*

Transfers subject to gift tax. *I.R.C. § 2501.*

Estate tax marital deduction. *I.R.C. § 2056.*

Valuation of gifts. *I.R.C. § 2512.*

Gifts to spouse. *I.R.C. § 2523.*

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 111.07 Text References

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§ 111.10 Use of Term "Premarital Agreement"

Agreements made in contemplation of marriage between intended spouses and between intended spouses and third parties have been variously described as "marriage settlements," "marriage contracts," "premarital contracts," "premarital agreements," and "antenuptial agreements." These terms are similar in meaning, but differ to some extent according to origin, customary use, and scope of potential application [*see generally Fam. Code §§ 1500 et seq.* (general provisions), 1600 et seq. (referring to "premarital agreements," and constituting the Uniform Premarital Agreement Act, governing premarital agreements executed on or after January 1, 1986); former *Civ. Code § 5133 et seq.* (using term "marriage settlement" and governing formalities of premarital agreements made before January 1, 1986, per *Fam. Code § 1503*); *see also Prob. Code §§ 140 et seq.* (applicable to waivers, agreements, or property settlements made on or after January 1, 1985), 6560 et seq. (applicable for testators dying on or after January 1, 1985); former *Prob. Code §§ 70, 220* (applicable for testators dying before January 1, 1985)].

This chapter uses the term "premarital agreement" because of its consistency with the Uniform Premarital Agreement Act [*Fam. Code § 1600 et seq.*] and related general provisions [*see Fam. Code § 1500 et seq.*]. As defined under the Act, a "premarital agreement" is an agreement between prospective spouses that is made in contemplation of marriage and to be effective on marriage [*Fam. Code § 1610(a)*]; *see Fam. Code § 1613* (premarital agreement becomes effective on marriage)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 111.11 Controlling Law

The Uniform Premarital Agreement Act (the Act) [*Fam. Code § 1600 et seq.*] governs premarital agreements executed on or after January 1, 1986 [*Fam. Code §§ 1600, 1601*]. In addition, the provisions of *Family Code Sections 1500-1503* generally govern marital property agreements and premarital agreements [*Fam. Code § 1503*]. The Act is to be applied and construed to effectuate its general purpose to make uniform the law governing the subject matter it addresses among the states enacting it [*see Fam. Code § 3*; former *Civ. Code § 5301*; *see also* Stats. 1985, ch. 1315, § 4 (governing severability of any provisions of Uniform Premarital Agreement Act that might ever be found invalid)].

Former case and statutory law [*see former Civ. Code § 5133 et seq.*] still govern premarital agreements executed before January 1, 1986 [*see Fam. Code §§ 1503, 1601*], and are currently relevant primarily in the context of enforcing those agreements.

Individual provisions of the Act are discussed throughout this Part in the context of the requirements for making an enforceable agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 111.12 Summary of Requirements for Enforceable Agreements

In general, to be valid and enforceable, a premarital agreement executed on or after January 1, 1986 [*Fam. Code § 1601*], must meet all of the following requirements [*see Fam. Code §§ 1611, 1612, 1615*]:

- (1) Be written;
- (2) Be signed by both parties;
- (3) Be voluntarily entered into and not otherwise unconscionable or made without required disclosures of property and financial obligations; and
- (4) Have a lawful object, which may include any of the following matters [*Fam. Code § 1612(a)*]:
 - (a) The rights and obligations of each of the parties in any of the property of either or both of them, whenever and wherever acquired or located;
 - (b) The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
 - (c) The disposition of property on separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
 - (d) The making of a will, trust, or other arrangement to carry out provision of the agreement;
 - (e) The ownership rights in and disposition of the death benefit from a life insurance policy;

(f) The choice of law governing the construction of the agreement; and

(g) Any other matter, including the parties' personal rights and obligations, not violating public policy or a statute imposing a criminal penalty.

The parties may not may not adversely affect the right of a child to support in their premarital agreement [*Fam. Code* § 1612(b)].

The California Supreme Court has recognized the right of parties to provide for a waiver of spousal support following a termination of marriage in a premarital agreement, as discussed in § 111.32[1][a] [*In re Marriage of Pendleton & Fireman* (2000) 24 Cal. 4th 39, 49, 99 Cal. Rptr. 2d 278, 5 P.3d 839] . However, any provision in a premarital agreement regarding spousal support, including a waiver, is not enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement was signed, or if the provision is unconscionable *at the time of enforcement*. An otherwise unenforceable provision regarding spousal support may not become enforceable *solely* because the party against whom enforcement is sought was represented by independent counsel [*Fam. Code* § 1612(c)].

For further discussion of formal requirements for a premarital agreement, see §§ 111.20-111.22. For discussion of permissible matter in a premarital agreement related to property rights and support of the parties, see §§ 111.30-111.35. For discussion of issues related to children, as well as other personal rights, see §§ 111.50-111.52.

Even if it does not meet all of the requirements described above for an enforceable premarital agreement, a written agreement made before marriage may be an effective waiver of a surviving spouse's inheritance rights if it meets the requirements of the Probate Code for such waivers [*Estate of Will* (2009) 170 Cal. App. 4th 902, 907-908, 88 Cal. Rptr. 3d 502 ; see *Prob. Code* §§ 140 et seq., 21611(c)]. For a full discussion of spouses' waiver of inheritance rights, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, Ch. 25, *Succession to Marital Property* (Matthew Bender 2d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 111.13 Revocation and Modification

Pursuant to the Uniform Premarital Agreement Act, a premarital agreement may be amended or revoked after marriage only by means of a written agreement, signed by the parties. The amended agreement, or the revocation, is enforceable without consideration [*Fam. Code § 1614*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 111.14 Enforcement Issues

[1] Date of Execution Determines Applicable Law

Because the Uniform Premarital Agreement Act expressly applies only with respect to premarital agreements executed on or after January 1, 1986, and does not affect the validity of such agreements executed before that date, the date of execution becomes of prime importance in determining the law applicable to the agreement for enforcement purposes [see *Fam. Code* §§ 1503 (validity and effect of agreements made before Jan. 1, 1986, remains governed by former law), 1601 (current law applies to premarital agreement executed on or after Jan. 1, 1986)]. Although there are many similarities between current and former law with respect to the making of an enforceable premarital agreement, there are differences that must be kept in mind [compare *Estate of Wamack* (1955) 137 Cal. App. 2d 112, 115, 289 P.2d 871 (under prior law, consideration for agreement was required, but promise of marriage subsequently carried out was sufficient consideration), with *Fam. Code* § 1611 (under current law, premarital agreement is enforceable without consideration)]. These differences are pointed out in the context of the formal requirements for an enforceable agreement, as discussed in §§ 111.20-111.22.

[2] Enforcement Proceedings and Statute of Limitations

[a] Determining Agreement's Validity in Dissolution Proceedings

If the validity of a premarital agreement is at issue in a dissolution proceeding, counsel may move to bifurcate or sever the issue of validity of the agreement and have the validity issue adjudicated first [see *Code Civ. Proc.* § 1048(b); *Cal. Rules of Ct.*, Rule 5.175; see, e.g., *In re Marriage of Iverson* (1992) 11 Cal. App. 4th 1495, 1497, 15 Cal. Rptr. 2d 70; *In re Marriage of Garrity & Bishton* (1986) 181 Cal. App. 3d 675, 681, 226 Cal. Rptr. 485]. Once a determination of the validity of the agreement has been made, the determination of other property issues may be simplified. The burden of proof that a premarital agreement is invalid is on the party who asserts its invalidity [see *In re Marriage of Iverson* (1992) 11 Cal. App. 4th 1495, 1502, 15 Cal. Rptr. 2d 70 (citing, in part, *Evid. Code* § 500)].

PRACTICE TIP:

Whether to seek bifurcation of the validity issue when the enforceability of a premarital agreement is

being challenged, is not always as simple a decision as it seems. For tactical reasons, one or both counsel may sometimes prefer to leave the validity issue to be determined along with all other issues of property and support, hoping that considerations of equity may bootstrap one or the other items by having them tried concurrently. On the other hand, the court often favors a bifurcation, not only because it can simplify the evidence and decisions to follow, but also because it might assist in promoting settlement once the parties know clearly where they stand on the matter of the premarital agreement. *Commentary by Ira H. Lurvey*

For further discussion of bifurcation of the trial of various issues in a dissolution proceeding, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Chapter 111, *Pretrial Procedures*. For discussion of the tolling of the statute of limitations during marriage concerning claims for relief under a premarital agreement, see [c] [ii], *below*.

[b] Civil Proceedings in General

Parties may bring a general civil action to enforce the terms of a premarital agreement, though such actions are not common. With regard to obtaining damages, few reported cases have concerned actions to recover damages for alleged breaches of premarital agreements. Usually, the plaintiff in actions on such an agreement has sought either restitution of property conveyed under the agreement, restoration of rights waived under it, or specific performance of duties imposed on the other party by the agreement, such as the duty to convey title to property [*cf. Hall v. Hall* (1990) 222 Cal. App. 3d 587-588, 222 Cal. App. 3d 578, 588, 271 Cal. Rptr. 773 (terms of oral agreement were sufficiently certain to allow specific performance; and enforcement of agreement was not inequitable to contesting party)]. However, the Supreme Court has held that when a covenant in a premarital agreement is breached, the aggrieved person has the right to recover damages for the breach [*Estate of Warner* (1914) 168 Cal. 771, 776, 145 P. 504 ; *cf. O'Brien v. O'Brien* (1925) 197 Cal. 577, 588-589, 241 P. 861 (measure of damages in action by surviving spouse as survivor against representative of deceased spouse's estate is value of property agreed to be devised or bequeathed)]. For discussion of the statute of limitations in actions based on breach of contract, specific performance, and rescission, see [c], *below*.

[c] Statute of Limitations

[i] Tolling of Statute of Limitations During Marriage

Under current law, any statute of limitation applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. Equitable defenses limiting the time for enforcement, however, including laches and estoppel, are available to either party [*Fam. Code* § 1617].

PRACTICE TIP:

Because a challenge to the validity of a premarital agreement usually occurs concurrently with a marital dissolution, so that the alleged breach and enforcement occur at about the same time, the issue of limitations as a bar to attack does not usually arise. However, in a long term marriage, an issue worth raising is whether the doctrine of laches can be invoked on behalf of the spouse defending the agreement. He or she can argue that, but for the apparent acceptance of the agreement by the other spouse throughout the years of marriage, the defending spouse would have terminated the relationship long ago. *Commentary by Ira H. Lurvey*

[ii] Action for Breach of Contract

An action for breach of a written premarital agreement must be brought within four years of the time that the cause of action accrues [*Code Civ. Proc.* §§ 312, 337]. If the agreement is not in writing, but the aggrieved party can prove an exception to the statute of frauds so the suit is not barred on that ground [*see* [3], *below*], the action for breach must be commenced within two years of the time that the cause of action accrues [*Code Civ. Proc.* §§ 312, 339]. For discussion

of tolling provisions during marriage under the Uniform Premarital Agreement Act, see [i], *above* [Fam. Code § 1617].

[iii] Action for Specific Performance

An action for specific performance of a written premarital agreement must be commenced within four years of the time that the cause of action accrues. If the premarital agreement is oral, but the plaintiff can prove some exception to the statute of frauds so that the suit is not barred on that ground [see [3], *below*], the action for specific performance of the oral agreement must be begun within two years of the accrual of the cause of action [Code Civ. Proc. §§ 312, 339]. For discussion of tolling provisions during marriage under the Uniform Premarital Agreement Act, see [i], *above* [Fam. Code § 1617].

[iv] Action Based on Rescission

An action based on the rescission of an agreement in writing must be begun within four years from the date on which the facts that entitle the aggrieved party to rescind occurred [Code Civ. Proc. § 337]. An action based on the rescission of an agreement not in writing must be begun within two years [Code Civ. Proc. § 339]. When the ground for rescission is fraud or mistake, however, the time does not begin to run until the aggrieved party discovers the facts constituting fraud or mistake [Code Civ. Proc. §§ 337, 339].

Laches, in some cases, may bar an action for rescission before the statute of limitations has run when the aggrieved party's delay in seeking rescission is substantially prejudicial to the other party [see Civ. Code § 1693]. For discussion of tolling provisions during marriage under the Uniform Premarital Agreement Act, see [i], *above* [Fam. Code § 1617].

[3] Statute of Frauds (Writing Requirement)

[a] Effect of Failure to Reduce Premarital Agreement to Writing

A premarital agreement is required to be in written form [see Fam. Code § 1611]. In general, an oral premarital agreement is invalid for violation of the writing requirement, loosely referred to as the "statute of frauds," unless the party seeking to enforce the agreement can establish one of the exceptions to the statute of frauds summarized in [b], *below*.

However, as is true of other agreements in violation of the statute of frauds, an oral premarital agreement is not invalid in the sense that it is void, but instead merely is *voidable*. The statute of frauds relates to remedy only, and does not otherwise affect the validity of the oral agreement. Such an agreement, if otherwise valid, remains so, and the sole effect of the statute is to render the agreement unenforceable by one party against the other who abandons or repudiates it [O'Brien v. O'Brien (1925) 197 Cal. 577, 586, 241 P. 861].

The nature of the statute of frauds applicable to premarital agreements is in marked contrast to the specific statutory requirement of a writing for *postnuptial* transmutation agreements (changing the characterization of property as separate or community property). A postnuptial transmutation agreement is not valid unless a written declaration expressly changing the character of the property is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected [Fam. Code § 852(a); *In re Estate of MacDonald* (1990) 51 Cal. 3d 262, 267-268, 272-273, 272 Cal. Rptr. 153, 794 P.2d 911; *In re Marriage of Leni* (2006) 144 Cal. App. 4th 1087, 1095-1096, 50 Cal. Rptr. 3d 886 (escrow instruction that proceeds of sale of residence "be split 50/50" does not transmute proceeds from community to separate property, because it does not include express declaration that character of property is being changed)]. This requirement is more than an evidentiary standard; it is an essential element of any postnuptial transmutation, and it is not subject to implied exceptions that may apply in the context of the statute of frauds that governs premarital agreements [*In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1106-1111, 32 Cal. Rptr. 3d 471, 478-482, 116 P.3d 1152 ("[W]e see no evidence the Legislature intended to incorporate traditional exceptions to the statute of frauds into [Fam. Code § 852, governing interspousal transmutation agreements]. Indeed, the Commission

Comment ... supports the *opposite* proposition ... [P]remarital contracts are not construed and enforced under the same standards as interspousal agreements." [emphasis in original]]. For detailed coverage of postnuptial transmutation agreements, see Ch. 112, *Postnuptial Agreements* .

[b] Circumstances Rendering Oral Premarital Agreement Enforceable

Prior to the enactment of the Uniform Premarital Agreement Act, which applies with respect to agreements executed on or after January 1, 1986 [*Fam. Code* §§ 1503, 1601], a substantial body of law developed concerning circumstances that would permit enforcement of an oral premarital agreement by "taking the case out" of the statute of frauds. Although the Uniform Premarital Agreement Act does not expressly refer to traditional statute of frauds exceptions to the writing requirement it imposes, one court has held that the act is a statute of frauds and the exceptions to the statute recognized under the former law are equally applicable to the new act [*Hall v. Hall* (1990) 222 Cal. App. 3d 578, 585, 587, 271 Cal. Rptr. 773 ; cf. *In re Marriage of Shaban* (2001) 88 Cal. App. 4th 398, 406-408, 105 Cal. Rptr. 2d 863 (parol evidence cannot be used to provide material terms omitted in written agreement)]. Thus, it appears that the following circumstances may take an oral premarital agreement out the statute of frauds and render the agreement enforceable, regardless of when the agreement was executed [see generally *Hall v. Hall* (1990) 222 Cal. App. 3d 578, 585, 587, 271 Cal. Rptr. 773 (scope of statute of frauds exceptions applicable under Uniform Premarital Agreement Act)]:

(1) The subsequent execution of a written memorandum of the essential terms of the agreement, signed by the party to be charged [see *Civ. Code* § 1624; *Ayoob v. Ayoob* (1946) 74 Cal. App. 2d 236, 242-243, 168 P.2d 462] ;

(2) The complete execution of the agreement on both sides [*Realty Corp. of Am., Inc. v. Burton* (1958) 162 Cal. App. 2d 44, 57, 327 P.2d 948 ; see *Civ. Code* § 1661; see also *In re Marriage of Garrity & Bishton* (1986) 181 Cal. App. 3d 675, 685, 226 Cal. Rptr. 485 ; *Estate of Breschini* (1953) 120 Cal. App. 2d 154, 156, 260 P.2d 804 ; *La Liberty v. La Liberty* (1932) 127 Cal. App. 669, 670, 16 P.2d 681] , except if the transfer of property after marriage under an oral premarital agreement works a *fraud* on an existing creditor [*Sudbrock v. Kroener* (1934) 136 Cal. App. 624, 631-632, 29 P.2d 435 ; cf. *McKnight v. Faber* (1986) 185 Cal. App. 3d 639, 645-646, 230 Cal. Rptr. 57 (action to set aside transfer made under terms of marital termination agreement; disapproved on another point in *Silberg v. Anderson* (1990) 50 Cal. 3d 205, 212, 266 Cal. Rptr. 638, 786 P.2d 365)];

(3) Confirmation or affirmation of the terms of the agreement by words or conduct of the parties after the marriage [see, e.g., *Estate of Piatt* (1947) 81 Cal. App. 2d 348, 351, 183 P.2d 919 ; see *In re Marriage of Vanderbeek* (1986) 177 Cal. App. 3d 224, 230, 222 Cal. Rptr. 832 (agreement to "share and share alike" all property, including husband's stock and stock options acquired before marriage); *Woods v. Security-First Nat'l Bank* (1956) 46 Cal. 2d 697, 701-702, 299 P.2d 657] ;

(4) The complete execution of one party's obligations [see *Martin v. Pritchard* (1921) 52 Cal. App. 720, 724, 199 P. 846 ; see also *Braden v. Braden* (1960) 178 Cal. App. 2d 481, 485, 3 Cal. Rptr. 120] ; or

(5) Partial performance of the agreement by the party seeking to enforce it [see *Hall v. Hall* (1990) 222 Cal. App. 3d 578, 585-587, 271 Cal. Rptr. 773 (wife's premarital acts of quitting work and applying for early Social Security along with her gift after marriage of promised funds were partial performance of oral agreement for life estate in husband's residence); see also *O'Brien v. O'Brien* (1925) 197 Cal. 577, 586-587, 241 P. 861 ; *Stevenson v. Pantaleone* (1933) 131 Cal. App. 401, 405-408, 21 P.2d 703 ; *Hughes v. Hughes* (1920) 49 Cal. App. 206, 210, 193 P. 144 ; *Trout v. Ogilvie* (1919) 41 Cal. App. 167, 171-173, 182 P. 333] .

[c] Estoppel to Assert Statute of Frauds

[i] Fraud Preventing Reduction of Agreement to Writing

When a promisor by some fraud or deceit prevents an oral premarital agreement from being reduced to writing, thereby inducing an irretrievable change of position on the part of the promisee, the party committing the fraud may be estopped from asserting the statute of frauds as a defense to an action on the oral agreement [*see Peek v. Peek (1888) 77 Cal. 106, 110, 19 P. 227*] .

The California Supreme Court has explained that although actual fraud in inducing a prospective spouse to enter into a marriage may be such as to estop the guilty party from asserting the statute of frauds as a defense to an action on an oral premarital agreement, the fraud must be more than mere omission to put the agreement into writing before the marriage and failure to perform it thereafter. Instead, the plaintiff spouse clearly must have been induced through deceit, false statement, or concealment of the defendant to waive a written agreement and rely on promises in parol before entering into the marriage relation [*see Peek v. Peek (1888) 77 Cal. 106, 110, 19 P. 227*] .

[ii] Unconscionable Injury or Unjust Enrichment

The California Supreme Court has suggested indirectly that a party may be estopped from asserting the statute of frauds to prevent the enforcement of an oral premarital agreement if the promisee would suffer unconscionable injury or the promisor would be unjustly enriched if the oral agreement were not enforced [*see Estate of Baglione (1966) 65 Cal. 2d 192, 197-198, 53 Cal. Rptr. 139, 417 P.2d 683*] . The mere act of entering into a marriage is not considered a change of position that can amount to unconscionable injury [*see generally Hall v. Hall (1990) 222 Cal. App. 3d 578, 586, 271 Cal. Rptr. 773 ; see, e.g., Hughes v. Hughes (1920) 49 Cal. App. 206, 214, 193 P. 144*] . Other significant changes of position in reliance on an oral premarital agreement, however, might prove sufficient detriment to the promisee or benefit to the promisor to estop the promisor from asserting the statute of frauds as a defense to enforcement of the agreement [*see, e.g., Hall v. Hall (1990) 222 Cal. App. 3d 578, 586-587, 271 Cal. Rptr. 773* (contemplating marriage and pursuant to oral agreement, woman quit her job and applied for early payment of Social Security benefits, then moved in with fiancée and, on marriage, financed a trip and provided other funds aggregating some \$10,000, pursuant to agreement); *see also Estate of Sheldon (1977) 75 Cal. App. 3d 364, 374, 142 Cal. Rptr. 119*] .

[4] Effect of Void Marriage

Under current law, if a marriage is determined to be void, an agreement that otherwise would have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result [*Fam. Code § 1616*].

[5] Object of Agreement and Potential Remedy Problems

A premarital agreement must have a lawful object in order for its provisions to be valid [*see generally Fam. Code § 1612*]. Enforcement of the agreement may be denied if one or more of its provisions violates public policy or a statute that imposes a criminal penalty, or adversely affects the right of a child to support. While some provisions of an agreement that are invalid may not cause the entire agreement to fail, a court may invalidate an entire agreement if the invalid provision is "inseparably linked" to that provision [*see In re Marriage of Dawley (1976) 17 Cal. 3d 342, 349-350, 353, 131 Cal. Rptr. 3, 551 P.2d 323 ; see also § 111.35*].

Matters that have traditionally fallen within the scope of the "public policy" prohibition, such as payment for domestic services, or provisions that "encourage or promote dissolution" or defraud creditors, are discussed in §§ 111.32-111.34. Other kinds of provisions, primarily those that contemplate the rendition of personal services, may also raise public policy questions, or, even if not invalid on statutory or policy grounds, may not be amenable to remedies such as specific performance [*see § 111.52*]. When drafting a premarital agreement, counsel must examine each provision desired by the client and consider the potential enforcement issues that surround it.

PRACTICE TIP:

The spectrum of issues affecting enforceability of a premarital agreement includes: whether the agreement in fact only benefits one party and confers no rights on the other; whether counsel for the noninitiating party was truly independent; and how long in advance of the marriage the agreement was presented, negotiated, and signed. A one-sided agreement presented to an unsuspecting party on the eve of his or her wedding, as a condition of going forward with the marriage, is obviously vulnerable [*see Fam. Code § 1615(c)(2)* (seven-day rule)]. *Commentary by Diana Richmond*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Duties & RightsProperty RightsPremarital AgreementsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsEnforcementFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsRequirementsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 111 PREMARITAL AGREEMENTS
PART II. LEGAL BACKGROUND
A. Overview of Premarital Agreements

33-111 California Legal Forms--Transaction Guide §§ 111.15-111.19

[Reserved]

§§ 111.15[Reserved]



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 111 PREMARITAL AGREEMENTS
PART II. LEGAL BACKGROUND
B. Formal Requirements for Enforceable Agreements

33-111 California Legal Forms--Transaction Guide § 111.20

§ 111.20 Essential Contractual Elements for Premarital Agreement

[1] Contractual Capacity

By statute, all persons are capable of contracting except minors, persons of unsound mind, and persons deprived of civil rights [*Civ. Code § 1556*]. Although minors ordinarily have limited contractual capacity [*see Civ. Code § 1557; Fam. Code §§ 6700-6713*], a minor who is emancipated or otherwise capable of contracting marriage may make a valid premarital agreement [*Fam. Code § 1501; see Fam. Code § 1503; former Civ. Code § 5137* (applicable to pre-1986 agreements)].

A minor who otherwise lacks the requisite capacity may become capable of contracting marriage by obtaining the written consent of his or her parent or guardian, and by obtaining court approval of the marriage [*see Fam. Code § 302*]. For discussion of court approval of a marriage involving a minor, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, Ch. 10, *Validity and Legal Effects of Marriage* (Matthew Bender 2d ed.).

[2] Consent

[a] In General

The second major essential element for the existence of a valid premarital agreement is the parties' consent [*see Civ. Code § 1550*]. The consent of the parties to a contract must be free, mutual, and communicated by each to the other [*Civ. Code § 1565*]. Under the Uniform Premarital Agreement Act [*Fam. Code § 1600 et seq.*], operative January 1, 1986 and applicable to agreements executed on or after that date [*Fam. Code § 1601*], a premarital agreement is not enforceable if the party against whom enforcement is sought proves that he or she did not execute the agreement voluntarily [*see Fam. Code § 1615(a)(1)(c)*]. The agreement also is not enforceable if its terms are unconscionable [*Fam. Code § 1615(a)(2); see [d], below*].

An apparent consent is not real or free when obtained through duress, menace, fraud, undue influence, or mistake [*see Civ. Code §§ 1567-1579*]. A consent that is not free does not render an agreement absolutely void, but renders the

agreement subject to rescission [see *Civ. Code* § 1566]

Most of the cases in which defective consent to a premarital agreement has been an issue have involved undue influence exercised by one prospective spouse over the other, combined with either active misrepresentation of the nature and effect of the agreement being signed or a failure to disclose the extent of assets in which marital rights are being waived. These and related matters are discussed in the following subsections.

[b] No Confidential Relationship Between Intended Spouses

Although most other states impose fiduciary duties on those contracting with each other in contemplation of marriage [see Branca & Steinberg, *Antenuptial Agreements Under California Law: An Examination of the Current Law and In re Marriage of Dawley*, 11 U.S.F. L. Rev. 317, 333 n.78 (1977)], no confidential relationship automatically exists between persons contemplating marriage in California. The parties to a premarital agreement do not owe a fiduciary duty to each other as such. Rather, they make their premarital agreement at arm's length [see, e.g., *Fernandez v. Fernandez* (1961) 194 Cal. App. 2d 782, 790-791, 15 Cal. Rptr. 374]. This principle stands in contrast to the rule that, in transactions between themselves, husbands and wives in California are subject to the general rules governing fiduciary relationships that control the actions of persons having confidential relations with each other, which impose a duty of the highest good faith and fair dealing on each spouse [*Fam. Code* § 721; but see *Prob. Code* §§ 143, 144, 146, 16040; see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, ch. 24, *Management and Control of Property* (Matthew Bender 2d ed.); see also *In re Marriage of Bonds* (2000) 24 Cal. 4th 1, 6, 99 Cal. Rptr. 2d 252, 5 P.3d 815 (voluntariness of parties to premarital agreement was not intended by Legislature to be examined in light of strict fiduciary duties, like those imposed on married persons)].

Because the parties to a premarital agreement are not considered to be in a confidential relationship with each other, courts may be less prone to find that the consent of either to the agreement was obtained through the exercise of undue influence or oppressive conduct by the other. Undue influence may be found even when the parties are not in a confidential relationship, however, if one party takes a grossly oppressive and unfair advantage of the other's necessity or distress [see, e.g., *In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 355, 131 Cal. Rptr. 3, 551 P.2d 323]. Furthermore, a confidential relationship may arise in some circumstances between nonmarital cohabitants [*Marvin v. Marvin* (1976) 18 Cal. 3d 660, 682 n.22, 134 Cal. Rptr. 815, 557 P.2d 106]. Thus, if the parties to a premarital agreement were living together at the time the agreement was made, an argument may be made that the agreement should be evaluated in light of the principles governing persons in a confidential relationship. To avoid any suggestion of overreaching, care should be exercised in the drafting and execution of premarital agreements between those who already live together at the time the agreement is prepared and executed.

[c] Undue Influence

[i] Definition

Under the general statutory provision defining undue influence, oppressive advantage, and unfairness, undue influence in the negotiation and execution of a premarital agreement may be found if any of the following circumstances is present [*Civ. Code* § 1575]:

- (1) If a person in whom confidence is reposed by another, or who holds a real or apparent authority over another, uses that confidence or authority to gain an unfair advantage;
- (2) If a person takes an unfair advantage of another's weakness of mind; or
- (3) If a person takes a grossly oppressive and unfair advantage of another's necessity or distress.

[ii] Evidence of Undue Influence

In determining whether undue influence was exercised by one party over the other to procure consent to a premarital agreement, the courts attempt to determine whether equality of bargaining power existed between the parties at the time the agreement was executed [*In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 355, 131 Cal. Rptr. 3, 551 P.2d 323] . A court likely will find undue influence in connection with the execution of a premarital agreement if one or a combination of the following factors appears:

- (1) Extreme disparities between the parties in age, knowledge, or sophistication [see *Estate of Nelson* (1964) 224 Cal. App. 2d 138, 141-144, 36 Cal. Rptr. 352] ;
- (2) Substantial differences between the parties in their respective degrees of business expertise [Estate of Nelson (1964) 224 Cal. App. 2d, 138, 141-144 , 36 Cal. Rptr. 352 ; see *La Liberty v. La Liberty* (1932) 127 Cal. App. 669, 672, 16 P.2d 681] ;
- (3) Vulnerability of the party claiming undue influence at the time the agreement was executed due to illness, poverty, pregnancy, or similar circumstances [see *In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 355, 131 Cal. Rptr. 3, 551 P.2d 323] ; or
- (4) Lack of representation for the party claiming undue influence by independent counsel during the preparation, drafting, and signing of the premarital agreement, especially when the other party was represented [see, e.g., *Estate of Sayegh* (1953) 118 Cal. App. 2d 327, 331, 257 P.2d 995] .

In cases in which premarital agreements have been found unenforceable because one party used undue influence to induce the other party to execute the agreement, often a variety of factors, including fraud and misrepresentation, as well as undue influence, have prompted courts to invalidate the agreements [see, e.g., *Estate of Nelson* (1964) 224 Cal. App. 2d 138, 141-144, 36 Cal. Rptr. 352 (advantage gained by husband over prospective wife was so great, and disparities in their ages and business experience was so significant, as to give rise to presumption of fraud and undue influence; and inadequacy of consideration supported finding of fraud); cf. *In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 355, 131 Cal. Rptr. 3, 551 P.2d 323 (no undue influence tainted agreement, despite wife's unplanned pregnancy and fear of losing her job, when husband, threatened with paternity suit and likely loss of his position as a result, was in no position to take advantage of her distress, and both parties were educated and experienced professionals)].

[iii] Effect of Undue Influence

A premarital agreement is invalid, and the court will refuse to enforce it, if it was executed as the result of undue influence by one party on the other. The issue of whether undue influence has been exerted is a question of fact [*In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 354, 131 Cal. Rptr. 3, 551 P.2d 323] .

[d] Voluntariness and Unconscionability

Under the Uniform Premarital Agreement Act [*Fam. Code § 1600 et seq.*], operative on January 1, 1986, and applicable to agreements executed on or after that date [*Fam. Code § 1601*], a premarital agreement is not enforceable if the party against whom enforcement is sought proves either of the following [*Fam. Code § 1615(a)*; see *Estate of Gagnier* (1993) 21 Cal. App. 4th 124, 129-130, 26 Cal. Rptr. 2d 128 (premarital agreement found valid under former *Civ. Code § 5315*, now *Fam. Code § 1615*)]:

- (1) That party did not execute the agreement voluntarily; or
- (2) The agreement was unconscionable when it was executed and, before execution of the agreement, all of the following applied to that party:

(a) He or she was not provided a fair, reasonable, and full disclosure of the property or financial obligations of the other party;

(b) He or she did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(c) He or she did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

An issue of unconscionability must be decided by the court as a matter of law [*Fam. Code § 1615(b)*].

In addition, on and after January 1, 2002, in order for a court to find that a premarital agreement was entered into voluntarily, it must find in the writing or on the record all of the following conditions [*Fam. Code § 1615(c)*]:

- The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel;

- The party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed;

- The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished must be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party must, on or before the signing of the premarital agreement, execute a document declaring that he or she received the information required by this paragraph and indicating who provided that information;

- The agreement and the writings executed pursuant to the above requirements were not executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement; and

- Any other factors the court deems relevant.

[e] Validity of Waiver of Property Rights

Parties to a premarital agreement are generally permitted under the Uniform Premarital Agreement Act to waive property rights that they might otherwise acquire in the future as a result of marriage [*see Fam. Code § 1612(a)*]. The enforceability of a waiver, like the enforceability of the agreement in general, depends on various factors, which are summarized in *Family Code Section 1615* (see [d], above).

Although unmarried persons who contract with each other in contemplation of marriage are not held to be in a confidential relationship under California law [*Fernandez v. Fernandez* (1961) 194 Cal. App. 2d 782, 790, 15 Cal. Rptr. 374], the courts are particularly careful in their scrutiny of the circumstances surrounding the execution of premarital agreements if charges of fraud, misrepresentation, or undue influence are made [*see, e.g., Estate of Nelson*].

(1964) 224 Cal. App. 2d 138, 142-143, 36 Cal. Rptr. 352]. Scrutiny for possible unfairness is particularly acute when a premarital agreement has the effect of depriving one spouse, by waiver, of the normal incidents of marriage, including inheritance rights, the right to a probate homestead, and the right to a family allowance [see *Estate of Cantor* (1974) 39 Cal. App. 3d 544, 548, 114 Cal. Rptr. 160 (decided under former Prob. Code §§ 70, 220); Prob. Code § 140 et seq.; but see Prob. Code § 147(c) (Prob. Code § 140 et seq. have no effect on validity of any premarital property agreement)].

Under California probate law as it existed before 1985, and as still pertains to waivers made before 1985 [see Prob. Code § 147(b)], when one prospective spouse has waived valuable rights otherwise flowing from the married state (such as the right to a probate homestead or to a family allowance) [see Prob. Code §§ 6520-6528 (probate homestead), 6540-6545 (family allowance)], the waiver of those rights must have been "knowing" [see *Estate of Cantor* (1974) 39 Cal. App. 3d 544, 548-549, 114 Cal. Rptr. 160]. For a waiver of spousal rights to be characterized as "knowing," the spouse making the waiver should have been aware of the nature and extent of the other spouse's property and expectancies, the extent of his or her potential interest in that property under statutory guidelines, and the legal effect of the waiver agreement. The fact that one party to a premarital agreement can assert that he or she was not aware of the nature and extent of the rights being waived may constitute grounds for a court's refusal to enforce the agreement [see *Estate of Sayegh* (1953) 118 Cal. App. 2d 327, 331, 257 P.2d 995].

Waivers executed on or after January 1, 1985, regarding property rights as a surviving spouse are enforceable if (1) contained in a valid premarital agreement that is enforceable under the Uniform Premarital Agreement Act [see Fam. Code § 1600 et seq.], or (2) contained in a signed writing (executed on or after January 1, 1985) that meets the requirements of Probate Code Section 140 et seq., relating to the waiver of spousal rights [see *Estate of Will* (2009) 170 Cal. App. 4th 902, 907-908, 88 Cal. Rptr. 3d 502 (agreement that does not meet requirements for enforceability under Uniform Premarital Agreement Act may nevertheless be effective waiver of surviving spouse's inheritance rights if it meets requirements of Prob. Code § 140 et seq.); *Estate of Gagnier* (1993) 21 Cal. App. 4th 124, 128-131, 26 Cal. Rptr. 2d 128]. If the waiver is contained in a premarital agreement, it can be upheld under either the Uniform Premarital Agreement Act or Probate Code Section 140 et seq., each of which is sufficient to validate the waiver [see *Estate of Gagnier* (1993) 21 Cal. App. 4th 124, 128-131, 26 Cal. Rptr. 2d 128 (validity of premarital agreement signed before or after January 1, 1985, not affected by Prob. Code § 140 et seq. insofar as they affect rights listed in Prob. Code § 141(a))]. Waivers not contained in a premarital agreement must be judged under Probate Code § 140 et seq. [Prob. Code § 147; *Estate of Gagnier* (1993) 21 Cal. App. 4th 124, 128-131, 26 Cal. Rptr. 2d 128], which are discussed more fully in Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, Ch. 25, *Succession to Marital Property* (Matthew Bender 2d ed.).

To help avert later claims that parties to a premarital agreement waived valuable rights without understanding the import of their actions, it is recommended that counsel prepare an inventory of all assets owned and liabilities owed by each party at the time of contracting and append the inventories to the agreement. For illustrative disclosure provisions, see the forms in §§ 111.200 and 111.201.

As a further consideration, note that while the Act may otherwise permit parties to a premarital agreement to generally waive property rights [see Fam. Code § 1612(a)], the provisions of law governing particular types of benefits must be examined to determine the effectiveness of a premarital waiver. For example, a nonparticipant in an employee benefit plan subject to the Employee Retirement Income Security Act (ERISA) cannot by a premarital agreement effectively waive the right to receive a joint and survivor annuity or death benefits [see I.R.C. §§ 401(a)(11), 417; 29 U.S.C. § 1055(c); Treas. Reg. § 1.401(a)-20, Q & A 28, 32; *Hurwitz v. Sher* (S.D.N.Y. 1992) 789 F. Supp. 134; *Zinn v. Donaldson Co., Inc.* (D. Minn. 1992) 799 F. Supp. 69]. Accordingly, in that type of situation, even if the parties include in their agreement a provision requiring that a waiver of rights to the benefits be executed following marriage, counsel should advise the parties to wait until after marriage to *actually execute* the statutorily regulated written waiver (or consent to waiver) of the benefits. For a general discussion of spousal rights to ERISA pension benefits, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, Ch. 21, *Special Property Characterization and Division Issues* (Matthew Bender 2d ed.).

For a discussion of spousal support waivers, which are not per se unenforceable, see § 111.32[1].

[f] Advisability of Independent Counsel

One of the factors the courts consider in determining whether the parties had equality of bargaining power at the time a premarital agreement was executed is whether each party was represented and advised by independent counsel [see *In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 347, 131 Cal. Rptr. 3, 551 P.2d 323]. Representation by independent counsel provides good evidence that neither party imposed on the other, although independent representation is not necessarily a prerequisite to a finding of no undue influence [see, e.g., *La Liberty v. La Liberty* (1932) 127 Cal. App. 669, 674, 16 P.2d 681 (under circumstances, intended wife, an experienced real estate person, was not in need of independent legal counsel to advise her of legal effect of joint tenancy deed delivered to herself and her husband during marriage in performance of premarital agreement)].

Lack of representation by independent counsel for one party is just one factor to be considered in determining whether a premarital agreement was entered into voluntarily [*In re Marriage of Bonds* (2000) 24 Cal. 4th 1, 99 Cal. Rptr. 2d 252, 5 P.3d 815]. However, Fam. Code § 1615(c) now provides that a premarital agreement *shall be deemed* to be involuntary unless the court makes a finding that all conditions set forth in that statute have been met. Among these are the requirements that (1) the party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel; and (2) the party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed [Fam. Code § 1615(c)]. For discussion of additional requirements, see [d], *above*.

In addition, Fam. Code § 1612(c) sets forth several fairness conditions that must be present for spousal support waivers to be enforceable in premarital agreements. Under this section, any provision in a premarital agreement regarding spousal support, including but not limited to a waiver, is not enforceable if the party against whom the support provision is enforced was not represented by independent counsel at the time the agreement was signed, or if the provision is unconscionable *at the time of enforcement*. However, an otherwise unenforceable support provision does not become enforceable *solely* because the party against whom enforcement is sought was represented by independent counsel [Fam. Code § 1612(c)].

Conflict of interest problems arise if one attorney represents both prospective spouses in the negotiation and drafting of a premarital agreement because the interests of the prospective spouses are adverse to each other, especially when a waiver of marital property rights is involved [see Cal. Rules Prof. Conduct, Rule 3-310; see also Gallo, *Traps in Community Property Agreements*, 28 U.S.C. Tax Inst. 79 (1976)]. Therefore, it is not advisable for counsel to represent both parties to a premarital agreement. While one attorney may assist both parties in drafting the agreement, the drafting attorney should then refer the parties to independent counsel for review of and advice concerning the agreement. For an illustrative provision stating that each party was represented by independent counsel and a form of certification by the attorney for each party to a premarital agreement, see the *forms in* §§ 111.200 and 111.201.

[3] Lawful Object

A premarital agreement must have a lawful object to be valid. The Uniform Premarital Agreement Act [Fam. Code § 1600 *et seq.*], which applies to agreements executed on or after January 1, 1986 [Fam. Code § 1601], provides an expansive scope of permissible subject matter, as *set forth in* § 111.12 [Fam. Code § 1612]. Enforceable provisions of premarital agreements relating to property, as well as public policy limitations on these agreements, are discussed in §§ 111.30-111.35. Provisions of premarital agreements relating to children are *covered in* §§ 111.50 and 111.51, and provisions that purport to regulate the parties' personal relations are discussed in § 111.52.

[4] Need for Consideration**[a] No Consideration Under Current Law**

Premarital agreements executed on or after January 1, 1986, are enforceable without consideration [*Fam. Code* § 1611], and become effective on marriage [*Fam. Code* § 1613].

[b] Promise of Marriage as Sufficient Under Prior Law

Premarital agreements made before January 1, 1986, the operative date of the Uniform Premarital Agreement Act [*Fam. Code* § 1600 *et seq.*] are subject to the applicable law in effect at the time the agreement was made [*Fam. Code* § 1503], which included a technical requirement that the agreement be supported by consideration. However, under former law, a promise of marriage subsequently carried out was sufficient consideration for a premarital agreement [*Estate of Wamack* (1955) 137 Cal. App. 2d 112, 115, 289 P.2d 871 ; see *La Liberty v. La Liberty* (1932) 127 Cal. App. 669, 674, 16 P.2d 681] .

Even under prior law, however, marriage alone has not been sufficient "part performance" of an *oral* premarital agreement to take the agreement out of the statute of frauds and render it enforceable. Furthermore, if one party had given up valuable marital rights in return for only a promise of marriage courts have been more vigilant in scrutinizing the negotiations leading up to the signing of the agreement [see *Estate of Nelson* (1964) 224 Cal. App. 2d 138, 141-144, 36 Cal. Rptr. 352] .

[c] Estoppel to Assert Invalidity of Marriage

A person who induces another person to enter into an invalid marriage in good faith is estopped to assert the invalidity of the marriage as a defense to the enforcement of a premarital agreement made by the parties in contemplation of the putative union [see *Spellens v. Spellens* (1957) 49 Cal. 2d 210, 217-218, 317 P.2d 613 (decided before enactment of Uniform Premarital Agreement Act, *Fam. Code* § 1600 *et seq.*)]. This principle, which was decided under former law, appears to remain generally valid; but, for the purpose of enforcing agreements executed on or after January 1, 1986, it must be viewed in the light of *Family Code Section 1616*, which provides that if a marriage is determined to be void, an agreement that otherwise would have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result.

Legal Topics:

For related research and practice materials, see the following legal topics:

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33-111 California Legal Forms--Transaction Guide § 111.21

§ 111.21 Writing Requirement

[1] In General

A premarital agreement, whether executed before or after January 1, 1986, is required to be in writing and signed by both parties to be enforceable [see *Fam. Code § 1611*; former *Civ. Code §§ 1624(3), 5134* (applicable to premarital agreements executed before January 1, 1986); see also *Fam. Code § 1503, 1601*; for further discussion of the Uniform Premarital Agreement Act, see § 111.11]. An oral premarital agreement generally is invalid and unenforceable, unless a special exception applies. A variety of exceptions to the statute of frauds [*Civ. Code § 1624*] exists, under which some oral premarital agreements may be held valid and enforceable [see *Hall v. Hall* (1990) 222 *Cal. App. 3d* 578, 585, 271 *Cal. Rptr. 773*]. Although unenforceable in the absence of an applicable exception to the statute of frauds, an oral premarital agreement is treated as being voidable, rather than void [*O'Brien v. O'Brien* (1925) 197 *Cal.* 577, 586, 241 *P. 861*]. For further discussion of the effect of the statute of frauds on enforcement of oral agreements, see § 111.14 [3].

The law applicable to premarital agreements executed before January 1, 1986, required, in addition to a writing, that the agreement (1) had to be executed and acknowledged, or proved in like manner as a grant of land is required to be executed and acknowledged or proved, and (2) it had to be recorded in the office of the recorder of every county in which any real estate may be situated that was granted or affected by the agreement [former *Civ. Code §§ 5133-5135* (applicable to agreements executed before January 1, 1986); see *Fam. Code § 1503*].

By contrast, a premarital agreement executed on or after January 1, 1986, *may* be recorded in each county in which real property affected by the agreement is situated, when the agreement has been executed and acknowledged or proved in the manner required of a grant of real property [see *Fam. Code § 1502(a)*]. The recording or non-recording of the agreement, whether executed before or after January 1, 1986, has the same effect as the recording or non-recording of a grant of real property [see *Fam. Code § 1502(b)*; former *Civ. Code § 5136* (applicable only to agreements executed before January 1, 1986)]. For further discussion of these requirements, see § 111.22.

For a general discussion of the effect of recording or non-recording of a grant of real property, see California Real

Estate Law and Practice, Chapter 82, *Recording of Instruments* (Matthew Bender).

[2] Additional Circumstances When Writing May Be Required

Depending on the subject matter of the premarital agreement, regardless of when it was executed [*see Fam. Code §§ 1503, 1601*], other provisions of the statute of frauds [*Civ. Code § 1624*] may apply to require a writing, completely independent of the fact that the agreement is a premarital agreement. An independent requirement of a writing is imposed if the premarital agreement includes any of the following:

- (1) A promise that, by its terms, is not to be performed during the lifetime of the promisor [*Civ. Code § 1624(e)*; former *Civ. Code § 1624(6)* (applicable only to agreements executed before January 1, 1986)];
- (2) A promise that, by its terms, cannot be performed within a year from when it was made [*Civ. Code § 1624(a)*; former *Civ. Code § 1624(1)* (applicable only to agreements executed before January 1, 1986)];
or
- (3) A promise to transfer or convey an estate in real property, other than an estate at will or for a term not exceeding one year [*Civ. Code § 1624(c)*; former *Civ. Code § 1624(4)* (applicable only to agreements executed before January 1, 1986)].

Furthermore, an estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law or by an instrument in writing, signed by the party disposing of the property or by his or her authorized agent [*Civ. Code § 1091*].

Thus, in any given case, two statutory sources may require a premarital agreement to be in writing: (1) the statutory provisions requiring premarital agreements to be in writing whatever their subject matter [*Fam. Code § 1611*; former *Civ. Code §§ 1624(3), 5134* (applicable only to agreements executed before January 1, 1986)], and (2) a statutory provision that mandates that the agreement be in writing because of the particular provision or promise it embodies (for example, a promise to make a will) [*see Civ. Code § 1624(e)*; former *Civ. Code § 1624(6)* (applicable only to agreements executed before January 1, 1986)].

Legal Topics:

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§ 111.22 Acknowledgment, Proof, and Recording of Agreements

Agreements executed on or after January 1, 1986, may be executed and acknowledged or proven like a grant of realty and subsequently recorded in each county in which real property affected by the agreement is located; but acknowledgment, proof, and recordation are not required as such for the agreement to be enforceable [*Fam. Code §§ 1502(a), 1503*]. Recording or non-recording of a premarital agreement has the same effect as recording or non-recording of a grant of real property [*Fam. Code § 1502(b)*].

By contrast, all premarital agreements executed before January 1, 1986, involving property were required to be executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved [former *Civ. Code § 5134* (applicable to agreements executed before January 1, 1986)].

A deed or other instrument is "acknowledged" when the person who has executed it declares before a competent court or officer (usually a notary) that the deed or instrument was in fact executed by him or her [*De Wolfskill v. Smith* (1907) 5 Cal. App. 175, 184, 89 P. 1001 ; see *Civ. Code § 1180 et seq.* (statutory requirements regarding acknowledgments); see generally California Forms of Pleading and Practice, *Acknowledgments* (Matthew Bender)]. Acknowledgment or proof of the premarital agreement is a prerequisite for recordation [see *Civ. Code § 1170*; former *Civ. Code § 5135* (applicable to agreements executed before January 1, 1986)], which in turn is a prerequisite for the validity of the premarital agreement against third parties, insofar as real property is involved.

An acknowledged or proved premarital agreement executed before January 1, 1986, had to be recorded in the office of the recorder of every county in which any real estate may be situated that is granted or affected by the agreement [former *Civ. Code § 5135* (applicable to agreements executed before January 1, 1986)]. The recording or non-recording of the agreement had the same effect as the recording or non-recording of a grant of real property [former *Civ. Code § 5136* (applicable to agreements made before January 1, 1986)].

An unrecorded instrument is valid between the parties and those third parties who have notice of the instrument [*Civ. Code § 1217*]. Therefore, an unrecorded premarital agreement is valid as between the parties. It may also be valid as to third parties who have actual notice of the terms of the agreement [see *Civ. Code § 1217*]. This appears to be the rule,

regardless of whether the subject matter of the agreement is real property, personal property, or a combination of the two [see Branca & Steinberg, *Antenuptial Agreements Under California Law: An Examination of the Current Law and In re Marriage of Dawley*, 11 U.S.F. L. Rev. 317, 326-327 (1977)].

For further discussion of the processes of acknowledgment and proof generally, see California Forms of Pleading and Practice, Ch. 9, *Acknowledgments* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

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[Reserved]

§§ 111.23[Reserved]



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§ 111.30 Validity of Premarital Contracts Relating to Property

Premarital agreements relating to the property rights of the intended spouses long have been recognized and enforced in California [see *In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 131 Cal. Rptr. 3, 551 P.2d 323 ; *Conner v. Stanley* (1884) 65 Cal. 183, 3 P. 668 ; see also *U.S. v. Elam* (9th Cir. 1997) 112 F. 3d 1036, 1039 (government could use premarital agreement designating one spouse's earnings as separate property to show proper apportionment of tax refund between divorced spouses)]. The Family Code expressly exempts property matters from its general prohibition on agreements between spouses that alter their "legal relations" [see *Fam. Code* § 1620; see also *Fam. Code* § 721]. The Uniform Premarital Agreement Act [*Fam. Code* § 1600 et seq.] applicable to agreements made on or after January 1, 1986 [*Fam. Code* § 1601] includes specific property matters on which parties may make an agreement [see *Fam. Code* § 1612; see also § 111.12]. "Property," as used by the Act, is an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings [*Fam. Code* § 1610(b)].

The recognized rule for agreements made before the operative date of the Uniform Premarital Agreement Act has been that parties contemplating marriage may validly contract regarding their property rights, both with respect to property then owned by them and regarding property, including earnings, which may be acquired by them after marriage [*Barker v. Barker* (1956) 139 Cal. App. 2d 206, 212, 293 P.2d 85] . Premarital agreements may validly alter both the property rights of spouses during their lifetimes and the property consequences in the event of death of either of the spouses [see *Fam. Code* § 1612].

Legal Topics:

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§ 111.31 Limitations on Premarital Contracts Relating to Property--In General

The Uniform Premarital Agreement Act provides parties with broad freedom to contract regarding their property rights and personal relations, with respect to agreements made on or after January 1, 1986 [*Fam. Code §§ 1601, 1612(a)*; see § 111.12]. The Act expressly prohibits parties to a premarital agreement from contracting on any matter in violation of public policy or a statute imposing a criminal penalty [*Fam Code § 1612(a)(7)*]. Furthermore, the right of a child to support may not be adversely affected by a premarital agreement [*Fam. Code § 1612(b)*].

Prior to the enactment of the Uniform Premarital Agreement Act, parties were also permitted to contract with respect to property but were subject to three broad categories of prohibitions, as set forth below:

- (1) Persons contemplating marriage could contract with regard to property but were prohibited from entering an agreement that altered their "legal relations" [former *Civ. Code § 4802*; see Restatement of Contracts, § 587 (agreement changing "essential incidents of marriage" is illegal); see § 111.32];
- (2) Provisions of premarital agreements that "encourage or promote divorce" were void [see *In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 350, 131 Cal. Rptr. 3, 551 P.2d 323 ; see § 111.33]; and
- (3) Premarital agreements that operate to defraud creditors were prohibited [see *Sudbrock v. Kroener* (1934) 136 Cal. App. 624, 631-632, 29 P.2d 435 ; see *Civ. Code §§ 3439, 3439.12*; see § 111.34].

To the extent that these prohibitions reflect broad public policy concerns, it is arguable that they remain applicable to premarital agreements made under the Uniform Premarital Agreement Act, except with regard to those matters that the Act expressly permits that would have previously been prohibited on public policy grounds, such as provisions for transfer of property on dissolution [see *Fam. Code § 1612(a)(3), (7)*]. These issues are more fully discussed in §§ 111.32-111.34.

For a general discussion of waivers of property rights in premarital agreements, see § 111.20[2][e].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 111.32 Prohibition Against Contracts Altering "Legal Relations" of Spouses

[1] Spousal Support

[a] Prohibition Against Waivers of Spousal Support

Provisions of a premarital agreement that purport to relieve either party of the obligation to support the other party during marriage or to limit support in the event of dissolution, or that attempt to limit attorneys' fees if the parties separate and bring a dissolution action, have historically been held void as against public policy [*In re Marriage of Higgason* (1973) 10 Cal. 3d 476, 485-486, 110 Cal. Rptr. 897, 516 P.2d 289, overruled, *In re Marriage of Dawley*, 17 Cal. 3d 342, 131 Cal. Rptr. 3, 551 P.2d 323, 1976 Cal. LEXIS 282 (disapproved on other grounds in *In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 352, 131 Cal. Rptr. 3, 551 P.2d 323); see *In re Marriage of Fell* (1997) 55 Cal. App. 4th 1058, 1063, 64 Cal. Rptr. 2d 522; *Barker v. Barker* (1956) 139 Cal. App. 2d 206, 211-212, 293 P.2d 85; see, generally Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, Chs. 50, 51, 62 (Matthew Bender 2d ed.)]. These types of provisions were said to violate public policy by promoting dissolution [see, e.g., *Barham v. Barham* (1949) 33 Cal. 2d 416, 428, 202 P.2d 289]. The prohibition against such provisions has also been rationalized on the grounds that it serves to provide for indigent persons from the property of their spouses rather than from public funds, and to protect creditors of the indigent who contract with them for necessities [see *Fam. Code* §§ 910, 914]. The cases holding such provisions invalid predated the enactment of the Uniform Premarital Agreement Act, and it has been somewhat unclear whether such provisions would remain invalid under the Act's general prohibition against provisions that violate public policy [see *Fam. Code* § 1612(a)(7)].

However, the California Supreme Court in *In re Marriage of Pendleton & Fireman* held that spousal support waivers contained within premarital agreements are not per se unenforceable, and it is not a violation of public policy to permit enforcement of a spousal support waiver, when it is executed by intelligent, well-educated persons, each of whom appears to be self-sufficient in property and earning ability, and both of whom have the advice of counsel regarding their rights and obligations as marital partners at the time they execute the waiver [*In re Marriage of Pendleton v. Fireman* (2000) 24 Cal. 4th 39, 99 Cal. Rptr. 2d 278, 5 P.3d 839]. In response to the *Pendleton v. Fireman* ruling, *Fam. Code* § 1612(c) was enacted effective January 1, 2002, which sets forth several fairness conditions that must be present for spousal support waivers to be enforceable. Under this section, any provision in a premarital agreement

regarding spousal support, including but not limited to a waiver, is not enforceable if the party against whom the support provision is enforced was not represented by independent counsel at the time the agreement was signed, or if the provision is unconscionable *at the time of enforcement*. Moreover, an otherwise unenforceable support provision does not become enforceable *solely* because the party against whom enforcement is sought was represented by independent counsel [*Fam. Code* § 1612(c)].

Note also that, even prior to *Pendleton & Fireman*, under the traditional analysis, a spouse could waive, in a premarital agreement, the right to support from the other spouse after that spouse dies. Thus, an intended spouse could waive a family allowance from the estate of the other intended spouse [*Estate of Wamack* (1955) 137 Cal. App. 2d 112, 115-116, 289 P.2d 871 ; *Estate of Schwartz* (1947) 79 Cal. App. 2d 308, 309, 179 P.2d 868 ; see § 111.20[2][e]].

[b] Prohibition Against Provisions for Lump-Sum Payment in Lieu of Support

A provision in a premarital agreement that allows either spouse a lump-sum payment in lieu of court-ordered support in the event of marital dissolution has been held void. The leading case on this point, *Pereira v. Pereira*, involved a reconciliation agreement between married persons rather than a premarital agreement, and was decided when fault was still needed to establish grounds for divorce [*Pereira v. Pereira* (1909) 156 Cal. 1, 4-5, 103 P. 488 (parties agreed that if husband gave wife cause for divorce and she established cause against him, he would pay \$10,000 in lieu of all property claims, including support)]. Nevertheless, the *Pereira* case has been extensively cited as authority for the prohibition on payments in lieu of support in cases construing premarital agreements [see *Glickman v. Collins* (1975) 13 Cal. 3d 852, 857, 120 Cal. Rptr. 76, 533 P.2d 204 ; *In re Marriage of Higgason* (1973) 10 Cal. 3d 476, 485, 110 Cal. Rptr. 897, 516 P.2d 289 , disapproved on another point in *In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 352, 131 Cal. Rptr. 3, 551 P.2d 323 ; *Barham v. Barham* (1949) 33 Cal. 2d 416, 427-429, 202 P.2d 289 ; *Whiting v. Whiting* (1923) 62 Cal. App. 157, 166, 216 P. 92] .

However, in *Pendleton & Fireman*, the California Supreme Court held that spousal support waivers contained within premarital agreements are not per se unenforceable, and it is not a violation of public policy to permit enforcement of a spousal support waiver, when it is executed by intelligent, well-educated persons, each of whom appears to be self-sufficient in property and earning ability, and both of whom have the advice of counsel regarding their rights and obligations as marital partners at the time they execute the waiver [*In re Marriage of Pendleton & Fireman* (2000) 24 Cal. 4th 39, 49, 99 Cal. Rptr. 2d 278, 5 P.3d 839] . For related discussion of statutory requirements enacted in response to *Pendleton & Fireman*, see [a], *above*.

[c] Validity of Provisions Providing for Minimum Duration of Support

Premarital agreements that guarantee support for a specified minimum amount of time are not invalid. For example, a provision in a premarital agreement that the prospective husband would support his prospective wife and her daughter from a previous marriage for a minimum period of fourteen months after their marriage terminated was upheld as not violative of the public policy in favor of marriage and against waivers of the duty of spousal support. The court ruled that language imposing a minimum support obligation cannot be construed to impose a maximum limit on the husband's support obligation. Because a minimum guarantee continues to bind the person who promises it even beyond the period of the marriage, the court held, even if dissolution were sought immediately, such a provision deters rather than promotes dissolution [*In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 353-354, 131 Cal. Rptr. 3, 551 P.2d 323] .

Subsequent to the ruling in *Dawley*, the California Supreme Court held that spousal support waivers contained within premarital agreements are not per se unenforceable, as discussed in [a], *above* [*In re Marriage of Pendleton & Fireman* (2000) 24 Cal. 4th 39, 49, 99 Cal. Rptr. 2d 278, 5 P.3d 839] . Thus, a provision for a minimum support duration would also appear to remain valid under this analysis.

[d] Validity in California of Settlements Made in Other States in Lieu of Support

Although, prior to *Pendleton & Fireman*, premarital agreements limiting support obligations had historically been held invalid as against public policy in California [see [a], [b], *above*], courts in some of the other states appear to have accepted such agreements in certain cases [see, e.g., *Belcher v. Belcher* (Fla. 1975) 307 So. 2d 918, 919-920 ; *Volid v. Volid* (1972) 6 Ill. App. 3d 386, 286 N.E.2d 42, 43-48] . Cases approving the limitation of support have been viewed by some commentators as the beginning of a trend toward recognition of the principle that adults contemplating marriage should have the freedom to structure their relationship as they wish [Fleischmann, *Marriage by Contract: Defining the Terms of Relationship*, 8 Fam. L.Q. 27, 40-41 (1974)]. The cases in which courts have upheld premarital agreements limiting support obligations have primarily dealt with support obligations in the event of dissolution. No cases appear to exist in which the reviewing court has upheld a premarital agreement waiving support obligations that exist during the marriage and before dissolution.

[2] Prohibition Against Promises to Pay for Spouse's Domestic Services

[a] Origin of Rule

Two court of appeal decisions, *Brooks v. Brooks* and *Estate of Sonnickson*, stand for the proposition that premarital agreements in which one prospective spouse promises to perform domestic or nursing services for the other spouse during the marriage in return for the other spouse's promise to pay money or transfer property are void as against public policy. Each case involved a wife who made a premarital promise to perform domestic services during the marriage in return for the husband's promise to pay her a salary or transfer property to her in consideration of her services. The appellate courts reviewing the cases held that agreements of this type are void because the wife's promise was not adequate consideration for the husband's promise to pay [*Brooks v. Brooks* (1941) 48 Cal. App. 2d 347, 349, 351, 119 P.2d 970 ; *Estate of Sonnickson* (1937) 23 Cal. App. 2d 475, 479, 73 P.2d 643 ; see *Borelli v. Brusseau* (1993) 12 Cal. App. 4th 647, 652, 16 Cal. Rptr. 2d 16 (in general, contract under which a spouse is to receive compensation for providing personal domestic services to other spouse is void as against public policy)].

[b] Severability of Provisions Obligating One Spouse to Care for Another

Courts have taken a negative view of agreements under which prospective wives explicitly agreed to perform nursing and domestic services for their prospective husbands in exchange for money or property [see *Borelli v. Brusseau* (1993) 12 Cal. App. 4th 647, 652-654, 16 Cal. Rptr. 2d 16 ; *Brooks v. Brooks* (1941) 48 Cal. App. 2d 347, 349, 351, 119 P.2d 970 ; *Estate of Sonnickson* (1937) 23 Cal. App. 2d 475, 479, 73 P.2d 643] . Some cases have held the entire agreement void and unenforceable [*Borelli v. Brusseau* (1993) 12 Cal. App. 4th 647, 652-654, 16 Cal. Rptr. 2d 16 ; *Estate of Sonnickson* (1937) 23 Cal. App. 2d 475, 479, 73 P.2d 643] . In another case, the court held that the husband had stated a cause of action for restitution of the sums he had paid his wife for domestic services and nursing under the agreement during their married years [*Brooks v. Brooks* (1941) 48 Cal. App. 2d 347, 349, 351, 119 P.2d 970] . Other cases have indicated that language in a premarital agreement obligating each spouse to care for the other, or words to that effect, does not render the agreement void, even though such promises are not necessary and, under former law, would not by themselves constitute sufficient consideration to support the agreement [see *Ayoob v. Ayoob* (1946) 74 Cal. App. 2d 236, 247-248, 168 P.2d 462] .

[c] Modern Implications

It has been argued that the prohibition on contracts between spouses for domestic services perpetuates sex-role stereotypes that are not only outmoded, but also unconstitutional in view of the current law of equal protection [Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 Cal. L. Rev. 1169, 1262 (1974); see *Frontiero v. Richardson* (1973) 411 U.S. 677, 682-683, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (plurality opinion); *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal. 3d 1, 16-20, 95 Cal. Rptr. 329, 485 P.2d 529 ; cf. *Borelli v. Brusseau* (1993) 12 Cal. App. 4th 647, 655-662, 16 Cal. Rptr. 2d 16 (dissenting opinion)]. Furthermore, the California Supreme Court has expressly stated that agreements between unmarried cohabitants in which the domestic partner is paid for homemaking duties are valid and

enforceable [*Marvin v. Marvin* (1976) 18 Cal. 3d 660, 674 n.10, 134 Cal. Rptr. 815, 557 P.2d 106] .

However, the traditional view, which prohibits contracts to transfer property in return for domestic services by a spouse during marriage, is still being adhered to by some courts. One appellate court held that a contract in which one spouse is to receive compensation for nursing-type services provided to the other spouse is void as against public policy and that there is no consideration for a spouse's promise to transfer property in return for the other spouse's rendition of such services. The court reasoned that spouses are obligated by the nature of the marriage contract to provide one another with uncompensated protective supervision services, such as nursing an ill spouse. The rendition of these services comes within the ambit of the concept of providing "support," which is one of the obligations implicit in the marriage relation. A spouse is not entitled to compensation for support apart from rights to community property and the like that arise from the marital relation itself [*Borelli v. Brusseau* (1993) 12 Cal. App. 4th 647, 652-654, 16 Cal. Rptr. 2d 16] .

Legal Topics:

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§ 111.33 Prohibition Against Provisions Encouraging or Promoting Dissolution

[1] In General

Before enactment of the Uniform Premarital Agreement Act [*Fam. Code § 1600 et seq.*], which applies to any premarital agreement executed on or after January 1, 1986 [*Fam. Code § 1601*], courts held that premarital agreements that dispose of community property on dissolution violate public policy when they "promote" or "encourage" dissolution [*see In re Marriage of Dawley (1976) 17 Cal. 3d 342, 349-350, 131 Cal. Rptr. 3, 551 P.2d 323 ; In re Marriage of Noghrey (1985) 169 Cal. App. 3d 326, 329-330, 215 Cal. Rptr. 153 ; see also In re Marriage of Dajani (1988) 204 Cal. App. 3d 1387, 1389-1390, 251 Cal. Rptr. 871 (foreign premarital "dowry" agreement that provided for cash payment on death or dissolution was void as against public policy because wife would "profit" from dissolution)*].

Although provisions of a premarital agreement subject to the Uniform Premarital Agreement Act must also not be in violation of public policy [*see Fam. Code § 1612(a)(7)*], the Act now expressly permits the parties to a premarital agreement to contract on a wide variety of property-related matters, including the disposition of property on dissolution of marriage [*Fam. Code § 1612(a)(1)-(4)*; *see § 111.12*]. Because the Act expressly permits provisions for the disposition of property on marital dissolution, property division provisions in premarital agreements executed on or after January 1, 1986, are generally valid.

[2] Exception for Cases in Which Objects of Marriage Are Utterly Destroyed

Before enactment of the Uniform Premarital Agreement Act [*Fam. Code § 1600 et seq.*], it was held that a premarital agreement that encourages or promotes the dissolution of a preexisting marriage to a third party is not void as against public policy if the legitimate objects of that existing marriage have been utterly destroyed. For example, a promise by a third party that, when a wife obtained her divorce, he would marry her, take care of her and her children, and make her an equal partner in all things, was enforceable because the marriage of the wife and her first husband was beyond saving when the agreement with the third party was executed [*Spellens v. Spellens (1957) 49 Cal. 2d 210, 224, 317 P.2d 613*].

In another case, an agreement by which a woman guaranteed a husband's support obligations to induce his wife to

obtain a prompt divorce was enforceable because the marriage had irrevocably broken down and the agreement did not promote the divorce [*Glickman v. Collins* (1975) 13 Cal. 3d 852, 857-858, 120 Cal. Rptr. 76, 533 P.2d 204] .

[3] Determinative Nature of Contract Terms

Before enactment of the Uniform Premarital Agreement Act [*Fam. Code § 1600 et seq.*], it was held that a court must consider the objective terms of the agreement and the effect, if any, of the objective terms in promoting the dissolution of the marriage, rather than the subjective contemplation of the parties, in determining whether a particular premarital agreement violates public policy by encouraging or promoting dissolution [*In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 350, 131 Cal. Rptr. 3, 551 P.2d 323] . Thus, a premarital agreement that by its terms is valid cannot be invalidated by uncontradicted parol evidence that the parties did not enter into a marriage contemplated to last until death, but anticipated the early dissolution of their marriage [*In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 349-352, 131 Cal. Rptr. 3, 551 P.2d 323] .

[4] Validity of Provisions Making Earnings and Accumulations of Each Spouse Separate Property

Before enactment of the Uniform Premarital Agreement Act [*Fam. Code § 1600 et seq.*], it was held that a provision in a premarital agreement that the earnings and accumulations of each spouse will be held as separate property is not considered in violation of public policy as promotive of divorce [*In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 351, 131 Cal. Rptr. 3, 551 P.2d 323] . These agreements prevent the automatic application of the community property system to California spouses' accumulations of property during marriage [See *Fam. Code §§ 760, 850(a)*; see generally Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Ch. 20, *Community Property: General Characterization and Division Principles*].

Under the Uniform Premarital Agreement Act, the parties may contract on the disposition of property on separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event [*Fam. Code § 1612(a)(3)*]. They also may contract with regard to their property whenever and wherever acquired or located [*Fam. Code § 1612(a)(1)*; see discussion in § 111.12].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 111.34 Prohibition Against Contracts to Defraud Creditors

[1] Premarital Creditors

A premarital agreement that provides for the transfer of one party's assets to the other without fair consideration and thereby renders the transferor insolvent is fraudulent with respect to existing creditors of the transferor [*Sudbrock v. Kroener* (1934) 136 Cal. App. 624, 631-632, 29 P.2d 435] . Such a conveyance is void and may be set aside under the Uniform Fraudulent Transfer Act [see Civ. Code §§ 3439, 3439.12]. For discussion of procedure, see California Forms of Pleading and Practice (Matthew Bender), *Fraudulent Conveyances*. This rule operates to invalidate any provision under which a prospective spouse transfers his or her separate property to the other spouse as that other's separate property in an attempt to insulate the property from the claims of the transferor's premarital creditors [see *Sudbrock v. Kroener* (1934) 136 Cal. App. 624, 631-632, 29 P.2d 435] .

[2] Marital Creditors

[a] Contract Creditors

Contract debts incurred during marriage may be satisfied from the separate property of the spouse who contracted the debt [Fam. Code § 913(a)] and from all of the community property [Fam. Code § 910(a); but see Fam. Code § 910(b) (spouses are not liable for each other's debts during the period in which they are living separate and apart before judgment for dissolution of marriage or judgment for legal separation)]. A spouse's separate property ordinarily is not liable for contract debts incurred by the other spouse during marriage, except when the other spouse incurred the debts for the "necessaries of life" [Fam. Code § 914; see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed. (Matthew Bender), Ch. 23, *Debt Liability and Division and Related Reimbursement Issues*].

If the parties agree that all of their separate property will become community property, contract creditors will not be affected because all the community property is liable for the contract debts incurred by either spouse during marriage [Fam. Code § 910(a)]. The intended spouses may also agree, however, that their earnings during the marriage, which ordinarily would be community property [see Fam. Code § 760], will remain separate property. Such a provision would

diminish the community property fund from which a contract creditor could collect a judgment, but would not deprive the creditor of the right to collect a contract judgment from the separate property of the contracting spouse.

The California Supreme Court has suggested that a premarital agreement providing that the spouses' earnings will be their separate property is valid as against subsequent creditors with a right to community funds, provided that no creditor is misled to his or her detriment by the failure of the spouses to inform the creditor that the supposed community assets on which the creditor relied in extending credit are in fact separate assets [see *In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 357, 131 Cal. Rptr. 3, 551 P. 2d 323]. Recording the premarital agreement may have the effect of putting potential creditors on notice as to the character of real property purchased with the spouses' earnings. Recording is required when an agreement executed before January 1, 1986, affects real property [see former Civ. Code § 5135 (applicable to agreements made before January 1, 1986)] but is not required when the agreement is executed on or after January 1, 1986 [see Fam. Code §§ 1502, 1503; see also discussion in § 111.12].

Under former law, recording an inventory of a spouse's separate property specifically constituted notice and prima facie evidence of the title of the party filing the inventory [former Civ. Code §§ 5114, 5115].

Neither method appears to give creditors clear notice that future earnings are separate property. To avoid any claim by creditors against the other spouse's earnings, the spouse applying for credit should, at a minimum, be sure not to include the other spouse's income in any credit application.

For further discussion of the liability of community and separate property for contractual debts incurred before or during marriage, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 23, *Debt Liability and Division and Related Reimbursement Issues* (Matthew Bender),

[b] Tort Creditors

If one spouse commits a tort while performing an activity "for the benefit of the community," the community estate is primarily liable for satisfaction of an ensuing tort judgment, and the separate property of the tortfeasor spouse is secondarily liable. If the tortfeasor was not acting for the benefit of the community, his or her separate property is primarily liable and the community estate is secondarily liable. These rules do not apply to the extent that the liability is satisfied out of proceeds of insurance for the liability, whether the proceeds are from the community estate or are separate property [Fam. Code § 1000]. The liability of the community estate and separate property for the torts of the spouses is discussed in detail in Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 23, *Debt Liability and Division and Related Reimbursement Issues* (Matthew Bender).

It has not been determined whether a premarital agreement between intended spouses that their marital earnings are to remain the separate property of each respective spouse insulates those earnings from liability to victims of the other spouse's torts occurring during the marriage.

A premarital agreement converting future earnings to separate property before any tort has occurred can be distinguished from cases in which a tortfeasor spouse has attempted to render himself or herself judgment-proof by transferring assets to his or her spouse without fair consideration after a tort has occurred, but before suit is brought or an adverse judgment entered. The latter transfer clearly is fraudulent and will be voided by the courts at the request of the tort victim in an action to set aside the conveyance [see *Freeman v. La Morte* (1957) 148 Cal. App. 2d 670, 672-675, 307 P. 2d 734; see also *Hansen v. Cramer* (1952) 39 Cal. 2d 321, 322-325, 245 P.2d 1059].

For further discussion of the law of fraudulent conveyances, see California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 111.35 Continuing Validity of Contracts Containing Void Provisions

If a court finds that a provision in a premarital agreement violates public policy by, for example, promoting or encouraging divorce [see § 111.33], or in some other way, the offending provision will be held void and unenforceable [see *In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 349-350, 353, 131 Cal. Rptr. 3, 551 P.2d 323 ; *Barker v. Barker* (1956) 139 Cal. App. 2d 206, 212, 293 P.2d 85] . The void provision will not cause the entire agreement to fail, however, unless the rest of the agreement is "inseparably linked" to the offending language [see *In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 349-350, 353, 131 Cal. Rptr. 3, 551 P.2d 323] .

Thus, for example, on several occasions courts have held invalid provisions deemed promotive of divorce, and yet enforced property divisions contained in the same agreement [e.g., *Barham v. Barham* (1949) 33 Cal. 2d 416, 428-429, 202 P.2d 289 ; *Whiting v. Whiting* (1923) 62 Cal. App. 157, 165, 216 P. 92] . The few decisions striking down property provisions as well as void terms all have involved agreements in which otherwise valid provisions were inseparably linked to void terms [see, e.g., *Pereira v. Pereira* (1909) 156 Cal. 1, 4-5, 103 P. 488 (\$10,000 consideration in settlement of support and alimony claims); *Estate of Nelson* (1964) 224 Cal. App. 2d 138, 142-143, 36 Cal. Rptr. 352 (waiver of all property and support rights; agreement procured by undue influence); *but cf.* *In re Marriage of Pendleton & Fireman* (1998) 62 Cal. App. 4th, 751, 764 , 72 Cal. Rptr. 2d 840 (pet. for rev. 5/4/98; a *nonfinal* case holding that waivers of or limitations on spousal support in premarital agreements are not per se unenforceable, as discussed in § 111.32[1][a)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 111.36 Tax Considerations in Drafting Property Provisions

[1] Federal Gift Taxes

A transfer of property is a taxable gift if it is given for less than adequate and full consideration [I.R.C. § 2512(a), (b)]. Accordingly, most transfers made *prior* to the parties' marriage, even if pursuant to a premarital agreement, will be subject to gift tax. The parties' marriage is not a valuable consideration for the transfer, because it cannot be given a financial value; therefore, there is no consideration exchanged for the transfer [see *Commissioner v. Wemyss* (1945) 324 U.S. 303, 65 S. Ct. 652, 89 L. Ed. 958]. Under the estate tax provisions (see [2], *below*), a donee's release of any marital property rights in exchange for a transfer of property pursuant to the premarital agreement is not given for adequate consideration [I.R.C. § 2043(b)(1)]; therefore, because the estate and gift tax elements of the Internal Revenue Code must be consistently construed together, the transfer is a taxable gift [see *Merrill v. Fahs* (1945) 324 U.S. 308, 65 S. Ct. 655, 89 L. Ed. 963].

In contrast, if a surrender of marital support rights, including the right to alimony on divorce, is otherwise permitted within the state, this type of surrender is treated as having value sufficient to constitute consideration, and a transfer made in exchange for such a surrender is not otherwise taxable as a gift [see *Merrill v. Fahs* (1945) 324 U.S. 308, 65 S. Ct. 655, 89 L. Ed. 963; see also *Commissioner v. Wemyss* (1945) 324 U.S. 303, 65 S. Ct. 652, 89 L. Ed. 958; *Rev. Rul. 60-31, 1960-1 C.B. 174*; *Lasker v. Commissioner* (7th Cir. 1943) 138 F.2d 989]. In one case a federal court determined that an agreement that included such a surrender was contrary to the public policy of the state in which it was made, and so the surrender was held ineffective, rendering the property transfer a gift and subject to gift tax [*Ellis v. Commissioner* (9th Cir. 1971) 437 F.2d 442]. Because California has historically prohibited premarital waivers of support rights, this gift treatment for a property transfer founded on a purported waiver of spousal support would, arguably, apply in California; but more recent case law permitting spousal support waivers, at least in principle, may have reversed this result (see § 111.32[1][a]) [In re Marriage of Pendleton & Fireman (1998) 62 Cal. App. 4th, 751, 764, 72 Cal. Rptr. 2d 840 (pet. for rev. 5/4/98) (*nonfinal* case holding that waivers of or limitations on spousal support in premarital agreements are not per se unenforceable)].

The annual gift tax exclusion allows a donor to make nontaxable gifts to other individuals in the amount of up to

\$10,000 per year per donee, an amount that is indexed for inflation for gifts made in calendar years after 1998 [*I.R.C. § 2503(b)*]. The gift and any claimed consideration are valued as of the date of the transfer [*see I.R.C. § 2512(a)*]. These rules apply to transfers made pursuant to the premarital agreement but occurring after the marriage [*see Rev. Rul. 69-347, 1969-1 C.B. 227*]. However, transfers between spouses that are actually made after the marriage are subject to the unlimited marital deduction [*I.R.C. § 2523(a)*].

For a related discussion of gift taxes in the context of particular forms, see §§ 111.212[1], 111.224[1].

PRACTICE TIP:

If a waiver of spousal support in a premarital agreement is contemplated as consideration for a premarital transfer of property, counsel should refer the client to tax counsel for all opinion on the probable tax consequences of the proposed action. *Commentary by Kathryn Kirkland.*

[2] Federal Estate Taxes

The primary concern in the area of federal estate taxes is whether the property transferred to the surviving spouse under a premarital agreement will be included in the decedent's taxable estate, or whether it may be deducted, thereby making the transfer tax-free. The tax-free result clearly is achieved if the transfer was made after marriage, so as to bring the transfer within the marital deduction [*I.R.C. § 2523(a)*]. However, if the transfer was made *prior* to marriage, the central inquiry will be whether the transfer was made in exchange for adequate consideration. For estate tax purposes, a surrender of marital property rights is not adequate consideration [*I.R.C. § 2043(b)(1)*; *see Estate of Hermann (Herbert R.) T.C. Memo. 1995-90*], .

[3] I.R.C. § 1041 "Nonrecognition Rule" Inapplicable to Premarital Transfers for Income Tax Purposes

Internal Revenue Code Section 1041 generally provides that no gain or loss is recognized on a transfer of property from an individual to, or in trust for the benefit of, his or her spouse, with specific exceptions. This "nonrecognition rule," by its own terms, does not apply to a transfer of property between parties before their marriage, even if made in contemplation of marriage [*see I.R.C. § 1041*].

Thus, a transfer of property before marriage pursuant to a premarital contract in return for consideration is a "sale or exchange" subject to all the usual tax rules. However, such premarital transfers are sales or exchanges only to the extent that consideration is received for the transferred property, and if no consideration is involved, the transfer may be treated as a gift (see [1], *above*) [*see I.R.C. §§ 102, 1015*].

For further discussion of *Internal Revenue Code Section 1041*, see *Ch. 112, Postnuptial Agreements*, § 112.15[2][a], and Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., § 160.30 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

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[Reserved]

§§ 111.37[Reserved]



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§ 111.50 Validity in General of Provisions Relating to Children

Strict limitations govern existing or contemplated provisions of premarital agreements relating to children. Certain narrowly defined provisions generally are considered enforceable by the California courts; other provisions either clearly are deemed void as against public policy, or are subject to practical difficulties in enforcement.

Enforceable provisions of premarital agreements relating to children include both of the following:

- A promise to support the intended spouse's children by a former relationship [*see* § 111.51[3][c]]; and
- A promise that a minor stepchild of the intended spouse will be provided for on the death of his or her natural parent [*see* § 111.51[3][d]].

The interest of the state in the welfare of minor children imposes the following practical limitations on the rights of parents to agreement regarding children of the marriage:

- Neither parent may contract away the duty to support his or her minor child [*Elkind v. Byck* (1968) 68 Cal. 2d 453, 457, 67 Cal. Rptr. 404, 439 P.2d 316 ; *see* Fam. Code § 1612(b)]. Nevertheless, nothing prohibits parents from making a binding agreement to support a child in situations in which the law does not require support, such as after the child has reached majority [*see* *Kamper v. Waldon* (1941) 17 Cal. 2d 718, 721, 112 P.2d 1] or has married before reaching the age of majority [*see* *Bryant v. Swoap* (1975) 48 Cal. App. 3d 431, 439, 121 Cal. Rptr. 867] .
- Although spouses may be bound between themselves by contractual provisions determining custody of children on dissolution, such agreements are not binding on the court, which is required to determine custody matters according to the best interests of the child [*see* Fam. Code § 3040; *see* § 111.51[1]].
- Contracts between the spouses requiring a particular form of religious or secular education of

children are likely to present difficulties in enforcement, because of the court's paramount interest in the welfare of the child [*see* § 111.51[2]].

■ Enforcement problems make it inadvisable to include in a premarital agreement a promise that one intended spouse will adopt the minor children of the other [*see* § 111.51[3][a]].

Legal Topics:

For related research and practice materials, see the following legal topics:

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§ 111.51 Specific Provisions Concerning Children

[1] Provisions Regarding Custody of Children on Dissolution

No reported appellate decisions have construed provisions in premarital agreements addressing custody of children of the parties in the event of dissolution of the marriage. Reported cases dealing with agreements between parents on the custody of their children that analyze the extent to which they should be honored or enforced by the courts have concerned agreements made at the time of the parties' separation [*see Brown v. Brown (1951) 104 Cal. App. 2d 88, 91-92, 230 P.2d 651 ; but see In re Marriage of Weiss (1996) 42 Cal. App. 4th 106, 109* (holding premarital agreement provision on child's religious upbringing unenforceable, as discussed in [3][b], below), *cert. denied 519 U.S. 1007 (1996)*]. These agreements are authorized, and even encouraged, by statute [*see Fam. Code §§ 1620, 3061, 3580*].

The rule established by the cases involving child custody agreements made at the time of separation is that a court is never conclusively bound in child custody matters by an agreement of the parents [*see Van der Vliet v. Van der Vliet (1927) 200 Cal. 721, 722-723, 254 P. 945*], though it will likely give substantial consideration to such an agreement. Rather, the power of the court to vary or modify its decree in dissolution proceedings regarding the custody, care, and education of the minor children is governed by statute [*see Fam. Code § 3020 et seq.*]. Regardless of what agreement the parties have made, the court always retains power to award custody or modify a custody decree in the best interests of the child. This is true even if the court originally adopted the agreement or stipulation of the parties as to the disposition of the children [*Black v. Black (1906) 149 Cal. 224, 225-226, 86 P. 505* (construing former *Civ. Code §§ 138, 159*)].

Although some prospective spouses may wish to discuss potential conflicts over the custody of children while preparing for marriage, they should be aware that any contractual agreement made by them at any time will be subordinate to the power of the court to determine custody matters in accordance with the best interests of the child. Any agreement made by them would be considered by a court and, if it is determined that the agreed arrangement is in the best interests of the child, would be given effect.

For sample marital settlement agreement provisions regarding child custody that may be modified for use in a

premarital agreement, see Chapter 124, *Custody and Visitation Provisions*. For a detailed discussion of child custody orders in family law proceedings, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Chapter 33, *Custody and Visitation Orders*.

[2] Provisions Regarding Education of Children

Little authority exists on the enforceability of agreements between prospective spouses relating to the practical details of a child's upbringing, such as the place where the child will attend school and the form, if any, of the child's religious education. California courts have not ruled on the enforceability of such an agreement by means of an action for damages or specific performance, nor have they considered whether the failure of one spouse to comply with such an agreement is a material breach of a premarital agreement justifying unilateral rescission of the agreement by the aggrieved spouse [*see Civ. Code § 1689(b)(2)*; *see also Estate of Warner (1914) 168 Cal. 771, 776, 145 P. 504* (failure of husband to pay for education of stepdaughter as promised in premarital agreement was grounds for rescission of agreement by wife); *but cf. In re Marriage of Smith & Maescher (1993) 21 Cal. App. 4th 100, 103, 107-108, 26 Cal. Rptr. 2d 133* (regarding provisions in marital settlement agreement for college education of child)]. However, as discussed in [3][b], *below*, at least one California court has ruled that a provision for religious upbringing in a premarital agreement is *unenforceable*, making it unlikely that an action for damages or specific performance would be successful, or that a failure to comply with the terms of the agreement concerning religious upbringing would justify unilateral rescission [*In re Marriage of Weiss (1996) 42 Cal. App. 4th 106, 109, 111, 117, 49 Cal. Rptr. 2d 339, cert. denied, 136 L. Ed. 2d 399 (1996)*].

California guardianship and custody cases have held that the parents' views on both the religious and secular education of children are not binding when compliance would interfere with the court's exercise of its discretion in the best interests of the child [*Frizzell v. Frizzell (1958) 158 Cal. App. 2d 652, 657, 323 P.2d 188*; *see Guardianship of Walsh (1950) 100 Cal. App. 2d 194, 198, 223 P.2d 322*; *see also In re Marriage of Weiss (1996) 42 Cal. App. 4th 106, 109, 111, 117, 49 Cal. Rptr. 2d 339*]. Thus, a court would be unlikely to enforce the terms of a premarital agreement concerning the education of a child unless it found that enforcement was in the child's best interest [*cf. Martin v. Martin (1954) 308 N.Y. 136, 123 N.E.2d 812* (premarital agreement required parties to rear child as Roman Catholic; on divorce, wife modified custody decree to raise child as Protestant; on appeal, court refused to enforce premarital agreement on grounds of child's best interests)].

[3] Provisions Regarding Children From Spouse's Previous Relationship

[a] Agreements to Adopt Child From Previous Relationship

Even if a court would decree specific performance of an executory agreement under which one intended spouse promised to adopt the minor child of the other on marriage, the specific enforceability of such a contractual provision is dependent on compliance with many other conditions imposed by statute that are beyond the control of the parties. In any case, it is unlikely that the report of the public agency charged with investigating the suitability of the adoption [*see Fam. Code § 9001*] would be favorable to the adoption when the adoptive parent expresses an unwillingness to adopt, any premarital written promise to adopt notwithstanding. It also is unlikely that a court would find the interests of the child to be promoted by decreeing adoption [*see Fam. Code § 8612(c)*] when the prospective adoptive parent expressed an unwillingness to adopt.

If the reason for the proposed adoption is to provide support of the child during minority or in the event of death of the natural parent, these concerns can be addressed directly by including a provision by which the non-parent party agrees to support the other party's child [*see [c], [d], below*]. These promises, if made independently, are enforceable. If adoption is agreed on by the parties, they may voluntarily take the required steps to carry it out after the marriage. If the prospective stepparent later decides that adoption is not desirable or the stepparent adoption proceeding is unsuccessful for some other reason, adequate provision for the child still will have been made in the premarital agreement, and the

enforcement and interpretation problems that otherwise might arise if the promise were phrased in terms of a promise to adopt can be avoided.

For discussion of procedures for stepparent adoptions of minors and adoption of adults, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Ch. 172, *Adoption of Unmarried Minors* and Ch. 173, *Adoption of Adults and Married Persons*.

Even if the stepparent does not formally adopt the other spouse's child, he or she may in some circumstances be deemed to have "equitably adopted" the child [see *Estate of Bauer* (1980) 111 Cal. App. 3d 554, 560, 168 Cal. Rptr. 743]. For discussion of the doctrine of equitable adoption, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Ch. 170, *Nature and Effect of Adoption*.

[b] Provisions Governing Religious Education of Child From Previous Relationship

In proceedings involving children, such as custody or guardianship proceedings, courts are required to exercise their discretion in favor of the best interests of the children. In doing so, courts have been willing to disregard the views of parents on the education of their children [see, e.g., *Frizzell v. Frizzell* (1958) 158 Cal. App. 2d 652, 656-657, 323 P.2d 188; *Guardianship of Walsh* (1950) 100 Cal. App. 2d 194, 198, 223 P.2d 322].

With respect to a provision in a premarital agreement on religious upbringing, one California appellate court has held such a provision unenforceable. Although the court made its ruling with respect to a child born of the marriage and in the context of marital dissolution proceedings, there is no reason to believe the court would have ruled otherwise with respect to a child from a previous relationship of one of the parties if the same custody and visitation issues were involved, or if the question arose during the course of marriage rather than on dissolution. The court reasoned that a parent will not be enjoined from involving a child with that parent's religious activities in the absence of a clear, affirmative showing of harm to the child. It noted the standard of a Pennsylvania court, which ruled that the party seeking the restriction on a parent must demonstrate that the parent's belief or practice actually presents a substantial threat of harm of the child. Apart from harm, the court also said that such an agreement provision is unenforceable because it would require a court to entangle itself in analyzing such issues as what constitutes a "religious service" or in determining which services were contrary to the agreement, as well as posing constitutional problems by encroaching on the fundamental right of individuals to question, doubt, and change their religious beliefs [*In re Marriage of Weiss* (1996) 42 Cal. App. 4th 106, 109, 111, 117, 49 Cal. Rptr. 2d 339, cert. denied, 136 L. Ed. 2d 399 (1996)]. Thus, it appears unlikely that a court would enforce a provision that a party must raise a child in a particular faith, including providing for the child's religious education in that particular faith [see *In re Marriage of Weiss* (1996) 42 Cal. App. 4th 106, 109, 111, 117, 49 Cal. Rptr. 2d 339, cert. denied, 136 L. Ed. 2d 399 (1996)].

For a related discussion in the context of marital settlement agreements, see § 124.200.

[c] Provisions for Support of Minor Child From Prospective Spouse's Previous Relationship

A provision sometimes found in premarital agreements is a promise to support the children of the intended spouse by a former relationship, either for a specified period of time [see, e.g., *In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 353-354, 131 Cal. Rptr. 3, 551 P.2d 323] or until the children reach majority [see, e.g., *Estate of Warner* (1914) 168 Cal. 771, 774-775, 145 P. 504]. If support of a stepchild is contemplated, an explicit provision to that effect must be included in the premarital agreement because, although the natural parents of a child have an equal responsibility to support and educate their child in a manner suitable to the child's circumstances [*Fam. Code* § 3900], a person has no legal obligation to support a spouse's child from a former marriage or other relationship involving a third party.

These provisions are enforceable against the promisor and, in the event of breach, give rise to a cause of action for damages [*Estate of Warner* (1914) 168 Cal. 771, 776, 145 P. 504]. The plaintiff in a damages action for breach of a

promise to support a stepchild could be the aggrieved spouse, the child as third-party beneficiary [*Civ. Code* § 1559; *see Fam. Code* § 4000], or the county welfare authorities on behalf of the child [*see Fam. Code* § 4002]. If the promise to support the child was expressly made as consideration for waivers of valuable marital rights in the property of the promisor, a breach of that promise may constitute grounds for unilateral rescission of the agreement by the aggrieved spouse and reassertion of the previously waived rights against the property of the promisor [*see Estate of Warner* (1907) 6 Cal. App. 361, 365-366, 92 P. 191] .

For a sample provision to be included in a premarital agreement contemplating that one intended spouse will contribute to the support of the child of the other by a former relationship during the child's minority, *see* § 111.221.

[d] Provisions for Minor Child From Previous Relationship on Death of Natural Parent

No court has dealt expressly with the validity of a provision in which the promisor covenants to pay a lump sum for the support of the children of the intended spouse from a former relationship in the event that the natural parent dies during the marriage while the children are still minors. Such a provision appears analogous to promises to support a minor stepchild while his or her natural parent is living, however, which clearly are valid and enforceable [*see In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 353-354, 131 Cal. Rptr. 3, 551 P.2d 323 ; *Estate of Warner* (1914) 168 Cal. 771, 775-776, 145 P. 504 ; *see* [c], *above*]. A promise of support can be enforced after the natural parent's death by the child as a third-party beneficiary [*see Civ. Code* § 1559] or by the county welfare authorities on behalf of the child [*see Fam. Code* § 4002].

[e] Provision for Separate Property of Prospective Spouse to Descend to Children of Former Relationship

Premarital agreements may contain provisions regarding the making of wills, trusts, or other arrangements to carry out the provisions of the agreement [*Fam. Code* § 1612(a)(4)]. Parties to an intended marriage may therefore provide in a premarital agreement for the execution of testamentary instruments leaving their separate property to their children of former relationships. However, such an agreement is unnecessary since a spouse always has the power of testamentary disposition over his or her own separate property [*see Prob. Code* § 6101(a)] and therefore does not need the consent of his or her spouse to devise his or her separate property to his or her children or to any other beneficiary.

Legal Topics:

For related research and practice materials, *see* the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 111 PREMARITAL AGREEMENTS

PART II. LEGAL BACKGROUND

D. Agreements Concerning Children and Personal Relations

33-111 California Legal Forms--Transaction Guide § 111.52

§ 111.52 Agreements Regulating Personal Relationship

[1] General Considerations

Some couples contemplating marriage may seek the advice of a family law attorney regarding premarital agreements covering personal relations--that is, subjects other than property or the support and custody of children. The Uniform Premarital Agreement Act [*Fam. Code § 1600 et seq.*], which is applicable to agreements made on or after January 1, 1986 [*Fam. Code § 1601*], provides that parties may contract regarding their personal rights and obligations provided the agreement terms do not violate public policy or a statute imposing a criminal penalty [*Fam. Code § 1612(a)(7)*; see § 111.12].

However, some such provisions may be difficult or impossible to enforce. For example, as discussed in § 111.32 [2], agreements requiring a spouse to pay another spouse for domestic and nursing-type services have been held unenforceable [see *Borelli v. Brusseau* (1993) 12 Cal. App. 4th 647, 652, 16 Cal. Rptr. 2d 16 (in general, contract under which a spouse is to receive compensation for providing personal domestic services to other spouse is void as against public policy)]. In addition, operative January 1, 2002, any provision in a premarital agreement regarding spousal support, including but not limited to a waiver, is not enforceable if the party against whom the support provision is enforced was not represented by independent counsel at the time the agreement was signed, or if the provision is unconscionable *at the time of enforcement* [*Fam. Code § 1612(c)*]. Thus, counsel should advise clients of the possible difficulties that may be encountered if either party seeks damages or specific performance in the event of breach of a provision governing personal relations [see [3], *below*].

The parties may wish to consider making two separate agreements--one regarding property and children, and the other governing personal relations. The parties should also be advised that if the premarital agreement is to be recorded [see *Fam. Code §§ 1502, 1503*; former *Civ. Code § 5135* (applicable to agreements made before January 1, 1986)], any provisions regarding personal relations included in it will become part of the public record.

[2] Public Policy Limitations

[a] In General

The Uniform Premarital Agreement Act [*Fam. Code § 1600 et seq.*], which is applicable to agreements made on or after January 1, 1986 [*Fam. Code § 1601*], provides that parties may contract regarding their personal rights and obligations as long as the agreement terms do not violate public policy or a statute imposing a criminal penalty [*Fam. Code § 1612(a)(7)*; *see § 111.12*]. Before its enactment, public policy imposed certain limitations on contractual freedom of intended spouses. For discussion of these limitations, *see §§ 111.31-111.34*.

While the Uniform Premarital Agreement Act has broadened the scope of matters on which the parties may contract, particularly concerning property [*see Fam. Code § 1612(a)*], many of the underlying broad public policy concerns must still be considered in drafting agreements [*see § 111.31*].

[b] Provision for Termination of Marriage Without Court Action

Because of the public policy limitation contained in the Uniform Premarital Agreement Act [*Fam. Code § 1612(a)(7)*], and because marriage can only be terminated by death or by a judgment of dissolution or nullity [*Fam. Code § 310*], a contractual provision attempting to make the marriage legally terminated at the will of either party or on the happening of a certain event appears to be invalid. However, the subjective contemplation of parties to a premarital agreement that their marriage will not last a lifetime does not void an otherwise valid premarital agreement unless the contemplation is made an express part of the terms of the agreement [*In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 350-352, 131 Cal. Rptr. 3, 551 P.2d 323] .

[3] Remedy Problems

In addition to the public policy limitations on the right of spouses to contract [*see [2], above, and § 111.31*], remedy problems surround the enforceability of provisions of premarital agreements that attempt to govern certain personal relations.

Specific enforcement of such contractual provisions may be precluded by the general refusal of the courts to grant specific performance of agreements for personal services [*see Civ. Code § 3390(1)*; *Marvin v. Marvin* (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106] . "Personal" provisions of premarital agreements that are likely not to be specifically enforceable include all of the following:

- Agreements regarding the division of household duties;
- Agreements to have a child or, alternatively, to terminate a pregnancy by abortion;
- Promises regarding domicile; and
- Promises regarding abstaining from, or participating in, religious observances.

Injunctive relief is also unavailable to prevent breach of such an agreement (except under circumstances that are not relevant in the context of premarital agreements) [*see Civ Code § 3423*].

Relief for breach in the form of damages may be limited by the rule that no damages can be recovered for a breach of agreement that are not clearly ascertainable, both in their nature and in their origin [*Civ. Code § 3301*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewFamily LawMarital Duties & RightsProperty

RightsPremarital AgreementsGeneral Overview



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[Reserved]

§§ 111.53[Reserved]



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PART III. TRANSACTION GUIDE
A. Drafting Guide

33-111 California Legal Forms--Transaction Guide

NOTE:

The checklists below summarize provisions that counsel may wish to include in a premarital agreement. It is not exhaustive of the possible provisions that might be included, and the individual circumstances of the parties will dictate which provisions will actually be needed in a particular case. Counsel is advised to refer to the forms and comments in Part B [see § 111.200 et seq.] for additional guidance in using particular provisions. Complete forms of premarital agreements regarding property are set forth in §§ 111.200 and 111.201. For a summary of the general types of provisions that are authorized under the Uniform Premarital Agreement Act [see *Fam. Code* § 1612], see § 111.12.



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A. Drafting Guide

33-111 California Legal Forms--Transaction Guide § 111.100

§ 111.100 Drafting Guide to Provisions Regarding Property and Spousal Support

1. Purpose clause explaining why parties have decided to enter into a premarital agreement.
2. List of items of separate property owned by the parties at the time of contracting.
3. List of obligations owed by parties at the time of contracting.
4. Provisions concerning property rights on death of one of the parties [*see Fam. Code § 1612(a)(3), (4)*], such as:
 - a. Purchase of an annuity payable to a surviving spouse;
 - b. Creation of a trust for the surviving party's benefit, such as
 - (1) A "lifetime income/power of appointment" trust that qualifies for the federal estate tax marital deduction [*see I.R.C. § 2056(b)(5)*]; or
 - (2) "Qualified terminable interest property" ("QTIP") trust that qualifies for federal estate tax marital deduction [*see I.R.C. § 2056(b)(7)*; *see California Wills and Trusts* (Matthew Bender)].
 - c. Provision for inclusion of a transfer of property by will by one party to the other [*see Fam. Code § 1612(a)(4)*; *see California Wills and Trusts*, Ch. 61, *Contracts and Other Instruments Affecting Wills* (Matthew Bender)].
 - d. Provision requiring one party to purchase life insurance naming the other as beneficiary, or requiring one party to change the beneficiary on an existing insurance policy [*see Fam. Code § 1612(a)(5)*];

- e. Provision for a prospective spouse to prevent automatic revocation of a premarital will [*see Prob. Code § 21610 et seq.*];
 - f. Provision for unilateral or mutual waivers of rights that otherwise might accrue in the separate property of either or both of the parties on the death of one of them.
5. If desired, provisions for an inter vivos transfer of property to the other, such as the following [*see Fam. Code § 1612(a)(1), (2)*]:
- a. Provision for lump-sum transfer of property immediately on marriage; or
 - b. Provision for annuity payable immediately after marriage takes place.
6. If desired, provisions for defining the parties' inter vivos property or support rights in a manner different from that provided by law, including one or more of the following:
- a. Mutual release of property rights;
 - b. Unilateral release of marital rights;
 - c. Separate property of parties to be community property after marriage;
 - d. Income from separate property to be community property of parties;
 - e. Waiver of right to reimbursement for separate property contributions to the acquisition of community property or to the acquisition of the other spouse's separate property [*see Fam. Code § 2640*];
 - f. Waiver of reimbursement for community property contributions to education or training of a spouse [*see Fam. Code § 2641*];
 - g. Right of one party to buy, sell, use, transfer, exchange, encumber, lease, consume, assign, create a security interest in, or otherwise dispose of community property [*see Fam. Code § 1612(a)(2)*];
 - h. Provision specifying that earnings and other income during marriage that would be deemed community property by operation of statute instead will remain the separate property of the recipient;
 - i. Waiver of rights arising out of a period of cohabitation without marriage ("*Marvin*" waiver--*see § 111.227*);
 - j. Waiver of rights to spousal support after a termination of the marriage, either with or without a related transfer of offsetting property (*see § 111.228*).
7. If desired, provision for one party to assume complete responsibility for management and control of the parties' community property or of particular community assets [*see Fam. Code § 1612(a)(2)*] and/or separate property assets of the other spouse.
8. Provision for the disposition of property on the parties separation after marriage, or on marital dissolution [*see Fam. Code § 1612(a)(3)*]. For forms of marital settlement agreement provisions regarding division of property on dissolution or legal separation that may be adapted for use in a premarital agreement, *see chs. 211- 213*].

9. A provision specifying whether joint or separate income tax returns will be filed, and, if separate returns are to be filed, who will be entitled to claim dependency exemptions for the support of children [*see* Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chs. 211 and 216(Matthew Bender)].

10. Provisions regarding division of responsibility for the parties' joint living expenses.

11. A provision specifying which state's law is to govern the agreement [*see Fam. Code § 1612(a)(6)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral Overview



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A. Drafting Guide

33-111 California Legal Forms--Transaction Guide § 111.101

§ 111.101 Drafting Guide to Provisions Regarding Children

1. If either or both parties have children from former relationships, a provision listing those children by name and date of birth.
2. If desired, provisions securing support by one party of the other party's children from a previous marriage or other relationship.
3. If desired, provisions for education of children born to the parties during or before the marriage.
4. If desired, a provision concerning the surname of any children born to the parties.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewFamily LawFamily Protection & WelfareChildrenGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsGeneral Overview



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[Reserved]

§§ 111.102[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 111 PREMARITAL AGREEMENTS
PART IV. FORMS
A. Complete Agreements

33-111 California Legal Forms--Transaction Guide § 111.200

§ 111.200 Complete Premarital Agreement--Parties' Interests in Property Acquired After Marriage to Be Separate

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, is a complete premarital agreement covering the property rights of prospective spouses [see *Fam. Code § 1612(a)(1)-(3)* (general right of parties to make premarital agreement regarding property interests, management and control of property, and disposition of property on separation, dissolution, or death)]. It is designed to be used by prospective spouses, each of whom is represented by independent counsel in the negotiation and preparation of the agreement, who do not wish to mingle or share their interests in property earned, accumulated, or in any other way received by either of them during their marriage or brought to that marriage by either of them. In the absence of such an agreement, the property acquired through their efforts during the marriage generally would be community property [see *Fam. Code § 760*; but see *In re Marriage of Brooks*, (2008) 169 Cal. App. 4th 176, 184-187, 86 Cal. Rptr. 3d 624 (under "form of title" presumption, taking title to property solely in name of one spouse, during marriage and with acquiescence of other spouse, effectively removes that property from general presumption of *Fam. Code § 760* that property acquired during marriage is community property)]. For a full discussion of the characterization of property acquired during marriage, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, Ch. 20, *Community Property: General Characterization and Division Principles* (Matthew Bender 2d ed.).

This form provides for a complete separation of the property interests of the prospective spouses and specifies that their respective incomes and accumulations during marriage will be deemed the separate property of the spouse receiving those earnings or accumulations. It also contains a complete mutual release of all marital rights to the property of each spouse.

This form is sufficiently general that it should be enforceable with respect to property that either spouse might own in another state. However, the laws of another state in which either of the parties owns real property should be consulted to ensure that any recording or other requirements are satisfied.

[b] No Presumed Confidential or Fiduciary Relationship Between Prospective Spouses

In California, unlike many other states [see Lindey, Separation Agreements and Antenuptial Contracts, vol. 2. (Matthew Bender)], prospective spouses who enter into a premarital agreement are not presumed to occupy a confidential or fiduciary relationship with respect to one another [see *Fernandez v. Fernandez* (1961) 194 Cal. App. 2d 782, 790, 15 Cal. Rptr. 374]. Paragraph 1 of this form provides that the parties are entering into the agreement "in contemplation of their marriage."

[c] Purpose Clause

Paragraph 2 of this form states that the parties are entering into the premarital agreement in order to define their property rights and to preclude the operation of the community property laws on their property after they are married. The purpose clause is included to make it clear that the parties are not attempting, by way of premarital agreement, to alter their "legal relations." For a general discussion of provisions that are considered to alter the "legal relations" of spouses and that are therefore void and unenforceable as against public policy [see *Fam. Code* § 1620; see § 111.32].

[d] Disclosure of Assets and Enforceability of Agreement

A premarital agreement is unenforceable if it was unconscionable when it was executed and, before execution one party (1) was not provided a fair, full, and reasonable disclosure of the property or financial obligations of the other; (2) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other beyond the disclosures provided; and (3) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party [*Fam. Code* § 1615(a)(2)(A)-(C)]. Any issue of unconscionability of a premarital agreement is a matter of law to be decided by a court [*Fam. Code* § 1615(b)]. For related discussion of the need for independent counsel by each party, the requirements for a valid waiver of independent counsel, and of a period of seven days between presentment and signing of the agreement, see § 111.20[2][d] [see *Fam. Code* § 1615(c)].

Paragraph 3(a) of this form states that the prospective spouses fully disclosed to one another the nature and extent of their assets and debts or other obligations. Exhibits A and B contain lists of that property and also specify the extent of any encumbrances or indebtedness of the prospective spouses. The exhibits must as accurately as possible reflect the value of each prospective spouse's assets and the amount of party's liabilities (including contingent liabilities, such as potential tax liabilities) as of the date that the premarital agreement is executed. Paragraphs 3(b) and 3(c) make reference to the parties' understanding concerning these Exhibits, and recite the parties' acknowledgment of having read the Exhibits and of entering into the agreement voluntarily and with a complete understanding of it.

Paragraph 3(d) makes reference to the parties having executed a written waiver of any disclosure of assets and obligations beyond that which has been disclosed as of the time the waiver was made. A written waiver of disclosure must be executed *before the time* that the premarital agreement is executed [see *Fam. Code* § 1615(a)(2)(B)]. It is appended as Exhibit C, and reference to that Exhibit is made in Paragraph 3(d).

For a summary of the general requirements for enforceability of a premarital agreement, see § 111.12.

[e] Children of Each Party

The first alternative Paragraph 4 of this form lists the children of each party. This paragraph is included to ensure that each party is fully aware of the potential heirs of, and possible duties of support [see *Fam. Code* §§ 3900, 3910(a), 4300, 4400] owed by, the other party. If neither of the prospective spouses has children, the second alternative Paragraph 4 should be used.

If the prospective spouses wish to make an agreement specifically relating to their duties to either, or both, of their children (for example, regarding support of the other party's children), those provisions may be added to this form following Paragraph 4. For a provision requiring one party to contribute to the support of the other party's children from a previous marriage or relationship, see the *form in § 111.221*.

[f] Mutual Release of Marital Rights

Paragraph 6 of this form contains a mutual release of all marital rights to the property of the other spouse. By including this provision, the parties agree to release any interest either one of them might have in the property of the other as an incident to their marital relationship, such as the right to dower or curtesy, which have been abolished in California [see *Prob. Code § 6412*], but which may exist in another state in which the one or both parties own property, rights of succession to the other party's property on the death of the other party [see *Prob. Code § 140 et seq.*], and community property rights.

The waiver of marital rights in the property of a prospective spouse may be accomplished through the use of general language in a premarital agreement. Whether the general language used in a particular premarital agreement is sufficient to waive specific rights is a question of construction. Each case must be determined in light of all surrounding circumstances as disclosed by the record and by the language used in the agreement [*Estate of Schwartz (1947) 79 Cal. App. 2d 308, 309, 179 P.2d 868*] . General language is sufficient to effectively relinquish the right to a family allowance [see *Estate of Wamack (1955) 137 Cal. App. 2d 112, 117, 289 P.2d 871*] and the right to be the administrator of the estate of the deceased spouse [see *Estate of Warner (1914) 168 Cal. 771, 773, 145 P. 504* ; see also *Warner v. Warner (1904) 144 Cal. 615, 618-619, 78 P. 24*] . The right to declare a homestead may be waived only by clear and explicit language [see *Warner v. Warner (1904) 144 Cal. 615, 618-619, 78 P. 24*] .

The Uniform Premarital Agreement Act [see *Fam. Code § 1600 et seq.*] states specifically that premarital agreements may contain provisions regarding the disposition of property and regarding the making of a will, trust, or other instrument to carry out the provisions of the agreement [see *Fam. Code § 1612(a)(3), (4)*; see also *Warner v. Warner (1904) 144 Cal. 615, 617-618, 78 P. 24* ; see also *Estate of Warner (1907) 6 Cal. App. 361, 363, 92 P. 191*] .

Paragraph 6(b) provides that neither party has made any promise to the other regarding any bequests or devises in his or her will.

[g] Acknowledgment

This form is designed to be used when one or both parties own or plan to acquire real property. A premarital agreement that is executed and acknowledged or proved in the same manner that is required for a grant of real property may be recorded in the office of the recorder for the county in which the real property affected by the agreement is situated [*Fam. Code § 1502(a)*]. Recording or non-recording of a premarital agreement has the same effect as the recording or non-recording of a grant of real property [*Fam. Code § 1502(b)*]. For a complete discussion of the formalities required in the conveyance of interests in real property, see California Legal Forms, Chapter 27, *Deeds and Recording* (Matthew Bender).

This agreement contains a form of acknowledgment of the parties' signatures by a notary or other authorized officer [see *Code Civ. Proc. § 1189(a)*]. For full discussion of the requirements and legal effects of an acknowledgment, see California Forms of Pleading and Practice, *Acknowledgments* (Matthew Bender).

[2] FORM

Complete Premarital Agreement--Parties' Interests in Property Acquired After Marriage to Be Separate

PREMARITAL AGREEMENT

Parties

1. _____[*Name of prospective spouse*], _____[*address*], and
 _____[*name of prospective spouse*], _____[*address*], in contemplation of their future marriage, now enter into this Premarital Agreement.

Purpose

2. The parties enter into this Agreement for the purpose of defining their respective property rights following their contemplated marriage. They intend that all property owned by either of them at the time of the marriage shall remain thereafter the separate property of the party who owns the property. They further intend that all additional property of any nature that either of them acquires after marriage shall be the separate property of the acquiring party, and not community estate property. The parties further intend to avoid any interests that, except for the operation of this Agreement, each of them might acquire in the property of the other as incidents of their marital relationship. The parties specifically intend that they will not acquire any community estate property after their marriage.

Disclosure of Property

3. (a) Each party has made a full, fair, and reasonable disclosure to the other party of all assets that he or she owns, and all debts, liabilities, or other obligations owed by him or her. A list of all assets owned, and obligations owed, by _____[*name of first prospective spouse*] is set forth in Exhibit A, which is attached to and made a part of this contract. A list of all assets owned, and obligations owed, by _____[*name of second prospective spouse*] is set forth in Exhibit B, which is attached to and made a part of this Agreement.

(b) The parties understand that the figures and amounts set forth in Exhibits A and B are approximately correct and not necessarily exact, and that they reflect the values of the listed property on or about the date of this Agreement.

(c) Each party acknowledges that he or she has read Exhibits A and B, that he or she is entering into this Agreement freely and voluntarily, and that he or she understands the contents of this Agreement.

(d) Each party acknowledges having voluntarily and expressly waived in writing any right to disclosure of the property and financial obligations of the other party beyond the disclosure already provided to date, and that such written waiver was made by an instrument that was executed prior in time to the execution of this Agreement. This waiver is attached hereto as Exhibit C.

[*EITHER, if one or both parties have children from a previous marriage or relationship:*]

Children of Prospective Spouses

4. (a) _____[*name of female prospective spouse*] _____[has no children by any prior marriage or other relationship or is the mother of the following children]:

[*List children's names and date of birth, using as many lines as necessary:*]

(1) Name:

_____ Date of Birth:

_____ .

(2) Name:

_____ Date of Birth:

_____ .

(b) _____ [*name of male prospective spouse*] _____ [has no children by any prior marriage or other relationship or is the father of the following children]:

[List children's names and date of birth, using as many lines as necessary:]

(1) Name:

_____ Date of Birth:

_____ .

(2) Name:

_____ Date of Birth:

_____ .

[OR, if neither party has children from a previous marriage or relationship:]

4. Neither party has any children by any prior marriage or other relationship.

[Continue as follows:]

Property of Each Spouse to Be Separate

5. (a) _____ [*Name of first prospective spouse*] agrees that all property of any nature or in any place, including but not limited to the earnings and income resulting from the personal services, skill, effort, and work belonging to _____ [*name of second prospective spouse*] during the marriage, or acquired by or coming to _____ [*name of second prospective spouse*] by purchase, gift, inheritance, or other means during the marriage, shall be the separate property of _____ [*name of second prospective spouse*] and shall be subject to his/her disposition as separate property, in the same manner as if no marriage had been entered into.

(b) _____ [Name of first prospective spouse] acknowledges that, except for this Agreement, the earnings and income resulting from the personal services of _____ [name of second prospective spouse] during the marriage would be the community property in which _____ [name of first prospective spouse] would have a one-half interest, but that by this Agreement those earnings and income are made the separate property of _____ [name of second prospective spouse].

(c) _____ [Name of second prospective spouse] agrees that all property of any nature or in any place, including but not limited to the earnings and income resulting from the personal services, skill, effort, and work belonging to _____ [name of first prospective spouse] during the marriage, or acquired by or coming to _____ [name of first prospective spouse] by purchase, gift, inheritance, or other means during the marriage, shall be the separate property of _____ [name of first prospective spouse] and shall be subject to his/her disposition as separate property, in the same manner as if no marriage had been entered into.

(d) _____ [Name of second prospective spouse] acknowledges that, except for this Agreement, the earnings and income resulting from the personal services of _____ [name of first prospective spouse] during the marriage would be the community property in which [second prospective spouse] would have a one-half interest, but that by this Agreement those earnings and income are made the separate property of _____ [name of first prospective spouse].

Release of Marital Rights to Separate Property

6. (a) The parties agree to waive and release any and all equitable or legal claims and rights, actual, inchoate, or contingent that he or she may acquire in the separate property of the other by reason of their marriage, including but not limited to:

- (1) The right to a family allowance;
- (2) The right to a probate homestead;
- (3) The right to claims of dower, curtesy, or any statutory substitutes provided by the laws of the state in which the parties or either of them die domiciled or in which they own real property;
- (4) The right of election to take against the will of the other;
- (5) The right to a distributive share in the estate of the other should he or she die intestate;
- (6) The right to declare a homestead in the separate property of the other; and
- (7) The right to act as estate administrator of the other.

(b) Nothing in this Agreement shall be deemed to constitute a waiver by either party of any bequest or devise that the other party may choose to make to him or her by will or codicil. [Add, if appropriate: However, the parties acknowledge that neither of them has made any promises of any kind to other regarding any bequests or devises.]

Execution of Other Instruments

7. Each party agrees, on the request of the other, to execute, deliver, and properly acknowledge any documents that may be required to carry out the intention of this Agreement and to execute, deliver, and properly acknowledge any deeds or

other documents in order that good and marketable title to any separate property can be conveyed by one party free from any claim of the other party acquired by him or her by reason of their marriage.

Representation by Separate Counsel and Presentment of Agreement

8. Each party acknowledges that he or she has been represented by independent counsel in the negotiation of this Agreement; that counsel representing each party is one of his or her own choosing; and that each party has read this Agreement and understands it. Each party further acknowledges that not less than seven days have elapsed between the time the agreement was presented to each of them [and each was advised to seek independent counsel] and the time this agreement was signed.

Binding Effect

9. This Agreement shall bind and inure to the benefit of the parties and their respective heirs, personal representatives, successors, and assigns.

Integration Clause

10. This Agreement constitutes the entire understanding between the parties concerning the subject matter that it covers. Any oral representations or modifications made prior to or after execution of this Agreement concerning the subject matter of this Agreement shall have no force or effect. However, this Agreement may be subsequently modified by a writing specifically referring to this Agreement and signed by both parties.

Effect of Partial Invalidity

11. If any term, provision, promise, or condition of this Agreement is determined by a court of competent jurisdiction to be invalid, void, or unenforceable, in whole or in part, the remainder of this Agreement shall remain in full force and effect and shall in no way be affected, impaired, or invalidated.

Governing Law

12. This Agreement shall be governed by the laws of the State of California.

Executed on _____[date].

_____ [signature of first prospective spouse]

_____ [typed name]

_____ [signature of second prospective spouse]

_____ [typed name]

ACKNOWLEDGMENT

State of California,)
County of _____)

On _____ [date] before me, _____ [name and title of officer taking acknowledgment], personally appeared _____ [names of persons signing instrument], who proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the persons executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____ (Seal)
 _____ [Name of officer]

EXHIBIT A

ASSETS AND OBLIGATIONS OF _____ [name of first prospective spouse]

Assets

[List all assets owned by first prospective spouse, and specify the approximate value of each.]

Obligations

[List all debts, encumbrances, liens, and other obligations against assets listed above or for which first prospective spouse is responsible.]

EXHIBIT B

ASSETS AND OBLIGATIONS OF _____ [name of second prospective spouse]

Assets

[List all assets owned by second prospective spouse, and specify the approximate value of each.]

Obligations

[List all debts, encumbrances, liens, and other obligations against property listed above or for which second prospective spouse is responsible.]

EXHIBIT C

[To be executed before execution of Premarital Agreement (parties assumed to be independently represented by counsel).]

Acknowledgment of Property Disclosure and Waiver of Further Disclosure

1. _____ *[Name of first prospective spouse]* _____ and _____ *[name of second prospective spouse]*, referred to hereafter as "the parties," hereby acknowledge that, in contemplation of their future marriage and the prospect of entering into a written premarital agreement, they have made a full, fair, and reasonable disclosure to one another of all assets in which either has any known interest and of all financial obligations for which either has any known responsibility.

2. The parties further acknowledge that in view of the above-mentioned disclosure of assets and obligations, each party has a complete and adequate knowledge and understanding of the nature and extent of the property and financial obligations of the other party. Each of the parties, being independently represented by counsel, has received the full and adequate assistance of counsel in determining and understanding the nature and extent of the assets and financial obligations of the other party.

3. Each of the parties is fully satisfied with the above-mentioned disclosure, and has had a reasonable opportunity to make an independent investigation of the assets and financial obligations of the other party, and neither of the parties wishes to obtain any such further disclosure or to make *[any or any further]* investigation.

4. Each of the parties hereby voluntarily and expressly waives any right to disclosure of the property and financial obligations of the other party beyond the disclosure heretofore made and mentioned above. The foregoing waiver is expressly made with the advice of counsel for each of the parties, and each party acknowledges being informed of the legal effect of such waiver by counsel prior to making the waiver.

5. The parties acknowledge that this instrument has been executed by each of them in the presence of one another and of the respective counsel of each of them, prior in time to the execution of any agreement or other instrument made in contemplation of marriage that pertains to or affects the parties' legal rights.

Executed on _____ *[date]*.

_____ *[signature of first prospective spouse]*

_____ *[typed name]*

_____ *[signature of second prospective spouse]*

_____ *[typed name]*

[Add Notarial ACKNOWLEDGMENT (use form of acknowledgment at end of main body of Premarital Agreement,

above)]

Approved by:

_____ [signature]

[typed name]

Attorney for _____ [first prospective spouse]

_____ [signature]

[typed name]

Attorney for _____ [second prospective spouse]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions General Overview Family Law Marital Duties & Rights Property

Rights General Overview Family Law Marital Duties & Rights Property Rights Premarital Agreements General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 111 PREMARITAL AGREEMENTS
PART IV. FORMS
A. Complete Agreements

33-111 California Legal Forms--Transaction Guide § 111.201

§ 111.201 Complete Premarital Agreement--Separate Property Owned Before Marriage Will Remain Separate After Marriage

[1] Comment

The form set forth in [2], *below*, is a complete premarital agreement designed to ensure that the parties' separate property, and all earnings attributable to that property, will retain its character following their marriage [*see generally Fam. Code § 1612(a)(1)* (general right of parties to make premarital contract regarding property interests)]. Generally, property owned by the parties prior to the marriage, and earnings and accumulations of that property, is separate property even without such an agreement [*see Fam. Code § 770(a)(1), (3)*; *see e.g., In re Marriage of Rossin (2009) 172 Cal. App. 4th 725, 735-740, 91 Cal. Rptr. 3d 427* (disability benefits received under policy purchased with separate property before marriage are separate property)]. However, executing such an agreement may be useful to avoid later misunderstandings regarding the scope of the parties' separate property.

Under this agreement, property acquired by either party during the marriage generally will be community property [*Fam. Code § 760* (property acquired by married person during marriage while domiciled in California is community property); *but see In re Marriage of Brooks, (2008) 169 Cal. App. 4th 176, 184-187, 86 Cal. Rptr. 3d 624* (under "form of title" presumption, taking title to property solely in name of one spouse, during marriage and with acquiescence of other spouse, effectively removes that property from general presumption of *Fam. Code § 760* that property acquired during marriage is community property)]. For an agreement that provides for complete separation of the parties' property interests (that is, that property acquired through the parties' efforts after marriage will be separate rather than community property), see the *form in § 111.200*.

For forms of transmutation agreements, see Chapter 112. For a discussion of transmutation of property, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, Ch. 20, *Community Property: General Characterization and Division Principles* (Matthew Bender 2d ed.).

To help ensure enforceability, this form provides for complete disclosure of each party's assets and obligations [*see Fam. Code § 1615(a)(2)*]. For further discussion of disclosure requirements, § 111.200[1][d]. In addition, the form

assumes that each party is independently represented by counsel. For related discussion of the need for independent counsel by each party, the requirements for a valid waiver of independent counsel, and of a period of seven days between presentment and signing of the agreement, see § 111.20[2][d] [see *Fam. Code* § 1615(c)].

[2] FORM

Complete Premarital Agreement--Separate Property Owned Before Marriage Will Remain Separate After Marriage

PREMARITAL AGREEMENT

Parties

1. _____[*name of prospective spouse*], _____[*address*], and
 _____[*name of prospective spouse*], _____[*address*], in contemplation of their future marriage, now enter into this Premarital Agreement.

Purpose

2. The parties intend to define the property that each of them owns at the time this Agreement is executed and to agree that that property shall remain each party's separate property.

Disclosure of Property Interests

3. (a) Each party has made a full, fair, and reasonable disclosure to the other party of all assets that he or she owns, and all debts, liabilities, or other obligations owed by him or her. A list of all assets owned, and obligations owed, by _____[*name of first prospective spouse*] is set forth in Exhibit A, which is attached to and made a part of this contract. A list of all assets owned, and obligations owed, by _____[*name of second prospective spouse*] is set forth in Exhibit B, which is attached to and made a part of this Agreement.

(b) The parties understand that the figures and amounts set forth in Exhibits A and B are approximately correct and not necessarily exact, and that they reflect the values of the listed property on or about the date of this Agreement.

(c) Each party acknowledges that he or she has read Exhibits A and B, that he or she is entering into this Agreement freely and voluntarily, and that he or she understands the contents of this Agreement.

(d) Each party acknowledges having voluntarily and expressly waived in writing any right to disclosure of the property and financial obligations of the other party beyond the disclosure already provided to date, and that such written waiver was made by an instrument that was executed prior in time to the execution of this Agreement. This waiver is attached hereto as Exhibit C.

Property of Parties

4. (a) Each of the Assets listed in Exhibit A is and shall remain the separate property of _____[*name of first prospective spouse*].

(b) Each of the Assets listed in Exhibit B is and shall remain the separate property of _____[*name of second prospective spouse*].

(c) All income, increases and other accumulations from the Assets listed in Exhibits A and B shall be the separate property of the party who owns that property.

(d) All debts and other liabilities incurred on behalf of the Assets listed in Exhibits A and B shall be the sole responsibility of the party who owns that property.

(e) Each Obligation listed in Exhibits A and B shall remain the separate responsibility of the party who incurred the debt or liability.

Binding Effect

5. This Agreement shall bind and inure to the benefit of the parties and their respective heirs, personal representatives, successors, and assigns.

Integration Clause

6. This Agreement constitutes the entire understanding between the parties concerning the subject matter that it covers. Any oral representations or modifications made prior to or after execution of this Agreement concerning the subject matter of this Agreement shall have no force or effect. However, this Agreement may be subsequently modified by a writing specifically referring to this Agreement and signed by both parties.

Effect of Partial Invalidity

7. If any term, provision, promise, or condition of this Agreement is determined by a court of competent jurisdiction to be invalid, void, or unenforceable, in whole or in part, the remainder of this Agreement shall remain in full force and effect and shall in no way be affected, impaired, or invalidated.

Governing Law

8. This Agreement shall be governed by the laws of the State of California.

Representation by Counsel and Presentment of Agreement

9. Each party acknowledges that he or she has been represented by independent counsel in the negotiation of this Agreement; that counsel representing each party is one of his or her own choosing; and that each party has read this Agreement and understands it. Each party further acknowledges that not less than seven days have elapsed between the time the agreement was presented to each of them [and each was advised to seek independent counsel] and the time this agreement was signed.

Executed on _____[*date*].

_____ [*signature of first prospective spouse*]

[*typed name*]
 _____ [*signature of second prospective spouse*]
 [*typed name*]

ACKNOWLEDGMENT

_____)
 State of California,)
 County of _____)

On _____ [*date*] before me, _____ [*name and title of officer taking acknowledgment*], personally appeared _____ [*names of persons signing instrument*], who proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the persons executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____ (*Seal*)
 _____ [*Name of officer*]

EXHIBIT A

ASSETS AND OBLIGATIONS OF _____ [*name of first prospective spouse*]

Assets

[*List all assets owned by first prospective spouse, and specify the approximate value of each.*]

Obligations

[*List all debts, encumbrances, liens, and other obligations against assets listed above or for which first prospective spouse is responsible.*]

EXHIBIT B

ASSETS AND OBLIGATIONS OF _____ [*name of second prospective spouse*]

Assets

[List all assets owned by second prospective spouse, and specify the approximate value of each.]

Obligations

[List all debts, encumbrances, liens, and other obligations against property listed above or for which second prospective spouse is responsible.]

EXHIBIT C

[To be executed before execution of Premarital Agreement (parties assumed to be independently represented by counsel).]

Acknowledgment of Property Disclosure and Waiver of Further Disclosure

1. _____ *[Name of first prospective spouse]* _____ and _____ *[name of second prospective spouse]*, referred to hereafter as "the parties," hereby acknowledge that, in contemplation of their future marriage and the prospect of entering into a written premarital agreement, they have made a full, fair, and reasonable disclosure to one another of all assets in which either has any known interest and of all financial obligations for which either has any known responsibility.
2. The parties further acknowledge that in view of the above-mentioned disclosure of assets and obligations, each party has a complete and adequate knowledge and understanding of the nature and extent of the property and financial obligations of the other party. Each of the parties, being independently represented by counsel, has received the full and adequate assistance of counsel in determining and understanding the nature and extent of the assets and financial obligations of the other party.
3. Each of the parties is fully satisfied with the above-mentioned disclosure, and has had a reasonable opportunity to make an independent investigation of the assets and financial obligations of the other party, and neither of the parties wishes to obtain any such further disclosure or to make *[any or any further]* investigation.
4. Each of the parties hereby voluntarily and expressly waives any right to disclosure of the property and financial obligations of the other party beyond the disclosure heretofore made and mentioned above. The foregoing waiver is expressly made with the advice of counsel for each of the parties, and each party acknowledges being informed of the legal effect of such waiver by counsel prior to making the waiver.
5. The parties acknowledge that this instrument has been executed by each of them in the presence of one another and of the respective counsel of each of them, prior in time to the execution of any agreement or other instrument made in contemplation of marriage that pertains to or affects the parties' legal rights.

Executed on _____[*date*].

_____[*signature of first prospective spouse*]
[*typed name*]

_____[*signature of second prospective spouse*]
[*typed name*]

[*Add Notarial **ACKNOWLEDGMENT** (use form of acknowledgment at end of main body of Premarital Agreement, above)]*

Approved by:

_____[*signature*]
[*typed name*]

Attorney for _____[*first prospective spouse*]

_____[*signature*]
[*typed name*]

Attorney for _____[*second prospective spouse*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate PropertyFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 111 PREMARITAL AGREEMENTS
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33-111 California Legal Forms--Transaction Guide §§ 111.202-111.209

[Reserved]

§§ 111.202[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 111 PREMARITAL AGREEMENTS

PART IV. FORMS

B. Provisions Regarding Property

33-111 California Legal Forms--Transaction Guide § 111.210

§ 111.210 Provision That Parties' Separate Assets Will Become Community Assets

[1] Comment

The form set forth in [2], *below*, is a provision under which prospective spouses agree that all property owned by the parties that would otherwise be the separate property of either spouse [*See Fam. Code §§ 770-772* (what constitutes separate property); *see also* Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed.), Ch. 20, *Community Property: General Characterization and Division Principles* (Matthew Bender)] will instead be their community property [*see Fam. Code § 760* (general definition of community property); *see generally Fam. Code § 1612(a)(1)* (general right of parties to make premarital agreement regarding property rights)]. If the parties wish to exempt any items of separate property from the operation of this provision, the optional bracketed language should be included.

The provision is for insertion in a premarital agreement. If the form of complete premarital agreement set forth in § 111.200 [2] is used, this provision would be substituted for Paragraph 5 of that form. In that event, appropriate modifications would need to be made to Paragraph 2 (purpose clause) to indicate that the parties wish to transmute their separate property into community property. Paragraph 6 (release of rights in separate property) should also be omitted from that form if this paragraph is used.

A provision in a premarital agreement to the effect that some or all separate property owned by either or both spouses will become community property on marriage is valid and enforceable [*see Woods v. Security-First Nat. Bank* (1956) 46 Cal. 2d 697, 703, 299 P.2d 657] .

In the absence of an agreement to the contrary, property acquired during the marriage solely in the name of one spouse, with the other spouse's acquiescence, is presumed to be the separate property of the titleholder [*In re Marriage of Brooks*, (2008) 169 Cal. App. 4th 176, 184-187, 86 Cal. Rptr. 3d 624 (under "form of title" presumption, taking title to property solely in name of one spouse, during marriage and with acquiescence of other spouse, effectively removes that property from general presumption of *Fam. Code § 760* that property acquired during marriage is community property)].

Prospective spouses who wish to change their separate property to community property must be fully advised of the practical consequences of their choice. For example, the affected property will be subject to attachment by creditors of either spouse for amounts due on contracts made after marriage [*see Fam. Code §§ 910, 911*]. The property will also be subject to execution by a judgment creditor for the torts of either spouse [*see Fam. Code § 1000*].

Any personal property affected by this form will be under the joint management and control of both spouses after marriage, and neither will be able to effectively convey the property, other than for fair and reasonable value, without the written consent of the other [*see Fam. Code § 1100(a), (b)*]. If the affected property consists of real estate, both spouses ordinarily must join in any conveyance or encumbrance of that property, with limited exceptions [*see Fam. Code § 1102*]. For full discussion of management and control of community property, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 24, *Management and Control of Property* (Matthew Bender).

Each party will become the one-half owner of all affected property and will inherit the entire amount of that property if the other party dies intestate [*see Prob. Code §§ 6400, 6401(a), 6414(a)*]. If the transferee spouse is survived by the transferor spouse, half of the affected property will be included in the decedent's estate for estate tax purposes [*see I.R.C. § 2040*]. For discussion of intestate succession rules regarding community and separate property, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 25, *Succession to Marital Property* (Matthew Bender). For a detailed discussion of estate taxation, see *California Probate Practice*, Ch. 15, *Taxation of Estates* (Matthew Bender), and *California Wills and Trusts*, Ch. 2, *Overview of Taxation Affecting the Disposition of Estates* (Matthew Bender).

[2] FORM

Provision That Parties' Separate Assets Will Become Community Assets

All Assets of Spouses to Be Community Property

[(a)] [Except as provided in subparagraph (b),] [A]ll property, rents, profits, and increases of whatever nature held by _____ [name of first prospective spouse] or _____ [name of second prospective spouse] on the date of their contemplated marriage and standing of record in the name of either party, and all property that may be acquired by either of them during their contemplated marriage, of any nature and from any source shall be their community property.

[Add if appropriate, and conform preceding paragraph: (b) Notwithstanding subparagraph (a), the following asset(s) shall _____ (be or remain) the separate property of _____ (name of owner-spouse or the party who acquired the asset): _____ (specify excluded asset or type of asset, e.g., if the parties separate, any earnings or income of either party derived from any employment or services rendered after the date of separation, and any asset acquired with such earnings or income).]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law
Contract Conditions & Provisions
General Overview
Family Law
Marital Duties & Rights
Property Rights
Characterization
General Overview
Family Law
Marital Duties & Rights
Property Rights
Characterization
Community Property
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Separate Property
Family Law
Marital Duties & Rights
Property Rights
Premarital Agreements
General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 111 PREMARITAL AGREEMENTS
PART IV. FORMS
B. Provisions Regarding Property

33-111 California Legal Forms--Transaction Guide § 111.211

§ 111.211 Provision That Income Derived From Parties' Separate Assets Will Become Community Property, With Separate Corpus Unchanged

[1] Comment

The form set forth in [2], *below*, is a provision making the income and accumulations from the separate property of either spouse (which would otherwise also be separate property) [see *Fam. Code* § 770(a)(3); see generally Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Ch. 20, *Community Property: General Characterization and Division Principles*] the community property of both spouses following their marriage, but leaving the character of the separate property corpus unchanged [see generally *Fam. Code* § 1612(a)(1) (general right of parties to make premarital agreement regarding property interests)]. This form is designed to be used by parties who wish to maintain intact the corpus of the property each acquires but who wish to share the returns produced by that property.

Although the form set forth in [2], *below*, changes the character of future income generated by separate property, it is not subject to the statutory requirements for transmutation agreements, since those requirements apply only to transmutation agreements made *during marriage* [see *Fam. Code* § 850 (transmutation agreements between "married persons" are subject to requirements of *Fam. Code* §§ 851-853); see *In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1110-1111, 32 Cal. Rptr. 3d 471, 481-482, 116 P.3d 1152 ("[p]remarital contracts are not construed and enforced under the same standards as interspousal agreements.")]. Nevertheless, to ensure that both parties fully understand the consequences of their premarital agreement, this form includes a provision that would be required in a transmutation agreement: an express statement that the characterization of future income from separate property will be changed [see *Fam. Code* § 852(a); *In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1106-1111, 32 Cal. Rptr. 3d 471, 478-482, 116 P.3d 1152 (spouses cannot accomplish transmutation in absence of written declaration expressly changing character of property); *In re Estate of MacDonald* (1990) 51 Cal. 3d 262, 267-268, 272-273, 272 Cal. Rptr. 153, 794 P.2d 911 (spouses' transmutation agreement must expressly state that characterization or ownership of property is being changed); *In re Marriage of Leni* (2006) 144 Cal. App. 4th 1087, 1095-1096, 50 Cal. Rptr. 3d 886 (escrow instruction that proceeds of sale of residence "be split 50/50" does not transmute proceeds from community to separate property, because it does not include express declaration that character of property is being changed)]. For discussion of the

requirements for interspousal transmutation agreements, see Ch. 112, *Postnuptial Agreements* .

This provision is for insertion in a premarital agreement. If inserted in the form *set forth in § 111.201[2]*, it should be substituted for Paragraph 4(c) of that form and appropriate modifications should be made to Paragraph 2 (purpose clause).

[2] FORM

Provision That Income Derived From Parties' Separate Assets Will Become Community Property, With Separate Corpus Unchanged

Income From Separate Property

The net rents, profits, and other income from the parties' separate property Assets, which are listed in Exhibits A and B, and the net proceeds from the sale of any of those Assets, shall be held and owned as the community property of the parties for the duration of their marriage. The parties expressly agree that this provision changes the character of such net rents, profits, income, and sale proceeds from each party's separate property to community property.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate PropertyFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 111 PREMARITAL AGREEMENTS

PART IV. FORMS

B. Provisions Regarding Property

33-111 California Legal Forms--Transaction Guide § 111.212

§ 111.212 Provision for Transfer of Property Immediately After Marriage

[1] Comment

The form set forth in [2], *below*, is a provision for the immediate transfer of property from one prospective spouse to the other after their marriage has taken place. This form contains four alternative provisions, all covering different types of property transfers. The first covers lump sum cash payments. The second covers transfers of real property. The third covers the transfer of fully paid life insurance policies. The fourth covers transfer of securities.

The form is for inclusion in a premarital agreement. If desired by the parties, one or more of the alternative provisions may be added to the premarital agreement *form in § 111.200 or § 111.201*.

It is important that the prospective spouses be fully advised of the potential tax consequences attending a transfer of property between them. Whether a transaction will be a taxable sale or exchange, or a gift, is an important consideration for the parties. Unless counsel has sufficient expertise in tax matters to advise the parties, counsel should refer the parties to a CPA, tax attorney, or other tax specialist for advice on the specific tax consequences of the proposed transfer.

For federal income tax purposes, no gain or loss is generally recognized on a transfer of property between spouses [*I.R.C. § 1041(a)*]. In addition, unlimited amounts of property, other than certain terminable interests, can be transferred between spouses without federal gift tax consequences [*see I.R.C. § 2523(a)*].

By contrast, premarital transfers, even those made pursuant to an agreement in contemplation of marriage, do not qualify for the marital gift tax deduction, even if the donor and donee subsequently marry in the same calendar year as the transfer [*see generally I.R.C. § 2523(a)(1); Treas. Reg. § 25.2523(a)-1(a); Rev. Rul. 69-347, 1969-1 C.B. 227*]. Furthermore, to the extent that the transfer does not qualify as a gift, the gain on the sale may be subject to income taxation [*see generally I.R.C. §§ 61(a)(3), 1001 et seq.*]. Thus, if a lump-sum transfer of property from one intended spouse to the other is contemplated, it is advisable to provide that the actual transfer will occur after the marriage.

A gift to be made in the future pursuant to a premarital agreement is, for tax purposes, complete on the date of the marriage (provided that the gift may be valued at that time) because it is on the date of marriage that the donor's obligation becomes enforceable [*see Rev. Rul. 69-347, 1969-1 C.B. 227*].

This form requires the transferor to make the transfer of property after the marriage has occurred. If the transferor fails to make the transfer, the transferee may seek specific enforcement of this contractual provision because he or she would have a valid contractual basis on which to proceed. A premarital agreement requiring a premarital transfer of property would probably be unenforceable because a premarital contract does not become effective until the marriage of the parties [*see Fam. Code § 1613*]. If a transfer of property in contemplation of marriage precedes the actual marriage, and the marriage does not take place, the transferor may not be able to recover possession of the transferred property [*see Estate of Smith (1936) 15 Cal. App. 2d 548, 550-551, 59 P.2d 854*].

[2] FORM

Provision for Transfer of Property Immediately After Marriage

Transfer of Property on Marriage

[Choose from the following provisions as appropriate:]

Within _____ [specify period, e.g., 30 days] after the date of the parties' marriage, _____ [name of first prospective spouse] shall pay to _____ [name of second prospective spouse] the sum of \$ _____, which amount shall thereafter be the sole and separate property of _____ [name of second prospective spouse].

[AND/OR]

Within _____ [specify period, e.g., 30 days] after the date of the parties' marriage, _____ [name of first prospective spouse] shall deliver to _____ [name of second prospective spouse] an Interspousal Transfer Deed for the real property located at _____ [address], City of _____, State of _____. Before executing and delivering the Interspousal Transfer Deed required under the provisions of this paragraph, _____ [name of first prospective spouse] shall obtain and deliver to _____ [name of second prospective spouse], a policy of title insurance on the property to be transferred. All expenses incurred in obtaining the title insurance policy and executing the Interspousal Transfer Deed shall be the responsibility of _____ [name of first prospective spouse].

[AND/OR]

Within _____ [specify period, e.g., 30 days] after the date of the parties' marriage, _____ [name of first prospective spouse] shall deliver to _____ [name of second prospective spouse] fully paid-up policies of [specify type of life insurance, e.g., whole] life insurance on the life of _____ [name of first prospective spouse] in a total face amount of not less than \$ _____ [specify] and naming _____ [name of second prospective spouse] as the irrevocable beneficiary and owner of all rights under those policies.

[AND/OR]

Within _____ [*specify period, e.g., 30 days*] after the date of the parties' marriage,
 _____ [*name of first prospective spouse*] shall deliver to _____ [*name of second
 prospective spouse*], free of any claims or liens, the following securities: _____ [*list name of security,
 number of shares and specify whether they are common, preferred, or convertible preferred*].
 _____ [*Name of first prospective spouse*] shall be responsible for satisfying all requirements of the
 transfer agents for, and assuming all expenses related to the transfer of, the specified securities.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions General Overview Family Law Marital Duties & Rights Property
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B. Provisions Regarding Property

33-111 California Legal Forms--Transaction Guide § 111.213

§ 111.213 Provision Granting One Party Exclusive Management and Control of Community Property

[1] Comment

The form set forth in [2], *below*, is a provision for a premarital agreement that gives one spouse the exclusive right to manage and control the community property of the spouses [*see generally Fam. Code § 1612(a)(2)* (general right of parties to make premarital agreement regarding management and control of property)]. The form contains an acknowledgment by the relinquishing spouse that he or she is informed concerning his or her right to equal management and control of the community property [*see Fam. Code §§ 1100(a), 1102(a)*; *see also* Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Ch. 24, *Management and Control of Property*], but is voluntarily relinquishing this right, except as specified.

As a general rule, the spouses have an equal right to manage and control community personal property [*see Fam. Code § 1100(a)*] and community real property [*see Fam. Code § 1102(a)*]. For community personal property, this right is subject to exceptions that require one spouse to obtain the other's written consent or to give that other spouse notice before entering into certain transactions [*see Fam. Code § 1100(b), (c), (d)*]. For community real property, the right to management and control is limited by the requirement that both spouses must, either personally or by duly authorized agent, join in executing any instrument by which the community real property is leased (for a period longer than one year), sold, conveyed, or encumbered [*Fam. Code § 1102(a)*].

By executing this agreement, the relinquishing spouse gives up all rights to management and control of the community property that he or she would otherwise have by law. The one exception provided for in this agreement is a provision that requires the managing spouse to obtain the other spouse's written consent before selling or encumbering the community household's furniture or furnishings or the clothing of the nonmanaging spouse or of the parties' children [*see Fam. Code § 1100(c)*].

In exercising the right of management and control, the managing spouse is subject to the fiduciary duty that exists by law for transactions between spouses [*see Fam. Code §§ 721(b), 1100(e)*]. In transactions between a husband and wife, each is subject to the general rules governing fiduciary relationships that control the actions of persons occupying

confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse and prohibits either from taking any unfair advantage of the other [*Fam. Code* § 721(b); see *In re Marriage of Burkle* (2006) 139 Cal. App. 4th 712, 730-736, 43 Cal. Rptr. 3d 181 (*Fam. Code* § 721(b) prohibits taking of *unfair* advantage but does not prohibit transaction in which benefits or advantages are obtained by both spouses and neither gains *unfair* advantage)]. The relationship is a fiduciary relationship subject to certain rights and duties that apply to nonmarital business partners [*Fam. Code* § 721(b) (legislatively abrogating holding of *In re Marriage of Duffy* (2001) 91 Cal. App. 4th 923, 111 Cal. Rptr. 2d 160, to extent in conflict with accompanying statement of legislative intent in Stats. 2002, ch. 310, § 2); see *Corp. Code* §§ 16403, 16404, 16503]. Thus, for example, a spouse must (1) provide the other spouse access to any books kept regarding a transaction for the purposes of inspection and copying [*Fam. Code* § 721(b)(1); see *Corp. Code* § 16403]; (2) render, on request, true and full information of all things affecting any transaction that concerns the community property [*Fam. Code* § 721(b)(2); see *Corp. Code* § 16403(c)(1); see also *In re Marriage of Walker* (2006) 138 Cal. App. 4th 1408, 1427, 42 Cal. Rptr. 3d 325 (*Corp. Code* § 16403(c)(1), which is incorporated by reference in *Fam. Code* § 721(b), requires partners to disclose to each other *without demand* any information concerning partnership's business and affairs reasonably required for proper exercise of partner's rights and duties)]; and (3) account to the other spouse, and hold as a trustee, any benefit or profit derived from any transaction made without the consent of the other spouse that concerns the community property [*Fam. Code* § 721(b)(3); see *Corp. Code* § 16404]. However, the Family Code's imposition of these duties of *business partners* does not broaden the spouses' duties and obligations to include those of *corporate* officers and directors beyond providing access, information, and an accounting [*In re Marriage of Leni* (2006) 144 Cal. App. 4th 1087, 1092-1094, 50 Cal. Rptr. 3d 886] . For a detailed discussion of fiduciary duties between spouses concerning the management and control of community property and other financial dealings, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed. (Matthew Bender), Ch. 24, *Management and Control of Property* .

[2] FORM

Provision Granting One Party Exclusive Management and Control of Community Property

Management and Control of Property

(a) _____ [*Name of first prospective spouse*] shall have the right of exclusive management and control of all community real and personal property that the parties acquire during their marriage. In exercising this right, _____ [*name of first prospective spouse*] shall at all times be subject to and abide by the rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other, as provided by law.

(b) _____ [*Name of first prospective spouse*] shall provide _____ [*name of second prospective spouse*] with reasonable use of and access to community funds.

(c) _____ [*Name of second prospective spouse*] acknowledges that but for the terms of this Agreement, _____ [*he or she*] and _____ [*name of first prospective spouse*] would share equally in the management and control of all community property acquired during their marriage. _____ [*Name of second prospective spouse*] further acknowledges that _____ [*he or she*] has voluntarily agreed to the exclusive management and control of the parties' community property by _____ [*name of first prospective spouse*]. _____ [*Name of second prospective spouse*] shall, on the request of _____ [*name of first prospective spouse*], take any and all steps and execute, acknowledge, and deliver to _____ [*name of first prospective spouse*] any and all instruments necessary or expedient to effectuate the purpose of this Agreement.

(d) Nothing in this Agreement shall be deemed to alter any requirements of law concerning the joint conveyancing or

prior written consents required for conveyancing of community personal property used as the parties' family dwelling, or consisting of the furniture, furnishings, or fittings of the parties' home, or the clothing or wearing apparel of _____[*name of second prospective spouse*] or of any minor children of the parties.

Legal Topics:

For related research and practice materials, see the following legal topics:

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33-111 California Legal Forms--Transaction Guide § 111.214

§ 111.214 Waiver of Reimbursement for Separate Property Contributions to Acquisition of Community Property

[1] Comment

The form set forth in [2], *below*, is a mutual waiver of the right to reimbursement for separate property contributions to the acquisition of community property in proceedings for marital dissolution or legal separation [see *Fam. Code* § 2640(b)]. It may be included in a premarital agreement between parties who anticipate the purchase of property toward which either or both will contribute separate property funds, and who wish to provide for the possible disposition of such property on dissolution or legal separation [see *generally Fam. Code* § 1612(a)(3) (parties' general right to make premarital agreement regarding disposition of property on dissolution or legal separation)]. For a form of mutual waiver of the right to reimbursement for separate property contributions to the acquisition of the other party's separate property, see § 111.215.

In proceedings to divide the community estate, unless a party has made a written waiver of the right to reimbursement or signed a writing that has the effect of a waiver, that party is entitled to reimbursement for his or her contributions to the acquisition of community property to the extent that he or she traces the contribution to a separate property source. The party is not entitled to receive interest or any adjustment for changes in monetary values, or to receive reimbursement in excess of the net value of the property at the time it is divided. "Contributions to the acquisition of the property" includes down payments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of property. It does not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property [*Fam. Code* § 2640(a)]. Further, the payment of community credit-card debt to enable the parties to qualify for a loan to purchase property is not a reimbursable "contribution to the acquisition of property" [*In re Marriage of Sparks* (2003) 104 Cal. App. 4th 289, 292-297, 127 Cal. Rptr. 2d 882] . For further discussion of reimbursement rights, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed. (Matthew Bender), Ch. 20, *Community Property: General Characterization and Division Principles* and Ch. 23, *Debt Liability and Division and Related Reimbursement Issues* .

[2] FORM

Waiver of Reimbursement for Separate Property Contributions to Acquisition of Community Property

Waiver of Right to Reimbursement for Separate Property Contributions

Neither party shall have the right to reimbursement for any contributions made from his or her separate property toward the acquisition of community property, as defined in *Family Code Section 2640*, and each party expressly waives any such right of reimbursement.

Legal Topics:

For related research and practice materials, see the following legal topics:

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33-111 California Legal Forms--Transaction Guide § 111.215

§ 111.215 Waiver of Reimbursement for Separate Property Contributions to Acquisition of Other's Separate Property

[1] Comment

The form set forth in [2], *below*, is a mutual waiver of the right to reimbursement for separate property contributions to the acquisition of the other spouse's separate property [*see Fam. Code § 2640(c)*]. It may be included in a premarital agreement between parties who anticipate the contribution of either's separate property toward the purchase of assets that will be the other's separate property. For a form of mutual waiver of the right to reimbursement for separate property contributions to the acquisition of community property, see § 111.214.

In dissolution proceedings, a spouse who has contributed his or her separate property to the acquisition of the other spouse's separate property during the marriage must be reimbursed for that contribution unless there has been a transmutation in writing [*see Fam. Code § 850 et seq.; see also Ch. 112, Postnuptial Agreements*] or a written waiver of the right to reimbursement [*Fam. Code § 2640(c)*]. Unless otherwise agreed in writing, the amount reimbursed is to be without interest or adjustment for a change in monetary values and may not exceed the net value of the acquired property at the time of the property division [*Fam. Code § 2640(c)*].

[2] FORM

Waiver of Right to Reimbursement for Separate Property Contributions

Neither party shall have the right to reimbursement for any contributions made from his or her separate property toward the acquisition of the other's separate property, as defined in *Family Code Section 2640*, and each party expressly waives any such right of reimbursement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions General Overview Family Law Marital Duties & Rights Property

RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty
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33-111 California Legal Forms--Transaction Guide §§ 111.215-111.219

[Reserved]

§§ 111.215[Reserved]



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C. Provisions Regarding Maintenance and Support

33-111 California Legal Forms--Transaction Guide § 111.220

§ 111.220 Provisions Regarding Responsibility for Joint Living Expenses**[1] Comment**

The form set forth in [2], *below*, contains provisions assigning responsibility for the joint living expenses of parties to a prospective marriage. It is intended for use in a premarital agreement. This form apportions responsibility for joint expenses on the basis of each parties' ability to pay. Each party remains individually responsible for the costs of items used exclusively by him or her, such as individual automobiles.

The provisions of this form would not be enforceable to the extent that they violate the statutory duty of each spouse to support the other during marriage [*see Fam. Code § 4300* (duty of support); *see also Fam. Code § 1612(a)(7)* (provisions of premarital agreement must not violate public policy) (c) (requirement of independent counsel in cases of support waivers); *In re Marriage of Higgason* (1973) 10 Cal. 3d 476, 485-486, 110 Cal. Rptr. 897, 516 P.2d 289 (premarital agreement waiving spousal support violates public policy; disapproved on other grounds in *In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 352, 131 Cal. Rptr. 3, 551 P.2d 323 ; but cf. *In re Marriage of Pendleton & Fireman* (2000) 24 Cal. 4th 39, 49, 99 Cal. Rptr. 2d 278, 5 P.3d 839 (waivers of or limitations on spousal support on marital dissolution in premarital agreements are not per se unenforceable, as discussed in § 111.32[1][a])].

[2] FORM**Provisions Regarding Responsibility for Joint Living Expenses**

Living Expenses

1. (a) _____ [*Name of first prospective spouse*] currently earns \$ _____ per year from _____ [*his or her*] employment. _____ [*Name of second prospective spouse*] currently earns \$ _____ per year from _____ [*his or her*] employment. Based on their total monthly income of \$ _____, the parties shall share their living expenses on a pro rata basis. _____ [*Name of first prospective spouse*] shall contribute _____ percent to payment of the parties' monthly living expenses, and _____ [*name of second prospective spouse*] shall

contribute _____ percent to payment of the parties' total monthly living expenses. These percentages shall be adjusted proportionately on any increase or decrease in either party's earnings.

(b) Joint living expenses shall be paid from a joint checking account that the parties shall open and maintain solely for the purpose of paying such expenses. The expenses to be paid from the joint checking account shall be limited to [specify covered expenses, e.g., rent; food; utilities; telephone; renters' insurance; joint entertainment; and joint gifts]. Neither party shall write a check on the joint checking account established pursuant to this paragraph for any purpose other than those specified in this paragraph without first obtaining the permission of the other party.

(c) On [specify time, e.g., the first of each month], the parties shall calculate their anticipated joint living expenses for the upcoming month. Each party shall deposit his or her percentage contribution to the total estimated joint monthly expenses in the joint checking account no later than [specify, e.g., the fifth day of the month]. If the estimated amount becomes insufficient, the parties will estimate the additional necessary amount and deposit that amount in the same manner.

Payments From Separate Property

2. (a) _____ [Name of first prospective spouse] shall pay from _____ [his or her] separate property all of the following: _____ [specify, e.g., all maintenance and replacement expenses for _____ (his or her) vehicle; all purchase and maintenance of items of clothing; and all personal grooming expenses].

(b) _____ [Name of second prospective spouse] shall pay from _____ [his or her] separate property all of the following: _____ [specify, e.g., all maintenance and replacement expenses for _____ (his or her) vehicle; all purchase and maintenance of items of clothing; all personal grooming expenses; and all expenses for the care and feeding of _____ (his or her) pets].

(c) Each party will manage and control his or her own separate property and shall maintain his or her own personal checking and savings accounts in addition to the parties' joint checking account described in Paragraph 1(b).

Legal Topics:

For related research and practice materials, see the following legal topics:

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*33-111 California Legal Forms--Transaction Guide § 111.221***§ 111.221 Provision for Support of Minor Stepchildren****[1] Comment**

The form set forth in [2], *below*, is a provision for the support of the minor children of one prospective spouse by the other prospective spouse. If the parties intend that one prospective spouse provide support for the other's minor children, they may include this provision in their premarital agreement. Although the natural parents of a child have an equal responsibility to support and educate their child in a manner suitable to the child's circumstances [*Fam. Code § 3900*; see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, Ch. 40, *Duty to Support Children and Jurisdiction to Order Support*, and Ch. 41, *Child Support Orders* (Matthew Bender 2d ed.)] an individual has no legal obligation to support a spouse's child by a former relationship.

Contractual provisions for the support of a spouse's children by a former relationship are enforceable against the promisor spouse and, in the event of breach, may give rise to a cause of action for damages by the spouse, the child as third-party beneficiary, or even the county welfare authorities on behalf of the child [see *Estate of Warner (1914) 168 Cal. 771, 776, 145 P. 504* (dicta defining promisee spouse's options as either to proceed against promisor for breach of contract or to rescind premarital agreement)].

[2] FORM**Provision for Support of Minor Stepchildren**

Provision for Support of Other Party's Child

(a) _____ [*Name of first prospective spouse*] shall provide a home and reasonable support for the care, maintenance, and education of the following minor _____ [*child or children*] of _____ [*name of second prospective spouse*] from a previous [*marriage or relationship*]:
 _____ [*list name and date of birth of each child*].

(b) _____ [*Name of first prospective spouse*] shall provide the support referred to above with respect to

[the *or* each] child for the duration of _____'s [*name of first prospective spouse*] marriage to _____ [*name of second prospective spouse*] or until the child reaches the age of majority, becomes emancipated, or marries, whichever occurs first.

(c) Nothing in this Agreement shall be construed as absolving either party of his or her statutory duty to support any minor child of the marriage.

Legal Topics:

For related research and practice materials, see the following legal topics:

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33-111 California Legal Forms--Transaction Guide § 111.222

§ 111.222 Provision Requiring One Party to Provide Annuity for Other Party in Event of First Party's Death During Marriage

[1] Comment

The form in [2], *below*, is a provision for a premarital agreement requiring one prospective spouse to purchase and maintain an annuity payable to the other prospective spouse on the first spouse's death. This type of arrangement provides the recipient spouse with financial security if the other spouse predeceases him or her. The recipient spouse is then assured of receiving periodic, unconditional income. For a form of provision for an annuity to be payable beginning immediately on marriage, see § 111.223.

This provision requires the prospective spouse to purchase the annuity contract during his or her own lifetime. If instead the parties wish to provide for an annuity to be paid out of or purchased from assets in the decedent's estate, any such provision would need to comply with the requirements for a testamentary disposition. For a discussion of annuity provisions in testamentary instruments and forms of such provisions, see *California Wills and Trusts*, Ch. 25, *Devises of Money and Personal Property* (Matthew Bender).

For a general discussion of annuities as personal planning devices, see Ch. 97, *Private Loans and Annuities*.

[2] FORM

Provision Requiring One Party to Provide Annuity for Other Party in Event of First Party's Death During Marriage

Purchase of Annuity

Within [*specify period, e.g., 30 days*] after the parties are married, _____ [*name of first prospective spouse*] shall purchase an annuity contract that will pay a sum of at least \$_____ per year on the death of _____ [*name of first prospective spouse*]. The annuity purchased shall provide for the specified payments to continue until the death of _____ [*name of second prospective spouse*].

_____ *[Name of first prospective spouse]* shall assume all costs of purchasing and maintaining the annuity contract for as long as the parties are married.

Legal Topics:

For related research and practice materials, see the following legal topics:

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C. Provisions Regarding Maintenance and Support

33-111 California Legal Forms--Transaction Guide § 111.223

§ 111.223 Provision Requiring One Party to Provide Annuity for Other Party, With Payments Immediately After Marriage

[1] Comment

The form in [2], *below*, is a provision requiring one prospective spouse to arrange annuity payments to the other beginning immediately after marriage. This type of arrangement is designed to ensure that the annuitant will have a guaranteed amount for his or her expenses. It can be used as a substitute for a lump-sum payment arrangement (see § 111.212). This form does not relieve the spouse who purchases the annuity of the duty to support the other spouse [see *Fam. Code § 4300*]. For a provision requiring one party to purchase an annuity for the other party that is payable on the first party's death, see § 111.222.

[2] FORM

Provision Requiring One Party to Provide Annuity for Other Party, With Payments Immediately After Marriage

Annuity

(a) _____ [Name of first prospective spouse] shall pay to _____ [name of second prospective spouse] during their marriage the sum of \$_____ per [specify period, e.g., month], which _____ [name of second prospective spouse] may use, spend, or invest as he/she chooses.

(b) _____ [Name of second prospective spouse] shall not be required to explain the use of any funds received to _____ [name of first prospective spouse].

(c) Nothing in this provision shall be deemed to relieve either prospective spouse of his or her duty to provide support for the other during or after their marriage.

Legal Topics:

For related research and practice materials, see the following legal topics:

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33-111 California Legal Forms--Transaction Guide § 111.224

§ 111.224 Provision Requiring One Party to Purchase Life Insurance in Favor of Other Party

[1] Comment

The form set forth in [2], *below*, is a provision for a premarital agreement requiring one prospective spouse to purchase insurance on his or her life, naming the other prospective spouse as the beneficiary of that insurance [*see generally Fam. Code § 1612(a)(5)* (general right of parties to make premarital agreement regarding ownership rights in and disposition of death benefit from a life insurance policy)]. For a provision that requires one prospective spouse to change the beneficiary under an existing life insurance policy, see the *form in § 111.225*.

If the decedent does not direct otherwise and if the proceeds of a life insurance policy are includable in the decedent's gross estate, the beneficiary is liable to the executor of the insured's estate for the estate tax attributable to his or her share of the proceeds [*see I.R.C. § 2206*]. Optional subparagraph (c) requires the party purchasing the insurance to include a provision in his or her will providing that the beneficiary party will not be liable to the insured's estate for any estate tax on the proceeds.

[2] FORM

Provision Requiring One Party to Purchase Life Insurance in Favor of Other Party

Life Insurance

(a) _____ [*Name of first prospective spouse*] shall purchase policies of [*specify type of life insurance, e.g., whole*] life insurance on _____ [*his or her*] life in the face amount of \$ _____ within [*specify period, e.g., 30 days*] after the marriage of the parties, and shall designate _____ [*name of second prospective spouse*] as the irrevocable primary beneficiary of those policies. _____ [*Name of first prospective spouse*] shall have the right to name alternate beneficiaries in the event that he/she survives the primary beneficiary.

(b) _____ [*Name of first prospective spouse*] shall continue pay all premiums and comply with any

other requirements necessary keep the insurance policies on _____ [his or her] life in full force and effect as long as the parties remain married to one another and shall not encumber the policies in any way during their marriage without the express written permission of _____ [name of second prospective spouse].

[Add if desired: (c) The proceeds payable to _____ (name of second prospective spouse) as the beneficiary of the policies specified in this paragraph shall be free from all estate, succession, or any other death tax, and _____ (name of first prospective spouse) shall include a provision to this effect in _____ (his or her) will.]

Legal Topics:

For related research and practice materials, see the following legal topics:

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C. Provisions Regarding Maintenance and Support

*33-111 California Legal Forms--Transaction Guide § 111.225***§ 111.225 Provision Requiring One Party to Change Life Insurance Policy Beneficiary in Favor of Other Party****[1] Comment**

The form set forth in [2], *below*, is a provision for a premarital agreement by which a prospective spouse agrees to change the beneficiary under an existing life insurance policy [see *generally Fam. Code § 1612(a)(5)* (general right of parties to make premarital agreement regarding ownership rights in and disposition of death benefit from a life insurance policy)]. For a provision requiring a prospective spouse to obtain a new life insurance policy naming the other prospective spouse as beneficiary, see the *form in § 111.224*.

If the insured spouse transfers ownership of the life insurance policy to his or her prospective spouse prior to the marriage, that transfer constitutes a gift for federal gift tax purposes [see *Treas. Reg. § 25.2512-6*]. However, transfers made during marriage are protected from tax under the federal gift tax marital deduction [see *I.R.C. § 2523*].

If the decedent does not direct otherwise and if the proceeds of a life insurance policy are includable in the decedent's gross estate, the beneficiary is liable to the executor of the insured's estate for the estate tax attributable to his or her share of the proceeds [*I.R.C. § 2206*]. Optional subparagraph (b) requires the insured party to include a provision in his or her will providing that the beneficiary party will not be liable to the insured's estate for any estate tax on the proceeds.

[2] FORM**Provision Requiring One Party to Change Life Insurance Policy Beneficiary in Favor of Other Party**

Life Insurance

[(a)] _____ [Name of insured prospective spouse] shall, within [specify period, e.g., 30 days] after the parties' marriage, change the primary beneficiary of any policies of insurance on _____ [his or her] life and shall designate _____ [name of prospective beneficiary spouse] as the irrevocable and primary beneficiary of the following life insurance policies: _____ [list name of insurers, policy numbers, types

of policies, and face amounts of each].

[Add if desired: (b) The proceeds payable to _____ (*name of prospective beneficiary spouse*) as the beneficiary of the policies specified in this paragraph shall be free from all estate, succession, or any other death tax, and _____ (*name of insured prospective spouse*) shall include a provision to this effect in _____ (his or her) will.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsGeneral OverviewInsurance LawLife InsuranceBeneficiariesGeneral Overview



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33-111 California Legal Forms--Transaction Guide § 111.226

§ 111.226 Waiver of Reimbursement for Community Contributions to Education or Training of One Party

[1] Comment

The form set forth in [2], *below*, is a waiver of the right of the community to reimbursement for contributions to the education and/or training of one or both spouses [*see Fam. Code § 2641(b)(1), (e)*]. It may be used in a premarital agreement when one or both of the prospective spouses intends to pursue some type of educational or training program that will enhance their earning capacities. It will preclude the community from recovering any contributions to that education or training in the event that the parties later become legally separated or have their marriage dissolved [*see generally Fam. Code § 1612(a)(3)* (general right of parties to provide for disposition of property on dissolution or legal separation)].

This form contains two alternatives. The first is general and should be used by parties who do not wish the community to have any claim whatsoever for the cost of community contribution to their education or training. The second alternative is specific and may be used by parties who know that one of them will undertake a specified course of study and who wish only to limit the community right to reimbursement for contributions to that undertaking.

For full discussion of community reimbursement rights regarding contributions to a spouse's education or training, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Ch. 23, *Debt Liability and Division and Related Reimbursement Issues*.

[2] FORM

Waiver of Reimbursement for Community Contributions to Education or Training of One Party

Waiver of Community Right to Reimbursement for Contributions to Education or Training

[Choose one of the following sets of provisions:]

(a) The parties contemplate that one or both of them will undertake a course of education or training in a profession or vocation. If contribution toward the funding of any such education or training is made from the community property of the parties, the community shall have no right to reimbursement of any part of that contribution from the party receiving the education or training, and each party hereby expressly waives any right to community reimbursement.

(b) In the event of a legal separation or dissolution of the parties' marriage, any loan taken by the parties to finance the education or training specified in this paragraph shall be assigned for payment to the party for whose education or training that loan was obtained, without offset.

[OR]

(a) The parties acknowledge that _____ [*name of prospective spouse who will undertake education or training*] will pursue a course of [study or training] in the field of [*specify, e.g., dentistry*] at _____ [*name of institution where study or training will take place*]. Contributions to this undertaking shall be made from the community funds of the parties during their marriage. Under no circumstances (including but not limited to a legal separation or dissolution of the marriage of the parties) shall the community be entitled to receive reimbursement for amounts contributed under this paragraph, and each party hereby expressly waives any right to community reimbursement.

(b) In the event of a legal separation or dissolution of the parties' marriage, any loan taken by the parties to finance the education or training specified in this paragraph shall be assigned for payment to _____ [*name of prospective spouse who will undertake education or training*], without offset.

(c) Nothing in this paragraph shall be deemed to preclude the community from recovering reimbursement for contributions to the education or training of either spouse, other than that specified under this paragraph, on the dissolution of the parties' marriage or on their legal separation.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions General Overview Family Law Marital Duties & Rights Property Rights Premarital Agreements General Overview



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33-111 California Legal Forms--Transaction Guide § 111.227

§ 111.227 Waiver of Claims Arising Out of Nonmarital Cohabitation ("*Marvin*" Waiver)

[1] Comment

The form set forth in [2], *below*, is for use in a premarital agreement to provide for a waiver of any claims to property or support of one of the parties arising from a period of cohabitation of the parties *before* marriage.

For forms pertaining to nonmarital cohabitation agreements, see Chapter 110.

[2] FORM

Premarital Agreement Provisions

"*Marvin*" Waiver

The parties acknowledge that they _____[currently live together *or* lived together from _____ to _____ (*specify dates*)]. The parties acknowledge that they have been advised of the principles of *Marvin v. Marvin* (1976) 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 . The parties agree that neither of them has any rights against the other arising out of their living together, for any services provided for their joint benefit, or for any services provided for the benefit of the other. There are no agreements between the parties regarding any property or support rights other than as set forth in this Agreement. The parties further acknowledge that they are not in a confidential relationship with one another and are dealing at "arm's length" in the negotiation of this Agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewFamily LawFamily Protection & WelfareCohabitants & SpousesGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsGeneral Overview



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33-111 California Legal Forms--Transaction Guide § 111.228

§ 111.228 Waiver of Right to Seek Spousal Support on Termination of Marriage or Legal Separation

[1] Comment

Set forth in [2]-[3], *below*, are forms for use in a premarital agreement to provide for a waiver of spousal support on termination of marriage or legal separation. The first form (see [2], *below*) is for use in providing an outright waiver of spousal support with no offsetting property. The second form (see [3], *below*) is for use when the waiver of support is conditioned on the transfer of money or other property on marriage.

The form assumes that each party to the agreement has been represented by independent counsel in the negotiation and preparation of the agreement. Pursuant to statute operative January 1, 2002, any provision in a premarital agreement regarding spousal support, including a waiver, is not enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement was signed, or if the provision is unconscionable *at the time of enforcement*. In addition, an otherwise unenforceable provision regarding spousal support may not become enforceable *solely* because the party against whom enforcement is sought was represented by independent counsel [*Fam. Code § 1612(c)*]. For related discussion of the requirements for a premarital agreement to be found voluntary and with respect to waivers of spousal support, see §§ 111.20[2][d], 111.32[1].

[2] FORM--Outright Waiver of Support With No Offsetting Property

Premarital Agreement Provisions

Waiver of Spousal Support

The parties do not currently contemplate, desire, or expect that a dissolution or annulment of their impending marriage to one another will ever occur. The parties have chosen to enter into this Agreement to strengthen their marriage by clarifying their respective financial positions. However, the parties realize that marital dissolutions or annulments do occur with respect to some marriages, and therefore they desire to put in place provisions pursuant to the terms of this Agreement that govern the consequences should marital dissolution, annulment, or related spousal separation occur.

Accordingly, each party hereby waives from the other any right to temporary or permanent spousal support in the event of separation, as defined by this Agreement, dissolution of marriage, or annulment of marriage. The parties have had the consequences of this waiver fully explained to them and they enter into this Agreement with the intent that it be binding in any future proceeding involving their marriage. The parties acknowledge that under current California law, a person may waive his or her interest in spousal support. It is the intent of each party, in consideration of the benefits of marriage and the benefits provided under this Agreement, to waive spousal support and not seek spousal support from the other party in the event of separation, as defined by this Agreement, dissolution of marriage, or annulment of marriage.

The parties acknowledge that each of them is in good health and is currently fully self-supporting, that each of them has been represented by independent counsel in the negotiation and preparation of this agreement, and that at least seven days have elapsed between the time the agreement was presented to each of them [and each was advised to seek independent counsel] and the time this agreement was signed.

[3] FORM--Waiver of Support With Provision for Transfer of Money or Other Property on Marriage

Premarital Agreement Provisions

Waiver of Spousal Support With Provision for Transfer or Transmutation of Property

The parties do not currently contemplate, desire, or expect that a dissolution or annulment of their impending marriage to one another will ever occur. The parties have chosen to enter into this Agreement to strengthen their marriage by clarifying their respective financial positions. However, the parties realize that marital dissolutions or annulments do occur with respect to some marriages, and therefore they desire to put in place provisions pursuant to the terms of this Agreement that govern the consequences should marital dissolution, annulment, or related spousal separation occur.

Accordingly, each party hereby waives from the other any right to temporary or permanent spousal support in the event of separation, as defined by this Agreement, dissolution of marriage, or annulment of marriage. The parties have had the consequences of this waiver fully explained to them and they enter into this Agreement with the intent that it be binding in any future proceeding involving their marriage. The parties acknowledge that under current California law, a person may waive his or her interest in spousal support; that each of them is in good health and is currently fully self-supporting; that each of them has been represented by independent counsel in the negotiation and preparation of this agreement; and that at least seven days have elapsed between the time the agreement was presented to each of them [and each was advised to seek independent counsel] and the time this agreement was signed.

This spousal support waiver is made in consideration of the benefits of marriage, and of the benefits provided under this Agreement, and specifically as part of the bargained-for compromise for the [transfer *and/or* transmutation of] property provisions [and the estate plan provisions] of this Agreement [that are set forth below].

[CONTINUE, with specific provisions for transfer or transmutation of property on marriage.]

[Transferring or transmuting party, e.g., Prospective Husband] agrees to transfer to [recipient party, e.g., Prospective Wife] as his/her sole and separate property [describe money or other property transferred or transmuted, e.g., the sum of two hundred thousand dollars (\$200,000.00) on the occasion of each anniversary of their marriage through and including the fifth (5th) anniversary of their marriage, for a total transfer of one million dollars (\$1,000,000.00)]. [Continue with any related transfer/transmutation provisions, e.g.: The parties expect to purchase a home, which will be titled in joint names, as community property. In the event of marital dissolution or annulment of their marriage, Prospective Husband agrees that the residence will be transferred to Prospective Wife.]

[ADD, any related provisions, e.g.:]

[*Transferring or transmuting party, e.g., Prospective Husband*] specifically waives any right to reimbursement for any down payment, capital improvement, and/or reduction of mortgage principal, pursuant to *California Family Code Section 2640*, as it is currently enacted or any subsequent statutory or case law right to reimbursement, as part of any transfer of any community real property to [*recipient party, e.g., Prospective Wife*] as his/her sole and separate property if the parties' marriage is ever terminated by marital dissolution or annulment.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawContract Conditions & ProvisionsWaiversGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral Overview



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33-111 California Legal Forms--Transaction Guide §§ 111.229-111.239

[Reserved]

§§ 111.229[Reserved]



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D. Miscellaneous Provisions

33-111 California Legal Forms--Transaction Guide § 111.240

§ 111.240 Provision for Private Annex to Premarital Agreement

[1] Comment

The form in [2], *below*, is a private annex to a premarital agreement. It is designed to be used when parties have made some agreement regarding real property that is to be recorded [*see Fam. Code § 1502*], but the parties do not wish other terms of that agreement that do not affect realty to be made a matter of public record.

[2] FORM

Provision for Private Annex to Premarital Agreement

ANNEX TO PREMARITAL AGREEMENT

_____[*Name of prospective spouse*], _____[*address*], and
_____[*name of prospective spouse*], _____[*address*], who have entered into a
premarital agreement dated _____, agree as follows:

Purpose

1. The premarital agreement described above was recorded in _____ County, California, because its terms granted an interest in real property situated there. The parties prefer that the following terms be kept private between themselves and that they not appear in the public records of any county. The following terms are a part of the premarital agreement between the parties, which is attached to this annex as Exhibit A.

[Specify terms of agreement between parties that they wish to keep private.]

EXHIBIT A

[Attach copy of recorded premarital agreement.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewFamily LawMarital Duties & RightsProperty
RightsPremarital AgreementsGeneral Overview



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33-112 California Legal Forms--Transaction Guide 112.syn

§ 112.syn Synopsis to Chapter 112: POSTNUPTIAL AGREEMENTS

§ 112.01 California Statutes

§ 112.02 Federal Statutes

§§ 112.03-112.04 [Reserved]

§ 112.05 Law Reviews and Periodicals

§ 112.06 Annotations

§ 112.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

[3] Legal Encyclopedias

§§ 112.08-112.09 [Reserved]

§ 112.10 Use of Term "Postnuptial Agreement"

§ 112.11 Reasons for Making Postnuptial Agreements

§ 112.12 Governing Statutes

§ 112.13 Scope of Authorized Transactions

§ 112.14 Limitations on Postnuptial Agreements

[1] Generally

[2] Specific Types of Agreements Prohibited

- [a] Contracts to Pay for Domestic Services and Companionship
- [b] Contracts Waiving or Limiting Spousal Support Obligations
- [c] Contracts Limiting Duty of Child Support
- [d] Contracts Modifying Obligation of Fidelity
- [e] Contracts Promoting or Encouraging Dissolution

§ 112.15 Use of Transmutation Agreements

[1] Nature of Transmutation Agreements

[2] Tax Effects

- [a] Income Tax Effects
 - [i] Recognition of Agreement for Tax Purposes
 - [ii] Taxable Gain and Deductible Loss in General
 - [iii] Stepped-Up Basis at Death
- [b] Gift Tax Effects
 - [i] Generally
 - [ii] Spousal Cotenancies in Personal Property
 - [iii] Spousal Cotenancies in Real Property
 - [iv] Availability of Marital Deduction
- [c] Estate Tax Effects

§ 112.16 General Enforcement Issues

[1] Bringing Actions in General

- [a] Capacity to Bring Action
- [b] Specific Actions

[2] Breach of Confidential and Fiduciary Relationship

- [a] Fraud, Undue Influence, or Other Breach

[b] Remedies for Breach

[c] Defenses Against Claim of Breach

[i] Lack of Confidential Relationship

[ii] Knowing, Free, and Voluntary Agreement

[iii] Disclosure

[iv] Acceptance of Benefits as Estoppel

[v] Laches

[3] Assertion of Agreement in Dissolution Proceeding

§§ 112.17-112.29 [Reserved]

§ 112.30 Essential Contractual Elements

[1] Contractual Capacity

[2] Consideration

[3] Consent

[a] In General

[b] Effect of Spouse's Confidential and Fiduciary Relationship

[4] Writing Requirement

[a] In General

[b] Transmutations of Property

[5] Acknowledgment, Proof, and Recording of Agreements

[a] Permissive Recording of Instruments Affecting Real Property

[b] Required Recording of Real Property Transmutations to Impart Notice

§ 112.31 Advisability of Independent Counsel

§§ 112.32-112.99 [Reserved]

§ 112.100 Drafting Guide to General Provisions

Scope

§ 112.101 Drafting Guide to Provisions Defining Property Rights

Scope

§ 112.102 Drafting Guide to Provisions Transmuting Property Rights

Scope

§ 112.103 Drafting Guide to Provisions Altering Property Rights

Scope

§ 112.104 Drafting Guide to Provisions Amending or Revoking Premarital Agreement

Scope

§§ 112.105-112.199 [Reserved]

§ 112.200 Agreement Defining Status of Property

[1] Comment

[2] FORM

Agreement Defining Status of Property

§ 112.201 Declaration Changing (Transmuting) Character of Separate or Community Personal Property

[1] Comment

[2] FORM

Declaration Changing (Transmuting) Character of Separate or Community Personal Property

§ 112.202 Agreement That All Property Will Be Community Property

[1] Comment

[2] FORM

Agreement That All Property Will Be Community Property

§§ 112.203-112.209 [Reserved]

§ 112.210 Agreement of Spouses Amending Premarital Agreement

[1] Comment

[2] FORM

Agreement of Spouses Amending Premarital Agreement

§ 112.211 Agreement of Spouses Revoking Premarital Agreement

[1] Comment

[a] Use of Form

[b] Revocation Method

[c] Ancillary Instruments

[2] FORM

Agreement of Spouses Revoking Premarital Agreement



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33-112 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter discusses agreements that are entered into between spouses during marriage without the expectation that the spouses will separate or dissolve their marriage, and presents forms of agreement by which they may delineate their rights to property. The Legal Background sets forth the major considerations that must be taken into account in drafting an enforceable postnuptial agreement and contains a general drafting guide. Forms include complete forms of agreement that cover property rights.

In *In re Marriage Cases*, the California Supreme Court held that differential treatment of opposite-sex and same-sex couples in California's marriage statutes violated the California Constitution's guarantees of privacy, due process, and equal protection [*In re Marriage Cases* (2008) 43 Cal. 4th 757, 784, 847-856, 76 Cal. Rptr. 3d 683, 183 P.3d 384] . That holding was superseded by the subsequent adoption of Proposition 8, which amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California [see *Cal. Const. art. I, § 7.5* (eff. Nov. 5, 2008)]. The Supreme Court upheld Proposition 8 against a constitutional challenge, but in doing so the Court reaffirmed the continuing validity of same-sex marriages entered into before November 5, 2008, the effective date of Proposition 8 [Strauss v. Horton (2009) 46 Cal. 4th 364, 470-474, 93 Cal. Rptr. 3d 591, 207 P.3d 48 (estimating 18,000 same-sex marriages lawfully entered into before Proposition 8 took effect)]. If a form in this chapter is used in the context of a same-sex marriage lawfully entered into before that date, the language in the form should be modified accordingly. For example, the names of the parties may be used instead of terms like "Husband" and "Wife."

For forms of agreement concerning property and other matters that may be used by unmarried cohabitants who have no intention of marrying, see Ch. 110. For forms of agreement entered into before marriage that are made in contemplation of marriage (premarital agreements), see Ch. 111. Note that provisions of certain of the forms set forth in Ch. 111 may, with appropriate modification, also be used in connection with postnuptial agreements. Agreements made on separation or in contemplation of termination of marriage (marital settlement agreements) are discussed in Chs. 120- 125.



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A. Primary Sources

33-112 California Legal Forms--Transaction Guide § 112.01

§ 112.01 California Statutes

Contracts.

Capacity. *Civ. Code §§ 1556-1559.*

Consent. *Civ. Code §§ 1565-1590.*

Consideration. *Civ. Code §§ 1605-1615.*

Statute of frauds. *Civ. Code § 1624.*

Uniform Fraudulent Transfer Act. *Civ. Code § 3439 et seq.*

Rights and obligations during marriage.

General provisions. *Fam. Code § 700 et seq.*

Characterization of marital property. *Fam. Code § 760 et seq.*

Liability of marital property. *Fam. Code § 900 et seq.*

Management and control of marital property. *Fam. Code § 1100 et seq.*

Agreements between spouses.

General provisions. *Fam. Code §§ 721, 1500-1503.*

Transmutation of property. *Fam. Code § 850 et seq.*

Restrictions on contract altering spouses' legal relations. *Fam. Code § 1620.*

Division of property. *Fam. Code § 2500 et seq.*

Custody provisions. *Fam. Code § 3000 et seq.*

Support provisions.

Agreements regarding child and spousal support. *Fam. Code §§ 3580-3593.*

Child support. *Fam. Code § 3900 et seq.*

Spousal support. *Fam. Code § 4300 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsEnforcementFamily LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsRequirements



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A. Primary Sources

33-112 California Legal Forms--Transaction Guide § 112.02

§ 112.02 Federal Statutes

Treatment of proceeds of life insurance. *I.R.C. § 2042.*

Transfers for insufficient consideration. *I.R.C. § 2043.*

Transfers subject to gift tax. *I.R.C. § 2501.*

Estate tax marital deduction. *I.R.C. § 2056.*

Valuation of gifts. *I.R.C. § 2512.*

Gifts to spouse. *I.R.C. § 2523.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsGeneral OverviewFamily
LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsEnforcementFamily LawMarital
Duties & RightsProperty RightsPostnuptial & Separation AgreementsRequirementsFamily LawMarital Termination &
Spousal SupportGeneral Overview



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A. Primary Sources

33-112 California Legal Forms--Transaction Guide §§ 112.03-112.04

[Reserved]

§§ 112.03[Reserved]



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PART I. RESEARCH GUIDE

B. Secondary Sources

33-112 California Legal Forms--Transaction Guide § 112.05

§ 112.05 Law Reviews and Periodicals

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Reppy, Jr., *Debt Collection From Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 San Diego L. Rev. 143 (1981).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Duties & Rights Property Rights Postnuptial & Separation Agreements General Overview Family Law Marital Duties & Rights Property Rights Postnuptial & Separation Agreements Enforcement Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview



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B. Secondary Sources

33-112 California Legal Forms--Transaction Guide § 112.06

§ 112.06 Annotations

Enforceability of Agreement Requiring Spouse's Co-operation in Obtaining Religious Bill of Divorce, 29 A.L.R. 4th 746 (1984).

Waiver of Widow's Allowance by Postnuptial Settlement, 9 A.L.R. 3d 955 (1966).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsEnforcementFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview



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B. Secondary Sources

33-112 California Legal Forms--Transaction Guide § 112.07

§ 112.07 Text References

[1] Matthew Bender Sources

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California Real Estate Law and Practice, Ch. 346 (Matthew Bender).

Rabkin & Johnson, *Federal Income, Gift and Estate Taxation*, Chs. 5, 52 (Matthew Bender).

Rice, *California Family Tax Planning*, Chs. 13, 14 (Matthew Bender).

[2] Additional Text References

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Witkin, *Summary of California Law*, vol. 11, *Husband and Wife*, vol. 11, *Community Property*; vol. 14, *Wills and Probate* (10th ed. 2005).

[3] Legal Encyclopedias

33 Cal. Jur. 3d, *Family Law*, §§ 493-511.

15A Am. Jur. 2d, *Community Property*, §§ 68-88.

41 Am. Jur. 2d, *Husband and Wife*, §§ 255-275, 316-319.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Duties & Rights Property Rights Postnuptial & Separation Agreements General Overview Family
Law Marital Duties & Rights Property Rights Postnuptial & Separation Agreements Requirements Family Law Marital
Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview



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B. Secondary Sources

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[Reserved]

§§ 112.08[Reserved]



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§ 112.10 Use of Term "Postnuptial Agreement"

For purposes of this chapter, the term "postnuptial agreement" means any contract made between the spouses in an ongoing marriage, except as described hereafter. By definition, the term excludes premarital agreements, which are agreements made between intended spouses in contemplation of marriage [see Ch. 111], and marital settlement (termination) agreements, which are agreements entered into in contemplation of the separation of the parties or on dissolution of their marriage [see Ch. 120, *Complete Marital Settlement Agreements*].

An agreement between the spouses is a postnuptial agreement and is governed by the rules regulating postnuptial agreements even if it is made on the day of marriage, provided it was made *after* the ceremony [*Tompkins v. Bishop* (1949) 94 Cal. App. 2d 546, 549, 211 P.2d 14] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsRequirements



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§ 112.11 Reasons for Making Postnuptial Agreements

Spouses in an ongoing marriage for whom spousal separation or termination of the marriage is not an issue may wish to make an express agreement for a variety of reasons, some of which include, but are not limited to, the following:

- (1) To clarify their ownership of property [*see § 112.200*].
- (2) To change (transmute) the character of property from separate to community, or vice versa [*see Fam. Code § 850 et seq.; see §§ 112.15, 112.30[4][b], 112.201, 112.202*].
- (3) To amend or revoke a premarital agreement [*see Fam. Code § 1614; see §§ 112.210, 112.211*].

Spouses may also desire to contract with each other with respect to matters unrelated to their property rights. In general, this is permissible so long as the subject matter of the agreement is not one prohibited by statute or contrary to public policy. Spouses are, however, constrained by the prohibition on agreements that alter their "legal relations," except with respect to property [*see Fam. Code § 1620; see § 112.13*]. As in the case of premarital agreements [*see Ch. 111*], the enforceability of provisions unrelated to property is often questionable and counsel must proceed with caution in including such provisions.

This chapter emphasizes property-related agreements between spouses. For discussion of specific limitations on postnuptial agreements, see § 112.14. For discussion of agreements relating to property, support, child custody, and other matters of significance when spouses agree to separate or terminate their marriage, see Chapters 120- 125.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview



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§ 112.12 Governing Statutes

Postnuptial agreements are governed primarily by *Fam. Code* §§ 721, 1500, 1620, and 3580. *Fam. Code* § 721(a) provides that a husband or wife may enter into any transaction with the other, or with any other person, respecting property, which either might enter into if unmarried, subject to the rules applying to the spouses' confidential and fiduciary relationship. In that regard, *Fam. Code* § 721(b) states that except as provided in *Prob. Code* §§ 143, 144, 146, 16040 and 16047, in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships that control the actions of person occupying confidential relations with each other [*Fam. Code* § 721(b)]. Property agreements between spouses and the impact of the spouses' confidential and fiduciary relationship on those agreements are discussed further in §§ 112.16[2], 112.30[3][b].

Fam. Code § 1500 provides general authority for spouses to alter their property rights by a marital property agreement. *Fam. Code* § 1620 states that, except as otherwise provided by law, a husband and wife cannot, by a contract with each other, alter their legal relations except as to property [see *In re Marriage of Higgason* (1973) 10 Cal. 3d 476, 487, 110 Cal. Rptr. 897, 516 P.2d 289 (construing a predecessor statute; *disapproved on other grounds* in *In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 352, 131 Cal. Rptr. 3, 551 P.2d 323)].

Family Code Section 3580, which is derived from a common predecessor statute to *Family Code* Section 1620 [see former *Civ. Code* § 4802], provides that spouses may agree in writing to an immediate separation and may make provision for the support of either of them and of their children during the separation or on dissolution of their marriage. It further provides that the mutual consent of the parties is sufficient consideration for the agreement. The language that the mutual consent of the parties is a sufficient consideration "for the agreement" has been applied to postnuptial agreements generally, rather than to separation agreements only [see, e.g., *Estate of Wilson* (1976) 64 Cal. App. 3d 786, 798, 134 Cal. Rptr. 749 (construing language in predecessor statute)], although the placement of the statement in the statute might create the impression that it refers only to separation agreements [see *Woods v. Security-First Nat. Bank* (1956) 46 Cal. 2d 697, 702, 299 P.2d 657 (mutual consent doctrine given alternative status as judicially created rule)]. For discussion of consideration, see § 112.30[2].

To the extent that a postnuptial agreement has the effect of transmuting the character of property, it will additionally be

governed by the special statutes relating to transmutation [see *Fam. Code* § 850 *et seq.*; see also §§ 112.15, 112.30[4][b]].

Agreements between spouses are construed under the statutory rules governing the interpretation of contracts generally, unless a more specific statute provides otherwise [*In re Marriage of Benjamins* (1994) 26 Cal. App. 4th 423, 429, 31 Cal. Rptr. 2d 313 ; see *Civ. Code* § 1635].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Duties & Rights Property Rights Postnuptial & Separation Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview



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§ 112.13 Scope of Authorized Transactions

Family Code Section 721(a) authorizes all kinds of "transactions" between spouses with respect to property. It appears that this language is intended to give spouses broad latitude in this regard, both with respect to interspousal transactions and those involving third parties. In one early case, the California Supreme Court commented that the phrase "engagement or transaction," which appeared in a predecessor statute [see former Civ. Code § 158], was sufficiently comprehensive to apply to a promissory note and mortgage [*Marlow v. Barlew* (1879) 53 Cal. 456, 459]. Section 721(a) further provides that either spouse may enter into any transaction concerning property "which either might [enter] if unmarried." This language is derived from the former "Married Women's Property Act," which was intended to remove various limitations on a wife's contractual capacity that were imposed by common law [see former Civ. Code §§ 158, 162; see also *Self v. Self* (1962) 58 Cal. 2d 683, 685, 26 Cal. Rptr. 97, 376 P.2d 65] .

The language of *Family Code Section 721(a)* and its predecessors have prompted statements in the cases to the effect that a husband and wife may deal freely with each other in all property transactions [see, e.g., *Tillaux v. Tillaux* (1897) 115 Cal. 663, 670, 47 P. 691] . The fact that spouses have such broad freedom to contract regarding property encourages courts to examine all cases involving property disputes between the spouses to determine if an interspousal contract with regard to property is involved [see *Perkins v. Sunset Tel. & Tel. Co.* (1909) 155 Cal. 712, 720, 103 P. 190] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law
Marital Duties & Rights
Property Rights
Postnuptial & Separation Agreements
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§ 112.14 Limitations on Postnuptial Agreements

[1] Generally

The state's interest in marriage has led to strict limitations on spouses' power to contract with one another. While spouses are authorized to make all types of contracts with regard to their property relations [*Fam. Code § 721(a)*], both public policy and an express statutory prohibition on contracts altering the spouses' "legal relations" [*see Fam. Code § 1620*] make many interspousal contracts relating to matters other than property rights unenforceable and void [*see Brooks v. Brooks (1941) 48 Cal. App. 2d 347, 351, 119 P.2d 970 ; see also In re Marriage of Mehren & Dargan (2004) 118 Cal. App. 4th 1167, 1172-1173, 13 Cal. Rptr. 3d 522* (postmarital agreement in which husband promised to grant wife his entire interest in certain community property if he used illicit drugs was unenforceable as violative of public policy favoring no-fault divorce)].

Although spouses are prohibited from altering their legal relations [*Fam. Code § 1620*], the statutes offer little guidance about precisely what those unalterable relations are. Aside from the statutes defining property rights, the primary statute governing spousal relations is *Family Code 720*, which provides that husband and wife contract toward each other obligations of mutual respect, fidelity, and support. Because neither this nor any other statute offers a comprehensive definition of the spouses' "legal relations," the prohibition on contracts altering these relations must be interpreted in terms of judicial decisions and inferences from related statutory law. The list of prohibited contracts set forth in [2], *below*, is based on such an interpretation. For a related discussion of matters that appear prohibited on public policy grounds from inclusion in a premarital agreement, see Ch. 111.

[2] Specific Types of Agreements Prohibited

[a] Contracts to Pay for Domestic Services and Companionship

The duty to furnish, and the right to enjoy, companionship, sexual relations, and the society and affection of one's spouse have long been regarded as essential elements of the marital relationship [*Hawkins v. Hawkins (1930) 104 Cal. App. 608, 612, 286 P. 747 ; Estate of Campbell (1910) 12 Cal. App. 707, 721, 108 P. 669 ; see Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 385, 115 Cal. Rptr. 765, 525 P.2d 669*] . It is therefore highly unlikely

that a contract between spouses to pay for any of these elements would be regarded as enforceable. The basis for refusal to enforce such a contract would be that a promise to furnish that which one is legally obligated to furnish is not consideration for a contract [see *Civ. Code* § 1605]. It has specifically been held that a spouse entitled to affection through the contract of matrimony cannot be required to pay for it [*Rottman v. Rottman* (1921) 55 Cal. App. 624, 634, 204 P. 46] .

Two early cases held that premarital agreements between intended spouses that promised payment for domestic or nursing services during marriage were void and unenforceable. In one of the cases, the disgruntled husband was allowed to sue his wife for restitution of the sums paid [*Brooks v. Brooks* (1941) 48 Cal. App. 2d 347, 351, 119 P.2d 970] . In the other, the wife was barred from recovering payment for her domestic services from the estate of her husband, which she had been promised in the agreement [*Estate of Sonnickson* (1937) 23 Cal. App. 2d 475, 479, 73 P.2d 643] . Some later cases have merely disregarded language promising payment for companionship and domestic services rather than considering that such language rendered the entire contract void [see, e.g., *Ayoob v. Ayoob* (1946) 74 Cal. App. 2d 236, 247-248, 168 P.2d 462] .

If the entire subject of the contract is the rendition of nursing-type services by a spouse in exchange for the promised transfer of property, the court may well find that the contract is void as against public policy. The court may adhere to the traditional view that spouses are obliged by the nature of the marriage relation to perform these services. The obligation of support that spouses mutually undertake embraces the rendition of such uncompensated "protective supervision services" [*Borelli v. Brusseau* (1993) 12 Cal. App. 4th 647, 652-654, 16 Cal. Rptr. 2d 16 ; see [b], below]. Accordingly, no case appears to have held such a contractual provision between spouses to be enforceable.

Challenges to the prohibition on contracts for domestic services between spouses are further discussed in Ch. 111, *Premarital Agreements* .

[b] Contracts Waiving or Limiting Spousal Support Obligations

One of the three mutual obligations imposed by statute on married persons is the obligation of support [*Fam. Code* §§ 720, 4300]. Generally speaking, the support obligation is a duty to provide one's spouse with the necessities of life, measured by the lifestyle of the particular parties, and to pay creditors of the other spouse, with separate property if required, for contracts made by that spouse for the necessities of life [see *Fam. Code* §§ 914, 4301; see also *Borelli v. Brusseau* (1993) 12 Cal. App. 4th 647, 652-654, 16 Cal. Rptr. 2d 16 (spouse is obligated by marriage contract to provide nursing-type care without compensation to other spouse when ill; contract to provide nursing care in return for promised transfer of property is void as against public policy)].

The obligation of support has long been regarded as an unalterable legal relation of spouses under *Family Code* Section 1620 and its predecessor statutes [see *In re Marriage of Higgason* (1973) 10 Cal. 3d 476, 487, 110 Cal. Rptr. 897, 516 P.2d 289 (disapproved on other grounds in *In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 352, 131 Cal. Rptr. 3, 551 P.2d 323) ; *Pereira v. Pereira* (1909) 156 Cal. 1, 4, 103 P. 488 , construing former *Civ. Code* §§ 158, 159]. Therefore, parties to an ongoing marriage ordinarily cannot make an enforceable agreement waiving or limiting the right of either spouse to support during marriages or in the event of separation.

Spouses can, however, provide for the following:

- A marital settlement (termination) agreement containing waivers or limitations on spousal support payments, as discussed in Ch. 123, *Spousal and Child Support Provisions* ; and
- An agreement in which one or both spouses waive the right to family allowance or probate homestead after the other spouse is dead [see, e.g., *Estate of Wamack* (1955) 137 Cal. App. 2d 112, 115-116, 289 P.2d 871 ; *Estate of Schwartz* (1947) 79 Cal. App. 2d 308, 309, 179 P.2d 868 (both cases

involving premarital agreement)).

For a related discussion of spousal support waivers in the context of premarital agreements, see Ch. 111, *Premarital Agreements*. For detailed discussion of the duty to support one's spouse, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Ch. 50, *Duty to Support Spouse*.

[c] Contracts Limiting Duty of Child Support

A parent may not contract away the duty to support his or her minor child [*Elkind v. Byck* (1968) 68 Cal. 2d 453, 457, 67 Cal. Rptr. 404, 439 P.2d 316 ; see *Fam. Code* § 3900], and it is extremely unlikely that a contract under which one spouse was purportedly relieved of his or her obligation to support an adult child in need [see *Fam. Code* § 3910] (or a parent in need) [*Fam. Code* § 4400] would be enforceable. However, parents are permitted to make binding contracts to support children in situations in which the law does not require support, as for example, after the child has attained majority or married before reaching the age of majority [see *Fam. Code* § 3901; *Kamper v. Waldon* (1941) 17 Cal. 2d 718, 721, 112 P.2d 1 ; *Bryant v. Swoap* (1975) 48 Cal. App. 3d 431, 439, 121 Cal. Rptr. 867] . Likewise, because a stepparent is not required to support his or her spouse's children by a former relationship, a contract is necessary to make such a support obligation enforceable. Contracts relating to the support of stepchildren are binding and give rise to a cause of action for damages if breached [see *Estate of Warner* (1907) 6 Cal. App. 361, 365-366, 92 P. 191 ; see also *Fam. Code* § 915].

For further discussion of child support duties, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Ch. 40, *Duty to Support Children and Jurisdiction to Order Support*.

[d] Contracts Modifying Obligation of Fidelity

In addition to support and respect, spouses contract towards each other the mutual obligation of fidelity [*Fam. Code* § 720]. This obligation is imposed on the spouses by law when they enter the marriage contract. However, under the statutory provisions barring suits for damages for breach of promise and for fraudulent inducement to marry [see *Civ. Code* §§ 43.4, 43.5 (the so-called "anti-heart balm" statutes)], a spouse does not have a cause of action for damages if the other spouse breaches this legal obligation of fidelity [see *Boyd v. Boyd* (1964) 228 Cal. App. 2d 374, 379-380, 39 Cal. Rptr. 400 (interspousal suit for failure to cohabit after marriage as barred by *Civ. Code* § 43.5, barring breach of promise actions)].

On the other hand, because of the legally imposed obligation of fidelity, it appears that any contractual provision that attempted explicitly to sanction sexual infidelity on the part of either husband or wife would be of no legal effect, either as consideration for a counterpromise or as the basis of an action for damages.

[e] Contracts Promoting or Encouraging Dissolution

Because of the strong public policy to foster and protect marriage [*Glickman v. Collins* (1975) 13 Cal. 3d 852, 857, 120 Cal. Rptr. 76, 533 P.2d 204 ; see [1], above], contracts between spouses that promote or encourage dissolution of the marriage are prohibited [see, e.g., *In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 349-350, 131 Cal. Rptr. 3, 551 P.2d 323] . However, such a void provision does not render the entire interspousal contract unenforceable unless it is "inseparably linked" to other contract provisions, in which case it causes the whole contract to fail [*In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 351, 131 Cal. Rptr. 3, 551 P.2d 323] .

On the other hand, an interspousal property agreement that merely simplifies the ownership of marital property is not considered to promote dissolution, even though it might make property division on dissolution easier. Further, the subjective intention of the parties that the marriage will not last throughout their mutual lifetimes is not promotive of

dissolution so as to render the contract void [*In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 350-352, 131 Cal. Rptr. 3, 551 P.2d 323] . For further discussion of the prohibition on interspousal contracts promoting dissolution, see Ch. 111.

The only exception to the rule prohibiting contracts promotive of dissolution involves the situation in which the objects of the marriage are utterly destroyed [*Glickman v. Collins* (1975) 13 Cal. 3d 852, 857-858, 120 Cal. Rptr. 76, 533 P.2d 204] . As discussed in Ch. 211, marital settlement (termination) agreements fall within this exception and are not void as against public policy, even though they often explicitly refer to the pendency of dissolution, and deal with the division of the parties' property, custody of children, and support payments on dissolution.

Because the Legislature has specified that a marriage can be terminated only by means of death of one of the parties, or by a judgment of dissolution or nullity [*Fam. Code* § 310], it is clear that any contractual provision by which the parties attempt to provide for an alternative means of ending the marriage (for example, at will, or at the end of a certain period of time after one of the parties gave notice) is void and of no legal force or effect.

Legal Topics:

For related research and practice materials, see the following legal topics:

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33-112 California Legal Forms--Transaction Guide § 112.15

§ 112.15 Use of Transmutation Agreements

[1] Nature of Transmutation Agreements

Many postnuptial agreements have as their purpose the change, or transmutation, of the character of the parties' property from separate to community, or vice versa. Spouses are free to alter the character of property in this manner [*Fam. Code § 850*], provided that all statutory requirements are met [*see Fam. Code § 850 et seq.* (applicable to transmutations made on and after January 1, 1985); *see also Fam. Code § 721*]. A transmutation agreement may be used to change the character of property to be acquired in the future, as well as property that the spouses own at the time of the agreement [*see, e.g., Roberts Land & Improvement Co. v. Dallas* (1932) 124 Cal. App. 86, 88, 11 P.2d 1103 (spouses agreed that all real property "held" by either spouse was community property, and agreement was construed to apply to real property thereafter acquired by the parties)].

A transmutation agreement between spouses must be fair and based on full disclosure of the pertinent facts [*Estate of Wilson* (1976) 64 Cal. App. 3d 786, 798, 134 Cal. Rptr. 749 (citing predecessor of *Fam. Code § 721(b)*); *see In re Marriage of Balcof* (2006) 141 Cal. App. 4th 1509, 1519-1522, 47 Cal. Rptr. 3d 183 (if one spouse secures advantage from transmutation, presumption arises under *Fam. Code § 721* that advantaged spouse exercised undue influence, and transaction will be set aside unless advantaged spouse rebuts presumption)]. For discussion of the effect of the confidential and fiduciary relationship existing between spouses on the consent element of the agreement, see § 112.30[3][b].

The major considerations pertaining to transmutation agreements between spouses under the law applicable to transmutations made on and after January 1, 1985, are the following:

- Except for certain interspousal gifts [*see Fam. Code § 852(c)*], a transmutation of real or personal property is not valid unless a written declaration expressly changing the character of the property is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected [*Fam. Code § 852(a)*; *In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1106-1111, 32 Cal. Rptr. 3d 471, 478-482, 116 P.3d 1152 ; *In re Estate of MacDonald* (1990) 51 Cal. 3d 262, 267-268,

272-273, 272 Cal. Rptr. 153, 794 P.2d 911 ; *In re Marriage of Leni* (2006) 144 Cal. App. 4th 1087, 1095-1096, 50 Cal. Rptr. 3d 886 (escrow instruction that proceeds of sale of residence "be split 50/50" does not transmute proceeds from community to separate property, because it does not include express declaration that character of property is being changed); see § 112.30[4][b]].

- Transmutations may be made with or without consideration [see *Fam. Code* § 850; see also § 112.30[2]].
- Transmutations of real property are not effective with respect to third parties without notice of the transmutation, unless the transmutation is recorded [*Fam. Code* § 852(b)].
- Transmutations are subject to the laws governing fraudulent transfers [*Fam. Code* § 851].
- A statement in a will of the character of property is not admissible as evidence of a transmutation of the property in any proceeding commenced before the death of the person who made the will [*Fam. Code* § 853(a)].
- A written joinder or written consent to a nonprobate transfer of community property on death that satisfies Family Code Section 852 is a transmutation and is governed by the law applicable to transmutations and not by specialized statutes governing nonprobate transfers [*Fam. Code* § 853(c)]. Otherwise, a spouse's written consent to a provision for a nonprobate transfer of community property on death generally is not a transmutation of the consenting spouse's interest in the property [see *Prob. Code* § 5022(a)].
- A waiver of a right to a joint and survivor annuity or survivor's benefits under the federal Retirement Equity Act of 1984 [Pub. L. No. 98-397] is not a transmutation of the community property rights of the person executing the waiver [*Fam. Code* § 853(b)].

The specialized transmutation statutes do not affect the law governing property characterization in which separate and community property have been commingled or otherwise combined [*Fam. Code* § 852(d)], nor are they applicable with respect to transmutations made before January 1, 1985 [*Fam. Code* § 852(e)]. For a detailed discussion of the requirements of law applicable to transmutation agreements made before and after January 1, 1985, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Ch. 20, *Community Property: General Characterization and Division Principles*.

[2] Tax Effects

[a] Income Tax Effects

[i] Recognition of Agreement for Tax Purposes

The characterization of property, and of the income from it, as separate or community property is important for income tax purposes only if the spouses file separate returns. The distinction between community and separate property is of little importance when a joint return is filed, because the income of the spouses is aggregated [see *I.R.C.* § 6013(d)(3)]. However, characterization and the effect of transmutation agreements on characterization will have important tax consequences when a husband and wife file separate returns, because each spouse must claim one-half of the community income, all income from his or her separate property, and all income from his or her percentage share of co-owned property, such as joint tenancy property [see *Poe v. Seaborn* (1930) 282 U.S. 101, 110-113, 51 S. Ct. 58, 75 L. Ed. 239].

Agreements between spouses that change the character of their ownership of property have generally been recognized as effective for federal income tax purposes [see *Dollar v. Commissioner* (1940) 41 B.T.A. 869, 873-874 ; *Olson v. Commissioner* (1948) 10 T.C. 458, 466 ; *Crail v. Commissioner* (1942) 46 B.T.A. 658, 659, 661-662 ; *Van Dyke v. Commissioner* (9th Cir. 1941) 120 F.2d 945, 946 ; *Helvering v. Hickman* (9th Cir. 1934) 70 F.2d 985, 986] . An oral transmutation agreement, which is valid only if made prior to January 1, 1985 [see *Fam. Code* § 852(e)], may be difficult to prove for tax purposes, and the evidence supporting such an agreement must be unequivocal [see *Wehe v. McLaughlin* (9th Cir. 1929) 30 F.2d 217, 218 ; *Helvering v. Hickman* (9th Cir. 1934) 70 F.2d 985, 986-987] . A written agreement is greatly preferred, and is required by California law for transmutations agreements made on or after January 1, 1985 [*Fam. Code* § 852(a); *In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1106-1111, 32 Cal. Rptr. 3d 471, 478-482, 116 P.3d 1152 ; *In re Estate of MacDonald* (1990) 51 Cal. 3d 262, 267-268, 272-273, 272 Cal. Rptr. 153, 794 P.2d 911 ; see § 112.30[4][b]].

Under federal income tax law, if the separate property of either or both spouses is transmuted into community property, one half of the income from the property is attributable and taxable to each spouse as community income [*Dollar v. Commissioner* (1940) 41 B.T.A. 869, 873] . If community property is transmuted to separate property, income from that property will be taxed as separate income [*Van Dyke v. Commissioner* (9th Cir. 1941) 120 F.2d 945, 947] . If the agreement provides that the earnings of either or both of the spouses will be the separate property of the earning spouse, the income will be treated as separate property for income tax purposes [*Helvering v. Hickman* (9th Cir. 1934) 70 F.2d 985, 986-987 ; *Van Every v. Commissioner* (9th Cir. 1940) 108 F.2d 650, 651-652 , cert. denied, 309 U.S. 689, 60 S.Ct. 891, 84 L. Ed. 1031 ; *Rev. Rul.* 73-390, 1973-2 C.B. 12] .

Separate, community, or quasi-community property may also be converted into joint tenancy or tenancy in common [see *United States v. Pierotti* (9th Cir. 1946) 154 F.2d 758, 762] , and the income from the property will be divided among the tenants for tax purposes in proportion to their fractional interests. The usual rule is that income from property owned by a husband and wife as (true) joint tenants or tenants in common is divided between them [*Bullis v. Commissioner* (1935) 32 B.T.A. 501, 505 ; *Hafner v. Commissioner* (1934) 31 B.T.A. 338, 341 ; *Finney v. Commissioner* (1976) T.C. Memo 1976-329 ; *P. Colabella* (1958) 17 T.C.M. (CCH) 704, 709] . One half of the income is taxable to each spouse even if one spouse actually receives all of the income [*Morgan v. Finnegan* (8th Cir. 1950) 182 F.2d 649, 650 ; *Finney v. Commissioner* (1976) 35 T.C.M. (CCH) 1504, 1507 ; see *Lipsitz v. Commissioner* (4th Cir. 1955) 220 F.2d 871, 873 , cert. denied, 350 U.S. 845, 76 S. Ct. 87, 100 L. Ed. 753 (1955)] or if the purchase price was paid by one spouse [*P. G. Greene* (1946) 7 T.C. 142, 152-153] .

[ii] Taxable Gain and Deductible Loss in General

In general, no gain or loss is recognized on a transfer of property (but not services) from an individual to, or in trust for the benefit of, his or her spouse. Transfers to, or for the benefit of a former spouse also qualify for nonrecognition if the transfers are made "incident to divorce." The transfer is treated as a gift and the basis of the transferee in the property is the adjusted basis of the transferor [*I.R.C.* § 1041(a), (b); see *Temp. Treas. Reg.* § 1.1041-1T(a), Q & A 2, 4]. This general rule of nonrecognition does not apply to a transfer made:

- To a spouse who is a nonresident alien at the time of the transfer, or for transfers after June 21, 1988, that are incident to a divorce, to a *former spouse* who is a nonresident alien [*I.R.C.* § 1041(d) (as amended by Pub. L. No. 100-647, § 1018(l)(3)); see *Temp. Treas. Reg.* § 1.1041-1T(a), Q-3];
- In trust, to the extent that the sum of the liabilities assumed, plus the liabilities to which the property is subject, exceeds the total adjusted basis of the property [*I.R.C.* § 1041(e) (added by Tax Reform Act of 1986, Pub. L. No. 99-514, § 1842(b) and effective retroactively)]; or
- In trust, of an installment obligation [*I.R.C.* § 453B(g) (as amended by Tax Reform Act of 1986, Pub. L. No. 99-514, § 1842(c) and effective retroactively)].

This rule of nonrecognition was enacted as part of the Tax Reform Act of 1984 [see Pub. L. No. 98-369, § 421] and amended by the Tax Reform Act of 1986 [see Pub. L. No. 99-514, § 1842]. It generally applies to all transfers of property after July 18, 1984, unless the transfers are pursuant to instruments in effect on or before that date [see Pub. L. No. 98-369, § 421(d) (permitting spouses to make election to apply rule to certain other earlier transfers)]. Special applications of this nonrecognition rule to transfers of property incident to a dissolution of marriage are discussed in Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Ch. 160, *Tax Effects of Dissolution*, along with a discussion of prior law.

If the nonrecognition rule [see *I.R.C. § 1041*] is inapplicable and a transfer between spouses is regarded as a sale or exchange rather than a gift for income tax purposes, taxable gain will be recognized. Gain or loss may be affected by the specialized rules concerning "stepped-up" basis on the death of a spouse that are summarized in [iii], *below*. The recognized gain is the amount by which the fair market value of the property received exceeds the basis of the property transferred [*I.R.C. § 1001(a)*]. If the value of the property (or rights) received are not readily ascertainable, the amount of gain is the amount by which the fair market value of the property transferred exceeds its basis [see *United States v. Davis* (1962) 370 U.S. 65, 66-67].

Furthermore, if the nonrecognition rule [see *I.R.C. § 1041*] is inapplicable, whether a transmutation of property from community to separate or vice versa is regarded as a gift for income tax purposes would appear to depend on whether the spouse whose interests in property are relinquished had donative intent (the intent to make a gift) [see *Farid-Es-Sultaneh v. C.I.R.* (2d Cir. 1947) 160 F.2d 812, 815]. The existence of donative intent may be negated by the fact that the donor received fair consideration for the transfer in question [see, e.g., *Farid-Es-Sultaneh v. C.I.R.* (2d Cir. 1947) 160 F.2d 812, 815].

[iii] Stepped-Up Basis at Death

On a spouse's death, one-half of the community property belongs to the surviving spouse, and the other half belongs to the decedent [*Prob. Code § 100*]. If the property has appreciated in value during the time that it was held, the entire property will receive a stepped-up basis equal to its fair market value on the date of the deceased spouse's death, if the decedent's half of the property was included in his or her estate [see *I.R.C. § 1014(b)(6)*; *Rev. & Tax. Code § 18031*; see also *I.R.C. § 2001* (tax imposed on estate); cf. *I.R.C. § 1022* (for decedents dying after 2009, modified carryover basis regime generally applies, so step-up basis for property included in decedent's estate does not apply; as discussed in Ch. 60, *Estate Planning*)]. The surviving spouse will receive a stepped-up basis in his or her half of the property, and will therefore have a smaller gain on disposition of that property [see *I.R.C. § 1001* (adjusted basis used to compute gain)].

By comparison, if the spouses had held the property separately in joint tenancy with a right of survivorship, the surviving spouse would automatically receive his or her half of the property by operation of law through the original joint tenancy title, and not through inheritance or any other type of succession after death [see *Goldberg v. Goldberg* (1963) 217 Cal. App. 2d 623, 628, 32 Cal. Rptr. 93]. Consequently, his or her basis would not be stepped up if the property has appreciated, but instead would remain at the original cost basis [see *I.R.C. § 1012*].

EXAMPLE

1: *Title in Joint Tenancy.* A husband and wife (H and W) buy property in 1960 for \$100,000 and take title as joint tenants. At H's death in 2001, the property has appreciated in value to \$500,000. W acquires H's one-half interest by operation of law through the joint tenancy title. W's one-half joint tenancy interest has a basis of \$50,000 (one-half the original total cost basis). H's one-half interest receives a stepped-up basis as of his date of death to \$250,000 (one-half the present fair market value). Thus, W has property with a basis of \$300,000 (\$250,000 + \$50,000) and a present fair market value of \$500,000. If W sells or otherwise disposes of the property, she must recognize a capital gain of \$200,000. Note that for decedents dying *after* 2009, a modified carryover basis regime generally applies, so a step-up basis

for property included in the decedent's estate does not apply [see *I.R.C. §§ 1001(a), 1011, 1014, 1022*]; see Ch. 60, *Estate Planning*, for detailed discussion].

EXAMPLE

2: Title in Community Property. A husband and wife (H and W) by property in 1960 for \$100,000 and take title in community property. At H's death in 2001, the property has appreciated in value to \$500,000. W now owns one-half of the property as community property, and the other half "belongs" to decedent H. The entire property receives a stepped-up basis (\$250,000 for each spouse's community property interest) to the present fair market value of \$500,000. Therefore, W will recognize no capital gain on a sale or other disposition of the property. Note that for decedents dying *after* 2009, a modified carryover basis regime generally applies, so a step-up basis for property included in the decedent's estate does not apply [see *I.R.C. §§ 1001(a), 1011, 1014, 1022*]; see Ch. 60, *Estate Planning*, for detailed discussion].

[b] Gift Tax Effects

[i] Generally

If community property is gratuitously transferred to a spouse as his or her separate property, the other spouse has at least nominally made a taxable gift equal to one-half the value of the property. The transmutation of the separate property of one spouse into community property without full and adequate consideration in money or money's worth [see *I.R.C. § 2512(b)*] is a taxable gift amounting to one-half the value of the property [*H. L. Damner (1944) 3 T.C. 638, 642*]. In either case, however, the transaction may result in no actual gift tax liability because of the availability of the gift tax marital deduction [see [iv], *below*].

If the transfer is pursuant to a written agreement between the spouses relative to their marital and property rights, and a marital dissolution occurs within a prescribed period after the agreement is made, the transfer is not subject to a gift tax because it is considered to have been made for a full and adequate consideration in money or money's worth [see *I.R.C. § 2516*; see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Ch. 160, *Tax Effects of Dissolution*].

For federal gift tax purposes, it appears that quasi-community property is treated as separate property, and transmutation agreements involving quasi-community property would be taxed accordingly [see *Sbicca v. Commissioner (1960) 35 T.C. 96, 104*].

For a complete discussion of the gift tax consequences of transmutation agreements and other property transfers between husband and wife, see Rabkin & Johnson, *Federal Income, Gift and Estate Taxation* (Matthew Bender), Ch. 51, *Gift Tax Pattern* .

[ii] Spousal Cotenancies in Personal Property

Under general gift tax principles, the gift tax consequences accompanying the creation of a joint tenancy or tenancy in common depend on the extent of the consideration furnished by each spouse. If one of the above tenancies is created from community property and the spouses are the sole tenants with equal interests, no gift tax consequences accompany the creation of the tenancy, because each spouse has converted a one-half interest in the community property into a one-half interest in the tenancy [see *Commissioner of Int. Rev. v. Mills (9th Cir. 1950) 183 F.2d 32, 34*]. If both spouses contribute an equal amount of their separate funds to the purchase of jointly held property, there are no gift tax consequences. However, if the tenancy was created from the separate property or quasi-community property of one of the spouses, there is a taxable gift to the other spouse equal to one-half of the value of the property [*Treas. Reg. § 25.2511-1(h)(5)*; see *Treas. Reg. § 25.2511-1(h)(4)* (relating to joint bank accounts, which are subject to different gift tax rules than other joint tenancies)].

For discussion of the availability of the gift tax marital deduction, see [iv], *below*.

[iii] Spousal Cotenancies in Real Property

If one spouse furnishes all, or a disproportionate share, of the consideration to purchase or create a joint tenancy between the spouses in real property, no gift tax will be imposed at the time the joint tenancy is created. The gift qualifies for the unlimited gift tax marital deduction [*I.R.C. § 2523(a)*], and no federal gift tax return need be filed [*I.R.C. § 6019*].

On termination of the joint tenancy by death of one of the spouses, the federal estate tax rules provide that one-half of the jointly held property will be included in the deceased's gross estate regardless of which spouse originally furnished the consideration [*I.R.C. § 2040(a)*]. Thus, for federal estate tax purposes, the factual issues under prior law of which spouse was the original donor and to what extent the donee spouse furnished consideration are eliminated. However, placing real property in joint tenancy may not be the best estate planning device, because the surviving spouse *will not* obtain a fully stepped-up basis for his or her one-half joint interest [*I.R.C. §§ 1014, 2040*], as discussed in [a] [iii], *above* [*but see I.R.C. § 1022* (for decedents dying after 2009, modified carryover basis regime generally applies, so step-up basis for property included in decedent's estate does not apply); see ch. 60, *Estate Planning*, for detailed discussion].

[iv] Availability of Marital Deduction

The gift tax marital deduction is available for interspousal gifts of separate and community property, subject to special provisions regarding spouses who are not citizens of the United States [*I.R.C. § 2523(a), (i)*]. Unlimited amounts of property, other than certain terminable interests, can be transferred between spouses with no gift tax. Because the estate tax marital deduction is also available for bequests of community property [*I.R.C. § 2056*], there is no longer any incentive to place real property in joint tenancy in an attempt to reduce transfer taxes. In fact, because the surviving spouse does not obtain a stepped-up basis on his or her half-interest in property held in joint tenancy, placing real property in joint tenancy is not the best estate planning device [*see I.R.C. §§ 1012, 1014, 2040, 2056; see [a][iii], above; but see I.R.C. § 1022* (for decedents dying after 2009, modified carryover basis regime generally applies, so step-up basis for property included in decedent's estate does not apply; see Ch. 60, *Estate Planning*, for detailed discussion)].

[c] Estate Tax Effects

In general, the transmutation of property will not have any estate tax consequences for the surviving spouse when the other spouse dies, because of the unlimited federal estate tax marital deduction for both separate and community property (other than certain terminable interests) [*see I.R.C. § 2056(a)*]. However, transmutation does change the relative sizes of the spouses' respective estates, and any time such a change occurs, its effect on the couple's estate must be considered because, in the context of the total estate plan, any such change may ultimately increase or decrease the combined tax liability of the spouses' estates. Counsel should consider the couple's estate plan and calculate the potential tax effect before preparing a transmutation agreement. If the attorney does not have sufficient expertise regarding estate taxes, he or she should consult with a tax specialist or CPA. For discussion of the federal estate tax marital deduction and marital deduction trusts, see *California Wills and Trusts* (Matthew Bender), Chapter 112.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 112 POSTNUPTIAL AGREEMENTS

PART II. LEGAL BACKGROUND
A. Overview of Postnuptial Agreements

33-112 California Legal Forms--Transaction Guide § 112.16

§ 112.16 General Enforcement Issues

[1] Bringing Actions in General

[a] Capacity to Bring Action

Either spouse in an ongoing marriage can sue the other on a postnuptial agreement, although there is a dearth of reported cases outside the context of proceedings for marital dissolution or legal separation. Lawsuits to enforce premarital contracts between the spouses are more common.

At common law, a husband and wife were deemed to be one person. Neither spouse could maintain an action at law of any character against the other spouse [*Peters v. Peters* (1909) 156 Cal. 32, 34, 103 P. 219 (overruled on other grounds in *Self v. Self* (1962) 58 Cal. 2d 683, 684, 26 Cal. Rptr. 97, 376 P.2d 65)]. The common-law rule of interspousal immunity from suit was modified with the adoption of the California Married Women's Property Act [Former Civ. Code §§ 158, 162; *see Fam. Code* §§ 721, 770; *Code Civ. Proc.* § 370]. At an early date, the Act was construed to permit actions between the spouses for the protection of separate property and for the enforcement of interspousal contracts relating to that property [*Peters v. Peters* (1909) 156 Cal. 32, 36, 103 P. 219 (overruled on other grounds in *Self v. Self* (1962) 58 Cal. 2d 683, 684, 26 Cal. Rptr. 97, 376 P.2d 65)]. For discussion of contract and tort-related actions, see [b], *below*.

[b] Specific Actions

The abolition of the prohibition on property and contract actions between the spouses [*see* [a], *above*] has allowed the maintenance of all types of interspousal actions for the protection of property and the enforcement of contracts, including:

(1) An action for money due on a note [*Wilson v. Wilson* (1868) 36 Cal. 447, 453 ; *Mann v. Mann* (1946) 76 Cal. App. 2d 32, 38, 172 P.2d 369] .

(2) An action in ejectment to remove one spouse from the separate real property of the other [*McDuff v.*

McDuff (1919) 45 Cal. App. 53, 56-57, 187 P. 37 (because parties were separated, husband could not assert general prohibition on a spouse excluding the other from separate property dwelling place)].

(3) An action to recover separate property appropriated by the other spouse or to recover its value [*People v. Graff* (1922) 59 Cal. App. 706, 712, 211 P. 829] .

The abolition of interspousal immunity from suits to vindicate property rights extended to actions based on torts as long as the tortious act involved a direct injury to a property interest of the spouse [*Langley v. Schumacker* (1956) 46 Cal. 2d 601, 603, 297 P.2d 977 ; *Peters v. Peters* (1909) 156 Cal. 32, 36, 103 P. 219 (overruled on other grounds in *Self v. Self* (1962) 58 Cal. 2d 683, 684, 26 Cal. Rptr. 97, 376 P.2d 65)]. The California Supreme Court has also abolished interspousal tort immunity for personal injuries, based on both intentional and negligent torts [see *Klein v. Klein* (1962) 58 Cal. 2d 692, 693, 26 Cal. Rptr. 102, 376 P.2d 70] .

As an alternative to action for damages or specific relief, a declaratory relief action between the spouses is also possible. The plaintiff in such a suit may be any person interested under a written instrument (excluding a will or trust), or under a contract, or one who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over, or on property. Although an obligation need not yet be breached, there must be an actual controversy [Code Civ. Proc. § 1060; see California Forms of Pleading and Practice (Matthew Bender), Ch. 182, *Declaratory Relief*].

A declaratory relief action must be instituted in the superior court [Code Civ. Proc. § 1060]. The court may refuse to exercise its powers if it determines that its declaration or determination is not necessary or proper at the time under all the circumstances [Code Civ. Proc. § 1061].

Ordinarily, declaratory relief actions take precedence over most matters on the court calendar, which is ordinarily another advantage [see Code Civ. Proc. § 1062.3(a)]. However, if the plaintiff seeks relief other than declaratory relief, the action will take precedence only if the plaintiff shows, on noticed motion, that the action requires a speedy trial [Code Civ. Proc. § 1062.3(b)].

The foregoing remedies are in addition to those now specifically set forth by statute for breach of spousal fiduciary duties, which are discussed in § 112.16[2].

[2] Breach of Confidential and Fiduciary Relationship

[a] Fraud, Undue Influence, or Other Breach

Spouses generally have a confidential, fiduciary relationship with each other. Thus, each spouse has a duty of the highest good faith and fair dealing with the other spouse, and neither spouse may take any unfair advantage of the other [Fam. Code § 721(b)]. Whenever spouses enter into an agreement in which one spouse gains an unfair advantage, a presumption of undue influence arises, and the advantaged spouse has the burden of demonstrating that the agreement was not obtained through undue influence [*In re Marriage of Bonds* (2000) 24 Cal. 4th 1, 27, 99 Cal. Rptr. 2d 252, 5 P.3d 815 ; *In re Marriage of Haines* (1995) 33 Cal. App. 4th 277, 293, 39 Cal. Rptr. 2d 673] . The presumption of undue influence does not arise, however, unless one spouse gains an *unfair* advantage; the presumption has no application in a transaction in which benefits or advantages are obtained by both spouses and neither gains an *unfair* advantage [*In re Marriage of Burkle* (2006) 139 Cal. App. 4th 712, 730-736, 43 Cal. Rptr. 3d 181 ; see Gray and Wagner, Complex Issues in California Law, Chs. A5.01[5][b], B7.04[3][b] and C5.05[2][b] (Matthew Bender)].

The statute setting forth the spouses' fiduciary relationship--and prohibiting the taking of *unfair* advantage--became operative January 1, 1994 [1992 Stats., ch. 162, enacting Fam. Code § 721, operative Jan. 1, 1994]. Before that statute took effect, some courts applied legal principles governing the duties of trustees to impose a presumption of undue influence in interspousal agreements based on *any* advantage gained by a spouse [see, e.g., *Gaines v. California Trust*

Co. (1941) 48 Cal. App. 2d 709, 714-715, 121 P.2d 28 ; see also Prob. Code § 16004(c); *Rader v. Thrasher* (1962) 57 Cal. 2d 244, 252, 18 Cal. Rptr. 736, 368 P.2d 360 (attorney-client relationship)]. However, the legal requirements applicable to the one-way trustee-beneficiary relationship do not necessarily apply to an interspousal transaction, in which fiduciary duties run in both directions [*In re Marriage of Burkle* (2006) 139 Cal. App. 4th 712, 732-734, 43 Cal. Rptr. 3d 181] . Thus, while a trustee is presumed to have violated his or her fiduciary duty by gaining *any advantage* from a trust beneficiary, a spouse is presumed to have exerted undue influence only if he or she gained an *unfair advantage* [compare Prob. Code § 16004(c) (transaction between trustee and beneficiary by which trustee "obtains an advantage" from beneficiary is presumed to violate trustee's fiduciary duties) (emphasis added) with Fam. Code § 721(b) ("neither [spouse] shall take *any unfair advantage* of the other") (emphasis added)]. Accordingly, pre-1994 decisions based on general trust principles are of limited value in assessing whether a transaction between spouses gives rise to a presumption of undue influence under the current statute governing interspousal transactions [see *In re Marriage of Burkle* (2006) 139 Cal. App. 4th 712, 733-734, 43 Cal. Rptr. 3d 181] .

Regardless of whether the presumption applies, a spouse who seeks to avoid a postnuptial contract may submit evidence of actual undue influence, fraud, or other breach of the confidential relationship. The following evidence has been viewed as tending to prove actual fraud, undue influence, or other breach of the fiduciary duty between spouses:

(1) Evidence that the spouse lied or misrepresented facts to the other spouse [see, e.g., *Estate of Cover* (1922) 188 Cal. 133, 142, 204 P. 583 (wife waived inheritance rights in \$200,000 estate in exchange for \$14,000 in part because of misrepresentation that she would otherwise receive no property on death of her husband); *In re Marriage of Cairo* (1988) 204 Cal. App. 3d 1255, 1261-1262, 251 Cal. Rptr. 731 (community-property presumption not rebutted by quitclaim deed signed in reliance on spouse's misrepresentation)].

(2) Evidence that the spouse concealed or undervalued assets that were the subject of the transaction or contract [see, e.g., *Haseltine v. Haseltine* (1962) 203 Cal. App. 2d 48, 54-58, 21 Cal. Rptr. 238 (husband grossly undervalued community property business when arranging to buy out wife's interest in it)].

(3) Evidence of threats or violence surrounding the transaction [see, e.g., *In re Marriage of Pashley* (1974) 40 Cal. App. 3d 1079, 1082, 115 Cal. Rptr. 537 (invalidation of quitclaim deed that husband was coerced into signing while recuperating from gunshot wound inflicted by wife)].

(4) Evidence that the spouse over whom the unfair advantage was obtained was disabled or senile [*Malone v. Malone* (1957) 155 Cal. App. 2d 161, 162-163, 317 P.2d 65 (gifts by husband to wife of real property and stocks set aside based on evidence of husband's advanced age, nervous disorders, impaired mental faculties, and complete trust and confidence in wife who acted as his confidential business agent during transactions)].

(5) Evidence that the consideration received for an interspousal transfer of property was clearly inadequate [*Hilton v. Hilton* (1921) 54 Cal. App. 142, 155-156, 201 P. 337 (wife transferred valuable property to husband without independent advice, and without knowledge of property's full value, receiving in return a "ridiculously small" amount of consideration)].

PRACTICE TIP:

Because mutual consent is sufficient consideration for a postnuptial agreement (see § 112.30[2]), this factor by itself is of limited current applicability. However, in combination with other factors, such as threats and deprivation of independent legal advice, it carries some weight. *Commentary by Diana Richmond*

(6) Evidence that the imposed-on spouse was ignorant of his or her rights and did not seek independent advice, but relied on the advice of his or her spouse [see, e.g., *Estate of Cover* (1922) 188 Cal. 133, 145, 204 P. 583] .

(7) Evidence that the marriage was harmonious and that one spouse habitually depended and relied on the other spouse for guidance [see, e.g., *Estate of Cover* (1922) 188 Cal. 133, 145, 204 P. 583] .

The fact that one spouse did not receive independent advice before entering into a business transaction with the other spouse is persuasive but not conclusive on the issue of undue influence. Although some early cases implied that independent advice was necessary for an interspousal transaction to be valid [see, e.g., *Dolliver v. Dolliver* (1892) 94 Cal. 642, 648, 30 P. 4] , the current rule is that independent advice is not absolutely necessary to establish the validity of an interspousal transaction [*Pfingst v. Goetting* (1950) 96 Cal. App. 2d 293, 309, 215 P.2d 93] , or to rebut a presumption of undue influence [*Combs v. Combs* (1946) 75 Cal. App. 2d 903, 905, 171 P.2d 949 ; cf. *In re Marriage of Haines* (1995) 33 Cal. App. 4th 277, 297, 39 Cal. Rptr. 2d 673 (citing earlier case for proposition that marriage relationship alone will not support presumption of undue influence, but when one spouse obtains advantage over other, the parties' confidential relationship raises presumption of "use and abuse of that relationship by the spouse obtaining the advantage"); see also *In re Marriage of Burkle* (2006) 139 Cal. App. 4th 712, 731, 43 Cal. Rptr. 3d 181 (reference to spouse obtaining "advantage" in *In re Marriage of Haines* plainly means "unfair advantage" proscribed by Fam. Code § 721(b))].

[b] Remedies for Breach

Under *Family Code Section 1101(a)*, a spouse has a claim against the other spouse for any breach of a fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate. The claim may be brought without filing an action for dissolution of marriage, legal separation, or nullity, in conjunction with such an action, or on the death of a spouse [Fam. Code § 1101(f)]. Remedies available under *Family Code Section 1101* include an accounting of the property and obligations [Fam. Code § 1101(b)], a determination of ownership and possessory rights in the property [Fam. Code § 1101(b)], and a reformation of title [Fam. Code § 1101(c)]. A claimant may also seek an award of 50 percent, or an amount equal thereto, of any asset undisclosed or transferred in breach of the fiduciary duty, plus attorney's fees and court costs [Fam. Code § 1101(g); see Fam. Code §§ 721, 1100 (fiduciary duties of spouse)]. If the breach involves oppression, malice, or fraud as defined in *Civil Code Section 3294*, the award may be increased to 100 percent, or an amount equal to 100 percent, of the asset [Fam. Code § 1101(h); see *In re Marriage of Rossi* (2001) 90 Cal. App. 4th 34, 42-43, 108 Cal. Rptr. 2d 270 (wife concealed lottery winnings)]. For further discussion and a form of a petition, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Ch. 24, *Management and Control of Property* .

Remedies under *Family Code Section 1101* generally apply only to transactions or events that occur on or after July 1, 1987 [see Stats. 1986, ch. 1091, § 3(a); Fam. Code § 1101(d)(4)]. The action must generally be commenced within three years of the date the petitioner had actual knowledge that the transaction or event occurred [Fam. Code § 1101(d)(1)]. However, these time limitations do not apply to actions commenced on the death of a spouse or in conjunction with an action for legal separation, dissolution or marriage, or nullity [see Stats. 1986, ch. 1091, § 3(a); Fam. Code § 1101(d)(2), (4)].

Before July 1, 1987, rescission of the agreement was ordinarily the proper remedy if, by virtue of an agreement or transaction between the spouses, one obtained an unfair advantage over the other [see, e.g., *Auclair v. Auclair* (1946) 72 Cal. App. 2d 791, 800-801, 165 P.2d 527 ; see *Haseltine v. Haseltine* (1962) 203 Cal. App. 2d 48, 54-58, 21 Cal. Rptr. 238] . However, even with respect to pre-July 1, 1987, transactions, the exercise of undue influence in a transaction between husband and wife did not automatically rescind the transaction. The transaction was not void but merely voidable and would remain valid and binding in the absence of an action to rescind it [*Hicks v. Hicks* (1962)

211 Cal. App. 2d 144, 156, 27 Cal. Rptr. 307] .

[c] Defenses Against Claim of Breach

[i] Lack of Confidential Relationship

In general, because the existence of a confidential relationship depends on the reposing of trust and confidence by one person in another, the confidential relationship may be terminated if trust and confidence no longer exist [*Vai v. Bank of America* (1961) 56 Cal. 2d 329, 337-338, 15 Cal. Rptr. 71, 364 P.2d 247] . The presumption that such a relationship existed when a postnuptial agreement was made may be rebutted. Whether a confidential relationship actually existed between a husband and wife at the time of a given transaction is a question of fact [see *Hayutin v. Weintraub* (1962) 207 Cal. App. 2d 497, 514, 24 Cal. Rptr. 761] .

However, a *fiduciary* relationship may be found to exist between the spouses even in the absence of a confidential relationship, and this relationship imposes a duty of the highest good faith and fair dealing between the spouses [see *Fam. Code* § 721(b)], particularly if one spouse has control over community property [see *Fam. Code* § 1100(e)]. Thus, a lack of confidence between the spouses appears not to be a complete defense to a purported breach of the statutory spousal fiduciary duties, unless it can also be shown that the defendant met all fiduciary requirements imposed by statute [see generally *Fam. Code* §§ 721(b), 1100(e)].

[ii] Knowing, Free, and Voluntary Agreement

A defense to a claim of undue influence in a transaction between spouses is that both parties were fully advised of the nature of the transaction and all the essential facts, and that they freely and voluntarily executed the agreement. This defense was sufficient in a case in which the attorney who prepared the agreement represented both parties, because both spouses had the opportunity to discuss fully the terms of the agreement and to object to any or all of its provisions [*Marsiglia v. Marsiglia* (1947) 78 Cal. App. 2d 701, 705, 178 P.2d 478] .

[iii] Disclosure

As a defense to a claim that a spouse was misled about the nature or effect of a postnuptial agreement, a spouse may submit evidence that he or she has made full and fair disclosure to the other spouse of all information that should be known for the other's benefit and protection about the nature and effect of the transaction. At the very least, the spouse must satisfy the requirements of *Family Code Section 1100(e)* by disclosing all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and providing access to all information, records, and books that pertain to the value and character of those assets and debts, on request. The disclosure requirements under current and prior law are more fully discussed in Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Ch. 24, *Management and Control of Property* .

If one spouse has made full disclosure to the other, there is apparently no general duty to ensure that the other spouse subjectively understood the facts. The subjective understanding of a spouse does not overcome the express language of a written agreement in the absence of fraud or imposition. In one case, a wife agreed to the transmutation of certain property from joint tenancy to community property. She executed a consent form in which she expressly declared that she fully understood the transaction. The court held that the wife could not subsequently rescind the agreement merely by asserting that she did not know what she was doing when she signed it [*Estate of Wilson* (1976) 64 Cal. App. 3d 786, 802, 134 Cal. Rptr. 749] . Also, the mere failure to read an agreement is not grounds for invalidating it in the absence of other evidence of fraud or mistake [*Chadwick v. Chadwick* (1928) 95 Cal. App. 690, 701, 273 P. 86] .

[iv] Acceptance of Benefits as Estoppel

A spouse who signs a postnuptial agreement that is voidable for undue influence or in violation of the parties' confidential relationship *is not* estopped from asserting the invalidity of the contract or agreement by virtue of having accepted benefits under the contract *unless*, in accepting the benefits, he or she acted with full knowledge of all the material facts and circumstances, and with full knowledge of his or her rights in the premises [*see Estate of Cover (1922) 188 Cal. 133, 146, 204 P. 583*].

[v] Laches

If an agreement between spouses is voidable for fraud, and the spouse who obtained an unfair advantage (or his or her successors in interest) attempts to enforce the agreement, the defrauded spouse is not barred by either the statute of limitations or the doctrine of laches from raising the fraud as a defense to enforcement of the agreement. When fraud is relied on merely as a defense, neither the limitation of the statute nor the doctrine of laches will operate to bar the defense of the invalidity of the agreement on the ground of fraud. As long as the plaintiff is permitted to come into court seeking to enforce the agreement, the defendant may allege and prove fraud as a defense. It is not incumbent on one who has been defrauded to go into court and ask for relief. Instead, he or she may wait until enforcement is sought and then be excused from performance by proof of the fraud [*Estate of Cover (1922) 188 Cal. 133, 140-141, 204 P. 583* ; *French v. Construction Laborers Pension Trust (1975) 44 Cal. App. 3d 479, 485, 118 Cal. Rptr. 731*].

The right to rescind by notice without judicial proceedings [*see Civ. Code § 1691*] is also not barred by the statute of limitations governing actions for affirmative relief for fraud [*see Code Civ. Proc. § 338*], because statutes of limitation apply to bar only actions or proceedings in courts [*French v. Construction Laborers Pension Trust (1975) 44 Cal. App. 3d 479, 485, 118 Cal. Rptr. 731*].

[3] Assertion of Agreement in Dissolution Proceeding

In general, at the time of trial in a proceeding for marital dissolution or legal separation, a spouse who has entered into a postnuptial agreement regarding specific property may assert the agreement's provisions as controlling with regard to the disposition of that property. Frequently, this occurs in the context of responding to a spouse's characterization of property by asserting that the property at issue has been transmuted by agreement. For a general discussion of asserting agreements in a dissolution proceeding, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Ch. 20, *Community Property: General Characterization and Division Principles*, and *California Family Law Trial Guide* (Matthew Bender), Unit 47.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsRequirements



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 112 POSTNUPTIAL AGREEMENTS
PART II. LEGAL BACKGROUND
A. Overview of Postnuptial Agreements

33-112 California Legal Forms--Transaction Guide §§ 112.17-112.29

[Reserved]

§§ 112.17[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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PART II. LEGAL BACKGROUND
B. Drafting the Postnuptial Agreement

33-112 California Legal Forms--Transaction Guide § 112.30

§ 112.30 Essential Contractual Elements

[1] Contractual Capacity

As in the case of other contracts, the parties to a postnuptial agreement must have legal capacity to contract [*see Civ. Code § 1556; see also Fam. Code § 1501* (capacity of emancipated minor to make marital property agreement)]. Capacity is usually not a controverted matter with respect to postnuptial agreements, unless there is an issue of mental illness with respect to a spouse at the time of contracting.

[2] Consideration

No formal monetary or similar consideration is required for an enforceable postnuptial agreement, but the parties' mutual consent, which is required in any event [*see* 112.30[3]], will also serve and suffice as the nominal consideration for the agreement [*see Fam. Code § 3580*; derived from former *Civ. Code § 4802; Estate of Wilson* (1976) 64 Cal. App. 3d 786, 798, 134 Cal. Rptr. 749 (construing language in predecessor statute); *see also Fam. Code §§ 850* (transmutation may be made with or without consideration), 1614 (agreement after marriage that amends or revokes premarital agreement is enforceable without consideration)].

[3] Consent

[a] In General

The parties' consent to a postnuptial agreement must be free, mutual, and communicated to each other [*see Civ. Code § 1565*]. An apparent consent is not free if it is obtained through duress, menace, fraud, undue influence, or mistake [*Civ. Code § 1567*].

The consent of the parties must be to a lawful object at the time the agreement is made, and the object must be possible and ascertainable by the time the agreement is to be performed [*see Civ. Code § 1596*]. For discussion of permissible objects of a postnuptial agreement, see §§ 112.13, 112.14 [*see Fam. Code §§ 721, 1620*].

[b] Effect of Spouse's Confidential and Fiduciary Relationship

Except as limited by statute [*see Prob. Code §§ 143, 144, 146, 16040, 16047*], in transactions between themselves, spouses are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse. The relationship is a fiduciary relationship subject to certain rights and duties that apply to nonmarital business partners [*Fam. Code § 721(b)*] (legislatively abrogating holding of *In re Marriage of Duffy* (2001) 91 Cal. App. 4th 923, 111 Cal. Rptr. 2d 160), to extent in conflict with accompanying statement of legislative intent in Stats. 2002, ch. 310, § 2; *see Corp. Code §§ 16403, 16404, 16503*]. Thus, for example, a spouse must:

- provide the other spouse access to any books kept regarding a transaction for the purposes of inspection and copying [*Fam. Code § 721(b)(1)*; *see Corp. Code § 16403*];
- render, on request, true and full information of all things affecting any transaction that concerns the community property [*Fam. Code § 721(b)(2)*; *see Corp. Code § 16403(c)(1)*; *see also In re Marriage of Walker* (2006) 138 Cal. App. 4th 1408, 1427, 42 Cal. Rptr. 3d 325 (*Corp. Code § 16403(c)(1)*, which is incorporated by reference in *Fam. Code § 721(b)*, requires partners to disclose to each other *without demand* any information concerning partnership's business and affairs reasonably required for proper exercise of partner's rights and duties)];
- account to the other spouse, and hold as a trustee, any benefit or profit derived from any transaction made without the consent of the other spouse that concerns the community property [*Fam. Code § 721(b)(3)*; *see Corp. Code § 16404*].

However, the Family Code's imposition of these duties of *business partners* does not broaden the spouses' duties and obligations to include those of *corporate* officers and directors beyond providing access, information, and an accounting [*In re Marriage of Leni* (2006) 144 Cal. App. 4th 1087, 1092-1094, 50 Cal. Rptr. 3d 886] .

In particular, each spouse must act with respect to the other in the management and control of community property in accordance with the general rules governing fiduciary relationships that control the actions of persons having relationships of personal confidence, as set forth above, until such time as the property has been divided by the parties or by the court [*see Fam. Code § 1100(e)*]. Thus, in entering into a postnuptial agreement that concerns their property interests, spouses have a fiduciary duty to act with the highest good faith and fair dealing, and neither may take any unfair advantage of the other [*see Fam. Code §§ 721, 1100(e)*; *In re Marriage of Burkle* (2006) 139 Cal. App. 4th 712, 730-736, 43 Cal. Rptr. 3d 181 (*Fam. Code § 721(b)* prohibits taking of *unfair* advantage but does not prohibit transaction in which benefits or advantages are obtained by both spouses and neither gains *unfair* advantage); *see also In re Marriage of Balcof* (2006) 141 Cal. App. 4th 1509, 1519-1522, 47 Cal. Rptr. 3d 183 (if one spouse secures advantage from transmutation of property, presumption arises under *Fam. Code § 721* that advantaged spouse exercised undue influence, and transaction will be set aside unless advantaged spouse rebuts presumption)].

In general, spouses are obligated to make full disclosure of information related to their community property and debts and to provide each other with access to records, books, and other information related to community property transactions [*see Fam. Code §§ 721(b), 1100(e)*]. For detailed discussion of the fiduciary duty with respect to community property transactions, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed. (Matthew Bender), Ch. 24, *Management and Control of Property* .

Therefore, subject to possible defenses [*see § 112.16[2]*], there is a presumption that the parties are subject to a confidential and fiduciary relationship, as set forth by statute, and that the rules applicable to persons in such a relationship will apply in "transactions" between spouses with regard to property [*Fam. Code § 721(b)*]. The rules have been held to apply in regard to such matters as:

- Contracts to make mutual wills [see *Brewer v. Simpson* (1960) 53 Cal. 2d 567, 589, 2 Cal. Rptr. 609, 349 P.2d 289] .
- Purchases and sales of property between the spouses [see *Haseltine v. Haseltine* (1962) 203 Cal. App. 2d 48, 54-58, 21 Cal. Rptr. 238] .
- Contracts for waiver of inheritable interests in a spouse's property in exchange for a cash settlement [*Estate of Cover* (1922) 188 Cal. 133, 143, 204 P. 583 ; see *Estate of Smith* (1966) 241 Cal. App. 2d 205, 209, 50 Cal. Rptr. 374] .
- Gifts of community property to third parties [see *Combs v. Combs* (1946) 75 Cal. App. 2d 903, 905, 171 P.2d 949] .

The California Supreme Court has held that a transmutation (changing separate property to community property, or community property to separate property) cannot be accomplished in the absence of a written declaration expressly changing the character of the property [*In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1106-1111, 32 Cal. Rptr. 3d 471, 478-482, 116 P.3d 1152 ; *In re Estate of MacDonald* (1990) 51 Cal. 3d 262, 267-268, 272-273, 272 Cal. Rptr. 153, 794 P.2d 911 ; see *Fam. Code* § 852(a) (transmutation is not valid unless made in express written declaration by spouse whose interest in property is adversely affected); see also *In re Marriage of Leni* (2006) 144 Cal. App. 4th 1087, 1095-1096, 50 Cal. Rptr. 3d 886 (escrow instruction that proceeds of sale of residence "be split 50/50" does not transmute proceeds from community to separate property, because it does not include express declaration that character of property is being changed)]. Therefore, a violation of the statutory interspousal fiduciary duty of good faith and fair dealing may not serve as the basis for establishing a transmutation, in the absence of an express written declaration changing the character of the property [*In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1110-1112, 32 Cal. Rptr. 3d 471, 482-483, 116 P.3d 1152 (absent transmutation that satisfies statutory formalities, there is no basis for applying presumption of undue influence under *Fam. Code* § 721(b))]. However, a spouse who has conveyed property in reliance on an unfulfilled oral promise to carry out a transmutation may seek to invalidate the conveyance based on the other spouse's violation of the interspousal fiduciary duty [see *In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1111-1112, 32 Cal. Rptr. 3d 471, 482, 116 P.3d 1152 ; see also *In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1112-1113, 32 Cal. Rptr. 3d 471, 483, 116 P.3d 1152 (Moreno, J., concurring)]. Furthermore, once an otherwise proper written transmutation has been made, a court may undo the transmutation if it is so grossly one-sided and unfair as to be the product of undue influence in violation of the interspousal fiduciary duty [see *In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1112, 32 Cal. Rptr. 3d 471, 482-483, 116 P.3d 1152 ; see, e.g., *In re Haines* (1995) 33 Cal. App. 4th 277, 293-294, 39 Cal. Rptr. 2d 673 ; see also § 112.16[2]].

For general discussion of transmutations of property by agreement, see § 112.15. Formal requirements for transmutation agreements are discussed in [4][b] and [5][b], *below*.

[4] Writing Requirement

[a] In General

Unlike premarital agreements [see *Fam. Code* § 1610 *et seq.*; see also Ch. 111, *Premarital Agreements*], postnuptial agreements are not subject to a specific requirement that they be in writing and, clearly, some postnuptial agreements can be oral [see, e.g., *Fam. Code* § 852(c) (written agreement for property transmutation is not required for certain gifts of personal property between spouses)]. However, postnuptial agreements are subject to both the general statute of frauds [see *Civ. Code* § 1624] and the writing requirements for transmutations of property [see *Fam. Code* § 850 *et seq.*; see also [b], *below*]. They are also subject to a writing requirement if they waive a surviving spouse's rights in a deceased spouse's estate [see *Prob. Code* § 142].

Because many interspousal property agreements fall within at least one of the foregoing categories of agreements that must be written, the circumstances under which oral agreements are valid appear extremely limited under current law.

[b] Transmutations of Property

As discussed in § 112.15, nearly all transmutations of property made on or after January 1, 1985, must be in writing. The writing must constitute an "express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected" [*Fam. Code* § 852(a)]. The California Supreme Court has held that a writing signed by the adversely affected spouse is not an "express declaration" for purposes of the statute unless it contains language that expressly states that the characterization or ownership of the property is being changed [*In re Estate of MacDonald* (1990) 51 Cal. 3d 262, 267-268, 272 Cal. Rptr. 153, 794 P.2d 911 ; see *In re Marriage of Leni* (2006) 144 Cal. App. 4th 1087, 1095-1096, 50 Cal. Rptr. 3d 886 (escrow instruction that proceeds of sale of residence "be split 50/50" does not transmute proceeds from community to separate property, because it does not include express declaration that character of property is being changed)]. Although a writing sufficient to satisfy the "express declaration" requirement of the statute might contain the words "transmutation," "community property," or "separate property," those words are not essential if the language used expressly states that the characterization or ownership of the property is being changed [*In re Estate of MacDonald* (1990) 51 Cal. 3d 262, 272-273, 272 Cal. Rptr. 153, 794 P.2d 911] .

The statute requiring an express written declaration changing the character of property to be transmuted [*Fam. Code* § 852(a)] does not operate like a general statute of frauds [see, e.g., *Civ. Code* § 1624(a) (general statute of frauds)]. The requirement of an express written declaration is more than an evidentiary standard; it is an essential element of any transmutation. Therefore, the requirement is not subject to implied exceptions that may apply in the context of a general statute of frauds [*In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1106-1109, 32 Cal. Rptr. 3d 471, 478-480, 116 P.3d 1152 ("[W]e see no evidence the Legislature intended to incorporate traditional exceptions to the statute of frauds into [*Fam. Code* § 852]. Indeed, the Commission Comment ... supports the *opposite* proposition." [emphasis in original])]. Thus, for example, a transmutation cannot be accomplished by part performance of an unwritten transmutation agreement [*In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1106-1107, 32 Cal. Rptr. 3d 471, 478-479, 116 P.3d 1152 (statutory language and legislative history establish that *Fam. Code* § 852(a) "cannot be satisfied where there is no writing about the subject property at all, and where a transmutation would have to be inferred from acts surrounding the contract in dispute")].

Similarly, the requirement of an express written declaration to effect transmutation is not subject to exceptions that might permit the enforcement of an oral *premarital* agreement [*In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1110-1111, 32 Cal. Rptr. 3d 471, 481-482, 116 P.3d 1152 ("[P]remarital contracts are not construed and enforced under the same standards as interspousal agreements"); see *Hall v. Hall* (1990) 222 Cal. App. 3d 578, 584-586, 271 Cal. Rptr. 773 (*Fam. Code* § 1611, requiring premarital agreements to be in writing, is ordinary statute of frauds that is subject to traditional exceptions, such as part performance)].

There are two express statutory exceptions to the requirement of a writing for transmutations:

- Gifts between the spouses of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature that are used solely or principally by the spouse to whom the gift is made and are not substantial in value taking into account the circumstances of the marriage [*Fam. Code* § 852(c)];
- Transmutations of property made *before* January 1, 1985, the effective date of the controlling statute, which are not subject to the requirement [*Fam. Code* § 852(e)].

Note that before 1985, joint wills that were executed by the spouses could be used to transmute property for all

purposes. Transmutation took place at the time the instruments were executed, and was not postponed until the testator died [see *Chase v. Leiter* (1950) 96 Cal. App. 2d 439, 448-449, 215 P.2d 756]. However, beginning in 1985, a statement in a will regarding the character of property is not admissible as evidence of a transmutation of the property in any proceeding commenced *before* the death of the person making the will [Fam. Code § 853(a); see Fam. Code § 852(e)].

If a written document contains the requisite express, unequivocal declaration of a present transmutation, any accompanying recital of the parties' motivations for executing the document do not change the nature of the transmutation itself. In one case, for example, an agreement stating that certain property "is hereby transmuted from [one spouse's] separate property to the community property of the spouses" was not made ambiguous by an accompanying statement that the agreement "is made solely for the purpose of interpreting how property shall be disposed of on the deaths of the parties." Because the agreement expressly and unequivocally effected a present transmutation, the affected property was treated as community property when the parties subsequently dissolved their marriage [*In re Marriage of Holtemann* (2008) 166 Cal. App. 4th 1166, 1172-1174, 83 Cal. Rptr. 3d 385 ; see also *In re Marriage of Lund* (2009) 174 Cal. App. 4th 40, 50-54, 94 Cal. Rptr. 3d 84 (clear and unambiguous statement that all separate property of spouse "is hereby converted to community property" accomplished transmutation, despite accompanying recital that conversion was made "for estate planning purposes")].

A transmutation, once effected, cannot be limited in purpose or otherwise rendered conditional or temporary. Thus, once the character of property has been changed, a "retransmutation" can be achieved only by an express agreement to that effect that independently satisfies the statutory requirements for a transmutation [*In re Marriage of Holtemann* (2008) 166 Cal. App. 4th 1166, 1174, 83 Cal. Rptr. 3d 385].

The statutory requirements for transmutations apply only to interspousal agreements to change the character of property already owned by the spouses; the initial acquisition of property from a third person does not constitute a transmutation and is not subject to the statutory requirements. Thus, for example, property acquired during the marriage solely in the name of one spouse, with the other spouse's acquiescence, is presumed to be the separate property of the titleholder even if there is no express written declaration by the other spouse regarding the character of the property [*In re Marriage of Brooks*, (2008) 169 Cal. App. 4th 176, 191-192, 86 Cal. Rptr. 3d 624].

[5] Acknowledgment, Proof, and Recording of Agreements

[a] Permissive Recording of Instruments Affecting Real Property

A postnuptial agreement affecting real property that is executed and acknowledged or proved in the manner that a grant of real property is required to be executed and acknowledged or proved, *may* be recorded in the office of the county recorder of each county in which real property affected by the agreement is situated [Fam. Code § 1502(a)]. Recording or not recording a marital property agreement has the same effect as recording or not recording a grant of real property [Fam. Code § 1502(b)]. For discussion of the need to record an agreement that transmutes interests in real property in order to impart notice to third parties, see [b], *below*.

[b] Required Recording of Real Property Transmutations to Impart Notice

A transmutation of real property is not effective with respect to *third parties* who are without notice of the transmutation unless the transmutation instrument is recorded [Fam. Code § 852(b)]. While recording is not a prerequisite to the validity of the transmutation as between the spouses, it is a prerequisite in making the transmutation effective with respect to third parties who are otherwise without notice.

This requirement is consistent with the fact that transmutations are subject to the laws governing fraudulent transfers [see Fam. Code § 851].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsRequirements



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DIVISION VII: PERSONAL TRANSACTIONS
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PART II. LEGAL BACKGROUND
B. Drafting the Postnuptial Agreement

33-112 California Legal Forms--Transaction Guide § 112.31

§ 112.31 Advisability of Independent Counsel

Because of the potential conflicting interests of the spouses, each spouse should be represented by independent counsel in the negotiating and drafting of a postnuptial agreement. An attorney may not concurrently represent parties with conflicting interests unless the attorney first obtains their written consent [*see Cal. Rules Prof. Conduct, Rule 3-310(B)*]. As a general rule, dual representation is not advisable, even if the parties express a willingness to consent to such representation. The forms set forth in this chapter [*see §§ 112.200-112.211*] assume that the parties will be represented by separate counsel. For further discussion of an attorney's duties regarding potential conflicts of interests in family law matters, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Ch. 60, *Professional Responsibility of Family Law Attorneys*.

Legal Topics:

For related research and practice materials, see the following legal topics:

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[Reserved]

§§ 112.32[Reserved]



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A. Drafting Guide

33-112 California Legal Forms--Transaction Guide § 112.100

§ 112.100 Drafting Guide to General Provisions

1. Include statement of purpose of postnuptial agreement.
2. Include statement that each party was represented by independent counsel of his or her own choosing, and that each party [see § 112.200[2]]:
 - a. Read the agreement before signing it; and
 - b. Had the meaning and legal consequences explained by his or her respective counsel.
3. Include statement that the parties are aware that agreement is subject to rules governing actions of persons occupying confidential relations with each other [see § 112.200[2]].
4. State the parties' agreement to execute any ancillary instruments necessary to carry out terms of postnuptial agreement [see § 112.200[2]].
5. Include statement that contract contains entire agreement of parties ("integration" clause).
6. Include statement regarding which state's law will govern agreement.
7. Include statement regarding modification or amendment rights.
8. Include provision stating that agreement is severable in event of partial invalidity.
9. Include statement of binding effect on successors in interest.

Legal Topics:

For related research and practice materials, see the following legal topics:

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33-112 California Legal Forms--Transaction Guide § 112.101

§ 112.101 Drafting Guide to Provisions Defining Property Rights

1. Include description of parties' community property.
2. Include description of wife's separate property.
3. Include description of husband's separate property.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 112 POSTNUPTIAL AGREEMENTS
PART III. TRANSACTION GUIDE
A. Drafting Guide

33-112 California Legal Forms--Transaction Guide § 112.102

§ 112.102 Drafting Guide to Provisions Transmuting Property Rights

1. Include description of each item of property for which character of ownership will change [*see § 112.201[2]*].
2. Include description of nature of transmutation [*see Fam. Code § 850; see § 112.201[2]*]:
 - a. From community property to one spouse's separate property;
 - b. From one spouse's separate property to community property; or
 - c. From one spouse's separate property to the other spouse's separate property.
3. Include consent of spouse whose interest in property is adversely affected, in form of written declaration expressly stating that characterization or ownership is being changed [*see Fam. Code § 852(a); In re Marriage of Benson (2005) 36 Cal. 4th 1096, 1106-1109, 32 Cal. Rptr. 3d 471, 478-480, 116 P.3d 1152; In re Estate of MacDonald (1990) 51 Cal. 3d 262, 272, 272 Cal. Rptr. 153, 794 P.2d 911; In re Marriage of Leni (2006) 144 Cal. App. 4th 1087, 1095-1096, 50 Cal. Rptr. 3d 886 (escrow instruction that proceeds of sale of residence "be split 50/50" does not transmute proceeds from community to separate property, because it does not include express declaration that character of property is being changed); see also § 112.201[2]*].

NOTE:

If a written document contains the requisite express, unequivocal declaration of a present transmutation, any accompanying recital of the parties' motivations for executing the document do not change the nature of the transmutation itself [*In re Marriage of Lund (2009) 174 Cal. App. 4th 40, 50-54, 94 Cal. Rptr. 3d 84* (clear and unambiguous statement that all separate property of spouse "is hereby converted to community property" accomplished transmutation, despite

accompanying recital that conversion was made "for estate planning purposes"); *In re Marriage of Holtemann* (2008) 166 Cal. App. 4th 1166, 1172-1174, 83 Cal. Rptr. 3d 385 (agreement that certain property "is hereby transmuted from [one spouse's] separate property to the community property of the spouses" was not made ambiguous by accompanying statement that agreement "is made solely for purpose of interpreting how property shall be disposed of on the deaths of the parties")].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 112 POSTNUPTIAL AGREEMENTS
PART III. TRANSACTION GUIDE
A. Drafting Guide

33-112 California Legal Forms--Transaction Guide § 112.103

§ 112.103 Drafting Guide to Provisions Altering Property Rights

1. If desired, include waivers of certain rights protected by statute, such as:
 - a. Waiver of right to reimbursement for separate property contributions to the acquisition of community property or to the acquisition of the other spouse's separate property [*see Fam. Code § 2640; see Ch. 111*]; or
 - b. Waiver of reimbursement for community property contributions to education or training of a spouse [*see Fam. Code § 2641; see Ch. 111*].
2. If desired, include provision giving one the right to buy, sell, use, give away, transfer, or otherwise dispose of community personal property [*see Fam. Code § 1100(b), (c)*].
3. If desired, include provision for one party to assume complete responsibility for management and control of the parties' community property or of particular community assets [*see Fam. Code §§ 1100, 1102; see Ch. 111*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsGeneral Overview



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A. Drafting Guide

33-112 California Legal Forms--Transaction Guide § 112.104

§ 112.104 Drafting Guide to Provisions Amending or Revoking Premarital Agreement

1. If parties wish to amend premarital agreement, include each of following [*see Fam. Code § 1614; see also § 112.210[2]*], subject to any specific modification procedures set forth in the premarital agreement that must otherwise be followed:

- a. Reference to existence of premarital agreement.
- b. Statement of parties' intent to continue premarital agreement in effect except for amended sections.
- c. Either:
 - i. Description of amendments; or
 - ii. Restatement of amended provisions.

2. If parties wish to revoke premarital agreement, include each of following [*see Fam. Code § 1614; see also § 112.211[2]*], subject to any specific revocation procedures set forth in the premarital agreement that must otherwise be followed:

- a. Reference to existence of premarital agreement.
- b. Statement of parties' intent to either:
 - i. Cancel agreement; or
 - ii. Rescind agreement.

c. Provisions regarding effect of cancellation or rescission on real and personal property, such as need for reconveyance of property already transferred [*see Mamula v. McCulloch* (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Modifications General Overview Family Law Marital Duties & Rights Property Rights Premarital Agreements General Overview



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33-112 California Legal Forms--Transaction Guide §§ 112.105-112.199

[Reserved]

§§ 112.105[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 112 POSTNUPTIAL AGREEMENTS

PART IV. FORMS

A. Agreements Defining and Changing Character of Property

33-112 California Legal Forms--Transaction Guide § 112.200

§ 112.200 Agreement Defining Status of Property

[1] Comment

This form is an agreement between spouses that defines the ownership status of the spouses' property. It may be used to clarify the parties' property rights, in order to simplify questions of property division in the event of dissolution or death of one of the parties. This form is *not* intended to be used by parties contemplating or in the process of marital dissolution. For discussion and forms relating to agreements between spouses incident to separation or dissolution, see Ch. 120, *Complete Marital Settlement Agreements* .

This form is not designed to change the status of the parties' property, but merely to list their property interests at the time the agreement is executed. For a "transmutation" agreement [*see Fam. Code § 850 et seq.*] in which the parties change the ownership status of their property, see § 112.201. The provisions of the form *set forth in § 112.201[2]* and this form may be combined to create an agreement that accomplishes the purposes of both forms.

If the postnuptial agreement affects rights to real property, it is recommended that the agreement be executed and acknowledged or proved in the same manner as a grant of real property, and recorded in the office of the recorder of each county in which real property affected by the agreement is situated [*see Fam. Code § 1502(a)*; *see § 112.30[5]*]. The recording or nonrecording of an acknowledged postnuptial agreement affecting real property has the same effect as the recording or nonrecording of any other grant of real property [*Fam. Code § 1502(b)*; *see Civ. Code § 1189* (acknowledgment form)].

[2] FORM

Agreement Defining Status of Property

AGREEMENT DEFINING STATUS OF PROPERTY

This Agreement is made by _____ [*name of wife*] ("Wife") and _____ [*name of husband*] ("Husband").

Purpose

1. The parties to this Agreement intend to define and clarify their respective property interests existing at the time of executing this Agreement. This Agreement is not made in contemplation of a separation or marital dissolution.

Community Property

2. The parties agree that the list of property set forth as Exhibit A, which is attached to and made a part of this Agreement, is a complete and correct inventory of the property acquired by them during marriage in California, and that all property listed in Exhibit A has been since acquisition, and shall remain, the community property of the parties.

Wife's Separate Property

3. The parties agree that the list of property set forth as Exhibit B, which is attached to and made a part of this Agreement, is a complete and correct inventory of property owned by Wife prior to marriage or acquired during marriage by gift, inheritance, or devise, and that all property listed in Exhibit B has been since acquisition, and shall remain, her separate property.

Husband's Separate Property

4. The parties agree that the list of property set forth as Exhibit C, which is attached to and made a part of this Agreement, is a complete and correct inventory of property owned by Husband prior to marriage or acquired during marriage by gift, inheritance, or devise, and that all property listed in Exhibit C has been since acquisition, and shall remain, his separate property.

Disclosure of Property

5. Each of the parties has made a full and complete disclosure of the nature and extent of the property he or she owns separately or jointly with the other.

Representation by Separate Counsel

6. The parties acknowledge that they have been represented by separate counsel in the negotiations of this Agreement; that their respective counsel were of their own choosing; that they have read this Agreement; and that their counsel have explained its meaning and legal consequences to them. They further acknowledge that they are aware, and that counsel has explained to them, that in making and carrying out this Agreement as to property they are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other.

Execution of Other Instruments

7. Each party covenants and agrees that on the request of the other party, or his or her successors or assigns, he or she

shall execute, deliver, and properly acknowledge any deeds or other documents necessary to effectuate this Agreement.

Executed on _____ [date]:

_____ [signature]
 _____ [typed name]

Wife

_____ [signature]
 _____ [typed name]

Husband

ACKNOWLEDGMENT

State of California,
 County of _____

)
)
)

On _____ [date] before me, _____ [name and title of officer taking acknowledgment], personally appeared _____ [names of persons signing instrument], who proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the persons executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____ (Seal)
 _____ [Name of officer]

EXHIBIT A

COMMUNITY PROPERTY OF _____ [names of spouses]

[List all items of community property.]

EXHIBIT B

SEPARATE PROPERTY OF _____ [name of wife]

[List all items of wife's separate property, including date and place of acquisition.]

EXHIBIT C

SEPARATE PROPERTY OF _____ [*name of husband*]

[List all items of husband's separate property, including date and place of acquisition.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Modifications General Overview Family Law Marital Duties & Rights Property Rights General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 112 POSTNUPTIAL AGREEMENTS
PART IV. FORMS

A. Agreements Defining and Changing Character of Property

33-112 California Legal Forms--Transaction Guide § 112.201

§ 112.201 Declaration Changing (Transmuting) Character of Separate or Community Personal Property

[1] Comment

This form is a form of declaration that may be used in changing the character of separate or community personal property. An agreement changing the character of separate or community property is known as a "transmutation" [see *Fam. Code* §§ 850, 851, 852], as discussed in § 112.15. This form may be used to accomplish any of the following: (1) transmute community property to separate property of either spouse, (2) transmute separate property of either spouse to community property, or (3) transmute separate property of one spouse to separate property of the other spouse [*Fam. Code* § 850]. The provisions in this form may be combined with those in § 112.200[2], defining existing property rights, to create an agreement that accomplishes the purposes of both forms. For a form setting forth a premarital agreement that income from separate property will be treated as community property, see Ch. 111, *Premarital Agreements*.

A transmutation will not be valid unless it is made in writing and contains a declaration expressly stating that the characterization or ownership of the property is being changed. The writing must be made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected [*Fam. Code* § 852(a); *In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1106-1111, 32 Cal. Rptr. 3d 471, 478-482, 116 P.3d 1152; *In re Estate of MacDonald* (1990) 51 Cal. 3d 262, 267-268, 272-273, 272 Cal. Rptr. 153, 794 P.2d 911; see *In re Marriage of Leni* (2006) 144 Cal. App. 4th 1087, 1095-1096, 50 Cal. Rptr. 3d 886 (escrow instruction that proceeds of sale of residence "be split 50/50" does not transmute proceeds from community to separate property, because it does not include express declaration that character of property is being changed)]. If an agreement contains the requisite express, unequivocal declaration of a present transmutation, any accompanying recital of the parties' motivations for executing the agreement do not change the nature of the transmutation itself [*In re Marriage of Lund* (2009) 174 Cal. App. 4th 40, 50-54, 94 Cal. Rptr. 3d 84 (clear and unambiguous statement that all separate property of spouse "is hereby converted to community property" accomplished transmutation, despite accompanying recital that conversion was made "for estate planning purposes"); *In re Marriage of Holtemann* (2008) 166 Cal. App. 4th 1166, 1172-1174, 83 Cal. Rptr. 3d 385 (agreement that certain property "is hereby transmuted from [one spouse's] separate property to the community property of the spouses" was not made ambiguous by accompanying statement that agreement "is made solely for purpose of interpreting how property shall be disposed of on the deaths of the parties")]. For further discussion of the writing

requirement, see § 112.30[4][b].

The form in [2], *below*, may be modified for use in transmuting the character of real property. A transmutation of real property is not effective as to third parties who do not have notice of the transmutation unless it is recorded [*Fam. Code* § 852(b); see *Civ. Code* §§ 1169-1220 (recordation)]. Any transmutation of real property should be drafted in *recordable form* and recorded. For a deed designed to be used for the transmutation of real property, see Ch. 27, *Deeds and Recording*. However, because an agreement transmuting the character of real property does not have to be in the form of a deed, this form may be modified to include real property and, if so modified, should also be recorded [see *California Real Estate Law and Practice* (Matthew Bender), Ch. 346, *Community Property*]. For discussion of the desirability of including language to specifically sever a joint tenancy in property, in order to clarify that the parties intend it to be community property (or otherwise), see the comments *set forth in* § 112.202.

The statute requiring that a transmutation of property be made by "express declaration" [see *Fam. Code* 852(a)] does not mention whether the declaration needs to be made under penalty of perjury [see *Code Civ. Proc.* § 2015.5], but there is no indication elsewhere in the transmutation statutes that this would be required. The form set forth in [2], *below*, and the *form in* § 112.202[2] do not contain declarations under penalty of perjury. Instead, they make provision for acknowledgment [see *Civ. Code* § 1189 (form of acknowledgment)] to assure that the document can be recorded.

This form is not designed to be used by parties contemplating dissolution or legal separation. For discussion and forms relating to agreements between spouses incident to legal separation or dissolution proceedings, see Ch. 120, *Complete Marital Settlement Agreements*. For discussion of the tax effects of transmutation, see § 112.15[2].

[2] FORM

Declaration Changing (Transmuting) Character of Separate or Community Personal Property

DECLARATION TRANSMUTING CHARACTER OF PERSONAL PROPERTY

This Agreement is made by _____ [name of wife] ("Wife") and _____ [name of husband] ("Husband").

Purpose

1. The parties to this Agreement intend to transmute the character of personal property. This Agreement is not made in contemplation of a separation or marital dissolution.

[If parties wish to transmute some or all of husband's or wife's separate property to community property, use the following provision:]

Transmutation of Separate Property to Community Property

2. _____ [Husband or Wife] agrees to transmute the character of the personal property described in Exhibit A, which is attached to and made a part of this Agreement, from _____ [his or her] separate property to the community property of both parties.

[AND/OR, if parties wish to transmute some or all of one spouse's separate property to separate property of the other spouse, use the following provision:]

Transmutation of Separate Property to Separate Property

3. _____ [Husband or Wife] agrees to transmute the character of the personal property described in Exhibit B, which attached to and made a part of this Agreement, from _____ [his or her] separate property to the separate property of _____ [Wife or Husband].

[AND/OR, if parties wish to transmute some or all of community property to separate property of one of the spouses, use the following provision:]

Transmutation of Community Property to Separate Property

4. _____ [Spouse whose interest is adversely affected, e.g., Husband or Wife] agrees to transmute the character of the personal property described in Exhibit C, which is attached to and made a part of this Agreement, from the community property of both parties to the separate property of _____ [other spouse, e.g., Wife or Husband].

[Continue as follows:]

Representation by Separate Counsel

5. The parties acknowledge that they have been represented by separate counsel in the negotiations of this Agreement; that their respective counsel were of their own choosing; that they have read this Agreement; and that their counsel have explained its meaning and legal consequences to them. They further acknowledge that they are aware, and that counsel has explained to them, that in making and carrying out this Agreement as to property they are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other.

Executed on _____ [date]:

_____ [signature]
 _____ [typed name]

Wife

_____ [signature]
 _____ [typed name]

Husband

ACKNOWLEDGMENT

State of California,
 County of _____

)
)
)

On _____ [date] before me, _____ [name and title of officer taking acknowledgment]

], personally appeared _____ [*names of persons signing instrument*], who proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the persons executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____ (Seal)
 _____ [*Name of officer*]

EXHIBIT A

SEPARATE PROPERTY OF _____ [*name of spouse*]

[*List items of separate property to be transmuted.*]

EXHIBIT B

SEPARATE PROPERTY OF _____ [*name of spouse*]

[*List items of separate property to be transmuted.*]

EXHIBIT C

COMMUNITY PROPERTY OF _____ [*names of spouses*]

[*List all items of community property to be transmuted.*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Duties & Rights Property Rights General Overview Family Law Marital Duties & Rights Property Rights Characterization Community Property Family Law Marital Duties & Rights Property Rights Characterization Separate Property Family Law Marital Duties & Rights Property Rights Postnuptial & Separation Agreements General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 112 POSTNUPTIAL AGREEMENTS

PART IV. FORMS

A. Agreements Defining and Changing Character of Property

33-112 California Legal Forms--Transaction Guide § 112.202

§ 112.202 Agreement That All Property Will Be Community Property

[1] Comment

This form is an agreement between married persons providing that all of the parties' property, except for damages resulting from personal injury by one spouse, will be community property. Damages are excepted from this agreement in order to allow one spouse to recover damages for personal injuries inflicted by the other spouse [*see Fam. Code § 781(c)* (damages paid by one spouse to other are separate property of injured spouse)]. The form presents a type of "transmutation" agreement, in which one or both spouses transmute separate property to community property [*see Fam. Code § 850(b)*].

This form may be used to transmute property to be acquired in the future, as well as property owned at the time of the agreement. However, it may not be advantageous to make decisions regarding the character of property in advance of its receipt.

If the parties acquire property together after the agreement is made and take title in a form other than as community property, it may be unclear whether they actually intended for the property to be transmuted by their prior agreement, and questions may arise, particularly with respect to third parties, over whether the common law "form of title" presumption should apply for certain purposes. Under the "form of title" presumption, a description in a deed as to how title is held is presumed to reflect the actual ownership interests in the property. For example, the act of taking title to property solely in the name of one spouse, during marriage and with the acquiescence of the other spouse, effectively removes that property from the general presumption that property acquired during marriage is community property [*In re Marriage of Brooks*, (2008) 169 Cal. App. 4th 176, 184-187, 86 Cal. Rptr. 3d 624 ; *see Fam. Code § 760* (general presumption that property acquired during marriage is community property)]. Therefore, it is recommended that after the acquisition of property in a form other than as community property, the parties either amend their agreement in writing to specifically refer to the property, or prepare a new agreement concerning that property. In the case of joint tenancy property, the agreement should be drafted so as to make it clear that the joint tenancy is severed and the property is held as community property. This applies to any joint tenancies held at the time of the original agreement as well. Any such amendment or new agreement should be recorded, as should the original agreement, at least if real

property is involved, as noted further below. For discussion of special rules pertaining to joint tenancy, and to accounts in banks and similar institutions, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender), Ch. 20, *Community Property: General Characterization and Division Principles*, and Ch. 21, *Special Property Characterization and Division Issues*, respectively.

A transmutation of separate property to community property will not be valid unless it is made in writing and contains a declaration expressly stating that the characterization or ownership of the property is being changed [see [2], P 3, *below*]. The writing must be made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected [*Fam. Code* § 852(a); *In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1106-1111, 32 Cal. Rptr. 3d 471, 478-482, 116 P.3d 1152; *In re Estate of MacDonald* (1990) 51 Cal. 3d 262, 267-268, 272-273, 272 Cal. Rptr. 153, 794 P.2d 911; see *In re Marriage of Leni* (2006) 144 Cal. App. 4th 1087, 1095-1096, 50 Cal. Rptr. 3d 886 (escrow instruction that proceeds of sale of residence "be split 50/50" does not transmute proceeds from community to separate property, because it does not include express declaration that character of property is being changed)]. If an agreement contains the requisite express, unequivocal declaration of a present transmutation, any accompanying recital of the parties' motivations for executing the agreement do not change the nature of the transmutation itself [*In re Marriage of Lund* (2009) 174 Cal. App. 4th 40, 50-54, 94 Cal. Rptr. 3d 84 (clear and unambiguous statement that all separate property of spouse "is hereby converted to community property" accomplished transmutation, despite accompanying recital that conversion was made "for estate planning purposes"); *In re Marriage of Holtemann* (2008) 166 Cal. App. 4th 1166, 1172-1174, 83 Cal. Rptr. 3d 385 (agreement that certain property "is hereby transmuted from [one spouse's] separate property to the community property of the spouses" was not made ambiguous by accompanying statement that agreement "is made solely for purpose of interpreting how property shall be disposed of on the deaths of the parties")]. For further discussion of the writing requirement, see § 112.30[4][b].

Because a transmutation of real property is not effective as to third parties who do not have notice of the transmutation unless it is recorded [see *Fam. Code* § 852(b)], a document evidencing the transmutation of real property should be recorded. This form contains an acknowledgment [see *Civ. Code* § 1189 (form of acknowledgment)] to facilitate recording. In addition, this form provides that the parties will execute any additional instruments, such as a deed, required to effectuate the agreement.

For a general form for a transmutation agreement, see § 112.201. For a form used to define the parties' existing property rights, which may be combined with the provisions of this form to accomplish the purposes of both forms, see § 112.200.

[2] FORM

Agreement That All Property Will Be Community Property

POSTNUPTIAL AGREEMENT REGARDING COMMUNITY PROPERTY

This Agreement is entered into between _____ [name of wife] ("Wife") and
_____ [name of husband] ("Husband").

Purpose

1. The parties intend to establish and fix their respective rights and interests in and to all property now owned [or hereafter acquired] by them. This Agreement is not made in anticipation of separation or dissolution.

Status of Property Prior to Agreement

2. The parties agree that the list of property set forth as Exhibit A, which is attached to and made a part of this Agreement, is a complete and correct inventory of property now held by Wife as her separate property. The parties further agree that the list of property set forth as Exhibit B, which is attached to and made a part of this Agreement, is a complete and correct inventory of property now held by Husband as his separate property.

Community Property

3. The parties agree that all property now owned [or hereafter acquired] by Wife or Husband, except the property listed in Paragraph 4 of this Agreement, shall be the community property of the parties. The parties are expressly agreeing to change the character of such property from their sole and separate property to community property.

Separate Property

4. Notwithstanding Paragraph 3 of this Agreement, all damages resulting from personal injury inflicted by one spouse on the other shall be the separate property of the injured spouse. Furthermore, all of the following property shall remain the separate property of _____ [Wife or Husband]: _____ [specify property to remain separate, e.g., the gold ring inherited by Wife from her mother, _____ (name).]

Additional Instruments

5. Each party covenants and agrees that on the request of the other party, or his or her successors or assigns, he or she shall execute, deliver, and properly acknowledge any deeds or other documents necessary to effectuate this Agreement.

Disclosure of Property

6. Each of the parties has made a full and complete disclosure of the nature and extent of the property he or she owns separately or jointly with the other.

Representation by Separate Counsel

7. The parties acknowledge that they have been represented by separate counsel in the negotiations of this Agreement; that their respective counsel were of their own choosing; that they have read this Agreement; and that their counsel have explained its meaning and legal consequences to them. They further acknowledge that they are aware, and that counsel has explained to them, that in making and carrying out this Agreement as to property they are subject to the general rules that control the actions of persons occupying confidential relations with each other.

Executed on _____ [date]:

_____ [signature]

_____ [typed name]

Wife

_____ [signature]

_____ [typed name]

Husband

ACKNOWLEDGMENT

State of California,

County of _____

)

)

)

On _____ [date] before me, _____ [name and title of officer taking acknowledgment], personally appeared _____ [names of persons signing instrument], who proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the persons executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____ (Seal)
 _____ [Name of officer]

EXHIBIT A

SEPARATE PROPERTY OF _____ [name of wife]

[List all items of wife's separate property, including date and place of acquisition.]

EXHIBIT B

SEPARATE PROPERTY OF _____ [name of husband]

[List all items of husband's separate property, including date and place of acquisition.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Duties & Rights Property Rights General Overview Family Law Marital Duties & Rights Property Rights Characterization Community Property Family Law Marital Duties & Rights Property Rights Postnuptial & Separation Agreements General Overview



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 112 POSTNUPTIAL AGREEMENTS

PART IV. FORMS

A. Agreements Defining and Changing Character of Property

33-112 California Legal Forms--Transaction Guide §§ 112.203-112.209

[Reserved]

§§ 112.203[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 112 POSTNUPTIAL AGREEMENTS

PART IV. FORMS

B. Agreements Amending or Revoking Premarital Agreement

33-112 California Legal Forms--Transaction Guide § 112.210

§ 112.210 Agreement of Spouses Amending Premarital Agreement

[1] Comment

This form is an agreement between a husband and wife amending the provisions of a premarital agreement. After marriage, a premarital agreement may be amended only by a written agreement signed by the parties. The amended agreement is enforceable without consideration [*Fam. Code § 1614*]. For discussion and examples of premarital agreements, see Ch. 111, *Premarital Agreements*. For a general discussion of matters about which spouses may contract, which appears to apply to the amendment during marriage of a premarital agreement, see §§ 112.13-112.14.

If the premarital agreement provides for modification on the occurrence of specified events and pursuant to a designated procedure, this form should be changed to conform with those requirements.

For general discussion and examples of the modification, rescission, and cancellation of contracts, see Ch. 77, *Discharge of Obligations*.

An amended premarital agreement affecting real property that is executed and acknowledged or proved in the manner that a grant of real property is required to be executed and acknowledged or proved may be recorded in the office of the recorder of each county in which real property affected by the agreement is situated [*Fam. Code § 1502(a)*]. This form contains an acknowledgment [*see Civ. Code § 1189* (form of acknowledgment)] to facilitate recording.

[2] FORM

Agreement of Spouses Amending Premarital Agreement

MODIFICATION OF PREMARITAL AGREEMENT

This Agreement is made _____[*date*], between _____[*name of wife*] ("Wife") and _____[*name of husband*] ("Husband").

Original Agreement

1. On _____ [date], the parties executed a premarital agreement ("original agreement") in contemplation of their future marriage. A copy of the original agreement is attached to this Agreement and incorporated herein by reference. The parties agree that the provisions of the original agreement shall continue in effect, except as modified in Paragraph 2.

Modification

[If modification is to be described in lieu of setting forth the entire provision as modified, use the following provision:]

2. The parties agree to modify [indicate paragraph or section number, e.g., Paragraph 12] of the original agreement so that [describe modification, e.g., the earnings of each party will be held as community property, rather than as separate property].

[OR, if modified provision is to be set forth in its entirety, use the following provision:]

2. The parties agree to modify [indicate paragraph or section number, e.g., Paragraph 12] of the original agreement to read as follows:

" _____ " [Set forth modified provision of original agreement in its entirety].

[Continue as follows:]

Construction

3. In the event of any conflict or inconsistency between the provisions of this modification Agreement and the original agreement, the provisions of this modification Agreement shall control in all respects.

Representation by Separate Counsel

4. The parties acknowledge that they have been represented by separate counsel in the negotiations of this Agreement; that their respective counsel were of their own choosing; that they have read this Agreement; and that their counsel have explained its meaning and legal consequences to them. They further acknowledge that they are aware, and that counsel has explained to them, that in making and carrying out this Agreement as to property they are subject to the general rules that control the actions of persons occupying confidential relations with each other.

Executed on _____ [date]:

_____ [signature]

_____ [typed name]

Wife

_____ [signature]

_____ [typed name]
Husband

ACKNOWLEDGMENT

State of California,)
County of _____)

On _____ [date] before me, _____ [name and title of officer taking acknowledgment], personally appeared _____ [names of persons signing instrument], who proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the persons executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____ (Seal)
_____ [Name of officer]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Duties & RightsProperty RightsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 112 POSTNUPTIAL AGREEMENTS
PART IV. FORMS

B. Agreements Amending or Revoking Premarital Agreement

33-112 California Legal Forms--Transaction Guide § 112.211

§ 112.211 Agreement of Spouses Revoking Premarital Agreement

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, is an agreement that spouses may use to revoke a premarital agreement. This form may be used to either rescind or cancel the premarital agreement [see [b], *below*].

For examples and discussion of premarital contracts, see Ch. 111, *Premarital Agreements*. For an example of a postnuptial agreement modifying a premarital agreement, see § 112.210. For a complete discussion of the termination of contracts generally, see Volume 14, Chapter 77, *Discharge of Obligations*.

The form contains an acknowledgment [see *Civ. Code* § 1189 (form of acknowledgment)] to facilitate recording, if the revoked agreement pertained to real property [see *Fam. Code* § 1502; see also discussion in § 112.30[5]].

[b] Revocation Method

After marriage, a premarital agreement may be "revoked" only by a written agreement signed by the parties. The revocation is enforceable without consideration [*Fam. Code* § 1614]. A contract may be terminated, or "revoked," in several different ways. A rescission is an agreement under which the parties to a contract agree to extinguish it, and restore the parties to the position they were in when the contract was made [see *Civ. Code* § 1688]. In comparison, a cancellation [see *Civ. Code* § 1699] is an agreement in which the parties agree only to abrogate so much of a contract as remains unperformed [see *Mamula v. McCulloch* (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571]. The parties may also cancel a written agreement by destroying the agreement or the signatures of the parties with the intent to extinguish the agreement [*Civ. Code* § 1699].

The form below is drafted to allow the parties to either rescind or cancel their premarital agreement, depending on the nature of the premarital agreement that they wish to terminate. If they wish to restore their respective positions to those existing at the time the contract was made, the rescission provisions, rather than cancellation provisions, should be used.

A rescission clause is also desirable in a contract in which the parties intend to supersede a previous agreement. While an inconsistent contract will provide an implied rescission, if the new contract has the same legal effect and differs only in terms, the two instruments will be construed together [*Thomson v. Leak* (1933) 135 Cal. App. 544, 549, 27 P.2d 795] . The use of a definite rescission clause avoids that result by making the intent of the parties completely clear. The rescission clause set forth in this agreement may be inserted in a postnuptial agreement intended to supersede the premarital agreement [see, e.g., § 112.201[2]].

For a discussion and example of novation, which is the substitution of a new obligation between the same parties with intent to extinguish the old obligation [see Civ. Code § 1531; see also vol. 14, ch. 77, *Discharge of Obligations*].

[c] Ancillary Instruments

On termination of a premarital agreement, the parties may need to transfer separate or community property between themselves if the premarital agreement affected the character of ownership of their real or personal property [see *Fam. Code* § 1612(a)(1) (permissible matters in premarital agreements)]. This form (Paragraph 4) provides that the parties will execute any additional instruments required to carry out the purposes of the agreement.

[2] FORM

Agreement of Spouses Revoking Premarital Agreement

_____ [CANCELLATION or RESCISSION] OF PREMARITAL AGREEMENT

This Agreement is made on _____ [date] between _____ [name of wife] ("Wife") and _____ [name of husband] ("Husband").

Original Agreement

1. On _____ [date], the parties executed a premarital agreement ("original agreement"). A copy of the original agreement is attached to this Agreement and incorporated herein by reference.

[If original agreement is to be cancelled, use the following provision:]

Cancellation

2. The parties agree to cancel the original agreement, pursuant to *Civil Code Section 1699*. They agree that cancellation of the original agreement is made with their mutual and express intent to extinguish all remaining obligations imposed on them by that contract. [If original agreement affected separate or community property, describe effect of cancellation on property transfers already performed, e.g., The parties agree that all real or personal property transferred pursuant to the original agreement shall retain the title in effect on the date of this cancellation Agreement.]

[OR, if original agreement is to be rescinded, use the following provision:]

Rescission

2. The parties agree to rescind the original agreement, pursuant to *Civil Code Section 1689*. They agree that rescission

of that contract is made with their mutual and express intent to forego all rights and benefits provided for under the original agreement. *[If real or personal property was affected by original agreement, provide for disposition when applicable, e.g., The parties agree to restore all real and personal property to the status of ownership that was in effect before execution of the original agreement.]*

[Continue as follows:]

Additional Instruments

3. Each party agrees, on the request of the other, to execute, deliver, and properly acknowledge any additional instruments that may be required to carry out the intention of this Agreement and to execute, deliver, and properly acknowledge any deeds or other documents in order that good and marketable title to any separate property can be conveyed by one party free from any claim of the other party acquired by him or her by reason of their marriage.

Representation by Separate Counsel

4. The parties acknowledge that they have been represented by separate counsel in the negotiations of this Agreement; that their respective counsel were of their own choosing; that they have read this Agreement; and that their counsel have explained its meaning and legal consequences to them. They further acknowledge that they are aware, and that counsel has explained to them, that in making and carrying out this Agreement as to property they are subject to the general rules that control the actions of persons occupying confidential relations with each other.

Executed on _____ *[date]*:

_____ *[signature]*
 _____ *[typed name]*

Wife

_____ *[signature]*
 _____ *[typed name]*

Husband

ACKNOWLEDGMENT

_____))
 State of California,))
 County of _____))

On _____ *[date]* before me, _____ *[name and title of officer taking acknowledgment]*, personally appeared _____ *[names of persons signing instrument]*, who proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the persons executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____ (Seal)
_____ [Name of officer]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsGeneral
OverviewFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS

Chapters 113-119 [Reserved]

33-113 California Legal Forms--Transaction Guide Chapters 113-119

[Reserved]

Chapters 113[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 120 COMPLETE MARITAL SETTLEMENT AGREEMENTS

34-120 California Legal Forms--Transaction Guide 120.syn

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.syn Synopsis to Chapter 120: COMPLETE MARITAL SETTLEMENT AGREEMENTS

§ 120.01 California Sources

[1] Constitution

[2] Statutes

[3] Rules of Court

§ 120.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 120.03-120.04 [Reserved]

§ 120.05 Law Reviews and Periodicals

§ 120.06 [Reserved]

§ 120.07 Text References

[1] Matthew Bender Sources

[2] Legal Encyclopedias

[3] Additional Text References

§§ 120.08-120.09 [Reserved]

§ 120.10 Definition and Usage of "Marital Settlement Agreement"

§ 120.11 Validity of Agreement

[1] In General

[2] Necessity of a Writing

[3] Consideration

[4] Agreements Promoting Dissolution Invalid

[5] Consent

[6] Effect of Partial Invalidity

§ 120.12 Effect of Duties Between Spouses

[1] General Rules Governing Interspousal Transactions

[a] Nature of Confidential Relationship

[b] Fraud, Undue Influence, or Other Breach

[2] Special Disclosure Duties After Separation

[3] Exchange of Disclosure Forms Before Entering Into Agreement

§ 120.13 Effect of Judicial Action Concerning Agreement on Enforcement

[1] In General

[2] Significance of Incorporation

[3] Approval

[4] Merger

[a] Definition and Effect

[b] Merger as Based on Intention of Parties and Court

[c] Available Uses of Merger

[i] Complete Incorporation and Merger

[ii] Partial Merger

§§ 120.14-120.19 [Reserved]

§ 120.20 Obtaining Necessary Information

§ 120.21 Obtaining Supporting Documentation

§ 120.22 Obtaining Information From Third Persons

§ 120.23 Use of Experts

§§ 120.24-120.99 [Reserved]

§ 120.100 General Provisions

Scope

§ 120.101 Division of Property

[1] Division of Community Estate

Scope

[2] Provide for Division of Specific Assets

Scope

§ 120.102 Spousal Support

Scope

§ 120.103 Child Support

Scope

§ 120.104 Child Custody and Visitation

Scope

§ 120.105 Income Tax Returns

Scope

§ 120.106 Attorneys' Fees and Costs

Scope

§§ 120.107-120.199 [Reserved]

§ 120.200 Marital Settlement Agreement Dividing Property and Requiring Child Support and Spousal Support--Both Parties Employed and Share Child Custody

[1] Comment

[a] Use of Form

[b] Modification of Form

[c] Settlement Agreements in Annulment Proceedings

[d] Child Custody and Visitation

[e] Child Support

[f] Spousal Support

[g] Division of Community Estate

[i] In General

[ii] Division of Family Home

[iii] Division of Employee Benefits

[iv] Full and Fair Disclosure

[h] Income Taxes

[i] Fees and Costs

[j] Modification and Revocation

[k] Judicial Action

[l] Notarization

[2] FORM

Marital Settlement Agreement Dividing Property and Requiring Child Support and Spousal Support--Both Parties Employed and Share Child Custody

§ 120.201 Marital Settlement Agreement Dividing Property and Requiring Spousal Support--No Children; One Party Unemployed or Underemployed

[1] Comment

[a] Use of Form

[b] Spousal Support

[i] Payments and Jurisdiction

[ii] Factors on Which Support is Based

[iii] COBRA Health Care Coverage Extension

[iv] Alimony Tax Treatment

[c] Unrepresented Party

[d] Judicial Action

[2] FORM

Marital Settlement Agreement Dividing Property and Requiring Spousal Support--No Children; One Party
Unemployed or Underemployed

§ 120.202 Reconciliation Agreement Revoking Prior Marital Settlement Agreement

[1] Comment--Use of Form

[2] FORM

Reconciliation Agreement Revoking Prior Marital Settlement Agreement

§§ 120.203-120.209 [Reserved]

§ 120.210 Effective Date of Agreement

[1] Comment

[a] Use of Form

[b] Alternative Provisions for Effective Date

[i] Agreement Immediately Effective on Execution

[ii] Agreement Effective on Specified Date

[iii] Agreement Effective on Court Approval

[iv] Agreement Effective When Dissolution Judgment Granted

[v] Agreement Effective When Final Judgment Granted Within Specified Time Period

[vi] Agreement Effective on Attorney Approval, Approval by Court, and When Final Judgment Granted

[vii] Agreement Effective on Approval by Court Without Merger

[2] FORM

Effective Date of Agreement

§ 120.211 Judicial Action Concerning Agreement

[1] Comment

[a] Use of Form

[b] Alternatives for Judicial Action

[i] Merger of Agreement Into Judgment

[ii] Request for Court Approval by Either Party

[iii] Partial Merger of Agreement Into Judgment

[iv] Insertion of Agreement's Provisions in Judgment

[2] FORM

Judicial Action Concerning Agreement

§ 120.212 Waiver of Rights on Death

[1] Comment

[a] Use of Form

[b] Effect of Dissolution on Prior Will

[c] Effect of Waiver on Intestate Rights

[2] FORM

Waiver of Rights on Death

§ 120.213 Release of All Claims

[1] Comment

[2] FORM

Release of All Claims

§ 120.214 Indemnity and Hold Harmless From Liabilities

[1] Comment

[2] FORM

Indemnity and Hold Harmless From Liabilities

§ 120.215 Satisfaction of Temporary Orders

[1] Comment

[2] FORM

Satisfaction of Temporary Orders

§ 120.216 Representation by Independent Counsel

[1] Comment

[a] Use of Form

[b] Independent Counsel Does Not Relieve Spouses' Fiduciary Duty

[2] FORM

Representation by Independent Counsel

§ 120.217 Acknowledgment of Party's Refusal to Obtain Independent Counsel

[1] Comment

[a] Use of Form

[b] Attorney's Duty in Dealing With Party Not Represented by Counsel

[2] FORM

Acknowledgment of Party's Refusal to Obtain Independent Counsel

§ 120.218 Nonapplicability of Rule of Construction Against Drafting Party

[1] Comment

[2] FORM

Nonapplicability of Rule of Construction Against Drafting Party

§ 120.219 Agreement Entered Into Voluntarily

[1] Comment

[2] FORM

Agreement Entered Into Voluntarily

§ 120.220 Effect of Reconciliation

[1] Comment

[a] Use of Form

[b] Effect of Reconciliation of the Parties

[2] FORM

Effect of Reconciliation

§ 120.221 Execution of Instruments and Further Assurances

[1] Comment

[2] FORM

Execution of Instruments and Further Assurances

§ 120.222 Parties Bound

[1] Comment

[2] FORM

Parties Bound

§ 120.223 Waiver of Breach

[1] Comment

[2] FORM

Waiver of Breach

§ 120.224 Effect of Partial Invalidity

[1] Comment

[2] FORM

Effect of Partial Invalidity

§ 120.225 Modification and Revocation

[1] Comment

[2] FORM

Modification and Revocation

§ 120.226 Governing Law

[1] Comment

[2] FORM

Governing Law

§ 120.227 Entirety of Agreement

[1] Comment

[2] FORM

Entirety of Agreement

Editorial Consultants: Kathryn Kirkland, Esq.,
Ira Lurvey, Esq., and Diana Richmond, Esq.n*

FOOTNOTES:

(n161)Footnote *. Ms. Kirkland, Mr. Lurvey, and Ms. Richmond are Certified Family Law Specialists practicing in California. They are also editorial consultants for Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure 2d ed. (Matthew Bender), as well as editorial board members for the California Family Law Monthly(Matthew Bender).



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DIVISION VII: PERSONAL TRANSACTIONS CHAPTER 120 COMPLETE MARITAL SETTLEMENT AGREEMENTS

34-120 California Legal Forms--Transaction Guide Scope

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

Scope

Editorial Consultants: Kathryn Kirkland, Esq.,
Ira Lurvey, Esq., and Diana Richmond, Esq.n* Scope

This chapter discusses agreements made between spouses primarily in contemplation of the dissolution of their marriage or of obtaining a legal separation. The Legal Background presents an overview of the matters that should be considered when preparing a marital settlement agreement. The Transaction Guide sets out checklists to assist counsel in drafting the agreement, and the Forms part includes complete forms of agreements as well as optional general provisions that may be used in connection with the complete forms.

In *In re Marriage Cases*, the California Supreme Court held that differential treatment of opposite-sex and same-sex couples in California's marriage statutes violated the California Constitution's guarantees of privacy, due process, and equal protection [*In re Marriage Cases* (2008) 43 Cal. 4th 757, 784, 847-856, 76 Cal. Rptr. 3d 683, 183 P.3d 384] . That holding was superseded by the subsequent adoption of Proposition 8, which amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California [see Cal. Const. art. I, § 7.5 (eff. Nov. 5, 2008)]. The Supreme Court upheld Proposition 8 against a constitutional challenge, but in doing so the Court reaffirmed the continuing validity of same-sex marriages entered into before November 5, 2008, the effective date of Proposition 8 [Strauss v. Horton (2009) 46 Cal. 4th 364, 470-474, 93 Cal. Rptr. 3d 591, 207 P.3d 48 (estimating 18,000 same-sex marriages lawfully entered into before Proposition 8 took effect)]. If a form in this chapter is used in the context of a same-sex marriage lawfully entered into before that date, the language in the form should be modified accordingly. For example, the names of the parties may be used instead of terms like "Husband" and "Wife."

Later chapters cover specific alternate provisions designed to be substituted into the complete forms illustrated in this chapter. For provisions that concern the general division of property in a marital settlement agreement, see Ch. 121, *Provisions for Division of Property* . For provisions to divide employee benefits, see Chapter 122. Provisions for spousal and child support are covered in Chapter 123; provisions concerning child custody and visitation are discussed in Chapter 124; and provisions for the payment of taxes, attorney's fees, and costs are set forth in Chapter 125.

For detailed coverage of separation and dissolution, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed. (Matthew Bender).

FOOTNOTES:

(n162)Footnote *. Ms. Kirkland, Mr. Lurvey, and Ms. Richmond are Certified Family Law Specialists practicing in California. They are also editorial consultants for Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure 2d ed. (Matthew Bender), as well as editorial board members for the California Family Law Monthly(Matthew Bender).



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A. Primary Sources

34-120 California Legal Forms--Transaction Guide § 120.01

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.01 California Sources

[1] Constitution

When married person's property is separate. *Cal. Const., art. I, § 21.*

[2] Statutes

Contracts.

Capacity. *Civ. Code §§ 1556-1559.*

Consent. *Civ. Code §§ 1565-1590.*

Consideration. *Civ. Code §§ 1605-1615.*

Statute of frauds. *Civ. Code § 1624.*

Uniform Fraudulent Transfer Act. *Civ. Code § 3439 et seq.*

Marital property rights. *Fam. Code § 760 et seq.*

Transmutation of property. *Fam. Code § 850 et seq.*

Marital agreements. *Fam. Code §§ 1500-1502, 1620.*

Nullity, dissolution, and legal separation. *Fam. Code § 2000 et seq.*

Division of property. *Fam. Code § 2500 et seq.*

Custody of children. *Fam. Code § 3000 et seq.*

Spousal and child support. *Fam. Code § 3500 et seq.*

Prevention of domestic violence. *Fam. Code § 6200 et seq.*

Uniform Parentage Act. *Fam. Code § 7600 et seq.*

Duty of loyalty in confidential relationship. *Prob. Code § 16002.*

Duty to avoid conflict of interest in confidential relationship. *Prob. Code § 16004.*

[3] Rules of Court

Family Rules. *Cal. Rules of Ct., Rule 5.5 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements



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DIVISION VII: PERSONAL TRANSACTIONS
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A. Primary Sources

34-120 California Legal Forms--Transaction Guide § 120.02

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.02 Federal Sources

[1] Statutes

Nondischargeability in bankruptcy of domestic support obligations. *11 U.S.C. §§ 101(14A), 523(a)(5)*

Alimony and separate maintenance payments. *I.R.C. § 71.*

Certain death benefits. *I.R.C. § 101.*

Allowance of deductions for personal exemptions. *I.R.C. § 151.*

Dependent defined. *I.R.C. § 152.*

Alimony and separate maintenance payments as deductions. *I.R.C. § 215.*

Distributions of property. *I.R.C. § 301.*

Transfers of property between spouses or incident to divorce. *I.R.C. § 1041.*

Treatment of proceeds of life insurance. *I.R.C. § 2042.*

Transfers for insufficient consideration. *I.R.C. § 2043.*

Transfers subject to gift tax. *I.R.C. § 2501.*

Annual gift tax exclusion. *I.R.C. § 2503(b).*

Valuation of gifts. *I.R.C. § 2512.*

Certain property settlements. *I.R.C. § 2516.*

Penalty for failure to supply identification number. *I.R.C. § 6676.*

Meaning of "husband" and "wife." *I.R.C. § 7701(a)(17).*

Determination of marital status. *I.R.C. § 7703.*

[2] Regulations

Determination of marital status. *Treas. Reg. § 1.153-1.*

Medical, dental, and other expenses. *Treas. Reg. § 1.213-1.*

Periodic alimony and other payments. *Treas. Reg. § 1.215-1.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements



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PART I. RESEARCH GUIDE
A. Primary Sources

34-120 California Legal Forms--Transaction Guide §§ 120.03-120.04

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 120.03[Reserved]



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B. Secondary Sources

34-120 California Legal Forms--Transaction Guide § 120.05

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.05 Law Reviews and Periodicals

Barkhausen & Barkhausen, *Benefits of Structured Settlements (Divorce)*, 16 Fam. Advoc. 54(2) (Fall 1993).

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Munson, *The Forgotten Community Property Asset: An Overview of the Individual Whole Life Insurance Policy at the Time of Marital Dissolution*, 53 Cal. St. B.J. 310 (1978).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements



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B. Secondary Sources

34-120 California Legal Forms--Transaction Guide § 120.06

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§ 120.06[Reserved]



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B. Secondary Sources

34-120 California Legal Forms--Transaction Guide § 120.07

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.07 Text References

[1] Matthew Bender Sources

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California Forms of Pleading and Practice(Matthew Bender)

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Ch. 122, *Community Property*.

Ch. 220, *Dissolution of Marriage and Related Proceedings*.

Ch. 359, *Marriage*.

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Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionProperty Settlements



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 120 COMPLETE MARITAL SETTLEMENT AGREEMENTS
PART I. RESEARCH GUIDE
B. Secondary Sources

34-120 California Legal Forms--Transaction Guide §§ 120.08-120.09

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 120.08[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 120 COMPLETE MARITAL SETTLEMENT AGREEMENTS
PART II. LEGAL BACKGROUND

A. Validity and Effect of Marital Settlement Agreements

34-120 California Legal Forms--Transaction Guide § 120.10

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.10 Definition and Usage of "Marital Settlement Agreement"

For purposes of this chapter and Chs. 121-125, the term "marital settlement agreement" refers to an agreement between spouses made in contemplation of their indefinite separation, or, more frequently, made in contemplation of obtaining a judgment of dissolution of marriage or legal separation. Technically, it can also refer to an agreement reached by parties to a proceeding for nullity of marriage, though the use of such agreements in nullity proceedings is generally less frequent because of the typical unwillingness of both parties to stipulate to the underlying facts and grounds for an annulment in advance of trial.

Attorneys, courts, and legal commentators have used various terms to label these agreements [*see, e.g., Di Marco v. Di Marco* (1967) 60 Cal. 2d 387, 389, 33 Cal. Rptr. 610, 385 P.2d 2 ("property settlement agreement"); *Flynn v. Flynn* (1954) 42 Cal. 2d 55, 57, 265 P.2d 865 ("separation agreement"); *In re Marriage of Gonzalez* (1976) 57 Cal. App. 3d 736, 739, 129 Cal. Rptr. 566 ("marital settlement agreement")]. As used in this chapter, "marital settlement agreement" is synonymous with the term "marital termination agreement," which has growing acceptance within the legal community but lacks the general usage and recognition currently associated with "marital settlement agreement."

Note that the term "marital settlement agreement" is *not* synonymous with "marriage settlement agreement," which under former law generally referred to a premarital agreement [*see former Civ. Code §§ 5133-5135* (expressly prescribing effect and requirements of "marriage settlement agreements"; repealed, operative January 1, 1986, but still applicable to agreements executed before that date); *see also Corker v. Corker* (1891) 87 Cal. 643, 648, 25 P. 922 ; but *see Plante v. Gray* (1945) 68 Cal. App. 2d 582, 587, 157 P.2d 421 (refers to "marriage settlement" agreement as agreement made so parties may live separate and apart)]. For discussion of premarital agreements, see Ch. 111, *Premarital Agreements* . For discussion of postmarital agreements, see Ch. 112, *Postnuptial Agreements* .

Marital settlement agreements, also known as "MSA's," generally have as their purpose the settlement of some or all of the rights, claims, and liabilities that arise out of the parties' marriage. Accordingly, these agreements cover such primary items as the division of community property, payment of child and spousal support, and custody of the children

of the marriage. The agreement may also include waivers and indemnification agreements between the parties, income tax provisions, attorney's fees provisions, and any other provisions that are necessary or desirable to wind up the marriage and the parties' legal relationship.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure
Settlements
Settlement Agreements
General Overview
Family Law
Marital Termination & Spousal Support
Dissolution & Divorce
General Overview
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Marital Termination & Spousal Support
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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 120 COMPLETE MARITAL SETTLEMENT AGREEMENTS
PART II. LEGAL BACKGROUND
A. Validity and Effect of Marital Settlement Agreements

34-120 California Legal Forms--Transaction Guide § 120.11

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.11 Validity of Agreement

[1] In General

In general, spouses are competent to contract with one another with respect to their marital property rights [see *Fam. Code* §§ 721(a), 1500, 1620] and, subject to the approval of the court, to determine matters relating to child and spousal support, child custody, and visitation [see *Fam. Code* §§ 3061, 3080, 3580, 3585]. Spouses may agree in writing to an immediate separation, and may make provision for the support of either of them and of their children during that separation or on dissolution of their marriage [see *Fam. Code* § 3580 (incorporating substance of former *Civ. Code* § 4802)]. Such an agreement is valid even if it fails to provide expressly for the *immediate* separation of the parties [see *Brown v. Brown* (1927) 83 Cal. App. 74, 81-83, 256 P. 595] or to recite the fact of separation [*Boland v. Boland* (1935) 7 Cal. App. 2d 401, 405, 46 P.2d 238] . The agreement is valid even if the parties were living separate and apart at the time of its execution [*Cookinham v. Cookinham* (1934) 219 Cal. 723, 726, 28 P.2d 1045 (agreement dealing with division of property and spousal and child support)].

As in the case of other agreements involving spouses, marital settlement agreements must have a lawful object [see *Civ. Code* § 1596] and must not otherwise violate public policy, such as for example, by "promoting dissolution of marriage" [see [4], *below*], or by attempting to contract away the right of a child to support [see *Elkind v. Byck* (1968) 68 Cal. 2d 453, 457, 67 Cal. Rptr. 404, 439 P.2d 316] . Nevertheless, as a general rule, agreements between spouses that settle their respective rights and obligations occupy a favored position in California, in that courts greatly prefer agreement to litigation. Courts prefer not to disturb an agreement, especially concerning property, except for equitable considerations [see generally *Rose v. Rose* (1959) 175 Cal. App. 2d 585, 589, 346 P.2d 460 ; see also Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 20, *Community Property: General Characterization and Division Principles* (Matthew Bender)], though courts will scrutinize particularly carefully provisions for child custody, child support, and spousal support, as discussed in Chs. 123- 124 [see, e.g., *Armstrong v. Armstrong* (1976) 15 Cal. 3d 942, 947, 126 Cal. Rptr. 805, 544 P.2d 941 (prohibition against agreements that compromise children's right to support); *In re Marriage of Goodarzirad* (1986) 185 Cal. App. 3d 1020, 1026, 230 Cal.

Rptr. 203 (prohibition against agreements that abrogate court's authority in custody matters)].

In addition, note that a marital property agreement remains valid even if it contains a provision for a non-probate transfer of property on death and the agreement is not otherwise executed with the formalities required for a will [see *Prob. Code § 5000(a)*].

Agreements between spouses are construed under the statutory rules governing the interpretation of contracts generally, unless a more specific statute provides otherwise [*In re Marriage of Benjamins* (1994) 26 Cal. App. 4th 423, 429, 31 Cal. Rptr. 2d 313 ; see *Civ. Code § 1635*].

[2] Necessity of a Writing

Marital settlement agreements are not subject to a comprehensive statutory requirement of a writing to be enforceable in the same sense that premarital agreements are [see *Fam. Code § 1610 et seq.*; see also Ch. 111, *Premarital Agreements*]. However, the practical implication of a number of current statutes is that marital settlement agreements must ordinarily be written. First, in proceedings for marital dissolution or legal separation, the court must equally divide the parties' community estate in accordance with the provisions of the Family Code, in the absence of a written agreement between the parties, or an oral stipulation in open court [see *Fam. Code § 2550*; *In re Marriage of Dellaria* (2009) 172 Cal. App. 4th 196, 201-205, 90 Cal. Rptr. 3d 802 (trial court erred in enforcing parties' oral property settlement agreement that was neither reduced to writing nor made in open court)]. Thus, if the parties wish to effect their own division in the context of a family law proceeding, without stipulating in open court, they must do so pursuant to a written instrument.

Second, on and after January 1, 1985, to the extent that a marital settlement agreement effects a transmutation of property, it must ordinarily be in writing, except for certain items of personal property of insubstantial value that are gifts between the spouses [*Fam. Code § 852(a), (c)*]. This requirement is more than an evidentiary standard; it is an essential element of any transmutation. Therefore, the requirement is not subject to implied exceptions that may apply in the context of a general statute of frauds [*In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1106-1109, 32 Cal. Rptr. 3d 471, 478-480, 116 P.3d 1152 ("[W]e see no evidence the Legislature intended to incorporate traditional exceptions to the statute of frauds into [*Fam. Code § 852*]. Indeed, the Commission Comment ... supports the *opposite* proposition." [emphasis in original])]. Thus, for example, a transmutation cannot be accomplished by part performance of an unwritten transmutation agreement [*In re Marriage of Benson* (2005) 36 Cal. 4th 1096, 1106-1107, 32 Cal. Rptr. 3d 471, 478-479, 116 P.3d 1152 (statutory language and legislative history establish that *Fam. Code § 852(a)* "cannot be satisfied where there is no writing about the subject property at all, and where a transmutation would have to be inferred from acts surrounding the contract in dispute")]. For detailed coverage of transmutation agreements, see Ch. 112, *Postnuptial Agreements* .

Third, *Fam. Code § 3580* provides that, subject to certain statutory provisions relating to child and spousal support, a husband and wife may agree, *in writing*, to an immediate separation, and may provide in the agreement for the support of either of them and of their children during the separation or on dissolution of the marriage. The requirement of a writing in that provision has been held to imply that the writing must be signed by both parties [*Fitch v. Tyler* (1930) 105 Cal. App. 306, 311, 288 P. 74 ("separation and maintenance" agreement; interpreting predecessor statute)].

Finally, there may be instances in which, because of the nature of the transaction contemplated by the agreement, such as the sale of real property [*Civ. Code § 1624(c)*], that the general statute of frauds requires a writing, even though the statute of frauds does not specify marital settlement agreements within its list of agreements that must always be written [see *Civ. Code § 1624(c)*; see also *Estate of Patterson* (1920) 46 Cal. App. 415, 420, 189 P. 483] .

Accordingly, although there were exceptions to the need for a writing under former law [see *Doxsee Co. v. All Persons* (1935) 3 Cal. 2d 609, 613-614, 45 P.2d 192 ; *Estate of Patterson* (1920) 46 Cal. App. 415, 419-420, 189 P. 483] and

may still be limited instances in which an oral agreement is enforceable [see *Fam. Code* § 852(c); see also *Braden v. Braden* (1960) 178 Cal. App. 2d 481, 485, 3 Cal. Rptr. 120 (at least under then applicable law, party who fully performed under oral marital agreement dealing solely with property issues could enforce agreement)], the best practice is to reduce all marital settlement agreements to writing.

[3] Consideration

Like other contracts, a valid marital settlement agreement is subject to the general technical requirement that it must contain adequate consideration [see *Civ. Code* §§ 1550, 1605]. Nevertheless, the *mutual consent* of the parties is sufficient consideration for an agreement, in writing, to separate immediately, regardless of whether it also provides for the support of either party and of their children during the separation [see *Fam. Code* § 3580].

Furthermore, the *mutual promises* of the parties are sufficient consideration to support marital settlement agreements containing other types of provisions as well. Thus, for example, one spouse's promise to release certain community property and her right to support is sufficient consideration to support the other spouse's promise to release other community property and his right to support. The fact that the consideration proves worthless or of little value because of an unexpected occurrence is immaterial [*Konecko v. Konecko* (1958) 164 Cal. App. 2d 249, 252-253, 330 P.2d 393]. Similarly, one spouse's promise to release further claims against the other spouse's earnings and his or her estate is sufficient consideration to support the latter spouse's promise to pay spousal support [*Remondino v. Remondino* (1940) 41 Cal. App. 2d 208, 213-214, 106 P.2d 437]. Finally, note that a written transmutation agreement is valid with or without consideration [*Fam. Code* § 850]. Thus, little in the way of formal consideration is actually needed for a valid marital settlement agreement.

[4] Agreements Promoting Dissolution Invalid

In California, there is a strong public policy favoring preservation of marriage [see *Hill v. Hill* (1943) 23 Cal. 2d 82, 88, 142 P.2d 417]. A marital settlement agreement entered into between spouses that has as its primary object the procurement of dissolution of marriage is contrary to such public policy and is invalid for that reason. Hence, an agreement having as its sole consideration for a property settlement a promise by one spouse to dissolve the marriage of the parties may be invalid [*Moss v. Moss* (1942) 20 Cal. 2d 640, 642, 128 P.2d 526]. The test of invalidity of an agreement does not turn on the subjective contemplation of the parties--a standard that would make it impossible to rely on any agreement--but on the language of the agreement itself [*In re Marriage of Dawley* (1976) 17 Cal. 3d 342, 349-354, 131 Cal. Rptr. 3, 551 P.2d 323 (premarital agreement)].

However, agreements promotive of dissolution of marriage must be distinguished from those made in *contemplation* of dissolution. Marital settlement agreements are upheld even though made in contemplation of dissolution. Although public policy seeks to foster and protect marriage, to encourage parties to live together, and to prevent separation, it does not discourage dissolution of marriage if the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed. In the absence of fraud, collusion, or imposition on the court, public policy does not prevent parties who have separated from entering into a contract disposing of their property rights, which becomes effective only in the event that one of the parties dissolves the marriage, even though such a contract may be a factor persuading a party to obtain a dissolution [*Hill v. Hill* (1943) 23 Cal. 2d 82, 93, 142 P.2d 417; see *Glickman v. Collins* (1975) 13 Cal. 3d 852, 857-859, 120 Cal. Rptr. 76, 533 P.2d 204; see also *Miranda v. Miranda* (1947) 81 Cal. App. 2d 61, 69, 183 P.2d 61; *Cookinham v. Cookinham* (1934) 219 Cal. 723, 726, 28 P.2d 1045].

[5] Consent

Because a marital settlement agreement is a contract, the consent of both parties to the agreement must be free [*Civ. Code* § 1565; see *In re Marriage of Moore* (1980) 113 Cal. App. 3d 22, 32, 169 Cal. Rptr. 619]. In general, an agreement can be rescinded if the consent of a party was given by mistake or obtained through duress, menace, fraud, or

undue influence [Civ. Code §§ 1566, 1689(b)(1); see, e.g., *In re Marriage of McNeill* (1984) 160 Cal. App. 3d 548, 557-558, 206 Cal. Rptr. 641 (disapproved on other grounds in *In re Marriage of Fabian* (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253)].

Lack of consent in entering into a marital settlement agreement often occurs as a result of one spouse's breach of the duties arising from the confidential and fiduciary relationship between spouses. For further discussion of these duties, see § 120.12. For coverage of the conditions under which a judgment may be set aside, and of limitations on relief, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 122, *Judgment of Dissolution or Legal Separation* (Matthew Bender) [see *In re Marriage of Brockman* (1987) 194 Cal. App. 3d 1035, 1045-1048, 240 Cal. Rptr. 96 ; see also Fam. Code § 2122 (special statutory provision for setting aside judgments because of fraud, perjury, mistake, or other factors)].

[6] Effect of Partial Invalidity

Although parties to a marital settlement agreement should always endeavor to include only provisions that are valid, the inclusion of unlawful provisions in an agreement will not necessarily invalidate the entire agreement. Any lawful provisions that are *severable* from the unlawful ones will be valid [see Civ. Code § 1599]. This rule will apply only if it is consistent with the intention of the parties [see *Keene v. Harling* (1964) 61 Cal. 2d 318, 320-321, 38 Cal. Rptr. 513, 392 P.2d 273] . For a related discussion of severability of contractual provisions in the context of premarital agreements, see Ch. 111, *Premarital Agreements* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 120 COMPLETE MARITAL SETTLEMENT AGREEMENTS
PART II. LEGAL BACKGROUND

A. Validity and Effect of Marital Settlement Agreements

34-120 California Legal Forms--Transaction Guide § 120.12

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.12 Effect of Duties Between Spouses

[1] General Rules Governing Interspousal Transactions

[a] Nature of Confidential Relationship

In transactions between themselves, spouses ordinarily are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse and neither may take any unfair advantage of the other [*Fam. Code § 721(b)*; see *In re Marriage of Burkle* (2006) 139 Cal. App. 4th 712, 730-736, 43 Cal. Rptr. 3d 181 (*Fam. Code § 721(b)* prohibits taking of *unfair* advantage but does not prohibit transaction in which benefits or advantages are obtained by both spouses and neither gains *unfair* advantage)]. Moreover, the relationship is a fiduciary relationship subject to certain rights and duties that apply to nonmarital business partners [*Fam. Code § 721(b)*] (legislatively abrogating holding of *In re Marriage of Duffy* (2001) 91 Cal. App. 4th 923, 111 Cal. Rptr. 2d 160, to extent in conflict with accompanying statement of legislative intent in Stats. 2002, ch. 310, § 2); see *Corp. Code §§ 16403, 16404, 16503*]. Thus, for example, a spouse must (1) provide the other spouse access to any books kept regarding a transaction for the purposes of inspection and copying [*Fam. Code § 721(b)(1)*; see *Corp. Code § 16403*]; (2) render, on request, true and full information of all things affecting any transaction that concerns the community property [*Fam. Code § 721(b)(2)*; see *Corp. Code § 16403(c)(1)*; see also *In re Marriage of Walker* (2006) 138 Cal. App. 4th 1408, 1427, 42 Cal. Rptr. 3d 325 (*Corp. Code § 16403(c)(1)*, which is incorporated by reference in *Fam. Code § 721(b)*, requires partners to disclose to each other *without demand* any information concerning partnership's business and affairs reasonably required for proper exercise of partner's rights and duties)]; and (3) account to the other spouse, and hold as a trustee, any benefit or profit derived from any transaction made without the consent of the other spouse that concerns the community property [*Fam. Code § 721(b)(3)*; see *Corp. Code § 16404*]. However, the Family Code's imposition of these duties of *business partners* does not broaden the spouses' duties and obligations to include those of *corporate* officers and directors beyond providing access, information, and an accounting [*In re Marriage of Leni* (2006) 144 Cal. App. 4th 1087, 1092-1094, 50 Cal. Rptr. 3d 886] .

For a detailed discussion of fiduciary duties between spouses concerning the management and control of community property and other financial dealings, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 24, *Management and Control of Property* (Matthew Bender)].

In addition, each spouse ordinarily must act with respect to the other spouse in the management and control of the community property in accordance with the general rules governing fiduciary relationships that control the actions of persons having a relationship of personal confidence, until such time as the property is divided by the parties or by the court [see *Fam. Code* § 1100(e); *Worton v. Worton* (1991) 234 Cal. App. 3d 1638, 1648, 286 Cal. Rptr. 410 ; *In re Marriage of Alexander* (1989) 212 Cal. App. 3d 677, 682-684, 261 Cal. Rptr. 9]. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest, and debts for which the community is or may be liable. It also includes a duty to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, on request [see *Fam. Code* § 1100(e)].

For further discussion of the spouses' confidential and fiduciary relationship, its treatment under prior law, and remedies for its breach, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 24, *Management and Control of Property* (Matthew Bender).

[b] Fraud, Undue Influence, or Other Breach

Spouses generally have a confidential, fiduciary relationship with each other. Thus, each spouse has a duty of the highest good faith and fair dealing with the other spouse, and neither spouse may take any unfair advantage of the other [*Fam. Code* § 721(b)]. Whenever spouses enter into an agreement in which one spouse gains an unfair advantage, a presumption of undue influence arises, and the advantaged spouse has the burden of demonstrating that the agreement was not obtained through undue influence [*In re Marriage of Bonds* (2000) 24 Cal. 4th 1, 27, 99 Cal. Rptr. 2d 252, 5 P.3d 815 ; *In re Marriage of Haines* (1995) 33 Cal. App. 4th 277, 293, 39 Cal. Rptr. 2d 673]. The presumption of undue influence does not arise, however, unless one spouse gains an *unfair* advantage; the presumption has no application in a transaction in which benefits or advantages are obtained by both spouses and neither gains an *unfair* advantage [*In re Marriage of Burkle* (2006) 139 Cal. App. 4th 712, 730-736, 43 Cal. Rptr. 3d 181 ; see Gray and Wagner, *Complex Issues in California Family Law*, Chs. A5.01[5][b], B7.04[3][b], and C5.05[2][b] (Matthew Bender)].

The statute setting forth the spouses' fiduciary relationship--and prohibiting the taking of *unfair* advantage--became operative January 1, 1994 [1992 Stats., ch. 162, enacting *Fam. Code* § 721, operative Jan. 1, 1994]. Before that statute took effect, some courts applied legal principles governing the duties of trustees to impose a presumption of undue influence in interspousal agreements based on *any* advantage gained by a spouse [see, e.g., *Gaines v. California Trust Co.* (1941) 48 Cal. App. 2d 709, 714-715, 121 P.2d 28 ; see also *Prob. Code* § 16004(c); *Rader v. Thrasher* (1962) 57 Cal. 2d 244, 252, 18 Cal. Rptr. 736, 368 P.2d 360 (attorney-client relationship)]. However, the legal requirements applicable to the one-way trustee-beneficiary relationship do not necessarily apply to an interspousal transaction, in which fiduciary duties run in both directions [*In re Marriage of Burkle* (2006) 139 Cal. App. 4th 712, 732-734, 43 Cal. Rptr. 3d 181]. Thus, while a trustee is presumed to have violated his or her fiduciary duty by gaining *any* advantage from a trust beneficiary, a spouse is presumed to have exerted undue influence only if he or she gained an *unfair* advantage [compare *Prob. Code* § 16004(c) (transaction between trustee and beneficiary by which trustee "obtains an advantage" from beneficiary is presumed to violate trustee's fiduciary duties) (emphasis added) with *Fam. Code* § 721(b) ("neither [spouse] shall take *any* unfair advantage of the other") (emphasis added)]. Accordingly, pre-1994 decisions based on general trust principles are of limited value in assessing whether a transaction between spouses gives rise to a presumption of undue influence under the current statute governing interspousal transactions [see *In re Marriage of Burkle* (2006) 139 Cal. App. 4th 712, 733-734, 43 Cal. Rptr. 3d 181].

Note that regardless of whether there is a presumption of unfair advantage, a spouse who seeks to avoid a marital

settlement agreement with the other spouse may submit evidence of actual undue influence, fraud, or other breach of the confidential relationship [see, e.g., *Haseltine v. Haseltine* (1962) 203 Cal. App. 2d 48, 54-58, 21 Cal. Rptr. 238 (husband grossly undervalued community property business when arranging wife's interest in it)]. For discussion of possible defenses to the confidential relationship imposed on spouses, see Ch. 112, *Postnuptial Agreements*. For discussion of remedies for breach of interspousal duties, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 24, *Management and Control of Property* (Matthew Bender); for discussion of the conditions under which a judgment can be set aside, and limitations on such relief, see Ch. 122, *Judgment of Dissolution or Legal Separation*, of that publication [see *Fam. Code* § 2122 (special statutory provision for setting aside judgments because of fraud, perjury, mistake, or other factors)].

[2] Special Disclosure Duties After Separation

In addition to the disclosure discussed in § 120.12[1] [see *Fam. Code* §§ 721(b), 1100(e)], the Family Code further prescribes interspousal disclosure duties after separation. From the date of separation to the date of the distribution of the community or quasi community asset or liability in question, each party is now subject to the standards set forth in *Fam. Code* § 721 with respect to all activities that affect the assets and liabilities of the other party. For a discussion of the "activities" described by statute, which primarily involve the disclosure of information about assets, liabilities, income, expenses, investment opportunities, and operation or management of a business [see *Fam. Code* § 2102], see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 24, *Management and Control of Property* (Matthew Bender).

[3] Exchange of Disclosure Forms Before Entering Into Agreement

In family law proceedings, the parties are required to serve on one another prescribed "preliminary" and "final" declarations of disclosure pertaining to such matters as assets, liabilities, income, and expenses. During the proceedings, each party has a general, continuing duty to immediately, fully, and accurately update and augment his or her disclosure of such matters to the extent there have been any material changes, so that at the time the parties enter into an agreement about them, or at the time of trial, each party will have as full and complete knowledge of the relevant underlying facts as is reasonably possible under the circumstances [see *Fam. Code* §§ 2100(c), 2104-2113].

For further discussion of the disclosure requirements, including a special provision for a mutual waiver of the final declaration of disclosure [see *Fam. Code* 2105(c)], see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chs. 92, *Petitioning for Dissolution or Legal Separation*, § 92.11, and 111, *Pretrial Procedures*, § 111.20 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure
Settlements
Settlement Agreements
General Overview
Family Law
Marital Termination & Spousal Support
Dissolution & Divorce
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DIVISION VII: PERSONAL TRANSACTIONS
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 A. Validity and Effect of Marital Settlement Agreements

34-120 California Legal Forms--Transaction Guide § 120.13

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.13 Effect of Judicial Action Concerning Agreement on Enforcement

[1] In General

Because marital settlement agreements are typically prepared at a time when the parties are contemplating dissolution of their marriage, counsel must determine whether there will be judicial action with regard to the agreement, and if necessary, include provisions governing such action [see § 120.211]. Judicial action can consist of approval of the agreement or merger of all or part of the agreement in the judgment, or some combination of these [see § 120.13[3], [4]]. The significance of "incorporating" an agreement for one of these purposes is discussed in § 120.13[2].

As discussed hereafter, the choice of judicial action regarding the agreement may affect the remedies available for enforcement. If a contractual remedy is desirable and available, for example, the provision generally should *not* be merged into the judgment, even though it might otherwise be approved by the court [see § 120.13[4][a]]. Note that an action in contract to enforce an interspousal agreement is subject to all usual contract defenses. For example, the agreement may be rescinded by a party whose consent was obtained by duress, coercion, intimidation, and threats [*In re Marriage of Gonzalez* (1976) 57 Cal. App. 3d 736, 743-748, 129 Cal. Rptr. 566 ; cf. *In re Marriage of Benjamins* (1994) 26 Cal. App. 4th 423, 429, 31 Cal. Rptr. 2d 313 (agreements between spouses are construed under statutory rules governing interpretation of contracts generally, unless more specific statute provides otherwise)]. In addition, a marital settlement agreement entered into between parties to pending family law litigation may be enforced by a motion for judgment under *Code Civ. Proc.* § 664.6 (applicable generally to settlement agreements in civil actions) [see *In re Marriage of Assemi* (1994) 7 Cal. 4th 896, 900-901, 905-907, 30 Cal. Rptr. 2d 265, 872 P.2d 1190 ; see, e.g., *In re Marriage of Hasso* (1991) 229 Cal. App. 3d 1174, 1179, 280 Cal. Rptr. 919 ; see also Cal. Rules of Ct., Rule 5.21 (all provisions of law applicable to civil actions generally apply to family law proceedings unless otherwise provided by Family Rules, Cal. Rules of Ct., Rule 5.5 et seq.); California Forms of Pleading and Practice, Ch. 520, *Settlement and Release* (Matthew Bender)]. For a general discussion of enforcing family law judgments, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 140, *General Enforcement Principles and Remedies* (Matthew Bender).

[2] Significance of Incorporation

The term "incorporation" is sometimes used to describe the inclusion of the terms of a marital settlement agreement in a judgment of dissolution of marriage. An agreement may be incorporated in a judgment either by setting forth the provisions of the agreement in the judgment, by apt reference to the agreement in the judgment and its physical attachment to the judgment, or by apt reference to the agreement in the judgment and clear identification of it [see *Flynn v. Flynn* (1954) 42 Cal. 2d 55, 59, 265 P.2d 865 ; see, e.g., *In re Marriage of Smith & Maescher* (1993) 21 Cal. App. 4th 100, 103, 26 Cal. Rptr. 2d 133 (parties' separation agreement was incorporated by reference in Massachusetts's divorce judgment)].

Describing an agreement as "incorporated" is potentially misleading with respect to its legal effect. The legal effect of incorporation is determined by the language of the judgment that indicates the *reason* for incorporation, which usually will be to *merge* the agreement in the judgment or to obtain court *approval* of the agreement, or both, as discussed in [3] and [4], *below* [see *Flynn v. Flynn* (1954) 42 Cal. 2d 55, 58, 265 P.2d 865] .

PRACTICE TIP:

In order to preserve the privacy of a client's marital settlement agreement, counsel can offer the marital settlement agreement as evidence and then withdraw it, and incorporate it into the judgment only by reference. Because most consent judgments are now entered by mail, this procedure is awkward, and some courts prefer to seal the file rather than to incorporate the marital settlement agreement by reference only. *Commentary by Diana Richmond.*

[3] Approval

A marital settlement agreement may be submitted to the court for its approval as fair and equitable, although court approval is not a necessary prerequisite as such for the validity of the overall agreement unless the agreement makes court approval a precondition for its effectiveness [see *Sanborn v. Sanborn* (1934) 3 Cal. App. 2d 437, 442, 39 P.2d 830] . Note that to the extent there are provisions that concern matters deemed severable from the rest of the agreement or otherwise subject to the court's powers, such as child and spousal support and child custody, court approval is required before the court will issue an order that effectuates those provisions [see *Fam. Code* §§ 3585, 3590 (orders for child or spousal support deemed law-imposed and made under power of court to order); see also *Fam. Code* § 3021 (court's power to determine child custody); Ch. 123, *Spousal and Child Support Provisions*; Ch. 124, *Provisions for Child Custody and Visitation*].

If an agreement is in fact approved but *not merged* in the judgment, enforcement of the agreement generally rests in a cause of action for breach of the agreement and contempt is not available [*Plummer v. Superior Court* (1942) 20 Cal. 2d 158, 161-165, 124 P.2d 5 ; *Lazar v. Superior Court* (1940) 16 Cal. 2d 617, 620, 107 P.2d 249 ; see *Howarth v. Howarth* (1947) 81 Cal. App. 2d 266, 270-273, 183 P.2d 670] . However, because provisions for child and spousal support are deemed law-imposed and severable from other portions of the agreement, those provisions are enforceable by all judicial remedies for enforcement of judgment, whether or not the agreement is merged into the judgment [see *Fam. Code* §§ 3585, 3590 (child and spousal support); see also *Fam. Code* § 3021 (court's power to determine child custody)].

[4] Merger

[a] Definition and Effect

As an alternative, or in addition, to approval, all or part of the agreement may be incorporated in and merged with the judgment. Merger is a legally recognized process by which an agreement, incorporated in a judgment, becomes part of the court order. The effect of merger is that the agreement is superseded by the judgment, and the obligations imposed are not those imposed by contract, but are those imposed by the judgment and are enforceable as such [*Hough v.*

Hough (1945) 26 Cal. 2d 605, 609-610, 160 P.2d 15]. If the agreement is merged in the judgment, the provisions of the agreement so merged must be enforced as a judgment and not as a contract [*Plummer v. Superior Court* (1942) 20 Cal. 2d 158, 163, 124 P.2d 5 ; *Lazar v. Superior Court* (1940) 16 Cal. 2d 617, 620, 107 P.2d 249 ; see *In re Marriage of Lane* (1985) 165 Cal. App. 3d 1143, 1147, 211 Cal. Rptr. 262]. Thus, the remedies of contempt, execution, and receivership are available to enforce the provisions of the agreement that are merged in the judgment [Fam. Code § 290; see Fam. Code § 291(a), (b) (family law judgment remains enforceable until paid in full or otherwise satisfied, and judgment need not be renewed)], but the contractual remedies, such as an action for breach of contract, are no longer available for the provisions merged in the judgment [*Hough v. Hough* (1945) 26 Cal. 2d 605, 610, 160 P.2d 15] .

If a judgment into which an agreement has been merged is set aside, the agreement is also set aside [*In re Marriage of Jones* (1987) 195 Cal. App. 3d 1097, 1104, 241 Cal. Rptr. 231 ; but see *Marriage of Testa* (1985) 149 Cal. App. 3d 319, 322, 196 Cal. Rptr. 780 (moving party must specifically request that both judgment and agreement be set aside)]. It has also been held that parol evidence is inadmissible to construe a merged agreement because the intent of the parties is of no use in interpreting a judgment of the court [*In re Marriage of Benson* (1985) 171 Cal. App. 3d 907, 912, 217 Cal. Rptr. 589] . However, another court has rejected this position and allowed extrinsic evidence about the intent of the parties in the construction of an ambiguous term in the merged agreement [*In re Marriage of Trearse* (1987) 195 Cal. App. 3d 1189, 1192-1195, 241 Cal. Rptr. 257] .

Note that there may be a disadvantage to merging property division provisions in the judgment. In certain situations, these merged property division provisions may not be enforceable by contempt because it would constitute imprisonment for debt [see *In re Fontana* (1972) 24 Cal. App. 3d 1008, 1011, 101 Cal. Rptr. 465 ; but see *Verner v. Verner* (1978) 77 Cal. App. 3d 718, 729, 143 Cal. Rptr. 826 ; *In re Marriage of Fithian* (1977) 74 Cal. App. 3d 397, 405-406, 141 Cal. Rptr. 506 ; see also Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 140, *General Enforcement Principles and Remedies* (Matthew Bender)].

Furthermore, merger may extinguish the effect of a warranty in the agreement. For example, although one court concluded on the facts that there had been no merger, it stated that a husband's warranty of having provided accurate and current financial information would be extinguished by merger of the agreement into the dissolution judgment [see *In re Marriage of Lane* (1985) 165 Cal. App. 3d 1143, 1149, 211 Cal. Rptr. 262] . Therefore, counsel should exercise caution in determining whether to merge any particular portions of an agreement in the judgment.

[b] Merger as Based on Intention of Parties and Court

In determining whether an incorporated agreement has merged with a judgment, a court will look to the intention of the parties and of the court rendering the judgment at the time of incorporation. This intention may be established by any of the following factors [*Garrett v. Garrett* (1968) 258 Cal. App. 2d 407, 415, 65 Cal. Rptr. 580 ; see *Jackson v. Jackson* (1967) 253 Cal. App. 2d 1026, 1034, 62 Cal. Rptr. 121] :

- Recitals in the agreement indicating that the agreement is to be presented to the court;
 - Physical incorporation of the words of the agreement in either the body of the judgment or as an exhibit;
 - The extent to which the judgment expressly purports to incorporate the provisions of the agreement;
- or
- The extent to which the judgment purports to order the performance of the terms of the agreement.

One appellate court found that the parties lacked intent to merge a marital agreement based on the lack of express incorporation of the agreement into the judgment, the absence of language in the agreement that merger was intended,

the existence of language in the agreement to the effect that it could be enforced by successors in interest, and the fact that the agreement was operative even in the event of a reconciliation. The appellate court noted that the trial court merely approved the terms of the agreement and ordered the parties to comply with it, rather than ordering them to perform each and every covenant and condition. Additionally, the court noted that the judgment recited that neither party was discharging the other from any provision of any document executed in connection with the dissolution of marriage [*In re Marriage of Lane* (1985) 165 Cal. App. 3d 1143, 1148-1150, 211 Cal. Rptr. 262] .

[c] Available Uses of Merger

[i] Complete Incorporation and Merger

The agreement may provide for incorporation and merger of the entire agreement in the judgment and order the parties to comply fully with the agreement. Some courts permit an original or fully executed copy of the agreement to be attached to the judgment to accomplish incorporation. Other courts prohibit the incorporation of any provision of an agreement by reference, and in those counties the text of the agreement will have to be set forth in the body of the judgment. Accordingly, counsel should ascertain whether local rules of practice prescribe a particular format for the judgment in this regard.

[ii] Partial Merger

The parties may prefer to merge only certain provisions from the marital settlement agreement in the judgment. Generally, it is preferable to have support and custody provisions merged in the judgment so that the remedies of contempt and execution are available, although express merger is not required as support by statute is deemed law-imposed rather than contractual, whether or not the agreement is merged [see *Fam. Code* §§ 3585, 3590; see also *Fam. Code* § 3021; see also [3], above].

On the other hand, if there are executory property division provisions, the question of their merger should be considered carefully because contempt may not be available to enforce them, and contractual remedies that may be preferable would not be available after merger [see [a], above]. Thus, if the parties anticipate the need for a certain type of contract-related remedy, such as specific performance, the provision should not be merged [see *Plummer v. Superior Court* (1942) 20 Cal. 2d 158, 163, 124 P.2d 5 ; see also *In re Marriage of Lane* (1985) 165 Cal. App. 3d 1143, 1147, 211 Cal. Rptr. 262] . However, if the property division provisions can best be enforced by execution, the provisions may be merged so that execution is available. Therefore, counsel must examine the type of property provision involved to determine the most appropriate remedy and consider the effect of merger on that remedy. Thus, in some situations it may be desirable to obtain court approval of the entire agreement but only merge certain provisions.

Complete merger may also be avoided in order to protect the parties' privacy with respect to certain provisions, such as those enumerating their property.

Conceivably, the parties could also provide by agreement to make approval by the court or merger in the judgment optional with either party, but this course of action seems less desirable than having the parties settle on the extent to which any of the provisions should be merged.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Classification General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements



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PART II. LEGAL BACKGROUND
A. Validity and Effect of Marital Settlement Agreements

34-120 California Legal Forms--Transaction Guide §§ 120.14-120.19

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 120.14[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Drafting the Marital Settlement Agreement

34-120 California Legal Forms--Transaction Guide § 120.20

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.20 Obtaining Necessary Information

Settlement of the rights, claims, and liabilities arising out of the marriage requires that the attorney for each spouse know all the relevant facts before drafting a marital settlement agreement. Many attorneys use information sheets or checklists when obtaining information to remind them of the general categories of facts involved in marital matters and necessary for the preparation of marital settlement agreements.

For a checklist of matters that could be included in a marital settlement agreement, see the Transaction Guide [*see § 120.100 et seq.*]. A detailed interview checklist is set forth in Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 91, *Petitioning for Dissolution or Legal Separation* (Matthew Bender). It includes a list of information to be obtained from the client regarding the couple's financial affairs and a list of documents and sources that counsel should consult in becoming fully informed regarding their assets and liabilities.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure
Settlements
Settlement Agreements
General Overview
Family Law
Marital Termination & Spousal Support
Dissolution & Divorce
Property Distribution
General Overview
Family Law
Marital Termination & Spousal Support
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Dissolution & Divorce
Property Distribution
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34-120 California Legal Forms--Transaction Guide § 120.21

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.21 Obtaining Supporting Documentation

At the client interview, the attorney should inquire about documents that may be relevant to the parties' affairs and ask the client to obtain copies of all such documents available to him or her. If the parties are still living together, the client should be instructed immediately to obtain copies of all documents that may not be available after a separation. It is important that the attorney examine all relevant documents to ascertain their legal import because the client may be misinformed or unaware of their legal effect.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionProperty Settlements



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34-120 California Legal Forms--Transaction Guide § 120.22

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.22 Obtaining Information From Third Persons

In many situations, information that the client cannot supply must be obtained from third parties. The first source is the spouse of the client, who may be willing to provide certain information voluntarily. If the other spouse is represented by an attorney, the approach must be made through the attorney [*Cal. Rules Prof. Conduct, Rule 2-100*]. Once litigation commences, of course, the parties are subject to the requirement that they serve on one another preliminary and final declarations of disclosure on the prescribed Judicial Council form [*see Fam. Code § 2100 et seq.*; Cal. Judicial Council Form FL-140; *see also* Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 92, *Petitioning for Dissolution or Legal Separation* (Matthew Bender)], and the information derived from disclosure should greatly aid counsel in determining the scope of the parties' assets and liabilities. For an illustrated version of the disclosure declaration form, see *California Forms of Pleading and Practice, Ch. 221, Dissolution of Marriage: Procedure, § 221.311* (Matthew Bender).

In addition, necessary information can often be obtained without resort to discovery procedures from other third persons, including the:

1. Attorney of the other party;
2. Prior attorney of the client;
3. Employer of the client or the client's spouse;
4. Accountant and banker of the client;
5. Business associates of the client;
6. Client's stock broker, insurance agent, and real estate broker;

7. Trustee of any trust in which either party has, or has had, an interest; and
8. Executor of any estate from which either party has, or will receive, a distribution.

If third persons will not voluntarily disclose necessary information, counsel may use appropriate discovery procedures. For forms and a discussion of discovery procedure in family law proceedings, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 110, *Trial Preparation and Discovery* (Matthew Bender). For a comprehensive listing of matter that counsel may wish to discover, see Denner, Rothschild, and Johnson, *California Family Law Trial Guide* (Matthew Bender), Unit 1.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure
Settlements
Settlement Agreements
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Property Distribution
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34-120 California Legal Forms--Transaction Guide § 120.23

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.23 Use of Experts

The attorney drafting a marital settlement agreement may find it necessary to consult with and utilize the services of experts (hired by the client) who are able to analyze information obtained for the preparation of the agreement. The expert most frequently used in marital cases is the accountant. When the parties have substantial income and assets, an accountant may be selected to prepare a financial statement, which the attorneys may use during the negotiation stage of the transaction. Accountants may also be used in connection with valuing specific assets such as a closely held business.

When one party obtains the services of an accountant, the attorney representing the other party should, at a minimum, inform the client that any financial statements prepared by the accountant are unconfirmed and should be investigated and verified [*see Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 527, 50 Cal. Rptr. 592*]. The better practice is for the client to retain the services of an independent accountant to review the submitted financial statement. If cost, however, is the primary consideration, excessive costs may be avoided at the onset of the negotiation process if the parties agree on utilizing one accountant.

Another expert commonly used to obtain and analyze information in marital cases is the appraiser. Many assets are of such a nature that it takes an expert to evaluate them properly. Examples of these assets are real property, business assets, and personal property having a unique character. In helping the client to select an appraiser, counsel should consider whether the particular person is qualified to appraise the assets in question and the extent to which the person will be an effective witness if called in the proceeding. Pension plan valuations may require the services of an actuary, or other professional who appraises employee benefits.

In some cases, the services of other experts, such as physicians, may be needed, and investigators may be required when one party appears to be concealing assets or income. Valuation of selected community assets is discussed in Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 22, *Valuation of Property Interests* (Matthew Bender). For a comprehensive discussion of evidence used in family law proceedings, see Denner, Rothschild, and Johnson, *California Family Law Trial Guide* (Matthew Bender), Unit 20.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewEvidenceTestimonyExpertsGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily
LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily
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34-120 California Legal Forms--Transaction Guide §§ 120.24-120.99

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 120.24[Reserved]



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A. Drafting Guide

34-120 California Legal Forms--Transaction Guide § 120.100

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.100 General Provisions

NOTE:

The following is an illustrative checklist of provisions commonly used in marital settlement agreements. In a particular case counsel should, of course, select only those provisions that suit the facts involved, because use of all provisions would result in including some that are mutually exclusive. General provisions that correspond to forms in this chapter are followed by specific section references. Other provisions are preceded by a reference to the chapter number in which they are primarily discussed and related forms will be found [*see* chs. 121- 125]. An expanded listing of provisions concerning general property issues, employee benefits, child and spousal support, child custody and visitation, attorney's fees and costs, and miscellaneous tax matters can be found in Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapters 212- 216 (Matthew Bender).

1. Include general recitals [*see* §§ & 120.200-120.202].
 - a. Identification of parties.
 - b. Names and birth dates of children.
 - c. Dates of marriage and separation.
 - d. Grounds for dissolution or legal separation.
2. Include provision on when agreement is effective [*see* § 120.210].

- a. Effective on date of execution.
 - b. Effective on future date.
 - c. Effective on court action.
3. Include, if desired, provision on judicial action concerning agreement [*see* § 120.211].
- a. Request for court approval.
 - b. Request for complete or partial merger in judgment.
4. Include, if desired, provision reflecting parties' legal representation with respect to agreement [*see* §§ 120.216-120.218].
- a. Independent representation by counsel.
 - b. Preparation by joint efforts of attorneys.
 - c. Refusal of spouse to obtain representation.
5. Include other general provisions, as desired.
- a. Waiver of rights on death [*see* § 120.222].
 - b. Release of all interspousal claims arising from marriage except for those created by agreement [*see* § 120.213].
 - c. Indemnity, and hold harmless provisions [*see* § 120.214].
 - d. Satisfaction of pendente lite orders [*see* § 120.228].
 - e. Declaration that agreement is entered into voluntarily [*see* § 120.219].
 - f. Effect of reconciliation [*see* § 120.220].
 - g. Execution of other documents and further assurances [*see* § 120.221].
 - h. Rights and obligations of successors and assigns [*see* § 120.222].
 - i. Provision regarding waiver of breach [*see* § 120.223].
 - j. Provision on severability of any invalid provisions [*see* § 120.224].
 - k. Amendment or modification by written instrument only [*see* § 120.225].
 - l. Provision for governing law [*see* § 120.226].
 - m. Provision acknowledging entirety of agreement [*see* § 120.227].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionProperty Settlements



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34-120 California Legal Forms--Transaction Guide § 120.101

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.101 Division of Property

[1] Division of Community Estate

NOTE:

For forms illustrating provisions for the division of assets and debts in general, see Ch. 121, *Provisions for Division of Property*.

1. Include description of real and personal property of parties.
 - a. Real property descriptions.
 - b. Business interests descriptions.
 - c. Securities and bank account descriptions.
 - d. Personal property descriptions.
2. Include provision on any representations of value.
 - a. Describe use of appraiser, if any.
 - b. Disclaimer of representation of value.
3. Include provisions as needed for award of assets to each party or other disposition.

- a. Division of property in exhibits.
 - b. Sale of property to third persons.
 - c. Release of separate property.
 - d. Sale of family residence.
 - e. Refinancing family residence.
 - f. Promissory note to spouse.
 - g. Transfer of real property to parties as tenants in common.
 - h. Sale of real property to party.
 - i. Acknowledgment of prior division of personal property.
 - j. Title to transferred personal property.
 - k. Division of sole proprietorship.
 - l. Transfer of partnership interest to partner.
 - m. Division of closely held corporation.
 - n. Creation of trust.
 - o. Allocation of income taxes based on division of property.
 - p. Agreement not to seek new basis for property.
4. Include other general provisions regarding assets, as desired.
- a. Warranty of disclosure of property.
 - b. Division of concealed community property.
 - c. Warranty against unauthorized gifts.
 - d. Division of subsequently acquired property.
5. Include provisions, as needed, for division of obligations.
- a. Description of debts and obligations.
 - b. Payment of debts to third parties.
 - c. Refinancing to pay obligations.

- d. Disposition and payment of credit cards.
- e. Assumption of debts by one party.
- f. Division of debts.
- g. Release of spouse from contingent obligation.
- h. Acknowledgment of interspousal debt.
- i. Warranty against additional obligations.
- j. Division of omitted obligations.

[2] Provide for Division of Specific Assets

1. Provide for division of insurance policies [*see* Ch. 121].
 - a. Surrender of policy and division of proceeds.
 - b. Partition of policy.
 - c. Assignment of policy to one party.
 - d. One spouse to remain beneficiary on policy on other spouse.
2. Provide for division of retirement benefits and other divisible employee benefits [*see* Ch. 122].
 - a. Assignment of retirement benefits to employee spouse.
 - b. Reservation of jurisdiction for limited purposes.
 - c. Formula for division of benefits when received.
 - d. Specific allocation of benefits when received.
 - e. Payment of benefits to employee as trustee.
 - f. Exercise of retirement options.
 - g. Division of pension not being paid.
 - h. Retirement benefit as separate property.
 - i. Creation of qualified domestic relations order (QDRO).
 - j. Division of employee stock options or similar benefits.

k. Right to survivor benefits.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionProperty Settlements



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A. Drafting Guide

34-120 California Legal Forms--Transaction Guide § 120.102

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.102 Spousal Support

NOTE:

For forms illustrating provisions for the support of a spouse, see Chapter 123.

1. Provide for amount, duration, conditions, and termination of support, or waiver, as desired.
 - a. Waiver of spousal support.
 - b. Temporary support.
 - c. Periodic fixed sum support payments.
 - d. Support payments to vary with supporting spouse's income.
 - e. Support payments to vary with supported spouse's income.
 - f. Support payments to vary with economic index.
 - g. Inspection of financial records.
 - h. Installment payment of principal sum for support.
 - i. Support to be net amount after taxes.

- j. Payment of housing expenses.
 - k. Payment of educational expenses.
 - l. Payment of medical expenses.
 - m. Modification of support.
 - n. Termination of support.
 - o. Reservation of jurisdiction to extend support.
2. Provide for support-related matters.
- a. Notification of happening of contingency.
 - b. Survival of support obligation.
 - c. Taxation of support payments.
 - d. Security for support.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements Family Law Marital Termination & Spousal Support Spousal Support Obligations General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 120 COMPLETE MARITAL SETTLEMENT AGREEMENTS
PART III. TRANSACTION GUIDE
A. Drafting Guide

34-120 California Legal Forms--Transaction Guide § 120.103

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.103 Child Support

NOTE:

For forms illustrating provisions for the support of children, see Chapter 123.

1. Provide for amount and form of support.
 - a. Child support.
 - b. Family support (combined spousal and child support).
2. Provide for maintenance of health and related insurance for benefit of child.
 - a. Maintenance of medical insurance.
 - b. Payment of major medical expenses.
 - c. Medical care to be provided by custodial parent.
3. Provide for payment of child-related expenses.
 - a. Payment of private school tuition.
 - b. Payment of college expenses.

- c. Party entitled to claim children as dependents.
- d. Reports as to expenditures for support.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewFamily LawChild SupportObligationsGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily
LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 120 COMPLETE MARITAL SETTLEMENT AGREEMENTS
PART III. TRANSACTION GUIDE
A. Drafting Guide

34-120 California Legal Forms--Transaction Guide § 120.104

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.104 Child Custody and Visitation

NOTE:

For forms illustrating provisions for child custody and visitation, see Chapter 124.

1. Provide for legal and physical custody desired.
 - a. Legal and physical custody to one spouse.
 - b. Joint legal custody, with sole physical custody.
 - c. Joint legal and physical custody.
 - d. Custody to nonparent.
2. Provide for visitation desired.
 - a. Open-ended "reasonable" visitation.
 - b. Specific visitation periods, such as weekends.
 - c. Provisions for holidays.
 - d. Visitation rights to grandparents.

3. Provide for related matters.

- a. Religious training.
- b. Children to bear particular surname.
- c. Restrictions on removal from county or state.
- d. Report as to health and education.
- e. Report of change of address.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Child Custody General Overview Family Law Child Custody Visitation General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 120 COMPLETE MARITAL SETTLEMENT AGREEMENTS
PART III. TRANSACTION GUIDE
A. Drafting Guide

34-120 California Legal Forms--Transaction Guide § 120.105

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.105 Income Tax Returns

NOTE:

For forms illustrating provisions for filing of income tax returns and payment of taxes, see Chapter 125.

1. Provide for responsibility for payment of current income taxes.
 - a. Each party to pay proportionate share of income tax.
 - b. One spouse to pay all tax.
 - c. Separate returns when all income separate.
 - d. Each spouse to include one-half of community income.
2. Provide for liability for deficiencies on prior returns, including interest and penalties.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce General Overview Tax Law Federal Income Tax Computation Community Income (IRC sec. 66)



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 120 COMPLETE MARITAL SETTLEMENT AGREEMENTS
PART III. TRANSACTION GUIDE
A. Drafting Guide

34-120 California Legal Forms--Transaction Guide § 120.106

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.106 Attorneys' Fees and Costs

NOTE:

For forms illustrating provisions for payment of attorneys' fees and costs, see Chapter 125.

1. Provide for responsibility for payment of current fees and costs for negotiation, settlement, of case.
 - a. Payment of each spouse's attorney's fees.
 - b. Property from which payment will be made.
 - c. How payment will be made.
2. Court award of attorney's fees in future proceedings for failure to abide by agreement, or otherwise.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Costs & Attorney Fees Family Law Marital Termination & Spousal Support Dissolution & Divorce General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 120 COMPLETE MARITAL SETTLEMENT AGREEMENTS
PART III. TRANSACTION GUIDE
A. Drafting Guide

34-120 California Legal Forms--Transaction Guide §§ 120.107-120.199

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 120.107[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 120 COMPLETE MARITAL SETTLEMENT AGREEMENTS
PART IV. FORMS

A. Complete Settlement and Reconciliation Agreements

34-120 California Legal Forms--Transaction Guide § 120.200

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.200 Marital Settlement Agreement Dividing Property and Requiring Child Support and Spousal Support--Both Parties Employed and Share Child Custody

[1] Comment

[a] Use of Form

Set forth in [2], *below*, is a complete marital settlement agreement for use by parties who are obtaining a dissolution of marriage. It may easily be adapted for use in a legal separation or nullity proceeding [*see* [c] *below*]. The form should be modified as needed to suit the particular facts at hand [*see* [b] *below*]. Alternative general provisions are *set forth in* §§ 120.210-120.218. Alternative provisions concerning property, in general, are set forth in Ch. 121. Provisions specifically concerning employee benefits are set forth in Ch. 122. Provisions concerning child and spousal support are contained in Ch. 123; and provisions on child custody, and attorney's fees, costs, and tax provisions are set forth in Chapters 124, and 125, respectively.

This form includes provisions that (1) provide for child custody and visitation and child support; (2) provide for spousal support and attorney fees; (3) divide all of the parties' community and quasi-community assets and debts; and (4) establish a plan for the parties' handling of income tax matters during the pendency of their family law proceeding. In addition, the form contains general provisions concerning the parties' respective rights and responsibilities; and the operation of the agreement.

This form contemplates a situation in which (1) both parties are employed and will continue to work following the conclusion of their family law proceeding; (2) the parties will share joint custody of their minor children, with one party assuming physical custody of the children during the school year and the other for a period during the summer; (3) the parent with physical custody during the school year will receive child support payments for that time (and, for a limited time, spousal support payments) from the other party; (4) all of the parties' property that is subject to division on dissolution will be divided at or near the time of the execution of their agreement; and (5) both parties are represented by independent counsel.

For an alternative, illustrative form for a complete agreement that may be used when one party is not currently employed and will remain unemployed or work only part-time following the conclusion of the parties' family law proceeding in order to care for the parties' minor children, see § 120.201.

[b] Modification of Form

Although this form and the *form in § 120.201* illustrate complete illustrative agreements, neither will ever be completely appropriate "as is" in any particular case. Prior to drafting an agreement, the attorney should consult Chapters 121 through 125, which contain additional and alternative provisions that may be inserted into this form and the agreement in § 120.201.

Counsel should carefully consider the effect of each provision chosen for the complete marital settlement agreement on the consistency of the agreement as a whole. For example, if a provision in the asset division paragraph dictates that an item of property be sold to pay a particular debt, the discussion of the debt in the debt payment paragraph should also indicate that it is to be paid from the proceeds of that sale. When inserting provisions from Chapters 121 through 125 in this form or the *form in § 120.201*, modifications of either the new provision or the original agreement, or both, may be necessary to maintain internal consistency.

[c] Settlement Agreements in Annulment Proceedings

Although use of marital settlement agreements in annulment proceedings is not common, if a *putative* marriage is found to exist, or the parties have child custody or support issues to resolve, a settlement agreement may be appropriate. In the case of a putative marriage, at least one party must have believed in good faith that the marriage was valid when contracted, despite the marriage being void or voidable. Property that would have been community property in a putative marriage is deemed "quasi-marital" property, and is subject to division by the court in the same manner as community property [see *Fam. Code* §§ 2251, 2550; see also Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 11, *Putative Marriage* (Matthew Bender)].

Accordingly, the form of agreement set forth in [2] *below* is appropriate for an annulment situation in which (1) at least one party believed in good faith that the marriage was valid at the time the marriage was entered into, and (2) the parties' parentage of the minor children covered by the agreement is not in dispute.

[d] Child Custody and Visitation

This form provides for joint legal and physical custody of the parties' minor children, with physical custody alternating between the parties based on the children's school year [see Paragraphs 5-8]. A parent or other person has "physical custody" of children if they reside with and are supervised by him or her [see *Fam. Code* §§ 3004, 3007]. "Legal custody" refers to the right and responsibility to make decisions relating to the health, education, and welfare of the children [see *Fam. Code* §§ 3003, 3006]. As used in the Family Code, the term "joint custody" includes both joint legal custody and joint physical custody [*Fam. Code* § 3002]. For purposes of drafting an agreement, it is suggested that the types of custody agreed to by the parties either be defined, as above, in the agreement, or that the parties otherwise specify exactly the types of custody each party has in order to help avoid a later dispute over meaning. For additional provisions concerning custody and visitation, see Ch. 124, *Provisions for Child Custody and Visitation*.

PRACTICE TIP:

The terms "custody" and "visitation" can be highly inflammatory among parents, even those who are otherwise in agreement about what times their children spend in each household. In some instances, it may be wiser to refer simply to periods of residence in each parent's household rather than to use the loaded words. However, when there is any perceived danger of kidnapping by either parent, the statutory words should be used to aid in criminal enforcement. *Commentary by Diana Richmond.*

[e] Child Support

Paragraph 9 of this form is a general provision for child support. It requires the supporting party to make a payment of a specific sum each month. Paragraph 10 partially abates child support for the period of time when the payor parent has the physical custody of the children [see [d], *above*]. Paragraph 11 provides for both parents to provide health care coverage for the children under their respective employer-provided plans. For additional and alternative child support payment provisions, including provisions related to stay of a wage assignment when a support order issues, see Ch. 123, *Spouse and Child Support Provisions*. For a general discussion of child support orders, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 41, *Child Support Orders* (Matthew Bender).

Note that the support provision, like the custody provision, is subject to court approval. Moreover, if the support amount agreed to is less than would be provided by application of the statewide support guideline, the parties may agree to that amount only if they declare all of the following [*Fam. Code* § 4065]:

- They are fully informed of their rights concerning child support;
- The order is being agreed to without coercion or duress;
- The agreement is in the best interests of the children involved;
- The needs of the children will be adequately met by the stipulated amount; and
- The right to support has not been assigned to the county pursuant to *Welf. & Inst. Code* § 11477, and no public assistance application is pending.

Child support payable under a marital settlement agreement usually will qualify as a "domestic support obligation," which is not dischargeable in bankruptcy [see 11 U.S.C. § 523(a)(5)]. A "domestic support obligation" for bankruptcy purposes includes any debt payable to a bankruptcy debtor's spouse or former spouse in the nature of alimony, maintenance, or support of that spouse, former spouse, child, or child's parent under a separation agreement, divorce decree, or property settlement agreement [11 U.S.C. § 101(14A)]. For further discussion, see Ch. 123, *Spousal and Child Support Provisions*.

[f] Spousal Support

This form provides that one spouse will pay spousal support for a limited period of time, but with the court's jurisdiction over spousal support retained to extend the duration or modify the amount of support in the future [see Paragraph 12.1]. The supporting spouse's obligation terminates on the death of either party, or on the remarriage of the supported spouse, even if it occurs before the otherwise applicable termination date [see Paragraph 12.2]. It does not automatically terminate should the supported spouse cohabit with a person of the opposite gender, but any cohabitation is stated to be a change of circumstances on which the court may decrease the amount of support if the cohabitation produces a decrease in the supported spouse's needs [see Paragraph 13]. The payor spouse forever waives his or her rights to support from the payee spouse [see Paragraph 14].

Spousal support payable under a marital settlement agreement usually will qualify as a "domestic support obligation," which is not dischargeable in bankruptcy [see 11 U.S.C. § 523(a)(5)]. A "domestic support obligation" for bankruptcy purposes includes any debt payable to a bankruptcy debtor's spouse or former spouse in the nature of alimony, maintenance, or support of that spouse, former spouse, child, or child's parent under a separation agreement, divorce decree, or property settlement agreement [11 U.S.C. § 101(14A)]. For further discussion, see Ch. 123, *Spousal and Child Support Provisions*.

For additional provisions concerning spousal support, see Ch. 123. For a general discussion of spousal support, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 51, *Spousal Support Orders* (Matthew Bender).

[g] Division of Community Estate

[i] In General

Generally, the community estate (including both assets and debts) must be divided equally overall between the parties to a marital dissolution or legal separation, except as otherwise agreed by the parties in writing (or by oral stipulation in open court) [*Fam. Code* § 2550; see *In re Marriage of Dellaria* (2009) 172 Cal. App. 4th 196, 201-205, 90 Cal. Rptr. 3d 802 (trial court erred in enforcing parties' oral property settlement agreement that was neither reduced to writing nor made in open court); see also Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 20, *Community Property: General Characterization and Division Principles*, Ch. 21, *Special Property Characterization and Division Issues* (Matthew Bender)]. Each asset of the parties will be included in the Judicial Council form of Schedule of Assets and Debts [Cal. Judicial Council Form FL-142], an illustrated version of which is set forth in Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure* 2d ed., Ch. 111, *Pretrial Procedures*, § 111.31 (Matthew Bender)]. In this form, each asset and each obligation, including employee benefit plans, that is listed on the Judicial Council Schedule is distributed or allocated to one of the parties [see Paragraphs 15-22]. For forms for use for other dispositions, such as sale to a third party, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 212, *General Property Provisions in Marital Settlement Agreements* (Matthew Bender).

The list format for identifying and dividing community assets and debts may become unwieldy if long lists of assets and debts are involved. In that case, counsel should use attached schedules or exhibits to divide the community assets and debts. For examples of reference to schedules, see § 120.201 and Ch. 121, *Provisions for Division of Property*.

This form presumes that the division of the overall community estate comes out equal, so that each party is receiving essentially the same net amount. Often, an equalizing payment is required in order to effect an overall equal division of the estate. For a form for a secured equalizing payment, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 212, *General Property Provisions in Marital Settlement Agreements* (Matthew Bender).

[ii] Division of Family Home

This form does not include a separate provision dealing with the family home. The home may be listed and disposed to one party or the other in the same manner as other property, under Paragraphs 16 and 17. However, if the parties wish to postpone sale of the family home because the custodial spouse and minor children will continue living there for a certain period, a special provision should be included concerning the terms of the postponement and eventual disposal of the home. For specific provisions governing the handling of the family home, see Ch. 121, *Provisions for Division of Property*. For a general discussion of "deferred sale of home orders," see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 21, *Special Property Characterization and Division Issues* (Matthew Bender).

[iii] Division of Employee Benefits

This form allocates to each party his or her own employee benefit plans [see Paragraphs 16 and 17]. Often, however, it will be impossible to obtain an equal division of the community estate without preserving one spouse's community interest in pension or other employee benefits of the other spouse for future payment. In such a case, it will be necessary to divide the benefit plans between the parties. Division of employee benefits requires both provisions in the marital

settlement agreement [see Ch. 122, *Provisions for Division of Employee Benefits*], and preparation and entry by the court of a separate Qualified Domestic Relations Order (QDRO) or other benefit division order.

The classification, valuation, and division of employee benefits requires a knowledge of both federal law and financial principles. Counsel should carefully review Chapter 122 before attempting to negotiate or draft any provision dealing with the retirement benefits of either party.

[iv] Full and Fair Disclosure

Paragraphs 23-26 of this form pertain to full disclosure of assets and obligations. In Paragraph 23, each party warrants that he or she has made full and fair disclosure of all community and separate property, both assets and debts. Each party is required to make full disclosures to the other concerning all assets in which that party has or may have an interest and all liabilities for which that party is or may be liable, regardless of the characterization of the asset or liability as community, quasi-community, or separate property [see *Fam. Code* §§ 2100, 2102, 2104, 2105].

Paragraphs 24 and 25 address the disposition of after-discovered assets and omitted debts, whether or not the failure to include the asset or obligation in the agreement is due to inadvertence, unawareness, or intentional omission.

Paragraph 26 is a provision under *Fam. Code* § 2105(d), for mutual waiver of the final declaration of disclosure that otherwise would be required. For discussion of special disclosure forms that must be exchanged by the parties once family law litigation has commenced, and before or at the time the parties enter into an agreement during the litigation that settles property or support issues (other than temporary support), see § 120.12[3] [see *Fam. Code* § 2105].

[h] Income Taxes

This form provides that the parties will file joint income tax returns for the year during which their dissolution or separation action is pending [see Paragraph 27]. This type of provision may not be desired by the parties in all cases and may be modified to suit the particular circumstances of the parties.

Paragraph 28 provides for the allocation of any potential tax refund from any return that has not yet been filed. Specific expected tax refunds should be addressed as part of the community estate and allocated between the parties [see Paragraph 16, item h]. Similarly, specific tax liabilities on returns already filed should be addressed under the provisions for division of community obligations [see Paragraph 21.1, item b]. For additional and alternative provisions concerning the filing of income tax returns and the payment of income taxes by parties, see Chapter 125. For a general discussion of the tax effects of dissolution, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 160, *Tax Effects of Dissolution* (Matthew Bender).

[i] Fees and Costs

This form provides for the supporting spouse to also make monthly payments toward the supported spouse's attorney fees and costs [see Paragraph 29]. The agreement further provides that fees and costs incurred in *future* litigation concerning the agreement are to be paid by the prevailing party in the litigation [see Paragraph 30; see also *Civ. Code* § 1717(b)(1); see generally *Hsu v. Abbata* (1995) 9 Cal. 4th 863, 876-877, 39 Cal. Rptr. 2d 824, 891 P.2d 804] .

PRACTICE TIP:

The use of a "prevailing party" fee provision enables a party to recover fees even if he or she could not otherwise qualify for a fee award under the Family Code on the basis of need or because of lack of cooperation. *Commentary by Diana Richmond.*

For additional forms concerning fees and costs, see Chapter 125.

[j] Modification and Revocation

This form provides for future modification or revocation of the agreement [see Paragraph 39]. Notwithstanding any agreement between the parents, arrangements for child support, custody, and visitation are always subject to court order [Fam. Code §§ 3651, 4001; *In re Marriage of Alter* (2009) 171 Cal. App. 4th 718, 726-730, 89 Cal. Rptr. 3d 849 (court always has power to modify child support order, upward or downward, regardless of parents' agreement to contrary); *Armstrong v. Armstrong* (1976) 15 Cal. 3d 942, 947, 126 Cal. Rptr. 805, 544 P.2d 941; *In re Marriage of Goodarzirad* (1986) 185 Cal. App. 3d 1020, 1026, 230 Cal. Rptr. 203] .

[k] Judicial Action

Paragraph 42 of this form provides for a partial merger of the agreement into the parties' judgment of dissolution of marriage. Note that complete merger may not be advantageous with respect to some provisions, particularly those relating to property, as discussed in § 120.13[4]. For alternative provisions, see § 120.211.

[l] Notarization

If a judgment of marital dissolution, legal separation, or nullity of marriage is granted on the *default* of one of the parties, the signature of the defaulting spouse on any marital settlement agreement or stipulated judgment must be notarized (acknowledged) [Fam. Code § 2338.5; see Civ. Code § 1189]. Note that notarization of both parties' signatures is necessary in order to record the agreement [see Fam. Code § 1502].

[2] FORM

Marital Settlement Agreement Dividing Property and Requiring Child Support and Spousal Support--Both Parties Employed and Share Child Custody

MARITAL SETTLEMENT AGREEMENT

This Marital Settlement Agreement is entered into between _____ [name of wife] ("Wife"), and _____ [name of husband] ("Husband") in order to resolve all issues between them with regard to their dissolution of marriage. The parties intend this Agreement to be a final and complete settlement of all of their rights and obligations to each other arising out of their marriage, including without limitation, all past, present and future interspousal claims of any kind that either may have against the other, except as otherwise provided in this Agreement. Therefore, Husband and Wife agree as follows:

GENERAL RECITATIONS

1. Husband and Wife were married on _____ [date], in _____ [city], _____ [state], and have thereafter been married to each other continuously. They have _____ [lived separate and apart since _____ (date) or agreed to live separate and apart commencing _____ (date)]. As of the separation date, the duration of the marriage is _____ Years, _____ Months.

2. Irreconcilable differences have arisen between Husband and Wife, which have led to an irremediable breakdown of the marriage. There is no possibility of saving the marriage through counseling or other means, and the parties have agreed to dissolve their marriage

3. Husband and Wife are the parents of the following minor children of the marriage [and adult children of the marriage to whom they have, or shall create by this Agreement, a duty of support]: _____ [specify each child's

full name and birth date]. Husband and Wife have had no other children together, living or deceased, natural or adopted, and Wife is not currently pregnant.

4. [Husband or Wife] [has filed or will file] a petition for dissolution of marriage in the Superior Court of California, _____ County [, Case No. _____].

CHILD CUSTODY AND VISITATION

[For additional and alternative provisions relating to custody and visitation, see Ch. 215.]

Joint Legal Custody

5. Each of the parties recognizes that both have the right to fully participate in determining all important matters pertaining to the children's health, welfare, education, and upbringing. The parties agree that they shall have joint legal custody of the children. All decisions regarding the health, education, and welfare of the children shall be made jointly by the parties. The health, education, and welfare of the children includes, but is not limited to, medical and dental care, choice of schools, choice of child care facilities, religion, recreational activities, vacation plans, and travel. The parties shall each make good-faith efforts to reach agreement on these issues. [Add method to resolve disputes, if desired: If the parties cannot agree concerning any issue, they shall, on the request of either of them, _____ (e.g., consult a family counselor or private or court-appointed mediator to assist them in resolving their differences and shall agree to follow the recommendation of the mediator or counselor).]

Alternating Physical Custody

6.1. The parents shall share the physical custody of their children. The actual physical custody of the children shall alternate between the parties according to the school vacation schedule(s). [e.g., Husband] shall have physical custody of the children during [specify periods of school vacation, e.g., Christmas and Easter vacations and for two months during the summer vacation]. [e.g., Wife] shall have physical custody of the children at all other times. The vacation periods referred to shall be those of the school that each child is attending at the time of each vacation.

6.2. [Specify beginning and ending dates of parent's vacation custodial time, e.g., For the Christmas vacation, Husband's custody shall begin not later than two days after the beginning of the vacation and terminate no sooner than two days before the end of that vacation. For the Easter vacation, Husband's custody shall begin not later than one day after the beginning of the vacation and terminate no sooner than one day before the end of that vacation. For the summer vacation, Husband's custody shall be for any continuous two-month period as may be agreed to by the parties].

6.3. For each change of primary physical responsibility provided for in this Agreement, _____ [specify day and time of transfer, e.g., the transferring parent will deliver the children to the other by 12:00 p.m. on the first or last day of the custodial period].

Time-Sharing Percents for Child Support Guideline

7. For purposes of the statewide uniform child support guideline, Wife shall be deemed to have primary physical responsibility for the children _____ percent of the time, and Husband shall be deemed to have primary physical responsibility _____ percent of the time (*percentages must equal 100*).

Visitation

8. Each parent shall have the right to visitation with the children during the time when the other parent has primary physical responsibility for the children according to the following schedule: [*specify, e.g., between the hours of 5:00 p.m. on Friday until 10:00 a.m. on Saturdays*]. If the children are living with the other parent on any of the specified days, the parent without physical custody on that day shall be entitled to visitation as follows:

_____ [*include provision for special occasions and holidays, e.g.,* Husband shall have the right to visitation with the children all day on his birthday and on Father's Day, and Wife shall have the right to visitation all day on her birthday and on Mother's Day. Each parent shall have a right of visitation for at least six hours on Thanksgiving and Christmas Day]. If a party intends not to exercise his or her rights to visitation as to any date when the children are living with the other parent, he or she must notify the other parent at least _____ hours in advance of the specified pick-up time.

CHILD SUPPORT

[*For additional and alternative provisions governing child support, including provisions for stay of wage assignment and related issues, see Ch. 214.*]

Periodic Payments

9. [*Payor parent, e.g.,* Husband] shall pay the sum of \$_____ every [*period, e.g.,* month] to [*payee parent, e.g.,* Wife] as child support for their minor child. Payment shall be due by the [*e.g.,* fifth day of the month] beginning _____ [*date*]. Payments shall continue until the child dies, marries, is emancipated, attains the age of 18 years (or if the child is still a full-time student, until the child graduates from high school or attains the age of 19 years, whichever come first), or until further order of the court.

Reduction of Support During _____ [*Payor Spouse's*] Custodial Period

10. The child support payments provided under Paragraph 9 of this Agreement shall be reduced to the amount of \$_____ per month each year beginning [*date, e.g.,* June 20] and ending [*date, e.g.,* August 20] during which [*obligor parent, e.g.,* Husband] shall have primary physical responsibility for the children as provided in Paragraph 6 of this Agreement. [*e.g.,* Husband's] obligations under the other support provisions of this Agreement are unchanged during the above period.

Health Care Coverage for Children

11. Husband shall maintain the child as a covered dependent under the following coverages provided by his employer: _____ [*specify husband's coverages or plans*]. Wife shall maintain the child as a covered dependent under the following coverages provided by her employer: _____ [*specify wife's coverages or plans*]. Each party shall notify the other immediately on any termination or other material change of coverage. [*Add if desired:* With regard to medical coverage, _____ (*e.g.,* Husband's) plan shall be the primary coverage, and _____ (*e.g.,* Wife's) plan shall be the secondary coverage.] The parties shall stipulate to entry of a Qualified Medical Child Support Order (QMCSO), as defined in the Employee Retirement Income Security Act

(ERISA), Title 29 *United States Code*, Section 1169(a), identifying each such plan in which the child is to be enrolled.

SPOUSAL SUPPORT

[For additional and alternative provisions governing spousal support, including stay of wage assignment and related issues, see Ch. 214.]

Periodic Payments to _____ **[Supported Spouse]** and Jurisdiction

12.1. *[Supporting spouse, e.g., Husband]* shall pay spousal support to *[supported spouse, e.g., Wife]* in the sum of \$[per month or twice every month or every other week or every week] for a period of *[e.g., five years]*, beginning on _____ *[date]*, and ending with the payment to be made on _____ *[date]*. Payments shall be due on or before *[day of month or week, e.g., the fifth day of each month]*. The court shall reserve jurisdiction indefinitely to modify the amount of, extend the duration of, reinstate, or terminate support payments and jurisdiction over support on a proper showing made to the court.

12.2. The payments of spousal support provided in this Agreement, and the court's jurisdiction to order spousal support, shall terminate on the death of either party or on the remarriage of *[e.g., Wife]* before _____ *[restate above ending date]*.

Effect of Subsequent Shared Residency

13. The spousal support payments provided for in this Agreement shall not automatically terminate or be reduced should *[supported spouse, e.g., Wife]* begin cohabiting with a person of the opposite sex. However, if *[e.g., Wife]* shares a residence with any person in the future, regardless of the gender of that person and regardless of the existence of or lack of a sexual relationship between them, that shared residency may constitute a change of circumstances supporting a reduction or termination of spousal support and termination of jurisdiction to order spousal support. Any such modification or termination of spousal support shall be based on the effect of the shared residency on *[e.g., Wife's]* need for support.

Waiver of Spousal Support by _____ **[Supporting Spouse]**

14. *[supporting spouse, e.g., Husband]* waives the right ever to obtain spousal support from *[supported spouse, e.g., Wife]*. *[e.g., Husband]* understands that by waiving spousal support, *[he/she]* will never be able to return to court to request spousal support ever again, regardless of any change of circumstances that may occur. This waiver is knowingly, intelligently, and voluntarily made. The court's jurisdiction to order spousal support to be paid by *[e.g., Wife]* to *[e.g., Husband]* at any time is terminated.

DIVISION OF COMMUNITY ESTATE

[For alternative provisions governing division of parties' property, see Ch. 212.]

Division of Community Assets

15.1. Husband and Wife agree that their community [and quasi-community] assets shall be divided between them as set forth below. [The parties further agree that this Agreement effects an equal division of their community (and quasi-community) property.]

15.2. Each party releases, transfers, and assigns to the other as his or her sole and separate property, all right, title, and interest in and to the assets listed below. Each further agrees to execute any and all documents that may be required to establish or confirm the other party's sole ownership of any listed asset.

Assets Assigned to Wife

16. Wife shall be assigned the following assets: *[Set forth the applicable provisions below.]*

a. Real property located at _____ *[street address or other location]*, and more particularly described in Exhibit _____, which is attached to this Agreement and incorporated by reference.

b. Any and all household furniture, furnishings, appliances, clothing, and other personal effects situated in or about _____ *[Wife's or Husband's] residence at* _____ *[Address]*.

c. Jewelry, antiques, art, coin collections, and other similar items as follows: _____

d. The following motor vehicles: _____

e. Savings account _____ *[number]*, at _____ *[financial institution]*.

f. Checking account _____ *[number]*, at _____ *[financial institution]*.

g. Account _____ *[number]*, at _____ *[credit union or other financial institution holding deposit account]*.

h. The expected refund on _____ *[tax return]*.

i. Life insurance policy _____ *[number]* issued by _____ *[company]* on the life of _____ *[named insured]*, having a death benefit of \$ _____.

j. The following stocks, bonds, secured notes, mutual funds, and other investment instruments: _____

k. All interest in and benefits of _____ *[defined benefit plan]* to which _____ *[Wife or Husband]* is or shall be entitled on account of *[her/his]* past, present, and future employment at _____ *[employer]*, including survivor benefits;

m. All interest in and benefits of _____ *[defined contribution plan]* to which _____ *[Wife or Husband]* is or shall be entitled on account of *[her/his]* past, present, and future employment at _____ *[employer]*, including survivor benefits;

n. _____ *[Individual Retirement Account (IRA) or other private retirement plan]* held by

_____ [trustee, financial institution, or company], account _____ [number], in the name of _____ [owner].

o. The following accounts receivable and unsecured notes: _____

p. The business located at _____ [address], organized as a _____ [capacity], and doing business under the name of _____ [business name];

q. _____ [other assets].

Assets Assigned to Husband

17. Husband shall be assigned the following assets: *[Repeat the applicable provisions a-q, above.]*

Encumbrances

18. With regard to all property assigned under this Agreement, except as may otherwise be specifically provided in this Agreement (including in Paragraphs 20 through 22 regarding payment of community obligations), the assignee spouse assumes all encumbrances and liens on the property and agrees to indemnify and hold the other party free and harmless from any claim or liability that the other party may suffer or may be required to pay because of those encumbrances or liens, including the payment of reasonable attorney fees.

Insurance

19. The party assigned an insured asset shall, as of the effective date of this Agreement, receive the benefits and protections of that insurance, shall be considered the owner of the insurance policy, and shall pay all policy premiums coming due on and after that date, for so long as the policy is maintained in force. A party assigned insured property must notify the insurance carrier for the property concerning the change in ownership within *[period of time]* after the execution of this Agreement.

Division of Community Debts

20. Husband and Wife agree that their community [and quasi-community] debts and obligations shall be allocated between them as set forth below. *[Add if desired: The parties further agree that this Agreement effects an equal division of their community (and quasi-community) debts and obligations.]*

Debts to Be Paid by Wife

21.1. Wife is allocated the following debts and obligations: *[Set forth the applicable provisions below.]*

a. The student loan to _____ [lender]; Current Principal Balance: \$_____ [amount];

b. The following taxes that have been assessed but remain unpaid: _____ [taxing authority and due date]; Amount Due: \$_____;

c. Unpaid _____ [child or spousal or family] support in the total sum of \$_____ due to _____ [payee] [for the benefit of the children _____ (names) and] covering the period _____ [beginning date] through _____ [ending date];

d. The unsecured loan to _____ [creditor]; Current Principal Balance: \$_____;

e. The following credit cards: _____ [card and issuer]; _____ [acct number]; \$_____ [current balance];

f. The following charge accounts: _____ [charge account]; _____ [acct number]; \$_____ [current balance];

g. To _____ [creditor] for _____ [purpose]; Amount Due: \$_____.

21.2. Wife agrees to (1) indemnify and hold Husband harmless from the above debts and obligations, and (2) to defend Husband, at her own expense, against any claim, action, or proceeding that is hereafter brought seeking to hold Husband liable on account of these debts, including the payment of reasonable attorney fees incurred by Husband in his defense of any such claim, action, or proceeding.

Debts to Be Paid by Husband

22.1. Husband is allocated the following debts and obligations: *[Repeat the applicable provisions from a-g, above.]*

22.2. Husband agrees to (1) indemnify and hold Wife harmless from the above debts and obligations, and (2) to defend Wife, at his own expense, against any claim, action, or proceeding that is hereafter brought seeking to hold Wife liable on account of these debts, including the payment of reasonable attorney fees incurred by Wife in her defense of any such claim, action, or proceeding.

Warranty of Disclosure of Assets and Debts

23. Each party warrants to the other that (1) all community assets and debts of which he or she has any knowledge have been addressed in this Agreement, (2) that he or she is not possessed of or entitled to any community assets of any kind or description that have not been disposed of by this Agreement, and (3) that he or she has not incurred any community debts or obligations other than those disposed of by this Agreement.

Omitted Assets

24. If, after the execution of this Agreement, any asset is discovered to exist that was not listed in and disposed of by this Agreement and that would have been community or quasi-community property of the parties, that omitted asset shall be divided equally between the parties. If, however, the existence of the asset was known to one of the parties at the time of execution of this Agreement, the party with that knowledge shall transfer or pay to the party without knowledge of the asset ("the other party"), at the other party's option, one of the following: (1) if the asset is reasonably susceptible to division, a portion of the asset equal to the other party's interest in it; (2) the fair market value of the other party's interest in the asset on the effective date of this Agreement, plus interest at the legal rate from the effective date to the date of payment; or (3) the fair market value of the other party's interest in the asset on the date on which the other party discovers the existence of the asset, plus interest at the legal rate from the discovery date to the date of

payment. This provision will not be deemed to impair the availability of any other remedy arising from nondisclosure of community assets.

Division of Omitted Debts

25. The parties acknowledge that they have provided in this Agreement for the payment of all community debts of which each is aware. Any debt, claim, or obligation (including the cost of defending against it) not provided for in this Agreement and unknown by the parties at the time of the preparation of this Agreement, will be deemed a joint community obligation as long as the debt, claim, or obligation arose from the conduct of both parties, or from the conduct of one party and the marital community benefitted from that conduct, occurring during the marriage but before the effective date of this Agreement. If, however, an omitted claim, debt, or obligation arose from the conduct of only one party and the community did not benefit from it, then that claim, debt or obligation will be the sole and separate obligation of that party. This provision will not be deemed to impair the availability of any other remedy arising from nondisclosure of community debts.

Waiver of Final Declaration of Disclosure

26. The parties waive the exchange of Final Declarations of Disclosure, as authorized by *Family Code Section 2105(d)*. The parties declare the following, under penalty of perjury under the laws of the State of California:

1. Both parties have complied with *Family Code Section 2104* and the preliminary declarations of disclosure have been completed and exchanged;
2. Both parties have completed and exchanged a current income and expense declaration, that includes all material facts and information regarding that party's earnings, accumulations, and expenses;
3. Both parties have fully complied with *Family Code Section 2102* and have fully augmented the preliminary declarations of disclosure, including disclosure of all material facts and information regarding the characterization of all assets and liabilities, the valuation of all assets that are contended to be community property or in which it is contended the community has an interest, and the amounts of all obligations that are contended to be community obligations or for which it is contended the community has liability;
4. This waiver is knowingly, intelligently, and voluntarily entered into by each of the parties; and
5. Each party understands that this waiver does not limit the legal disclosure obligations of the parties, but rather is a statement under penalty of perjury that those obligations have been fulfilled. Each party further understands that noncompliance with those obligations will result in the court setting aside the judgment.

PAYMENT OF TAXES

[For additional income tax related provisions, see ch. 216 .]

Joint Tax Returns

27.1. The parties shall file joint federal and state income tax returns for the calendar year(s) ending December 31, [specify tax year(s) before the year in which a final judgment dissolving the marriage is expected to be entered].

27.2. [Husband or Wife] shall be responsible for the preparation of the joint tax returns. [Wife or Husband] shall cooperate with [Husband or Wife] in the preparation of the joint tax return by providing all information necessary information to prepare the joint return (including but not limited to, W-2 forms from all employers, statements of income from any source other than employment, interest from bank accounts, itemized deductions, and tax credits). This information shall be provided no later than _____[specify date for provision of information].

27.3. [Husband or Wife] shall send the completed returns to [Wife or Husband for approval and signature at least _____[specify time period, e.g., 30 days] before the deadline date for filing the returns with the Internal Revenue Service and the California Franchise Tax Board. If the tax returns as prepared are not acceptable to [Wife or Husband], [she/he] shall notify [Husband or Wife] of [her/his] objections within [specify time period, e.g., 10 days] before the filing deadline.

27.4. Should either spouse fail to cooperate in the preparation and filing of joint returns, that party shall pay any additional tax liability, late penalties, interest, attorney or accountant fees, and any other fees or costs incurred as a result of the failure to cooperate.

27.5. The parties shall divide all expenses incurred in the preparation and filing of the joint returns _____ percent to Husband and _____ percent to Wife. [For additional optional provisions, see § 216.30[2] .]

27.6. Responsibility for paying any amounts owing in connection with each joint income tax filed under this Agreement shall be apportioned between the parties. Husband shall pay _____ percent and Wife shall pay _____ percent of all amounts owing in connection with each joint tax return filed. [For additional optional provisions, see § 216.30[2] .]

27.7. If either party fails to comply with the provisions of paragraphs (27.1) through (27.6), that party shall indemnify the other party for, and hold the other party harmless from, any increased tax liability, late penalties, interest, attorney fees, accountant fees, and any other fees or costs incurred by or assessed against the other party as a result of the first party's failure to comply.

Allocation of Tax Refunds

28. Any tax refund received in connection with any joint income tax return filed by the parties shall be [the sole and separate property of Husband/Wife or divided between the parties as follows: _____ (specify percentage share of each party, e.g., each party shall receive 50 percent of the refund)].

ATTORNEY FEES AND COSTS

[For alternative provisions governing attorney fees and costs, see Ch. 216.]

Payment of Attorney Fees and Costs in Installments

29.1. [Payor spouse] shall pay to _____ [payee spouse or _____ (name of other spouse's attorney(s)), attorney(s) for Wife/Husband,] the sum of \$ _____, as [payor spouse's] contribution to [payee spouse's] attorney fees and costs in connection with the negotiation, preparation, and execution of this Agreement and with regard to the parties' proceeding for dissolution of marriage. This sum shall be paid in equal installments at the rate of \$ _____ per [specify period, e.g., month]. Each installment shall be due on or before [specify payment date, e.g., the first day of each month], beginning _____ [specify date first installment is due], without interest, and continuing until the total amount as specified above has been paid in full.

29.2. If any monthly payment is not timely made, interest on the delinquent installment shall accrue at the rate of _____ percent per annum, calculated from the date the delinquent installment is first due and payable. If all or part of any monthly installment is in default for a period of [specify amount of default period, e.g., 60 days], then the entire remaining balance shall become immediately due and payable.

29.3. Full payment by [payor spouse] shall fully release [him/her] from all liability to [payee spouse] and to [his/her] attorney(s) for legal fees and costs associated with the negotiation, preparation, and execution of this Agreement and with regard to the proceeding for dissolution of marriage.

29.4. [Payor spouse] agrees to indemnify and hold [payee spouse] harmless from any claim, including additional attorney fees, arising from a failure to pay any of the fees and costs specified above.

Payment of Future Fees and Costs to Prevailing Party

30.1. If either party to this Agreement brings an action or proceeding to enforce any provision of this Agreement, or to enforce any judgment or order made by a court in connection with this Agreement, the prevailing party in that action or proceeding shall be entitled to reasonable attorney fees and other reasonably necessary costs from the other party. The definition of "prevailing party" shall be the same as that set forth in *Civil Code Section 1717(b)*.

30.2. A party intending to bring an action or proceeding to enforce this Agreement shall not be entitled to recover attorney fees and costs under this provision unless he or she first gives the other party at least [specify amount of notice moving party must give, e.g., 30 days] written notice before filing the action or proceeding. The written notice shall specify (1) whether the subsequent action or proceeding is to enforce the original terms of the Agreement, (2) the reasons why the moving party believes the subsequent action or proceeding is necessary, (3) whether there is any action that the other party may take to avoid the necessity for the subsequent action or proceeding, and (4) a period of time within which the other party may avoid the action or proceeding by taking the specified action. The first party shall not be entitled to attorney fees and costs if the other party takes the specified action within the time specified in the notice.

GENERAL PROVISIONS

Representation by Counsel

[See also §§ 120.216- 218 .]

31.1. Husband has been represented in the negotiation and preparation of this Agreement by his attorney of record _____ [name of attorney]. Wife has been represented in the negotiation and preparation of this Agreement by her attorney of record _____ [name of attorney].

[Add, if appropriate:]

31.2. This Agreement was prepared and revised by the joint efforts of the respective attorneys for each of the parties. The rule of construction that ambiguities are to be construed in favor of the nondrafting party shall not be employed in the construction of this Agreement.

[Add if appropriate:]

Mediation

32. This Agreement was arrived at through mediation with _____ [name of mediator]. At the commencement and throughout the mediation process, the parties agreed that mediation was intended to produce a comprehensive resolution of all of their property and support rights. This Agreement reflects that comprehensive resolution of those rights. In reaching this Agreement, the parties have applied their individual standards of fairness. The conclusions that they have reached are based on their respect and regard for each other. From time to time, the parties have, in order to measure the appropriateness of their conclusions, considered what might happen if the matter were to be adjudicated in court. Husband and Wife represented to each other throughout the mediation process, that their negotiations were in good faith, and that each had fully and completely disclosed all information necessary in order to resolve their interspousal rights.

Execution of Instruments and Further Assurances

[See also § 120.221 .]

33. Husband and Wife shall each execute and deliver promptly on request to the other any and all additional papers, documents, and other assurances, and shall do any and all acts and things reasonably necessary or proper to carry out their obligations under this Agreement. If either party fails or refuses to comply with the requirements of this Paragraph in a timely manner, that party shall reimburse the other party for all expenses, including attorney fees and costs, incurred as a result of that failure, and shall indemnify the other for any loss or liability incurred as a result of the breach. Further, in case of a breach of the duties imposed by this Paragraph, the court may, on ex parte application, order the county clerk to execute any document or other paper on behalf of the breaching party.

Release of All Claims

[See also § 120.213 .]

34. Except for the obligations contained in or expressly arising out of this Agreement, each party releases the other from all interspousal obligations, and all claims to the property of the other. This release extends to all claims based on rights that have accrued before or during marriage, including, but not limited to, property and support claims and claims sounding in tort. [Add to waive protection of Civ. Code § 1542 : This release extends to all claims, whether known or unknown, that either party may have against the other. Each party waives, with respect to the other, the benefits of Civil Code Section 1542, which protects against the inadvertent waiver of material claims that one does not know or suspect to exist. Civil Code Section 1542 provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."]

Waiver of Rights on Death

[See also § 120.212 .]

35. Each party waives all right to inherit in the estate of the other party on his or her death, whether by testamentary disposition or intestacy, except under the terms of a will executed after the effective date of this Agreement. Each party further waives the right to claim a family allowance or probate homestead, or to act as personal representative of the estate of the other unless nominated by another person legally entitled to the right.

Indemnity and Hold Harmless

[See also § 120.214 .]

36. Except for the obligations contained in or expressly arising out of this Agreement, each party warrants to the other that he or she has not incurred, and shall not incur, any liability or obligation for which the other party is, or may be, liable. Except as may be expressly provided in this Agreement, if any claim, action, or proceeding, whether or not well founded, shall later be brought seeking to hold one party liable on account of any alleged debt, liability, act, or omission of the other, the warranting party shall, at his or her sole expense, defend the other against the claim, action, or proceeding. The warranting party shall also indemnify the other and hold him or her harmless against any loss or liability that he or she may incur as a result of the claim, action, or proceeding, including attorney fees, costs, and expenses incurred in defending or responding to any such action.

Agreement Entered Into Voluntarily

[See also § 120.219 .]

37. Husband and Wife represent that each, respectively:

1. Is fully and completely informed as to the facts relating to the subject matter of this Agreement, and as to the rights and obligations of both parties;
2. Has entered into this Agreement freely and voluntarily, without any coercion, undue influence, duress, or threat from any person;
3. Has carefully read each provision of this Agreement; and
4. Fully and completely understands each provision of the Agreement.

Each party acknowledges that this Agreement is fair and equitable to both parties.

Satisfaction of Temporary Orders

[See also § 120.215 .]

38. Pendente lite orders for _____ [specify, e.g., child and spousal support] issued by the Superior Court of California, _____ County, in case number _____, have been satisfied through _____ [date]. As to those acts whose performance was not required before the effective date of this Agreement, the obligation is deemed superseded by this Agreement.

Modification and Revocation

[See also § 120.225 .]

39. Except as otherwise provided in this Agreement, the terms of this Agreement may be modified or revoked only by a writing signed by Husband and Wife that expressly refers to this Agreement. The parties understand that this limitation is subject to the power of a court to modify any provisions or orders at any time concerning the custody, visitation, and support of their children.

Effect of Reconciliation

[See also § 120.220 .]

40. If after the effective date of this Agreement, as set forth in Paragraph 41, but before entry of any order or judgment of the court based on it, Husband and Wife acknowledge and agree in writing that their marriage has been restored and that they have mutually rescinded their intent to dissolve their marriage, the executory provisions of this Agreement _____[shall remain in effect notwithstanding the reconciliation or shall be revoked as of the date of reconciliation].

Effective Date

[For additional options, see § 120.210 .]

41. The effective date of this Agreement shall be the date on which it is last executed by either party, as set forth below.

Judicial Action

[For additional options, see § 120.211 .]

42. A party who obtains a judgment of dissolution of marriage shall attach a [properly authenticated copy or duplicate original] of this Agreement to the judgment, without objection by the other party. The parties agree that the court shall be requested to:

1. Approve the entire agreement as fair and equitable;

2. Merge

_____ [specify merged provisions, e.g., the provisions for child support] into the judgment for the purpose of being operative parts of the judgment;

3. Incorporate the remainder of the provisions of this Agreement by reference into the judgment for the sole purpose of identification only.

The validity and effectiveness of this Agreement and each provision of this Agreement shall not be affected by the parties' failure to obtain a final judgment from the court.

Entire Agreement

[See also § 120.227 .]

43. This Agreement constitutes the entire agreement of Husband and Wife concerning the settlement of their respective rights and obligations arising out of their marriage. It is a full and final settlement of all their rights and obligations arising from their marriage, including spousal support, property rights, liabilities, and other interspousal claims of any nature whatsoever that either party may have against the other. This Agreement supersedes any and all other

agreements, oral or written, entered into between the parties before the effective date of this Agreement concerning their respective rights and obligations arising out of their marriage. There are no enforceable representations or warranties other than those set forth in this Agreement.

Parties Bound

[See also § 120.222 .]

44. Except as otherwise expressly provided, this Agreement shall be binding on, and shall inure to the benefit of, the respective beneficiaries, legatees, devisees, heirs, representatives, executors, administrators, assigns, and successors in interest of Husband and Wife.

Effect of Partial Invalidity

[See also § 120.224 .]

45. If any provision of this Agreement is held by any court to be invalid, void, or unenforceable, that provision shall be deemed to be struck from the Agreement and the remainder of the Agreement shall be unaffected and shall remain in full force and effect.

Waiver of Breach

[See also § 120.223 .]

46. No waiver of any breach of this Agreement or default under it shall be deemed to be a waiver of any subsequent breach or default of the same or similar nature. No waiver of any rights under this Agreement shall be deemed to be a waiver for all time of those rights, but shall be considered only as to the specific events surrounding that waiver.

Duplicate Originals

47. This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

Paragraph Titles and Interpretation

48. Paragraph titles have been used throughout this Agreement for convenience and reference only. They are not intended to set forth substantive provisions, and shall not be used in any manner whatsoever in the interpretation of the Agreement.

Governing Law

[See also § 120.226 .]

49. This Agreement has been drafted, and shall be executed, entirely within the State of California and shall be governed by and interpreted and enforced under the law of the State of California as that law may from time to time be amended. The parties understand, however, that child custody and child support orders are subject to state and federal laws that determine and limit state court jurisdiction to make and modify these orders, and do not, by this provision, intend to affect the application of those laws.

Advice Regarding Future Property Rights

50. The parties acknowledge that they have been advised to review their wills, insurance policies, retirement benefit plans, credit card accounts and other credit accounts and reports, and other matters that they may want to change in view of their dissolution of marriage. The parties further acknowledge that they have been advised to review all property rights and employment benefits that have survivorship or inheritance features, such as life insurance policies, pensions, inter vivos trusts, joint tenancies in real and personal property, and bank accounts, to ensure that their present intentions are accurately expressed in the governing instruments.

Executed on _____ [date], at _____ [city], _____ County, California.

WIFE

_____ [signature of wife]

[typed name]

HUSBAND

_____ [signature of husband]

[typed name]

Approved by:

_____ [signature]

[typed name]

Attorney for Wife

_____ [signature]

[typed name]

Attorney for Husband

[If parties anticipate a need to record the agreement, or if the default of one of the parties will be taken in the family law proceeding, it should be acknowledged in the form required by Civ. Code § 1189.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Child Custody General Overview Family Law Child Support Obligations General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements



118 of 138 DOCUMENTS

California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 120 COMPLETE MARITAL SETTLEMENT AGREEMENTS
PART IV. FORMS

A. Complete Settlement and Reconciliation Agreements

34-120 California Legal Forms--Transaction Guide § 120.201

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.201 Marital Settlement Agreement Dividing Property and Requiring Spousal Support--No Children; One Party Unemployed or Underemployed

[1] Comment

[a] Use of Form

The form in [2], *below*, is a complete marital settlement agreement for parties with no minor children. Like the agreement contained in § 120.200, it contains provisions that divide all of the parties' community and quasi-community assets and debts; provides for spousal support; and establishes a plan for the parties' handling of income tax matters until a final judgment of dissolution is entered. It also includes general provisions concerning the parties' respective rights and responsibilities and the operation of the agreement.

This form contemplates a situation in which one party is not currently employed or employed at a low-paying job, and will remain unemployed or underemployed following the conclusion of the parties' family law proceeding. The other party will assume the primary responsibility for financial support of the former spouse.

This agreement uses schedules (or exhibits) to set forth the division of assets and debts. The agreement in § 120.200 sets forth the distribution of assets and the allocation of debts directly in the agreement.

The provisions in this agreement will never be completely appropriate "as is" in any particular case. Alternative general provisions are *set forth in § 120.210 et seq.* Alternative provisions concerning property, in general, are set forth in Ch. 121, *Provisions for Division of Property*. Provisions specifically concerning employee benefits are set forth in Ch. 122, *Provisions for Division of Employee Benefits*. Provisions concerning child and spousal support are contained in Ch. 123, *Spousal and Child Support Provisions*; and provisions on child custody are found in Ch. 124, *Provisions for Child Custody and Visitation*. Tax and attorney fees provisions are set forth in Ch. 125, *Provisions for Payment of Income Taxes, Attorney's Fees, and Costs*. For additional discussion, see § 120.200[1][b].

For discussion of the possible use of a marital settlement agreement in annulment proceedings, see § 120.200[1][c]. See § 120.200[1][d]-[m] for discussion of other provisions included in this agreement.

[b] Spousal Support

[i] Payments and Jurisdiction

This agreement provides for periodic payments of spousal support with an indefinite retention of jurisdiction [see Paragraph 5.1]. Payments and jurisdiction terminate on the death of either party or on the remarriage of the supported spouse [see Paragraph 5.2]. The effect of the supported spouse's subsequent cohabitation is not addressed [*cf.* agreement in § 120.200; cohabitation can be considered as changed circumstance]. The amount of support is nonmodifiable except on a stated condition, such as the supporting spouse becoming unemployed [see Paragraph 6]. The supporting spouse forever waives his or her rights to support from the supported spouse [see Paragraph 11]. For additional and alternative provisions, see Ch. 123, *Spousal and Child Support Provisions* .

[ii] Factors on Which Support is Based

Paragraph 9 sets forth the factors on which the spousal support provisions are based, including the duration of the marriage and the supported spouse's impaired earning capacity. The purpose of this provision is to give guidance to the court in modification proceedings. Only if there is a clear record of the facts and circumstances on which the original support provisions were based can a reviewing court determine whether there has been a material change of circumstances justifying a modification of support [see *In re Marriage of Laube* (1988) 204 Cal. App. 3d 1222, 1226, 251 Cal. Rptr. 745 ; see also *In re Marriage of Tydlaska* (2003) 114 Cal. App. 4th 572, 576, 7 Cal. Rptr. 3d 594] .

Statements regarding the factors under *Fam. Code* § 4320 that are critical in determining spousal support should be set forth as findings or in the agreement [see *In re Marriage of Geraci* (2006) 144 Cal. App. 4th 1278, 1296-1298, 51 Cal. Rptr. 3d 234 (court must weigh all factors listed in *Fam. Code* § 4320, and mere statement that factors favor award of support is insufficient if not accompanied by analysis of factors); *In re Marriage of Fenton* (1982) 134 Cal. App. 3d 451, 457-458, 184 Cal. Rptr. 597 (remanding for reconsideration and appropriate findings); but see *In re Marriage of Lucero* (1981) 118 Cal. App. 3d 836, 845, 173 Cal. Rptr. 680 (court not required to make separate findings regarding each factor in statute)]. Certain other issues have been noted by reviewing courts as particularly important to clarify at the time of the original order. If the amount of support agreed to is insufficient to meet the supported spouse's needs at the marital standard of living, the order should so specify [*In re Marriage of Smith* (1990) 225 Cal. App. 3d 469, 491-493, 274 Cal. Rptr. 911] . Such a statement is crucial to the power of the court to increase support in the future based solely on the supporting spouse's increased income [*In re Marriage of Hoffmeister* (1987) 191 Cal. App. 3d 351, 363-364, 236 Cal. Rptr. 543] .

In addition, *Fam. Code* § 4336 provides that jurisdiction is to be retained indefinitely in a marriage of long duration, unless the parties agree to the contrary. Paragraph 9 affirms that the marriage is of long duration within the statute and that the agreement does not abrogate the statute.

For further discussion, see Ch. 123, *Spousal and Child Support Provisions* .

[iii] COBRA Health Care Coverage Extension

Paragraphs 7 and 8 are for use under COBRA (the Consolidated Omnibus Budget Reconciliation Act of 1985) [Pub. L. 99-272]. Most employer-provided health care plans terminate dependent coverage for a former spouse once a divorce is final. However, COBRA requires the employer to offer continuing coverage to "qualified beneficiaries," such as a former spouse, on the occurrence of a "qualifying event," such as dissolution of marriage [29 U.S.C. §§ 1161, 1163(3), 1167(3)(a)(i)]. Continuation coverage must be offered for a period of 36 months [29 U.S.C. § 1162(2)(A)(iv)], and the employer may require payment of a premium for any period of continuation [29 U.S.C. § 1162(3)].

Paragraph 7 requires the supporting spouse to maintain employer-provided health care coverage until the decree of dissolution is final. If the spouse's coverage terminates before that time, it may be impossible for her or him to elect continuing coverage under COBRA [see 29 U.S.C. § 1167(3)(a) (COBRA coverage requires that person be covered under plan on day before qualifying event)]. Paragraph 8 requires the supporting spouse to assist in making an election for COBRA coverage and allocates the payment of premiums. COBRA is extremely complex and is considered in detail in Bacon, Prater & Tucker, Employee Benefit Guide(Matthew Bender).

[iv] Alimony Tax Treatment

Paragraph 10 specifies that the spousal support payments are to be afforded alimony tax treatment under the Internal Revenue Code; that is, they are to be deductible to the supporting spouse and taxable income to the supported spouse [see I.R.C. §§ 71, 215]. For additional provisions regarding alimony tax treatment, see Chapter 123.

[c] Unrepresented Party

In Paragraph 24.2 of this form, the parties acknowledge that only one of them was represented by counsel in the negotiation and preparation of the agreement, and that the agreement was drafted by that attorney. When the attorney for one party in marital settlement negotiations is forced to deal directly with the other party because he or she refuses to secure counsel, the attorney is under a most strict duty to deal with the unrepresented party fairly and objectively, and should afford that party with an opportunity to obtain his or her own counsel. A court will scrutinize the agreement carefully to make sure that there has been no overreaching [*Gregory v. Gregory* (1949) 92 Cal. App. 2d 343, 349, 206 P.2d 1122] , and will set aside any agreement obtained by keeping one party in ignorance or in some other manner preventing him or her from fully participating in the proceeding [see *Fam. Code* § 2120 *et seq.*; *In re Marriage of Stevenot* (1984) 154 Cal. App. 3d 1051, 1068, 202 Cal. Rptr. 116] .

[d] Judicial Action

Paragraph 34 of this form provides that either or both of the parties will request that the court approve their agreement. The agreement will not be effective unless the court approves it in its entirety, with no modifications or deletions, on or before a specified date.

For discussion of the effect of approval or merger of an agreement, see § 120.13.

[2] FORM

Marital Settlement Agreement Dividing Property and Requiring Spousal Support--No Children; One Party Unemployed or Underemployed

MARITAL SETTLEMENT AGREEMENT

This Marital Settlement Agreement is entered into between _____[*name of wife*] ("Wife"), and _____[*name of husband*] ("Husband") in order to resolve all issues between them with regard to their dissolution of marriage/legal separation. The parties intend this Agreement to be a final and complete settlement of all of their rights and obligations to each other arising out of their marriage, including without limitation, all past, present and future interspousal claims of any kind that either may have against the other, except as otherwise provided in this Agreement. Therefore, Husband and Wife agree as follows:

General Recitations

1. Husband and Wife were married on _____ [date], in _____ [city], _____ [state], and have thereafter been married to each other continuously. They have _____ [lived separate and apart since _____ (date) or agreed to live separate and apart commencing _____ (date)]. As of the separation date, the duration of the marriage is _____ Years, _____ Months.
2. Irreconcilable differences have arisen between Husband and Wife, which have led to an irremediable breakdown of the marriage. There is no possibility of saving the marriage through counseling or other means, and the parties have agreed to dissolve their marriage.
3. Husband and Wife have no children together, living or deceased, natural or adopted, and Wife is not currently pregnant.
4. [Husband or Wife] [has filed or will file] a petition for dissolution of marriage in the Superior Court of California, _____ County [, Case No. _____].

SPOUSAL SUPPORT

[For additional and alternative provisions governing spousal support, including provisions for stay of wage assignment and related issues, see ch. 214.]

Periodic Payments

5.1. [Supporting spouse, e.g., Husband] shall pay spousal support to [supported spouse, e.g., Wife] in the sum of \$ _____ per month, beginning _____ [date]. Payments shall be due on or before the [specify day, e.g., fifth] of each month.

5.2. The payments of spousal support provided in this Agreement, and the court's jurisdiction to order spousal support, shall terminate on the death of either party or on the remarriage of [e.g., Wife].

Subsequent Modification of Amount

6. The amount of the periodic payments of spousal support provided for in this Agreement shall not be subject to modification or termination unless _____ [set forth condition, e.g., Husband is involuntarily terminated from his current employment]. Should this condition occur, the court may consider whether the changed circumstance justifies modification of the amount of support, as the court deems proper.

COBRA: Maintenance of Health Care Coverage

7. The parties affirm that on account of their marriage, [supported spouse, e.g., Wife] is a covered family member under the following health care plans provided by [supporting spouse, e.g., Husband's] employment: [specify all medical, dental, vision, prescription medicines, and other plans through which coverage was provided to supported spouse]. These coverages are dependent on the existence of the marital relationship and will terminate on the termination of their marriage. [E.g., Husband] shall maintain [e.g., Wife's] coverage under all of the above plans, and shall pay all costs associated with this maintenance, until the termination of the parties' marriage.

COBRA: Election and Payment of Premium

8. Immediately on entry of the judgment of dissolution of the parties' marriage, [*supporting spouse, e.g., Husband*] shall notify [his/her] employer and all employer-provided health care plan administrators of the fact and date of judgment. [*E.g., Husband*] shall obtain all forms and other documents and information necessary, and shall provide all requested assistance, to allow [*e.g., Wife*] to elect continuation coverage under all such plans under the requirements of 29 *United States Code Section 1161* (COBRA). [*specify, e.g., Husband*] will pay the cost of all premiums assessed with regard to continuation health care coverages under COBRA.

Facts and Circumstances Regarding Spousal Support

9. The parties affirm that the following facts are true as of the date of this Agreement, and that the spousal support provisions of this Agreement are made in consideration of these facts:

a. The parties were married on _____ [*date*] and separated on _____ [*date*]. The duration of the marriage is _____ years, _____ months. Therefore, this is a marriage of long duration within the meaning of *Family Code Section 4336*. This Agreement is not intended to avoid the otherwise applicable effects of that statute regarding indefinite retention of jurisdiction over spousal support in a marriage of long duration.

b. Husband is _____ years old and Wife is _____ years old.
 _____ [*Specify facts concerning factors affecting appropriateness and amount of spousal support, e.g., Both are in good health. From 1974 through 1979, Wife was employed outside of the home and provided Husband's sole support so that he could obtain a professional degree in Optometry.*]

c. Wife is currently _____ [*employed or self-employed or unemployed*] [*add if employed as a* _____ (*job title*) by _____ (*employer*) at _____ (*employer or business address*)]. Her gross monthly income from all sources is \$ _____ and her monthly expenses are \$ _____.

d. Husband is currently _____ [*employed or self-employed or unemployed*] [*add if employed or self-employed as a* _____ (*job title*) by _____ (*employer*) at _____ (*employer or business address*)]. His gross monthly income from all sources is \$ _____ and his monthly expenses are \$ _____.

[*Include if support will be based on actual earnings rather than earning capacity:*]

e. The parties' current incomes, as set forth above, are a reasonable reflection of their earning capacities, and the spousal support provisions of this Agreement are based on their actual earnings, not on their earning capacity.

f. The marital standard of living was _____ [*describe generally, e.g., middle class; comfortable, but not lavish*]. Total marital net monthly income at the time of separation was approximately \$ _____.
 _____ [*supporting spouse, e.g., Husband's current income [is/is not] sufficient to maintain both parties separately at the marital standard of living.*]

g. _____ [*Specify facts concerning supported spouse's ability to support himself or herself, e.g., Wife has a bachelor of arts degree from the University of California, but was unemployed during the marriage until 1991 to*]

devote time to domestic duties. Since 1991, Wife has worked part-time as a graphic designer]. _____
 [Supported spouse's, e.g., Wife's] current net monthly income is insufficient to support [herself/himself] at the marital standard of living.

h. _____ [Supported spouse's, e.g., Wife's] reasonable needs to maintain [herself/himself] at the marital standard of living, considering the cost of living as of the date of this Agreement, require approximately \$_____ per month of total net disposable income]. The support provided for in this Agreement, together with _____ [supported spouse's, e.g., Wife's] reasonably anticipated income, [is/is not] sufficient to meet [her/his] reasonable needs.

i. _____ [Specify facts regarding underlying assumptions on which support provisions are based, e.g., Support for an indefinite term, as set forth in this Agreement, is based on the assumption that given _____ (supported spouse's) age, skills, and employment history, it is unlikely that (she/he) will ever be able to support (herself/himself) at the marital standard of living.].

Alimony Tax Treatment

10. All payments to or on behalf of [supported spouse, e.g., Wife] for [her/his] support are intended to qualify as alimony under *Internal Revenue Code Sections 71 and 215*, and are to be included in [e.g., Wife's] gross income and deducted by [e.g., Husband] as provided in those Code sections.

_____ [**Supporting Spouse's**] Waiver of Spousal Support

11. [Supporting spouse, e.g., Husband] waives the right ever to obtain spousal support from [supported spouse, e.g., Wife]. [Supporting spouse, e.g., Husband] understands that by waiving spousal support, [he/she] will never be able to return to court to request spousal support ever again, regardless of any change of circumstances that may occur. This waiver is knowingly, intelligently, and voluntarily made. The court's jurisdiction to order spousal support to be paid by [e.g., Wife] to [e.g., Husband] at any time is terminated.

DIVISION OF COMMUNITY ESTATE

[For additional and alternative provisions governing division of community assets and obligations, see ch. 212.]

Division of Community Assets

12.1. Husband and Wife agree that their community [and quasi-community] assets shall be divided between them as set forth in Schedules _____ and _____. [The parties further agree that this Agreement effects an equal division of their community (and quasi-community) property.]

12.2. Each party releases and transfers and assigns to the other as his or her sole and separate property, all right, title, and interest in and to the assets listed in Schedules _____ and _____. Each party further agrees to execute any and all documents that may be required to establish or confirm the other party's sole ownership of any listed asset.

Encumbrances

13. With regard to all property assigned under this Agreement, except as may otherwise be specifically provided in this Agreement (including in Paragraph 15 regarding payment of community obligations), the assignee spouse assumes all encumbrances and liens on the property and agrees to indemnify and hold the other party free and harmless from any claim or liability that the other party may suffer or may be required to pay because of those encumbrances or liens, including the payment of reasonable attorney fees.

Insurance

14. The party assigned an insured asset shall, as of the effective date of this Agreement, receive the benefits and protections of that insurance, shall be considered the owner of the insurance policy, and shall pay all policy premiums coming due on and after that date, for so long as the policy is maintained in force. A party assigned insured property must notify the insurance carrier for the property concerning the change in ownership within *[period of time]* after the execution of this Agreement.

Division of Community Debts

15.1. Husband and Wife agree that their community [and quasi-community] debts and obligations shall be allocated between them as set forth in Schedules _____ and _____. *[Add if desired: The parties further agree that this Agreement effects an equal division of their community (and quasi-community) debts and obligations.]*

15.2. Wife agrees to (1) indemnify and hold Husband harmless from the debts set forth in Schedule _____, and (2) defend Husband, at her own expense, against any claim, action, or proceeding that is hereafter brought seeking to hold Husband liable on account of these debts, including the payment of reasonable attorney fees incurred by Husband in his defense of any such claim, action, or proceeding.

15.3. Husband agrees (1) to indemnify and hold Wife harmless from the debts set forth in Schedule _____, and (2) defend Wife, at his own expense, against any claim, action, or proceeding that is hereafter brought seeking to hold Wife liable on account of these debts, including the payment of reasonable attorney fees incurred by Wife in her defense of any such claim, action, or proceeding.

Warranty of Disclosure of Assets and Debts

16. Each party warrants to the other that (1) all community assets and debts of which he or she has any knowledge have been addressed in this Agreement, (2) that he or she is not possessed of or entitled to any community assets of any kind or description that have not been disposed of by this Agreement, and (3) that he or she has not incurred any community debts or obligations other than those disposed of by this Agreement.

Omitted Assets

17. If, after the execution of this Agreement, any asset is discovered to exist that was not listed in and disposed of by this Agreement and that would have been community or quasi-community property of the parties, that omitted asset shall be divided equally between the parties. If, however, the existence of the asset was known to one of the parties at the time of execution of this Agreement, the party with that knowledge shall transfer or pay to the party without knowledge of the asset ("the other party"), at the other party's option, one of the following: (1) if the asset is reasonably susceptible to division, a portion of the asset equal to the other party's interest in it; (2) the fair market value of the other

party's interest in the asset on the effective date of this Agreement, plus interest at the legal rate from the effective date to the date of payment; or (3) the fair market value of the other party's interest in the asset on the date on which the other party discovers the existence of the asset, plus interest at the legal rate from the discovery date to the date of payment. This provision will not be deemed to impair the availability of any other remedy arising from nondisclosure of community assets.

Division of Omitted Debts

18. The parties acknowledge that they have provided in this Agreement for the payment of all community debts of which each is aware. Any debt, claim, or obligation (including the cost of defending against it) not provided for in this Agreement and unknown by the parties at the time of the preparation of this Agreement, will be deemed a joint community obligation as long as the debt, claim, or obligation arose from the conduct of both parties, or from the conduct of one party and the marital community benefitted from that conduct, occurring during the marriage but before the effective date of this Agreement. If, however, an omitted claim, debt, or obligation arose from the conduct of only one party and the community did not benefit from it, then that claim, debt or obligation will be the sole and separate obligation of that party. This provision will not be deemed to impair the availability of any other remedy arising from nondisclosure of community debts.

Waiver of Final Declaration of Disclosure

19. The parties waive the exchange of Final Declarations of Disclosure, as authorized by *Family Code Section 2105(d)*. The parties declare the following, under penalty of perjury under the laws of the State of California:

1. Both parties have complied with *Family Code Section 2104* and the preliminary declarations of disclosure have been completed and exchanged;
2. Both parties have completed and exchanged a current income and expense declaration, that includes all material facts and information regarding that party's earnings, accumulations, and expenses;
3. Both parties have fully complied with *Family Code Section 2102* and have fully augmented the preliminary declarations of disclosure, including disclosure of all material facts and information regarding the characterization of all assets and liabilities, the valuation of all assets that are contended to be community property or in which it is contended the community has an interest, and the amounts of all obligations that are contended to be community obligations or for which it is contended the community has liability;
4. This waiver is knowingly, intelligently, and voluntarily entered into by each of the parties; and
5. Each party understands that this waiver does not limit the legal disclosure obligations of the parties, but rather is a statement under penalty of perjury that those obligations have been fulfilled. Each party further understands that noncompliance with those obligations will result in the court setting aside the judgment.

PAYMENT OF INCOME TAXES

[For additional and alternative provisions relating to income taxes, see Ch. 216.]

Joint Tax Returns

20.1. The parties shall file joint federal and state income tax returns for the calendar year(s) ending December 31, [specify tax year(s) before the year in which a final judgment dissolving the marriage is expected to be entered].

20.2. [Husband or Wife] shall be responsible for the preparation of the joint tax returns. [Wife or Husband] shall cooperate with [Husband or Wife] in the preparation of the joint tax return by providing all information necessary information to prepare the joint return (including but not limited to, W-2 forms from all employers, statements of income from any source other than employment, interest from bank accounts, itemized deductions, and tax credits). This information shall be provided no later than _____ [specify date for provision of information].

20.3. [Husband or Wife] shall send the completed returns to [Wife or Husband] for approval and signature at least [specify time period, e.g., 30 days] before the deadline date for filing the returns with the Internal Revenue Service and the Franchise Tax Board. If the tax returns as prepared are not acceptable to [Wife or Husband], [she/he] shall notify [Husband or Wife] of [her/his] objections within [specify time period, e.g., 10 days] before the filing deadline.

20.4. Should either spouse fail to cooperate in the preparation and filing of joint returns, that party shall pay any additional tax liability, late penalties, interest, attorney's or accountants' fees, and any other fees or costs incurred as a result of the failure to cooperate.

20.5. [Husband or Wife] shall pay all expenses incurred in the preparation and filing of the joint returns. [For additional optional provisions, see § 216.30[2] .]

20.6. [Husband or Wife] shall pay all amounts owing, if any, in connection with each joint income tax return filed under this Agreement. [For additional optional provisions, see § 216.30[2] .]

20.7. If either party fails to comply with the provisions of Paragraphs 20.1 through 20.6, that party shall indemnify the other party for, and hold the other party harmless from, any increased tax liability, late penalties, interest, attorney fees, accountant's fees, and any other fees or costs incurred by or assessed against the other party as a result of the first party's failure to comply.

Allocation of Tax Refunds

21. Any tax refund received in connection with any joint income tax return filed by the parties shall be [the sole and separate property of _____ (Husband or Wife) or divided between the parties as follows: _____ (specify percentage share of each party, e.g., each party shall receive 50 percent of the refund)].

ATTORNEY FEES AND COSTS

[For alternative provisions governing attorneys' fees and costs, see Ch. 216.]

Payment of Attorney Fees and Expenses

22.1. [Payor spouse, e.g., Husband] shall pay to _____ [payee spouse, e.g., Wife) or

_____ (name of payee spouse's attorney(s)), attorney(s) for _____ (payee spouse),] the sum of \$_____, as [payor spouse's] contribution to [payee spouse's] attorney fees and costs in connection with the negotiation, preparation, and execution of this Agreement and with regard to the proceeding for dissolution of marriage. Payment of attorney fees and costs shall be made [specify time for payment, e.g., within 30 days after the effective date of this Agreement].

22.2. Full payment by [payor spouse] shall fully release [him/her] from all liability to [payee spouse] and to [his/her] attorneys for legal fees and costs associated with the negotiation, preparation, and execution of this Agreement and with regard to the proceeding for dissolution of marriage.

22.3. If payment is not made in full within the time specified above, the unpaid balance will immediately become due, with interest at the legal rate from the date of default to the date payment is finally made.

22.4. [Payor spouse] agrees to indemnify and hold [payee spouse] harmless from any claim, including additional attorney fees, arising from a failure to pay any of the fees and costs specified above.

Payment of Future Fees and Costs to Prevailing Party

23.1. If either party to this Agreement brings an action or proceeding to enforce any provision of this Agreement, or to enforce any judgment or order made by a court in connection with this Agreement, the prevailing party in that action or proceeding shall be entitled to reasonable attorney fees and other reasonably necessary costs from the other party. The definition of "prevailing party" shall be the same as that set forth in *Civil Code Section 1717(b)*.

23.2. A party intending to bring an action or proceeding to enforce this Agreement shall not be entitled to recover attorney fees and costs under this provision unless he or she first gives the other party at least [specify amount of notice moving party must give, e.g., 30 days] written notice before filing the action or proceeding. The written notice shall specify (1) whether the subsequent action or proceeding is to enforce the original terms of the Agreement, (2) the reasons why the moving party believes the subsequent action or proceeding is necessary, (3) whether there is any action that the other party may take to avoid the necessity for the subsequent action or proceeding, and (4) a period of time within which the other party may avoid the action or proceeding by taking the specified action. The first party shall not be entitled to attorney fees and costs if the other party takes the specified action within the time specified in the notice.

Representation by Counsel

24.1. [Husband or Wife] has been represented in the negotiation and preparation of this Agreement by his/her attorney of record _____ [name of attorney]. This Agreement was drafted by [Husband's or Wife's] attorney.

24.2. _____ [name of attorney], as attorney for [Husband or Wife], has, throughout the negotiation process and at all stages of the proceeding, informed [Wife or Husband] that he/she was acting solely as counsel for [Husband or Wife], and was not representing the interests of [Wife or Husband] in any manner whatsoever. At all stages during the negotiation and preparation of this Agreement, [Wife or Husband] has been told that she/he has a right to be represented by counsel of record of her/his own choosing. [Wife or Husband] has the financial means, and has had a reasonable opportunity, to engage counsel or to otherwise have this Agreement reviewed by counsel. [Wife or Husband] acknowledges that she/he has been advised, and has had the opportunity, to obtain counsel of her/his own choosing, but has freely elected to proceed without the assistance of counsel.

[Add if appropriate:]

Mediation

25. This Agreement was arrived at through mediation with _____ [name of mediator]. At the commencement and throughout the mediation process, the parties agreed that mediation was intended to produce a comprehensive resolution of all of their property and support rights. This Agreement reflects that comprehensive resolution of those rights. In reaching this Agreement, the parties have applied their individual standards of fairness. The conclusions that they have reached are based on their respect and regard for each other. From time to time, the parties have, in order to measure the appropriateness of their conclusions, considered what might happen if the matter were to be adjudicated in court. Husband and Wife represented to each other throughout the mediation process, that their negotiations were in good faith, and that each had fully and completely disclosed all information necessary in order to resolve their interspousal rights.

Execution of Instruments and Further Assurances

[See also § 120.221 .]

26. Husband and Wife shall each execute and deliver promptly on request to the other any and all additional papers, documents, and other assurances, and shall do any and all acts and things reasonably necessary or proper to carry out their obligations under this Agreement. If either party fails or refuses to comply with the requirements of this Paragraph in a timely manner, that party shall reimburse the other party for all expenses, including attorney fees and costs, incurred as a result of that failure, and shall indemnify the other for any loss or liability incurred as a result of the breach. Further, in case of a breach of the duties imposed by this Paragraph, the court may, on ex parte application, order the county clerk to execute any document or other paper on behalf of the breaching party.

Release of All Claims

[See also § 120.213 .]

27. Except for the obligations contained in or expressly arising out of this Agreement, each party releases the other from all interspousal obligations, and all claims to the property of the other. This release extends to all claims based on rights that have accrued before or during marriage, including, but not limited to, property and support claims and claims sounding in tort. [Add to waive protection of Civ. Code § 1542 : This release extends to all claims, whether known or unknown, that either party may have against the other. Each party waives, with respect to the other, the benefits of *Civil Code Section 1542*, which protects against the inadvertent waiver of material claims that one does not know or suspect to exist. *Civil Code Section 1542* provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

Waiver of Rights on Death

[See also § 120.212 .]

28. Each party waives all right to inherit in the estate of the other party on his or her death, whether by testamentary disposition or intestacy, except under the terms of a will executed after the effective date of this Agreement. Each party further waives the right to claim a family allowance or probate homestead, or to act as personal representative of the estate of the other unless nominated by another person legally entitled to the right.

Indemnity and Hold Harmless

[See also § 120.214 .]

29. Except for the obligations contained in or expressly arising out of this Agreement, each party warrants to the other that he or she has not incurred, and shall not incur, any liability or obligation for which the other party is, or may be, liable. Except as may be expressly provided in this Agreement, if any claim, action, or proceeding, whether or not well founded, shall later be brought seeking to hold one party liable on account of any alleged debt, liability, act, or omission of the other, the warranting party shall, at his or her sole expense, defend the other against the claim, action, or proceeding. The warranting party shall also indemnify the other and hold him or her harmless against any loss or liability that he or she may incur as a result of the claim, action, or proceeding, including attorney fees, costs, and expenses incurred in defending or responding to any such action.

Agreement Entered Into Voluntarily

[See also § 120.219 .]

30. Husband and Wife represent that each, respectively:

1. Is fully and completely informed as to the facts relating to the subject matter of this Agreement, and as to the rights and obligations of both parties;
2. Has entered into this Agreement freely and voluntarily, without any coercion, undue influence, duress, or threat from any person;
3. Has carefully read each provision of this Agreement; and
4. Fully and completely understands each provision of the Agreement.

Each party acknowledges that this Agreement is fair and equitable to both parties.

Satisfaction of Temporary Orders

[See also § 120.215 .]

31. Pendente lite orders for [*specify, e.g., spousal support*] issued by the Superior Court of California, _____ County, in case number _____, have been satisfied through _____[*date*]. As to those acts whose performance was not required before the effective date of this Agreement, the obligation is deemed superseded by this Agreement.

Modification and Revocation

[See also § 120.225 .]

32. Except as otherwise provided in this Agreement, the terms of this Agreement may be modified or revoked only by a writing signed by Husband and Wife that expressly refers to this Agreement.

Effect of Reconciliation

[See also § 120.220 .]

33. If after the effective date of this Agreement, as set forth in Paragraph 41, but before entry of any order or judgment of the court based on it, Husband and Wife acknowledge and agree in writing that their marriage has been restored and that they have mutually rescinded their intent to dissolve their marriage, the executory provisions of this Agreement _____ [shall remain in effect notwithstanding the reconciliation *or* shall be revoked as of the date of reconciliation].

Judicial Action

[For additional provisions on judicial action, see § 120.211 .]

34. Either party who obtains a judgment of dissolution of marriage [shall/may] offer this Agreement to the court, without objection by the other party, with the request that the court approve this Agreement as being fair and equitable and that it be incorporated by reference only into any judgment that may be entered by the court. If this request is granted, the judgment submitted to the court shall state that a [properly authenticated copy *or* duplicate original] of this Agreement is attached to it for identification only and not for the purpose of being an operative part of the judgment. It is intended by the parties that this Agreement not be merged in any judgment, but that it shall survive the judgment and be binding on the parties for all time. The validity and effectiveness of this Agreement and each provision of this Agreement shall not, however, be affected by the parties' failure to obtain a final judgment from the court.

Agreement Effective on Court Approval

35. This Agreement shall be effective as of the date on which it is approved by a [add, if desired: California] court of appropriate jurisdiction. [Add if desired: No provision of this Agreement shall be effective unless the entire Agreement is approved by the court, with no modifications or deletions.]

Entire Agreement

[See also § 120.227 .]

36. This Agreement constitutes the entire agreement of Husband and Wife concerning the settlement of their respective rights and obligations arising out of their marriage. It is a full and final settlement of all their rights and obligations arising from their marriage, including spousal support, property rights, liabilities, and other interspousal claims of any nature whatsoever that either party may have against the other. This Agreement supersedes any and all other agreements, oral or written, entered into between the parties before the effective date of this Agreement concerning their respective rights and obligations arising out of their marriage. There are no enforceable representations or warranties other than those set forth in this Agreement.

Parties Bound

[See also § 120.222 .]

37. Except as otherwise expressly provided, this Agreement shall be binding on, and shall inure to the benefit of, the respective beneficiaries, legatees, devisees, heirs, representatives, executors, administrators, assigns, and successors in interest of Husband and Wife.

Effect of Partial Invalidity

[See also § 120.224 .]

38. If any provision of this Agreement is held by any court to be invalid, void, or unenforceable, that provision shall be deemed to be struck from the Agreement and the remainder of the Agreement shall be unaffected and shall remain in full force and effect.

Waiver of Breach

[See also § 120.223 .]

39. No waiver of any breach of this Agreement or default under it shall be deemed to be a waiver of any subsequent breach or default of the same or similar nature. No waiver of any rights under this Agreement shall be deemed to be a waiver for all time of those rights, but shall be considered only as to the specific events surrounding that waiver.

Duplicate Originals

40. This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

Paragraph Titles and Interpretation

41. Paragraph titles have been used throughout this Agreement for convenience and reference only. They are not intended to set forth substantive provisions, and shall not be used in any manner whatsoever in the interpretation of the Agreement.

Governing Law

[See also § 120.226 .]

42. This Agreement has been drafted, and shall be executed, entirely within the State of California and shall be governed by and interpreted and enforced under the law of the State of California as that law may from time to time be amended.

Advice Regarding Future Property Rights

43. The parties acknowledge that they have been advised to review their wills, insurance policies, retirement benefit plans, credit card accounts and other credit accounts and reports, and other matters that they may want to change in view of their dissolution of marriage. The parties further acknowledge that they have been advised to review all property rights and employment benefits that have survivorship or inheritance features, such as life insurance policies, pensions, inter vivos trusts, joint tenancies in real and personal property, and bank accounts, to ensure that their present intentions are accurately expressed in the governing instruments.

Executed on _____[date], at _____[city], _____ County, California.

WIFE

_____ [signature of wife]

[typed name]

HUSBAND

_____ [signature of husband]

[*typed name*]

Approved by:

_____ [*signature*]

[*typed name*]

Attorney for _____ [Husband or Wife]

[*If parties anticipate a need to record the agreement, or if one of the parties will default in the family law proceeding, it should be acknowledged in the form required by Civ. Code § 1189.*]

SCHEDULES

Marital Settlement Agreement of _____ [*name of husband*] and _____ [*name of wife*]

SCHEDULE _____

Assets Distributed to Wife

Community [and quasi-community] assets transferred to Wife as her sole and separate property under Paragraph 12.1 of this Agreement:

1. Real property located at _____ [*street address or other location*], and more particularly described in Exhibit _____, which is attached to this Agreement and incorporated by reference.
2. Any and all household furniture, furnishings, appliances, clothing, and other personal effects situated in or about _____ [Wife's or Husband's] residence at _____ [Address].
3. Jewelry, antiques, art, coin collections, and other similar items as follows: _____

4. The following motor vehicles: _____
5. Savings account _____ [number], at _____ [financial institution].
6. Checking account _____ [number], at _____ [financial institution].
7. Account _____ [number], at _____ [credit union or other financial institution holding deposit account].
8. The expected refund on _____ [tax return].

9. Life insurance policy _____ [number] issued by _____ [company] on the life of _____ [named insured], having a death benefit of \$ _____.

10. The following stocks, bonds, secured notes, mutual funds, and other investment instruments:

11. All interest in and benefits of _____ [defined benefit plan] to which _____ [Wife or Husband] is or shall be entitled on account of [her/his] past, present, and future employment at _____ [employer], including survivor benefits;

12. All interest in and benefits of _____ [defined contribution plan] to which _____ [Wife or Husband] is or shall be entitled on account of [her/his] past, present, and future employment at _____ [employer], including survivor benefits;

13. _____ [Individual Retirement Account (IRA) or other private retirement plan] held by _____ [trustee, financial institution, or company], account _____ [number], in the name of _____ [owner].

14. The following accounts receivable and unsecured notes: _____

15. The business located at _____ [address], organized as a _____ [capacity], and doing business under the name of _____ [business name];

16. _____ [other assets].

Marital Settlement Agreement of _____ [name of husband] and _____ [name of wife]

SCHEDULE _____

Assets Distributed to Husband

Community [and quasi-community] assets transferred to Husband is his sole and separate property under Paragraph 12.1 of this Agreement: [See Schedule of Assets Distributed to Wife, above.]

Marital Settlement Agreement of _____ [name of husband] and _____ [name of wife]

SCHEDULE _____

Debts Allocated to Wife

Community [and quasi-community] obligations allocated to Wife as her sole and separate property under Paragraph 15.1 of this Agreement:

1. The student loan to _____ [*lender*]; Current Principal Balance: \$ _____ [*amount*];
2. The following taxes that have been assessed but remain unpaid: _____ [*taxing authority and due date*]; Amount Due: \$ _____;
3. Unpaid _____ [*child or spousal or family*] support in the total sum of \$ _____ due to _____ [*payee*] [for the benefit of the children _____ (*names*) and] covering the period _____ [*beginning date*] through _____ [*ending date*];
4. The unsecured loan to _____ [*creditor*]; Current Principal Balance: \$ _____;
5. The following credit cards: _____ [*card and issuer*]; _____ [*acct number*]; \$ _____ [*current balance*];
6. The following charge accounts: _____ [*charge account*]; _____ [*acct number*]; \$ _____ [*current balance*];
7. To _____ [*creditor*] for _____ [*purpose*]; Amount Due: \$ _____.

Marital Settlement Agreement of _____ [*name of husband*] and _____ [*name of wife*]

SCHEDULE _____

Debts Allocated to Husband

Community [and quasi-community] obligations allocated to Husband as his sole and separate property under Paragraph 15.1 of this Agreement: [*See Schedule of Debts Allocated to Wife, above.*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements Family Law Marital Termination & Spousal Support Spousal Support Obligations General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 120 COMPLETE MARITAL SETTLEMENT AGREEMENTS
PART IV. FORMS

A. Complete Settlement and Reconciliation Agreements

34-120 California Legal Forms--Transaction Guide § 120.202

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.202 Reconciliation Agreement Revoking Prior Marital Settlement Agreement

[1] Comment--Use of Form

Set forth in [2], *below*, is a form illustrating a complete reconciliation agreement. The form contains two alternate provisions relating to revocation of a prior marital settlement agreement. The first provides that the marital settlement agreement is revoked by the reconciliation agreement; the second provides that that the marital settlement agreement is *not* revoked, or is revoked only in part [see Paragraph 4]. This form is designed for use when the parties reconcile either before or after the entry of a judgment of dissolution of the marriage, and anticipates the situation in which divorced parties remarry. Counsel will need to modify this form in accordance with the particular circumstances presented.

Use of the first alternative (revoking the marital settlement agreement) is especially vital if the marital settlement agreement contains a provision stating that it can be abrogated only by another written agreement. Use of the second alternative (not revoking the marital settlement agreement) is appropriate when the parties wish to maintain the efficacy of the marital settlement agreement for a period of time, or when they wish to abrogate some but not all of the provisions of that agreement. In using this alternative, each provision of the prior agreement should be examined to determine whether its survival is advisable. For example, it might be determined that provisions relating to the status of property should survive and all other provisions that have not been fully performed should be revoked.

Counsel must evaluate the need to formally modify (or seek termination of) any order the court has made under a prior marital settlement agreement if that agreement has been revoked in whole or in part. For a general discussion of modification proceedings, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapters 35, 42, *Modification of Child Support Orders*, and 52, *Modification and Termination of Spousal Support Orders* (Matthew Bender) [see *Fam. Code* §§ 2026 (effect of reconciliation in considering contempt of court order), 2334 (temporary orders during continuance occasioned by reconciliation), 3602 (orders for support as not enforceable during period in which parties have reconciled and are living together, unless order specifies otherwise); cf. *In re Marriage of McCann* (1994) 27 Cal. App. 4th 102, 107, 32 Cal. Rptr. 2d 639 (child support order does not

terminate automatically by operation of law on death of custodial parent, unless order provides for termination; noncustodial parent could not terminate it unilaterally before time listed in order)].

[2] FORM

Reconciliation Agreement Revoking Prior Marital Settlement Agreement

RECONCILIATION AGREEMENT

THIS AGREEMENT is made this _____ [date], between _____ [name], ("Husband"), and _____ [name], ("Wife"). Husband and Wife were married on _____ [date of original marriage], in _____ [place (city and state) of original marriage].

Prior Court Proceedings

1. A proceeding for dissolution of the marriage of Husband and Wife was filed in the Superior Court of California, County of _____, Case Number _____. [Specify disposition of that proceeding, e.g., A judgment of dissolution of the marriage of the Husband and Wife was entered in that proceeding on _____ (date), or That proceeding was dismissed prior to judgment, on _____ (date).]

Prior Agreement

2. Husband and Wife, in connection with the above court proceedings, entered into a Marital Settlement Agreement on _____ [date].

[Select from the following alternatives:]

Reconciliation

3. (a) Husband and Wife reconciled as of _____ [date]. [Add, if reconciliation occurred before entry of dissolution judgment and court proceedings were terminated: Ever since that date they have continued the relationship of Husband and Wife.]

[Add, if dissolution judgment was already entered and parties intend to remarry:]

Intention to Remarry

(b) Husband and Wife intend to remarry one another and to resume their marital relationship as of the date of their remarriage.

[Or, add, if parties already remarried following entry of dissolution judgment:]

Remarriage

(c) Husband and Wife were remarried on _____ [date], in _____ [city],
 _____ [state] and ever since have continued the relationship of Husband and Wife.

Treatment of Prior Agreement

[If the marital settlement agreement is to be revoked by the reconciliation, use the following:]

Abrogation of Marital Settlement Agreement

4. Husband and Wife, as of [specify applicable date, e.g., date of reconciliation, remarriage, or execution of this agreement], revoke and abrogate their original Marital Settlement Agreement, as referred to in Paragraph 2 above.

[Add, if parties wish to declare character of particular property] Husband and Wife each declare that all property owned or held by them or by either of them on this date is _____ *[specify community property or*
 Husband and Wife each declare that the community property of Husband and Wife of this date consists of
 _____ *(specify)*; the separate property of Husband consists of _____ *(specify)*; the
 separate property of Wife consists of _____ *(specify)*. *[If desired for clarity regarding later-acquired*
property, add] With respect to property that either or both parties acquire on or after the above date, no specific
 characterization is given by this Agreement to such property; and therefore its ownership is subject to characterization
 in accordance with the California Family Code, or as the parties may otherwise agree in writing hereafter.

[Indicate how any issues raised by the revocation that may be the subject of a court order, such as child custody, child support, or spousal support, are to be resolved.]

[If the marital settlement agreement is not revoked by the reconciliation, use the following:]

Status of Prior Marital Settlement Agreement

4. Husband and Wife agree that their original Marital Settlement Agreement _____, as specified in Paragraph 2, above [has not been or will not be] revoked by the [reconciliation and/or remarriage] of Husband and Wife. All terms and provisions of the Marital Settlement Agreement are, and shall remain, in full force and effect, except that: _____ *[specify provisions of Marital Settlement Agreement that are revoked or modified as of a particular date, and indicate how any issues concerning those provisions that are raised by the modification or revocation are to be resolved; also indicate the resolution of any matters that may be the subject of a court order, such as child custody, child support, or spousal support].*

[Continue with the following:]

EXECUTED at _____, California on _____ [date].

_____ [signature of husband]

[typed name]

_____ [signature of wife]

[*typed name*]

[*If parties anticipate a need to record the agreement, it should be acknowledged in the form required by Civ. Code § 1189.*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support
Dissolution & Divorce General Overview Family Law Marital Termination & Spousal Support
Dissolution & Divorce Fault-Based Defenses Reconciliation



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 120 COMPLETE MARITAL SETTLEMENT AGREEMENTS
PART IV. FORMS

A. Complete Settlement and Reconciliation Agreements

34-120 California Legal Forms--Transaction Guide §§ 120.203-120.209

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 120.203[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 120 COMPLETE MARITAL SETTLEMENT AGREEMENTS
PART IV. FORMS
B. General Provisions

34-120 California Legal Forms--Transaction Guide § 120.210

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.210 Effective Date of Agreement

[1] Comment

[a] Use of Form

Set forth in [2], *below*, is a form containing several alternative provisions relating to the effective date of a marital settlement agreement. The effective date of an agreement should be carefully evaluated because it has a direct bearing on the rights and liabilities of the parties. Accordingly, the agreement should be specific about the date on which it will become effective. The form may be modified as needed to suit the particular circumstances of the parties.

In selecting a provision for the effective date of the agreement, it is most important that the provision be entirely consistent with the provision in the agreement dealing with judicial action concerning the agreement [*see* § 120.211[2]]. Several of the alternative provisions in this form and in § 120.211[2] are inconsistent with each other.

[b] Alternative Provisions for Effective Date

[i] Agreement Immediately Effective on Execution

This provision makes the agreement effective as of the date of execution. It should be used only when the parties intend that the agreement be effective immediately, regardless of whether a judgment of dissolution of the marriage is obtained or whether the agreement is approved by a court. In certain situations, the parties may desire that the agreement become effective immediately even though a dissolution action is pending or contemplated.

[ii] Agreement Effective on Specified Date

This provision specifies a particular date in the future on which the agreement will be effective. It is generally used if there is a particular date on which a transaction must be completed, regardless of whether a judgment of dissolution has

been entered. The parties might select a particular date for any number of reasons, including for tax reasons. For discussion of tax issues, see Chapter 125.

[iii] Agreement Effective on Court Approval

This provision makes the agreement effective on the date that it is approved by the court. The purpose of this type of provision is to protect the parties if the court changes some part of the parties' arrangement. It ensures that a party will not lose his or her bargained-for benefits in court while remaining bound to other detrimental parts of the agreement which were given in exchange for the lost benefits.

In drafting any provision making the agreement effective on court approval, the attorney should consider whether the provision should or should not require approval in its entirety. For a discussion of court approval of marital settlement agreements, see § 120.13[3]. If the court refuses to approve an agreement in its entirety that becomes effective only on that approval, a new agreement would have to be reached or the matter must be tried.

If the effectiveness of the agreement is dependent on action by a court, consideration should be given to whether a California court should be specified. Many agreements used in California do not specify the "California" court, although it is usually assumed that the matter will be brought to a California court. If the attorney desires certainty in the agreement that a California court will be involved, he or she should so specify in the agreement.

[iv] Agreement Effective When Dissolution Judgment Granted

Provisions specifying that the agreement is effective only when a judgment of dissolution of the marriage is granted are most frequently used if one of the parties wants to make certain that the other party will actually obtain the judgment.

[v] Agreement Effective When Final Judgment Granted Within Specified Time Period

Provisions specifying that the agreement becomes effective on the date on which a final judgment of dissolution is granted, and so long as it is obtained within a specified period of time, are generally used if one of the parties is very anxious to remarry and wants assurance that the other party will not delay in seeking the judgment.

[vi] Agreement Effective on Attorney Approval, Approval by Court, and When Final Judgment Granted

This provision, which specifies three events, each of which must occur before the agreement can become effective, is designed to illustrate how a provision can be drafted specifying more than one event that must occur before the agreement is effective. The three events specified in the provision are (1) approval by the attorneys representing the parties to the agreement, (2) approval by the court handling the dissolution of marriage proceeding, and (3) the granting of a final judgment of dissolution of marriage. If a marital settlement agreement has signature lines for "approval as to form" by the parties' attorneys but does not in any way state that it is subject to review or content-approval by the attorneys, attorney approval is not a condition precedent to the effectiveness of the agreement [*In re Marriage of Hasso* (1991) 229 Cal. App. 3d 1174, 1180-1182, 280 Cal.Rptr. 919] .

[vii] Agreement Effective on Approval by Court Without Merger

In certain situations the parties may desire that the agreement be enforceable only as a private contract and that none of the remedies specified for the enforcement of judgments and orders under the Family Code [see *Fam. Code* § 290] be immediately available. For a further discussion, see § 120.211[1][b]. This provision fulfills this purpose by making the effective date of the agreement the date on which the court issues a final judgment of dissolution that simply approves the agreement and does not order compliance with any of its provisions.

[2] FORM

Effective Date of Agreement

[FIRST ALTERNATIVE]

[If the agreement is to be effective immediately on execution:]

Agreement Effective Immediately on Execution

The effective date of this Agreement shall be the date it is last executed by either party, as set forth below.

[OR]

[SECOND ALTERNATIVE]

[If the agreement is to be effective as of a specified date later than the date of execution:]

Agreement Effective on Specified Date

The effective date of this agreement shall be _____[date].

[OR]

[THIRD ALTERNATIVE]

[If the agreement is to be effective when it is approved by the court:]

Agreement Effective on Court Approval

This Agreement shall be effective as of the date on which it is approved by a [add, if desired: California] court of appropriate jurisdiction. [add if desired: No provision of this Agreement shall be effective unless the entire Agreement is approved by the court, with no modifications or deletions.]

[OR]

[FOURTH ALTERNATIVE]

[If the agreement is to be effective when it is approved by the court, but with a time limit.]

Agreement Effective on Court Approval

This Agreement shall be effective as of the date on which it is approved by a [*add, if desired:* California] court, provided that court approval is obtained within [*Time Limit*] from the date of execution of the Agreement. If court approval is not obtained within this period of time, the Agreement shall not become effective. [*add if desired:* No provision of this Agreement shall be effective unless the entire Agreement is approved by the court, with no modifications or deletions.]

[OR]

[FIFTH ALTERNATIVE]

[*If the agreement is to be effective on entry of final judgment.*]

Agreement Effective When Final Judgment Entered

This Agreement shall be effective as of the date on which a final judgment of dissolution of the marriage of the parties is granted _____ [in Proceeding No. _____ now pending in the Superior Court of California, _____ County or by a [California] court].

[OR]

[SIXTH ALTERNATIVE]

[*If the agreement is to be effective on entry of final judgment, provided that it is granted within a specified time:*]

Agreement Effective When Final Judgment Entered

The effective date of this Agreement shall be the date on which either of the parties obtains a final judgment of dissolution of the marriage [*add, if desired:* from a California court], provided that the judgment is granted within [*specify, e.g., 10 days from the date of execution of this Agreement*]. If the judgment is not obtained within this period of time, the Agreement shall never become effective.

[OR]

[SEVENTH ALTERNATIVE]

[*If the agreement is to be effective only after approval by the attorneys and by the court, and after a final judgment has been entered:*]

When Agreement Effective

This Agreement shall be effective only after all of the following have occurred:

- (a) the Agreement has been approved by each attorney representing each of the parties;
- (b) the Agreement has been approved by a [add, if desired: California] court [add if desired: in its entirety]; and
- (c) a final judgment of dissolution of the marriage has been entered.

[OR]

[EIGHTH ALTERNATIVE]

[If the agreement is to be effective only on the granting of a final judgment that approves the agreement but does not merge the agreement into the judgment:]

When Agreement Effective

The effective date of this Agreement shall be the date on which a [add, if desired: California] court grants a final judgment of dissolution of the marriage of the parties that approves the Agreement [add, if desired: in its entirety] but does not order compliance with any of the provisions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements



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DIVISION VII: PERSONAL TRANSACTIONS
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B. General Provisions

34-120 California Legal Forms--Transaction Guide § 120.211

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.211 Judicial Action Concerning Agreement

[1] Comment

[a] Use of Form

The forms in [2], *below*, are several alternative provisions relating to judicial action affecting a marital settlement agreement, that is, the action that will be taken by the court, and the relation between the agreement and the judgment. Generally, judicial action can consist of judicial approval of all or part of the agreement, or merger of all or part of the agreement into the judgment, or some combination of these. Before execution of the agreement, counsel must consider whether the agreement is simply to be approved by the court, or whether it is to become an operative part of the judgment so that it is "merged" into the judgment. For a discussion of "approval" and "merger" of an agreement, see § 120.13.

In selecting or modifying one of the alternative provisions set forth in [2], *below*, the attorney should make certain that the particular provision chosen is entirely consistent with the provision regarding the effective date of the agreement [see § 120.210].

[b] Alternatives for Judicial Action

[i] Merger of Agreement Into Judgment

Merger incorporates the agreement as an operative part of the judgment. The court is requested to approve the agreement and make specific orders requiring each party to perform all provisions of the agreement. After merger, the agreement loses its independent nature as a contract, and becomes part of the judgment. Thus, the agreement cannot be enforced by legal action for breach of contract. The judgment may, however, be enforced by any of the remedies available for any judgment, or order rendered under the Family Code [*Fam. Code § 290* (contempt, execution, receivership, or other order)]. The judgment will be enforceable until paid in full or otherwise satisfied, and the

judgment is exempt from any general requirement that a judgment be renewed for purposes of enforcement [Fam. Code § 291(a),(b); *see* Fam. Code § 291(c) (family law judgment may be renewed)].

An advantage of this method is that the rights and liabilities of the parties after the judgment can be determined by reference to the judgment alone. This makes it easier, not only for the attorneys and their clients, but also for any judge hearing subsequent proceedings. However, there may be a disadvantage to complete merger, particularly with respect to property provisions [*see* § 120.13[4]].

[ii] Request for Court Approval by Either Party

This provision may be used if the parties do not desire to have the agreement made an operative part of the judgment, but they wish the court to approve the agreement at the request of either party. An agreement that has been approved only and not merged retains its contractual nature, but cannot be enforced by the remedies for enforcement of a judgment. Note, however, that support provisions are deemed law-imposed and made under the power of the court to order support. They are severable from other portions of the agreement [*see* Fam. Code §§ 3585, 3590 (child and spousal support)].

[iii] Partial Merger of Agreement Into Judgment

This provision is used if the parties intend that parts of the agreement will be merged into and become operative parts of the judgment, while other parts will be merely approved by the court.

Before the passage of the (now former) Family Law Act in 1969, this type of provision was often used with regard to "integrated" agreements to ensure that the provisions for support of the spouse would remain contractual in nature and not subject to later modification by the court. This procedure is no longer necessary, because *Family Code Section 3591* now provides that the provisions of any agreement or order for spousal support are subject to subsequent modification or revocation by court order only if no written agreement (or, if there is no written agreement, no oral agreement entered into in open court between the parties) specifically provides to the contrary.

This provision is provided because in certain situations the attorney may decide that some provisions of the agreement should, and others should not, become an operative part of the judgment.

[iv] Insertion of Agreement's Provisions in Judgment

An attorney may decide that all or some provisions of the agreement should be merged in the judgment, and that it would be useful to set forth these merged portions verbatim in the judgment, rather than simply setting forth a listing of paragraphs of the agreement that are to be merged. Alternatively, counsel may wish to set forth verbatim only matters such as child custody, visitation, child support, and spousal support, and attach the agreement to the judgment, with appropriate language in the judgment that incorporates and merges the attached matter (in whole or in part) into the judgment.

[2] FORM

Judicial Action Concerning Agreement

[FIRST ALTERNATIVE]

[If the court will be requested to merge entire agreement into the judgment and make specific orders requiring each party to perform all provisions of the agreement:]

Merger of Agreement into Judgment

A _____ [properly authenticated copy *or* duplicate original] of this Agreement shall be attached to the judgment of dissolution of marriage and merged into the judgment for the purpose of becoming an operative part of the judgment. The validity and effectiveness of this Agreement and each provision of this Agreement shall not be affected by the parties' failure to obtain a final judgment from the court.

[OR]

[SECOND ALTERNATIVE]

[If either party may request that court simply approve the agreement:]

Request for Court Approval by Either Party

Either party who obtains a judgment of dissolution of marriage _____ [shall *or* may] offer this Agreement to the court, without objection by the other party, with the request that the court approve this Agreement as being fair and equitable and that it be incorporated by reference only into any judgment that may be entered by the court. If this request is granted, the judgment submitted to the court shall state that a _____ [properly authenticated copy *or* duplicate original] of this Agreement is attached to it for identification only and not for the purpose of being an operative part of the judgment. It is intended by the parties that this Agreement not be merged in any judgment, but that it shall survive the judgment and be binding on the parties for all time. The validity and effectiveness of this Agreement and each provision of this Agreement shall not, however, be affected by the parties' failure to obtain a final judgment from the court.

[OR]

[THIRD ALTERNATIVE]

[If certain provisions are to be merged into the judgment and the the remainder of the agreement will be approved only:]

Partial Merger of Agreement Into Judgment

A party who obtains a judgment of (dissolution of marriage/legal separation) shall attach a [properly authenticated copy *or* duplicate original] of this Agreement to the judgment without objection from the other party. The parties agree that the court shall be requested to:

(1) Approve the entire agreement as fair and equitable.

(2) Merge _____ [e.g., the provisions relating to child custody, visitation, child support, and spousal support *or* Paragraphs _____, _____, and _____] (specify

appropriate sections of agreement)] into the judgment for the purpose of being operative parts of the judgment.

(3) Incorporate the remainder of the provisions of this Agreement by reference into the judgment for the sole purpose of identification

The validity and effectiveness of this Agreement and each provision of this Agreement shall not be affected by the parties' failure to obtain a final judgment from the court.

[OR]

[FOURTH ALTERNATIVE]

[If provisions of agreement that are to be merged into judgment will be set forth verbatim:]

Insertion of Agreement's Provisions in Judgment

The judgment of dissolution of marriage shall expressly set forth verbatim all of the provisions of this Agreement that the parties intend shall merge with and become an operative part of the judgment. These provisions are *[set forth specific provisions by subject matter or Paragraph number that the parties intend to merge into the judgment and that will be set forth verbatim there]*. A *[properly authenticated copy or duplicate original]* of the Agreement shall otherwise be attached to the dissolution judgment, and the judgment shall incorporate, for identification only, those portions of the agreement not stated above, which are not being merged. The parties agree that the court will be requested to approve all provisions of the Agreement, both merged and unmerged, as fair and equitable. The validity and effectiveness of this Agreement and each provision of this Agreement shall not be affected by the parties' failure to obtain a final judgment from the court.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements



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B. General Provisions

34-120 California Legal Forms--Transaction Guide § 120.212

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.212 Waiver of Rights on Death

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, is a marital settlement agreement clause providing for the waiver by each party of specified rights on the death of the other. The rights waived include all rights to inherit in the estate of the other party, whether by testamentary disposition or intestacy, to claim a family allowance or probate homestead, or to act as personal representative of the estate of the other. The waiver expressly excludes any rights given by a will or codicil dated after the effective date of the agreement, in case either party decides later that the other party should have a right in the estate. Counsel and the client should confirm that the client's estate plan is consistent with the intentions expressed in this form.

[b] Effect of Dissolution on Prior Will

A judgment of dissolution will revoke all of the following unless the will expressly provides otherwise [*Prob. Code* § 6122(a); *see Fam. Code* § 2024]:

1. Any disposition of property made by the will to the former spouse;
2. Any provisions of the will conferring a general or special power of appointment on the former spouse;
and
3. Any will provision nominating the former spouse as executor, trustee, conservator, or guardian.

Nevertheless, it is advisable for the spouses to execute a waiver explicitly renouncing any interest either party may have in the other's estate [*see Prob. Code* §§ 141, 145].

[c] Effect of Waiver on Intestate Rights

This form waives intestate as well as testate rights. If a spouse dies intestate before the effective date of a judgment of dissolution, the surviving spouse will not be held to have waived or relinquished in a marital settlement agreement his or her right to succeed by inheritance to the property of the other spouse unless the intention to do so [*see Estate of Smith (1966) 241 Cal. App. 2d 205, 210, 50 Cal. Rptr. 374*] :

1. Is expressed in the agreement in clear and unmistakable language (this form); or
2. Appears from the provisions of the will by necessary implication.

A marital settlement agreement constitutes a waiver of the right of inheritance in the spouse's property by "necessary implication" if the agreement states that each party releases all claims against the other and that all property distributed to each party under the agreement will be the separate property of the recipient free from any claim or claims of the other party [*Estate of Smith (1966) 241 Cal. App. 2d 205, 210-215, 50 Cal. Rptr. 374*] . Nevertheless, use of an express provision is strongly recommended.

[2] FORM**Waiver of Rights on Death****Waiver of Rights on Death**

Each party waives all right to inherit in the estate of the other party on his or her death, whether by testamentary disposition or intestacy, except under the terms of a will executed after the effective date of this Agreement. Each party further waives the right to claim a family allowance or probate homestead, or to act as personal representative of the estate of the other unless nominated by another person legally entitled to the right.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Contracts Law Contract Conditions & Provisions Waivers General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements



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34-120 California Legal Forms--Transaction Guide § 120.213

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.213 Release of All Claims

[1] Comment

Set forth in [2], *below*, is a general form of release of all claims between the parties. The form provides that the release extends to all claims except any that are otherwise stated in the agreement, or that arise out of the agreement, or a judgment based on the agreement. If counsel wishes to preserve the right of a party to make subsequent claims arising out of issues not addressed in the agreement, any exceptions to this general release provision should be explicitly set out in the appropriate paragraph of the agreement.

Language waiving the benefits of *Civil Code Section 1542* may also be included. This section provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

Some practitioners feel that language releasing future claims should never be included in a marital settlement agreement because of the possibility of the need for future enforcement proceedings. To protect against any such construction, the release should clearly except future proceedings based on rights created by the agreement.

[2] FORM

Release of All Claims

Release of All Claims

Except for the obligations contained in or expressly arising out of this Agreement, each party releases the other from all interspousal obligations, and all claims to the property of the other. This release extends to all claims based on rights that have accrued before or during marriage, including, but not limited to, property and support claims and claims

sounding in tort. *[Add if desired:* This release extends to all claims, whether known or unknown, that either party may have against the other. Each party waives, with respect to the other, the benefits of *Civil Code Section 1542*, which protects against the inadvertent waiver of material claims that one does not know or suspect to exist. *Civil Code Section 1542* provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."*]*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Contracts Law Types of Contracts Releases Family Law Marital Termination & Spousal Support Dissolution & Divorce General Overview



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34-120 California Legal Forms--Transaction Guide § 120.214

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.214 Indemnity and Hold Harmless From Liabilities

[1] Comment

Set forth in [2], *below*, is a provision stating that each party agrees to hold the other harmless from liabilities and obligations that have been, or will be, incurred, except as otherwise specified in the agreement. The right of indemnification extends to attorney fees, costs, and other expenses incurred in defending against a claim on a debt incurred by the other, regardless of whether the claim is successful. The attorney must carefully examine the operation of this form with regard to the division of the community obligations of the parties. It may be necessary to modify this form to make it clearly consistent with the other parts of the agreement. For forms related to the division of the debts and obligations of the parties, see Ch. 121, *Provisions for Division of Property*.

[2] FORM

Indemnity and Hold Harmless From Liabilities

Indemnity and Hold and Harmless

Except for the obligations contained in or expressly arising out of this Agreement, each party warrants to the other that he or she has not incurred, and shall not incur, any liability or obligation for which the other party is, or may be, liable. Except as may be expressly provided in this Agreement, if any claim, action, or proceeding, whether or not well founded, shall later be brought seeking to hold one party liable on account of any alleged debt, liability, act, or omission of the other, the warranting party shall, at his or her sole expense, defend the other against the claim, action, or proceeding. The warranting party shall also indemnify the other and hold him or her harmless against any loss or liability that he or she may incur as a result of the claim, action, or proceeding, including attorney fees, costs, and expenses incurred in defending or responding to any such action.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewContracts LawContract Conditions & ProvisionsIndemnityFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionProperty Settlements



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34-120 California Legal Forms--Transaction Guide § 120.215

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.215 Satisfaction of Temporary Orders

[1] Comment

The form set forth in [2], *below*, is a provision that clarifies that all pendente lite orders between the parties in any pending proceeding have been satisfied, subject to any necessary confirmation to this effect by the court. Because the parties cannot by their agreement actually abrogate a preexisting court order, they will need to seek court approval of any changes desired in pendente lite orders. These types of changes would ordinarily be embodied in provisions of the marital settlement agreement regarding which the parties will seek court approval and merger in the judgment, such as provisions governing child custody, child support, and spousal support.

[2] FORM

Satisfaction of Temporary Orders

Satisfaction of Pendente Lite Orders

All pendente lite orders for [*specify orders complied with in full, to date, e.g.,* payment of court-ordered child support through the date of execution of this Agreement] issued by the Superior Court of California, _____ County, in Case No. _____, have been satisfied through _____ [*date*]. As to those acts whose performance was not required before the effective date of this Agreement, the obligation is deemed superseded by this Agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce General Overview Family Law Marital Termination & Spousal Support Dissolution &

DivorceProperty DistributionProperty Settlements



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34-120 California Legal Forms--Transaction Guide § 120.216

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.216 Representation by Independent Counsel

[1] Comment

[a] Use of Form

Set forth in [2], *below*, is a provision stating that both parties have been represented by independent counsel and identifies the attorneys of record. If one party is unrepresented, the agreement clarifies that counsel is not in any way acting for the unrepresented party. It also specifies who the drafter of the agreement is. For a form provision dealing with a party's refusal to secure independent counsel, see § 120.217. For related provisions acknowledging that an agreement was jointly drafted and is understood by the parties, see §§ 120.218 and 120.219.

[b] Independent Counsel Does Not Relieve Spouses' Fiduciary Duty

Courts have held that spouses owe a fiduciary duty to one another that survives their separation or commencement of dissolution proceedings [*Marriage of Modnick* (1983) 33 Cal. 3d 897, 906, 191 Cal. Rptr. 629, 663 P.2d 187] . This duty is also codified [see *Fam. Code* §§ 721, 1101(e), 2102]. Retaining independent counsel does not relieve either spouse from meeting his or her obligation to deal in good faith and not exercise any advantage through concealment, adverse pressure, or undue influence. For a more detailed discussion of fiduciary duties between separated spouses, see § 120.12 [see also *Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure*, 2nd ed., ch. 24, *Management and Control of Property* (Matthew Bender)].

[2] FORM

Representation by Independent Counsel

Representation of Parties by Independent Counsel

Husband has been represented in the negotiation and preparation of this Agreement by his attorney of record _____[*name of husband's attorney*]. Wife has been represented in the negotiation and preparation of this Agreement by her attorney of record _____[*name of wife's attorney*]. This Agreement was _____[prepared by _____ (Husband's or Wife's) attorney or prepared and revised by the joint efforts of the respective attorneys for each of the parties or prepared primarily by the attorney for _____ (Husband or Wife), but with substantial revisions by the respective attorneys for each of the parties].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview



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34-120 California Legal Forms--Transaction Guide § 120.217

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.217 Acknowledgment of Party's Refusal to Obtain Independent Counsel

[1] Comment

[a] Use of Form

Set forth in [2], *below*, is a provision specifying that only one party was represented by counsel in the negotiation and preparation of the agreement, and the agreement was drafted by that attorney.

[b] Attorney's Duty in Dealing With Party Not Represented by Counsel

When the attorney for one party in family law negotiations is forced to deal directly with the other party because he or she refuses to secure counsel, the attorney is under a most strict duty to deal with the unrepresented party fairly and objectively, and should afford that party with an opportunity to obtain his or her own counsel. A court will scrutinize the agreement carefully to make sure that there has been no overreaching [*Gregory v. Gregory* (1949) 92 Cal. App. 2d 343, 349, 206 P.2d 1122], and will set aside any agreement obtained by keeping one party in ignorance or in some other manner preventing him or her from fully participating in the proceeding [see *Fam. Code* § 2120 *et seq.*; *In re Marriage of Stevenot* (1984) 154 Cal. App. 3d 1051, 1068, 202 Cal. Rptr. 116] .

[2] FORM

Acknowledgment of Party's Refusal to Obtain Independent Counsel

Unrepresented Party

_____[*name of attorney*], as attorney for [*represented party*], has, throughout the negotiation process and at all stages of the proceeding, informed [*unrepresented party*] that [he/she] was acting solely as counsel for [*represented party*], and was not representing the interests of [*unrepresented party*] in any manner whatsoever. At all

stages during the negotiation and preparation of this Agreement, *[unrepresented party]* has been told that [he/she] has a right to be represented by counsel of record of [his/her] own choosing. *[unrepresented party]* has the financial means, and has had a reasonable opportunity to engage counsel or to otherwise have this Agreement reviewed by counsel. *[unrepresented party]* acknowledges that [he/she] has been advised, and has had the opportunity, to obtain counsel of [his/her] own choosing, but has freely elected to proceed without the assistance of counsel.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure
Settlements
Settlement Agreements
General Overview
Family Law
Marital Termination & Spousal Support
Dissolution & Divorce
General Overview
Family Law
Marital Termination & Spousal Support
Dissolution & Divorce
Property Distribution
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34-120 California Legal Forms--Transaction Guide § 120.218

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.218 Nonapplicability of Rule of Construction Against Drafting Party

[1] Comment

Set forth in [2], *below*, is a provision stating that the agreement was the product of a joint effort by both parties and that, in the event of any ambiguity, it should not be strictly interpreted against either party. The general rule is that any ambiguities caused by the attorney drafting a contract should be resolved against that attorney's client [*Neal v. State Farm Ins. Co. (1961) 188 Cal. App. 2d 690, 695, 10 Cal. Rptr. 781 ; Civ. Code § 1654*]. Applying this general rule to the typical marital settlement agreement could at times be unfair, because marital settlement agreements involving parties who are both represented by counsel in dissolution proceedings are typically drafted, reviewed, and approved jointly.

[2] FORM

Nonapplicability of Rule of Construction Against Drafting Party

Agreement Drafted Jointly by Parties

[If agreement prepared jointly, use the following provision:]

This Agreement was prepared and revised by the joint efforts of the respective attorneys for each of the parties. The rule of construction that ambiguities are to be construed in favor of the nondrafting party shall not be employed in the construction of this Agreement.

[OR, if agreement prepared primarily by one party's attorney, use the following provision:]

This Agreement was prepared primarily by the attorney for [Husband or Wife], but with substantial revisions by the respective attorneys for each of the parties. The rule of construction that ambiguities are to be construed in favor of the nondrafting party shall not be employed in the construction of this Agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Contracts Law Contract Conditions & Provisions General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements



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34-120 California Legal Forms--Transaction Guide § 120.219

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.219 Agreement Entered Into Voluntarily

[1] Comment

Set forth in [2], *below*, is a provision that the parties are fully and completely informed regarding the substance of the agreement, have entered into the agreement voluntarily, without any coercion, undue influence, duress, or threat from any person; have carefully read each provision; fully understand each provision; and acknowledge that the agreement is fair and equitable to both parties. Of course, if a party is under coercion, undue influence, duress, or threat, stating that there is none does not make it so, and the provision is not likely to have any effect if the facts are to the contrary.

[2] FORM

Agreement Entered Into Voluntarily

Agreement Voluntary and Clearly Understood

Husband and Wife represent that each, respectively:

- a. Is fully and completely informed as to the facts relating to the subject matter of this Agreement and as to the rights and liabilities of both parties;
- b. Has entered into this Agreement freely and voluntarily, without any coercion, undue influence, duress, or threat from any person;
- c. Has carefully read each provision of this Agreement; and
- d. Fully and completely understands each provision of this Agreement.

Each party acknowledges that this Agreement is fair and equitable to both parties.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements



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34-120 California Legal Forms--Transaction Guide § 120.220

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.220 Effect of Reconciliation

[1] Comment

[a] Use of Form

Set forth in [2], *below*, is a form designed to eliminate the problem of determining the effect of a reconciliation of the parties on the agreement, by specifying that a reconciliation will or will not result in the modification or abrogation of the agreement. For a revocation of the entire marital settlement agreement, see § 120.202.

[b] Effect of Reconciliation of the Parties

Reconciliation alone will not provide a court sufficient factual evidence to determine the future effect of the parties' original agreement. The mutual intent and understanding of the parties, as understood by the court, determines the future effect of the agreement. The clearest way for the parties to manifest their intent is by an express provision in the agreement itself.

In drafting a provision that concerns the parties' possible reconciliation, counsel should also determine what effect a reconciliation may have, if any, on court orders that will exist with respect to the parties. For a related discussion, see § 120.202.

[2] FORM

Effect of Reconciliation

Effect of Reconciliation

If after the effective date of this Agreement, as set forth in Paragraph _____, but before entry of any order or judgment

of the court based on it, Husband and Wife acknowledge and agree in writing that their marriage has been restored and that they have mutually rescinded their intent to dissolve their marriage, the executory provisions of this Agreement _____[shall remain in effect notwithstanding the reconciliation *or* shall be revoked as of the date of reconciliation].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceFault-Based DefensesReconciliationFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionProperty Settlements



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34-120 California Legal Forms--Transaction Guide § 120.221

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.221 Execution of Instruments and Further Assurances

[1] Comment

Set forth in [2] *below* is a form expressly providing that the parties will execute whatever documents and do whatever acts are necessary to carry out the terms of the agreement. There appears to be an implied provision in contracts to this effect [*see Civ. Code § 1656*], but such a provision is generally included to avoid any later claim of misunderstanding concerning the duties arising from executing the agreement.

[2] FORM

Execution of Instruments and Further Assurances

Execution of Instruments and Further Assurances

Husband and Wife shall each execute and deliver promptly on request to the other any and all additional papers, documents, and other assurances, and shall do any and all acts and things reasonably necessary or proper to carry out their obligations under this Agreement. If either party fails or refuses to comply with the requirements of this paragraph in a timely manner, that party shall reimburse the other party for all expenses, including attorney fees and costs, incurred as a result of that failure, and shall indemnify the other for any loss or liability incurred as a result of the breach. Further, in case of a breach of the duties imposed by this Paragraph, the court may, on ex parte application, order the county clerk to execute any document or other paper on behalf of the breaching party.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements



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34-120 California Legal Forms--Transaction Guide § 120.222

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.222 Parties Bound

[1] Comment

Set forth in [2], *below*, is a form providing that it will be binding on, and inure to the benefit of, the successors and assigns of the parties. This type of provision is commonly used in marital settlement agreements that contain executory property division. The purpose of a successors-and-assigns provision is to ensure the performance of all executory obligations by any successor in interest or assignee of either of the parties. This provision will settle any question of intention of the parties regarding the assumption of obligations by an assignee or successor in interest [*see Brady v. Fowler (1920) 45 Cal. App. 592, 595, 188 P. 320*] . A successors-and-assigns provision automatically binds any successors and assigns in the event of an assignment or succession, even in the absence of an express assumption of obligations [*Citizens Suburban Co. v. Rosemont Dev. Co. (1966) 244 Cal. App. 2d 666, 675, 53 Cal. Rptr. 551*] .

This general provision should not be relied on to determine the effect of the death of either party on the child and spousal support obligations contained in the agreement. The effect of the death of each party on support should be addressed in the child and spousal support provisions of the agreement. Appropriate options are contained in Chapter 123.

[2] FORM

Parties Bound

Parties Bound

Except as otherwise expressly provided, this Agreement shall be binding on, and shall inure to the benefit of, the respective beneficiaries, legatees, devisees, heirs, representatives, executors, administrators, assigns, and successors in interest of Husband and Wife.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewFamily LawMarital Termination & Spousal
SupportDissolution & DivorceProperty DistributionProperty Settlements



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34-120 California Legal Forms--Transaction Guide § 120.223

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.223 Waiver of Breach

[1] Comment

Set forth in [2], *below*, is a form providing that a waiver of a breach of the marital settlement agreement is not a waiver of any subsequent breaches. This type of provision is helpful if one party unintentionally or inadvertently overlooks a breach of a particular provision, and the parties desire that the breached provision, and any others that may be breached in the future, remain in effect regardless of whether any remedial action is taken by the nonbreaching party.

For a discussion of this type of provision generally, see Chapter 75, *Formation of Contracts and Standard Contractual Provisions*.

[2] FORM

Waiver of Breach

Waiver of Breach

No waiver of any breach of this Agreement or default under it shall be deemed to be a waiver of any subsequent breach or default of the same or similar nature. No waiver of any rights under this Agreement shall be deemed to be a waiver for all time of those rights, but shall be considered only as to the specific events surrounding that waiver.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Contracts Law Contract Conditions & Provisions Waivers General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements



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34-120 California Legal Forms--Transaction Guide § 120.224

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.224 Effect of Partial Invalidity

[1] Comment

Set forth in [2], *below*, is a form that specifies that a judicial determination that a provision is invalid or unenforceable does not affect the remainder of the agreement. It is a standard clause commonly used in contracts to protect the totality of the bargain against the possibility that one or more provisions will be found to be unenforceable. If any particular provision is so essential that its invalidity will deny a party the benefit of the bargain, then this clause should not be used or modified to except the deal-breaking clause.

[2] FORM

Effect of Partial Invalidity

Effect of Partial Invalidity

If any provision in this Agreement is held by a court to be invalid, void, or unenforceable, that provision shall be deemed to be struck from the Agreement and the remainder of the Agreement shall be unaffected and shall remain in full force and effect.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements



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34-120 California Legal Forms--Transaction Guide § 120.225

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.225 Modification and Revocation

[1] Comment

Marital settlement agreements often contain a provision, such as that set forth in [2], *below*, that states that amendments or modification to the agreement may be made only by written agreement. The use of this form tends to prevent misunderstandings arising out of alleged oral commitments made after the execution of the agreement.

The application of this type of provision is limited. It effectively prevents executory oral modifications [*Civ. Code* § 1698(c)], but there may still remain an exception for a modification by an *executed* oral agreement [*Civ. Code* § 1698(b)]. Furthermore, provisions for child support and custody can be modified by the court regardless of any agreement to the contrary [*Fam. Code* §§ 3021, 3651; *In re Marriage of Alter* (2009) 171 Cal. App. 4th 718, 726-730, 89 Cal. Rptr. 3d 849 (court always has power to modify child support order, upward or downward, regardless of parents' agreement to contrary)]. Similarly, provisions for spousal support are modifiable or revocable by the court unless there is a written agreement, or oral stipulation in open court, to the contrary [*Fam. Code* § 3591(a), (c); *but see In re Marriage of Cauley* (2006) 138 Cal. App. 4th 1100, 1105-1108, 41 Cal. Rptr. 3d 902 (under *Fam. Code* § 4325(a), parties' agreement for nonmodifiable support will not prevent court from terminating support if payee spouse is convicted of domestic violence offense perpetrated against payor spouse)]. For further discussion of modification of custody and support obligations, see Ch. 124, *Provisions for Child Custody and Visitation* and Ch. 123, *Spousal and Child Support Provisions*.

[2] FORM

Modification and Revocation

Modification and Revocation

Except as otherwise provided in this Agreement, the terms of this Agreement may be modified or revoked only by a

writing signed by Husband and Wife that expressly refers to this Agreement. [*If there are children:* The parties understand that this limitation is subject to the power of a court to modify any provisions or orders at any time concerning the custody, visitation, and support of their children.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewContracts LawContract ModificationsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionProperty Settlements



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34-120 California Legal Forms--Transaction Guide § 120.226

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.226 Governing Law

[1] Comment

The form in [2], *below*, is a marital settlement agreement provision specifying that it will be governed and construed in accordance with California law. Under California's choice-of-law rules, a contract is to be interpreted according to the law and usage of the place where it is to be performed, but if the contract does not indicate a place of performance, it is to be interpreted according to the law and usage of the place where it is made [*Civ. Code § 1646*]. The value of this provision is that it expressly informs all concerned that the agreement will be controlled by California law.

If one party is living outside the state at the time of execution and the agreement is to be signed by that party while outside the state, it is most important that the agreement include this provision if it is desired that the agreement be governed by California law.

The governing law provision should address the effect of future changes in California law. For example, a provision that requires support of "minor" children will be altered if there is a change in the age of majority. The better practice is probably to incorporate future changes in California law into the governing law clause, but if a party has bargained for a particular right, then it might be appropriate to insulate that right from any possible future change in the law.

[2] FORM

Governing Law

Governing Law

This Agreement has been drafted, and shall be executed, entirely within the State of California and shall be governed by and interpreted and enforced under the law of the State of California as that law _____[may from time to time be amended *or* stands on the effective date of this Agreement. Interpretation shall not be affected by any

changes in that law after that date]. *[Add if there are children:* The parties understand, however, that child custody and child support orders are subject to state and federal laws that determine and limit state court jurisdiction to make and modify these orders, and do not, by this provision, intend to affect the application of those laws.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure
Settlements
Settlement Agreements
General Overview
Family Law
Marital Termination & Spousal Support
Dissolution & Divorce
Property Distribution
Property Settlements



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 120 COMPLETE MARITAL SETTLEMENT AGREEMENTS
PART IV. FORMS
B. General Provisions

34-120 California Legal Forms--Transaction Guide § 120.227

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 120.227 Entirety of Agreement

[1] Comment

The form in [2], *below*, is a provision stating that it contains the entire agreement of the parties, superseding all previous contracts and understandings. This is a standard contract clause that is designed to eliminate attacks on the agreement based on the existence of other and further matters that were agreed to by the parties, but not reduced to writing and included in the agreement. The intent is to eliminate parole evidence of other matters not contained in the four corners of the document.

[2] FORM

Entirety of Agreement

[For short form of recital, use:]

Entire Agreement

This Agreement constitutes the entire agreement of Husband and Wife concerning the settlement of their respective rights and obligations arising out of their marriage. It is a full and final settlement of all those rights and obligations, including spousal support, property rights, liabilities, and other interspousal claims of any nature whatsoever that either party may have against the other. This Agreement supersedes any and all other agreements, oral or written, entered into between the parties before the effective date of this Agreement concerning their respective rights and obligations arising out of their marriage. There are no enforceable representations or warranties other than those set forth in this Agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewFamily LawMarital Termination & Spousal
SupportDissolution & DivorceProperty DistributionProperty Settlements



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 121 PROVISIONS FOR DIVISION OF PROPERTY

34-121 California Legal Forms--Transaction Guide 121.syn

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.syn Synopsis to Chapter 121: PROVISIONS FOR DIVISION OF PROPERTY

§ 121.01 California Statutes

§ 121.02 Federal Statutes

§§ 121.03-121.04 [Reserved]

§ 121.05 Law Reviews and Periodicals

§ 121.06 Annotations

§ 121.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 121.08-121.09 [Reserved]

§ 121.10 Desirability of Agreed Division of Property

[1] Advantages

[2] Equal or Unequal Division

[3] Tax Consequences

[4] Nondischargeability in Bankruptcy of Debt Incurred in Connection With Property Division

§ 121.11 Determination of Assets and Debts

[1] Sources of Information

[a] Information From Client

[b] Disclosure Between Parties

[2] Effect of Omitted Property

§§ 121.12-121.29 [Reserved]

§ 121.30 Transfers of Property Between Spouses or Incident to Divorce

[1] No Recognition of Gain or Loss on Transfer

[a] Current Law

[b] Pre-1984 Law Contrasted

[2] Nonrecognition Applies to Appreciated Gain but Not Income

[3] Unequal Division of Property to Adjust for Tax Consequence

[4] Transfers Deemed Incident to Divorce

[5] Transfers to Third Parties on Behalf of Spouse

[a] Transfers Qualifying for Nonrecognition in General

[b] Treatment of Corporate Stock Redemptions on Behalf of Spouse

[6] Transfers in Trust

[7] Transfers to Nonresident Alien Spouse

[8] Basis in Transferred Property

[9] All Transfers Covered--Step Transaction

[10] Obligation of Transferor to Supply Records

§ 121.31 Gift Tax Consequences of Property Divisions

§ 121.32 Estate Tax Consequences of Property Divisions

[1] Death Before Property Settlement or Divorce

[2] Spouses Divorced at Time of Death

[3] Similarities to Gift Tax

§§ 121.33-121.39 [Reserved]

§ 121.40 Gain or Loss on Transaction

[1] Amount of Gain or Loss

[2] Gain Treated as Capital Gain

§ 121.41 Conversion of Principal Residence to Property Held for Profit or Investment

§ 121.42 Treatment of Gain on Sale of Principal Residence

[1] Exclusion of Gain Under Current Law

[a] Overview

[b] Principal Residence

[c] Effective Dates and Election to be Bound by Former Law

[2] Former "Rollover" Rule and "Once-in-a-Lifetime" Exclusion

[a] Rollover of Gain

[b] "Once-in-a-Lifetime" Exclusion of Gain by Older Taxpayer

§§ 121.43-121.99 [Reserved]

§ 121.100 General Drafting Guide to Provisions Dividing Assets and Debts

[1] Description of Assets and Obligations

Scope

[2] Warranties and Other General Provisions

Scope

[3] Disposition of Assets in General

Scope

[4] Disposition of Real Property

Scope

[5] Disposition of Personal Property in General

Scope

[6] Disposition of Life Insurance, Trust Interests, and Bank and Investment Accounts

Scope

[7] Disposition of Business Interests

Scope

[8] Provisions for the Payment of Debts

Scope

§§ 121.101-121.199 [Reserved]

§ 121.200 Reference to Schedule Listing Assets and Obligations

[1] Comment

[a] Use of Form

[b] Characterization of Property

[c] Dual Character Property

[d] Description of Debts

[i] In General

[ii] Information Obtained by Counsel

[iii] Preparation of Entries

[2] FORM

Reference to Schedule Listing Assets and Obligations

§ 121.201 Confirmation of Separate Assets and Obligations

[1] Comment

[a] Use of Form

[b] Joint Tenancy or Tenancy in Common Property

[2] FORM--Confirmation of Separate Assets

Confirmation of Separate Assets

[3] FORM--Confirmation of Separate Debts

Confirmation of Separate Debts

§ 121.202 Division of Community Assets

[1] Comment

[2] FORM

Division of Community Assets

§ 121.203 Allocation of Community Debts

[1] Comment

[a] Use of Form

[b] Assumption and Indemnification

[2] FORM

Allocation of Community Debts

§ 121.204 Reimbursement of Separate Property Contributions to Acquisition of Property

[1] Comment

[2] FORM--Reimbursement of Separate Property Contributions to Community Property

Reimbursement of Separate Property Contributions to Community Property

[3] FORM--Waiver of Right to Reimbursement for Contributions to Community Property

Waiver of Right to Reimbursement for Contributions to Community Property

[4] FORM--Waiver of Right to Reimbursement for Contributions to Separate Property

Waiver of Right to Reimbursement for Contributions to Separate Property

§ 121.205 Equalizing Payment

[1] Comment

[a] Use of Form

[b] Tax Consequences

[2] FORM

Equalizing Payment

§ 121.206 Division of After-Discovered Assets and Debts

[1] Comment

[a] Use of Form

[b] Duty of Good Faith

[2] FORM--Division of After-Discovered Assets Division of After-Discovered Assets

Division of After-Discovered Assets

[3] FORM--Division of Omitted Debts

Division of Omitted Debts

§ 121.207 Acknowledgment of Reliance on Spouse's Appraisal

[1] Comment

[a] Use of Form

[b] Duty of Good Faith

[2] FORM

Acknowledgment of Reliance on Spouse's Appraisal

§ 121.208 Waiver of Rights to Future Earnings and Acquisitions

[1] Comment

[2] FORM

Waiver of Rights to Future Earnings and Acquisitions

§ 121.209 Compliance With Family Code Disclosure Requirements

[1] Comment

[2] FORM

Compliance With Family Code Disclosure Requirements

§ 121.210 Waiver of Final Declaration of Disclosure

[1] Comment

[2] FORM

Waiver of Final Declaration of Disclosure

§ 121.211 Reimbursement for Contributions to Education and Training

[1] Comment

[2] FORM--Reimbursement for Contributions to Education and Training

Reimbursement for Contributions to Education and Training

[3] FORM--Waiver of Right of Reimbursement

Waiver of Right of Reimbursement

§§ 121.212-121.219 [Reserved]

§ 121.220 Complete Disclosure of Community Assets and Obligations

[1] Comment

[a] Use of Form

[b] Related Provisions

[c] Duty of Good Faith

[2] FORM

Complete Disclosure of Community Assets and Obligations

§ 121.221 Warranty Against Additional Debts

[1] Comment

[2] FORM

Warranty Against Additional Debts

§ 121.222 Disclosure of Value of Property

[1] Comment

[2] FORM

Disclosure of Value of Property

§ 121.223 Warranty Against Unauthorized Gifts and Transfers of Community Assets

[1] Comment

[a] Use of Form

[b] Violations of Gift Restriction

[2] FORM

Warranty Against Unauthorized Gifts and Transfers of Community Assets

§ 121.224 No Dissipation of Community Assets

[1] Comment

[2] FORM

No Dissipation of Community Assets

§§ 121.225-121.229 [Reserved]

§ 121.230 Description of Real Property

[1] Comment

[2] FORM

Description of Real Property

§ 121.231 Sale of Real Property to Third Party

[1] Comment

[2] FORM--Short Form

Sale of Real Property to Third Party--Short Form

[3] FORM--Long Form

Sale of Real Property to Third Party--Long Form

§ 121.232 Deferred Sale of Family Home for Benefit of Minor Children

[1] Comment

[a] Use of Form

[b] Joint Ownership

[c] Tax Consequences

[d] Mortgage and Related Payments

[2] FORM

Deferred Sale of Family Home for Benefit of Minor Children

§ 121.233 Option to Purchase Other Party's Interest in Family Home

[1] Comment

[2] FORM

Option to Purchase Other Party's Interest in Family Home

§ 121.234 Retention of Joint Ownership of Real Property as Tenants in Common

[1] Comment

[a] Use of Form

[b] Joint Ownership

[2] FORM

Retention of Joint Ownership of Real Property as Tenants in Common

§ 121.235 Provisions for Interspousal Transfer of Real Property

[1] Comment

[a] Use of Forms

[b] Handling Existing Encumbrances

[2] FORM--Transfer "Subject To" Existing Encumbrances

Transfer "Subject To" Existing Encumbrances

[3] FORM--Delivery of Deed

Delivery of Deed

[4] FORM--Waiver of Right to Deposits for Rental Property

Waiver of Right to Deposits for Rental Property

§§ 121.236-121.249 [Reserved]

§ 121.250 Description of Personal Property

[1] Comment

[a] Use of Form

[b] General Description of Items

[c] Groups of Assets

[2] FORM

Description of Personal Property

§ 121.251 Acknowledgment of Prior Division

[1] Comment

[2] FORM

Acknowledgment of Prior Division of Personal Property

§ 121.252 Sale of Personal Property Not Divided by Parties

[1] Comment

[a] Use of Form

[b] Taxation

[2] FORM

Sale of Personal Property Not Divided by Parties

§ 121.253 Sale of Motor Vehicle

[1] Comment

[2] FORM

Sale of Motor Vehicle

§ 121.254 Interspousal Transfer of Motor Vehicle, Vessel, or Aircraft

[1] Comment

[2] FORM--Motor Vehicle

Interspousal Transfer of Motor Vehicle

[3] FORM--Vessel

Interspousal Transfer of Vessel

[4] FORM--Aircraft

Interspousal Transfer of Aircraft

§ 121.255 Ownership of Family Pet

[1] Comment

[2] FORM

Ownership of Family Pet

§§ 121.256-121.269 [Reserved]

§ 121.270 Interspousal Transfer of Interest in Life Insurance Policy

[1] Comment

[a] Use of Form

[b] Disposition of Community Life Insurance Policies

[c] Divisibility of Life Insurance

[2] FORM

Interspousal Transfer of Interest in Life Insurance Policy

§ 121.271 Surrender of Community Life Insurance Policy and Distribution of Proceeds

[1] Comment

[a] Use of Form

[b] Disadvantages

[2] FORM

Surrender of Community Life Insurance Policy and Distribution of Proceeds

§ 121.272 Partition of Life Insurance Policy

[1] Comment

[2] FORM

Partition of Life Insurance Policy

§ 121.273 Transfer of Property in Trust for Children

[1] Comment

[a] Use of Form

[b] Taxation

[2] FORM

Transfer of Property in Trust for Children

§ 121.274 Revocation or Amendment of Trust

[1] Comment

[2] FORM--Revocation of Existing Trust

Revocation of Existing Trust

[3] FORM--Amendment of Existing Revocable Trust

Amendment of Existing Revocable Trust

§§ 121.275-121.279 [Reserved]

§ 121.280 Description of Business Interests

[1] Comment

[2] FORM

Description of Business Interests

§ 121.281 Interspousal Transfer of Interest in Community Business or Professional Practice

[1] Comment

[a] Use of Forms

[b] Characterization and Transfer of Partnership Interest

[2] FORM--Sole Proprietorship or Partnership

Interspousal Transfer of Interest in Community Business

[3] FORM--Professional Practice

Interspousal Transfer of Interest in Professional Practice

§ 121.282 Interspousal Transfer of One Party's Community Interest in Partnership

[1] Comment

[a] Use of Form

[2] FORM

Interspousal Transfer of One Party's Community Interest in Partnership

§ 121.283 Retention of Co-ownership in Business

[1] Comment

[2] FORM

Retention of Co-ownership in Business

§ 121.284 Distribution of Community Shares of Closely Held Corporation

[1] Comment

[a] Use of Forms

[b] Definition of "Closely Held Corporation"

[c] Division Problems

[d] Professional Corporations

[e] Redemption

[f] Tax Consequences of Redemption

[i] Capital Gain Treatment

[ii] Attribution of One Spouse's Stock to Other Spouse

[iii] Nonrecognition Consequences on Redemption of Spouse's Corporate Stock

[g] Voting Trusts

[2] FORM--Equal Division of Shares

Distribution of Community Shares of Closely Held Corporation--Equal Division of Shares

[3] FORM--Interspousal Transfer of All Shares to One Party

Distribution of Community Shares of Closely Held Corporation--Interspousal Transfer of All Shares to One Party

[4] FORM--Redemption of Shares by Corporation

Distribution of Community Shares of Closely Held Corporation--Redemption of Shares by Corporation

[5] FORM--Transfer of Shares to Voting Trust

Distribution of Community Shares of Closely Held Corporation--Transfer of Shares to Voting Trust

[6] FORM--Dissolution of Corporation

Distribution of Community Shares of Closely Held Corporation--Dissolution of Corporation

§§ 121.285-121.289 [Reserved]

§ 121.290 Assumption of All Community Debts by One Party

[1] Comment

[2] FORM

Assumption of All Community Debts by One Party

§ 121.291 Sole Responsibility of Incurring Party for Post-Separation Debts

[1] Comment

[2] FORM

Sole Responsibility of Incurring Party for Post-Separation Debts

§ 121.292 Payment of Debts From Specified Source

[1] Comment

[2] FORM

Payment of Debts From Specified Source

§ 121.293 Special Account for Payment of Debts

[1] Comment

[2] FORM

Special Account for Payment of Debts

§ 121.294 Loan to Pay Debts

[1] Comment

[2] FORM

Loan to Pay Debts

§ 121.295 Payment and Termination of Joint Credit Cards and Charge Accounts

[1] Comment

[2] FORM--Payment and Cancellation of Joint Credit Cards

Payment and Termination of Joint Credit Cards

[3] FORM--Payment and Closing of Joint Charge Accounts

Payment and Termination of Joint Charge Accounts

§ 121.296 Assumption of Liability on Existing Promissory Note

[1] Comment

[2] FORM

Assumption of Liability on Existing Promissory Note

§ 121.297 Release From Continuing Guaranty

[1] Comment

[2] FORM

Release From Continuing Guaranty

§ 121.298 Indemnity on Executory Contract

[1] Comment

[2] FORM

Indemnity on Executory Contract

§ 121.299 Payment of Interspousal Debt

[1] Comment

[2] FORM

Payment of Interspousal Debt

§§ 121.300-121.309 [Reserved]

§ 121.310 Description of Investment, Bank, and Related Accounts

[1] Comment

[2] FORM

Description of Investment, Bank, and Related Accounts

§ 121.311 Division of Investment and Related Accounts

[1] Comment

[2] FORM--Division Based on Value of Assets in Account

Division of Investment and Related Accounts Based on Value of Assets in Account

[3] FORM--Division on Asset-by-Asset Basis

Division of Investment and Related Accounts on Asset-by-Asset Basis

§§ 121.312-121.319 [Reserved]

§ 121.320 Note Secured by Deed of Trust

[1] Comment

[2] FORM

Note Secured by Deed of Trust

§ 121.321 Note Secured by Term Life Insurance

[1] Comment

[2] FORM

Note Secured by Term Life Insurance

Editorial Consultants: Kathryn Kirkland, Esq.,
Ira Lurvey, Esq., and Diana Richmond, Esq.n*

FOOTNOTES:

(n164)Footnote *. Ms. Kirkland, Mr. Lurvey, and Ms. Richmond are Certified Family Law Specialists practicing in California. They are also editorial consultants for Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed. (Matthew Bender), as well as editorial board members for the California Family Law Monthly(Matthew Bender).



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 121 PROVISIONS FOR DIVISION OF PROPERTY

34-121 California Legal Forms--Transaction Guide Scope

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

Scope

Editorial Consultants: Kathryn Kirkland, Esq.,
Ira Lurvey, Esq., and Diana Richmond, Esq.n* Scope

This chapter discusses provisions intended to be included in marital settlement agreements to divide community and quasi-community assets and debts, and to confirm the parties' respective separate property interests. Legal Background focuses on the tax aspects of property division. The Transaction Guide contains a general drafting guide that provides an overview of available provisions. Forms include provisions for the division of the parties' property, as well as related provisions and agreements, such as an agreement between a closely held corporation and a spouse for the purchase by the corporation of the spouse's stock. The forms are intended to be used in conjunction with the complete forms of marital settlement agreement set forth in Ch. 120, as explained in the form comments.

In *In re Marriage Cases*, the California Supreme Court held that differential treatment of opposite-sex and same-sex couples in California's marriage statutes violated the California Constitution's guarantees of privacy, due process, and equal protection [*In re Marriage Cases* (2008) 43 Cal. 4th 757, 784, 847-856, 76 Cal. Rptr. 3d 683, 183 P.3d 384] . That holding was superseded by the subsequent adoption of Proposition 8, which amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California [see Cal. Const. art. I, § 7.5 (eff. Nov. 5, 2008)]. The Supreme Court upheld Proposition 8 against a constitutional challenge, but in doing so the Court reaffirmed the continuing validity of same-sex marriages entered into before November 5, 2008, the effective date of Proposition 8 [Strauss v. Horton (2009) 46 Cal. 4th 364, 470-474, 93 Cal. Rptr. 3d 591, 207 P.3d 48 (estimating 18,000 same-sex marriages lawfully entered into before Proposition 8 took effect)]. If a form in this chapter is used in the context of a same-sex marriage lawfully entered into before that date, the language in the form should be modified accordingly. For example, the names of the parties may be used instead of terms like "Husband" and "Wife."

The chapter covers the division of real and personal property other than of employee benefits; division of those benefits is the subject of Ch. 122. For forms relating to child and spousal support, see Ch. 123. Forms pertaining to child custody and visitation are set forth in Ch. 124, and forms concerning attorney's fees, costs, and payment of income tax are set forth in Ch. 125.

For a general discussion of characterizing and dividing property, see Kirkland, Lurvey, Richmond and Wagner,

California Family Law Practice and Procedure, 2nd ed., Ch. 20, *Community Property: General Characterization and Division Principles* (Matthew Bender). That publication also discusses the division of particular assets in Ch. 21, *Special Property Characterization and Division Issues*.

FOOTNOTES:

(n165)Footnote *. Ms. Kirkland, Mr. Lurvey, and Ms. Richmond are Certified Family Law Specialists practicing in California. They are also editorial consultants for Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed. (Matthew Bender), as well as editorial board members for the California Family Law Monthly(Matthew Bender).



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CHAPTER 121 PROVISIONS FOR DIVISION OF PROPERTY
PART I. RESEARCH GUIDE
A. Primary Sources

34-121 California Legal Forms--Transaction Guide § 121.01

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.01 California Statutes

Contracts.

Capacity. *Civ. Code §§ 1556-1559.*

Consent. *Civ. Code §§ 1565-1590.*

Consideration. *Civ. Code §§ 1605-1615.*

Statute of frauds. *Civ. Code § 1624.*

Uniform Fraudulent Transfer Act. *Civ. Code § 3439 et seq.*

Division of property. *Fam. Code § 2500 et seq.*

General provisions. *Fam. Code §§ 2550-2556.*

Presumption concerning property held in joint form. *Fam. Code §§ 2580-2581.*

Special rules for division of community estate. *Fam. Code §§ 2600-2604.*

Debts and liabilities. *Fam. Code §§ 2620-2627.*

Reimbursements. *Fam. Code §§ 2640, 2641.*

Jointly held separate property. *Fam. Code § 2650.*

Real property located in another state. *Fam. Code § 2660.*

Duty of loyalty in confidential relationship. *Prob. Code § 16002.*

Duty to avoid conflict of interest in confidential relationship. *Prob. Code § 16004.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General
 Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property
 Distribution Characterization General Overview Family Law Marital Termination & Spousal Support Dissolution &
 Divorce Property Distribution Classification General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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34-121 California Legal Forms--Transaction Guide § 121.02

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.02 Federal Statutes

Nondischargeability in bankruptcy of debt to spouse or former spouse incurred in connection with marital separation or dissolution. *11 U.S.C. § 523(a)(15)*.

Tax consequences of property transfer between spouses incident to divorce. *I.R.C. § 1041*.

Treatment of proceeds of life insurance. *I.R.C. § 2042*.

Transfers for insufficient consideration. *I.R.C. § 2043*.

Transfers subject to gift tax. *I.R.C. § 2501*.

Annual gift tax exclusion. *I.R.C. § 2503(b)*.

Valuation of gifts. *I.R.C. § 2512*.

Certain property settlements exempt from gift tax. *I.R.C. § 2516*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution &
DivorceProperty DistributionClassificationGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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PART I. RESEARCH GUIDE
A. Primary Sources

34-121 California Legal Forms--Transaction Guide §§ 121.03-121.04

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 121.03[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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34-121 California Legal Forms--Transaction Guide § 121.05

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.05 Law Reviews and Periodicals

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Lewis, *Using the Marginal Interest Rate Principle in Valuing the Spousal Contribution to the Human Capital of a Marital Partner*, 6 J. Forensic Econ. 105 (Spr.-Sum. 1993).

Turner, *The Benefits of Prosperity: Classification and Division of the Appreciation of Separate Property*, Part 1: 5 Divorce Litig. 89 (May 1993); Part 2: 5 Divorce Litig. 109 (Jun. 1993).

Stone, *Analyzing and Adjusting Financial Statements*, 7 Am. J. Fam. L. 17 (Spr. 1993).

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Morgan, *The Consideration of Tax Consequences of Divorce as a Factor in Equitable Distribution*, 5 Divorce Litig. 65 (Apr. 1993).

Roddy, *Marital Contributions to Property Owned By a Third Party: Distribution Upon Divorce*, 5 Divorce Litig. 41

(Mar. 1993).

Simpson, *Equitable Distribution of Income and Remainder Interests in Inter Vivos and Testamentary Trusts*, 5 Divorce Litigation 1 (Jan. 1993).

Vitek, *Computing Community Income During the Divorce*, 15 Fam. Advoc. 26(3) (Fall 1992).

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Cunningham, *Closely Held Corporations and Divorce Settlements*, 22 Tax Adviser 792(2) (Dec. 1991).

Roddy, *Equitable Distribution of Individual Retirement Accounts*, 3 Divorce Litig. C33 (Sep. 1991).

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Schueler & Gott, *The "Diploma Dilemma": Whether a Professional Degree or License Should Be Treated as a Marital Asset on Divorce*, 15 Com. Prop. J. 28 (1988).

Kozub & Davis, *Structuring Separation Agreements and Divorce Settlements After TRA'86*, 16 Tax. for Law. 82 (1987).

Roman, *The Division of Marital Property in California Before and After In re Marriage of Buol and In re Marriage of Fabian*, 16 Sw. U. L. Rev. 563 (1986).

Note, *Educational Degrees at Divorce: Toward an Educated Dissolution*, 59 S. Cal. L. Rev. 1351 (1986).

California Practicum, *Reimbursement of Community Contributions to a Spouse's Education Upon Divorce: California Civil Code Section 4800.3*, 12 Pepp. L. Rev. 1115 (1985).

Shue & Velman, *California Civil Code §§ 4800.1 and 4800.2: Review, Analysis, and Suggestions for Reform*, 12 Com. Prop. J. 5 (1985).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionProperty Settlements



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 121 PROVISIONS FOR DIVISION OF PROPERTY
PART I. RESEARCH GUIDE
B. Secondary Sources

34-121 California Legal Forms--Transaction Guide § 121.06

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.06 Annotations

Annot., Propriety of Property Distribution Leaving Both Parties with Substantial Ownership Interest in Same Business, 56 A.L.R.4th 862 (1988).

Annot., Treatment and Method of Valuation of Future Interest in Real Estate or Trust Property Not Realized During Marriage, 62 A.L.R.4th 107 (1988).

Annot., Real Estate or Trust Property in Which Interest Vested Before Marriage and Was Realized During Marriage, 60 A.L.R.4th 217 (1988).

Annot., Consideration of Tax Liability or Consequences in Determining Alimony or Property Settlement Provisions, 51 A.L.R.3rd 461 (1987).

Annot., Property Settlement Agreement as Affecting Divorced Spouse's Right to Recover as Named Beneficiary Under Former Spouse's Life Insurance Policy, 31 A.L.R.4th 59 (1984).

Annot., Effect of Trial Court Giving Consideration to Needs of Children in Making Property Division--Modern Status, 19 A.L.R.4th 239 (1983).

Annot., License or Professional Degree of Spouse as Marital Property for Purposes of Alimony, Support, or Property Settlement, 4 A.L.R.4th 1294 (1981).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution &
DivorceProperty DistributionClassificationGeneral OverviewFamily LawMarital Termination & Spousal
SupportDissolution & DivorceProperty DistributionProperty Settlements



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B. Secondary Sources

34-121 California Legal Forms--Transaction Guide § 121.07

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.07 Text References

[1] Matthew Bender Sources

California Community Property with Tax Analysis(Matthew Bender).

Ch. 5, *Division of Property or Dissolution of Marriage*.

Ch. 10, *Property Agreements Between Parties*.

Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed. (Matthew Bender).

California Forms of Pleading and Practice(Matthew Bender), "Marriage and Interspousal Rights and Obligations."

California Real Estate Law & Practice(Matthew Bender).

Ch. 345, *Cotenancies: Creation, Characteristics, and Estate Planning Aspects*.

Ch. 346, *Community Property*.

Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 10, *Separation and Divorce* , Forms 10.37-10.59 (Matthew Bender).

Rabkin & Johnson, Federal Income, Gift, and Estate Taxation(Matthew Bender).

Ch. 5, *Husband and Wife*.

Ch. 6, *Family Transactions*.

Lindey, Separation Agreements and Ante-nuptial Contracts(Matthew Bender).

Valuation & Distribution of Marital Property(Matthew Bender).

Ch. 22, *Valuation of a Closely Held Corporation, Small Business, or Professional Practice*.

Ch. 27, *Valuation of Real Property*.

[2] Additional Text References

Witkin, Summary of California Law, vol. 11, *Husband and Wife*; vol. 11, *Community Property* (10th ed. 2005).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionClassificationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution &
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B. Secondary Sources

34-121 California Legal Forms--Transaction Guide §§ 121.08-121.09

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 121.08[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
 CHAPTER 121 PROVISIONS FOR DIVISION OF PROPERTY
 PART II. LEGAL BACKGROUND
 A. Division of Property

34-121 California Legal Forms--Transaction Guide § 121.10

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.10 Desirability of Agreed Division of Property

[1] Advantages

There is a definite advantage in having the parties agree between themselves on the division of their property by means of a marital settlement agreement rather than leaving the division of the property to the court in connection with a proceeding for marital dissolution or legal separation. If the division of the property is made by the court, the court will be bound by the "equal division" requirement set forth by statute [*Fam. Code § 2550*], and in attempting to arrive at an equal division the court may not divide the property in the manner that the parties would have selected if they were making the division. Furthermore, the parties will generally have greater flexibility in determining the means of arriving at a division method, than if a court were to divide the property [*see, e.g., In re Marriage of Cream (1993) 13 Cal. App. 4th 81, 88, 16 Cal. Rptr. 2d 575* (court lacks authority to order interspousal auction of property, over party's objection)]. Division of property by the court is discussed in Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 20, *Community Property: General Characterization and Division Principles*, and Ch. 21, *Special Property Characterization and Division Issues* (Matthew Bender).

If the parties and their respective attorneys can negotiate a division of the property, the parties will generally save the additional time and attorneys' fees that would be involved if the division of the property had to be tried. When extensive property is involved, the parties will then be able to arrange for the continuation of their business and financial affairs with a minimum amount of disruption. Also, they will be better able to avoid unwanted publicity concerning their personal financial affairs than would be possible in connection with a court-ordered division of the property.

[2] Equal or Unequal Division

Because, in most cases, either party could obtain an equal division from the court, the parties often will simply choose to divide the property equally to avoid the need for further litigation [*Fam. Code § 2550*].

However, *Fam. Code § 2550* expressly excepts written agreements of the parties, as well as oral stipulations made in

open court, from the requirement that the court in an action for dissolution or legal separation must divide the parties' community estate equally. Section 2550 therefore authorizes the parties to enter into any division of property that they desire, including one that is unequal, so long as they memorialize that agreement in writing or in an oral stipulation made in open court [*Fam. Code* § 2550; *In re Marriage of Dellaria* (2009) 172 Cal. App. 4th 196, 201-205, 90 Cal. Rptr. 3d 802 (trial court erred in enforcing parties' oral property settlement agreement that was neither reduced to writing nor made in open court)]. The validity of any such division does not depend on the degree of inequality involved in the division, but only on whether such an agreement is free of invalidating defects such as fraud, undue influence, or similar equitable grounds for setting aside the agreement.

For a general discussion of the statutory equal division requirement [*see Fam. Code* § 2550] and of exceptions to that requirement, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 20, *Community Property: General Characterization and Division Principles* (Matthew Bender).

PRACTICE TIP:

It should be a standard consideration to recite in any marital settlement agreement that the parties each have freely and voluntarily entered into the agreement, knowingly and with full understanding and acceptance of all of its terms and provisions [*see* § 120.219[2], for a related form]. An explicit detailing of the various quid-pro-quos on which the agreement is based will also be helpful in resisting any subsequent challenge to the fairness of enforceability of the instrument. Thus, although the law does provide that an agreement for division between the parties need not necessarily be as rigidly "equal" as a division decreed by the court, the agreement should still profess that it was designed and intended to be equal or substantially equal, and actually be so in provable fact [*see* §§ 120.200[2] (cl. [3(d)]), 121.220[2], for forms with related provisions]. *Commentary by Ira H. Lurvey.*

PRACTICE TIP: Conversely, if the parties have made an agreement that obviously is unequal, or that arguably is so, they should not use a recital in the MSA stating that the division is equal. The MSA should set forth the quid-pro-quos, one of which might be that in consideration of other provisions in the agreement, one party has agreed to accept less than half of the community property. Such provisions will help establish "knowing consent" and protect the agreement against future challenge. *Commentary by Diana Richmond.*

The Uniform Fraudulent Transfer Act (UFTA) [*Civ. Code* §§ 3439-3439.12] applies to marital settlement agreements. Thus, for example, if a marital settlement agreement provides for an unequal division of real property for the purpose of preventing a third person from collecting child support for one spouse's child conceived outside the marriage, the UFTA authorizes a court to impose a lien on the real property [*Mejia v. Reed* (2003) 31 Cal. 4th 657, 663-669, 3 Cal. Rptr. 3d 390, 74 P.3d 166 (marital settlement agreement provided for transfer of all of husband's interest in jointly held property to wife); *see Civ. Code* §§ 3439.01, 3439.04(a), 3439.05]. Similarly, a fraudulent transfer made in a marital settlement agreement may result in the denial of a discharge in bankruptcy [11 U.S.C. § 727(a)(2)(A) (bankruptcy discharge may be denied if debtor, with intent to hinder, delay, or defraud creditor, transfers debtor's property within one year before filing of bankruptcy petition); *see Wolkowitz v. Beverly* (In re Beverly) (B.A.P. 9th Cir. 2007), 374 B.R. 221, 242-246] .

[3] Tax Consequences

Most interspousal transfers of property on marital dissolution are now less burdened with tax consequences than under former law, because transfers incident to a dissolution are generally treated as "nonrecognition events," with limited exception [*see I.R.C.* § 1041]. Thus, as a general rule, spouses can make agreements in which the division of the parties' community property is unequal, without adverse income tax consequences. Exceptions to the nonrecognition rules do exist, however, and should be carefully reviewed before making any agreement to settle the parties' property interests [*see, e.g., I.R.C.* § 1041(a)(2), (c)-(e)].

PRACTICE TIP:

Expert advice is always desirable, but perhaps in no other aspect of family law is expert consultation more necessary than in dealing with the tax consequences of property division and support. The suggested terms for any marital division should always be reviewed with at least one person relatively expert in tax laws and procedures. *Commentary by Ira H. Lurvey.*

[4] Nondischargeability in Bankruptcy of Debt Incurred in Connection With Property Division

Generally, a debt owed to a spouse, former spouse, or child of a bankruptcy debtor will not be dischargeable in the bankruptcy proceeding if it was incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or determination made in accordance with state or territorial law by a governmental unit [11 U.S.C. § 523(a)(15)]. This nondischargeability provision applies even if the debt is not in the nature of alimony or spousal or child support [11 U.S.C. § 523(a)(15) (nondischargeability applies to debts to former spouse incurred in course of divorce or separation that do not constitute domestic support obligations under 11 U.S.C. §§ 101(14A), 523(a)(5))]. Therefore, if a marital settlement agreement requires one spouse to make payments to the other spouse as part of the parties' division of property, the obligation to make those payments may not be discharged in a bankruptcy proceeding.

Moreover, even if an obligation under an agreement for settlement of property to a spouse is discharged in bankruptcy, the court in a dissolution proceeding may make all proper orders for the support of the spouse, as the court determines are just, based on the circumstances of the parties and the amount of the obligations under the agreement that are discharged [*Fam. Code* § 3592].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements



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PART II. LEGAL BACKGROUND
A. Division of Property

34-121 California Legal Forms--Transaction Guide § 121.11

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.11 Determination of Assets and Debts

[1] Sources of Information

[a] Information From Client

In order to draft provisions for the division or confirmation of the parties' property interests, counsel will, of course, need to have complete information on the nature and extent of those interests. Primary sources of this information include the client, the client's spouse or counsel, and third-party holders of property belonging to the parties. A detailed client interview checklist is set forth in Ch. 120, *Complete Marital Settlement Agreements*. Pretrial discovery from the client's spouse and third parties is discussed in Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 110, *Trial Preparation and Discovery* (Matthew Bender).

[b] Disclosure Between Parties

The parties are subject to special disclosure provisions imposed by statute. In general, spouses in family law litigation are required to make a full and accurate disclosure to one another of all assets and liabilities in which one or both parties have or may have an interest, regardless of the characterization as community, separate, or otherwise, together with a disclosure of all income and expenses. Each party has a continuing duty to immediately, fully, and accurately update and augment that disclosure to the extent there have been any material changes so that at the time the parties enter into an agreement for the resolution of these issues each party will have full and complete knowledge of the relevant underlying facts [*Fam. Code § 2100(c)*; see *Fam. Code § 2102* (standards imposed on spouses from date of separation until date of distribution of asset or liability in question)].

Under the disclosure rules, spouses must generally exchange "preliminary" and "final" declarations of disclosure, and income and expense declarations during the course of the family law proceeding [*Fam. Code §§ 2104, 2105*]. For further discussion of spousal duties and disclosure requirements, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chs. 24, *Management and Control of Property*, 92, *Petitioning*

for *Dissolution or Legal Separation* , and 111, *Pretrial Procedures* (Matthew Bender).

[2] Effect of Omitted Property

If the parties fail to dispose of all their community or quasi-community assets or debts in their agreement, and the property is not otherwise divided by the court in a proceeding for marital dissolution or legal separation, it will remain subject to later division by a motion or order to show cause, or by an independent partition action [see *Fam. Code* § 2556; *Henn v. Henn* (1980) 26 Cal. 3d 323, 330, 161 Cal. Rptr. 502, 605 P.2d 10] . In general, until an adjudicated asset is divided in a later proceeding, the court will consider the parties' interests in the asset, as between themselves, as that of tenants in common [see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 20, *Community Property: General Characterization and Division Principles* (Matthew Bender)].

In a postdissolution order to show cause or motion proceeding, a family law court must equally divide the omitted or unadjudicated asset or debt, unless the court finds on good cause shown that the interests of justice require an unequal division [*Fam. Code* § 2556]. In an equitable action to partition unadjudicated community property, the court has broad discretion to fashion any appropriate equitable remedy [see *Zarrah v. Zarrah* (1988) 205 Cal. App. 3d 1, 4-6, 252 Cal. Rptr. 20] .

However, the availability of a postdissolution remedy to divide omitted property does not mean that parties can *deliberately* fail to disclose the existence of property to one another. To the contrary, such a failure to disclose would not only violate the special disclosure provisions noted in [1], *above* [see *Fam. Code* § 2100 *et seq.*], but also constitute grounds for setting aside any agreement based on the nondisclosure [see *Fam. Code* § 2120 *et seq.*]. Thus, it remains imperative for the parties to make a complete disclosure. For a general discussion of dividing omitted property, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 20, *Community Property: General Characterization and Division Principles* (Matthew Bender). For a discussion of special limitations on dividing certain omitted military retirement benefits, see Chapter 21, *Special Property Characterization and Division Issues* , of that publication.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure
Settlements
Settlement Agreements
General Overview
Family Law
Marital Termination & Spousal Support
Dissolution & Divorce
Property Distribution
General Overview
Family Law
Marital Termination & Spousal Support
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Property Distribution
Property Settlements



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34-121 California Legal Forms--Transaction Guide §§ 121.12-121.29

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 121.12[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Tax Aspects of Property Division
1. Division of Property in General

34-121 California Legal Forms--Transaction Guide § 121.30

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.30 Transfers of Property Between Spouses or Incident to Divorce

[1] No Recognition of Gain or Loss on Transfer

[a] Current Law

Generally no gain or loss is recognized on a transfer of property from an individual to (or in trust for the benefit of) a spouse. Transfers to (or for the benefit of) a former spouse also generally qualify for nonrecognition if the transfers are made incident to divorce [*I.R.C. § 1041(a)*; Temp. Treas. Reg. § 1.1041-1T(a), Q&A 2; *but see* [4], [5], *below*, for discussion of exceptions to the general rule for transfers in trust and transfers to nonresident alien spouses; Ch. 122, *Provisions for Division of Employee Benefits* (§ 122.12) for special rules for nontaxability of distributions made under employee benefit plan; *but cf. Tahamtan v. Commissioner, T.C. Memo. 1995-226*, (when spouse transferred community business assets to other spouse under duress, court ignored Section 1041 and allowed the business a loss deduction for *theft* by conversion)]. Property transferred to a former spouse need not have been owned by the transferor during marriage [Temp. Treas. Reg. § 1.1041-1T(a), Q&A 5].

PRACTICE TIP:

Date of Transfer Crucial. I.R.C. § 1041 was enacted as part of the Deficit Reduction Act of 1984, and generally allows nonrecognition to an interspousal transfer incident to divorce only if the transfer occurred after July 18, 1984. The Tax Court in one case required a wife to recognize gain on the transfer of her one-half community interest in various partnerships to her former husband, although incident to divorce, because the transfer occurred prior to enactment of Section 1041 [*see Harrington v. Commissioner (1994) T.C. Memo. 1994-258* (this result followed although divorce was finalized after statute's enactment date, because date of transfer, not of divorce, determines application of the statute)]. *Commentary by Publisher's Editorial Staff.*

PRACTICE TIP:

Expert advice is always desirable, but perhaps in no other aspect of family law is expert consultation more necessary than in dealing with the tax consequences of property division and support. The suggested terms for any marital division should always be reviewed with at least one person relatively expert in tax laws and procedures. *Commentary by Ira H. Lurvey.*

Gain is not recognized even if the transferred property is subject to liabilities in excess of basis, provided the transfer is not in trust [Temp. Treas. Reg. § 1.1041-1T(d), Q&A 12; *see* I.R.S. Letter Rul. 9615026; *I.R.C. § 1041(e)* (excepting certain transfers in trust from nonrecognition treatment, discussed in [4], *below*)]. Similarly, the transferor recaptures no investment credit on the transfer, if the credit was taken before 1986 or pursuant to a transitional rule effective for a subsequent year. If the transferred property is disposed of by the transferee, or otherwise ceases to be investment credit property with respect to the transferee, however, the transferee is subject to recapture of the investment credit taken by the transferor [Temp. Treas. Reg. § 1.1041-1T(d), Q&A 13; *see* former *I.R.C. § 47*; *see also* former *I.R.C. § 49*]. The transfer of an installment obligation does not trigger recognition of gain [*see I.R.C. § 453B*] unless the transfer is in trust [H.R. Rep. No. 432, 98th Cong., 2d Sess. 1491-1493 (1984); *see* [4], *below*]. Furthermore, because of the carryover basis rule, no possibility exists that the proceeds of a life insurance policy transferred between spouses will be subject to income tax [*I.R.C. § 101(a)(2)(A)*].

In contrast to the transfer of "property" incident to divorce, one spouse's assignment of *personal service income* to the other, although incident to divorce, will generally be taxable to the spouse who earned the income [*see Kochansky v. Commissioner* (1994) *T.C. Memo* 1994-160 (citing *Lucas v. Earl* (1930) 281 U.S. 111, 50 S. Ct. 241, 74 L. Ed. 731 for proposition that "income is taxed to those who earn it"); *affm'd. Kochansky (Richard W.) v. Commissioner* (9th Cir. 1996) 92 F. 3d 957]. The Tax Court has held that an attorney husband, required by a dissolution judgment to pay his wife part of a contingent fee to be earned from a personal injury case, owed income tax on the whole fee earned. The husband was taxable on the entire fee earned because he had transferred personal service income and not income-producing property to his former spouse [*see Kochansky v. Commissioner* (1994) *T.C. Memo* 1994-160].

However, if, in the situation posed above, the husband had transferred an income-producing asset to his wife, then she alone would have been taxed on the income stream from the asset [*see Kochansky v. Commissioner* (1994) *T.C. Memo* 1994-160 (dicta)]. Note that transfer of the income-producing asset itself per divorce should be accorded nonrecognition under *I.R.C. § 1041*.

The Tax Court has also distinguished between payments made between spouses in order to settle their rights to a community asset, and payments received by the spouses directly from a third party entity--such as a pension plan--as a result of the division of their community property. Thus, in a 1992 decision, the Tax Court held that three payments made by a military retiree to his former spouse in settlement of her community interest in the retiree's military retirement benefits were not taxable to her, but did not rule on the taxability of the retirement income if it had been paid to her directly by the government [*Balding v. Commissioner* (1992) 98 *T.C.* 368 ; *see I.R.C. § 1041*]. However, in a 1996 decision, the Tax Court held that a former spouse was taxable on retirement benefits she received directly from the federal government that were her community property share of her former husband's benefits [*Graham (Angela M.) v. Commissioner*, *T.C. Memo.* 1996-512].

PRACTICE TIP:

Counsel would do well to deal with the issue of who pays the taxes when the buy-out negotiations occur. The spouses should provide in their marital settlement agreement or judgment for allocation of tax liability. One of the things to consider is that the assignment of income doctrine generally will not apply. The general rule is that no tax recognition arises to either spouse on a division in kind incident to divorce of the community's economic interest in a commonly held business or asset [Temp. Treas. Reg. § 1.1041-1T(d), Q&A 10, 11]. Under existing case authority, it appears equally clear that after a court makes its division in kind of the community's economic interest in a partnership or similar business, each spouse will thereafter be taxed on his or her proportional share of the income stream arising from that

division in kind. It will not matter that the interest may continue to be held in the name of one spouse and administered by him or her solely [*Kenfield v. United States* (10th Cir. 1986) 783 F.2d 966 ; *Schulze v. Commissioner* (1983) T.C. Memo. 1983-263 ; see *Friscone v. Commissioner* (1996) 71 T.C.M. 2837] .

[b] Pre-1984 Law Contrasted

Before the 1984 enactment of the rule governing transfers of property between spouses or incident to divorce contained in *I.R.C. § 1041* [see [a], above], although equal divisions of the community estate were not subject to tax, unequal divisions were taxable events [*Carrieres v. Commissioner* (1975) 64 T.C. 959 , *aff'd*, (9th Cir. 1977) 552 F.2d 1350] . An unequal division of community property or co-owned property was treated as a nontaxable equal division followed by a taxable transfer of a portion of the property between the spouses. Each spouse carried over the community basis in the property except that the spouse receiving the taxable portion took a cost basis in that portion [*Rev. Rul. 74-347*, 1974-2 C.B. 26 ; see *Rev. Rul. 81-292*, 1981-2 C.B. 158 ; *Siewert v. Commissioner* (1979) 72 T.C. 326, 332 ; *Davis v. Commissioner* (1987) 88 T.C. 1460 (applying both *Carrieres* and *Siewert* to hold that former wife's award of money judgment on divorce, representing portion of debt reimbursable to community by her former husband, was nontaxable--that is, equal--community property division); *United States v. Davis* (1962) 370 U.S. 65, 82 S. Ct. 1190, 8 L. Ed. 2d 335 , *reh'g denied*, 371 U.S. 854, 83 S. Ct. 14 (transfer of inchoate rights for property taxable transaction)].

The pre-1984 rules remain important for transfers pursuant to marital settlement agreements executed before 1984 if no transition elections were made, and also for transfers to nonresident alien spouses, and transfers between unmarried cohabitants.

[2] Nonrecognition Applies to Appreciated Gain but Not Income

The IRS has taken the position that nonrecognition of gain applies only to market appreciation and not to ordinary income items. In a published ruling, a spouse transferred United States savings bonds with accrued interest to the other spouse incident to divorce. The IRS ruled that the transferor spouse must report the accrued interest as taxable income because it was not "gain" within the meaning of *Internal Revenue Code Section 1041*. The transferee spouse was allowed a basis adjustment reflecting the accrued interest taxed to the transferor [*Rev. Rul. 87-112*, 1987-2 C.B. 207]. In a subsequent private ruling, a spouse purchased the other spouse's interest in a military pension. The IRS ruled that the spouse receiving the cash payment recognized taxable income because the value of her right to receive a portion of the pension could not be treated as "gain" [Letter Rul. 8813023 (Dec. 27, 1987)].

[3] Unequal Division of Property to Adjust for Tax Consequence

Property settlements may be adjusted to account for tax factors without risking loss of nonrecognition treatment for the settlement [*I.R.C. § 1041*; see [1][b], above, regarding treatment under prior law]. Although such an adjustment may result in an unequal division in terms of fair market value, the settlement is still nontaxable, and the division may be equal after tax consequences are considered. Unequal community property divisions may be equalized by a transfer of separate property to adjust for the shifting of tax liabilities and benefits--again without the recognition of gain or loss.

In addition, apart from the nonrecognition provisions, it appears that if a property settlement is considered as an unequal division because it involves a transfer of property in return for a promissory note bearing below-market interest, the transaction will not be subject to the imputed interest rules or below-market interest rules [see Letter Rul. 8645082 (Nov. 7, 1986) (spouses proposed note of this type, purportedly to effect equal division of community property); see also *I.R.C. §§ 483, 1271-1274, 7872* (unstated interest; classification as original issue discount; loans with below-market interest rates)]. However, the Taxpayer Relief Act of 1997 amended the provisions of *I.R.C. § 1271* that exempted debt obligations issued by natural persons from the rule that treats gain or loss realized on retirement of the debt as gain or loss realized on an exchange. Accordingly, with respect to obligations issued by a natural person after June 9, 1997, gain or loss on the retirement of this type of debt is capital gain or loss if the debt is a capital asset [see

I.R.C. § 1271 (b)(1)(A). Until guidance is given by regulations or case law, it appears that while no gain is recognized on a transfer of property to a spouse incident to divorce, gain may nonetheless be recognized on retirement of debt obligations related to such a transfer [*compare I.R.C. § 1041 with I.R.C. § 1271(b)(1)(A)* (amended by Pub. L. No. 105-34, § 1003(c)(2)]. For further discussion of the use of promissory notes in connection with property transfers, see Chapter 25A.

[4] Transfers Deemed Incident to Divorce

A transfer is deemed to be incident to divorce if it occurs within one year after the date the marriage ceases or if it is related to the cessation of marriage [*I.R.C. § 1041(c)*]. Thus, if a transfer occurs more than one year after divorce, it must be related to the cessation of marriage, in order to qualify for nonrecognition treatment. A transfer is considered as related to the cessation of marriage if the transfer is pursuant to a divorce or separation instrument and the transfer occurs no more than six years after the date of divorce [Temp. Treas. Reg. § 1.1041-1T(b), Q&A 7; *see I.R.S. Letter Rul. 9306015* (party's transfer of interest in former marital residence was unrelated to termination of marriage, occurring more than eight years after final decree and not addressed in divorce judgment)].

Decrees of divorce or separate maintenance, written agreements incident to decrees of divorce or separate maintenance, and written separation agreements all qualify as divorce or separation instruments, as do modifications and amendments [Temp. Treas. Reg. § 1.1041-1T(b), Q&A 7; *see I.R.C. § 71(b)(2)*; *cf. Harris v. Commissioner, T.C. Memo 1991-375* (in noncommunity property state, husband as taxable on withdrawals from IRA even though they were used to pay former spouse's income taxes pursuant to divorce decree; decree as not otherwise satisfying alimony income-shifting rules, and husband as not required to transfer his interest in IRA to wife in lieu of portion of his obligation to pay her taxes)]. Transfers may be closely scrutinized to ascertain whether they bear a sufficient connection to the marital settlement to be deemed "incident to divorce" [*see, e.g., Praegitzer (Dennis A.) v. Commissioner, T.C. Memo 1997-79* (large cash distribution made by closely held corporation as part of overall marital settlement was taxable as not made "incident to divorce" because the cash distribution was not necessary part of marital settlement)].

Any transfer occurring more than six years after divorce is presumed not to be related to the cessation of marriage. This presumption can be rebutted by showing that the transfer was made to effect a division of property owned by the spouses at the time of divorce. For example, the presumption may be rebutted by showing that (1) the transfer was not made within six years of divorce because of factors that hampered an earlier transfer, such as legal or business impediments to transfer or disputes about value, and (2) the transfer was effected promptly after the impediments were removed [Temp. Treas. Reg. § 1.1041-1T(b), Q&A 7; *see Letter Rul. 9123053* (June 7, 1991) (60-installment transfer of community share of employment benefits effected division of marital property when spouses simply chose to extend transfers over period of more than six years after divorce)]. Annulments and cessations of marriages that are void *ab initio* because of violations of state law are considered as divorces [Temp. Treas. Reg. § 1.1041-1T(b), Q&A 8].

[5] Transfers to Third Parties on Behalf of Spouse

[a] Transfers Qualifying for Nonrecognition in General

Transfers of property to third parties on behalf of a spouse or former spouse may qualify for nonrecognition [*I.R.C. § 1041(a)*; Temp. Treas. Reg. § 1.1041-1T(c), Q&A 9]. In general, a transfer to a third party on behalf of a spouse or former spouse qualifies if the transfer to a third party is required by the divorce or separation agreement or is made pursuant to the written request of the spouse or former spouse. A transfer to a third party also qualifies, generally, if the transferor receives a written consent or ratification from the other spouse or former spouse. The consent or ratification must state that the parties intend the transfer to be treated as a transfer to the spouse or former spouse subject to *Internal Revenue Code Section 1041* and must be received by the transferor before the date of filing the transferor's first tax return for the taxable year in which the transfer is made. In these circumstances, the transfer to the third party will be considered as made directly to the spouse or former spouse, who is then deemed to have transferred the property to the

third party. Only the first of these two deemed transfers (that is, to the transferee spouse or former spouse) is subject to nonrecognition [Temp. Treas. Reg. § 1.1041-1T(c), Q&A 9].

[b] Treatment of Corporate Stock Redemptions on Behalf of Spouse

Generally, if a corporation redeems its stock from a spouse, the redemption is treated as a distribution in part or full payment in exchange for the stock, and the selling spouse will recognize a capital gain or loss [see *I.R.C. § 302(a)*; cf. *Yonadi v. C.I.R.* (3rd Cir. 1994) 21 F.3d 1292, 1300-1302]. However, a version of the "transfer to a third party on behalf of a spouse" nonrecognition principle can arise if a corporation redeems a spouse's stock "on behalf of" the other spouse [see *Arnes v. United States* (9th Cir. 1992) 981 F.2d 456, 459-460]].

In the *Arnes* case, a married couple held all shares of a corporation in their joint names. The corporation was formed to operate a franchise that required 100-percent ownership of equity and profits by the owner-operator. When the couple agreed to divorce, joint ownership of the franchise was no longer possible, and their decree of dissolution therefore included an agreement to have the corporation redeem the wife's 50-percent interest in the outstanding stock. The redemption was treated as a transfer qualifying for nonrecognition treatment under *I.R.C. § 1041*, as a transfer on behalf of the husband, because it relieved him of his obligation to purchase his wife's stock. The redemption was viewed as a constructive transfer from the wife to the husband, who then transferred the stock to the corporation. The Court of Appeals upheld a district court ruling that the wife was entitled to a refund for income tax paid on capital gains from the redemption. She did not have to recognize income on the redemption [*Arnes v. United States* (9th Cir. 1992) 981 F.2d 456, 459-460]].

Based on the above facts involving these parties, the Internal Revenue Service (I.R.S.) proceeded in the Tax Court against the husband on the theory that the redemption was taxable to him as a constructive dividend. The Tax Court disagreed, ruling that no constructive dividend occurred because the husband was not primarily obligated to buy the shares. The court appeared to base its decision partly on a 1969 revenue ruling concerning two shareholders who agreed that the corporation would redeem the shares of either shareholder who died, and if the corporation did not, then the surviving shareholder would buy the decedent's shares [*John A. Arnes v. Commissioner* (1994) 102 T.C. 522, 527 (citing *Rev. Rul. 69-608, 1969-2 C.B. 43, 44*)]. The Tax Court concluded that the husband had received no constructive distribution on redemption of the wife's shares [*John A. Arnes v. Commissioner* (1994) 102 T.C. 522, 528-529].

Shortly before hearing the *Arnes* case, the Tax Court had, in a case involving different parties but similar facts, refused to follow the Ninth Circuit's (*Arnes*) holding that the spouse whose shares were redeemed recognized no gain on the redemption. The Tax Court held that redemption of the wife's shares, although incident to the divorce judgment, was not a "transfer on behalf of" the husband [*Blatt v. Commissioner* (1994) 102 T.C. 77, 83; Temp. Treas. Reg. § 1.1041-1T(b), Q&A 9].

In another decision involving similar facts, the Tax Court had earlier considered the issue of a constructive dividend to the nonredeeming spouse on redemption of the other spouse's stock in the context of divorce. In that case, the spouses had entered into a separation agreement, later incorporated into a divorce judgment, under which the husband agreed to purchase the wife's shares in the parties' closely held franchise. However, it later became clear that the husband's cost of obtaining the buy-out funds would be greater than the cost to the wife of redeeming her shares. After executing a redemption agreement, the parties obtained a court order correcting the earlier divorce judgment to require redemption of the wife's shares. The Tax Court held that the redemption was a "constructive dividend" to the husband, who was obligated to purchase the wife's shares under the separation agreement and original divorce decree. The Tax Court refused to honor the nunc pro tunc order, which instead required the redemption of the wife's shares under the judgment, because in the court's view the order was violative of state law. However, the court noted that the result would have been the same even if the nunc pro tunc order were given effect, because the corporation in that case would have assumed the husband's obligation to purchase the wife's shares under the earlier separation agreement, and the assumption would have amounted to a constructive dividend to the husband [*Mary Ruth Hayes v. Commissioner*

(1993) 101 T.C. 593] .

The net effect of the two *Arnes* cases is that neither spouse was taxable on the stock redemption. The dissenting judges who heard the husband's case in the Tax Court expressed certainty that the majority opinion will be reversed on appeal to the Ninth Circuit [*John A. Arnes v. Commissioner* (1994) 102 T.C. 522, 543, 549] . This awaits further judicial action. The Ninth Circuit decision was based on the view that the corporate redemption of the wife's stock satisfied the husband's divorce-related obligation to her. The redemption was seen as an interspousal transfer incident to divorce, entitling her to I.R.C. § 1041 nonrecognition of gain on the redemption [see *Arnes v. United States* (9th Cir. 1992) 981 F.2d 456, 459- 460] . Accordingly, the Tax Court's strained and artificial reasoning that the redemption was not a "constructive dividend" to the former husband, because the corporation and not the husband had the primary obligation to redeem wife's stock, is not likely to fare well on appeal to the Ninth Circuit [see *Arnes v. United States* (9th Cir. 1992) 981 F.2d 456, 459- 460 ; cf. *Friscone v. Commissioner* (1996) 71 T.C.M. 2837 (in Ohio case, Tax Court allocated fraction of tax burden to each party in accordance with marital settlement agreement that clearly assigned a fractional share from the sale of corporate stock to each party)].

PRACTICE TIP:

The conflict of authority between the Ninth Circuit Court of Appeals and the Tax Court places counsel in something of a dilemma in terms of both analysis and client advice. Although partly in conflict with the Ninth Circuit, the Tax Court decisions are at least fairly consistent when read together. In the Tax Court, there appear to be some basic patterns: (1) generally, the redemption of a spouse's shares are not a "transfer in behalf of" the other spouse; (2) the redeeming spouse most likely must pay the tax if the corporation has the "primary obligation" to purchase the shares; (3) however, the nonredeeming spouse will likely be taxed if that spouse has the "primary obligation" to purchase the other spouse's shares and the corporation is fulfilling the nonredeeming spouse's obligation [see *John A. Arnes v. Commissioner* (1994) 102 T.C. No. 20, 25 ; *Blatt v. Commissioner* (1994) 102 T.C. 77, 83 ; *Mary Ruth Hayes v. Commissioner* (1993) 101 T.C. 593] . When does a corporation, or a spouse, have the "primary obligation" to purchase the other spouse's shares? The answer in the Tax Court appears to be to look to the form of the agreement. By contrast, the Ninth Circuit apparently looks more to the substance of the transaction, and will more likely view redemptions in these situations "in behalf of" the other spouse even if in form the corporation has the "primary obligation" to purchase the shares [see generally *Arnes v. United States* (9th Cir. 1992) 981 F.2d 456, 459-460] . Although the issue is still open, the Ninth Circuit might possibly hold the nonredeeming spouse liable for tax based on receipt of a "constructive dividend" or perhaps some other theory having the same result. Accordingly, counsel for the redeeming spouse should remember that the Tax Court will likely require the client to pay the tax on the redemption, a likelihood increasing all the more the transaction appears in form to be between the redeeming spouse and the corporation. The redeeming spouse may prevail on appeal to the Ninth Circuit, based on the view that the redemption is entitled to nonrecognition of income as a transfer in behalf of the other spouse. Counsel for the nonredeeming spouse might advise the client that tax on the redemption as a "constructive dividend" may be avoided at the Tax Court level, if the transaction is structured so that the corporation, not the nonredeeming spouse, has the "primary obligation" to purchase the other spouse's shares. However, if the I.R.S. appeals to the Ninth Circuit, the nonredeeming spouse will probably be taxed on the redemption under a constructive dividend or similar theory. It is difficult to conceive of a situation crying out any more for the tax liability shifting of an indemnification agreement between the spouses. Although the I.R.S. is not bound by such an agreement because it is not a party to the agreement [*Angelina G. Alioto* (1994) T.C. Memo 1994-51] , the family law courts most likely will enforce the agreement. *Commentary by Publisher's Editorial Staff*

[6] Transfers in Trust

The nonrecognition provisions do not apply to the transfer of property in trust to the extent that the sum of the amount

of the liabilities assumed, plus the amount of the liabilities to which the property is subject, exceeds the transferor's adjusted basis in the property transferred. Proper adjustment must be made to the transferee's basis in the property to take into account gain recognized because of these trust exceptions [*I.R.C. § 1041(e)*; see [8], *below*, for discussion of basis].

EXAMPLE:

H purchased an apartment building in 1970 for \$50,000. In 1986, H obtained an \$80,000 loan using the building as security. One year later, when the building had appreciated to \$200,000, H and W dissolved their marriage. As part of their marital settlement agreement, H agreed to place the building in trust for W, with rent payments to be used to pay the mortgage and any remainder to be paid to W. Because the building's liabilities (\$80,000) exceeded H's basis (the \$50,000 purchase price), the excess liabilities (\$30,000) must be recognized to H as gain [*see I.R.C. 1041(e)*].

The nonrecognition provisions for transfer of an installment obligation do not apply if the obligation is transferred in trust [*I.R.C. § 453B(g)*].

If the spouses choose to create an "alimony trust" by the transfer of property, the transaction may require consideration of both of these exceptions to the general nonrecognition rule, as well as provisions concerning taxation of income from the trust [*see Ch. 123, § 123.37*].

[7] Transfers to Nonresident Alien Spouse

Transfers to a spouse or former spouse who is a nonresident alien do not qualify for nonrecognition [*I.R.C. § 1041(d)*]. Note that originally, the rule did not encompass transfers to former spouses who are nonresident aliens at the time of a property transfer incident to a divorce [*see I.R.C. § 1041(d)*, before amendment by Pub. L. No. 100-647, § 1018(1)(3)]. Transfers that do not qualify for nonrecognition treatment may result in the recognition of gain or loss, except to the extent precluded by the disallowance of losses on transactions between "related parties" [*see generally I.R.C. § 267*].

[8] Basis in Transferred Property

A transferor's basis in the property is carried over to the transferee [*I.R.C. § 1041(b)*]. Because the transfer is treated as a gift, the transferee recognizes no income from the receipt of the property [*see I.R.C. § 102(a)*]. The carryover of basis ensures that the transferee retains any unrecognized gain or loss in the property.

This carryover basis rule differs from the carryover basis rule generally applied to gifts, under which the donee's basis is the donor's basis or the fair market value of the property as of the date of the gift, whichever is less [*I.R.C. § 1015(a)*]. Thus, an unrecognized loss cannot be transferred to a donee by gift. If the transfer qualifies for nonrecognition of gain or loss, however, the transferee's basis in the property is the same as the transferor's basis. As a result, an unrecognized loss can be transferred to the transferee. In addition, the transferee assumes the transferor's holding period for the transferred property [*I.R.C. § 1223(2)*].

[9] All Transfers Covered--Step Transaction

Although *Internal Revenue Code Section 1041* was enacted to eliminate the taxability of marital property settlements, its effect is much broader. All transfers of property between spouses generally are subject to Section 1041, without regard to divorce. Thus, if a husband sells property to his wife, the transaction is treated as a gift of the property to the wife and a gift of the purchase price to the husband, that is, neither spouse recognizes gain or loss. Furthermore, a transfer from a corporation owned by a spouse to the other spouse may be treated, in appropriate circumstances, as a transfer made directly by the owner spouse [*see Temp. Treas. Reg. § 1.1041-1T(a)*, Q&A 2 (applying general tax principles, including step-transaction doctrine, in recharacterizing transaction)].

[10] Obligation of Transferor to Supply Records

The transferor must supply, at the time of the transfer, records sufficient to determine the adjusted basis and holding period of the property as of the date of the transfer. If the property is subject to potential investment tax credit recapture, the transferor also must supply records sufficient to determine the amount and period of potential liability [Temp. Treas. Reg. § 1.1041-1T(e), Q&A 14].

Legal Topics:

For related research and practice materials, see the following legal topics:

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 121 PROVISIONS FOR DIVISION OF PROPERTY
PART II. LEGAL BACKGROUND
B. Tax Aspects of Property Division
1. Division of Property in General

34-121 California Legal Forms--Transaction Guide § 121.31

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.31 Gift Tax Consequences of Property Divisions

It has been long established that equal divisions of the community estate do not result in taxable gifts, either on the theory that no transfer occurs between the spouses or because the transfer is for full consideration [*Commissioner v. Mills* (9th Cir. 1950) 183 F.2d 32, 34 ; see I.R.C. §§ 2511, 2512(b) (transfers and valuation of gifts)]. Unequal divisions of the community estate that are equalized by a payment out of separate property also are deemed nontaxable because the exchange of excess community property for separate property is for full consideration from the point of view of both spouses [see I.R.C. § 2512(b) (property transferred for less than adequate and full consideration)].

Apart from the statutory exception discussed below, divisions of the community property in which there is no (or insufficient) consideration in the form of separate property or the relinquishment of spousal support rights appear to result in taxable gifts to the extent of the inequality [see I.R.C. §§ 2511, 2512(b)]. Even more clearly, uncompensated transfers of separate property at the time of divorce are taxable gifts. If the division or transfer is accomplished while the spouses are still married, the gift is exempted from tax by the unlimited marital deduction [see I.R.C. § 2523(a)], although this deduction is no longer allowed if the donor's spouse is not a United States citizen, in which case other special gift tax rules apply.

If the division or transfer takes place after divorce, it is arguable that the transfer may be exempt under a statutory provision [see I.R.C. § 2516] or judicial rule [*Harris v. Commissioner* (1950) 340 U.S. 106, 71 S. Ct. 181, 95 L. Ed. 111] . The statutory provision exempts any transfers in settlement of marital or property rights, or to provide a reasonable allowance for support of minor children of the marriage, from gift tax if the transfers are made pursuant to a written agreement of the spouses and divorce occurs within the three-year period beginning one year before the agreement is entered. This rule applies regardless of whether the agreement is approved by the divorce decree [I.R.C. § 2516]. Because each spouse has a right to only half of the community estate, it is unclear whether the transfer of excess property actually is a transfer in settlement of property rights within the meaning of the statute. The statute originally was drafted to exempt transfers in settlement of inchoate marital property rights in common-law jurisdictions, in effect

allowing equal divisions of the marital property in common-law states to receive the same gift tax-free treatment as equal divisions of community property [see *I.R.C. § 2516*].

PRACTICE TIP:

A possible alternative exemption theory may be found in the judicial rule that transfers are exempt if "founded" on the divorce decree rather than on an agreement of the spouses [see *Harris v. Commissioner* (1950) 340 U.S. 106, 71 S. Ct. 181, 95 L. Ed. 111] . The scope of this exemption is somewhat unclear, but it can apply only if the settlement is incorporated into the divorce decree. This rule, too, was fashioned in a case involving transfers in settlement of inchoate marital rights that were otherwise taxable under the law existing at that time, and the decision was motivated by the desire to exempt such transfers from gift tax. Strictly speaking, it should not apply to transfers that are not made in satisfaction of property rights. The court's confusing opinion in the case, however, arguably can be read broadly to exempt all transfers that are incorporated in the divorce decree. In addition, some practitioners take the (arguably) aggressive view that when a settlement agreement is incorporated into a dissolution decree, no gift occurs on transfers pursuant to the settlement agreement, even if there is not a final divorce decree within the three-year period beginning one year before or two years after the agreement is entered, as normally required for exemption from gift taxes under the Internal Revenue Code [see *I.R.C. § 2516*]. This view, if correct, will certainly provide relief in instances when the statutory time limits cannot be met due to protracted litigation. However, rather than relying completely on such an alternative exemption theory, the more conservative (and prudent) approach is to assure the exemption from gift tax by avoiding whenever possible any undue delay to getting a final decree, after execution of the marital settlement agreement, so that it is obtained within the time limits required under the Internal Revenue Code. *Commentary by Publisher's Editorial Staff.*

Legal Topics:

For related research and practice materials, see the following legal topics:

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34-121 California Legal Forms--Transaction Guide § 121.32

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.32 Estate Tax Consequences of Property Divisions

[1] Death Before Property Settlement or Divorce

If a spouse dies before a property settlement is effected or completed, estate taxes are avoided to the extent that the property to be transferred in the settlement is deductible from the decedent's gross estate [*see I.R.C. § 2053(a)(3)*]. On the other hand, with limited exception, the decedent's right to receive property from the other spouse is includible in the gross estate [*I.R.C. § 2031; see I.R.C. § 2031(c)* (providing special rules for "qualified conservation easements")]. If the spouses are still married at the time of death, and the community estate still exists, all of the decedent's separate property along with half of the community property is includible in the gross estate [*I.R.C. § 2033*].

If the property settlement then to be effected between the surviving spouse and the decedent spouse's estate involves an equal division of the community estate or an unequal division with an equalizing payment out of separate property, the value of the decedent's estate is not affected. This is because the deduction for the claims of the surviving spouse is offset by the inclusion of an equal amount of property to be received by the estate from the surviving spouse. If the property settlement would effect an unequal division of community property (without equalization out of separate property) in which the surviving spouse is to receive a greater share, or would effect an uncompensated transfer of separate property to the surviving spouse, the decedent's estate will be diminished below what it would have been had it included half of the community property and all of the decedent's separate property. This decrement is not deductible from the gross estate as a claim against the estate because it is not made for adequate consideration [*see I.R.C. § 2053(c)(1)(A)*]. It is deductible, however, if made in a form qualifying for the unlimited marital deduction [*see I.R.C. § 2056(a)*], subject to special rules regarding transfers to surviving spouses who are not United States citizens [*see I.R.C. §§ 2056(d), 2056A*].

Thus, if the spouses are still married at the time of death, the taxable estate of the decedent will contain only the property that passes from the estate to persons other than the surviving spouse [*see I.R.C. § 2056(a)*].

[2] Spouses Divorced at Time of Death

If the spouses are already divorced or legally separated at the time of the death of one of them, and transfers pursuant to the property settlement remain to be effected, the property to be transferred by the decedent's estate to the other spouse to complete an equal division of the community estate or an unequal division with equalizing payment out of separate property are deductible from the gross estate. The claims of the surviving former spouse are supported by adequate consideration in the form of the property received by the decedent or to be received by the estate [I.R.C. § 2053(a)(3), (c)(1)(A)]. Claims to complete an unequal division of community property (without separate property consideration) in which the surviving spouse receives the greater portion, however, are not deductible to the extent of the inequality, because of the absence of full consideration in money or money's worth [I.R.C. § 2053(a)(3), (c)(1)(A); see *Estate of Scholl v. Commissioner* (1987) 88 T.C. 1265 (claims against estate in satisfaction of unpaid spousal support)]. The same rule applies to the surviving former spouse's claims for uncompensated transfers out of the decedent's separate property. Because the spouses are no longer married, the marital deduction is not available. Thus, the decedent's taxable estate includes these amounts despite the obligation of the estate to make the transfers to the surviving former spouse.

PRACTICE TIP:

If a spouse dies in the period between filing of the petition and completion of the trial on all property issues, it becomes particularly important to ascertain whether there was a bifurcated judgment on marital status and, if so, whether the "standard conditions" were given to the surviving spouse [see *Fam. Code* § 2337]. Because the conditions set forth in *Family Code Section 2337* usually are given only to the spouse who requests the bifurcation, and one of the conditions provides for tax indemnification to the "other" spouse for any damages arising from the bifurcated judgment, the issue of who "requests" the bifurcated status judgment becomes crucial. *Commentary by Ira H. Lurvey.*

A deduction is allowed to the decedent's taxable estate for all transfers made after death to a former spouse that satisfy the requirements for transfers to be exempt from gift tax [I.R.C. § 2043(b); see I.R.C. § 2516 (property settlements); cf. *Estate of Herrmann* (Herbert R.) T.C. Memo 1995-90, (for purposes of deducting claim against estate of decedent married at time of death, waiver of marital rights in premarital agreement is not adequate consideration "in money or money's worth")].

[3] Similarities to Gift Tax

As under the gift tax, it is unclear whether the claims of surviving former spouses for property that are not supported by consideration can be deducted under the estate tax version of *Internal Revenue Code Section 2516* [see § 121.31]. A deduction from the gross estate is allowed for claims made pursuant to a written agreement relative to marital property rights if the claim is in settlement of marital or property rights, and divorce occurred within the three-year period beginning one year before the agreement was entered [I.R.C. §§ 2043(b), 2516]. As discussed with respect to the gift tax, this provision was enacted to eliminate the estate taxation of amounts to be transferred to surviving spouses in satisfaction of inchoate marital property rights in common-law jurisdictions. Given this purpose, it appears that claims to more than half of the community property or to the decedent's separate property (if uncompensated) should not be treated as in settlement of property rights, and thus be eligible for deduction.

In addition, as is true of the gift tax, the *Harris* rule can be invoked to permit a deduction if the claims are made pursuant to a settlement incorporated in the divorce decree. However, the applicability of the *Harris* rule in the community property context is uncertain [see *Harris v. Commissioner* (1950) 340 U.S. 106, 71 S. Ct. 181, 95 L. Ed. 111 ; see § 121.31].

Legal Topics:

For related research and practice materials, see the following legal topics:

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34-121 California Legal Forms--Transaction Guide §§ 121.33-121.39

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 121.33[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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2. Sale or Exchange of Personal Residence

34-121 California Legal Forms--Transaction Guide § 121.40

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.40 Gain or Loss on Transaction

[1] Amount of Gain or Loss

Gain on the sale or exchange of a personal residence is the amount that a taxpayer realizes from the sale or exchange less the adjusted basis in the residence. Loss is the excess of the adjusted basis over the amount realized [*I.R.C. § 1001(a)*]. The amount realized from a sale or exchange of a personal residence is the sum of money received plus the fair market value of any other property received. The amount realized does not include any amount received as reimbursement for real property taxes that are treated as imposed on the purchaser, but it does include amounts representing real property taxes that are treated as imposed on the taxpayer-seller if the taxes are paid by the purchaser [*I.R.C. § 1001(b)*].

A taxpayer's basis in a personal residence generally is the cost [*I.R.C. § 1012*]. A separate basis, however, must be computed if the residence was inherited or received as a gift [*see I.R.C. §§ 1014, 1015; cf. I.R.C. § 1022* (for decedents dying after 2009, modified carryover basis regime generally applies, as discussed in Ch. 60, *Estate Planning*)]. Adjustments to basis, in general, are [*I.R.C. § 1016*]:

- Additions for capital improvements made to the residence, and
- Subtractions if any part of the residence has been depreciated.

PRACTICE TIP:

Keeping records of capital improvements in order to document increases in the basis of a personal residence is critically important in the event that gain on the sale of the principal residence will exceed the exclusion amounts [*see I.R.C. § 121*]. Also, if the taxpayer's acquisition of a new residence resulted in nonrecognition of gain from a sale, exchange, or involuntary conversion of a former residence under (now former) *I.R.C. § 1034*, as in effect on the day before enactment of the Taxpayer Relief Act of 1997,

the taxpayer's basis in the new personal residence is reduced to the extent of the gain not recognized on sale of that former residence [see *I.R.C. § 1016(a)(7)*]. For further discussion of the treatment of gain on sale or exchange of a personal residence, see § 121.42. *Commentary by Publisher's Editorial Staff.*

As a general rule, all gain or loss realized on the sale or exchange of property must be recognized [*I.R.C. § 1001(c)*]. But, for all practical purposes the recognition of gain or loss on the sale or exchange of a personal residence is the unusual rather than the usual case. Loss, although realized, is not recognized because it is not deductible with respect to a personal residence (since there is no profit motive in an investment sense when the home is acquired) [*Treas. Reg. § 1.165-9(a)*; *Pulliam v. Commissioner* (1963) 39 T.C. 883, 885, *aff'd on other grounds*, (10th Cir. 1964) 329 F.2d 97; *but see § 121.41* (conversion of a personal residence to property held for profit or investment)]. In the case of gain, although it may be recognized in part, one of the following usually applies [see § 121.42]:

- Gain realized on the sale or exchange of a "principal residence" [see *I.R.C. § 121(a)*] may be excluded from taxable income, up to \$250,000 for an individual, and up to \$500,000 for married taxpayers filing a joint tax return, or for an unmarried taxpayer whose spouse died within two years before the sale if the taxpayer and deceased spouse would have qualified for the \$500,000 exclusion immediately before the spouse's death [*I.R.C. § 121(b)(1),(2),(4)*; *see also I.R.C. § 121(b)(3)* (exclusion available only for one sale or exchange in any two-year period)].

- Under certain limited circumstances, gain may still be totally or partly deferred through acquisition of a replacement residence within the time limits prescribed under former *I.R.C. § 1034*, despite the 1997 repeal of the *I.R.C. § 1034* "rollover" rule [see Pub. L. No. 105-34, § 312(b) (repealing *I.R.C. § 1034*); *see also § 121.42*].

- Under certain limited circumstances, the former "once-in-a-lifetime" \$125,000 exclusion from income of gain on the sale of a principal residence by a taxpayer age 55 or over may still be utilized, possibly in combination with the former "rollover" rule, despite the 1997 repeal of both the special exclusion and the rollover rule [see *I.R.C. § 121*].

However, even in the limited circumstances under which the former "rollover of gain" rule and the age 55 and over exclusion might be asserted, these provisions are less likely to be utilized given the special provisions for excluding substantial amounts of gain on the sale or exchange of a personal residence [see *I.R.C. § 121*].

[2] Gain Treated as Capital Gain

The sale or exchange of a personal residence is treated as a capital transaction. Thus, any gain required to be recognized [*but see I.R.C. § 121* (exclusion of gain from sale of principal residence)] is treated as capital gain [see *I.R.C. § 1221*]. Capital gains are generally taxed at rates that are more favorable to the taxpayer than those specified for ordinary income [*compare I.R.C. § 1(a)-(e), (i)(2) with I.R.C. § 1(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law
Marital Termination & Spousal Support
Dissolution & Divorce
Property Distribution
General Overview
Family Law
Marital Termination & Spousal Support
Dissolution & Divorce
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Classification
General Overview



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CHAPTER 121 PROVISIONS FOR DIVISION OF PROPERTY
PART II. LEGAL BACKGROUND
B. Tax Aspects of Property Division
2. Sale or Exchange of Personal Residence

34-121 California Legal Forms--Transaction Guide § 121.41

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.41 Conversion of Principal Residence to Property Held for Profit or Investment

A taxpayer does not recognize loss on the sale of a personal residence unless the taxpayer establishes that the property was held for profit or investment [*Treas. Reg. § 1.165-9(b)*; *Gordon v. Commissioner* (1928) 12 B.T.A. 1191, 1194]. The intent to hold property for profit or investment clearly is shown if the property is held for production of rental, trade, or business income [*Treas. Reg. § 1.165-9(b)(1)*]. Insignificant acts, such as leasing the property at low rent for a short period, do not evidence a profit motive [*Foehl v. Commissioner*, T.C. Memo. 1961-93]. Once the taxpayer establishes a profit motive, however, vacancy of the property does not defeat the profit motive [*McBride v. Commissioner* (1968) 50 T.C. 1, 10].

The conversion of a principal residence to income-producing property allows the taxpayer to recognize loss. The recognizable loss is limited to the adjusted basis or the adjusted fair market value as of the time of conversion (adjusted for depreciation for the period between the conversion and the sale), whichever is less [*Treas. Reg. § 1.165-9(b)(2)*; *Heiner v. Tindle* (1928) 276 U.S. 582, 48 S. Ct. 326, 72 L. Ed. 714; see *Estate of De Lucchi v. Commissioner*, T.C. Memo. 1957-234]. Thus, loss is limited to the difference between the amount realized on the sale and whichever of the above amounts is less [*Treas. Reg. § 1.165-9(b)*; *Heiner v. Tindle* (1928) 276 U.S. 582, 48 S. Ct. 326, 72 L. Ed. 714; see *Parsons v. United States* (3d Cir. 1955) 227 F.2d 437, 438-439 (value of property at time of conversion to rental property deemed taxpayer's basis for computing depreciation when property has declined in value between date of purchase and date of conversion)]. Recognizable gain is determined by subtracting the adjusted basis from the amount realized on the sale [*I.R.C. § 1001*; see *I.R.C. § 1011* (adjusted basis); *Parsons v. United States* (3d Cir. 1955) 227 F.2d 437, 438-439 (for purposes of depreciation, taxpayer's basis is limited by property's value at time of conversion)]. Neither gain nor loss results when the amount realized is greater than the basis for loss but less than the basis for gain--an outcome that may occur if the fair market value as of the conversion date is less than the adjusted basis as of that date.

Taxpayers may recognize loss on the sale of rental homes that they own and in which they temporarily resided,

provided they can show that they always intended to occupy a different dwelling as their personal residence [*Willcox v. Commissioner* (1953) 20 T.C. 305, 307] . Thus, the taxpayer's intentions generally will determine the availability of loss on the sale of a home [see *Tillotson v. Commissioner* (1953) 12 T.C.M. 171] .

A taxpayer's intent not to use a residence permanently, however, is insufficient to show that the property was purchased with a profit motive [*Warrick v. Commissioner* (1941) 44 B.T.A. 1068, 1071-1073] . Similarly, loss will be disallowed if a taxpayer's primary intent for purchasing a home is to reside there temporarily while constructing a permanent residence [*Meyer v. Commissioner* (1960) 34 T.C. 528, 531-532] . A profit motive is evidenced, however, if a taxpayer changes the construction of a custom residence to a commercial residence [see *Treas. Reg. § 1.165-9(b)*; *Heiner v. Tindle* (1928) 276 U.S. 582, 48 S. Ct. 326, 72 L. Ed. 714] .

When a taxpayer cannot show a profit motive on multiple sales of personal residences, the taxpayer's actual losses cannot be used to offset realized gains. Furthermore, two or more transactions may not be aggregated to produce a net result. As a result, only the gain may be recognized [*Koehn v. Commissioner* (1951) 16 T.C. 1378, 1380-1381] . Similarly, only gain is recognized from the sale of a single unit of personal residential property even if the sale is made in separate transactions to different buyers [*Rev. Rul. 54-95, 1954-1 C.B. 98*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionClassificationGeneral OverviewFamily LawMarital Termination & Spousal SupportTaxationTax LawState
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34-121 California Legal Forms--Transaction Guide § 121.42

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.42 Treatment of Gain on Sale of Principal Residence

[1] Exclusion of Gain Under Current Law

[a] Overview

As a result of passage of the Taxpayer Relief Act of 1997 (Pub. L. No. 105-34), individuals are permitted to exclude from taxable income up to \$250,000 of gain on the sale or exchange of a "principal residence," and this amount generally increases to \$500,000 for married couples who file a joint return [*see I.R.C. § 121(b)(1), (2)*]. The \$500,000 exclusion is also available to an unmarried taxpayer whose spouse died within two years before the sale, if the taxpayer and spouse would have qualified for the \$500,000 exclusion immediately before the spouse's death [*I.R.C. § 121(b)(4)*]. The exclusion is allowed each time a taxpayer selling or exchanging a principal residence meets the eligibility requirements discussed hereinafter, but generally no more often than once every two years [*see I.R.C. § 121(b)(3)*]. The Act abolished the special rules for "rollover of gain," as well as the "once-in-a-lifetime" exclusion of up to \$125,000 in gain for taxpayers aged 55 or older, on the sale or exchange of a personal residence. It generally applies to sales or exchanges occurring after May 6, 1997 [Pub. L. No. 105-34, §§ 312(a), (b), (d); *see [c], below*].

To qualify, a taxpayer must have both owned and used the property as his or her principal residence for at least two years during the five year period ending on the date of the sale or exchange [*see I.R.C. § 121(a)*]. However, married couples who file a joint return may claim the \$500,000 exclusion if (1) either spouse meets the ownership requirement; (2) both spouses meet the use requirement; and (3) neither spouse is ineligible for exclusion by way of a sale or exchange of a residence within the last two years [*I.R.C. § 121(b)(2)(A), (B)*].

PRACTICE TIP:

According to a House Committee Report on the Taxpayer Relief Act of 1997, if a single taxpayer who is otherwise eligible for an exclusion marries someone who has used the exclusion within the two years prior to the marriage, the 1997 Act allows the newly married taxpayer a maximum exclusion of

\$250,000; that is, the fact that an individual's spouse used the exclusion within the past two years does not preclude the individual from claiming the exclusion. Once both spouses satisfy the eligibility rules and two years have elapsed since the last exclusion was allowed to either of them, the taxpayers may exclude \$500,000 of gain on their joint return [*see* House Ways and Means Comm. Report (H.R. 1014), rel. June 18, 1997 (construing the bill preceding final enactment of § 312(a) of the Taxpayer Relief Act of 1997, amending *I.R.C. § 121*]. *Commentary by Publisher's Editorial Staff*.

Note that the law allows an exception under which a taxpayer is entitled to a *prorated* amount of the exclusion on failing to meet either of the two year requirements (i.e., ownership and use) because of a change in the place of employment, health, or other unforeseen circumstances [*see I.R.C. § 121(c)(2)(A), (B)*]. In this event, the taxpayer's exclusion is a percentage of the amount that would have been allowed if the two-year requirements had been met, and is derived from the ratio of the aggregate amount of time the taxpayer owned or used the property as a principal residence during the statutory five-year period (or, if shorter, the amount of time since the most recent prior sale to which the exclusion applied), to two years [*see I.R.C. § 121(c)(1)(A)(i), (ii)*]. For discussion of a special, additional provision of the 1997 law concerning the ability of a spouse or former spouse to claim an exclusion from gain despite having lived away from the residence pursuant to a divorce or separation instrument, see [b], *below* [*see I.R.C. § 121(d)(3)*].

The exclusion of gain under the 1997 law does not apply to any gain attributable to depreciation deductions taken in connection with the rental or business use of the property for periods after May 6, 1997 [*I.R.C. 121(d)(6)*].

The Taxpayer Relief Act of 1997 also amended *I.R.C. § 1038*, which imposes recognition of gain on certain reacquisitions of real property. The amendment provides that no gain will be recognized upon either the reacquisition or resale of real property previously sold as a principal place of residence, with no gain having been recognized under *I.R.C. § 121* from the previous sale, if within one year after reacquisition the taxpayer resells the property [*see I.R.C. § 1038(e)*].

[b] Principal Residence

To qualify for the exclusion of gain on the sale or exchange of a residence, the taxpayer must have owned or used the property as a "principal residence" during the applicable time period [*see I.R.C. § 121(a)*; *see also* [a], *above*]. In construing this term, resort to decisions under the former "rollover" rules may be instructive, because it would seem that such decisions would have analogous application, except to the extent inconsistent with the revisions to the law made by the 1997 Act. Thus, whether a residence constitutes the taxpayer's principal residence has been required to be determined from all the facts and circumstances of each case. Although a taxpayer may have more than one residence, only one of those residences is the taxpayer's principal residence [*see, e.g., Grace v. Commissioner (1969) 51 T.C. 685, 686-690, aff'd, (5th Cir. 1969) 421 F.2d 165; Smith v. Commissioner (9th Cir. 1964) 332 F.2d 671, 673*]. It has been held that a principal residence can be stock held by a tenant-shareholder in a cooperative housing corporation [*Treas. Reg. § 1.1034-1(c)(3)(i)*], a house-trailer [*Disney v. Commissioner, T.C. Memo. 1961-177*], a houseboat [*Treas. Reg. § 1.1034-1(c)(3)*], a condominium [*Rev. Rul. 64-31, 1964-1 C.B. 300; see Rev. Rul. 85-132, 1985-2 C.B. 182*], a mobile home [*Treas. Reg. § 1.1034-1(c)(3)*], or a cooperative apartment [*Barnum v. Commissioner (1952) 19 T.C. 401, 408-409; see Treas. Reg. § 1.1034-1(c)(3)(i)*]. The primary factor has been whether the taxpayer uses the property as a residence [*Stanley v. Commissioner (1959) 33 T.C. 614, 616; see Skorniak v. Commissioner, T.C. Memo. 1996-178*]. Although land and a house may together constitute a personal residence, it has been held that land in itself does not [*O'Barr v. Commissioner (1965) 44 T.C. 501, 503*].

However, under a special provision of the 1997 Act, an individual is treated as using property as a principal residence during any period of ownership in which the individual's *spouse or former spouse* is granted use of the property under a divorce or separation instrument, as defined in *I.R.C. § 71(b)(2)* [*see I.R.C. § 121(d)(3)*].

PRACTICE TIP:

This provision of the 1997 Act affords significant relief to "out spouses" who live away from the family residence pursuant to a court order, such as an order for deferred sale of the residence [*see Fam. Code § 3800 et seq.*] or other "divorce or separation instrument." The key for the "out spouse" would appear to be to ensure that a "divorce or separation instrument" is in place to establish the other ("in") spouse's right to use the residence. *Commentary by Publisher's Editorial Staff.*

[c] Effective Dates and Election to be Bound by Former Law

The current rules for exclusion of gain [see [a], *above*] are generally effective for sales or exchanges after May 6, 1997, which, of necessity, would be those taking place on or after May 7, 1997. Sales before May 7, 1997, are subject to the former "rollover" and "once-in-a-lifetime exclusion" provisions [*I.R.C. § 121(b)(3)(B)* (excluding "pre-May 7, 1997" sales or exchanges)].

A taxpayer may nonetheless elect to be subject to the former provisions if: (1) the sale or exchange occurred prior to August 5, 1997, the enactment date of the new law; (2) the sale or exchange occurs after August 5, 1997, but is pursuant to a binding contract in effect on that date; or (3) no gain on the sale would be recognized, under the prior rollover rules, due to a replacement residence that was acquired on or before August 5, 1997, or pursuant to a binding contract effective on that date [Pub. L. No. 105-34, § 312(d), (e)(2)-(4)].

In addition, a taxpayer can elect not to have the revised *I.R.C. § 121* exclusion apply to any sale or exchange [see *I.R.C. § 121(f)*].

[2] Former "Rollover" Rule and "Once-in-a-Lifetime" Exclusion

[a] Rollover of Gain

Under former law, if property used by the taxpayer as his or her principal residence was sold or exchanged, and the taxpayer acquired a new principal residence within a period beginning two years before and ending two years after the sale or exchange, then gain, if any, was recognized only to the extent that the adjusted sale price of the old residence exceeded the cost of the new residence [former *I.R.C. § 1034*; see *Kirst (Randall L.) v. Commissioner, T.C. Memo. 1997-353*; *Snowa (Jeanne G.) v. Commissioner, 123 F.3d 190 (4th Cir. 1997)*; *Ryan v. Commissioner, T.C. Memo. 1995-579*; *Pagliarulo (Robert), T.C. Memo 1994-506*]. If these conditions were met, nonrecognition of gain was mandatory [*Treas. Reg. § 1.1034-1(a)*]. California incorporated the federal rollover provisions [*Rev. & Tax. Code § 18031*].

In determining whether a particular property remained a taxpayer's principal residence for rollover purposes, the Tax Court generally demonstrated a remarkable tolerance for periods of absence from the property. Thus, for example, the court found that a house remained the taxpayers' principal residence for rollover purposes despite a three year absence, when the taxpayers could not sell the house because of depressed market conditions [*Clapham v. Commissioner (1975) 63 T.C. 505*]. In another case, a taxpayer's principal residence was found to have remained her principal residence for rollover purposes even though she had not lived in the house on a permanent basis for six years at the time she sold it, because she was prevented from selling the house by her co-owner [*Green v. Commissioner, T.C. Memo. 1992-439*].

By contrast, courts held that a divorce is not a "force beyond [the taxpayer's] control," so a voluntary release of exclusive possession without a mandate for immediate sale of a residence prevented the "out spouse" from treating it as his or her "principal residence" [*Perry (Curtis B.) v. Commissioner (9th Cir. 1996) 91 F.3d 82*]. Thus, an order allowing one party to have "exclusive use," such as a "deferred sale of home order" (also known as a "Duke" order), without an order for immediate sale of the home, apparently precluded its use as a "residence" by the nonpossessory party and thereby precluded that party from taking an *I.R.C. § 1034* rollover [see *Perry (Curtis B.) v. Commissioner (9th Cir. 1996) 91 F.3d 82*].

PRACTICE TIP:

This adverse treatment of "out spouses" has been eliminated under the 1997 provisions for exclusion of gain, under which an individual is treated as using property as a "principal residence" during any period of ownership in which the individual's spouse or former spouse is granted use of the property under a "divorce or separation instrument," as defined in *I.R.C. § 71(b)(2)* [see *I.R.C. § 121(d)(3)*]. Thus, the considerations discussed above, pertaining to the "out spouse" being precluded from treating a property occupied by a former spouse as a "principal residence" for rollover of gain purposes (and, in general, all rollover discussion in this section) are relevant now only to the extent that the rollover provisions still have limited application under the 1997 tax law [see [1][c], *above*]. *Commentary by Publisher's Editorial Staff.*

The former rollover provisions did not eliminate but only deferred recognition of the gain on the sale of a principal residence. The gain that was not recognized under the rollover provisions was subtracted from the taxpayer's basis in the replacement principal residence. Thus, the gain was preserved and recognized on the sale of the replacement property [former *I.R.C. § 1034(e)*].

[b] "Once-in-a-Lifetime" Exclusion of Gain by Older Taxpayer

Under former law, a taxpayer aged 55 or older could elect to exclude from gross income up to \$125,000 of gain on the sale or exchange of property owned and used as his or her principal residence [prior version of *I.R.C. § 121*]. The residence had to be the taxpayer's principal residence for an aggregate period of three or more years during the five-year period ending on the date of the sale or exchange [*I.R.C. § 121(a)(2)*]. A married taxpayer who filed a separate return could exclude up to \$62,500 [prior version of *I.R.C. § 121(b)(1)*]. If a property was used partly as a taxpayer's principal residence and partly for other purposes, only that part used for the residence qualified for the election [prior version of *I.R.C. § 121(d)(5)*]. The California exclusion conformed to the federal exclusion [*Rev. & Tax. Code § 17131*].

In addition, if a taxpayer aged 55 or over replaced his or her principal residence within the former rollover-of-gain period [see [a], *above*], and also elected to exclude gain from the sale, he or she was entitled to reduce the amount required for reinvestment under the rollover provisions by the amount of gain excluded [see prior version of *I.R.C. § 121(d)(7)*]. The taxpayer presumably would have increased his or her basis in the replacement property by the excluded amount.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law
Marital Termination & Spousal Support
Dissolution & Divorce
Property Distribution
General Overview
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34-121 California Legal Forms--Transaction Guide §§ 121.43-121.99

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 121.43[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 121 PROVISIONS FOR DIVISION OF PROPERTY
PART III. TRANSACTION GUIDE

34-121 California Legal Forms--Transaction Guide § 121.100

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.100 General Drafting Guide to Provisions Dividing Assets and Debts

[1] Description of Assets and Obligations

1. If assets and debts are to be listed and characterized in exhibit or schedule, include provision that incorporates by reference that exhibit or schedule [*see § 121.200[2]*].

NOTE:

It is generally not necessary to separately describe the parties' assets and obligations in their marital settlement agreement. Their Judicial Council form of Schedule of Assets and Debts [Cal. Judicial Council Form FL-142] will set forth the entirety of the community estate. The dispositional provisions of the marital settlement agreement should address all assets and obligations listed on the Judicial Council form, and should describe each item sufficiently to identify it. For an illustrated version of this Judicial Council form, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2d ed., Ch. 111, ***Pretrial Procedures***, § 111.31 (Matthew Bender).

[2] Warranties and Other General Provisions

1. Include warranty by each spouse to other party that property described in agreement is all of the community estate, including both assets and obligations [*see § 121.220*].
2. If desired, add warranty providing that each party has not and will not incur any debt [*see § 121.221*]:
 - a. That is not disclosed in marital settlement agreement; and

- b. That could result in liability against other party.
- 3. If desired, include warranty that each party has made full disclosure of all information concerning the value of all items comprising the community estate [see § 121.222].
- 4. Set forth warranty provision stating that neither party has made prior gift of community personal property without prior written consent of other party [see *Fam. Code* § 1100(b); see also § 121.223].
- 5. If desired, add warranty that neither party has done anything to cause any dissipation of any asset in the community estate during the pendency of the legal proceeding [see § 121.224].
- 6. Provide for the disposition of any asset or obligation, not addressed in the agreement, that subsequently is found to be a part of the community estate [see § 121.206].
- 7. If applicable, affirm that one party has relied in good faith on an appraisal provided by the other party in accepting the valuation of one or more assets [see § 121.207].
- 8. If desired, specify that each party waives any right to the future earnings and acquisitions of the other [see § 121.208].
- 9. If desired, confirm that each party has fully complied with the requirements of the Family Code regarding full disclosure of all community assets and obligations [see *Fam. Code* § 2100 et seq.; see also § 121.209].
- 10. If applicable, provide for waiver of the requirement of a final declaration of disclosure [see *Fam. Code* § 2105(d); see also § 121.210].

[3] Disposition of Assets in General

- 1. Include provision that divides community assets of parties [see § 121.202].
 - a. List assets each spouse is to receive, either in the body of agreement or in attached schedules [see [1], above];
 - b. If applicable, indicate that assets are being divided equally;
 - c. State that each party assigns all of his or her right, title, and interest in assets given to other party;
 - d. State that transfer of assets is subject to existing encumbrances and liens, or provide for assumption by transferee of encumbrances and liens;
 - e. Transfer insurance on asset to party receiving it.
- 2. Specify disposition of any property that is not to be assigned to one party or the other;
 - a. Provide for sale of all undivided assets to third parties, and equal division of proceeds

between spouses;

b. Identify community assets to be sold and provide for equal division of proceeds between spouses; or

c. State that all undivided community property is to be sold to third parties, and specify use of sales proceeds (e.g., to pay community debts).

4. If applicable, add provision listing and confirming separate property of spouses [see § 121.201].

5. If one or both spouses have contributed separate property to acquisition of community property, or if one spouse has contributed separate property to acquisition of other spouse's separate property, as described in *Family Code Section 2640* [see § 121.204]:

a. Provide for reimbursement of separate property contributions; or

b. State that contributor waives right to reimbursement.

6. If division of community estate is not equal, provide for equalizing payment [see § 121.205]:

a. Payable either in single payment or in installments;

b. If to be paid in installments:

i. Prepare promissory note also;

ii. Set forth agreed interest rate;

iii. Provide for acceleration in case of default on any payment.

c. Provide for adequate security;

i. Deed of trust [see § 121.320];

ii. Term life insurance [see § 121.321].

[4] Disposition of Real Property

1. To describe real property [see [1], *above*], include common designation (such as street address) or full legal description, which usually should be included for recording purposes [see § 121.230];

2. Provide for disposition of each real property asset, including family residence, e.g.:

a. Allocation to one party or other as part of overall division of community estate [see § 121.202];

i. Address status of existing encumbrances [see § 121.235[1][b], [2]];

ii. Require delivery of deed [see § 121.235[3]];

- iii. In case of rental property, provide for transferor to release rights to all deposits [§ 121.235[4]].
- b. Provide for immediate sale to third party [see § 121.231].
- c. Provide for deferred sale of family home during minority of children [see *Fam. Code § 3800 et seq.*; see also § 121.232];
- d. Give one party option to purchase other's interest in family home [see § 121.233];
- e. Provide for parties to retain income-producing property as tenants in common [see § 121.234].

[5] Disposition of Personal Property in General

- 1. To describe personal property in general [see [1], *above*], include [see § 121.250]: (1) general description of items; (2) separate description of each item of value; (3) general description of particular type or group of items.
- 2. If parties have already divided any personal property assets, include acknowledgment of that prior division [see § 121.251].
- 3. Allocate personal property to one party or other as part of overall division of community estate [see § 121.202];
- 4. Provide for transfer of insurance and other collateral rights with regard to vehicles, vessels, and aircraft [see § 121.254];
- 5. Provide for sale to third persons of all personal property not allocated to parties [see §§ 121.352, 121.253 (motor vehicles)];
- 6. If necessary, provide for family pet [see § 121.255].

[6] Disposition of Life Insurance, Trust Interests, and Bank and Investment Accounts

- 1. For each life insurance policy:
 - a. If it is separate asset of one spouse, confirm this in agreement [see § 121.201];
 - b. If policy was purchased with community funds, do one of the following:
 - i. Provide for assignment of community property interest in policy to one spouse as part of overall division of community estate [see §§ 121.202, 121.270].
 - ii. Provide for surrender of policy for its cash surrender value and for division of that value if parties wish to effect equal division of community property interests in policy [see § 121.271]; or
 - iii. Provide for partition of policy if both spouses wish to continue to hold interests and

to divide their community interests in it [see § 121.272];

c. For support provisions requiring a supporting spouse to obtain life insurance covering his or her life and naming supported spouse as beneficiary, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapter 214, *Spousal and Child Support Provisions in Marital Settlement Agreements* (Matthew Bender).

2. If parties are concerned about succession rights of their children, provide for creation of irrevocable trust for benefit of children [see § 121.273];

3. If there is an existing revocable trust [see § 121.274]:

a. Provide for amendment of trust to make it irrevocable, if trust provisions remain acceptable to parties [see § 121.274[2]] or

b. Provide for revocation of trust if parties wish to dispose of trust property [see § 121.274[3]].

4. For securities, bank, and investment or brokerage accounts:

a. sufficiently describe the security or account [see [1], above] by including the following [see § 121.310]:

i. party in whose name security or account is held;

ii. certificate number of securities, unless one party is to receive all security owned by parties; and

iii. in the case of bank account, account number and name of branch of financial institution where funds are located.

b. Allocate entire account to one party as part of overall division of community estate [see § 121.202]; or

c. Divide account between parties by [see § 121.311]

i. Dividing overall value of account equally by giving each securities equal to half of the value of the account [see § 121.311[2]; or

ii. Diving each kind of security equally [see § 121.311[3]].

[7] Disposition of Business Interests

1. For business interest, include general description instead of itemization of each asset [see § 121.280, [1], above].

2. If one spouse has a business or professional practice and other spouse has community interest in it, consider assigning interest of other spouse to proprietor spouse as part of overall division of community estate [see §§ 121.202, 121.281].

3. If one spouse has community interest in other spouse's limited partnership interest, provide for division of interest [*see* § 121.282].
4. If parties jointly own and operate a successful business, consider possibility of retaining co-ownership of business [*see* § 121.283]
5. If one spouse operates a closely held corporation, provide for division of community and separate property shares [*see* § 121.284], and:
 - a. If both spouses wish to retain stock:
 - i. Divide shares between them [*see* § 121.284[2]];
 - ii. Or, to safeguard operation of corporation from future conflicts that may arise between them, provide for transfer of shares to voting trust [*see* § 121.284[5]].
 - b. If nonoperator spouse is to dispose of his or her interests in corporation, provide for:
 - i. Transfer of stock to operator spouse as part of overall division of community estate [*see* §§ 121.202, 121.284[3]]; or
 - ii. Redemption of shares of nonoperator spouse by corporation [*see* § 121.284[4]].
 - c. If parties are not able to agree on disposition of nonoperator's interest, provide for dissolution of corporation and division of corporate assets between parties [*see* § 121.284[6]].

[8] Provisions for the Payment of Debts

1. In dispositional provisions, sufficiently identify the community obligations of the parties, including the following information regarding each debt:
 - a. Name of creditor;
 - b. Account number if any;
 - c. Balance due;
 - d. Means by which debt is secured, if any.
2. Specify cut-off date for creation of community debt (usually date of separation), and provide that each spouse is solely responsible for all debts incurred by him or her after that date [*see* § 121.291].
3. If debt will be paid off with community funds in connection with execution of marital settlement agreement, specify method of payment, e.g.,
 - a. Use of specified assets [*see* § 121.292];
 - b. Use of special fund or account [*see* § 121.293]; or

- c. Use of loan obtained specifically for this purpose [see § 121.294].
 - d. Provide for payment of outstanding balance on all joint credit cards and charge accounts and for cancellation of cards and closing of accounts [see § 121.295]
- 4. For each debt that will not paid off in connection with execution of agreement:
 - a. Provide for assumption of debt by one or both parties, e.g.:
 - i. Allocate certain debts to each spouse as part of overall division of community estate [see § 121.203];
 - ii. Have one spouse assume all community debts [see § 121.290];
 - iii. Have one spouse assume liability on existing promissory note [see § 121.296].
 - b. Have assuming spouse agree to [see, e.g., § 121.290]:
 - i. Indemnify and hold other party harmless from any claims arising from assumed debts; and
 - ii. Defend, at his or her own expense, other party against any claim, action, or proceeding brought against other party seeking to hold other party liable on account of above debts.
 - c. If applicable and desired, set forth agreement of spouse to have other spouse released from continuing guaranty [see § 121.297].
- 5. If one spouse has executed contract to purchase property and other spouse is to be relieved from all liability in connection with purchase [see § 121.298].
 - a. Obtain consent of seller or lender to remove other spouse from liability, if possible.
 - b. If above consent is not required and cannot be obtained, provide that purchaser spouse:
 - i. Assumes all liability in connection with purchase; and
 - ii. Indemnifies other spouse for any liability other spouse might suffer from purchase.
- 6. If specific asset is encumbered, consider assigning asset and related debt to same party, which is a common form of division.
- 7. If one spouse has made loan to other spouse from first spouse's separate property, have debtor spouse agree to [see § 121.299]:
 - a. Repay indebtedness (1) in one lump sum on or before a specified date, or (2) in installments.
 - b. Provide spouse with promissory note evidencing indebtedness, if this has not yet been done.
- 8. State that each party will pay one-half of any community debt that is discovered after execution of the marital

settlement agreement [*see* § 121.205].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General
Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property
Distribution Classification General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 121 PROVISIONS FOR DIVISION OF PROPERTY
PART III. TRANSACTION GUIDE

34-121 California Legal Forms--Transaction Guide §§ 121.101-121.199

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 121.101[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 121 PROVISIONS FOR DIVISION OF PROPERTY
PART IV. FORMS

1. General Provisions for Dividing Property

34-121 California Legal Forms--Transaction Guide § 121.200

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.200 Reference to Schedule Listing Assets and Obligations

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, incorporates by reference an exhibit or a schedule that lists and characterizes all of the assets and obligations of the parties. This clause does not divide the property or allocate the debts.

It is not generally necessary to both separately describe and also divide the property and debts in a marital settlement agreement. It is sufficient if the dispositional clauses also adequately describe each item of property and each obligation. However, if the parties own numerous items of property, counsel should consider preparing an exhibit or a schedule that lists the property, with a breakdown between assets and debts (with community and separate property and obligations scheduled separately), and attaching the exhibit or schedule to the marital settlement agreement. In that case, the agreement should incorporate the exhibit or schedule by reference. The dispositive provisions then might simply cross refer to the property as described in the schedule (e.g., "Wife shall receive all securities listed under Item 4 of Schedule A.").

The degree of specificity used in describing the property is largely a factor of the complexity of the property division and the personal preference of the attorneys involved in the transaction. As a general rule, the property need be described only in sufficient detail to identify it. For example, the list may include the legal description or common designation of real property, although a legal description of realty should always be included if it is anticipated that the agreement will be recorded. A listing that includes motor vehicles would commonly include the year and make of the vehicle, along with its license number. The vehicle identification number may also be included. Once the item has been described with specificity, any additional references elsewhere in the agreement to that item may consist of a more abbreviated description of the item.

[b] Characterization of Property

Each item of property owned by either or both spouses should be characterized by type as community, quasi-community, or separate property. Characterization is important because the agreement should dispose of all of the community and quasi-community assets and liabilities of the parties [*see Fam. Code § 2500 et seq.*].

Although a marital settlement agreement need not list or otherwise cover the separate property of each of the spouses, it should identify that property for several important reasons. First, this permits the parties to confirm that the property is separate property. Second, a disclosure of the existence of the property may be important if the property is later claimed to be community property. Finally, spouses must disclose the existence of all assets in which they have, or may have an interest, and liabilities for which they are or may be liable, regardless of the characterization of the asset or liability as community, quasi-community, or separate. This latter disclosure is required to be made on special Judicial Council disclosure forms [*see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure*, 2nd ed., chs. 92, *Petitioning for Dissolution or Legal Separation*, and 111, *Pretrial Procedures* (Matthew Bender)], but the parties also may wish to make such a disclosure in the marital agreement [*see Fam. Code §§ 2100 et seq., 2104(c)*].

For a complete discussion of community, quasi-community, and separate property, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 20, *Community Property: General Characterization and Division Principles* (Matthew Bender).

[c] Dual Character Property

If an item of property has a dual character, that is, it has both separate and community or quasi-community property components, the marital agreement should reflect the apportioned interests. This may be accomplished by creating an individual category in which to list the property, or, by listing the property under each applicable category and setting forth the fractional share or percentage of the property applicable to that category. For example, if 40 percent of an asset is the wife's separate property, the paragraph describing her separate property should contain the following or a similar entry: "40 percent of the single-family residence described as _____, more particularly described in Exhibit _____, which is attached to this Agreement and incorporated by reference." In that instance, there would need to be a corresponding entry under the community property listing for the remaining fractional share of the same property.

For discussion of issues related to dual character property and a sample worksheet for apportioning interests, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 21, *Special Property Characterization and Division Issue* (Matthew Bender).

[d] Description of Debts

[i] In General

All debts for which either or both of the parties are personally liable should be listed in the agreement or in an attached exhibit or schedule. For example, the list should include any outstanding credit card accounts; department store accounts; other credit accounts; real estate loans; automobile loans; loans secured by household appliances, furniture, or other personal property; medical bills; business loans; obligations on which one or both of the parties have signed as cosigner or guarantor; tax obligations; liens on real or personal property (if there is also personal liability); unsatisfied judgments; pending or potential lawsuits; and any other present or contingent liability that should be satisfied or divided between the parties.

Parties are now required to disclose all liabilities for which they are or may be liable, using special Judicial Council disclosure forms [*Fam. Code §§ 2104, 2105; see In re Marriage of Burkle (2006) 139 Cal. App. 4th 712, 746-748, 43 Cal. Rptr. 3d 181* (statutory disclosure requirements apply only when parties are making agreement that contemplates judgment dissolving marriage, not reconciliation agreement)]. Their agreement should also set forth these liabilities and

be consistent with the disclosure forms [see *Fam. Code* §§ 2104(c), 2105(b)]. For a general discussion of disclosure requirements, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chs. 92, *Petitioning for Dissolution or Legal Separation*, and 111, *Pretrial Procedures* (Matthew Bender).

[ii] Information Obtained by Counsel

Before preparing the list, counsel should elicit from the client all of the relevant facts concerning the debts, including the party or parties liable, the name and address of the creditor, the amount unpaid, the due date or dates of the debt, the interest rate, whether any amounts are past due, the security for secured loans, and the nature of the debt as a community or separate liability. If the liability is contingent, counsel should determine the potential liability of each spouse.

[iii] Preparation of Entries

Although it is important that the attorney obtain all relevant information concerning the debts, it is normally not necessary or desirable to set forth all of that information in the agreement. Instead, counsel should simply provide sufficient information to identify the debt so that it is clear what debts the parties wish to include in the agreement. In most cases, an entry for a particular debt should include the following, to the extent applicable: the name of the creditor; the account number; the balance due; and the means by which the debt is secured. If the debt is secured by a community or separate asset that is listed elsewhere in the agreement (or in an attached exhibit or schedule), the debt entry should briefly describe the security and cross-refer to the earlier description of the asset.

[2] FORM

Reference to Schedule Listing Assets and Obligations

Community [and Quasi-Community] Assets

All of the community [and quasi community] assets owned jointly by the parties are set forth in Schedule _____ [number or letter], which is attached to this Agreement and incorporated by reference.

Separate Assets

All of the separate assets owned by each party individually are set forth in Schedules _____ and _____, which are attached to this Agreement and incorporated by reference.

Community [and Quasi-Community] Obligations

All of the community [and quasi-community] debts of the parties are set forth in Schedule _____, which is attached to this Agreement and incorporated by reference.

Separate Obligations

All of the separate debts of each party are set forth in Schedules _____ and _____, which are attached to this Agreement and incorporated by reference

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution &
DivorceProperty DistributionClassificationGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 121 PROVISIONS FOR DIVISION OF PROPERTY
PART IV. FORMS

1. General Provisions for Dividing Property

34-121 California Legal Forms--Transaction Guide § 121.201

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.201 Confirmation of Separate Assets and Obligations

[1] Comment

[a] Use of Form

The forms set forth in [2] and [3], *below*, set forth the separate assets and obligations of each of the spouses. The property and debts being confirmed as separate may either be listed directly in the agreement or in a schedule.

These forms include language indicating that each spouse confirms to the other spouse all right, title, and interest in the separate property of the other spouse. Form [3] (separate debts) includes indemnity and hold harmless provisions to protect the nondebtor spouse against any claim of liability for the debt. These forms are for use to confirm property and debts that have always been the separate asset or obligation of the indicated spouse; not community property or debts that will become the separate asset or obligation of a spouse on division.

Although neither spouse has any interest in the separate property of the other [*see Fam. Code § 752*] and separate property is not subject to division by the court in a marital dissolution or legal separation action [*see Fam. Code §§ 2550, 2551*], there are advantages to confirming each party's separate property in a marital settlement agreement. First, if the separate property provision contains the language discussed above, it should forestall a later claim by a party regarding the character of the other party's separate property. Second, if the property is later claimed to be community property and the agreement sets forth all of the material facts concerning the existence or source of the property that would have a bearing on its characterization as separate or community property, this information should help dispel any claim that the owner failed to satisfy his or her duty to disclose the existence of the community property [*see Fam. Code §§ 1100(e), 2100 et seq.; but see Fam. Code § 2650* (jurisdiction of court to divide parties' separate interests in jointly held property, at request of party)]. For a general discussion of spouse's duty to disclose the existence of community and separate assets and liabilities and of special Judicial Council forms for that disclosure, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapters 92, *Petitioning for Dissolution or Legal Separation*, and 111, *Pretrial Procedures* (Matthew Bender).

[b] Joint Tenancy or Tenancy in Common Property

The parties might own property as true joint tenants or as true tenants in common (and not community property). If so, the interest of each spouse in the property is a separate property interest. The spouses may set forth these interests under their respective descriptions of separate property, or may create an individual listing category for it. It is recommended that these interests be set forth under each spouse's separate property listing. For example, the following entry could appear under the paragraph entitled "Husband's Separate Property": "That certain undivided one-half interest in joint tenancy in the house and lot located at _____, more particularly described in Exhibit _____, which is attached to this Agreement and incorporated by reference." Any subsequent reference to that interest, or to the wife's corresponding one-half interest, could cross-refer to the first description.

The parties must distinguish true joint tenancy or tenancy in common property from any property held in one of those joint forms that is actually divisible as community property on dissolution or legal separation because of the operation of the "joint form-community property" presumption [*see Fam. Code §§ 2580-2581*]. Property held in "joint form" that the parties agree is actually divisible community property should be set forth under the community property listing. For a complete discussion of the "joint form--community property presumption" and the means of its rebuttal, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 20, *Community Property: General Characterization and Division Principles* (Matthew Bender).

[2] FORM--Confirmation of Separate Assets**Confirmation of Separate Assets**

Confirmation of Separate Assets

[Husband or Wife] confirms to [Wife or Husband] all of [her/his] right, title, and interest in and to the assets set forth [below or in Schedule _____]. [Husband or Wife] acknowledges that all of these assets are the sole and separate property of [Wife or Husband], and that [he/she] has no community property interest in any of them. [Husband or Wife] agrees not to assert any claim to any of these assets and releases any right or interest in them. [Husband or Wife] further agrees to execute any and all documents that may be required to establish or confirm [Wife's or Husband's] sole ownership of any listed asset.

[Set forth the applicable provisions below as next paragraphs of agreement, or in separate schedule.]

Real property located at _____ [street address or other location], and more particularly described _____ [as follows: _____ (legal description) or in Exhibit _____, which is attached to this Agreement and incorporated by reference.

[EITHER]

The following household furniture, furnishings, appliances: _____

[OR]

Any and all household furniture, furnishings, appliances, clothing, and other personal effects situated in or about [Wife's or Husband's] residence at _____ [address].

Jewelry, antiques, art, coin collections, and other similar items as follows: _____

The following motor vehicles: _____

Savings account [number], at [financial institution].

Checking account [number], at [financial institution].

Account [number], at [credit union or other financial institution holding deposit account].

The expected refund on [tax return].

Life insurance policy [number] issued by [company] on the life of _____ [named insured], having a death benefit of \$_____.

The following stocks, bonds, secured notes, mutual funds, and other investment instruments: _____

All interest in and benefits of [defined benefit plan] to which [Wife or Husband] is or shall be entitled on account of [her/his] past, present, and future employment at [employer], including survivor benefits;

All interest in and benefits of [defined contribution plan] to which [Wife or Husband] is or shall be entitled on account of [her/his] past, present, and future employment at [employer], including survivor benefits;

[Individual Retirement Account (IRA) or other private retirement plan] held by [trustee, financial institution, or company], account [number], in the name of [owner].

The following accounts receivable and unsecured notes: _____

The business located at _____ [address], organized as a _____ [capacity], and doing business under the name of _____ [business name];

[other assets].

[3] FORM--Confirmation of Separate Debts

Confirmation of Separate Debts

Confirmation of Separate Debts

Husband and Wife confirm that the debts set forth _____ [below or in Schedule _____] are the separate debts of _____ [Wife or Husband].

The student loan to [lender]; Current Principal Balance: \$[amount];

The following taxes that have been assessed but remain unpaid: _____ [taxing authority and due date];
Amount Due: \$_____;

Unpaid _____ [child or spousal or family] support in the total sum of \$_____ due to [payee] [for the benefit of the children _____ (names) and] covering the period

_____ [beginning date] through _____ [ending date];

The unsecured loan to [creditor]; Current Principal Balance: \$_____;

The following credit cards: [card and issuer]; [acct number]; \$[current balance];

The following charge accounts: [charge account]; [acct number]; \$[current balance];

To [creditor] for [purpose]; Amount Due: \$_____.

[Wife or Husband] agrees (1) to indemnify and hold [Husband or Wife] harmless from the _____ [above debts or debts set forth in Schedule _____], and (2) to defend _____ [Husband or Wife], at [her/his] own expense, against any claim, action, or proceeding that is hereafter brought seeking to hold [Husband or Wife] liable on account of these debts, including the payment of reasonable attorney fees incurred by [Husband or Wife] in defense of any such claim, action, or proceeding.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General
Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property
Distribution Characterization General Overview Family Law Marital Termination & Spousal Support Dissolution &
Divorce Property Distribution Characterization Separate Property



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 121 PROVISIONS FOR DIVISION OF PROPERTY
PART IV. FORMS

1. General Provisions for Dividing Property

34-121 California Legal Forms--Transaction Guide § 121.202

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.202 Division of Community Assets

[1] Comment

The form set forth in [2], *below*, is for use to divide all or some of the community (and quasi-community) estate between the parties in kind. Assets can be allocated to either Husband or Wife. Each party's allocation can be placed either directly into the agreement or into schedules.

The clause contains optional language providing that the property is being divided equally. Further, it makes the transfer subject to existing encumbrances and liens. It also contains an optional provision relating to providing security for the division. Finally, it transfers any insurance on the property to the party receiving the property.

There are other property division dispositions that may be used for community assets that are not to be assigned to one party or the other. For example, an asset may be sold, either to a third party or to the other party, or made subject to an option or to a deferred sale. A pension or other retirement or employer-provided asset may be divided pursuant to a Qualified Domestic Relations Order [see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 213, *Employee Benefits Provisions in Marital Settlement Agreements*].

[2] FORM

Division of Community Assets

Division of Community Assets

Husband and Wife agree that their community [and quasi-community] assets shall be divided between them as set forth [below or in Schedules ____ and ____]. [The parties further agree that this Agreement effects an equal division of their community (and quasi-community) property.]

Each party releases and transfers and assigns to the other as his or her sole and separate property, all right, title, and interest in and to the assets listed [below or in Schedules ____ and ____]. Each further agrees to execute any and all documents that may be required to establish or confirm the other party's sole ownership of any listed asset.

[Set forth the applicable provisions below as next paragraphs of agreement, or in separate schedule.]

Assets Assigned to Wife

Real property located at _____ [street address or other location], and more particularly described _____ [as follows: _____ (legal description) or in Exhibit _____, which is attached to this Agreement and incorporated by reference.

[EITHER]

The following household furniture, furnishings, appliances: _____

[OR]

Any and all household furniture, furnishings, appliances, clothing, and other personal effects situated in or about [Wife's or Husband's] residence at _____ [address].

Jewelry, antiques, art, coin collections, and other similar items as follows: _____

The following motor vehicles: _____

Savings account [number], at [financial institution].

Checking account [number], at [financial institution].

Account [number], at [credit union or other financial institution holding deposit account].

The expected refund on [tax return].

Life insurance policy [number] issued by [company] on the life of _____ [named insured], having a death benefit of \$ _____.

The following stocks, bonds, secured notes, mutual funds, and other investment instruments: _____

All interest in and benefits of [defined benefit plan] to which [Wife or Husband] is or shall be entitled on account of [her/his] past, present, and future employment at [employer], including survivor benefits;

All interest in and benefits of [defined contribution plan] to which [Wife or Husband] is or shall be entitled on account of [her/his] past, present, and future employment at [employer], including survivor benefits;

[*Individual Retirement Account (IRA) or other private retirement plan*] held by [*trustee, financial institution, or company*], account [*number*], in the name of [*owner*].

The following accounts receivable and unsecured notes: _____

The business located at _____ [*address*], organized as a _____ [*capacity*], and doing business under the name of _____ [*business name*];

[*other assets*].

Assets Assigned to Husband [*Repeat the applicable provisions above.*]

Encumbrances

With regard to all property assigned under this Agreement, except as may otherwise be specifically provided in this Agreement (including in Paragraphs _____ through _____ regarding payment of community obligations), the assignee spouse assumes all encumbrances and liens on the property and agrees to indemnify and hold the other party free and harmless from any claim or liability that the other party may suffer or may be required to pay because of those encumbrances or liens, including the payment of reasonable attorney fees.

Insurance

The party assigned an insured asset shall, as of the effective date of this Agreement, receive the benefits and protections of that insurance, shall be considered the owner of the insurance policy, and shall pay all policy premiums coming due on and after that date, for so long as the policy is maintained in force. A party assigned insured property must notify the insurance carrier for the property concerning the change in ownership within [*period of time*] after the execution of this Agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral

OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty

DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution &

DivorceProperty DistributionClassificationGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 121 PROVISIONS FOR DIVISION OF PROPERTY
PART IV. FORMS

1. General Provisions for Dividing Property

34-121 California Legal Forms--Transaction Guide § 121.203

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.203 Allocation of Community Debts

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, is for use to divide all or some of the community (and quasi-community) obligations between the parties in kind. Debts can be allocated to either Husband or Wife. Each party's allocation can be placed either directly into the agreement or into schedules. The form contains optional language providing that the debts are being divided equally.

There are other debt allocation dispositions that may be used for community obligations that are not to be assigned to one party or the other. For example, particular property may be sold and the proceeds used to pay community obligations [*see* § 121.292]. Clauses effecting these other dispositions are found in Subpart 7.

If a specific asset is encumbered, the party receiving the asset should ordinarily assume the debt, and the parties may wish to list such a debt as part of the award of the corresponding asset. For example, if one party is assigned an automobile with a value of \$4,500, he or she should also assume the debt secured by the automobile.

[b] Assumption and Indemnification

This form also provides for the spouse to whom a debt is allocated to indemnify the other and to hold the other harmless on any claim against the indemnitee spouse based on the debt. The right of indemnity extends to attorney fees incurred in defending against the claim, whether or not the claim is meritorious or successful. Although an indemnity provision will not relieve the nonassuming spouse from liability to a creditor, [*see Fam. Code* § 910 (liability of community property for debts of spouses); *see also Code Civ. Proc.* § 410.70 (when defendants are jointly and/or severally liable, court may proceed against any defendant as though he or she were only defendant); *Civ. Code* § 1457], it will provide some measure of recourse against the other spouse for any payments that the nonassuming spouse may have to make to

the third party.

[2] FORM

Allocation of Community Debts

Allocation of Community Debts

Husband and Wife agree that their community [and quasi-community] debts and obligations shall be allocated between them as set forth _____ [below or in Schedules ____ and ____]. *[Add if desired: The parties further agree that this Agreement effects an equal division of their community (and quasi-community) debts and obligations.]*

[Set forth the applicable provisions below as next paragraphs of agreement, or in separate schedule.]

Debts Allocated to Wife

The student loan to _____ [lender]; Current Principal Balance: \$_____ [amount];

The following taxes that have been assessed but remain unpaid: _____ [taxing authority and due date];
Amount Due: \$_____;

Unpaid _____ [child or spousal or family] support in the total sum of \$_____ due to [payee] [for the benefit of the children _____ (names) and] covering the period _____ [beginning date] through _____ [ending date];

The unsecured loan to _____ [creditor]; Current Principal Balance: \$_____;

The following credit cards: _____ [card and issuer]; _____ [acct number]; \$_____ [current balance];

The following charge accounts: _____ [charge account]; _____ [acct number]; \$_____ [current balance];

To _____ [creditor] for _____ [purpose]; Amount Due: \$_____.

Wife agrees to (1) indemnify and hold Husband harmless from the _____ [above debts or debts set forth in Schedule ____], and (2) to defend Husband, at her own expense, against any claim, action, or proceeding that is hereafter brought seeking to hold Husband liable on account of these debts, including the payment of reasonable attorney fees incurred by Husband in his defense of any such claim, action, or proceeding.

Debts Allocated to Husband *[Repeat the applicable provisions above.]*

Husband agrees (1) to indemnify and hold Wife harmless from the _____ [above debts or debts set forth in Schedule ____], and (2) to defend Wife, at his own expense, against any claim, action, or proceeding that is hereafter brought seeking to hold Wife liable on account of these debts, including the payment of reasonable attorney fees incurred by Wife in her defense of any such claim, action, or proceeding.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution &
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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 121 PROVISIONS FOR DIVISION OF PROPERTY
PART IV. FORMS

1. General Provisions for Dividing Property

34-121 California Legal Forms--Transaction Guide § 121.204

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.204 Reimbursement of Separate Property Contributions to Acquisition of Property

[1] Comment

The form set forth in [2], *below*, is for use if one or both of the spouses wish to be reimbursed for contributions of separate property to acquisition of community property. It is intended to be used in connection with the division of a specific community asset. The form in [3], *below*, is an alternative provision by which a party expressly waives the right to reimbursement in connection with the acquisition of a specific asset. The form in [4], *below*, is a waiver of a party's right to reimbursement for his or her separate property contributions to the acquisition of the other party's separate property.

In the division of community property on marital dissolution or legal separation, unless a spouse has made a written waiver of the right to reimbursement or signed a writing that has the effect of a waiver, that spouse is entitled to reimbursement for his or her separate property contributions to the acquisition of the property to the extent he or she traces the contributions to a separate property source [*Fam. Code* § 2640(b); *see, e.g., In re Marriage of Weaver* (2005) 127 Cal. App. 4th 858, 866-870, 26 Cal. Rptr. 3d 121 (spouse who transferred real property from separate property to joint tenancy with other spouse is entitled to reimbursement unless written statement, apart from joint tenancy deed, specifically waives right to reimbursement); *In re Marriage of Lange* (2002) 102 Cal. App. 4th 360, 365, 125 Cal. Rptr. 2d 379; *In re Marriage of Carpenter* (2002) 100 Cal. App. 4th 424, 427, 122 Cal. Rptr. 2d 526]. For discussion of important limitations on the application of this section based on when the subject property was acquired and when the proceeding for dissolution or legal separation was commenced, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapters 20, *Community Property: General Characterization and Division Principles*, and 23, *Debt Liability and Division and Related Reimbursement Issue* (Matthew Bender) [*see also Fam. Code* § 2580; *In re Marriage of Heikes* (1995) 10 Cal. 4th 1211, 1225, 44 Cal. Rptr. 2d 155, 899 P.2d 1349 (reimbursement statute may not constitutionally be applied to property acquired before January 1, 1984); *In re Marriage of Bankovich* (1988) 203 Cal. App. 3d 49, 51, 249 Cal. Rptr. 713]. This form assumes that the parties will want to limit any right to reimbursement to that which exists by law.

In the absence of a written agreement between the parties, the spouse who has contributed separate property to the acquisition of community property is not entitled to interest or an adjustment for change in monetary values. Further, the amount reimbursed may not exceed the net value of the property at the time of the division. Separate property contributions that may be reimbursed include down payments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement. On the other hand, payments of interest on the property and payments made for maintenance, insurance, or taxation of the property are not subject to reimbursement [Fam. Code § 2640(a), (b)]. Further, the payment of community credit-card debt to enable the parties to qualify for a loan to purchase property is not a reimbursable "contribution to the acquisition of property" [*Nicholson v. Sparks (In re Marriage of Sparks)* (2003) 104 Cal. App. 4th 289, 292-297, 127 Cal. Rptr. 2d 882] .

A spouse who has contributed his or her separate property to the acquisition of the other spouse's separate property during the marriage must be reimbursed for that contribution unless there has been a transmutation in writing [see Fam. Code § 850 et seq.; see also Ch. 112, *Postnuptial Agreements*] or a written waiver of the right to reimbursement [Fam. Code § 2640(c)]. Unless otherwise agreed in writing, the amount reimbursed is to be without interest or adjustment for a change in monetary values and may not exceed the net value of the acquired property at the time of the property division [Fam. Code § 2640(c)].

[2] FORM--Reimbursement of Separate Property Contributions to Community Property

Reimbursement of Separate Property Contributions to Community Property

Reimbursement of Separate Property Contributions

_____ [Wife or Husband] has made contributions in the amount of \$_____ from [her/his] separate property to acquisition of _____ [specify asset], which is a community asset of the parties. In connection with the division of that asset, as provided in Paragraph _____ of this Agreement, _____ [Wife or Husband] shall be reimbursed for the above contributions in the following manner: _____ [describe method of reimbursement, e.g., _____ (Husband or Wife) agrees to pay to _____ (Wife or Husband) \$_____ out of _____ (Husband's or Wife's) _____ (specify type of property from which payment will be made, e.g., separate property)].

[3] FORM--Waiver of Right to Reimbursement for Contributions to Community Property

Waiver of Right to Reimbursement for Contributions to Community Property

Waiver of Reimbursement for Separate Property Contributions

_____ [Wife or Husband] has made contributions in the amount of \$_____ from [her/his] separate property to acquisition of _____ [specify asset], which is a community asset of the parties. Notwithstanding these contributions, _____ [Wife or Husband] waives the right to be reimbursed under Family Code Section 2640 for these contributions and agrees that there shall be no such reimbursement.

[4] FORM--Waiver of Right to Reimbursement for Contributions to Separate Property

Waiver of Right to Reimbursement for Contributions to Separate Property

Waiver of Reimbursement for Separate Property Contributions

_____ [Wife or Husband] has made contributions in the amount of \$_____ from [her/his] separate property to acquisition of _____ [specify asset], which is the separate property of _____ [Husband or Wife]. Notwithstanding these contributions, _____ [Wife or Husband] waives the right to

be reimbursed under *Family Code Section 2640* for these contributions and agrees that there shall be no such reimbursement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General
Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property
Distribution Characterization General Overview Family Law Marital Termination & Spousal Support Dissolution &
Divorce Property Distribution Classification General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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1. General Provisions for Dividing Property

34-121 California Legal Forms--Transaction Guide § 121.205

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.205 Equalizing Payment

[1] Comment

[a] Use of Form

The form in [2], *below* may be used to equalize the division of the marital assets and debts if one of the spouses is to receive more than half of the community property (for example, if one spouse is to receive the family residence and it is the primary marital asset). The equalizing payment may be made either in a lump sum or in installments. If to be made in installments, then proper security should be provided, such as a first deed of trust on real property (such as the family residence) in the possession of the spouse executing the note. For comprehensive coverage of promissory notes and deeds of trust in general, see Ch. 25A, *Security Instruments for Real Estate Financing*. For discussion of promissory notes in relation to the "equal division" requirement for community property divisions on marital dissolution, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 20, *Community Property: General Characterization and Division Principles* (Matthew Bender).

[b] Tax Consequences

The transfer of property between spouses generally does not result in recognition of gain or loss for income tax purposes [*I.R.C. § 1041(a)(1)*]. The same rule applies to transfers between former spouses, provided the transfer is incident to divorce [*I.R.C. § 1041(a)(2), (c)*]. When one spouse takes more than half of the community property, compensation to the other spouse with a promissory note or with separate property is not a taxable event [see *In re Marriage of Bergman* (1985) 168 Cal. App. 3d 742, 762, 214 Cal. Rptr. 661 (abrogating *Carrieres v. Commissioner* (1975) 64 T.C. 959, *aff'd*, 552 F.2d 1350 (9th Cir. 977))].

An equalizing payment should be clearly specified as that; otherwise, the payments might be construed as spousal support and be subject to alimony tax treatment, meaning that they would be taxable income to the payee spouse and deductible to the payor spouse [see *I.R.C. §§ 71, 215*].

For further discussion of *Internal Revenue Code Section 1041*, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 160, *Tax Effects of Dissolution* (Matthew Bender).

[2] FORM

Equalizing Payment

Equalizing Payment

[For payment in lump sum:]

To equalize the overall division of the parties' community assets and obligations, _____ [Husband or Wife] agrees to pay to _____ [Wife or Husband] the _____ in a single payment to be made on or before _____ [date]. _____ [Husband or Wife] shall deliver to _____ [Wife or Husband], concurrently with the execution of this Agreement, a promissory note evidencing the obligation. [Add if desired: The note shall be secured by _____ (security property).]

[For payment in installments:]

To equalize the overall division of the parties' community assets and obligations, _____ [Husband or Wife] agrees to pay to _____ [Wife or Husband] the sum of \$ _____. _____ [Wife or Husband] acknowledges the receipt of \$ _____ [amount of down payment] as part payment of [her/his] interest. The balance of the equalizing payment, plus interest at the rate of _____ percent per annum, shall be paid in monthly installments of \$ _____ [installment amount]. The first installment shall be due and payable on _____ [date], and the remaining monthly installments shall be due and payable on the same day of each succeeding month until the entire balance of the equalizing payment, plus interest, has been paid in full. _____ [Husband or Wife] shall deliver to _____ [Wife or Husband], concurrently with the execution of this Agreement, a promissory note evidencing the obligation. [Add if desired: The note shall be secured by _____ (security property).]

[Continue with:]

The payment(s) provided above [is or are] intended solely to effect an equal division of the parties' community property and obligations and [is or are] in no way intended as spousal support. Therefore, the principal amount shall not be taxable to _____ [support payee] nor deductible to _____ [support payor].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionMarital Liabilities



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1. General Provisions for Dividing Property

34-121 California Legal Forms--Transaction Guide § 121.206

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.206 Division of After-Discovered Assets and Debts

[1] Comment

[a] Use of Form

The form *set forth in § 121.206[2]* provides that any community or quasi-community asset discovered after the execution of the marital settlement agreement will be divided equally between the parties, unless one of them knew of the asset's existence when the agreement was executed. In that case, the form provides alternate dispositions, at the election of the other party (who did not know about the asset): (1) equal division; (2) the fair market value of the party's share, plus interest from the effective date of the agreement, or (3) the fair market value of the party's share, plus interest from the date of the asset's discovery. The form thereby places the risk of loss of willfully concealed property on the concealing party.

The *form in § 121.206[3]* provides for joint responsibility for the payment of any community debt that is discovered after the execution of the marital settlement agreement, as long as the debt arose from the conduct of both parties, or from the conduct of one party and the community benefitted from the conduct. Otherwise, the debt becomes the separate obligation of the party who was aware of it.

[b] Duty of Good Faith

In transactions between themselves, a husband and wife are subject to the rules that govern the actions of persons occupying confidential relations with each other [*Fam. Code § 721(b)*]. Their relationship is a fiduciary relationship. It subjects both spouses to a duty of the highest good faith and fair dealing and prohibits either from taking any unfair advantage of the other [*Fam. Code § 721(b)*; see *In re Marriage of Burkle* (2006) 139 Cal. App. 4th 712, 730-736, 43 Cal. Rptr. 3d 181 (*Fam. Code § 721(b)* prohibits taking of *unfair* advantage but does not prohibit transaction in which benefits or advantages are obtained by both spouses and neither gains *unfair* advantage)]. In their dealings with each other, the spouses are subject to the rights and duties that govern the relations of nonmarital business partners as

provided in *Corp. Code* §§ 16403, 16404, and 16503 [see *Fam. Code* § 721(b) (legislatively abrogating holding of *In re Marriage of Duffy* (2001) 91 Cal. App. 4th 923, 111 Cal. Rptr. 2d 160, to extent in conflict with accompanying statement of legislative intent in Stats. 2002, ch. 310, § 2); see also *In re Marriage of Leni* (2006) 144 Cal. App. 4th 1087, 1092-1094, 50 Cal. Rptr. 3d 886 (reference in *Fam. Code* § 721(b) to *Corp. Code* §§ 16403, 16404, and 16503 does not broaden spouses' duties and obligations to include those of corporate officers and directors, beyond providing access, information, and accounting)]. The fiduciary duties of the spouses continue until their community property is divided, by the spouses themselves or by the court [*Fam. Code* §§ 1100(e), 2102].

Specific disclosures regarding all assets, liabilities, income, and expenses must be made by each spouse before entering into any agreement for the resolution of property or support issues, absent a court order for good cause or the parties' stipulation to a mutual waiver of the final declaration of disclosure [see *Fam. Code* §§ 2105(a), (d), 2106]. Specific disclosures also are required in connection with community property [see *Fam. Code* § 1100(e)]. Remedies for breach of the fiduciary duties of spouses in connection with community property are set forth by statute, as discussed in Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 24, *Management and Control of Property* (Matthew Bender) [see also *Fam. Code* § 1101].

[2] FORM--Division of After-Discovered Assets Division of After-Discovered Assets

Division of After-Discovered Assets

Omitted Assets

If, after the execution of this Agreement, any asset is discovered to exist that was not listed in and disposed of by this Agreement and that would have been community or quasi-community property of the parties, that omitted asset shall be divided equally between the parties. If, however, the existence of the asset was known to one of the parties at the time of execution of this Agreement, the party with that knowledge shall transfer or pay to the party without knowledge of the asset ("the other party"), at the other party's option, one of the following: (1) if the asset is reasonably susceptible to division, a portion of the asset equal to the other party's interest in it; (2) the fair market value of the other party's interest in the asset on the effective date of this Agreement, plus interest at the legal rate from the effective date to the date of payment; or (3) the fair market value of the other party's interest in the asset on the date on which the other party discovers the existence of the asset, plus interest at the legal rate from the discovery date to the date of payment. This provision will not be deemed to impair the availability of any other remedy arising from nondisclosure of community assets.

[3] FORM--Division of Omitted Debts

Division of Omitted Debts

Division of Omitted Debts

The parties acknowledge that they have provided in this Agreement for the payment of all community debts of which each is aware. Any debt, claim, or obligation (including the cost of defending against it) not provided for in this Agreement and unknown by the parties at the time of the preparation of this Agreement, will be deemed a joint community obligation as long as the debt, claim, or obligation arose from the conduct of both parties, or from the conduct of one party and the marital community benefitted from that conduct, occurring during the marriage but before the effective date of this Agreement. If, however, an omitted claim, debt, or obligation arose from the conduct of only one party and the community did not benefit from it, then that claim, debt or obligation will be the sole and separate obligation of that party. This provision will not be deemed to impair the availability of any other remedy arising from nondisclosure of community debts.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution &
DivorceProperty DistributionClassificationGeneral OverviewFamily LawMarital Termination & Spousal
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1. General Provisions for Dividing Property

34-121 California Legal Forms--Transaction Guide § 121.207

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.207 Acknowledgment of Reliance on Spouse's Appraisal

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, states that one spouse is relying on an appraisal of property obtained by the other spouse. This provision is sometimes used if the party obtaining the appraisal is also in possession of the subject property (for example, real estate or a family business). The inclusion of the statement makes the basis of the valuation a part of the agreement. For coverage of the valuation of marital property, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 22, *Valuation of Property Interests* (Matthew Bender).

[b] Duty of Good Faith

Each spouse has a duty of the highest good faith and fair dealing with respect to the other spouse in the management and control of the community property, in accordance with the general rules governing fiduciary relationships that control the actions of persons having relationships of personal confidence [*see Fam. Code § 721(b)*]. This duty continues until the property has been divided by the parties or by a court [*Fam. Code §§ 1101(e), 2102*].

As part of the final declaration of disclosure [*see § 121.209*] that each party is required to furnish the other party before, or at the time of entering into an agreement for the resolution of property or support issues (absent a court order for good cause or the parties' stipulation to a mutual waiver of that declaration), each spouse must include all material facts and information regarding the valuation of all assets that are contended to be community or in which it is contended the community has an interest [*see Fam. Code § 2105(a), (b)(2), (d)*]. For a discussion of this and related disclosure requirements, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chs. 92, *Petitioning for Dissolution or Legal Separation*, and 111, *Pretrial Procedures* (Matthew Bender).

[2] FORM

Acknowledgment of Reliance on Spouse's Appraisal

Reliance on Appraisal

The parties acknowledge that in arriving at the division of property set forth in this Agreement, [Husband or Wife] is relying on the appraisal of [*specify asset, e.g., Wife's business*] dated _____. That appraisal was prepared by an appraiser employed by [Wife or Husband] and acting solely for the benefit of [Wife or Husband]. [Husband or Wife] has elected not to pursue [his/her] own appraisal based on [Wife's or Husband's] assurances that the appraisal was conducted in good-faith and represents a fair evaluation of the property.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
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34-121 California Legal Forms--Transaction Guide § 121.208

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.208 Waiver of Rights to Future Earnings and Acquisitions

[1] Comment

The form set forth in [2], *below*, is a marital settlement agreement provision waiving all rights of each party to earnings and other property received or acquired in the future by the other party. It may be included to inform the parties of their rights regarding future earnings and acquisitions.

[2] FORM

Waiver of Rights to Future Earnings and Acquisitions

Future Earnings and Acquisitions

The parties agree and acknowledge that all income, earnings, or other property received or acquired by Husband or Wife on or after _____ [date of separation or other date] is the sole and separate property of the receiving or acquiring party. Each party does forever waive, release, and relinquish all right, title, and interest in all income, earnings, or other property so received or acquired by the other.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Characterization General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Classification General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Property Settlements



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34-121 California Legal Forms--Transaction Guide § 121.209

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.209 Compliance With Family Code Disclosure Requirements

[1] Comment

The form in [2], *below*, affirms that both parties have complied with the disclosure requirements of the Family Code. In family law proceedings, each party is required to make full disclosures to the other concerning all assets in which that party has or may have an interest and all liabilities for which that party is or may be liable, regardless of the characterization of the asset or liability as community, quasi-community, or separate property [*see Fam. Code §§ 2100(c), 2102, 2104(c)*]. Special disclosure duties are imposed on spouses in connection with family law proceedings, and in the management and control of community property [*see Fam. Code § 2105*]. For a general discussion of these duties, and of disclosure forms that must be exchanged by the parties once family law litigation has commenced, and before or at the time the parties enter into an agreement during the litigation that settles property or support issues (other than temporary support), see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapters 24, *Management and Control of Property*, and 211, *Complete Marital Settlement Agreements* (Matthew Bender).

[2] FORM

Compliance With Family Code Disclosure Requirements

Compliance With Family Code Disclosure Requirements

Each party warrants to the other that the warrantor has complied with the service, filing, and exchange requirements of *California Family Code Section 2100 et seq.* with respect to Declarations of Disclosure, Schedules of Assets and Debts, and Income and Expense Declarations, and that his or her respective declarations and schedules set forth all required information. The information disclosed included, but was not limited to, all assets, liabilities, and obligations, income, earnings, accumulations, expenses, any investment opportunity, business opportunity, or other income-producing opportunity presenting itself after the date of separation but that resulted from any investment, significant business

activity outside the ordinary course of business, or other income-producing opportunity of either party from the date of marriage to the date of separation, inclusive, and concerning the operation or management of any business or business interest in which the community may have an interest. The parties are fully satisfied with the nature and extent of disclosure made.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General
Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property
Distribution Characterization General Overview Family Law Marital Termination & Spousal Support Dissolution &
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DIVISION VII: PERSONAL TRANSACTIONS
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1. General Provisions for Dividing Property

34-121 California Legal Forms--Transaction Guide § 121.210

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.210 Waiver of Final Declaration of Disclosure

[1] Comment

The form in [2], *below*, confirms that the parties waive the statutory requirement that final declarations of disclosure be exchanged [*see Fam. Code § 2105; see also § 121.208*]. The parties in a dissolution of marriage or legal separation may stipulate to a mutual waiver of the declaration of disclosure by execution of a waiver under penalty of perjury entered into in open court or by separate stipulation. The waiver must include all of the representations set forth in the form [*see Fam. Code § 2105(c)*].

[2] FORM

Waiver of Final Declaration of Disclosure

Waiver of Final Declaration of Disclosure

The parties waive the exchange of Final Declarations of Disclosure, as authorized by *Family Code Section 2105(d)*. The parties declare the following, under penalty of perjury under the laws of the State of California:

1. Both parties have complied with *Family Code Section 2104* and the preliminary declarations of disclosure have been completed and exchanged;
2. Both parties have completed and exchanged a current income and expense declaration, that includes all material facts and information regarding that party's earnings, accumulations, and expenses;
3. Both parties have fully complied with *Family Code Section 2102* and have fully augmented the preliminary declarations of disclosure, including disclosure of all material facts and information regarding the characterization of all assets and liabilities, the valuation of all assets that are contended to

be community property or in which it is contended the community has an interest, and the amounts of all obligations that are contended to be community obligations or for which it is contended the community has liability;

4. This waiver is knowingly, intelligently, and voluntarily entered into by each of the parties; and

5. Each party understands that this waiver does not limit the legal disclosure obligations of the parties, but rather is a statement under penalty of perjury that those obligations have been fulfilled. Each party further understands that noncompliance with those obligations will result in the court setting aside the judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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1. General Provisions for Dividing Property

34-121 California Legal Forms--Transaction Guide § 121.211

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.211 Reimbursement for Contributions to Education and Training

[1] Comment

In an action for dissolution of marriage or legal separation, the community must be reimbursed for community contributions to education or training of either party that substantially enhanced that party's earning capacity [*Fam. Code § 2641(b)(1)*]; *see Fam. Code § 2641(a)* ("community contributions to education or training" defined); *see also In re Marriage of Graham* (2003) 109 Cal. App. 4th 1321, 1324-1326, 135 Cal. Rptr. 2d 685 (attaining law degree does not as matter of law result in substantially enhanced earning capacity for purposes of *Fam. Code § 2641(b)(1)*)). Reimbursement is not limited to education or training that was received during the marriage; rather, the reimbursement obligation depends on whether community funds were used to pay for the education, even if the education took place before the marriage [*In re Marriage of Weiner* (2003) 105 Cal. App. 4th 235, 238-241, 129 Cal. Rptr. 2d 288]. The form in [2], *below*, provides for this reimbursement and establishes the amount to be reimbursed. As required by statute, the amount includes interest at the legal rate, accruing from the end of the calendar year in which the contributions were made [*Fam. Code § 2641(b)(1)*].

Reimbursement must be reduced or modified to the extent that circumstances render it "unjust," as prescribed by statute [*see Fam. Code § 2641(c)*]. Reimbursement is the exclusive remedy of the community or of a party for the education or training and any resulting enhancement of the earning capacity of a party. However, the effect of the education, training, or enhancement, or of the amount reimbursed, on the circumstances of the parties may be considered in setting spousal support [*Fam. Code § 2641(d)*]; *see Fam. Code § 4320(b)*; *see also* chs. Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., chs. 51, *Spousal Support Orders*, 214, *Spousal and Child Support Provisions in Marital Settlement Agreements* (Matthew Bender)].

This statutory right of reimbursement may be waived by an express written agreement of the parties to the contrary [*Fam. Code § 2641(e)*]. The form in [3], *below*, effects this waiver.

For a provision requiring that one spouse be reimbursed for his or her separate property contributions to the acquisition of community property, see § 121.204. For further discussion of all situations in which reimbursement is required or permitted in family law actions, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 23, *Debt Liability and Division and Related Reimbursement Issues* (Matthew Bender).

[2] FORM--Reimbursement for Contributions to Education and Training

Reimbursement for Contributions to Education and Training

Reimbursement of Contributions for Education or Training

Community property in the amount of \$_____ was contributed to [Husband's or Wife's] education and training, which resulted in [his/her] obtaining a [degree, credential, or certificate] that has substantially enhanced [his/her] earning capacity. [Husband or Wife] shall reimburse [Wife or Husband] for [her/his] share of this community expenditure by paying \$_____ to [Wife or Husband], out of [Husband's or Wife's] separate property. This amount represents half of the community property amount contributed plus interest at the legal rate from the end of [year], the year in which the contributions were made. [Wife or Husband] acknowledges that receipt of this amount is [her/his] exclusive remedy for the community contributions to [Husband's or Wife's] education and training.

[3] FORM--Waiver of Right of Reimbursement

Waiver of Right of Reimbursement

Waiver of Reimbursement of Contributions for Education or Training

Community property in the amount of \$_____ was contributed to [Husband's or Wife's] education and training, which resulted in [his/her] obtaining a [degree, credential, or certificate] that has substantially enhanced [his/her] earning capacity. The community shall have no right to reimbursement of any part of that contribution from [Wife or Husband], and each party hereby expressly waives any right to community reimbursement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral Overview



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1. General Provisions for Dividing Property

34-121 California Legal Forms--Transaction Guide §§ 121.212-121.219

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 121.212[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 121 PROVISIONS FOR DIVISION OF PROPERTY
PART IV. FORMS
2. Warranties

34-121 California Legal Forms--Transaction Guide § 121.220

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.220 Complete Disclosure of Community Assets and Obligations

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, is a warranty by each spouse to the other that all community assets and debts of which the warrantor has any knowledge have been listed in the agreement; that the warrantor neither has nor is entitled to entitled to any community assets that have not been disposed of by the agreement; and that the warrantor has not incurred any community debts or obligations other than those disposed of by the agreement.

[b] Related Provisions

The marital settlement agreement should contain a provision stating that neither party has made unauthorized gifts or other transfers of community property [*see Fam. Code § 1100(b)*], as illustrated in § 121.223. Further, the agreement should include a clause governing the handling of any community or quasi-community assets that are discovered after the execution of the agreement, including property that has been willfully concealed by one of the spouses [*see § 121.206*].

[c] Duty of Good Faith

As part of the fiduciary duty that exists between spouses [*see Fam. Code §§ 721(b), 1100(e), 2100 et seq.*] each spouse is required to make full disclosures to the other of all assets and liabilities in which the party has or may have an interest or obligation [*see Fam. Code § 2102*]. Special disclosure provisions, including the use of prescribed Judicial Council declarations of disclosure, are set forth by statute in connection with making an agreement to settle outstanding property or support issues, as discussed in § 121.11[1][b] and Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapters 92, *Petitioning for Dissolution or Legal Separation*, and 111, *Pretrial Procedures* (Matthew Bender). For further discussion of the fiduciary duty that exists between spouses, see Kirkland,

Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapter 24, *Management and Control of Property* (Matthew Bender).

[2] FORM

Complete Disclosure of Community Assets and Obligations

Warranty of Disclosure of Assets and Debts

Each party warrants to the other that (1) all community assets and debts of which he or she has any knowledge have been addressed in this Agreement, (2) that he or she is not possessed of or entitled to any community assets of any kind or description that have not been disposed of by this Agreement, and (3) that he or she has not incurred any community debts or obligations other than those disposed of by this Agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution &
DivorceProperty DistributionClassificationGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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34-121 California Legal Forms--Transaction Guide § 121.221

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.221 Warranty Against Additional Debts

[1] Comment

The form set forth in [2], *below*, is a warranty that each party has not incurred any debt that could result in liability against the other party, other than the debts listed in the marital settlement agreement. It may be set forth as a separate provision or combined with one of the other clauses governing the debts of the parties. For discussion of special disclosure provisions that apply to spouses, see § 121.11[1][b] and Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapters 92, *Petitioning for Dissolution or Legal Separation*, and 111, *Pretrial Procedures* (Matthew Bender).

[2] FORM

Warranty Against Additional Debts

Warranty Against Additional Debts

Each party warrants to the other that he or she has not incurred, and will not incur, any debt as to which the other is, or may become, liable, other than those debts addressed in this Agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Duties & Rights Debt Liability Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Characterization General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Classification General Overview



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34-121 California Legal Forms--Transaction Guide § 121.222

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.222 Disclosure of Value of Property

[1] Comment

The form in [2], *below*, is for use to affirm that each party has disclosed sufficient information regarding the value of all assets in which the community has an interest. Compliance can be either by disclosing the fair market value of the asset, or by disclosing sufficient information from which the fair market value may be determined by the other party. If an asset assigned to the warrantor is undervalued, or if an asset assigned to the warrantee is overvalued, then the warrantor is to pay to the warrantee one-half of the difference between the actual and the stated fair market values of the asset.

[2] FORM

Disclosure of Value of Property

Disclosure of Value of Assets

Each party warrants to the other that the warrantor has disclosed either the fair market value of the community [and quasi-community] assets described in this Agreement, or all material facts and information regarding the valuation of all assets that are contended to be community property or in which it is contended that the community has an interest. If either warrantor has willfully understated the fair market value of any asset assigned to him or her, or has willfully overstated the fair market value of any asset assigned to the other party, the warrantor shall pay to the warrantee a sum of money equal to one-half (1/2) of the difference between the stated and actual fair market values of the undervalued or overvalued asset. For purposes of this warranty, the actual fair market value of any undervalued or overvalued asset should be determined as of the effective date of this Agreement or the date of discovery, at the warrantee's option.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution &
DivorceProperty DistributionClassificationGeneral Overview



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2. Warranties

34-121 California Legal Forms--Transaction Guide § 121.223

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.223 Warranty Against Unauthorized Gifts and Transfers of Community Assets

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, contains a warranty provision stating that neither spouse has made an unauthorized gift of community property. A spouse may not make a gift of community personal property, or otherwise dispose of community personal property for less than fair and reasonable value, unless he or she obtains the written consent of the other spouse. Special restrictions are also imposed on the transfer of community real property [*Fam. Code* §§ 1100(b), 1102]. Because an unauthorized gift or other transfer will affect the amount of community property that is available for division between the spouses under a marital settlement agreement, each spouse should obtain the express warranty of the other that unauthorized gifts or other transfers have not been made within a stated period before the date of the agreement.

[b] Violations of Gift Restriction

Special rules apply with respect to voiding gifts or other transfers made in violation of statute [*see generally In re Marriage of Stephenson* (1984) 162 Cal. App. 3d 1057, 1071, 209 Cal. Rptr. 383 ; *Bank of California v. Connolly* (1973) 36 Cal. App. 3d 350, 377, 111 Cal. Rptr. 468 (decided under former Civ. Code § 5125(b))]. For discussion of these rules, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapter 24, *Management and Control of Property* (Matthew Bender).

[2] FORM

Warranty Against Unauthorized Gifts and Transfers of Community Assets

Warranty Against Unauthorized Gifts or Other Transfers

Each party represents and warrants to the other that he or she has not made any gifts of community personal property to any other person, or otherwise disposed of such property for less than fair and reasonable value, without the written consent of the other party [within the past ____ years]. Each party further represents and warrants that he or she has not sold, conveyed, encumbered, leased, or otherwise transferred any community real property of the parties or any interest in any community real property of the parties without the other party having joined in the instrument of transfer [within the past ____ years].

If it is subsequently determined that either party has made such a gift or other transfer [within the past ____ years], the party making the gift or transfer agrees to pay to the other party, on demand, a sum equal to the higher of (1) one-half of the fair market value of the property as of ____ [valuation date], plus interest at the rate of ____ percent per annum, or (2) one-half of the value of the fair market value of the property as of the date of discovery by the other party.

This Agreement shall not impair the availability, in a court of competent jurisdiction, of any other remedy arising from the undisclosed disposition of any property. [Add if desired: This provision shall not impair any Family Law Attorney's Real Property Lien that has been established under *Family Code Section 2033* if all procedural requirements of that statute have been met prior to the execution of this Agreement.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution &
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SupportDissolution & DivorceProperty DistributionClassificationGifts



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34-121 California Legal Forms--Transaction Guide § 121.224

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.224 No Dissipation of Community Assets

[1] Comment

The form in [2], *below*, contains a provision against dissipation or other waste of community assets. It provides that if the warrantor intentionally caused the dissipation in value of an asset after legal proceedings were commenced, he or she is to pay to the warrantee half of the difference between the current value of the asset and the value of the asset before it dissipated. For a warranty that the property described in the marital settlement agreement constitutes all of the property of the spouses, see § 121.220. If desired, that warranty and this form may be combined into one provision.

[2] FORM

No Dissipation of Community Assets

Warranty Against Dissipation of Community Assets

Each party represents to the other that there has been no intentional dissipation, waste, depletion, or destruction of community assets after the filing of the petition for dissolution of marriage. If it later appears the warrantor has caused a disposition of community property contrary to this warranty, the warrantor shall pay the warrantee one-half (1/2) of the difference between the actual fair market value of the asset and the fair market value of the asset measured, at the warrantee's election, (a) on the effective date of this Agreement; or (b) at the time the warrantee discovers the disposition. This Agreement shall not impair the availability of any other remedy arising from the disposition of any property.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General

OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionCharacterizationCommunity Property



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34-121 California Legal Forms--Transaction Guide §§ 121.225-121.229

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 121.225[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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3. Other Real Property Provisions

34-121 California Legal Forms--Transaction Guide § 121.230

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.230 Description of Real Property

[1] Comment

The form set forth in [2], *below*, contains descriptions of different types of real property assets. The descriptions may be inserted into a marital settlement agreement provision (or an attached exhibit or schedule) that describes or divides the property of the parties. No special form of description is required, although it is recommended that, in addition to a common (street) description, a legal description of the property also be included in an exhibit that is incorporated by reference, in case a party wishes to record the agreement. Including a full legal description is particularly important in the case of acreage, which may take a variety of physical configurations. Finally, a legal description should be included for any business real properties, especially in the case of large, irregular, or multiple parcels.

[2] FORM

Description of Real Property

[Use any of the following in any paragraph disposing of the real property of the parties:]

That certain real property situated in _____ [the City of _____, or an unincorporated area of] _____ County, California, and more particularly described [*either* as follows:
_____ (*insert legal description*) or in _____ (Exhibit or Schedule) _____, which is attached to this Agreement and hereby incorporated by reference].

[OR]

That certain single-family dwelling and lot located at _____ [*address, city, state*], held in the name of

[Husband or Wife].

[OR]

The family residence of the parties located at _____ [address, city, state], held in the names of Husband and Wife as [specify title, e.g., community property].

[OR]

That certain _____ percent interest in an apartment building and lot located at _____ [address, city, state], held in the name of [specify].

[OR]

That certain [number]-unit apartment building known as " _____," _____ [address], and the real property situated in _____ [the City of _____, or an unincorporated area of] _____ County, California, and more particularly described [either as follows: _____ (insert legal description) or in _____ (Exhibit or Schedule) _____, which is attached to this Agreement and hereby incorporated by reference].

[OR]

That certain warehouse and lot located at _____ [address, city, state] and more particularly described in [Exhibit or Schedule] _____, which is attached to this Agreement and hereby incorporated by reference.

[OR]

That certain vineyard property located in _____ [city], California, consisting of approximately [number] acres, and more particularly described in [Exhibit or Schedule] _____, which is attached to this Agreement and hereby incorporated by reference, together with: (1) all improvements constructed on that property [if desired, describe any significant improvements, e.g., including the freestanding single-story building and paved parking on the north side of the building], and (2) all items of personal property located in or used in connection with the operation of that property or the improvements constructed on it, and described in [Exhibit or Schedule] _____, which is attached to this Agreement and hereby incorporated by reference.

[OR]

That certain shopping center known as " _____," located at the intersection of _____ and _____ [street names] in _____, California, and more particularly described in [Exhibit or Schedule] _____, which is attached to this Agreement and hereby incorporated by reference.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General

OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionClassificationGeneral OverviewReal Property LawGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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3. Other Real Property Provisions

34-121 California Legal Forms--Transaction Guide § 121.231

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.231 Sale of Real Property to Third Party

[1] Comment

The forms set forth in [2] and [3], *below*, provide for the sale of community real property to a third party. Form [2] is a short form, and Form [3] is a long form. Either may be used in connection with the disposition of virtually any type of real property. Some common uses might be with respect to the family home, income-producing realty, or a vacation home.

The short form includes only a direction to sell the property and the disposition of the proceeds. The proceeds may be divided either equally or in specified unequal percents.

The long form sets forth all of the terms and conditions of sale. It provides for setting the initial asking price, either at the value as shown on the parties' Schedule of Assets and Debts (Judicial Council Form FL-142) or at a value to be agreed to subsequently within a specified time. If the property does not sell at that price after a specified time on the market, the parties may either agree to a specified percent reduction or to attempt to agree on a reduced asking price. The court is given the authority to resolve disputes over reducing the asking price and other terms and conditions of sale.

The long form also specifies the respective rights and responsibilities of the parties while the property is on the market and pending closing of a sale. One or both parties is given the right of occupancy. And one or both are given the responsibility for maintenance, and payment of mortgage, taxes, and insurance.

The long form also addresses the computation of the net proceeds of sale that are subject to division. Liens and other deductions from gross proceeds may be specified, and either or both parties may be given specified credits to be applied before the net proceeds are divided.

For a provision governing the deferred sale of the family residence, see § 121.232. For discussion of tax aspects of a sale of property to a third party, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 160, *Tax Effects of Dissolution* (Matthew Bender).

[2] FORM--Short Form

Sale of Real Property to Third Party--Short Form

Sale of _____ [*short identification of property, e.g., Family Home*]

The parties presently own as [*specify form of ownership, e.g., community property*] real property located at _____ [*specify street address*] in _____ County, California, and more particularly described [as follows: _____ (*legal description*) or in _____ (Exhibit or Schedule) _____, which is attached to this Agreement and hereby incorporated by reference]. This property is [*specify e.g., income-producing residential property or unimproved land or a vacation home or other*].

The parties agree that the property described above shall be immediately listed for sale with a licensed real estate broker and shall remain listed for sale until it is sold. After the sale and the satisfaction of all encumbrances and payment of reasonable sales expenses, the net proceeds shall be divided [equally between the parties or _____ percent to Husband and _____ percent to Wife].

[3] FORM--Long Form

Sale of Real Property to Third Party--Long Form

Sale of _____ [*short identification of property, e.g., Family Home*]

The parties presently own as [*specify form of ownership, e.g., community property*] real property located at _____ [*specify street address*] in _____ County, California, and more particularly described [as follows: _____ (*legal description*) or in _____ (Exhibit or Schedule) _____, which is attached to this Agreement and hereby incorporated by reference]. This property is _____ [*specify e.g., income-producing residential property or unimproved land or a vacation home or other*].

The parties agree that the property described above shall be immediately listed for sale with a licensed real estate broker and shall remain listed for sale until it is sold. The parties shall promptly execute all documents required to list the property for sale. If the parties are not able to agree on a real estate broker, either may apply to the court for appointment of a licensed broker. Both parties will cooperate with each other at all times to sign whatever further documents are necessary in order to keep the property listed for sale, and shall make the property available for showing to prospective purchasers.

Price and Terms

[*Use if parties will agree to terms and conditions of sale in future:*]

The parties shall mutually agree on the sale price and on any other terms and conditions of sale. If the parties are unable to agree on the initial asking price, they shall appoint an appraiser to determine the value of the property. If they are unable to agree on an appraiser, either party may apply to the court for an order appointing an appraiser. The value of the residence, as determined by the appraiser, shall be conclusively binding on the parties.

[OR: Use if terms and conditions of sale will be set forth in agreement:]

(i) The property shall be offered for sale at an initial asking price of \$_____, subject to the following terms and conditions: *[specify, e.g., all cash from buyer]*.

Mechanism for Change in Price and/or Terms

On receipt of an offer to purchase that does not meet the initial asking price or any term or condition of sale, both parties shall agree on whether to accept the terms of the offer or shall agree to the terms of a counteroffer. If the parties are unable to agree to accept the offer or to make a counteroffer to the proposed purchaser, either of them may apply to the court for an order directing the sale of the property, the sale price, and all terms and conditions of sale.

[Use if parties must agree on any changes in asking price or terms and conditions of sale:]

If no offer acceptable to the parties has been received within _____ days of the execution of the listing agreement, the parties shall mutually agree to adjust the price and/or the other terms and conditions of sale. If the parties are unable to agree on adjustments, either may apply to the court for an order setting a different asking price and/or other terms and conditions of sale.

[OR: Use if changes in asking price or terms and conditions of sale will be set forth in agreement:]

If no offer acceptable to the parties has been received within _____ days of the execution of the listing agreement, the parties shall reduce the price by _____ percent. This same procedure shall be repeated every _____ days until an acceptable offer is received. *[Add if desired: However, in no event shall the property be offered for sale for less than \$_____ (total amount of encumbrances on property or other minimum price).]*

Occupancy and Expenses Pending Sale

Until the property is sold, [(Husband or Wife) shall be entitled to the exclusive possession and use of the property or both parties shall have a right of possession and use of the property].

Until the property is sold, [Husband or Wife or both parties] shall be responsible for maintaining the property in good condition. If major repairs or improvements (such as a new roof) become necessary, [Husband or Wife] shall obtain the consent of [Wife or Husband], which consent shall not be unreasonably withheld, before making any repairs or improvements. The cost of maintenance, repairs, and improvements shall be [shared equally by the parties or paid by _____ (Husband or Wife) or paid _____ percent by Husband and _____ percent by Wife].

Until the property is sold, [(Husband or Wife) shall make all or each party shall pay half or Husband shall pay _____ percent and Wife shall pay _____ percent] of the required monthly mortgage payments and payments of property taxes and assessments against the property. If [Husband or Wife or either party] fails to make a required mortgage or property tax payment, [Wife or Husband or the other party] shall have the right to make the payment directly and shall be entitled to reimbursement from [Husband or Wife or the defaulting party] for the payment.

Until the property is sold, [Husband shall pay or Wife shall pay or each party shall pay half of or Husband shall pay

_____ percent and Wife shall pay _____ percent of] the cost to maintain in force a policy of insurance of a type and in an amount sufficient to protect the parties against loss by fire or other casualty and loss by virtue of liability to third persons resulting from ownership of the property. Both parties shall be named insureds under the policy. If [Husband or Wife or either party] fails to pay to maintain the insurance in force, [Wife or Husband or the other party] shall have the right to secure an appropriate policy and shall be entitled to reimbursement from [Husband or Wife or the defaulting party] for sums expended in preserving the insurance in force that should have been paid by [Husband or Wife or the defaulting party].

Distribution of Proceeds of Sale

On sale of the property, the net proceeds of sale shall be distributed [equally to the parties or _____ percent to Husband and _____ percent to Wife]. "Net proceeds of sale" is defined as the gross sale proceeds [less any allowable offsets or credits and] less the following allowable expenses: _____ [specify, e.g., real estate brokerage commissions, and all other expenses of sale and appropriate prorations, satisfaction of existing encumbrances, and other applicable items].

[Add if either party will be allowed offsets or credits from the proceeds of sale:]

From the net proceeds, [Husband or Wife] shall be entitled to the following offsets and credits: [Select from the following:]

- One-half of all payments on the existing mortgage and deed(s) of trust, including interest.
- One-half of all payments of real estate taxes and property insurance premiums covering the property.
- One-half of the cost of all major repairs. Major repairs are defined as any single repair or replacement with a cost in excess of \$_____.
- One-half of all maintenance costs, which include _____ [specify].
- One-half of the cost of all utilities, which include _____ [specify].
- _____ [other].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview
 Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Characterization General Overview
 Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Classification General Overview
 Real Property Law Purchase & Sale Contracts of Sale General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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34-121 California Legal Forms--Transaction Guide § 121.232

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.232 Deferred Sale of Family Home for Benefit of Minor Children

[1] Comment

[a] Use of Form

The form illustrated in [2], *below*, is a provision for the deferred sale of a family home, under *Family Code Section 3800 et seq.* It provides for the custodial parent to be given exclusive right of continued possession of the family home until a terminating event occurs. The terminating event is generally when all children of the marriage have attained a specified age. At that time, the family residence is to be sold and the proceeds divided. For discussion of requirements for deferred sale orders, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 21, *Special Property Characterization and Division Issues* (Matthew Bender).

The clause contains an optional provision that gives one party an option to purchase the interest of the other on the occurrence of the terminating event. It also contains optional provisions for the complete terms and conditions of sale on the ultimate sale of the property to a third party. Finally, it allocates the net proceeds of sale, either equally or according to specified percents.

[b] Joint Ownership

This form provides that the parties will hold the residence as tenants in common. The parties must execute and record a deed to accomplish this purpose. Use of a tenancy in common is preferable in this circumstance to a joint tenancy because neither party would presumably desire a right of survivorship to exist in favor of the other party, which a joint tenancy would involve. The form requires that the parties execute and record a deed to accomplish this purpose. Use of a tenancy in common is preferable in this circumstance to a joint tenancy because neither party would presumably desire a right of survivorship to exist in favor of the other party, which a joint tenancy would involve. For additional discussion of this type of co-ownership arrangement, see § 121.201[1][b].

[c] Tax Consequences

No gain or loss is recognized for income tax purposes on a transfer of property to (or for the benefit of) a former spouse if the transfer is incident to divorce [*I.R.C. § 1041(a)(2)*]. Instead, the transfer is treated as a gift, and the transferor's basis in the property is carried over to the transferee [*I.R.C. § 1041(b)*]. For these purposes, a transfer is incident to a divorce if it occurs within one year after the date on which the marriage ceases, or is related to the cessation of the marriage [*I.R.C. § 1041(c)*].

Under temporary regulations, a transfer is treated as related to the cessation of marriage if (1) it is pursuant to a divorce or separation instrument [see Temp. Treas. Reg. § 1.1041-1T(b)(A-7); *I.R.C. § 71(b)(2)*], and (2) it occurs not more than six years after the date on which the marriage ceases. If it occurs more than six years after the cessation of the marriage, it is presumed to be not related to the cessation of marriage. This presumption may be rebutted only by showing that the transfer was made to effect a division of property owned by the former spouses at the time of the cessation of marriage [Temp. Treas. Reg. § 1.1041-1T(b)(A-7)]. For additional coverage of *Internal Revenue Code Section 1041*, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 160, *Tax Effects of Dissolution* (Matthew Bender).

Note that if the residence is sold to a third party, the transaction may have capital gains tax consequences, although these have been ameliorated to some extent by repeal of the rollover provisions of (now former) *Internal Revenue Code § 1034* and enactment of provisions for liberal exclusion of gain [see Ch. 160].

[d] Mortgage and Related Payments

This form provides that one or both of the parties will make all mortgage, tax, and insurance payments. Normally, that party will be the resident party. The payment by the resident party of the housing costs is essentially a payment of a reasonable amount for the cotenant's yielding of his or her right of possession. Alternatively, the parties may wish to have the nonresident party make payments on the mortgage as additional support for the resident party, but these payments will apparently fail to qualify as deductible spousal support for income tax purposes if both parties remain owners of the property [see *I.R.C. § 71*; Temp. Reg. § 1.71-1T(b), Q-6, 7]. For discussion of the deductibility of payments made to a third party "on behalf of" a spouse, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 160, *Tax Effects of Dissolution* (Matthew Bender). For support related forms in that publication, see Chapter 214, *Spousal and Child Support Provisions in Marital Settlement Agreements*.

[2] FORM**Deferred Sale of Family Home for Benefit of Minor Children**

Deferred Sale of Family Home for Benefit of Minor Children

The parties presently own a home titled as [*specify form of ownership, e.g., community property*], located at _____ [*specify street address*] in _____ County, California, and that is more particularly described [as follows: _____ (*legal description*) or in Exhibit _____, which is attached to this Agreement and incorporated by reference]. As part of the division of their community estate, the parties agree that the residence shall be sold, but that sale shall be deferred temporarily for the following reasons:

- a. It is economically feasible for the parties to maintain the payments on the note secured by the trust deed on their family residence, property taxes, and insurance for the deferral period stated hereafter, and to maintain the condition of the home comparable to that at the time of this Agreement.
- b. A deferred sale of the residence is in the best interest of, and would otherwise minimize the adverse

impact of the dissolution on, the parties' minor children, in that _____ [state relevant factors, e.g., the residence has been specially modified for the special needs of the child/children (and/or resident parent), and/or the residence is in close proximity to the child care [or other] facility for the child/children and/or the location of the residence will permit the resident parent to continue employment, and/or other factor(s) found in Family Code Section 3802], and _____ [nonresidential parent] will not be substantially burdened economically by the deferral of sale.

The parties agree to execute, concurrently with the execution of this Agreement, a deed to the property to themselves as tenants in common. The deed shall be in the form set forth in Exhibit _____, which is attached to this Agreement and incorporated by reference. The parties also agree to have the deed recorded forthwith.

The period of temporary deferral and of exclusive use, occupancy, and possession by [residential parent], referred to as the "deferral period," shall terminate on the occurrence of any of the following events: [Select those desired:]

- The youngest child of the parties attains the age of 18 years.
- _____ [residential parent] moves from or otherwise abandons the residence.
- The parties sell the residence by mutual agreement.
- _____ [residential parent] dies or remarries.
- _____ [residential parent] cohabits in the family home with an unrelated adult of the opposite gender.
- _____ [other terminating event].

[Set forth terms of deferred sale (including provisions relating to actual sale after deferral).]

During the deferral period, [residential parent], who is the parent with primary physical custody of the parties' minor children, shall have exclusive use, occupancy, and possession of the family residence.

During the deferral period, neither party may encumber the family residence with any other encumbrances than those existing as of the time of this Agreement.

During the deferral period, [Husband or Wife or both parties] shall be responsible for maintaining the property in good condition. If major repairs or improvements (such as a new roof) become necessary, [Husband or Wife or a party] shall obtain the consent of [Wife or Husband or the other party], which consent shall not be unreasonably withheld, before making any repairs or improvements. The cost of maintenance, repairs, and improvements shall be [shared equally by the parties or paid by _____ (Husband or Wife) or paid _____ percent by Husband and _____ percent by Wife].

During the deferral period, [(Husband or Wife) shall make all or each party shall pay half or Husband shall pay _____ percent and Wife shall pay _____ percent] of the required monthly mortgage payments and payments of property taxes and assessments against the property. If [Husband or Wife or either party] fails to make a required mortgage or property tax payment, [Wife or Husband or the other party] shall have the right to make the payment directly and shall be entitled to reimbursement from [Husband or Wife or the defaulting party] for the payment.

During the deferral period, [Husband shall pay or Wife shall pay or each party shall pay half of or Husband shall pay

_____ percent and Wife shall pay _____ percent of] the cost to maintain in force a policy of insurance of a type and in an amount sufficient to protect the parties against loss by fire or other casualty and loss by virtue of liability to third persons resulting from ownership of the property. Both parties shall be named insureds under the policy. If [Husband or Wife or either party] fails to pay to maintain the insurance in force, [Wife or Husband or the other party] shall have the right to secure an appropriate policy and shall be entitled to reimbursement from [Husband or Wife or the defaulting party] for sums expended in preserving the insurance in force that should have been paid by [Husband or Wife or the defaulting party].

[To give one party an option to purchase the other's interest in the property at the end of the deferral period, insert provisions from § 121.233.]

[To provide for the eventual sale of the residence, continue with the following (or use Long Form of Sale of Real Property to Third Party, § 121.231[3]).]

On the first occurrence of a terminating event, the family residence shall be listed for sale with a licensed real estate broker and shall remain listed for sale until it is sold. The property shall be offered for sale at a price that is the fair market value of the residence at that time, as determined by agreement between the parties. On sale of the residence, the net proceeds of sale shall be distributed [equally to the parties or _____ percent to Husband and _____ percent to Wife].

If the property is condemned or totally destroyed, the proceeds remaining after payment of liens and encumbrances and reasonable necessary costs of sale shall be distributed [equally to the parties or _____ percent to Husband and _____ percent to Wife]. In the event of partial destruction and the property is covered by insurance, any insurance proceeds shall be used first for the repair and restoration of the property to its former condition. Any remaining funds shall be used to reduce the amount of any existing encumbrances in accordance with the applicable terms of any outstanding deeds of trust.

The parties agree that a court that hears their proceeding for dissolution of marriage may reserve jurisdiction over the deferral of the sale of the family residence for the purpose of determining any and all issues that arise with respect to the deferral.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Characterization General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Classification General Overview Real Property Law Purchase & Sale General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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34-121 California Legal Forms--Transaction Guide § 121.233

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.233 Option to Purchase Other Party's Interest in Family Home

[1] Comment

The form set forth in [2], *below*, is for use in a situation in which one party intends to purchase the other's interest in the family home, but needs more time to arrange financing.

This form includes a short form of provisions for the ultimate sale to a third party should the optionee be unable to complete the transaction. If desired, the long form of sale of real property may be used instead [*see § 121.231[3]*]. This form also include provisions directing the rights and responsibilities of the parties until the option is exercised and the transaction completed.

The option provisions of this form may be inserted in the *form in § 121.232* (Deferred Sale of Family Home for Benefit of Minor Children) to give either party an option to purchase the interest of the other when the deferral period ends [*see Fam. Code § 3800 et seq.*]. For community real property other than the family home, these option provisions may be included in the *form in § 121.234* (Retention of Joint Interest in Real Property as Tenants in Common) to give one party an option to purchase the interest of the other on termination of the tenancy in common. For a community business, these option provisions may also be included in the *form in § 121.283* (Retention of Co-ownership in Business), to give one party an option to purchase the interest of the other in the business when the co-ownership is terminated.

[2] FORM

Option to Purchase Other Party's Interest in Family Home

Option to Purchase Interest in Family Home

The parties presently own a home titled as [*specify form of ownership, e.g., community property*], located at _____ [*specify street address*] in _____ County, California, and more particularly

described [as follows: _____ (*legal description*) or in Exhibit _____, which is attached to this Agreement and incorporated by reference].

[*optionee spouse, e.g., Husband*] shall have the option to purchase [*optionor spouse's, e.g., Wife's*] half interest in the family residence for \$[*purchase price*].

[*e.g., Husband*] shall exercise [his/her] option to purchase by giving written notice to [*e.g., Wife*] within [*time limit, e.g., 90 days of the effective date of this Agreement*]. If [*e.g., Wife*] dies before this option can be exercised, [*e.g., Husband*] shall have the right to purchase [*e.g., Wife's*] interest from [her/his] estate on giving written notice to the personal representative of the estate within _____ calendar days of the date of death.

[*Use if optionee must make full payment in cash:*

The purchase price of the family residence must be paid in cash within _____ days from the date of the exercise of the option.

[*Use if optionee may make payment in either lump sum or installments:*

The purchase price of the family residence may, at the election of [*e.g., Husband*], be paid in cash or in installments. If [*e.g., Husband*] elects to pay in cash, [he/she] must pay the entire amount of the purchase price in cash within _____ days from the date of the exercise of the option. If [*e.g., Husband*] elects to pay the purchase price in installments, [he/she] must make a down payment of _____ percent of the purchase price within _____ days from the date of the exercise of the option. Thereafter, [he/she] must pay the balance in not more than _____ equal installments, commencing one month after the date of the down payment, with interest from the date of the down payment at the rate of _____ percent per annum. Each of these additional installments shall be due one month from the due date of the last installment. [*e.g., Husband*] shall execute a promissory note for the total amount to be paid in installments, made payable to [*e.g., Wife*] on order and delivered to [*e.g., Wife*] at the time of the down payment. The note shall be secured by a deed of trust on the residence.

[*To provide for the sale of the residence if option is not exercised, continue with the following (or use Long Form of Sale of Real Property to Third Party, § 121.231[3]).*]

If [*e.g., Husband*] does not exercise [his/her] option to purchase the residence, the residence shall be listed for sale with a licensed real estate broker and shall remain listed for sale until it is sold. The property shall be offered for sale at a price that is the fair market value of the residence at that time, as determined by agreement between the parties. On sale of the residence, the net proceeds of sale shall be distributed _____ [equally to the parties or _____ percent to Husband and _____ percent to Wife].

Until the property is sold, [Husband or Wife] shall be entitled to the exclusive occupancy and use of the property.

Until the property is sold, [Husband or Wife or both parties] shall be responsible for maintaining the property in good condition. If major repairs or improvements (such as a new roof) become necessary, [Wife or Husband or a party] shall obtain the consent of [Husband or Wife or the other party], which consent shall not be unreasonably withheld, before making the repairs or improvements. The cost of maintenance, repairs, and improvements shall be [shared equally by the parties or paid by _____ (Husband or Wife) or paid _____ percent by Husband and _____ percent by Wife].

Until the property is sold, [(Husband or Wife) shall make all or each party shall pay half or Husband shall pay _____ percent and Wife shall pay _____ percent] of the required monthly mortgage payments and payments of property taxes and assessments against the property. If [Husband or Wife or either party] fails to make a required mortgage or property tax payment, [Wife or Husband or the other party] shall have the right to make the payment directly and shall be entitled to reimbursement from [Wife or Husband or the defaulting party] for the payment.

Until the property is sold, [Husband shall pay or Wife shall pay or each party shall pay half of or Husband shall pay _____ percent and Wife shall pay _____ percent of] the cost to maintain in force a policy of insurance of a type and in an amount sufficient to protect the parties against loss by fire or other casualty and loss by virtue of liability to third persons resulting from ownership of the property. Both parties shall be named insureds under the policy. If [Husband or Wife or either party] fails to pay to maintain the insurance in force, [Wife or Husband or the other party] shall have the right to secure an appropriate policy and shall be entitled to reimbursement from [Husband or Wife or the defaulting party] for sums expended in preserving the insurance in force that should have been paid by [Husband or Wife or the defaulting party].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution &
DivorceProperty DistributionClassificationGeneral OverviewReal Property LawPurchase & SaleGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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34-121 California Legal Forms--Transaction Guide § 121.234

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.234 Retention of Joint Ownership of Real Property as Tenants in Common

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, is a marital settlement agreement provision that divides real property of the parties by transferring it to them as tenants in common. This form is for use with community real property other than the family home. Its most likely use would be with income-producing property for which it would make better economic sense for the parties to retain than to sell and divide the proceeds. It might also be used with regard to a vacation home that the parties wish to continue to be able to share.

This form provides for the continuation of this joint ownership arrangement until the parties agree to sell, until receipt of an offer to purchase at a specified price, or until the occurrence of any other terminating event to be specified by the parties. A party may be given an option to buy out the interest of the other on the occurrence of a terminating event. The *form in § 121.233[2]* for an option to purchase the family home, may be adapted and inserted for this purpose. The clause provides a short form of provisions for the ultimate sale of the property to a third party should no option be exercised. For the long form for sale of real property to a third party, see *§ 121.231[3]*.

This form provides for the payment of all expenses associated with the property from any income produced by the property. If income is insufficient, it includes language allocating responsibility for maintenance and repairs, the payment of the mortgage and related expenses, and the maintenance of insurance.

[b] Joint Ownership

The parties to a marital settlement agreement may wish to co-own certain real property after the termination of their marriage. For example, joint ownership may be advantageous if market conditions are unfavorable for an immediate sale or if a tax holding period has not been completed [*see, e.g., I.R.C. § 121* (providing for exclusion of gain up to

statutory amount on sale or exchange of property owned and used as principal residence for two or more years during five-year period ending on date of sale or exchange)].

When joint ownership is desired, tenancy in common is generally preferred to a joint tenancy because the parties typically do not wish to create a right of survivorship, which is the principal distinguishing feature of a joint tenancy [see *Goldberg v. Goldberg* (1963) 217 Cal. App. 2d 623, 628, 32 Cal. Rptr. 93]. Tenants in common do not have a right of survivorship.

Each tenant in common holds an undivided interest in the property [*Davis v. Davis* (1963) 222 Cal. App. 2d 691, 693, 35 Cal. Rptr. 281]. The interests of the cotenants need not be equal [see Civ. Code §§ 683, 685]. For further discussion of tenancy in common, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapter 20, *Community Property: General Characterization and Division Principles* (Matthew Bender).

The main drawback to the creation of a tenancy in common in connection with a dissolution of marriage or a legal separation is that the parties' affairs will not be completely severed. Consequently, there is the potential for future conflicts over the property and its management and control. If the transfer of marital property to the parties as tenants in common is made without any further agreement, the parties will each have the right of possession and all the other attributes of tenants in common [see *Cole v. Cole* (1956) 139 Cal. App. 2d 691, 695, 294 P.2d 494]. Consequently, if they wish to allocate rights and responsibilities with respect to the property, they should include provisions that accomplish this purpose, or enter into a separate management agreement.

[2] FORM

Retention of Joint Ownership of Real Property as Tenants in Common

Tenancy in Common

Husband and Wife presently own as [*specify form of ownership, e.g., community property*] real property situated in [*location*], and more particularly described [as follows: _____ (*legal description*) or in Exhibit _____, which is attached to this Agreement and incorporated by reference]. This property is [*nature of property, e.g., a 12-unit apartment building*]. On _____, this property shall be divided equally between the parties so that each party will retain an undivided one-half separate interest as a tenant in common.

The parties agree to execute, concurrently with the execution of this Agreement, a deed to the property to themselves as tenants in common. The deed shall be in the form set forth in Exhibit _____, which is attached to this Agreement and incorporated by reference. The parties also agree to have the deed recorded as of [*specify when deed should be recorded*].

Each party agrees to obtain the written consent of the other before encumbering the property.

During the tenancy in common, [(Husband or Wife) shall be entitled to the exclusive possession and use or both parties shall have a right of possession and use] of the property.

During the tenancy in common, any gross income produced by the property shall first be applied to the payment of mortgages and other debts encumbering the property, taxes and other assessments against the property, insurance on the property, and maintenance of and repairs to the property. Any net income remaining after all such amounts have been paid shall be distributed [equally to the parties or _____ percent to Husband and _____ percent to Wife].

During the tenancy in common, to the extent not paid from income from the property, [Husband or Wife or both parties] shall be responsible for maintaining the property in good condition. If major repairs or improvements (such as a

new roof) become necessary, [Wife or Husband or a party] shall obtain the consent of [Husband or Wife or the other party], which consent shall not be unreasonably withheld, before making the repairs or improvements. The cost of maintenance, repairs, and improvements shall be [shared equally by the parties or paid by _____ (Husband or Wife) or paid _____ percent by Husband and _____ percent by Wife].

During the tenancy in common, to the extent not paid from income from the property, [(Husband or Wife) shall make all or each party shall pay half or Husband shall pay _____ percent and Wife shall pay _____ percent] of the required monthly mortgage payments and payments of property taxes and assessments against the property. If [Husband or Wife or either party] fails to make a required mortgage or property tax payment, [Wife or Husband or the other party] shall have the right to make the payment directly and shall be entitled to reimbursement from [Wife or Husband or the defaulting party] for the payment.

During the tenancy in common, to the extent not paid from income from the property, [Husband shall pay or Wife shall pay or each party shall pay half of or Husband shall pay _____ percent and Wife shall pay _____ percent of] the cost to maintain in force a policy of insurance of a type and in an amount sufficient to protect the parties against loss by fire or other casualty and loss by virtue of liability to third persons resulting from ownership of the property. Both parties shall be named insureds under the policy. If [Husband or Wife or either party] fails to pay to maintain the insurance in force, [Wife or Husband or the other party] shall have the right to secure an appropriate policy and shall be entitled to reimbursement from [Husband or Wife or the defaulting party] for sums expended in preserving the insurance in force that should have been paid by [Husband or Wife or the defaulting party].

The parties agree to take steps to terminate their co-ownership on the occurrence of the earliest of the following (hereafter referred to as "terminating events"):

- The parties mutually agree to sell the property.
- The parties receive an offer to purchase the property from a buyer who is ready, willing, and able to buy the real property for a selling price of at least \$ _____.
- The expiration of the period of time commencing on the execution of this Agreement and ending on _____ [date].

[To give one party an option to purchase the other's interest in the property on the occurrence of a terminating event, insert provisions from § 121.233[2].]

[To provide for the eventual sale of the property, continue with the following (or use Long Form of Sale of Real Property to Third Party, § 121.231[3]).]

On the first occurrence of a terminating event, the property shall be listed for sale with a licensed real estate broker and shall remain listed for sale until it is sold. The property shall be offered for sale at a price that is the fair market value of the property at that time, as determined by agreement between the parties. On sale of the property, the net proceeds of sale shall be distributed _____ [equally to the parties or _____ percent to Husband and _____ percent to Wife].

If the property is condemned or totally destroyed, the proceeds remaining after payment of liens and encumbrances and reasonable necessary costs of sale shall be distributed _____ [equally to the parties or _____ percent to Husband and _____ percent to Wife]. In the event of partial destruction and the property is covered by insurance, any

insurance proceeds shall be used first for the repair and restoration of the property to its former condition. Any remaining funds shall be used to reduce the amount of any existing encumbrances in accordance with the applicable terms of any outstanding deeds of trust.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
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DIVISION VII: PERSONAL TRANSACTIONS
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34-121 California Legal Forms--Transaction Guide § 121.235

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.235 Provisions for Interspousal Transfer of Real Property

[1] Comment

[a] Use of Forms

The forms set forth in [2]-[4], *below*, are for use in a transfer of community real property from one spouse to the other. An interspousal transfer of realty may be accomplished in a marital settlement agreement simply by including the property in the schedule or list of assets that are assigned to the transferee spouse. Then, if appropriate, these forms may be included to address other matters involved in the transfer.

Form [2] is for use if the transferee spouse is to be protected from liability for a debt that is secured by the transferred real property [see [b], *below*]. Form [3] specifies the form of deed and places requirements for its delivery from the transferor to the transferee. Form [4] is the transferor's release in various deposits from community rental property.

[b] Handling Existing Encumbrances

A transferee of real property who takes the property "subject to" an existing mortgage or deed of trust does not assume or agree to pay the secured debt [see *Wolfert v. Guadagno* (1933) 130 Cal. App. 661, 663, 20 P.2d 360], and does not become personally liable for the debt [see *Braun v. Crew* (1920) 183 Cal. 728, 731, 192 P. 531; *Cornelison v. Kornbluth* (1975) 15 Cal. 3d 590, 599, 125 Cal. Rptr. 557, 542 P.2d 981]. Instead, the property remains the primary security for the obligation [*Birkhofer v. Krumm* (1935) 4 Cal. App. 2d 43, 50, 40 P.2d 553], and the transferor (if he or she is the original trustor or mortgagor) remains personally liable for the payment of the debt, subject to the antideficiency provisions of *Code of Civil Procedure Sections 580b and 580d* [see *Ward v. DeOca* (1898) 120 Cal. 102, 105, 52 P. 130].

A transferee of real property subject to a mortgage or deed of trust "assumes" the encumbrance by agreeing to pay and discharge the debt that the transferor is liable for and that is secured by the mortgage or trust deed. Thus, the assuming

transferee becomes personally liable for the debt to the mortgagee or beneficiary [see *Williams v. Naftzger* (1894) 103 Cal. 438, 440, 37 P. 411] . Although the assuming transferee becomes the principal debtor of the mortgagee or beneficiary, the transferor remains liable, but only as a surety for the transferee [see *Braun v. Crew* (1920) 183 Cal. 728 . 731, 192 P. 531] .

In a marital settlement, a transfer "subject to" is not likely to be common. Usually, in a transfer of community real property from one spouse to the other, both parties will be liable on all mortgages secured by the real property. There may be situations, however, in which the spouses have given a security interest in the property to secure indebtedness unrelated to the purchase, refinancing, or improvements to the real property (often a business loan) that will become the separate obligation of the transferor spouse. In such a case, use of the "subject to" clause might be appropriate to protect the transferee spouse from any possible liability on the debt, even though the property will remain as security.

[2] FORM--Transfer "Subject To" Existing Encumbrances

Transfer "Subject To" Existing Encumbrances

The property is transferred subject to the following encumbrances and liens on the property: *[specify]*.

[3] FORM--Delivery of Deed

Delivery of Deed

[*Transferor spouse's, e.g., Husband's*] conveyance of [his/her] interest in [*property transferred*] shall be by [*form of deed*]. The deed shall be executed [*time, e.g., within 30 days of the effective date of this Agreement*] and shall be recorded [*time, e.g., within 30 days of execution*]. On delivery of the deed to [*transferee spouse, e.g., Wife*], [she/he] shall be solely responsible for all obligations with respect to the property. [*transferee spouse, e.g., Wife*] indemnifies and agrees to hold [*transferor spouse, e.g., Husband*] harmless with respect to all obligations arising after delivery of the deed.

[4] FORM--Waiver of Right to Deposits for Rental Property

Waiver of Right to Deposits for Rental Property

[*Transferor spouse, e.g., Husband*] specifically waives all rights to utility deposits, rental deposits, escrow deposits, and any prepaid insurance premiums with respect to [his/her] transfer of [his/her] interest in [*rental property subject to interspousal transfer*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationInterspousal Transfers



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34-121 California Legal Forms--Transaction Guide §§ 121.236-121.249

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 121.236[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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34-121 California Legal Forms--Transaction Guide § 121.250

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.250 Description of Personal Property

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, consists of alternative descriptions of items of personal property (other than business interests, securities, and bank accounts) that may be included in a marital settlement agreement. Descriptions of business interests are *set forth in § 121.280*; and § 121.310 contains descriptions of securities and bank accounts. For descriptions of real property assets, see § 121.230.

For clauses dividing the personal property of the spouses, see §§ 121.251-121.255.

[b] General Description of Items

A marital settlement agreement frequently contains a general description of items of personal property, such as "any and all furniture, furnishings, appliances, objects of art, clothing, jewelry, and personal effects situated in or about the _____ [Husband's or Wife's] residence at _____ [address, city, state]." Particular items of value should be listed and described separately. Items that merit a separate listing include vehicles, pets and other animals of value, antiques, jewelry, furs, coins, stamps, and paintings, or other collectibles. An interest in an estate or a beneficial interest in a trust should also be listed separately.

[c] Groups of Assets

The agreement may contain a general description of a particular type or group of items, such as "power and hand tools in the garage" or "office furniture and equipment in the den," in lieu of a comprehensive listing of the individual items. However, if a dispute should arise at a later date concerning these items, it will be difficult to prove what property was in the specified location on a certain date. Consequently, if there is a possibility that a dispute may arise, the better

practice would be to attach an itemized list of the major items of the property as an exhibit or a schedule to the agreement and to incorporate the exhibit or schedule by reference in a general description set forth in the agreement.

If one party is to receive most of the items in a group of assets (such as a jewelry collection) and the other party is to receive a few of them, the description of the property being given to the first party may identify the group in general terms and except certain specific items that are described elsewhere as going to the other party. For example, if the wife is to receive the bulk of a jewelry collection, the description of the collection included in the list of her property could read as follows: "Except as otherwise expressly provided in Exhibit _____, which is attached to this Agreement and incorporated by reference, the jewelry collection of the parties presently in Wife's possession."

[2] FORM

Description of Personal Property

[If desired, use any of the following as a model for a description of an item or items of personal property:]

One United States \$20 gold coin dated 1877.

[OR]

One silver fox stole.

[OR]

One original oil painting entitled "_____ " by _____, with frame.

[OR]

Two antique chairs, upholstered in red velvet with gold trim.

[OR]

The membership of [Wife or Husband] in _____.

[OR]

Power and hand tools and equipment presently in the garage of the family residence of the parties.

[OR]

Office furniture and equipment presently in the den of the family residence of the parties.

[OR]

That certain pedigreed Labrador retriever named "_____."

[OR]

That certain Bay Thoroughbred gelding named "_____", _____ hands, age _____ years, white blaze, together with various tack and equipment connected with his care and training.

[OR]

That certain 1997 Mercedes 300D sedan, California license _____, presently in [Wife's or Husband's] possession.

[OR]

That certain 1995 Dodge Chinook motor home, California license _____.

[OR]

That certain 48-foot houseboat now located at Tinsley Island, San Joaquin River, San Joaquin County, California.

[OR]

That certain 18-foot Starcraft speedboat, together with trailer and other equipment used in connection with that speedboat.

[OR]

That certain Piper Cherokee aircraft, registration number _____.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview
 Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Characterization General Overview
 Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Classification General Overview



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34-121 California Legal Forms--Transaction Guide § 121.251

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.251 Acknowledgment of Prior Division

[1] Comment

The form set forth in [2], *below*, is for use if the parties have already divided up some or all of their personal property and want to confirm the division in their agreement as fair and equitable. They may either list the items that have been divided in an attached exhibit or schedule, or simply confirm that each party is entitled to the personal property that is currently in his or her possession, without providing a list of the divided items. The latter approach is more appropriate if there are few or no items of significant value. Without a list, there is no evidence of what was in whose possession at the time of the agreement.

[2] FORM

Acknowledgment of Prior Division of Personal Property

Prior Division of Personal Property

The parties acknowledge that they have previously divided all of their personal property not otherwise specifically disposed of in this Agreement between them to their mutual satisfaction. Each party confirms the division as fair and equitable and transfers, assigns, and conveys to the other all right, title, and interest to the divided personal property _____, [as set forth in Schedule _____, which is attached to this Agreement and incorporated by reference *or* in the possession of the other].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support
Dissolution & Divorce
Property Distribution
General Overview
Family Law Marital Termination & Spousal Support
Dissolution & Divorce
Property

DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution &
DivorceProperty DistributionClassificationGeneral Overview



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34-121 California Legal Forms--Transaction Guide § 121.252

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.252 Sale of Personal Property Not Divided by Parties

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, can be used to require the sale of either a single item of personal property or a list or category of personal property to a third party. Use of the clause would be appropriate, for example, if personal property such as household furniture and furnishings are to be sold at auction. The property to be sold can be set forth either in the agreement directly or in a schedule. The clause provides that after the payment of the expenses of the sale, the net proceeds may either be used to pay debts or divided equally between the parties. If used to pay debts, the specific debts to which the proceeds are to be applied are listed either in the agreement or in a schedule.

[b] Taxation

Counsel should inform the parties that the sale of marital property to a third party will not, as a general rule, qualify for nonrecognition under *Internal Revenue Code Section 1041*. A transfer to a third party may qualify for nonrecognition only if the transfer is on behalf of a spouse or former spouse [see *I.R.C. § 1041(a)*]. A sale of property that does not qualify for nonrecognition may be a taxable event if the property is sold for more than the adjusted tax basis of the parties in the property [see *I.R.C. § 1221*]. For further discussion, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 160, *Tax Effects of Dissolution* (Matthew Bender).

[2] FORM

Sale of Personal Property Not Divided by Parties

Sale of Single Asset

The parties agree that [*describe item of property, e.g., antique Shaker dining room table*] shall immediately be listed for sale and shall remain listed for sale until sold.

Sale of Group of Assets

The parties agree that all of the assets set forth [below or in Schedule ____] shall be listed for sale and shall remain listed for sale until sold.

Disposition of Proceeds of Sale [*If proceeds are to be divided:*]

The proceeds of sale, after payment of all reasonable expenses of sale, shall be divided equally between the parties.

[*OR, if proceeds are to be used to pay community debts:*]

The proceeds of sale, after payment of all reasonable expenses of sale, shall be applied first to pay the community obligations set forth _____ [below or in Schedule _____]. Thereafter, any remaining proceeds shall be divided equally between the parties.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution &
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34-121 California Legal Forms--Transaction Guide § 121.253

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.253 Sale of Motor Vehicle

[1] Comment

The form in [2], *below*, is for use to provide for the sale of one or more motor vehicles to a third party. The initial asking price is set at the value of the vehicle as shown in the parties' Schedule of Assets and Debts (Judicial Council Form FL-142). If the vehicle does not sell at this price, the clause provides either for the parties to agree on a reduced sale price, or for a percent reduction in sale price at specified intervals until the vehicle is sold. A minimum price is provided, however.

The proceeds of sale are either to be divided equally or applied to specified community debts. Debts to be paid may be either listed in the agreement or set forth in a separate schedule.

[2] FORM

Sale of Motor Vehicle

Sale of Motor Vehicle

The parties agree that their _____ [*identify vehicle by year, make, model, license number*] shall immediately be listed for sale at an initial asking price of \$ _____, and shall remain listed for sale until sold. [*Add if proceeds are to be divided by parties: The proceeds of any resultant sale, after payment of all reasonable expenses of sale, shall be divided equally between the parties.*]

[To provide for change in price by future agreement if vehicle doesn't sell:]

If no offer acceptable to the parties has been received within _____ days of the initial offering of the

_____ [short description of motor vehicle] for sale, the parties shall mutually agree to adjust the price and/or the other terms and conditions of sale. If the parties are unable to agree on adjustments, either may apply to the court for an order setting a different asking price and/or other terms and conditions of sale.

[OR, to set forth change in price in the agreement:]

If no offer acceptable to the parties has been received within _____ days of the initial offering of the motor vehicle for sale, the parties shall reduce the price by _____ percent. This same procedure shall be repeated every _____ days until an acceptable offer is received. However, in no event shall the motor vehicle be offered for sale for less than \$_____.

[Include if proceeds are to be used to pay debts:]

The proceeds of sale shall, after all reasonable sales expenses are paid, be applied to pay the community obligations set forth [below or in Schedule _____]. Thereafter, any remaining sales proceeds shall be divided equally between the parties.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution &
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34-121 California Legal Forms--Transaction Guide § 121.254

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.254 Interspousal Transfer of Motor Vehicle, Vessel, or Aircraft

[1] Comment

The forms set forth in [2]-[4], *below*, are for use if one spouse, as part of the overall division of community property, is to release his or her interest in the property to the other. While the property may be simply listed in the list or schedule of property that the transferee is to receive [*see* § 121.202], use of these more particularized clauses provides for the disposition of certain collateral rights and obligations associated with the property. In the case of an automobile or other motor vehicle [Form [2]] the clause provides for the transfer of insurance and the duty to maintain insurance. In the case of a vessel (watercraft) [Form [3]] the clause provides for the transfer of any interest in a boat slip, berth, or docking facility. In the case of an aircraft [Form 4], the clause provides for the transfer of any hangar or other aircraft parking facility rights.

[2] FORM--Motor Vehicle

Interspousal Transfer of Motor Vehicle

Transfer of Automobile and Insurance

The parties own, as community property, a [*identify vehicle by year, make, model, license number*], which is titled in the name of [*owner and form of title*]. On or before _____ [*date or condition*], _____, [*transferor spouse, e.g., Wife*] shall, transfer whatever right, title and interest [*she/he*] may have in the vehicle to [*transferee spouse, e.g., Husband*], which shall then be his/her sole and separate property. [*transferor*] also agrees to transfer to [*transferee*] a fully executed certificate of ownership (pink slip) on execution of this Agreement. [*transferee*] shall assume responsibility for all obligations in connection with the vehicle. [*transferee*] shall indemnify and hold [*transferor*] harmless from any liability in connection with the vehicle, including the payment of reasonable attorney fees incurred by [*transferor*] in defending against any alleged liability.

[*Transferee*] shall notify the insurance carrier of the change in ownership of the vehicle and shall request that all insurance coverage be placed in [his/her] name alone. The parties agree to execute any documents required by the insurer to effect the change in coverage. [*transferor*] shall relinquish whatever right, title and interest [she/he] may have in and to any prepaid automobile insurance premiums. When the policy of insurance on the vehicle expires, _____ [*transferee*] shall be solely responsible for obtaining insurance coverage on the vehicle.

[3] FORM--Vessel

Interspousal Transfer of Vessel

Transfer of Vessel

The parties own a vessel titled in the name of [*owner of title, e.g., Husband*], described as _____ [*specify vessel name, if any, manufacturer, serial number, length, type, and state registration/U.S. Coast Guard registration number*], which is presently [located or berthed or docked] at [*vessel location*]. [*transferor spouse, e.g., Wife*] shall transfer to [*transferee spouse, e.g., Husband*] all of [her/his] right, title, and interest in and to the vessel, [and any right, title and interest to the boat slip, berth or docking facility,] which shall then become the separate property of [*transferee*]. [*transferee*] shall indemnify [*transferor*] and hold [her/him] harmless from any liability, loss, obligation, lien, or encumbrance on the vessel, including the payment of reasonable attorney fees incurred by [*transferor*] in defending against any alleged liability. [*transferee*] shall notify all insurers of the change in ownership of the vessel and shall request that any insurance coverage be placed in [*transferee's*] name alone. The parties agree to execute any documents required by the insurer to effect the change in coverage.

[4] FORM--Aircraft

Interspousal Transfer of Aircraft

Transfer of Aircraft

The parties own an aircraft titled in the name of [*owner of title*], described as _____ [*specify aircraft name, if any, manufacturer, serial number, length, type, number of engines, and applicable state/federal registration*], which is presently located at [*specify location*]. [*transferor spouse, e.g., Wife*] shall transfer to [*transferee spouse, e.g., Husband*] all of [her/his] right, title, and interest in and to the aircraft, [and any right, title and interest to the hangar or parking facility,] which shall then become [*transferee's*] separate property. [*transferee*] shall indemnify [*transferor*] and hold [her/him] harmless in connection with any liability, loss, obligation, lien, or encumbrance on the aircraft, including the payment of reasonable attorney fees incurred by [*transferor*] in defending against any alleged liability. [*transferee*] shall notify all insurers of the aircraft of the change in ownership and shall request that any insurance coverage be placed in [*transferee's*] name alone. The parties agree to execute any documents required by the carrier to effect such change in coverage.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Duties & Rights Property Rights General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Classification Interspousal Transfers



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34-121 California Legal Forms--Transaction Guide § 121.255

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.255 Ownership of Family Pet

[1] Comment

The form set forth in [2], *below*, provides for which party is to receive a family pet. The clause includes provisions regarding veterinary care and the sale of the pet to a third party, giving the other spouse the first opportunity to acquire the pet.

In the case of an animal that has monetary worth because of its use for breeding purposes or for specialized shows, counsel should add a clause that provides for the disposition of any related anticipated income, such as unpaid breeding fees, and breeding fees that may be obtained in the future.

The question of whether the parties may, by their agreement, create enforceable visitation rights with an animal has not been addressed by a California court.

[2] FORM

Ownership of Family Pet

Ownership of Pet

The parties agree that [Wife or Husband] shall own, and have possession of and control over, their family pet, _____ [description and name of pet]. As owner, [e.g., Husband] shall be solely responsible for providing veterinary care and for obtaining all applicable vaccinations, licenses, and the like for the pet. As owner, [e.g., Husband] may sell or give away the pet, but must first offer to sell or give the pet to [e.g., Wife] before offering it to a third person.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution &
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34-121 California Legal Forms--Transaction Guide §§ 121.256-121.269

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 121.256[Reserved]



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34-121 California Legal Forms--Transaction Guide § 121.270

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.270 Interspousal Transfer of Interest in Life Insurance Policy

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, provides for the assignment of a community property interest in a life insurance policy from one spouse to the other [*see generally Life Insurance Co. of North America v. Cassidy* (1984) 35 Cal. 3d 599, 606, 200 Cal. Rptr. 28, 676 P.2d 1050]. A segregated buy-out of life insurance apart from the rest of the division of community property is not necessary. The parties may simply allocate the insurance asset to the assignee party as part of their overall division of the community estate. As long as the overall division is fair and equitable, the separate consideration allocated to the life insurance assignment need not be specifically set forth.

For discussion of the assignment of life insurance policies, see California Insurance Law & Practice, Chapter 21, *The Life Insurance Contract* (Matthew Bender). For forms concerning insurance in relation to support, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapter 214, *Spousal and Child Support Provisions in Marital Settlement Agreements* (Matthew Bender).

[b] Disposition of Community Life Insurance Policies

Community life insurance may be address in several ways. It may be allocated to the named insured as part of the parties' division of their community property in exchange for the payment of the assignor's community interest in the insurance [*see* [2], *below*]. Or it may be surrendered to the insurer and the proceeds, if any, divided [*see* § 121.271]. Or it may be partitioned; that is, surrendered to the insurer in exchange for two policies, one on the life of each of the spouses, each for half the amount of the surrendered policy [*see* § 121.272].

Life insurance is also commonly used as security for support or to provide a replacement for support in case of the death of the payor. In such a case, provisions must be included governing the disposition of the death benefit on the death of

the named insured. For clauses for this purpose, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapter 214, *Spousal and Child Support Provisions in Marital Settlement Agreements* (Matthew Bender).

[c] Divisibility of Life Insurance

Courts have recognized a property interest in whole life insurance and have divided that value when a policy is determined to be community property. The value of the insurance is its cash surrender value [see *In re Marriage of Lorenz* (1983) 146 Cal. App. 3d 464, 468, 194 Cal. Rptr. 237 ; see also *In re Marriage of Holmgren* (1976) 60 Cal. App. 3d 869, 871, 130 Cal. Rptr. 440] . However, in the case of term life insurance, there is a split in the courts of appeal concerning its divisibility and valuation on dissolution of marriage [see *In re Marriage of Lorenz* (1983) 146 Cal. App. 3d 464, 468, 194 Cal. Rptr. 237 ; *Estate of Logan* (1987) 191 Cal. App. 3d 319, 325-326 236 Cal. Rptr. 368 ; *In re Marriage of Gonzalez* (1985) 168 Cal. App. 3d 1021, 1024-1025, 214 Cal. Rptr. 634] . For discussion of that split, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapter 21, *Special Property Characterization and Division Issues* (Matthew Bender).

[2] FORM

Interspousal Transfer of Interest in Life Insurance Policy

Life Insurance

The parties agree that the following life insurance policy is the community property of the parties: [*set forth name of insured, policy number, name of insurer, face value, and current cash surrender value, e.g., A Prudential whole life insurance policy, policy number AF23 456 333, on the life of Jane Smith, with a face value of \$10,000 and a current cash surrender value of \$1,300*].

As part of the division of their community property, [*transferor spouse, e.g., Husband*] hereby assigns all right, title, and interest that [he/she] has in the above life insurance policy (including any cash value) to [*transferee spouse, e.g., Wife*] as [her/his] separate property, and releases and relinquishes any and all claims that [he/she] may have or may assert in the future against the policy. [*transferor spouse*] agrees to release [his/her] interest as the designated beneficiary in the above policy. [*transferee spouse*] agrees to notify the insurer of the change desired in the designation of the beneficiary and to have the change or changes endorsed on the policy.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationInterspousal TransfersInsurance LawLife InsuranceGeneral Overview



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34-121 California Legal Forms--Transaction Guide § 121.271

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.271 Surrender of Community Life Insurance Policy and Distribution of Proceeds

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, provides for (1) the surrender of an existing life insurance policy for its cash surrender value, and (2) the division of the cash surrender value. This is a relatively quick and simple way to effect an equal division of community life insurance. It may be used if the parties cannot otherwise agree on the disposition of life insurance, if other assets do not exist to offset the value of the insurance if it were to be assigned to one spouse, or if there are several policies with a cash value and the most efficient division is by using that value.

For coverage of the division of life insurance in general, see § 121.270[1][b].

[b] Disadvantages

There may be disadvantages in surrendering an existing policy for its cash value. These disadvantages include the elimination of a potential source of support for a spouse or child on the death of the insured spouse, the sacrifice of some of the acquisitions costs of the surrendered policy (because cash value is usually less than cost), and the difficulty or perhaps impossibility of obtaining new life insurance.

[2] FORM

Surrender of Community Life Insurance Policy and Distribution of Proceeds

Surrender of Life Insurance

The parties agree that the following life insurance policy is the community property of the parties: [*set forth name of*

insured, policy number, name of insurer, face value, and current cash surrender value, e.g., A Prudential whole life insurance policy, policy number AF23 456 333, on the life of Jane Smith, with a face value of \$10,000 and a current cash surrender value of \$1,300].

As part of the division of their community property, the parties shall, on execution of this Agreement, surrender the above life insurance policy to the insurer for the current cash surrender value. Thereafter, the proceeds shall be distributed to Husband and Wife in equal shares [*or according to the community and separate property interest of each or other division*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
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34-121 California Legal Forms--Transaction Guide § 121.272

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.272 Partition of Life Insurance Policy

[1] Comment

The form set forth in [2], *below*, provides for the partition of a life insurance policy. It may be used if the parties wish to continue to hold life insurance and to divide the community property interests in the insurance. Partition requires the parties to surrender the existing policy to the insurer in exchange for a policy on the life of each spouse with a face amount of one-half the original policy. Because partitioning requires the issuance of two new insurance policies and involves personal factors (such as the age, health, and financial capabilities of the parties), counsel should contact the insurer to ensure that this method of division is in fact feasible. Obtaining written confirmation from the insurer that two new policies will be issued appears to be the most prudent course to follow before the insured party agrees to a partition.

Partition may be the preferred disposition of community life insurance if an assignment will not provide adequate offsetting liquid assets to permit a buy-out by the assignee spouse, or if an in-kind division is necessary to achieve an equal division of the community estate.

[2] FORM

Partition of Life Insurance Policy

Partition of Life Insurance Policy

The parties agree that the following life insurance policy is the community property of the parties: [*set forth name of insured, policy number, name of insurer, face value, and current cash surrender value, e.g., A Prudential whole life insurance policy, policy number AF23 456 333, on the life of Jane Smith, with a face value of \$10,000 and a current cash surrender value of \$1,300*].

As part of the division of their community property, the parties shall, on execution of this Agreement, surrender the

above life insurance policy to the insurer for a partition of the policy and the issuance of two life insurance policies with the following characteristics: one policy shall be in the name of Husband and one policy shall be in the name of Wife; each shall have one-half of the face value of the death benefit of the original policy; each shall have one-half of the current cash surrender value of the original policy; and each shall be the separate property of the spouse in whose name the policy appears.

The parties agree that surrender and partition of the foregoing policy is conditioned on the insurer's willingness to issue two policies. The parties acknowledge that the insurer's own standards will apply in determining whether the policies will be issued. Should the insurer decline to issue either or both of the new policies requested, the policy shall be surrendered and its then current cash value will be equally divided between the parties [*or other disposition*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
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34-121 California Legal Forms--Transaction Guide § 121.273

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.273 Transfer of Property in Trust for Children

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, provides for both spouses to transfer community property to create an irrevocable trust for the benefit of their minor children. The provision incorporates by reference the trust instrument, which is to be attached to the agreement and executed concurrently with the execution of the marital settlement agreement.

The parties to a marital settlement agreement are often concerned with the rights of their children to succeed to some or all of their community property. Each party may be concerned that the other party will remarry and that the other party's spouse will succeed to the other party's estate to the exclusion of the children. One method of avoiding such a situation is to create a trust for the benefit of the children and to transfer a share of the community property to the trust. The parties may then equally divide the remaining portion of the property.

This trust is not designed to meet either party's duty of child support. Income produced by the trust is to be accumulated in the trust to increase the value of the property ultimately to be distributed to the children. For agreement provisions requiring trusts to meet a duty of support, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 214, *Spousal and Child Support Provisions in Marital Settlement Agreements* (Matthew Bender).

For extensive coverage of irrevocable trusts, see Chapter 72.

[b] Taxation

Under an exception to the nonrecognition provisions of *Internal Revenue Code Section 1041* [see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 160, *Tax Effects of Dissolution*

(Matthew Bender)], a transfer of property in trust will result in a taxable event to the extent that the sum of the liabilities assumed plus the liabilities to which the property is subject exceeds the total adjusted basis of the property. In that case, an adjustment must be made under *Internal Revenue Code Section 1041(b)* in the basis of the transferee in the property to take into account gain recognized because of the transfer [*I.R.C. § 1041(e)*]. For additional coverage of this exception to nonrecognition, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 160, *Tax Effects of Dissolution* (Matthew Bender).

As a general principle, a trust is a separate taxpayer and is taxable on trust income [*I.R.C. § 641(a)*]. However, this general principle is qualified by the grantor trust rules of the Internal Revenue Code [*see I.R.C. § 671 et seq.*], which, if applicable, treat the grantor as the substantial owner of a trust, and thereby taxable on trust income. Among the trust provisions that have this tax effect are the power to revoke [*see I.R.C. § 676*] and distributions of income to the grantor or the grantor's spouse, including distributions used to discharge the grantor's or spouse's obligation of support of a beneficiary [*see I.R.C. § 677*]. There are also special rules for the taxation of income from a trust used to pay alimony or child support incident to a decree of dissolution of marriage or legal separation [*see I.R.C. § 682; see also* Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., chs. 160, *Tax Effects of Dissolution*, 214, *Spousal and Child Support Provisions in Marital Settlement Agreements* (Matthew Bender)]. If particular tax treatment is desired for any trust created in the context of dissolution of marriage, an estate planning or trust law specialist should be consulted.

[2] FORM

Transfer of Property in Trust for Children

Transfer of Property in Trust

The parties shall establish an irrevocable trust naming their minor children as the primary beneficiaries and _____[name] as trustee. Concurrently with the execution of this Agreement, they shall execute the trust agreement attached to this Agreement as Exhibit _____ and incorporated by reference. The trust will be funded by transferring to the trust the community property set forth in Schedule _____, which is attached to this Agreement and incorporated by reference. Disposition of principal and income shall be as set forth in the trust instrument.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareChildrenGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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5. Other Life Insurance and Trust Provisions

34-121 California Legal Forms--Transaction Guide § 121.274

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.274 Revocation or Amendment of Trust

[1] Comment

The form set forth in [2], *below*, provides for the revocation of a revocable trust. If the parties wish to dispose of the property of an existing revocable trust, they should revoke the trust.

The form in [3], *below*, converts an existing revocable trust into an irrevocable trust. It is for use if the parties agree that the provisions of the trust are acceptable. Usually, a trust is made irrevocable if the primary concern of the parties is the rights of the children to succeed to the property. If the trust does not adequately provide for the children, the parties should consider revoking the trust and creating an irrevocable trust for the benefit of the children [*see § 121.273*].

If a revocable trust is being amended and one of the spouses is the trustee, the parties should remove that spouse as trustee and appoint an independent trustee.

[2] FORM--Revocation of Existing Trust

Revocation of Existing Trust

Revocation of Trust

The parties have previously created a revocable trust dated _____, naming _____ [*names of beneficiaries*] as beneficiaries and _____ [*name(s)*] as Trustee[s]. A copy of the trust instrument is attached to this Agreement as Exhibit _____ and is incorporated by reference. The parties now revoke the trust and agree that the remaining trust property shall be [*specify disposition*].

[3] FORM--Amendment of Existing Revocable Trust

Amendment of Existing Revocable Trust

Amendment of Trust

The parties have previously created a revocable trust dated _____, naming _____ [names of beneficiaries] as beneficiaries and _____ [name(s)] as Trustee[s]. A copy of the trust instrument is attached to this Agreement as Exhibit _____ and is incorporated by reference. The parties now agree to the following amendments to the trust:

[Select appropriate provisions from the following:]

- _____ [Name] shall be removed as Trustee and _____ [name] shall be appointed as Trustee.
- The trust shall be made irrevocable and shall not be subject to amendment.
- _____ [Identify applicable provision, e.g., Article _____] is deleted from the trust instrument and the following provision is _____ [describe placement in trust instrument, e.g., inserted as a new Article _____].
- _____ [Describe any further amendments].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts General Overview Family Law Family Protection & Welfare Children General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Characterization General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Classification General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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5. Other Life Insurance and Trust Provisions

34-121 California Legal Forms--Transaction Guide §§ 121.275-121.279

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 121.275[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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6. Other Provisions for Division of Business and Business Interests

34-121 California Legal Forms--Transaction Guide § 121.280

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.280 Description of Business Interests

[1] Comment

The form set forth in [2], *below*, contains illustrative descriptions of business interests. The descriptions may be inserted into a marital settlement agreement provision describing the property of the parties. For descriptions of securities and bank accounts, see § 121.310. Section 121.250 contains descriptions of other types of personal property. For clauses dividing the business interests of the spouses, see §§ 121.281-121.284.

The description of the business or interest normally should be in general terms and should not contain an itemization of each asset of the business. If there are any specific business assets of significant value, such as vehicles or parcels of real estate, or if there is a chance that a dispute will arise in the future concerning the assets, the assets may be described in an exhibit or schedule that is attached to the marital settlement agreement and incorporated by reference. As in other cases, it is recommended that a full legal description of any real property be given, preferably in an exhibit that is incorporated by reference, in case a party wishes to record the agreement.

[2] FORM

Description of Business Interests

[Use any of the following as a model for the description of a business interest owned by one or both spouses:]

The interest of [Husband or Wife] in the sole proprietorship known as _____, located at _____ [city, state, zip].

[OR]

That certain business conducted by [Wife or Husband] under the name " _____ " and located at _____ [street address, city, state].

[OR]

The real estate business known as " _____ " carried on by [Husband or Wife] in _____ [city], California, together with the furniture and equipment described in [Exhibit or Schedule] _____, which is attached to this Agreement and hereby incorporated by reference.

[OR]

The partnership interest of [Husband or Wife] in the partnership known as _____, which is doing business at _____ [address, city, state].

[OR]

The medical practice of [Wife or Husband], together with the real and personal property located at _____ [street address, city, state] and more particularly described in [Exhibit or Schedule] _____, which is attached to this Agreement and hereby incorporated by reference.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution &
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6. Other Provisions for Division of Business and Business Interests

34-121 California Legal Forms--Transaction Guide § 121.281

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.281 Interspousal Transfer of Interest in Community Business or Professional Practice

[1] Comment

[a] Use of Forms

The forms set forth in [2] and [3], *below*, provide for the transfer of one spouse's community interest in a sole proprietorship or other enterprise [Form [2]] or in a professional practice [Form [3]], to the other spouse. Typically, such a transfer would be made from the spouse who is not operating the business or practice to the operating spouse. In the case of a spouse who holds a professional license, such as an attorney or physician, the license holder would always be awarded the practice.

These forms also transfer the interest of the nonproprietor spouse in the assets of the business. They assume that the assets are listed in a separate exhibit or schedule. These forms are for use for businesses operated as sole proprietorships or partnerships in which a spouse is a general partner. Other clauses address community interests in limited partnerships [*see* § 121.282] and closely held corporations [*see* § 121.284].

[b] Characterization and Transfer of Partnership Interest

A partner's right in specific partnership property is not community property [*Corp. Code* § 15025(e) (repealed, operative January 1, 1999); *cf. Corp. Code* §§ 16501, 16502]. However, if community assets are transferred to a partnership of which one spouse is a member, the partner-spouse's interest in the partnership is itself community property, and the nonpartner-spouse acquires a general claim in the partner-spouse's share of the partnership in place of the nonpartner's interest in the community assets transferred to the partnership [*Rosenthal v. Rosenthal* (1966) 240 Cal. App. 2d 927, 930-931, 50 Cal. Rptr. 385] . In other words, the nonpartner does not have a community property right in the partnership or in specific partnership property, but does have a community interest in the partner-spouse's partnership interest.

On dissolution or legal separation, the nonpartner's community interest typically is transferred to the partner, and the nonpartner spouse is given property or money equal to one-half of the present value of the partner-spouse's partnership interest as compensation for giving up his or her claim to the partner-spouse's share of the partnership [see *Rosenthal v. Rosenthal* (1966) 240 Cal. App. 2d 927, 931, 50 Cal. Rptr. 385 ; *Carmichael v. Carmichael* (1963) 216 Cal. App. 2d 674, 682-683, 31 Cal. Rptr. 514] . For further discussion, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapter 21, *Special Property Characterization and Division Issues* (Matthew Bender).

[2] FORM--Sole Proprietorship or Partnership

Interspousal Transfer of Interest in Community Business

Transfer of Interest in Community Business

The community estate includes an interest in the business located at _____ [street address, city, state], organized as a [specify capacity of enterprise, e.g., sole proprietorship], and doing business under the name of _____ [business name], including all of the assets of the business set forth in Schedule _____, which is attached to this Agreement and incorporated by reference. [proprietor spouse, e.g., Wife] operates and manages the business on behalf of the community.

As part of the division of the parties' community estate, [transferor spouse, e.g., Husband] assigns to [transferee spouse, e.g., Wife] as [her/his] sole and separate property, all of [his/her] right, title, and interest in and to _____ [business name], and to all of the assets of the business set forth in Schedule _____.

[Transferee spouse] assumes and agrees to hold [transferor spouse] harmless from all claims, liabilities, obligations, liens, and encumbrances presently existing against _____ [business name], and its assets, or arising out of the operation of the business. This obligation extends to all existing and future claims asserted against the business and the its assets. [Transferee spouse] further agrees to indemnify [transferor spouse] from all liability or loss that [he/she] may incur as a result of any such claim, obligation, lien, or encumbrance, including reasonable attorney fees incurred in defending against the claim. If any claim, action, or proceeding is brought seeking to hold [transferor spouse] liable on account of any such claim, liability, obligation, lien, or encumbrance, [transferee spouse] at [her/his] sole expense, shall defend [transferor spouse] against the claim, action, or proceeding.

[3] FORM--Professional Practice

Interspousal Transfer of Interest in Professional Practice

Transfer of Interest in Professional Practice

[Husband or Wife] is engaged in the practice of [specify profession], under the name of _____ [professional practice name] located at _____ [street address, city, state] ("the Practice"). The Practice is operated as [specify capacity of enterprise, e.g., a limited liability corporation]. The community estate includes an interest in the Practice, including all of the assets of the Practice set forth in Schedule _____, which is attached to this Agreement and incorporated by reference.

As part of the division of the parties' community estate, [transferor spouse, e.g., Wife] assigns to [transferee spouse, e.g., Husband] as [his/her] sole and separate property, all of [her/his] right, title, and interest in and to _____ [professional practice name] and to all of the assets of the Practice set forth in Schedule _____.

[Transferee spouse] assumes and agrees to hold [transferor spouse] harmless from all claims, liabilities, obligations, liens, and encumbrances presently existing against _____ [professional practice name] and its assets,

or arising out of the operation of the Practice. This obligation extends to all existing and future claims asserted against the Practice and the its assets, including any claim for malpractice or professional negligence. [*Transferee spouse*] further agrees to indemnify [*transferor spouse*] from all liability or loss that [she/he] may incur as a result of any such claim, obligation, lien, or encumbrance, including reasonable attorney fees incurred in defending against the claim. If any claim, action, or proceeding is brought seeking to hold [*transferor spouse*] liable on account of any such claim, liability, obligation, lien, or encumbrance, [*transferee spouse*] at [his/her] sole expense, shall defend [*transferor spouse*] against the claim, action, or proceeding.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
 OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
 DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution &
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6. Other Provisions for Division of Business and Business Interests

34-121 California Legal Forms--Transaction Guide § 121.282

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.282 Interspousal Transfer of One Party's Community Interest in Partnership

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, is for use to divide a community limited partnership interest between the parties. It is for use if the community interest is as a limited partner. It is not for use if the community is interested in a limited partnership as a general partner.

The clause includes a mutual request of the limited partnership that the parties' interest be divided and that each be supplied with documentation as to his or her new ownership interest in the limited partnership. If either or both parties have received any distributions from the partnership that have not otherwise been addressed in the agreement, the clause requires an accounting and appropriate division of the distributions. The clause also provides for the division of any distributions that may be received before the division of their interests by the partnership is effected.

For discussion of using promissory notes to equalize a division of community assets, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 20, *Community Property: General Characterization and Division Principles* (Matthew Bender). If the partnership involves a professional practice, see § 121.281[3], for a related form.

[2] FORM

Interspousal Transfer of One Party's Community Interest in Partnership

Assignment of Partnership Interest

The parties own an interest, as community property, in a limited partnership more particularly identified as

_____ [name of partnership], doing business at _____ [street address, city, state].

The parties shall divide this limited partnership interest between them [equally or _____ percent to Husband and _____ percent to Wife]. They shall mutually request of the limited partnership that their interest be divided and that each be supplied with documentation as to his or her new ownership interest in the limited partnership.

[To divide any partnership distributions received before division is accomplished:]

During the pendency of the parties' proceeding for dissolution of marriage, [Husband has or Wife has or Husband and Wife have] received distributions from the limited partnership. The parties shall account for and divide _____ equally or according to the above percentages] all distributions received in connection with the limited partnership from the date of the filing of the petition for dissolution of marriage through the date of execution of this Agreement. In addition, until the parties are able to effectuate the separation of their ownership interests in the limited partnership, all distributions to be received shall be distributed between them [equally or according to the above percentages].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawGeneral PartnershipsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationInterspousal Transfers



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6. Other Provisions for Division of Business and Business Interests

34-121 California Legal Forms--Transaction Guide § 121.283

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.**§ 121.283 Retention of Co-ownership in Business****[1] Comment**

The form set forth in [2], *below*, is a marital settlement agreement clause providing for the maintenance by both parties of an equal interest in an income-producing enterprise, either for an indefinite period or pending its sale to a third party. The form contemplates that one of the parties will actually manage the enterprise and that there will be a distribution of net income from the enterprise to the parties. The distribution may be either equal or according to percentages specified by the parties.

The co-ownership continues until the parties agree to sell, until an offer to purchase is received at a specified price, or until any other event that the parties specify. On the occurrence of a terminating event, one party may be given the option to purchase the interest of the other party. On the eventual sale of the property, either a long form or short form of terms and conditions of sale may be included. The distribution of the proceeds of sale may also be either equal or according to percentages specified by the parties.

For forms providing for the sale of real property, including income-producing property, see § 121.231. For a form for use to retain income-producing real property, see § 121.234.

[2] FORM**Retention of Co-ownership in Business**

Retention of Community Business

The parties own an income-producing business located at _____[*street address*], organized as a _____(*capacity, e.g., sole proprietorship*), and doing business under the name of _____[*business name*]. The parties shall maintain their ownership interests in the business as follows:

a. _____ [Husband shall be solely or Wife shall be solely or The parties jointly shall be] responsible for the management of the business.

b. From the gross income earned by the business, all fixed and operating expenses shall be paid. If the business does not generate sufficient gross income to pay all of its fixed and operating expenses, then these expenses shall be paid by _____ [Husband or Wife], and before any distribution of net income is made to the parties. After the payment of these expenses, the net income shall first be applied to reimburse _____ [Husband or Wife] for payments of business expenses made from [his/her] separate property. The balance shall be distributed _____ [equally or _____ percent to Husband and _____ percent to Wife].

The parties shall terminate their co-ownership of the business on the occurrence of the earliest of the following (hereafter referred to as "terminating events"):

- The parties mutually agree to sell the business.
- The parties receive an offer to purchase the business from a buyer who is ready, willing, and able to buy the business for a selling price of at least \$_____.
- The expiration of the period of time commencing on the execution of this Agreement and ending _____ [specify terminating date or event].

[To give one party an option to purchase the other's interest in the business on the occurrence of a terminating event, adapt provisions from § 121.233[2].]

[To provide for the eventual sale of the business, continue with the following (or adapt Long Form of Sale of Real Property to Third Party, § 121.231[3]).]

On the first occurrence of a terminating event, the business shall be listed for sale with a licensed real estate broker and shall remain listed for sale until it is sold. The business shall be offered for sale at a price that is the fair market value of the business at that time, as determined by agreement between the parties. On sale of the business, the net proceeds of sale shall be distributed _____ [equally to the parties or _____ percent to Husband and _____ percent to Wife].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawGeneral PartnershipsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral Overview



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6. Other Provisions for Division of Business and Business Interests

34-121 California Legal Forms--Transaction Guide § 121.284

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.284 Distribution of Community Shares of Closely Held Corporation

[1] Comment

[a] Use of Forms

The forms *set forth in § 121.284[2]-[6]* provide five different approaches to address the disposition of community property shares of stock in a closely held corporation. The options are the following:

1. The parties will divide their shares in the corporation equally [*see § 121.284[1][c]* and Form [2]];
2. One party is to transfer his or stock to the other [Form [3]];
3. The corporation is to redeem the shares of one spouse [Form [4]];
4. A voting trust will be used to enable one spouse to control the corporation [Form [5]];
5. The corporation is to be dissolved and its assets distributed [Form [6]].

The division of stock between parties should qualify for nonrecognition (for income tax purposes) under *Internal Revenue Code Section 1041*. For discussion of Section 1041, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapter 160, *Tax Effects of Dissolution* (Matthew Bender).

[b] Definition of "Closely Held Corporation"

For these purposes, "closely held corporation" means a corporation with relatively few shareholders. There are different types of closely held corporations. For example, under the General Corporation Law [*Corp. Code § 100 et seq.*], a "close corporation" is a corporation whose articles contain, in addition to other required provisions [*see Corp. Code §*

202]: (1) a provision that all of the corporation's issued shares of all classes must be held of record by not more than a specified number of persons, not exceeding 35; and (2) the statement "This corporation is a close corporation" [*Corp. Code* § 158(a)]. Characteristics of closely held corporations, in addition to the relatively small number of shareholders, include an emphasis on simplified and informal procedures, general participation by the shareholders in decision making, and restrictions on the transfer of shares to limit the intrusion of outsiders into the business. For further discussion of these corporations, see Ballantine & Sterling, *California Corporation Laws*, Ch. 4 (Matthew Bender).

[c] Division Problems

One of the most difficult problems to be resolved in connection with a marital dissolution is the disposition of one spouse's community interest in a closely held corporation operated by the other spouse. A simple division of the stock between the husband and wife [Form 2]] is seldom satisfactory because it is unlikely that the corporation could operate effectively with control split between the parties. Further, if the spouses own all of the stock of the corporation, the parties probably will not be able to agree on the directors of the corporation, and either party will always be able to threaten the other with dissolution of the corporation, because 50 percent of the voting stock of a corporation can cause a voluntary dissolution of the corporation [*Corp. Code* § 1900; see § 121.284[6] (voluntary dissolution)] in the absence of contrary provisions in the shareholders' agreement [*Corp. Code* § 300(c)]. For these reasons, parties to a marital settlement agreement often provide for the removal of one spouse's interest in the business. Forms [3] through [6] represent different ways of accomplishing this removal.

[d] Professional Corporations

In the case of a professional corporation [see *Corp. Code* § 13401(b) ("professional corporation" defined); see also Ch. 12A *Professional Corporations*] the shares may be transferred only to a licensed person or to the professional corporation, and any transfer that violates this restriction is void [*Corp. Code* § 13407]. Consequently, the shares could not be transferred to an unlicensed spouse, and his or her shares would have to be transferred to the licensed spouse, with an offsetting award of other community property to the unlicensed spouse, assuming the shares were community property.

For comprehensive coverage of professional corporations, see Ch. 12A *Professional Corporations* .

[e] Redemption

Form [4] requires one spouse to offer his or her shares for sale to the corporation. The redemption of the shares by the corporation permits the spouse with managing control of the business to use corporate funds to acquire the shares. Stock is treated as redeemed by a corporation if the corporation acquires its stock from a shareholder in exchange for property [*I.R.C.* § 317(b); see *Rev. & Tax. Code* §§ 17024.5(a), 23051.5(a), 24451-24481 (incorporating federal definition)]. For these purposes, "property" means money, securities, and any other property, but does not include the stock of the corporation (or rights to acquire that stock) [*I.R.C.* § 317(a)]. The redeemed stock can be canceled, retired, or held as treasury stock [*I.R.C.* § 317(b); see *Rev. & Tax. Code* §§ 17024.5(a), 23051.5(a), 24451-24481 (incorporating federal definition)].

[f] Tax Consequences of Redemption

[i] Capital Gain Treatment

If a corporation redeems its stock and one of four conditions apply, the redemption is treated as a distribution in part or full payment in exchange for the stock and the gain or loss recognized by the selling spouse is treated as capital gain or loss [see *I.R.C.* § 302(a)]. One of the conditions permitting capital gain treatment is that the redemption terminates the shareholder's entire interest in the corporation [*I.R.C.* § 302(b)(3)]. Form [4] provides for such a termination. However, a redemption of all the spouse's stock in the corporation may not satisfy this condition if the spouse constructively owns

other stock of the corporation [see [ii], *below*]. If capital gain treatment does not apply, the transaction is deemed a dividend and any gain realized by the corporate shareholder is treated as ordinary income [I.R.C. § 302(d)].

An individual shareholder usually prefers sale or exchange treatment because it permits him or her to offset basis in the redeemed shares and receive capital gain treatment on the gain [see I.R.C. §§ 302(a), 1001(a)]. If a redemption is treated as a dividend, it is included in the shareholder's income to the extent it does not exceed the corporation's earnings and profits [I.R.C. §§ 301(a), (c), 302(d), 316]. Even for years in which dividends are taxed at capital gains rates (generally tax years beginning after December 31, 2002, and before January 1, 2009) [see I.R.C. § (h)(11); Pub. Law No. 108-27, §§ 302(f)(1), 303 (effective date and sunset provisions for dividend taxation at capital gains rates)], sale or exchange treatment is preferable because the amount of gain from the sale and exchange will be less because of the offset for the basis of the shares [see I.R.C. § 301(a),(c)]. For other years, the discrepancy between ordinary income and capital gains rates may result in significantly higher tax liability if the redemption is treated as a distribution [see I.R.C. §§ 1(a)-(e), (h), (i)(2), 301(a),(c), 316]. Any portion that exceeds the earnings and profits reduces the basis of the stock. Any portion that exceeds the earnings and profits and the basis of the stock is treated as gain from the sale or exchange of the stock [I.R.C. § 301(c); see Treas. Reg. § 1.301-2].

An individual shareholder may elect to roll over capital gain from the sale of qualified small business stock held for more than six months if other small business stock is purchased by the individual during the 60-day period commencing on the sale date. In this manner, gain is recognized only to the extent that the amount realized on the sale exceeds the cost of the replacement small business stock that is purchased during the 60 day period, reduced by any portion of cost previously taken into account [I.R.C. § 1045].

[ii] Attribution of One Spouse's Stock to Other Spouse

Although a redemption is generally taxed at capital gains rates if it effects a complete termination of the shareholder's interest in the corporation [I.R.C. § 302(b)(3); see [i], *above*], the family attribution rules provide that stock owned by a shareholder's spouse (or certain relatives) is generally attributed to, and deemed constructively owned by, the shareholder, with certain exceptions [I.R.C. §§ 302(c)(1), (2)(A), 318(a)]. Therefore, even though all of the stock owned by one spouse is redeemed by the corporation, that spouse will retain an interest in the stock of the corporation by virtue of the attribution rules, and any gain realized by the spouse as a result of the redemption will be treated as ordinary income, unless all of the following conditions are satisfied:

1. Immediately after the distribution the former shareholder has no interest in the corporation (including an interest as an officer, director, or employee), other than an interest as a creditor [I.R.C. § 302(c)(2)(A)(i)];
2. The former shareholder does not acquire any interest (other than stock acquired by bequest or inheritance) in the corporation within 10 years from the date of the distribution in redemption [I.R.C. § 302(c)(2)(A)(ii); *but see* I.R.C. § 302(b)(5)]; and
3. The former shareholder files an agreement to notify the Internal Revenue Service of any acquisition of an interest (other than stock acquired by bequest or inheritance) in the corporation within 10 years from the date of the distribution in redemption [I.R.C. § 302(c)(2)(A)(iii); Treas. Reg. § 1.302-4(a); Rev. & Tax. Code § 23051.5(f); 18 Cal. Code Reg. § 26422].

[iii] Nonrecognition Consequences on Redemption of Spouse's Corporate Stock

Generally, if a corporation redeems its stock from a spouse, the redemption is treated as a distribution in partial or full payment in exchange for the stock, and the selling spouse will recognize a capital gain or loss [see I.R.C. § 302(a); see also discussion in [i], *above*]. However, transfers of property to third parties on behalf of a spouse or former spouse may

qualify for nonrecognition [*I.R.C. § 1041(a)*; Temp. Treas. Reg. § 1.1041-1T(c), Q&A 9]. Nonrecognition may occur if a corporation redeems a spouse's stock "on behalf of" of the other spouse. In this situation, the Ninth Circuit Court of Appeals has held that the redeeming spouse is entitled to nonrecognition of income from the redemption [*Arnes v. U.S.* (9th Cir. 1992) 981 F.2d 456, 459-460] .

However, the Tax Court has denied nonrecognition to the redeeming spouse under similar circumstances [*Blatt v. Commissioner* (1994) 102 T.C. 77, 83] . Accordingly, there is now a split of authority regarding whether the redeeming spouse in this situation is entitled to nonrecognition of income. Another issue in controversy is whether and under what circumstances the nonredeeming spouse is taxed on redemption of the other spouse's stock (a transfer on behalf of the nonredeeming spouse) as a constructive dividend [see *Arnes v. U.S.* (9th Cir. 1992) 981 F.2d 456, 459-460 ; *Arnes v. Commissioner* (1994) 102 T.C. No. 522 ; *Blatt v. Commissioner* (1994) 102 T.C. 77, 83] . For a general discussion of tax treatment of property transfers on dissolution of marriage, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 160, *Tax Effects of Dissolution* (Matthew Bender).

[g] Voting Trusts

Form [5] provides that the shares of the parties in a closely held corporation are to be transferred to a voting trust. A voting trust is a trust created by a written agreement among the shareholders of a corporation to transfer their shares to a trustee or trustees in order to confer on the trustee or trustees the right to vote and otherwise represent the shares [see *Corp. Code § 706(b)*]. Consequently, the transfer of the spouses' shares to a voting trust permits them to retain their shares while safeguarding the operation of the corporation from any conflicts that may arise between the spouses.

The spouses should select the trustee or trustees at the time the marital settlement agreement is being negotiated. The agreement should specify the term of the voting trust, which may not exceed 10 years [*Corp. Code § 706(b)*].

For comprehensive coverage of voting trusts, see Ch. 8B. *Voting Agreements and Voting Trusts* .

[2] FORM--Equal Division of Shares

Distribution of Community Shares of Closely Held Corporation--Equal Division of Shares

Division of Stock in _____ [*name of corporation*]

The parties acknowledge that they hold [*number*] shares of _____ [*name of corporation*], a California closely held corporation. These shares are community property and are held by the parties as [*specify form of ownership*]. One-half of the shares are assigned to Husband as his sole and separate property, and one half of the shares are hereby assigned to Wife as her sole and separate property. Each party agrees to take all necessary steps to effectuate this transfer.

[3] FORM--Interspousal Transfer of All Shares to One Party

Distribution of Community Shares of Closely Held Corporation--Interspousal Transfer of All Shares to One Party

Transfer of Stock in _____ [*name of corporation*]

The parties acknowledge that they hold [*number*] shares of _____ [*name of corporation*], a California closely held corporation. These shares are community property and are held by the parties as [*specify form of ownership*]. [*transferor spouse, e.g., Husband*] transfers and assigns to [*transferee spouse, e.g., Wife*] as [*her/his*] sole and separate property, all of [*transferor spouse's*] right, title, and interest in and to these shares.

[4] FORM--Redemption of Shares by Corporation**Distribution of Community Shares of Closely Held Corporation--Redemption of Shares by Corporation**

Sale of Stock to Corporation

The parties acknowledge that they hold [number] shares of _____[name of corporation], a California closely held corporation. These shares are community property and are held by the parties as [specify form of ownership]. [transferor spouse, e.g., Wife] agrees to offer for sale to _____[name of corporation] all of the shares that [he/she] owns in the corporation. The offer shall be made on _____[date], and will provide that the corporation has [number] days from the time of receipt of the offer to accept it and redeem the shares. If the corporation does not accept the offer and redeem during this period, the offer shall terminate without further notice. The purchase price of the shares and the terms and conditions of the sale are set forth in the Purchase Agreement that is attached to this Agreement as Exhibit _____ and incorporated by reference.

[5] FORM--Transfer of Shares to Voting Trust**Distribution of Community Shares of Closely Held Corporation--Transfer of Shares to Voting Trust**

Transfer of Shares to Voting Trust

The parties acknowledge that they hold [number] shares of _____[name of corporation], a California closely held corporation. These shares are community property and are held by the parties as [specify form of ownership]. The parties agree to transfer all of these shares immediately to a voting trust. The trust shall be irrevocable for a period of [specify term, which may not exceed 10 years]. _____[Name of trustee] shall be the trustee of the trust and shall be entitled to exercise all voting rights of the stock for the duration of the trust.

[6] FORM--Dissolution of Corporation**Distribution of Community Shares of Closely Held Corporation--Dissolution of Corporation**

Dissolution of Corporation

The parties acknowledge that they hold [number] shares of _____[name of corporation], a California closely held corporation. These shares are community property and are held by the parties as [specify form of ownership]. The parties agree that (1) within _____ days from the effective date of this Agreement, they shall cause a shareholders' meeting to be held for the purpose of resolving to voluntarily elect to wind up and dissolve the corporation; (2) they shall vote all of their shares at the meeting in favor of the dissolution; and (3) they shall cause the corporation to be completely wound up and dissolved within a reasonable time thereafter.

On dissolution of the corporation, the corporate assets shall be divided as set forth in Schedule _____, which is attached to this Agreement and incorporated by reference at though fully set forth.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Closely Held Corporations General Overview Family Law Marital Termination & Spousal Support
 Dissolution & Divorce Property Distribution General Overview Family Law Marital Termination & Spousal Support
 Dissolution & Divorce Property Distribution Classification General Overview



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6. Other Provisions for Division of Business and Business Interests

34-121 California Legal Forms--Transaction Guide §§ 121.285-121.289

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 121.285[Reserved]



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7. Other Provisions for Payment of Debts

34-121 California Legal Forms--Transaction Guide § 121.290

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.290 Assumption of All Community Debts by One Party

[1] Comment

The form set forth in [2], *below*, is a marital settlement agreement clause that provides that one spouse agrees (1) to assume and pay all of the community debts, and (2) to indemnify and hold the other party harmless from these debts. An assumption of all the community debts may be inadvisable in that it may expose the assuming spouse to unknown liabilities [*see Ede v. Ede (1962) 208 Cal. App. 2d 718, 721, 25 Cal. Rptr. 576* (assuming spouse liable for income tax deficiency for prior years when deficiency assessed after execution of marital settlement agreement)]. Consequently, this type of assumption is not recommended for general use.

[2] FORM

Assumption of All Community Debts by One Party

Assumption of Community Debts by _____ [Husband **or** Wife]

[Husband *or* Wife] assumes and agrees to pay all of the community debts of the parties described in Schedule _____, attached to this Agreement. [Husband *or* Wife] further agrees (1) to indemnify and hold [Wife *or* Husband] harmless from these debts, and (2) to defend [Wife *or* Husband], at [his/her] own expense, against any claim, action, or proceeding that may be brought seeking to hold [Wife *or* Husband] liable on account of these debts, including the payment of reasonable attorney fees incurred by [Wife *or* Husband] in defending against any such allegation of liability.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Duties & Rights Debt Liability Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview Family Law Marital Termination & Spousal Support Dissolution &

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34-121 California Legal Forms--Transaction Guide § 121.291

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.291 Sole Responsibility of Incurring Party for Post-Separation Debts

[1] Comment

The form set forth in [2], *below*, is a marital settlement agreement clause providing that each party will assume all of the debts incurred by him or her after the date of the parties' separation. If a particular reason exists, the parties could choose another "cut-off" date, such as the date the agreement is executed.

[2] FORM

Sole Responsibility of Incurring Party for Post-Separation Debts

Subsequent Debts

The parties agree that every debt incurred by either party after _____ [the date of their separation, which was _____ (*specify*), or *specify other date*] shall be the obligation of the party incurring the debt. The parties further agree that the party incurring a debt after that date shall (1) indemnify and hold the other party harmless from the debt, and (2) defend, at his or her own expense, the other party against any claim, action, or proceeding that is brought seeking to hold the other party liable on account of the debt, including the payment of reasonable attorney fees incurred by the other party in defending against any such alleged liability.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Duties & RightsDebt LiabilityFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral Overview



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7. Other Provisions for Payment of Debts

34-121 California Legal Forms--Transaction Guide § 121.292

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.292 Payment of Debts From Specified Source

[1] Comment

The form set forth in [2], *below*, allows the parties to specify that one or more particular debts will be paid from one or more specified sources. For example, the parties might designate a particular account from which the debts are to be paid. Or the parties might agree to sell particular community property or cash in particular community investments in order to pay some or all of their community debts. The division of the community estate will then be net of these debts; that is, the community funds used to pay debts will be subtracted before equitably dividing the remainder of the assets and obligations.

[2] FORM

Payment of Debts From Specified Source

Payment of Community Obligations

The following community debts shall be paid out of the indicated funds: as soon as practicable after the execution of this Agreement: _____ [*Specify, e.g.:*

(a) The \$2,000 owing to ABC Company shall be paid from proceeds of the sale of 50 shares of XYZ stock.

(b) The \$100 owing to Northern Telephone shall be paid from the joint checking account of the parties at Midtown Bank].

The division of the community estate as otherwise set forth in this Agreement is net of these obligations.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Duties & RightsDebt LiabilityFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral Overview



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34-121 California Legal Forms--Transaction Guide § 121.293

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.293 Special Account for Payment of Debts

[1] Comment

The form set forth in [2], *below*, is a marital settlement agreement clause providing for the creation of a special fund, such as a checking or savings account, that will be used to pay some or all of the debts of the parties. The form provides for the attachment and incorporation by reference of an exhibit or a schedule that lists the debts to be paid from the account. Further, it states that the debts must be paid by a specified date, and that any remaining funds will be divided equally between the parties. The division of the community estate will then be net of these debts; that is, the community funds used to pay debts will be subtracted before equitably dividing the remainder of the assets and obligations.

[2] FORM

Special Account for Payment of Debts

Special Fund For Payment of Community Obligations

The parties acknowledge that they have set aside \$_____ of community funds in order to provide funds for the payment of community obligations. The funds are currently deposited in checking account number _____ at *[financial institution]*. The funds in this account shall be subject to withdrawal by check on the signature of either party, but solely for the purpose of paying the debts listed in Schedule _____, which is attached to this Agreement and incorporated by reference as though fully set forth at this point. The payment of those debts shall be made on or before _____*[date]*. Any funds remaining after payment of all debts shall be divided equally between the parties. The division of the community estate as otherwise set forth in this Agreement is net of these funds and obligations.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Duties & RightsDebt LiabilityFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral Overview



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7. Other Provisions for Payment of Debts

34-121 California Legal Forms--Transaction Guide § 121.294

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.294 Loan to Pay Debts

[1] Comment

The form set forth in [2], *below*, provides that the parties will pay specified community debts by obtaining a loan from a financial institution. Debts are sometimes paid in this manner if there is no liquid source for payment, and the debts are accruing higher interest than what will be payable on the loan. The division of the community estate will then be net of these debts; that is, the amount of the debts will be subtracted before equitably dividing the remainder of the assets and obligations.

The clause provides that the proceeds of the loan are to be deposited in a joint checking account, from which they can be disbursed to the creditors. Should the total loan proceeds exceed the debts to be paid, the balance is to be divided between the parties.

The parties are made jointly and severally liable for repayment of the loan. A party who is forced to pay the share of the other is given a right of indemnity against the defaulting party.

[2] FORM

Loan to Pay Debts

Use of Loan to Pay Community Obligations

The parties will obtain a loan from a bank, savings and loan association, or other financial institution in the amount of \$ _____ for the purpose of paying the community obligations of the parties set forth in Schedule _____, which is attached to this Agreement and incorporated by reference. The listed debts shall be paid from the escrow on the loan. The parties agree to execute all loan documents required by the lender in connection with the obtaining of the loan. The loan will be secured by *[specify security]*. The division of the community estate as otherwise

set forth in this Agreement is net of the debts to be paid from the loan proceeds.

The loan proceeds shall be deposited in a joint checking account established by the parties and shall be used solely to pay the listed debts. Either party may write checks on or make withdrawals from the account to pay the debts. Any funds remaining in the account after all of the listed debts have been paid shall be divided equally between the parties.

The parties will be jointly and severally liable for the repayment of the loan. Each shall be responsible for payment of half of each installment as it comes due. Should either party fail to make a required payment, and the other pays the entire amount of the payment, the defaulting party shall indemnify the other for all loss or liability that may result from the default.

[Add, If desired.]

If the parties are unable to obtain the required loan, *[specify course of action]*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Duties & RightsDebt LiabilityFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral Overview



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7. Other Provisions for Payment of Debts

34-121 California Legal Forms--Transaction Guide § 121.295

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.**§ 121.295 Payment and Termination of Joint Credit Cards and Charge Accounts****[1] Comment**

The forms set forth in [2] and [3], *below*, provide for the payment and closing of joint credit cards [Form [2]] and charge accounts [Form [3]]. If the parties have a joint credit card or joint charge account, the marital settlement agreement should, at a minimum, provide for the termination of the joint liability on the card or account. In most situations, the better approach is to pay off the balance on the card or account, and cancel the card or close the account. Each party may then obtain new credit cards and charge accounts in his or her sole name and based solely on his or her creditworthiness.

Alternatively, the parties might provide for the assumption by one spouse of liability for the payment of the balance due on a joint charge account, and for the removal of the other party from the account. For this purpose, use the *form in § 121.203* and assign each card or account to the assuming party. However, there is no guarantee that the creditor will convert the account from joint liability to sole liability, particularly if there is a large outstanding balance due and the creditor expressly relied on the creditworthiness of both spouses in opening the account. Therefore, the nonassuming spouse may not be escaping liability on the card or account.

[2] FORM--Payment and Cancellation of Joint Credit Cards**Payment and Termination of Joint Credit Cards**

Payment and Cancellation of Credit Card

The parties presently owe \$_____ on their joint [*credit card kind, e.g., Master Card*], Number _____, as shown on the card statement dated _____[*date*]. This balance will be paid off in its entirety from community funds, and the credit card shall be cancelled. Either party may request the closing of the account from the creditor, and shall give notice to the other party of the request to close. The other party shall take

any steps necessary to effect the closing. If either party has incurred or incurs any indebtedness on the credit card that is not reflected in the above balance, that party shall be wholly responsible for payment of that indebtedness, and shall indemnify the other and hold the other harmless from any loss or liability incurred by the other on account of the indebtedness, including any reasonable attorney fees incurred in defending against any alleged claim of liability on account of the indebtedness.

[3] FORM--Payment and Closing of Joint Charge Accounts

Payment and Termination of Joint Charge Accounts

Payment and Closing of Charge Account

The parties presently owe \$_____ on their joint charge account for [store or other creditor], Number _____, as shown on the statement dated _____[date]. This balance will be paid off in its entirety with community funds, and the account shall be closed. Either party may request the closing of the account from the creditor, and shall give notice to the other party of the request to close. The other shall take any steps necessary to effect the closing. If either party has incurred or incurs any indebtedness on the account that is not reflected in the above balance, that party shall be wholly responsible for payment of that indebtedness, and shall indemnify the other and hold the other harmless from any loss or liability incurred by the other on account of the indebtedness, including any reasonable attorney fees incurred in defending against any alleged claim of liability on account of the indebtedness.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Duties & RightsDebt LiabilityFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral Overview



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34-121 California Legal Forms--Transaction Guide § 121.296

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.**§ 121.296 Assumption of Liability on Existing Promissory Note****[1] Comment**

The form set forth in [2], *below*, is a marital settlement agreement provision that may be used if (1) both spouses are liable on an existing promissory note and one spouse is to assume liability on the note, or (2) one spouse is liable on the note and the other spouse is to assume liability on it. As a practical matter, this type of provision is typically used if the loan was made to one spouse's business, the lender required the signature of the other spouse, and the unpaid balance of the note is substantial. The clause requires the assuming party to indemnify the other and to hold the other harmless on the note.

If the loan was made on the basis of a guaranty executed by both spouses, the agreement should also contain a provision under which the spouse assuming liability on the note agrees to have the other spouse removed from the guaranty. For such a provision, see § 121.297.

[2] FORM**Assumption of Liability on Existing Promissory Note**

Assumption of Note

[Husband is or Wife is or Husband and Wife are] presently indebted on a promissory note dated _____, for the amount of \$ _____, payable to _____ [name of creditor]. The present balance of the note is \$ _____ and is due _____ [date]. [Husband or Wife] agrees to assume this indebtedness and to indemnify and hold [Wife or Husband] harmless from any claim or liability that [she/he] may suffer or may be required to pay on account of the indebtedness, including the payment of reasonable attorney fees incurred by [Wife or Husband] in defending against any alleged liability. If any claim, action, or proceeding is brought seeking to hold [Wife or Husband] liable on account of the indebtedness,

[Husband *or* Wife] will, at [his/her] expense, defend [Wife *or* Husband] against the claim, action, or proceeding.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Duties & Rights Debt Liability Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Characterization General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Classification General Overview



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34-121 California Legal Forms--Transaction Guide § 121.297

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.**§ 121.297 Release From Continuing Guaranty****[1] Comment**

The form set forth in [2], *below*, is a marital settlement agreement provision that requires one spouse to secure the release of the other spouse from a continuing loan guaranty. Usually, a continuing guaranty is executed for a loan made by a bank to one spouse's business. This provision should not be used unless the creditor has agreed to the release. A creditor is most likely to agree to a release if the guarantee of the spouse who is to be removed was not a significant factor in making the loan. If the creditor will not give its consent, the existing loan may have to be refinanced in order to remove the other spouse from liability, and this assumes that any refinanced loan will obligate only one of the parties.

For coverage of continuing guaranties in general, see Chapter 43.

[2] FORM**Release From Continuing Guaranty**

Release from Guaranty on Loan

[Husband or Wife] agrees to secure from _____ [name of creditor] the release of [Wife or Husband] from all liability under a continuing guaranty dated _____, by which the parties jointly and severally guaranteed all the debts of _____ [name of debtor] to _____ [name of creditor]. [Husband or Wife] further agrees to indemnify and hold [Wife or Husband] harmless from any liability on the continuing guaranty, and to defend [Wife or Husband], at [his/her] own expense, against any claim, action, or proceeding that may be brought seeking to hold [Wife or Husband] liable on account of the continuing guaranty, including the payment of reasonable attorney fees incurred by [Wife or Husband] in defending against any such alleged liability. [Husband or Wife] agrees to deliver to [Wife or Husband] the duly canceled guaranty as well as a statement of _____ [name of creditor] that it holds no other guarantees by [Wife or Husband] of the indebtedness of

_____[*name of debtor*].

This provision is based on the representation made on _____[*date*] by _____[*name of creditor*] that it will, in fact, release [Wife or Husband] from the continuing guaranty. The parties agree that if _____(*name of creditor*) subsequently fails or refuses to release [Wife or Husband] from the guaranty, the obligation of [Husband or Wife] to secure the release is null and void. In such a case, [*specify alternative action, e.g., the parties will meet within 60 days and renegotiate the issue of the loan guaranty*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGuaranty ContractsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral Overview



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34-121 California Legal Forms--Transaction Guide § 121.298

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.298 Indemnity on Executory Contract

[1] Comment

The form set forth in [2], *below*, is a marital settlement agreement provision that may be used if a party has executed a contract to purchase personal or real property and the other spouse is to be relieved from all liability in connection with the purchase. It is always preferable, and may be necessary under the terms of the purchase agreement or related instrument, to obtain the consent of the seller or lender to remove the other spouse from liability. If that consent cannot be obtained and is not required, this clause may be used. It provides that the purchaser spouse assumes all liability in connection with the purchase and indemnifies the other spouse for any liability that he or she might suffer from the purchase.

[2] FORM

Indemnity on Executory Contract

Indemnity on Executory Contract

The parties acknowledge that [Husband or Wife] has entered into a contract for the purchase of [*specify*] for a contract price of \$_____. [Husband or Wife] shall (1) be solely responsible for the payments due on the purchase of this property; (2) indemnify and hold [Wife or Husband] harmless from all liability in connection with the contract; and (3) defend [Wife or Husband] at [his/her] own expense, against any claim, action, or proceeding that may be brought seeking to hold [Wife or Husband] liable on account of the contract, including the payment of reasonable attorney fees incurred by [Wife or Husband] in defending against any alleged liability.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsIndemnityContracts LawTypes of ContractsExecutory ContractsFamily
LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily
LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral
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34-121 California Legal Forms--Transaction Guide § 121.299

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.**§ 121.299 Payment of Interspousal Debt****[1] Comment**

The form set forth in [2], *below*, provides for the repayment by one spouse of a loan made to that spouse by the other from the other's separate property during the course of the marriage. It includes options for the repayment of the debt in one lump sum on or before a specified date or for repayment in installments at a specified interest rate. Both options assume that the indebtedness has not been evidenced by a promissory note, and require the debtor spouse to provide the other with such a note.

[2] FORM**Payment of Interspousal Debt**

Repayment of Indebtedness

[Husband or Wife] acknowledges that [he/she] is presently indebted to [Wife or Husband] in the amount of \$_____ for funds that [she/he] loaned to [him/her] from [her/his] separate property from time to time during their marriage. [Husband or Wife] shall repay this indebtedness, plus interest at the rate of _____ percent per annum from the date of this Agreement [Add if payment is to be made in lump sum: on or before _____ (date)].

[Use of payment is to be made in installments:]

Payments shall be made in monthly installments of \$_____ or more. The first installment is due and payable on _____[date], and each succeeding installment is due and payable on the same day of each succeeding month through _____[date], at which time, the indebtedness, plus interest, will have been

paid in full. If any installment payment is in default for a period of more than _____ days, the entire unpaid principal and interest shall be immediately payable at the noteholder's option.

[*Continue with:*]

Evidence of the indebtedness is represented by a promissory note that has been executed by [Husband or Wife] and payable to [Wife or Husband], or order. [Wife or Husband] acknowledges receipt of the note, a copy of which is attached as Exhibit _____ to this Agreement and incorporated by reference.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Duties & Rights Debt Liability Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Characterization General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Classification General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 121 PROVISIONS FOR DIVISION OF PROPERTY
PART IV. FORMS
7. Other Provisions for Payment of Debts

34-121 California Legal Forms--Transaction Guide §§ 121.300-121.309

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 121.300[Reserved]



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8. Other Investment or Brokerage Account Provisions

34-121 California Legal Forms--Transaction Guide § 121.310

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.310 Description of Investment, Bank, and Related Accounts

[1] Comment

The form set forth in [2], *below*, contains illustrative descriptions of bank, investment, and other accounts owned by one or both parties to a marital settlement agreement. It contains provisions for the description of investments, including securities, limited partnerships, and like accounts. For a related form containing provisions for the division of these accounts, see § 121.311. For provisions dividing interests in employment--based deferred compensation accounts, including "401(k)" and like accounts, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 213, *Employee Benefits Provisions in Marital Settlement Agreements* .

The description of the investment, security, or account should, as a general rule, indicate the party in whose name the security or account is held, so that it will be possible to determine what transfers will be necessary to effect the agreed division of the property. In the case of securities such as stock, certificate numbers may be included, but ordinarily will not be necessary if one party is to receive all of the particular stock or similar security owned by the parties. A description of a bank account should include the account number and the name of the branch of the financial institution where the account is located.

[2] FORM

Description of Investment, Bank, and Related Accounts

General Descriptions of Accounts, Securities, and Other Investments

[If desired, use any of the following as a model for the description of an account, investment, or related item:]

The following bank accounts:

(a) The present balance in that certain joint checking account of the parties at the _____ Branch of _____ Bank, Account No. _____.

(b) Account No. _____ in [Husband's or Wife's] name at the _____ Branch of _____ Savings and Loan Association.

(c) Account No. _____ in [Husband's or Wife's] name at the _____ Branch of _____ Bank in _____ [city].

(d) Account No. _____ in [Husband's or Wife's] name at the _____ Branch of _____ Bank.

[AND/OR]

[Number] shares of the common stock of _____ Corporation, a corporation formed in the State of California, held in the name[s] of [Husband or Wife or Husband and Wife].

[AND/OR]

[Number] shares of _____ Corporation, a California close corporation, held in [Husband's or Wife's] name.

[AND/OR]

[Number] Street Improvement bonds of the _____ [name of assessment district], County of _____, Series [number].

[AND/OR]

[Number] United States Treasury Bills due _____ [date], in the principal amount of \$_____ each.

[AND/OR]

[Number] United States Treasury Federal Reserve notes in the principal amount of \$_____ each.

[AND/OR]

[Number] partnership units in _____, a California limited partnership, held in the name[s] of [Husband or Wife or Husband and Wife].

[AND/OR]

Securities account No. _____ at the _____ [city] office of [e.g., First Empire Securities, Inc.] in the

name[s] of [Husband or Wife or Husband and Wife].

[CONTINUE]

Description of Investment and/or Brokerage Account

The parties presently own _____[*specify, e.g., as community property or in the name of Husband or in the name of Wife or specify other ownership method*] an investment *and/or* brokerage account with _____[*specify name of place accounts are held*], bearing account number [*specify account number*], valued as of _____[*date*] in the amount of \$[*fill in total amount of value of stock, securities, or other investments in account*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution &
DivorceProperty DistributionClassificationGeneral Overview



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8. Other Investment or Brokerage Account Provisions

*34-121 California Legal Forms--Transaction Guide § 121.311***AUTHOR:** Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.**§ 121.311 Division of Investment and Related Accounts****[1] Comment**

The forms set forth in [2] and [3], *below*, are two provisions that may be used to divide a community property account held for the parties by a stock broker or an account with a financial institution, such as a mutual funds account. Form [2] provides for the account to be divided strictly on the basis of the value of the assets. The division is to be made by the broker or other investment officer who is managing the account at his or her discretion. Under this clause, the broker would have the discretion to assign 100 shares of stock A to Husband and 30 shares of stock B to Wife, as long as the value of 100 shares of stock A was equal to the value of 30 shares of stock B at the time of the division.

Form [3] requires each spouse to receive a part of each asset. Under this clause, in the above example, Husband and Wife would each receive 50 shares of Stock A and 15 shares of stock B. Use of this clause equalizes the risk of loss and the opportunity for gain based on the future performance on the assets in the portfolio.

For a related form that may be used simply to describe investment accounts, see § 121.310. For provisions dividing interests in employment--based deferred compensation accounts, including "401(k)" accounts and the like, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 213, *Employee Benefits Provisions in Marital Settlement Agreements*.

[2] FORM--Division Based on Value of Assets in Account**Division of Investment and Related Accounts Based on Value of Assets in Account**

Division of Investment Account

The parties presently own as community property, in the name of [account owner spouse] an investment account with _____ [specify name of place accounts are held], bearing account number _____,

valued as of _____ [date] in the amount of \$[total value of stock, securities, or other investments in account]. The parties shall divide the account between them as follows:

a. Wife shall receive investment assets in the account having a value of \$_____ as of the close of market on _____ [date]; Husband shall receive investment assets in the account having a value of \$_____ as of the close of market on that date. This represents a distribution of _____ percent of the account to Wife and _____ percent of the account to Husband. The division of the investment assets in the account between the parties shall be made by _____ [name]. The parties shall effectuate this transfer as soon as reasonably practicable to do so after the execution of this Agreement.

b. After distribution of the investment assets in the account to the parties, _____ [the account shall be closed or _____ (Husband or Wife) shall have the right to retain account _____, and _____ (Wife or Husband) shall transfer [her/his] portion of the investment assets in the account into another account to be established by _____ (Wife or Husband) at [her/his] sole discretion].

[3] FORM--Division on Asset-by-Asset Basis

Division of Investment and Related Accounts on Asset-by-Asset Basis

Division of Investment Account

The parties presently own as community property, in the name of [account owner spouse] an investment account with _____ [specify name of place accounts are held], bearing account number _____, valued as of _____ [date] in the amount of \$[total value of stock, securities, or other investments in account]. The parties shall divide the account between them as follows:

a. The parties will divide each security, all cash, and all other assets of the account on an asset-by-asset basis. At the time of actual transfer of this account, Wife will receive _____ percent and Husband will receive _____ percent of each account asset. The parties shall effectuate this transfer as soon as reasonably practicable to do so after the execution of this Agreement.

b. After distribution of the investment assets in the account to the parties, _____ [the account shall be closed or _____ (Husband or Wife) shall have the right to retain account _____, and _____ (Wife or Husband) shall transfer [her/his] portion of the investment assets in the account into another account to be established by _____ (Wife or Husband) at [her/his] sole discretion].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral Overview



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8. Other Investment or Brokerage Account Provisions

34-121 California Legal Forms--Transaction Guide §§ 121.312-121.319

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 121.312[Reserved]



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9. Security Provisions

34-121 California Legal Forms--Transaction Guide § 121.320

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.320 Note Secured by Deed of Trust

[1] Comment

The form set forth in [2], *below*, provides for a deed of trust against real property owned by the spouse executing the note. This clause would generally be used with an equalizing payment to be made by the party who is receiving the family residence or other real property in an otherwise unequal division of the community estate.

For a form for an equalizing payment, including the requirement of a promissory note, see § 121.205.

[2] FORM

Note Secured by Deed of Trust

Note and Deed of Trust

As security for the payments to [Wife or Husband] on the promissory note described in Paragraph ____ of this Agreement, [Husband or Wife] shall execute and deliver to [Wife or Husband] a deed of trust against [*property securing note*]. [*Add if other than a first deed of trust: The deed of trust is to be subordinate to an existing first trust deed against the secured property in favor of [first mortgagee] in the approximate amount of \$_____.]* The note shall provide for acceleration of the entire balance due in the event of alienation by [Husband or Wife] of [his/her] interest in the secured property.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsTypesPromissory NotesEstate, Gift & Trust LawTrustsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily

LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
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9. Security Provisions

34-121 California Legal Forms--Transaction Guide § 121.321

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 121.321 Note Secured by Term Life Insurance

[1] Comment

The form set forth in [2], *below*, requires a spouse to acquire term insurance on his or her life as security for the payment of a note to the other spouse. Use of this form assumes that the spouse can in fact obtain the insurance, and the form should not be used without confirmation from the insurer that coverage will be issued.

This clause is usually used in connection with an equalizing payment if there is no other property that will provide adequate security for the payee spouse [see § 121.205, Equalizing Payment). If alimony tax treatment is to be avoided, it is important to make it clear that the installment payments on the note secured by insurance are pursuant to the division to the community estate and not intended as support. Insurance is also commonly used to continue support in the event of the death of the payor spouse.

For forms providing for the disposition of an existing life insurance policy in connection with the division of the marital property, see §§ 121.270-121.272.

[2] FORM

Note Secured by Term Life Insurance

Term Life Insurance as Security

As security for the payment to [Husband or Wife] on the promissory note described in Paragraph _____ of this Agreement, [Wife or Husband] shall obtain and pay all premiums on a term life insurance policy on [her/his] life with a death benefit of \$_____, payable to [Husband or Wife]. [Wife or Husband] shall maintain the policy throughout the period that any indebtedness is owing on the promissory note. If [Wife or Husband] dies before having made full payment of the promissory note and without having the insurance policy in effect, [Husband or Wife] shall

have a claim against the estate of [Wife or Husband] in the amount of \$[*amount of death benefit*] or the amount of the unpaid balance of the indebtedness on the promissory note at the time of [her/his] death, whichever is less.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawNegotiable InstrumentsTypesPromissory NotesEstate, Gift & Trust LawTrustsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral Overview



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34-122 California Legal Forms--Transaction Guide 122.syn

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.syn Synopsis to Chapter 122: PROVISIONS FOR DIVISION OF EMPLOYEE BENEFITS

§ 122.01 California Sources

[1] Constitution

[2] Statutes

§ 122.02 Federal Sources

[1] Constitution

[2] Statutes

§§ 122.03-122.04 [Reserved]

§ 122.05 Law Reviews and Periodicals

§ 122.06 Annotations

§ 122.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 122.08-122.09 [Reserved]

§ 122.10 Ascertaining Benefits Subject to Division

§ 122.11 Summary of Major Considerations

§ 122.12 General Tax Considerations in Dividing or Distributing Retirement Benefits

[1] Distributions Under ERISA Plan Pursuant to QDRO

[2] I.R.A. and Other Plans to Which Tax-Free Rollover May Be Made

[a] Distributions to Spouse on Employee Spouse's Death

[b] Distributions Under QDRO During Employee Spouse's Lifetime

[3] Transfers From Individual Retirement Plans ("I.R.A.s")

§§ 122.13-122.99 [Reserved]

§ 122.100 General Information Needed in Drafting Retirement Benefits Provisions

[1] Employer and Plan

Scope

[2] Employee Spouse Information

Scope

[3] Nonemployee Spouse Information

Scope

[4] Other Information

Scope

§§ 122.101-122.199 [Reserved]

§ 122.200 Provision Confirming Certain Benefits as Separate Property of Employee Spouse

[1] Comment

[2] FORM

Provision Confirming Certain Benefits as Separate Property of Employee Spouse

§ 122.201 Provision for Each Spouse to Retain Own Employment Benefits

[1] Comment

[2] FORM

Provision for Each Spouse to Retain Own Employment Benefits

§ 122.202 Division of Individual Retirement Account (IRA)

[1] Comment

[2] FORM

Division of Individual Retirement Account (IRA)

§ 122.203 Enumeration of Employee Benefit Plans; Warranties; Duties

[1] Comment

[a] Use of Form

[b] Survey of Employee Benefit Plans

[c] Description and Examples of Defined Benefit Plans

[d] Description and Examples of Defined Contribution Plans

[e] Availability of Benefits

[f] Taxation of Benefits

[2] FORM

Enumeration of Employee Benefit Plans; Warranties; Duties

§ 122.204 Division of Employee Stock Options

[1] Comment

[a] Use of Form

[b] Survey of Stock Options and Issues

[c] Stock Options Are Not Subject to ERISA

[d] Income Tax Characteristics of Employee Stock Options

[e] Characterization and Apportionment of Employee Stock Options

[f] Valuing Stock Options

[2] FORM

Division of Employee Stock Options

§§ 122.205-122.219 [Reserved]

§ 122.220 Division of Qualified Plans

[1] Comment

[a] Use of Form

[b] Qualified and Nonqualified Plans

[c] Formula for Determining Community Interest in Plan

[d] Qualified Domestic Relations Order (QDRO)

[e] Death and Survivor Benefits

[i] Death of Employee-Participant Spouse

[ii] Death of Nonparticipant Spouse

[f] Suspension of Benefits

[g] Matured Benefits Not Yet Being Paid

[i] Alternate Payee's Right to Immediate Receipt Under Marriage of Gillmore

[ii] Gillmore Election of Early Retirement Subsidy

[h] Joinder of Plan as Party

[i] Assets Allocation and Direction of Investments

[j] Present Division Providing for Future Payments

[k] TEFRA

[l] Payment of Income Taxes on Distributions

[m] Payment of QDRO-Related Expenses

[2] FORM

Division of Qualified Plans

§ 122.221 Division of Nonqualified Plans

[1] Comment

[2] FORM

Division of Nonqualified Plans

§ 122.222 Rollover to Individual Retirement Account and Assignment

[1] Comment

[2] FORM

Rollover to Individual Retirement Account and Assignment

§ 122.223 Special Provisions for Plan Controlled by Business-Owner Spouse

[1] Comment

[2] FORM

Special Provisions for Plan Controlled by Business-Owner Spouse

§ 122.224 Valuation of Community Interest in Defined Benefit Plans

[1] Comment

[2] FORM

Valuation of Community Interest in Defined Benefit Plans

§§ 122.225-122.239 [Reserved]

§ 122.240 California Public Employees Retirement System (CalPERS)

[1] Comment

[a] Use of Form

[b] Other State Employee Benefit Plans and Reciprocity

[c] Election between Separate Account or Shared-Interest Methods of Division

[i] Shared Interest and Separate Accounts Explained

[ii] Structure of Benefits Under Separate Account

[iii] Advantages and Disadvantages of Separate Account Versus Shared Interest

[d] Further Considerations Under Shared Interest

[i] Early Retirement Enhancement

[ii] Accumulated Unused Sick Leave

[iii] Reduced Worktime for Partial Service Retirement

[iv] Temporary Annuity

[v] Suspension of Benefits on Reemployment

[e] Optional Settlement for Beneficiary at Retirement

[f] Redeposit of Contributions for Service Credit

[g] Right to Purchase Service Credit

[h] Effect of Nonmember Spouse's Death

[i] Election to Obtain Higher Retirement Benefits

[j] Consideration of Rollover Rights

[k] Right to Purchase Five Years of "Air Time"

[l] Effect of Member's Disability or Death on Installment Payment of Contributions for Service Credit

[2] FORM

California Public Employees Retirement System (CalPERS)

§ 122.241 State Teachers Retirement System (CalSTRS)

[1] Comment

[a] Use of Form

[b] CalSTRS Plans and Programs

[c] Joinder Required

[d] Division of Community Interest; Separate Account or Shared Interest

[e] Considerations Under Separate Account

[i] Disadvantages and Advantages

[ii] Nonmember's Right to Designate Beneficiary

[f] Considerations Under Shared Interest

[i] Time-Rule Formula

[ii] Enhanced Early Retirement

[iii] Accumulated Unused Leave

[A] Unused Sick Leave

[B] Unused Educational Leave of Absence

[iv] Retirement Options for Beneficiaries

[v] Preretirement Options

[vi] Death of Nonmember

[vii] Suspension of Benefits on Reemployment

[g] Refund of Contributions

[h] Redeposit of Previously Refunded Contributions

[i] Purchase of Additional Service Credit

[j] Consideration of Rollover Rights

[2] FORM

State Teachers Retirement System (CalSTRS)

§§ 122.242-121.249 [Reserved]

§ 122.250 Federal Employees Retirement System (FERS) and Civil Service Retirement System (CSRS)

[1] Comment

[a] Use of Forms

[b] Division of Retirement Annuity and Annuity Supplement

[c] Salary and Cost-of-Living Adjustments

[d] Former Spouse Survivor Annuity

[i] Regular Survivor Annuity

[A] Postretirement Death of Employee

[B] Preretirement Death of Employee

[C] Employee Already Retired at Dissolution

[D] Restrictions on Payment of Survivor Annuities

[E] Importance of Timely Court Order

[F] Cost of Survivor Annuity

[ii] Insurable Interest Survivor Annuity

[iii] Survivor Annuity for Health Insurance Eligibility

[e] Refund of Contributions on Termination of Government Employment Before Retirement

[f] Employee's Receipt of Payments before COAP is Entered

[g] Death of Nonemployee

[h] Suspension of Benefits on Reemployment

[2] FORM--Federal Employees Retirement System (FERS)

Federal Employees Retirement System (FERS) Benefits

[3] FORM--Civil Service Retirement System (CSRS)

Civil Service Retirement System (CSRS) Benefits

§ 122.251 Thrift Savings Plan (TSP)

[1] Comment

[a] Use of Form

[b] Distribution of Community Interest to Nonemployee Spouse

[2] FORM

Thrift Savings Plan (TSP)

Editorial Consultants: James M. Crawford, Jr., Esq.,
R. Ann Fallon, Esq., and Anne E. Moss, Esq.n*

FOOTNOTES:

(n167)Footnote *. Mr. Crawford, Ms. Fallon, and Ms. Moss specialize in employee benefit aspects of marital dissolution cases.



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34-122 California Legal Forms--Transaction Guide Scope

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

Scope

Editorial Consultants: James M. Crawford, Jr., Esq.,
R. Ann Fallon, Esq., and Anne E. Moss, Esq.n* **Scope**

This chapter contains forms for use in marital settlement agreements to divide the parties' interests in employee benefits.

In *In re Marriage Cases*, the California Supreme Court held that differential treatment of opposite-sex and same-sex couples in California's marriage statutes violated the California Constitution's guarantees of privacy, due process, and equal protection [*In re Marriage Cases* (2008) 43 Cal. 4th 757, 784, 847-856, 76 Cal. Rptr. 3d 683, 183 P.3d 384] . That holding was superseded by the subsequent adoption of Proposition 8, which amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California [see Cal. Const. art. I, § 7.5 (eff. Nov. 5, 2008)]. The Supreme Court upheld Proposition 8 against a constitutional challenge, but in doing so the Court reaffirmed the continuing validity of same-sex marriages entered into before November 5, 2008, the effective date of Proposition 8 [Strauss v. Horton (2009) 46 Cal. 4th 364, 470-474, 93 Cal. Rptr. 3d 591, 207 P.3d 48 (estimating 18,000 same-sex marriages lawfully entered into before Proposition 8 took effect)]. If a form in this chapter is used in the context of a same-sex marriage lawfully entered into before that date, the language in the form should be modified accordingly. For example, the names of the parties may be used instead of terms like "Husband" and "Wife."

For forms concerning the division of real and personal property other than employee benefits, see Ch. 121.

For discussion of characterizing and dividing employee benefits, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 21, *Special Property Characterization and Division Issues* (Matthew Bender).

FOOTNOTES:

(n168)Footnote *. Mr. Crawford, Ms. Fallon, and Ms. Moss specialize in employee benefit aspects of marital dissolution cases.



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DIVISION VII: PERSONAL TRANSACTIONS
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PART I. RESEARCH GUIDE
A. Primary Sources

34-122 California Legal Forms--Transaction Guide § 122.01

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.01 California Sources

[1] Constitution

Separate property of spouses. *Cal. Const., art. I, § 21.*

[2] Statutes

Characterization of marital property. *Fam. Code § 760 et seq.*

Liability of marital property. *Fam. Code § 900 et seq.*

Division of property. *Fam. Code § 2500 et seq.*

Definitions and general provisions. *Fam. Code § 2500 et seq.*

Retirement plan benefits. *Fam. Code § 2610.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationMarital
PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportDissolution &
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PART I. RESEARCH GUIDE
A. Primary Sources

34-122 California Legal Forms--Transaction Guide § 122.02

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.02 Federal Sources

[1] Constitution

Supremacy clause. U.S. Const., art. VI, cl. 2.

[2] Statutes

Civil service retirement benefits and survivor annuities. *5 U.S.C. §§ 8341, 8345(j)*.

Uniformed Services Former Spouses' Protection Act (USFSPA). *10 U.S.C. § 1408*.

Military survivor benefits. *10 U.S.C. §§ 1448, 1450*.

Tax consequences of transfer of property between spouses incident to divorce. *I.R.C. § 1041*.

Certain property settlements as exempt from gift tax. *I.R.C. § 2516*.

Employee Retirement Income Security Act (ERISA). *29 U.S.C. §§ 1001-1461*.

Defined contribution plan. *29 U.S.C. § 1002(34)*.

"Defined benefit plan" defined. *29 U.S.C. § 1002(35)*.

Plans governed. *29 U.S.C. §§ 1003(a), (b)*.

Joint and survivor annuity requirements. *29 U.S.C. 1055.*

"Qualified domestic relations order" defined. *29 U.S.C. § 1056(d)(3)(B)(i).*

No preemption of state court's authority to divide benefits when pursuant to qualified domestic relations order. *29 U.S.C. §§ 1144(a), 1144(b)(7).*

Eligibility of former spouse for continuation coverage under private group health plan subject to COBRA. *29 U.S.C. §§ 1161-1167.*

Eligibility of former spouse for continuation coverage under public group health plan subject to COBRA. *42 U.S.C. §§ 300bb-1-300bb-8.*

Social Security Act. *42 U.S.C. 301-1397e.*

Railroad Retirement Act benefits: assignability. *45 U.S.C. § 231m.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution &
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PART I. RESEARCH GUIDE
A. Primary Sources

34-122 California Legal Forms--Transaction Guide §§ 122.03-122.04

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

[Reserved]

§§ 122.03[Reserved]



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B. Secondary Sources

34-122 California Legal Forms--Transaction Guide § 122.05

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.05 Law Reviews and Periodicals

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Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
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34-122 California Legal Forms--Transaction Guide § 122.06

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.06 Annotations

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Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
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34-122 California Legal Forms--Transaction Guide § 122.07

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.07 Text References

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Witkin, Summary of California Law, vol. 11, *Community Property*, §§ 54-98 (10th ed. 2005).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
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34-122 California Legal Forms--Transaction Guide §§ 122.08-122.09

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

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34-122 California Legal Forms--Transaction Guide § 122.10

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.10 Ascertaining Benefits Subject to Division

Employee benefits must be fully ascertained in order to draft appropriate provisions for their division in a marital settlement agreement. Employee benefits may take many forms and sometimes are not readily apparent even to an employee spouse. The more common types of benefits in which there may be a divisible community interest include:

- Pension and retirement benefits, both qualified and nonqualified;
- Stock options and other forms of deferred compensation;
- Stock purchased by an employer for an employee;
- Certain forms of termination or severance pay; and
- *I.R.C. § 401(h)* retiree medical accounts.

In addition, the employer may have provided term life insurance that has a community property component, though courts of appeal have split on the issue of the divisibility of such insurance [see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 21, *Special Property Characterization and Division Issues* (Matthew Bender)].

Finally, there are benefits that, while not divisible as such, should not be overlooked in determining the entitlement of each party to various services after a marital dissolution, and these may also merit consideration in relation to collateral matters, such as the need for spousal support. For example, with respect to health care benefits, there may be an entitlement to a continuation of group health care benefits for a limited time period under legislation known as "COBRA" [see 29 U.S.C. § 1161 *et seq.*; 42 U.S.C. § 300bb-1 *et seq.*; Pub. L. No. 99-272 (as amended by Pub. L. No. 99-514); see also *Health & Safety Code* §§ 1366.20, 1373.621, 1399.63; *Ins. Code* §§ 10116.5, 10128.3, 10128.50; *Lab. Code* § 2800.2 (California state provisions for extended COBRA coverage for certain employees and spouses or former

spouses)). Similarly, certain former spouses of military service members may be entitled to health benefits under the CHAMPUS program [see 10 U.S.C. § 1072 et seq.].

Counsel will need to obtain information from a variety of sources in order to ascertain the nature and scope of the available benefits. The client, the opposing party (through counsel, if represented), the employer, and the employee benefit plan administrator are all sources of information. Summary descriptions of employee benefit plans, annual statements of employee benefits, including a breakdown of monetary amounts for matters such as stock ownership and savings plans, often can be obtained without the need for formal discovery. If litigation has already commenced, counsel should be able to gain basic information about the existence of the benefits from the declarations of disclosure required to be exchanged by the parties [see *Fam. Code* § 2100 et seq.]. Formal discovery can, of course, be employed if informal efforts to obtain the necessary information are unsuccessful.

PRACTICE TIP:

Sometimes, even an employer is not aware a plan exists. For example, a case held that an unwritten grocery voucher program for retirees of a supermarket chain was an ERISA-covered pension plan that should have been funded, and could not be terminated in connection with the sale of the company without first providing the value of the promised benefits to the qualifying retirees. Such surprises only emphasize the need for family law attorneys to thoroughly explore all potential sources of benefits when evaluating the value of the community estate [*Musmeci v. Schwegmann Giant Super Markets, Inc.* (5th Cir.2003) 2003 U.S. App. LEXIS 11602 (case not final as of time of this printing)]. *Commentary by James M. Crawford, Jr.*

For a discussion of spousal duties in relation to disclosing property interests, see Chapter 120. For related coverage, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chs. 21, *Special Property Characterization and Division Issues*, and 110, *Trial Preparation and Discovery* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Characterization General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Classification General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Classification Retirement Benefits General Overview



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34-122 California Legal Forms--Transaction Guide § 122.11

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.11 Summary of Major Considerations

The division of employee benefits, particularly retirement and pension benefits, requires careful consideration and planning to ensure that the benefits will be properly characterized, valued, and protected from improper unilateral disposition by an employee spouse pending settlement, or from the inadvertent loss of surviving spouse status for the nonemployee spouse. Listed below is a summary of considerations that counsel should take into account at the outset of any litigation over employee benefits, even if a settlement of the division is ultimately reached without trial:

- (1) Ascertaining whether the benefits are derived from a retirement or pension plan that is subject to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA) [*see* 29 U.S.C. § 1001 *et seq.*], or subject to some other special statutory scheme [*see, e.g.,* 10 U.S.C. § 1408 (Federal Uniformed Services Former Spouses' Protection Act); *Educ. Code* § 22650 *et seq.* (State Teachers' Retirement System benefits); *Gov. Code* §§ 21290 *et seq.* (Public Employee's Retirement System benefits), 75050 *et seq.* (Judge's Retirement System benefits)];
- (2) Planning for joinder of the plan as a party to the proceeding (if the plan is otherwise subject to joinder) [U.S. government retirement systems such as the Civil Service Retirement System or military service retirement are not subject to joinder in a state court proceeding, as discussed in Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 21, *Special Property Characterization and Division Issues* (Matthew Bender)], keeping in mind that joinder often is the preferred method of protecting a nonemployee spouse's interest in a plan, and may even be required in certain cases [*see, e.g., Educ. Code* § 22656 (State Teachers' Retirement System benefits); *cf. I.R.C.* § 414(p) (pertaining to requirements when plan governed by ERISA)];
- (3) Determining, in the case of military retirement benefits, whether jurisdiction to divide the benefits can be obtained over the service member if he or she refuses to consent to jurisdiction [*see* 10 U.S.C. § 1408(c); *In re Marriage of Tucker* (1991) 226 Cal. App. 3d 1249, 1255-1256, 277 Cal. Rptr. 403];

- (4) Determining the need for immediate protective orders to prevent a retirement plan participant from improperly investing, withdrawing, or otherwise liquidating plan benefits [*see Fam. Code § 2610; In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 209, 251 Cal. Rptr. 126*] ;
- (5) Determining whether the benefits are qualified or nonqualified, and the state and federal tax implications of their division and distribution;
- (6) Ascertaining whether the benefits should be valued (necessary in a disposition other than an "in-kind" division, such as a "cash out" of the nonemployee spouse's interest); and if so, whether they can be valued without the aid of a professional actuary or appraiser; and, if not, whether the client is willing to incur appraisal costs (pending their possible recoupment during the proceeding);
- (7) Determining for benefits that are to be valued whether, because of their nature, the benefits should be valued as of a time other than the date of trial, such as the date of the parties' separation; and, if so, then preparing, serving, and filing the motion for an alternate valuation date [*see Cal. Rules of Ct., Rule 5.126; Fam. Code § 2552*]; and
- (8) Making adequate provision for the interim investment of retirement accounts over which the employee spouse has investment authority.

In addition, if litigation has already commenced before settlement negotiations concerning the benefits have been undertaken, counsel should consider whether it would be advantageous to bifurcate the division of the benefits from the termination of the parties' marital status or from other issues in the case, keeping in mind the need for protective orders pending the adjudication of the benefits and the desirability of avoiding an open-ended reservation of the court's jurisdiction to adjudicate them [*see Fam. Code §§ 2337, 2550, 2610; In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 755-757, 214 Cal. Rptr. 661* ; *see also* Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 111, *Pretrial Procedures* (Matthew Bender)]. Postjudgment events, such as the death of one of the spouses, can have a material effect on the feasibility of the division of retirement benefits [*see, e.g., Branco v. UFCW-Northern Calif. Employers Joint Pension Plan (9th Cir. 2002) 279 F.3d 1154*] .

Additional considerations are involved when disability benefits are at issue, with the main area of contention usually being whether a community interest exists at all. Moreover, because the U.S. Supreme Court has held that state courts may not divide as community property military-retirement pay that has been waived to receive veterans' disability benefits, counsel must pay particular attention to the nature of any benefits that result from military service [*see Mansell v. Mansell (1989) 490 U.S. 581, 594-595, 109 S. Ct. 2023, 104 L. Ed. 2d 675, 688-689* (construing Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408(a)(4), (c)(1)); *In re Marriage of Smith (2007) 148 Cal. App. 4th 1115, 1123-1124, 56 Cal. Rptr. 3d 341* (Mansell applies only if military retirement pay has already been waived before entry of state-court order dividing retirement pay; military spouse's waiver occurring subsequent to state-court order does not prevent state court from making further order requiring military spouse to indemnify other spouse for effects of his or her unilateral reduction of retirement asset); *cf. In re Marriage of Babauta (1998) 66 Cal. App. 4th 784, 789-790* ; *78 Cal. Rptr. 2d 281* (Marine Corps voluntary separation benefits could be divided as community property)]. For additional discussion, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, Ch. 21, *Special Property Characterization and Division Issues* (Matthew Bender 2d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
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34-122 California Legal Forms--Transaction Guide § 122.12

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.12 General Tax Considerations in Dividing or Distributing Retirement Benefits

[1] Distributions Under ERISA Plan Pursuant to QDRO

Distributions from a retirement or pension plan are normally taxable to the plan participant, as the distributee [*see I.R.C. § 402(a)*]. However, the Retirement Equity Act of 1984 (REA) created special rules for the tax treatment of distributions governed by ERISA under a qualified domestic relations order (QDRO) to an alternate payee who is the spouse or former spouse of the plan participant, from certain employee benefit plans that are prescribed by federal law. Under these rules, an "alternate payee" who is the *spouse or former spouse* of the plan participant must be treated as the distributee, for tax purposes, of any distribution or payment made to the alternate payee under a QDRO [*see I.R.C. §§ 402(e)(1)(A), 414(p)(8); 29 U.S.C. § 1056(d)(3)(K)* (defining alternate payee); Pub. L. Nos. 98-397, 98-406; Pub. L. No. 99-514, § 1898(c)(1)(A), (C)(if alternate payee is another dependent, such as child, plan participant may be required to include distribution in his or her gross income); *see also* Pub. L. No. 109-280, § 1001 (Secretary of Labor to issue regulations clarifying that QDRO does not fail to qualify solely because of time at which it is issued, or because it is issued after, or revises, another domestic relations order or QDRO); *Stahl v. Commissioner, T.C. Memo. 2001-22*, (distribution from qualified retirement plan to participant's daughter for child support was taxable to participant)].

The rule of distributee tax liability applies even if the parties include language in their QDRO that requires the employee party to pay all of the tax on the distribution. The nonemployee in that instance must still include his or her share of the benefits distribution on that party's income tax return and is responsible for paying the tax thereon--subject to his or her right under state law to seek reimbursement from the other party pursuant to the court order or agreement [*see Clawson v. Commissioner (1996) T.C. Memo. 1996-446*].

In general, distributee tax liability will apply with respect to distributions or payments from employee benefit plans that are considered "qualified" [*see Brotman v. Commissioner (1995) 105 T.C. 141* (noting that, whether order meets QDRO requirements and plan is entitled to tax-exempt treatment by being "qualified" are separate issues; distinction between orders providing for assignment of benefits under qualified plan versus assignment under nonqualified plan is accomplished "by providing for special tax treatment of a QDRO only in respect of distributions from a qualified

plan"); *see also* I.R.C. §§ 403(b), 414(p)(9); Temp. Treas. Reg. § 1.403(b)-2T]. Nevertheless, certain other plans may also be subject to ERISA. For example, although an *unfunded* "excess benefit" plan is not subject to ERISA [29 U.S.C. § 1003(b)], at least one reported decision held that a distribution from an unfunded, nonqualified plan that was considered a "top hat plan" was subject to division by means of a QDRO [*Bass v. Mid-America Co., Inc. (N.Dist. Illinois, Eastern Division, 1995) 1995 U. S. Dist. LEXIS 15719*]. In addition, while governmental plans, "non-ERISA coverage-electing" church plans, and (for distributions after 2001) eligible deferred compensation plans under I.R.C. § 457(d), are not subject to ERISA, a distribution from a such a plan will be treated as made pursuant to a QDRO if made pursuant to a domestic relations order meeting the requirements of I.R.C. § 414(p)(1)(A)(i) [I.R.C. § 414(p)(11); *cf.* I.R.C. § 410(d) (permitting church plan to "elect into" ERISA coverage)].

The failure of a court order that purports to divide employee benefits to meet the strict requirements for a QDRO may subject an employee spouse to taxation on both spouses' shares of a retirement plan distribution [*see Hawkins v. C.I.R. (10th Cir. 1996) 86 F.3d 982, 987-988, 993-994* (divorce decree with minimally acceptable language qualified as QDRO despite failure to reference the applicable federal statute or use statutory language)]. Similarly, if the distribution from an employee benefit plan is made *before* a QDRO issues, and therefore is not made *pursuant* to a QDRO, it will be fully taxable to an employee who initially receives the entire distribution [*see Rodoni v. Commissioner (1995) 105 T.C. 29*]. Thus, use of a QDRO is desirable and essential, both because it provides a means of direct payment from an ERISA employee benefit plan to a former spouse of his or her share of the benefits divided, and because it makes the alternate payee the taxable distributee of that share [*see I.R.C. §§ 402(e)(1)(A), 414(p)*].

Arguably, in a community property state, a QDRO may not be theoretically necessary to shift the taxability of the distribution to an alternate payee. In one case arising out of a California pension distribution *prior* to the operative date of the QDRO provisions, the Tax Court held that a nonemployee spouse was the taxable distributee of her community property share of the pension, which her former husband paid over to her after receiving a lump sum distribution from the plan. The court based its ruling on the *community property* nature of the pension, which created a right of ownership in both spouses, so that there was no improper "alienation" of the benefits in its division [Powell (Rodney L.)(1993) 101 T.C. No. 32 (distinguishing *Darby v. commissioner (1991) 97 T.C. 51*, No. 4; *see* Pub. L. No. 98-397, § 303(d)(generally, operative date of QDRO provisions is January 1, 1985)]. The extent, if any, to which the rationale for that decision might conceivably be applied to a current division of community property benefits that fails to qualify as a QDRO, or to a distribution from a nonqualified plan that is not subject to ERISA coverage, is presently unclear, particularly in view of some countervailing authority. Therefore, pending further decisional or statutory clarification, the most prudent course of action appears to be to ensure that the instrument dividing the benefits meets the requirements for a QDRO to avert the potential for taxation of the employee spouse on the entire distribution [*see Hawkins v. C.I.R. (10th Cir. 1996) 86 F. 3d 982, 987-988, 993-994* ; *Karem v. Commissioner (1993) 100 T.C. 521* ; *see also I.R.C. § 414(p)(11)*].

PRACTICE TIP:

It is advisable for counsel to insert in a marital settlement agreement a provision under which the nonemployee spouse must indemnify the employee spouse against any tax liability arising from distributions made to the nonemployee spouse either directly by the plan or by the employee spouse. However, the clients should be advised that such an agreement is strictly between the spouses and does not bind the I.R.S., which is not a party to the agreement [*see Alioto v. Commissioner (1994) T.C. Memo. 1994-51*], . *Commentary by Publisher's Editorial Staff.*

[2] I.R.A. and Other Plans to Which Tax-Free Rollover May Be Made

[a] Distributions to Spouse on Employee Spouse's Death

If, on the death of an employee spouse, a retirement distribution is paid to an employee's immediate surviving spouse--that is, the person to whom the employee was married at the time of death, as opposed to a former

spouse-alternate payee who is treated as a surviving spouse--that surviving spouse is entitled to transfer (or "roll over") the distribution. Effective for distributions after 2001, the surviving spouse may roll over distributions to an I.R.A., a qualified plan, an *I.R.C. § 403(b)* annuity plan, or a governmental *I.R.C. § 457* plan in which the surviving spouse participates [*I.R.C. § 402(c)(8)(B)*, (9)]. For distributions before 2002, rollovers could not be made to a qualified plan or to an *I.R.C. § 403(b)* annuity plan [*I.R.C. § 402(c)(9)*, before amendment by Pub. L. No.107-16]. In general, an "eligible rollover distribution" is all or any portion of the balance credited to the employee in a qualified trust [see *I.R.C. § 402(c)(2)*, (4); Temp. Treas. Reg. § 1.402(c)-2T(c), Q&A 3].

By rolling over the distribution within the time period prescribed by law, the surviving spouse payee need not include it in his or her current income, in contrast to the inclusion that would be required in the absence of the rollover [see *I.R.C. §§ 402(c)(3)*, (9), *408(d)(3)*]. The payee may avoid a mandatory 20 percent tax withholding from the distribution by making the direct rollover to an I.R.A. [see *I.R.C. §§ 402(f)(1)(B)*, *408(d)(3)(C)(ii)(II)*, *3405(c)(2)*; see also Temp. Treas. Reg. § 1.402(c)-2T, Q&A 1].

[b] Distributions Under QDRO During Employee Spouse's Lifetime

A transfer from a qualified employee benefit plan to an employee will not result in recognition of current income if the employee then makes a transfer ("rollover") into a qualifying plan for the employee's own benefit within the statutory time period [see *I.R.C. § 402(c)(1)*, (3); *Rodoni v. Commissioner* (1995) 105 T.C. 29]. Qualifying rollovers of all or part of the benefits distributed during an employee's lifetime to his or her spouse or former spouse as alternate payee, which would otherwise be taxable to the alternate payee [see [1], *above*], may be excluded from such spouse's income, so long as the distribution is made pursuant to a QDRO. A qualifying rollover may be made to an eligible plan, including a qualified plan that accepts rollovers, a qualified annuity under *I.R.C. § 403(b)*, or an I.R.A. account, if the rollover is made within the period prescribed by law [see *I.R.C. § 402(c)(3)*, (e)(1)(B) (transfer normally must be made within 60 days, but Secretary may waive 60-day requirement in certain cases of hardship, such as occurrence of casualty, disaster, or other events beyond parties' control); *but cf.* *Rodoni* (Mario) 1995 105 T.C. 29 (distribution and rollover took place before QDRO issued, and therefore did not qualify for favorable tax treatment)].

An "alternate payee spouse or former spouse" under a QDRO may avoid a mandatory 20 percent tax withholding from the distribution by making a direct rollover to an eligible I.R.A. or other eligible plan within the time prescribed by law [see *I.R.C. §§ 402(e)(1)(A)*, (f)(1)(B), *408(d)(3)(C)(ii)(II)*, *3405(c)(2)*; see also *I.R.C. § 402(e)(6)* (regarding direct "trustee-to-trustee" transfers); Temp. Treas. Reg. § 1.402(c)-2T]. An eligible I.R.A. may be the alternate payee's *I.R.C. § 408(a)* individual retirement account or *I.R.C. § 408(b)* individual retirement annuity. An alternate payee can roll over her interest in her former spouse's *I.R.C. § 403(b)* plan to the alternate payee's own *I.R.C. § 403(b)* plan or to the alternate payee's individual retirement plan [Temp. Treas. Reg. § 1.402(c)-2T, Q&A 1]. The foregoing explanation is a brief overview of rollovers, and should not be viewed as a comprehensive treatment of this subject. It is suggested that ERISA-tax counsel be consulted whenever a rollover is contemplated.

PRACTICE TIP:

Counsel for both spouses should note carefully the requirements for nontaxability of retirement distributions. Tax consequences to both parties will turn on strict compliance with all statutory requirements [see, e.g., *Rodoni v. Commissioner* (1995) 105 T.C. 29 (distribution and rollover to I.R.A. took place before QDRO issued; court noted that rules relating to QDROs are strictly construed and "substantial compliance" is not sufficient); *Rudzin v. Commissioner* T.C. Memo 1995-13 (wife had to incur tax on stock distribution via QDRO, which she failed to roll over to I.R.A., despite fact that delay was caused by her uncertainty over how much stock should have been distributed to her)]. In addition, counsel should exercise caution in providing any advice to the plan fiduciary. Violation of highly technical plan disclosure and notice requirements required to be made to an alternate payee relating to a rollover can be cause for disqualification of the plan [see, e.g., *Treas. Reg. § 1.401(a)(31)-1*, Q&A 17]. In such cases, referral to ERISA-knowledgeable counsel is advisable. *Commentary by Publisher's Editorial*

Staff.

[3] Transfers From Individual Retirement Plans ("I.R.A.s")

"I.R.A." is an acronym for two species of "individual retirement plans": the Individual Retirement Account [*I.R.C.* § 408(a)] and the Individual Retirement Annuity [*I.R.C.* § 408(b)]. The Individual Retirement Annuity must be an annuity contract or an endowment contract issued by an insurance company that meets certain other requirements. Simplified Employee Pensions (SEP-I.R.A.s) are a species of I.R.A. [*see I.R.C.* § 408(k)].

An I.R.A. or an interest therein (including specific assets) may be transferred without taxable event from one spouse to the I.R.A. of the other in the context of a dissolution of marriage or separation by appropriate court order or agreement [*I.R.C.* §§ 408(d)(6), 1041].

An order providing that the nontitled spouse receive a distribution from an I.R.A. will result in a 10 percent penalty tax in addition to the ordinary income that must always be paid on such distributions [*I.R.C.* § 72(t)(3)(A)]. In order to insure that an I.R.A. transfer is tax-free, counsel should use an order or judgment meeting both the requirements of *I.R.C.* § 408(d)(6) and that the transfer document be a "divorce or separation instrument." In one instance, for example, *I.R.C.* § 1041 "nonrecognition of income treatment" was denied to separated individuals who had not filed a divorce or separation action and who contemplated none, and who proposed to transfer an I.R.A. from the husband to the wife by written agreement. Because the spouses were not separating, the agreement did not meet the "divorce or separation instrument" test [*I.R.S.* Letter Rul. 9344027].

On the other hand, the direct transfer of an employee spouse's interest in an I.R.A. to the I.R.A. of his or her spouse or former spouse pursuant to a divorce or separation instrument is a nontaxable transfer to both spouses. Thereafter, the account or annuity or portion thereof is treated as belonging to the distributee spouse or former spouse [*see I.R.C.* §§ 71(b)(2)(A), 408(d)(6); *see also I.R.C.* § 408(d)(3) (describing qualifying rollovers)].

A "Roth I.R.A." is a variety of I.R.A. that was created as part of the Tax Reform Act of 1997, and is effective for tax years after 1997. A Roth I.R.A. or a "regular" (that is, non-Roth) I.R.A. can be "rolled over" or converted tax-free to another Roth I.R.A. if it meets the general requirements for a qualified I.R.A. rollover contribution [*I.R.C.* § 408A(e); *see I.R.C.* § 408(d)(3)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsPensionsPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 122 PROVISIONS FOR DIVISION OF EMPLOYEE BENEFITS
PART II. LEGAL BACKGROUND

34-122 California Legal Forms--Transaction Guide §§ 122.13-122.99

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

[Reserved]

§§ 122.13[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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PART III. TRANSACTION GUIDE
A. Drafting Guide

34-122 California Legal Forms--Transaction Guide § 122.100

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.100 General Information Needed in Drafting Retirement Benefits Provisions

[1] Employer and Plan

1. Employer's name, address, and telephone number:

- a. Official business (or government or other private) name and address of employer's home office.
- b. Address of any local site where employee spouse works.
- c. Telephone and fax numbers of both work site and employer's official home office.

2. Retirement plan's name, address, and telephone number:

- a. Plan name and address may differ from employer's, so both must be ascertained.
- b. Name and address of plan administrator.
- c. Telephone and fax numbers of plan administrator.
- d. E-mail address of plan administrator, if any.
- e. Name and address of any third party administrator, or TPA--as another information source--but keeping in mind that although these persons may refer to themselves as "plan administrators," they are contract service providers who in most cases are not plan

fiduciaries, and thus arguably have no fiduciary duty toward nonemployee spouses.

3. Nature of plan benefits:

- a. Traditional defined benefit pension plan.
- b. Cash balance plan.
- c. Traditional defined contribution plan, such as a profit-sharing plan or money purchase pension plan.
- d. Associated elements, such as "401-k," stock savings, stock options, and the like.
- e. Nonqualified plans (such as SERPs) of both types.
- f. Early retirement "window" benefits.
- g. "Special Separation Benefits" or "Voluntary Separation Incentive Benefits" (for certain military retirees).
- h. Disability or severance components of benefits.
- i. Survivor benefit features, including limitations on payment of preretirement survivor benefits (may be payable only to spouse or deemed spouse under a QDRO).
- j. Approximate current value of benefits.
- k. Availability of self-direction of investment of plan accounts, if any.
- l. Deemed IRAs.

4. Period required for vesting and maturity of benefits, and earliest possible date of availability for distribution to nonemployee spouse.

5. Availability of summary plan description, and current plan document, annual benefit statements, and sample qualified domestic relations orders (QDROs) or benefits division orders (BDOs) from plan administrator.

6. Types of forms needed to formally change beneficiary designation(s).

7. Any restrictions on, or costs associated with, the employee's right to elect different options for retirement benefits.

8. Current funding status of plan (for traditional defined benefit or cash balance pension plans only).

9. Determine, in the case of a plan sponsored by a business of which the employee spouse is an owner, whether any postseparation funding liabilities (particularly in the case of a defined benefit plan) have been properly taken into account in the valuation of the community interest in the business. If not, it may not be reasonable to use a "time rule" approach to apportioning the benefits.

[2] Employee Spouse Information

1. Employee's full name and date of birth.
2. Employee's Social Security number, and any unique employee or identification number (such as an military identification number).
3. Employee's last known mailing address.
4. Exact date employee began employment; and date plan participation began (may vary by plan).
5. Date(s) of any break(s) in employment in current position, and duration of each break.
6. Date(s) of any prior employment service credited under the plan for benefit accrual.
7. Current beneficiary(ies) listed on employer-based life insurance and retirement benefits.
8. Availability of benefits statements issued to employee by employer on annual, quarterly, or other periodic basis.
9. Employee's retirement plan account number, if any.
10. Employee's earliest retirement date, and actual or expected date of retirement.
11. Any withdrawals of or loans against retirement benefits by employee.
12. Any written waivers of rights in benefits based on longevity of employment in favor of disability retirement.
13. Any prior QDROs.
14. Any elections made or available with respect to "window" or similar benefits.
15. If employee spouse is in "pay status," elected form of distribution and date benefit commenced, and name of survivor annuitant, if any.

[3] Nonemployee Spouse Information

1. Nonemployee's full name and date of birth.
2. Nonemployee's Social Security number.
3. Nonemployee's last known mailing address.
4. Nature and amount of any life insurance, or retirement/deferred compensation benefits currently being received by nonemployee by reason of employee spouse's current employment.

5. Any written waivers, consents, or disclaimers of interest made by nonemployee spouse in benefits of employee spouse.

[4] Other Information

1. Date of parties' marriage.

2. Date of parties' separation.

3. Describe formula or "rule" under which respective interests of spouses in plan are to be determined, or dollar amount, if a "cash out" is desired.

4. Basis of court's personal jurisdiction over employee spouse, if he or she is a military service member [see 10 U.S.C. § 1408(c)]:

a. Residence, other than because of military assignment;

b. Domicile; or

c. Consent.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsGeneral Overview



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CHAPTER 122 PROVISIONS FOR DIVISION OF EMPLOYEE BENEFITS
PART III. TRANSACTION GUIDE
A. Drafting Guide

34-122 California Legal Forms--Transaction Guide §§ 122.101-122.199

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

[Reserved]

§§ 122.101[Reserved]



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PART IV. FORMS
A. Division of Retirement Benefits in General

34-122 California Legal Forms--Transaction Guide § 122.200

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.200 Provision Confirming Certain Benefits as Separate Property of Employee Spouse

[1] Comment

The form set forth in [2], *below*, is a marital settlement agreement provision in which the spouses agree that specific employee benefits are the separate property of the employee spouse [see generally *Fam. Code* §§ 770, 771, 772]. It also contains an agreement by the nonemployee spouse that he or she will not assert any claims against the employee spouse's interest in the benefits and that he or she generally releases any right or claim to the benefits. The form further contains an *optional* provision that the nonemployee spouse's agreement to not assert a claim and to release any right or claim in the benefits does not apply to any interest created under a beneficiary designation executed and filed with the plan by the employee spouse after the effective date of the parties' agreement. Counsel should use caution in adding this latter statement, however, because it cannot be relied on in an ERISA-covered plan to defeat any existing beneficiary designation naming the nonemployee spouse. In such plans, the only sure way to change the beneficiary, is to file a new beneficiary designation with the plan administrator [see *Egelhoff v. Egelhoff* (2001) 532 U.S. 141, 121 S.Ct. 1322, 149 L. Ed. 2d 264] .

PRACTICE TIP:

It is important to remember that the *Egelhoff* decision (cited above) is not binding on *non-ERISA* plans, such as a pension plan that benefits only the owner (or owners) of a business and his or her spouse (or, if multiple owners, their respective spouses). However, *Prob. Code* § 5600 (dealing with nonprobate transfers) comes into play when a non-ERISA plan is involved, and may defeat the intentions of a participant who is relying on an old designation to continue to be valid. Given *Prob. Code* § 5600, when the intent is to keep the other party as beneficiary after the dissolution, be sure the order clearly so states; and, if necessary, have the beneficiary redesignated after the dissolution. Thus, for either ERISA-covered, or non-ERISA- covered plans, there really is no good substitute for filing a new designation after dissolution, even if the person designated is not changed. In addition, with respect to ERISA plans, if the intended beneficiary is one of the individuals who could qualify as an alternate payee under a QDRO (for example, a spouse, former spouse, child, or dependent of a participant), counsel may

wish to include in the order sufficient information to allow the order to qualify as a QDRO (by including the amount or percentage of the death benefit to be distributed to each person, mailing addresses of those persons, and the other information required in the federal statute for QDROs), because a QDRO is the only reliable way, other than by redesignation, to ensure that a plan will pay the intended beneficiary.

Commentary by James Crawford Jr.

Alternatively, the parties may list employee benefits that are the separate property of one party in an exhibit or schedule that sets forth all of the separate property of that party, with a clause in the body of the marital settlement agreement that incorporates the exhibit or schedule by reference, and with respect to which the other party expressly waives any right or interest. For general forms of descriptions of assets that make use of an exhibit or schedule, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, Chapter 212, *General Property Provisions in Marital Settlement Agreements* (Matthew Bender 2d ed.). For forms of complete marital settlement agreements in that publication that may be adapted for use with this form, see Chapter 211, *Complete Settlement Agreements*.

[2] FORM

Provision Confirming Certain Benefits as Separate Property of Employee Spouse

Confirmation of Employee Benefits to One Spouse as Separate Property

The parties acknowledge and agree that all benefits accrued, now or in the future, by [employee spouse, e.g., Wife] under _____ [name of plan] ("the Plan"), by reason of his or her employment with _____ [name of employer], are the sole and separate property of [employee spouse, e.g., Wife], and that [nonemployee spouse, e.g., Husband] has no community property interest in these benefits. [Nonemployee spouse, e.g., Husband] agrees not to assert any claim to any such benefits under the Plan and waives and releases all claims, rights, and interests with respect to those benefits. [However, the preceding sentence shall not apply to any interest created under a beneficiary designation executed and filed with the Plan by the (employee spouse) subsequent to the effective date of this Agreement.]. [_____ (Nonemployee spouse, e.g., Husband) further agrees to execute all documents required by _____ (the Plan and/or the employer) releasing said interest in favor of _____ (employee spouse, e.g., Wife), including survivor's benefits.]

[Add, if exhibit or schedule also sets forth separate property of each party:]

The parties acknowledge that they have listed this separate property interest of [employee spouse] in [Exhibit/Schedule]_____, which is incorporated herein by reference as though fully set forth.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support
 Dissolution & Divorce Property Distribution
 General Overview
 Family Law Marital Termination & Spousal Support
 Dissolution & Divorce Property Distribution
 Classification General Overview
 Family Law Marital Termination & Spousal Support
 Dissolution & Divorce Property Distribution
 Classification Retirement Benefits General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 122 PROVISIONS FOR DIVISION OF EMPLOYEE BENEFITS
PART IV. FORMS
A. Division of Retirement Benefits in General

34-122 California Legal Forms--Transaction Guide § 122.201

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.201 Provision for Each Spouse to Retain Own Employment Benefits

[1] Comment

The form set forth in [2], *below*, is a marital settlement agreement provision in which each party retains the retirement or other benefits that he or she has earned through employment, notwithstanding any community interest either party may have in the other's benefits. The form also provides that each party generally agrees not to assert any claim to the other's employment benefits, including survivor benefits. Further, it includes a statement of release in those benefits. An additional, optional, provision states that the agreement to not assert a claim and to release any interest does not apply to any interest created under a beneficiary designation executed and filed with the plan by the employee spouse after the effective date of the agreement. In an ERISA-covered plan, releases or waivers of claims to beneficiary rights by a nonemployee spouse who is a designated beneficiary may or may not be effective. In such plans, the only sure way to change a beneficiary is to file a new beneficiary designation with the plan administrator [*see Egelhoff v. Egelhoff* (2001) 532 U.S. 141, 121 S.Ct. 1322, 149 L. Ed. 2d 264 ; § 122.201[1] (comments)].

This method of dividing employment benefits may be preferred by spouses who have been employed for a similar length of time during their marriage and are entitled to comparable employment benefits. By using this method, the parties can make a present and final division of their employment benefits that obviates the need for any future contact, or for a QDRO or similar order. Before using this provision, however, counsel should verify that the parties' benefits are in fact comparable so that one spouse is not unknowingly giving up a valuable community interest to which he or she would otherwise be entitled. For example, an individual account plan may not offer the same retirement security as an annuity-type pension, particularly when most annuity pensions (but not account plans) are covered by a governmental guarantee [*see* ERISA § 4000 et seq.].

Plans of disparate value may be allocated each to the owner spouse as long as the overall division of community property is of equal value, assuming that the parties wish to achieve an overall equal division--which is the usual case. Other property or an equalizing payment can be used to make up the difference. "Value" for an account-based plan is

typically equal to the current account balance. In other types of plans, such as defined benefit plans, "value" will have to be determined based on actuarial assumptions made as to a number of future events, as to which reasonable minds may differ.

The parties may list employee benefits that are awarded to each party in an exhibit or schedule that sets forth the parties' division of community assets, with a clause in the body of the marital settlement agreement that incorporates the exhibit or schedule by reference.

In most plans, the waiver of spousal survivor rights will not be effective until the marital status is terminated unless accomplished through the plan's administrative procedures in accord with the terms of the plan and applicable ERISA requirements for consents and waivers by spouses.

[2] FORM

Provision for Each Spouse to Retain Own Employment Benefits

Division of Employee Benefits (Each Party Awarded Own Benefits)

All benefits accrued, now or in the future, by Husband under the employee benefit plan from Husband's employer entitled _____ [*name of husband's pension or other employee benefit plan*], are awarded to Husband as his sole and separate property. Wife will not assert any claim to these benefits and Wife waives and releases all claims, rights, and interest in and to these benefits under the plan, including but not limited to, survivor benefits. [However, the preceding sentence shall not apply to any interest created under a beneficiary designation executed and filed with the Plan by the [*employee spouse*] subsequent to the effective date of this Agreement.]

All benefits accrued, now or in the future, by Wife under the employee benefit plan from Wife's employer entitled _____ [*name of wife's pension or other employee benefit plan*], are awarded to Wife as her sole and separate property. Husband will not assert any claim to these benefits and Husband waives and releases all claims, rights, and interest in and to these benefits under the plan, including, but not limited to, survivor benefits. [However, the preceding sentence shall not apply to any interest created under a beneficiary designation executed and filed with the Plan by the [*employee spouse*] subsequent to the effective date of this Agreement.]

[Add, if exhibit or schedule also reflects foregoing award of property to each party:]

The parties acknowledge that they have listed this allocation of employee benefits as part of the property division summarized in [Exhibit/Schedule]_____, which is incorporated by reference as though fully set forth.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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34-122 California Legal Forms--Transaction Guide § 122.202

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.202 Division of Individual Retirement Account (IRA)

[1] Comment

The form in [2], *below*, divides an Individual Retirement Account (IRA) between the parties. Unlike most qualified retirement plans [see § 122.220], personal Individual Retirement Accounts (IRAs) are not subject to ERISA (the Employee Retirement Income Security Act of 1974), and therefore, no Qualified Domestic Relations Order (QDRO) is required in order to divide an IRA between divorcing spouses [see 29 U.S.C. § 1001 *et seq.* (ERISA)]. However, IRAs may still be divided between the parties under *Internal Revenue Code Section 408(d)(6)* without triggering income tax on the transfer to the nonowner spouse, provided that the transfer is made under a divorce or separation instrument that constitutes (1) a decree of divorce or separate maintenance or a written instrument incident to such a decree; or (2) a written separation agreement; or (3) another kind of decree requiring a spouse to make payments for the support or maintenance of the other spouse [*I.R.C. § 408(d)(6)*; see *I.R.C. § 71(b)(2)(A)* ("divorce or separation instrument" defined)]. Unless the requirements of section 408(d)(6) are met, the transfer of all or any part of an IRA from one spouse to the other will result in the transferred amount being included in the gross income of the transferor, notwithstanding *Internal Revenue Code Section 1041*.

PRACTICE TIP:

Some IRAs, known as Simplified Employee Pensions (SEPS) or Savings Incentive Match Plans (Simple Plans), are employer-provided. Although nothing in *I.R.C. § 408(d)(6)* suggests that the tax treatment of interspousal transfers with respect to these IRAs is not the same as for personal IRAs, because SEPS and Simple Plans are often ERISA-covered plans, some SEP-IRA and Simple IRA custodians require that the division order meet the requirements of a QDRO, as well as those of section 408(d)(6). Because the applicability of the QDRO rules to SEPS and Simple Plans is unclear, and because the QDRO requirements are not difficult to satisfy in this context, many practitioners will choose to comply rather than to dispute the matter. *Commentary by James Crawford Jr.*

The IRS, in private rulings, has recognized the following three ways to effect an IRA division: (1) split the IRA into two

IRAs and assign one to the nonowner spouse; (2) transfer the correct amount to a new IRA in a trustee-to-trustee transfer, followed by an assignment to the nonowner spouse; or (3) transfer the required amount to an IRA in the name of the nonowner spouse. There is no requirement that the amount transferred be limited to half of the community interest.

PRACTICE TIP:

In the case of a Roth IRA [*see I.R.C. § 408A*], assume that the same treatment would apply to permit tax-free transfers between spouses or former spouses within the restricted distribution period. However, the issue has not yet been addressed in published guidance. In the disposition of standard and Roth IRAs, special attention should be given to the difference in taxability on distributions. Generally speaking, Roth IRAs, unlike standard IRAs, are not taxable as ordinary income on distribution. *Commentary by James M. Crawford Jr.*

PRACTICE TIP:

If the IRA to be divided is in "pay status" under the annuity exception to the early distribution additional tax, under *I.R.C. § 72(t)(2)(A)(iv)*, care should be taken to ensure that the transfer is handled so as not to defeat the requirement under *I.R.C. § 72(t)(4)* that such distributions continue substantially unchanged with respect to the owner until the owner reaches 59½ or has taken distributions for at least 5 years. *Commentary by James M. Crawford Jr.*

[2] FORM

Division of Individual Retirement Account (IRA)

Division of Individual Retirement Account (IRA)

_____ [Spouse in whose name account is held] is the owner of an Individual Retirement Account (IRA) held by _____ [name of trustee], Account Number [set forth abbreviated number to preserve privacy, e.g., XXX234] (see full account number in transmittal to trustee/custodian). The current value of the account is \$ _____. [Add, if this document is for stipulated order attached to Marital Settlement Agreement (MSA): The purpose of this order is to assign all or part of the IRA to _____ (name of account owner's spouse or former spouse), incident to _____ (specify title of agreement, judgment, etc.), a divorce or separation instrument described in subparagraph A of section 71(b)(2) of the Internal Revenue Code of 1986, as amended ("Code"), in a nontaxable transfer pursuant to Code section 408(d)(6).]

[EITHER, if transfer is for one-half of community interest.]

The total community property interest in the IRA is _____ percent, and [nonowner spouse's] share of the community property interest is _____ percent. The balance is the separate property of [owner spouse]. The community interest in the IRA shall be divided between the parties according to their respective interests as set forth above. [Owner] shall direct [trustee] to transfer to [nonowner] _____ [(his/her) full community property share as of the date of transfer or \$ _____ or _____ percent of the value of the account as of the date of transfer] to a new IRA account as may be designated by _____ nonowner]. [Owner] shall immediately assign all right, title, and interest in the new IRA to [nonowner] as [his/her] sole and separate property [(add, for transfer within MSA) in a nontaxable transfer under *I.R.C. § 408(d)(6)*].

[OR, for transfer of separate interest or other than half of community interest (to equalize property division).]

[(For attached stipulated order) The IRA shall be divided between the parties (or, for transfer within MSA) Ownership

in the IRA, or a portion thereof, shall be transferred between the parties incident to this Agreement] as follows: [Owner] shall direct [trustee] to transfer to [nonowner] _____[\$_____or _____ percent of the value of the account as of the date of transfer] to a new IRA account as may be designated by [nonowner]. [Owner] shall immediately assign all right, title, and interest in the new IRA to [nonowner] as [his/her] sole and separate property [(add, for transfer within MSA) in a nontaxable transfer under I.R.C. § 408(d)(6)].

PRACTICE TIP

If the contents of the MSA are such that the parties would prefer not having to share the entire agreement with the IRA trustee or custodian, the agreement should instead provide for the issuance of a separate I.R.C. § 408(d)(6) order. Note also that there is no statutory reason why a section 408(d)(6) order need be limited to IRAs in which there is a community interest. Thus, it would seem that any IRA is fair game for transfer, regardless of when or how created, so long as it is being reassigned incident to the division of the community estate. In this event, the above form should be modified to remove the references to community interest. If there is a substantial delay between the divorce and the transfer, an issue may arise as to whether the transfer is still under a divorce or separation instrument. Although it is not clear they apply, the regulations under I.R.C. § 1041 (relating to nonrecognition of gain or loss on transfers incident to divorce) may offer some guidance in this area. Counsel should also be mindful of the potential effect of *Prob. Code* § 5600 (concerning nonprobate transfers), which may invalidate any beneficiary designation naming a former spouse unless it is renewed after divorce. *Commentary by James M. Crawford Jr.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsGeneral OverviewPensions & Benefits LawEmployee Benefit PlansIndividual Retirement Accounts



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PART IV. FORMS
A. Division of Retirement Benefits in General

34-122 California Legal Forms--Transaction Guide § 122.203

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.203 Enumeration of Employee Benefit Plans; Warranties; Duties

[1] Comment

[a] Use of Form

The form in [2], *below*, is a basic provision that sets forth all of the employee benefit plans of both parties that will be awarded or divided under the marital settlement agreement. The form includes a provision that each party warrants that there are no other plans not addressed in the agreement. Provisions setting forth the duty to give notice of options and elections, the duty to give notice regarding termination of employment, and the duty to give notice regarding health status are also included.

PRACTICE TIP:

Numerous changes in the law and the corresponding increase in the complexity of retirement plan design have made it incumbent on the practitioner to identify and understand not only the plans under which the parties are currently covered, but also to account for the possibility that a party may later become a participant in other plans in which there could be a community interest. Although under *In re Marriage of Lehman* (1998) 18 Cal. 4th 169, 74 Cal. Rptr. 2d 825, 955 P.2d 451, a subsequently created plan will not, in most instances, include a community interest even if its benefits derive in part from years of service that occurred during marriage, it may be that a community interest would arise if the right to have the plan put into place arose during the marriage and prior to separation--for example, if the right to have a deferred compensation plan covering all years of service was set forth in an employment agreement entered into during, or even prior to the marriage. *Commentary by James M. Crawford, Jr.*

[b] Survey of Employee Benefit Plans

Generally speaking, there are two varieties of qualified retirement plans: Defined Contribution Plans, and Defined Benefit Plans. "Qualified" refers to having met the requirements for tax qualification under *Internal Revenue Code*

Section 401(a) et seq.

Although most qualified private employer retirement plans are covered by ERISA, some are not [*see 29 U.S.C. § 1001 et seq.*]. All qualified plans, and all funded ERISA-covered retirement plans, however, can only be divided between a participant and a nonparticipant spouse (or used to pay spousal, family, or child support) by a court order that meets certain criteria; that is, a Qualified Domestic Relations Order, or QDRO [*see 29 U.S.C. § 1056(d); I.R.C. § 414(p)*].

There are numerous other types of retirement plans that are not "qualified," but that mirror the operation of a qualified plan. Others are specialized forms of deferred compensation. Unlike qualified plans, nonqualified retirement plans, however designed, are almost always unfunded, and are, in substance, unilateral arrangements between an employer and one or more executive employees. An example might be a Supplemental Executive Retirement Plan (SERP), or "Top Hat" plan. Some employers will recognize a court ordered division of a nonqualified plan; others may not, citing federal preemption under ERISA. In contrast, all qualified plans are required to recognize a QDRO (although special rules apply for governmental qualified retirement plans; *see § 122.240 et seq.*).

In addition to plans that are designed primarily to provide for retirement, employers may provide a full gamut of other plan types, which are generally grouped together in the category of "welfare plans" and other plans. These generally include plans that provide for any nonretirement type benefits, such as severance, bonus, life, health and accident plans, and fringe benefits, just to name a typical few. Like the case with nonqualified retirement plans, the ability of a state court to override the operation of these plans in terms of dividing the benefits is unclear, at least if they are subject to ERISA. However, developing case law has gone a long way toward recognition of state family law court authority in this area [*see, e.g., Metropolitan Life Ins. Co. v. Marsh (6th Cir. 1997) 119 F.3d 415* (giving effect to "QDRO" held by plan participant's children from previous marriage, although participant had designated his current spouse as his sole beneficiary)].

[c] Description and Examples of Defined Benefit Plans

Under the Internal Revenue Code, a "defined benefit plan" is defined broadly as any plan that is not a defined contribution plan [*I.R.C. § 414(j)*]. Qualified benefit plans are always pension plans; that is, they are designed primarily to provide benefits at retirement. They are distinguished from qualified individual account, or "defined contribution" plans mainly by the fact that they provide a benefit at retirement that is *defined* in terms of a formula, not an account balance. A defined benefit formula is typically based on the participant's compensation, and years of service [*see § 122.220[1][c]*]. These formulas have various names, (e.g., unit benefit, flat benefit), and some may even be based on a hypothetical account balance (such as a Cash Balance plan). But in every case, the level of benefits is determined by formula, regardless of the actual investment experience of the plan [*see 29 U.S.C. § 1002(35); I.R.C. § 414(j)*].

Defined benefit plan benefits are secured by an excise-tax-enforced contribution liability for the employer, and are, in most cases, also guaranteed by the Pension Benefit Guaranty Corporation (PBGC). Small professional employer plans are an exception. Because participants *do not* have individual accounts in defined benefit plans (even in cash balance plans), any attempt to divide a defined benefit plan on that basis may have an unintended result [*see generally In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 748 n.4, 214 Cal. Rptr. 661 ; see also Ch. 12B*]. Governmental plans, however, can contain "accounts" in the sense that a member may withdraw his or her contributions in lieu of taking the pension benefit.

[d] Description and Examples of Defined Contribution Plans

In a defined contribution plan, a participant's benefit at retirement is determined solely by how much was contributed over the years to his or her account by the employer, the employee, or both, and how well it was invested [*see 29 U.S.C. § 1002(34); I.R.C. § 414(i); In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 748 n.4, 214 Cal. Rptr. 661*]. Although sometimes the contribution is "defined" by a formula (hence the name) the contributions can be discretionary.

Defined contribution plans that have the word "pension" in their name (for example, a Money Purchase Pension Plan, or a Target Benefit Pension Plan) will almost always have a set contribution formula. In contrast, a Profit Sharing Plan or a 401(k) plan typically will not, but will instead contain provisions stating how the employer or employee contributions, if any, will be allocated.

Funds in the participant accounts are held in trust, and may either be invested by the trustee or investment manager on a pooled basis, or as directed by the individual employee. Other examples of defined contribution plans are employee stock ownership plans (ESOPs), stock bonus plans, thrift plans, and savings plans. Although technically not a qualified plan, a tax-sheltered annuity plan (TSA or 403(b) plan) is another type of plan that is for most purposes treated as a defined contribution plan. The same is true for Simple IRA Plans and Simplified Employee Pensions (SEPS) [see § 122.202]. Defined contribution plan benefits are NOT guaranteed by the employer, or by the PBGC.

[e] Availability of Benefits

Benefits under a pension plan (whether defined benefit or defined contribution) are generally not available for distribution until separation from service, death, or retirement, although special exceptions can exist for distributions that are ordered by a QDRO. Nonpension qualified retirement plans, such as a profit sharing, 401(k) plan, or ESOP, are allowed to permit distributions while a participant is still in service. Both types of plans, pension and nonpension, will distribute benefits only to the extent that they are vested, that is, have become nonforfeitable under the plan.

The form in which any plan will pay benefits is a function of the plan document, and not all payment options (e.g., a lump sum) are available for all plans. For example, many defined benefit plans will only pay benefits in the form of an annuity, and many 401(k) plans will only pay in a lump sum or installments.

[f] Taxation of Benefits

As a general rule, benefits from all qualified plans are taxable to the participant on receipt, without concern for the constructive receipt rules, under *I.R.C. § 402*. That section also contains special rules for benefits paid under a QDRO to a spousal alternate payee, making them taxable to the recipient, not to the participant. Under these rules, if the alternate payee is a child or dependent (such as would occur in the case of a support QDRO), the distribution is taxed to the participant, not the recipient. Regarding nonqualified plans of deferred compensation, the IRS has ruled that the share awarded to a nonparticipant spouse incident to divorce would, under *I.R.C. § 1041*, not be taxable on the transfer, and would be income to the recipient spouse when paid. However, it should be noted that this is an income tax ruling, and that separate rules apply to the payment of any related employment taxes. For additional discussion of taxation of benefits, see § 122.12.

PRACTICE TIP:

The IRS regulations under *I.R.C. § 3121(v)* can be complicated as they apply to nonqualified plans of deferred compensation, particularly those that are designed as defined benefit plans. When dividing any of these plans, special provision may need to be made in order to fairly allocate both the withholding tax liability, if any, and the effect of any prior payment of amount due. *Commentary by James M. Crawford, Jr.*

[2] FORM

Enumeration of Employee Benefit Plans; Warranties; Duties

Employee Benefit Plans

Husband has accrued retirement or other deferred compensation benefits as a participant in the employee benefit plans listed below. The community has an interest in each of the designated plans.

1.

_____ [complete plan description]; (

_____ [short title])

2.

_____ [complete plan description]; (

_____ [short title])

Wife has accrued retirement or other deferred compensation benefits as a participant in the employee benefit plans listed below. The community has an interest in each of the designated plans.

1.

_____ [complete plan description]; (

_____ [short title])

2.

_____ [complete plan description]; (

_____ [short title])

Warranties

Except as listed above, each party warrants to the other that he or she is not covered by or entitled to any benefit under an employee benefit plan that is attributable in any way to service with an employer during the marriage and before the date of separation, nor does he or she have any expectation of becoming so covered. Each further warrants that if he or she becomes covered under any new employee benefit plan, or under an amendment to an existing employee benefit plan, that may provide benefits based partly or wholly on service rendered during marriage and before the date of separation, that party shall immediately notify the other and provide a copy of the plan if reasonably available. The court shall retain jurisdiction to make any further orders as may be necessary to divide the community interest, if any, in these benefits. Each party further warrants that he or she has provided to the other a complete, current, and accurate disclosure and accounting of the following with respect to each listed plan: the current value of all benefits accrued, participant loans outstanding, "basis in the contract," prior distributions and withdrawals, "window" elections that have been made or that are currently available, beneficiary designations, and any irrevocable elections or waivers of benefits. Pending the disposition of each of the plans listed above, each party further warrants that as a participant or beneficiary, he or she shall not make any election that may affect the nature, form, value, or timing of any benefits payable under the plan without prior written notice to the other party.

Duty to Give Notice of Options and Elections

Pending the issuance of any formal Qualified Domestic Relations Order or other Benefit Division Order required under

this Agreement to divide the benefits accrued under any plan set forth above (and awarded entirely to the participant spouse under this Agreement), the participant spouse with regard to the plan shall keep the nonparticipant spouse fully informed of any elections or options that may be or become available under the plan, including but not limited to subsidized early retirement, window benefits, elective transfer options, changes in selected investments, elective insurance coverage, loan availability, and hardship or other in-service distributions. The participant spouse shall consult and cooperate with the nonparticipant spouse with regard to the making or waiving of any election or option. The court shall reserve jurisdiction to resolve any dispute in connection with the exercise of any election or option.

Duty to Give Notice Regarding Termination of Employment

With regard to any plan listed above that is not awarded entirely to the participant spouse under this Agreement, the participant spouse shall give the nonparticipant spouse at least _____ days prior written notice of his or her intent to terminate employment or to retire. Immediate notice shall be give if the participant spouse is terminated from the covered employment involuntarily.

Duty to Give Notice Regarding Health Status

The parties acknowledge that each may be making future decisions concerning the timing and form of distribution of their respective community shares of the benefits provided by any or all of the plans listed above based in part on the respective state of health of the parties. Therefore, until such time as each begins to receive benefits under any affected plan, or if earlier, an order is entered that creates a separate interest in the plan for the benefit of the nonparticipant spouse, each party shall keep the other informed of any material change in health or other circumstance that may reasonably be expected to reduce his or her normal life expectancy so that the parties may tailor any benefit distribution order or election to their mutual benefit.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
DistributionClassificationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution &
DivorceProperty DistributionClassificationRetirement BenefitsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 122 PROVISIONS FOR DIVISION OF EMPLOYEE BENEFITS
PART IV. FORMS
A. Division of Retirement Benefits in General

34-122 California Legal Forms--Transaction Guide § 122.204

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.204 Division of Employee Stock Options

[1] Comment

[a] Use of Form

The form in [2], *below*, is for use to divide employee stock options between the spouses. It contains suggested provisions for various applications of the "time rule," and a "catch all" for those situations in which a time-rule application would be inappropriate *[see [b], below]*. It also contains provisions for dealing with the manner in which the intended divisions of stock options can be implemented, including various tax-related clauses and indemnity provisions designed to help deal with the uncertainty of the tax law in this area *[see [d], below]*. If there are multiple stock option grants from the employer, appropriate provisions for determining the community interest and for exercising the option and distributing stock to the nonemployee spouse must be selected for each grant.

Provisions are also included to address the making of and responsibility for many of the decisions that may need to be made by the employee spouse in connection with stock options; decisions that often will affect both the community and separate property interests, and potentially the employee spouse's income that can be taken into account in fashioning orders for support. These include items such as choosing the exercise date, whether to "reload" (exchange one option for another, more valuable option with different terms, such as the vesting or exercise dates); and whether to make an election for immediate taxation under *Internal Revenue Code Section 83(b)* *[see [d], below]*. In addition, this form addresses fiduciary issues, and the likelihood that the community and separate property interests will not always coincide, particularly if the decision could affect the post-separation employment of the employee spouse, or if the triggering of income tax will be a disadvantage to one party more than the other.

[b] Survey of Stock Options and Issues

In general, a stock option is a right granted by a corporation that entitles the holder to purchase a specified stock in the corporation at a later date for a specified price (sometimes called the "strike" price). The date on which a stock option

(or any stock purchased with the option) can no longer be forfeited is known as the "vesting" date. The earliest date on which the options can be exercised and the stock purchased is the "exercise" date. Stock options are usually granted in discrete blocks, each of which can have different exercise and vesting dates. The date an option or block of options is granted is the "grant" date.

Options can be granted to a corporation's employees for future services, past services, or both. They can be incentive based, or a replacement for cash compensation that would otherwise be paid as salary. They may be used as a "signing bonus," to lure an executive from another position, or as a form of "golden handcuffs," to keep a valued executive from seeking other employment. They can have different tax effects depending on how they are structured [see [d], *below*]. They can be subject to numerous combinations of conditions for grant, vesting, and exercise. They can be acquired by trading in other options, often with new vesting and exercise dates (a process called "reloading"). They can be styled as options to purchase ("call options") or to sell ("put" options). They can be publicly traded or highly restricted, and either way, their value may be stable, or fluctuate from week to week with extreme volatility.

PRACTICE TIP:

Because stock option plans vary widely, a critical but too-often overlooked step in dealing with stock options is to become fully acquainted with all the features of the stock option plan or program. Features such as the conditions for exercise (e.g., performance goals, cash bonus on exercise, sequential exercise dates, etc.), vesting, transferability, and subsequent sale of acquired shares are all potentially relevant to the identification and disposition of the community interest. For example, a pure "time rule" division may be appropriate to apportion options in which the community has an interest if the option right matures solely as a function of continued service, but less appropriate if vesting is a function of the employee's achieving a performance goal principally through post-separation efforts. At a minimum, practitioners in this area should always obtain and review a copy of the stock option plan if there is one, as well as any explanatory materials provided to the employee spouse by the employer. *Commentary by James M. Crawford, Jr.*

Because there is no one right way to approach the division of stock option compensation, the purpose of this form is to assist the practitioner in the *classification* (determining how the option property was or is "earned"); *characterization* and *apportionment* (identifying whether there is a community interest, and if so, determining the "time rule" formula, or other appropriate method to apply for its division); and *award* (designing orders to accomplish the intended allocation, and tax effect) of employee stock options. Although the discussion is limited to stock options, many of the same principles can be applied to similar compensation vehicles, such as restricted stock, discounted options; stock appreciation rights, stock repurchase agreements, junior stock plans, and phantom stock plans.

PRACTICE TIP:

Because of their complexity, stock option cases offer an opportunity to negotiate that is often not present with other forms of compensation-based property, such as a 401(k) plan account. The advantage in these negotiations will usually go to the party who is the more conversant with the various alternative approaches that are available, and the rationale used to support them. Practitioners who are not comfortable in this area, taking into account external considerations such as changes in the Internal Revenue Code, securities law, accounting rules, stockholder attitudes, and business climate issues affecting valuation, should not hesitate to seek expert assistance. *Commentary by James M. Crawford Jr.*

[c] Stock Options Are Not Subject to ERISA

Although stock options are employee benefits, stock option plans are generally not subject to ERISA (the Employee Retirement Income Security Act of 1974) because they are not welfare or pension benefit plans as those terms are defined in ERISA [see 29 U.S.C. § 1003(1)-(3); U.S. Department of Labor Opinion Letter 90-17A; *Vizcaino v. Microsoft Corp.* (9th Cir. 1997) 120 F.3d 1006, 1009 (stipulation of non-ERISA status); see also 29 U.S.C. § 1001 et

seq. (ERISA)]. Therefore, unlike retirement-type benefits, which can usually be divided by a QDRO (Qualified Domestic Relations Order), there is usually no practical way to compel the employer to divide stock options between the employee and nonemployee spouse even though stock options often effectively remain under the employer's control until all contractual conditions have been removed and they are exercised by the employee [see 29 U.S.C. § 1056(d); § 122.220[1][d]].

For this reason (and also for tax reasons) [see [d], below], unless the employer is willing to cooperate, a distribution of a share of the options themselves is usually not a viable vehicle for distributing the nonemployee spouse's community interest to him or her. The distribution has to be of the stock once the options have been exercised [see, e.g., *Marriage of Nelson* (1986) 177 Cal. App. 3d 150, 222 Cal. Rptr. 790 ; *Marriage of Hug* (1984) 154 Cal. App. 3d 780, 201 Cal. Rptr. 676] , or of the appreciated value of the stock (price at time of exercise minus option price) [see, e.g., *Marriage of Harrison* (1986) 179 Cal. App. 3d 1216, 225 Cal. Rptr. 234] .

[d] Income Tax Characteristics of Employee Stock Options

Employee stock options fall into one of two general categories, Incentive Stock Options (ISOs) and Nonstatutory Stock Options (NSOs). An ISO (which includes for this discussion an employee stock purchase plan or ESPP) is an option that meets the restrictive criteria of *Internal Revenue Code Section 422* or *423* (such as price, duration, nontransferability, etc.) for the advantageous tax treatment afforded by *Internal Revenue Code Section 421*. All other options are known as NSOs, and are taxed under *Internal Revenue Code Section 83* (relating to property transferred for the performance of services).

The main advantage of ISOs over NSOs is the potential for capital gains treatment and the opportunity for an additional deferral of tax for the employee. NSOs typically do not generate taxable income until they are exercised and the stock is acquired, at which time the employee is taxed on the difference between the discounted exercise ("strike") price and the fair market value of the shares [see generally, *I.R.C. § 83(a)* (and regulations thereunder for other timing considerations)]. In the case of ISOs, however, tax can be deferred from the date the options are granted until shares acquired by exercising the option are sold or otherwise disposed of, at which time the gain over the exercise price is taxed at the capital gains rate or as ordinary income, depending on the nature and timing of the disposition [*I.R.C. § 421(a), (b)*].

Note that rights earned under an ESOP (Employee Stock Ownership Plan) are not covered by these rules because an ESOP is a tax qualified plan under *Internal Revenue Code Section 401(a)*, and therefore is treated in the same fashion as any other qualified defined contribution plan, such as a 401(k) plan, even though it is invested substantially or wholly in employer securities [*I.R.C. §§ 401(a), 409*]. So called "Keysops" (options granted to key employees to purchase nonemployer securities, such as mutual funds, from the employer) and other similar types of compensatory options also do not fall within the scope of this discussion, although in form and perhaps substance they can resemble NSOs.

A key disadvantage to tax-favored ISOs when compared to NSOs, is that ISOs must meet a number of strict requirements relating to the grant, holding, and disposition of the stock acquired [see *I.R.C. § 422*]. Of these, the requirement that ISOs must be nontransferable and exercisable only by the employee is of particular significance to divorcing spouses [see *I.R.C. § 422(b)(5)*], because it seems clear that the transfer of legal title to an ISO between divorcing spouses would cause the option to be taxed as an NSO under the current statutes [see, e.g., Letter Rul. 200005006].

Past practice has been to attempt to avoid this problem by transferring only a beneficial interest in the ISO, effectively making the employee a constructive trustee for the nonemployee spouse's interest. Unfortunately, however, the question of whether the exercise of an ISO by an employee at the instruction of the nonemployee spouse (or under a court order) will also run afoul of Section 422(b)(5) has not yet been resolved, and may, in fact, have a different answer depending on whether or not the divorcing couple resides in a community property state [see Letter Ruls. 84-51-031 (division of

community interest in shares acquired under an ISO not a "disposition"), 9433010 (division of community interest in NSO not a "transfer" under § 83 because options considered to be owned equally from date of grant); *see also Powell v. Commissioner (1993) 101 T.C. 489, 498* (pre-REA distribution of nonemployee spouse's community interest in qualified plan to employee spouse who pays it over to nonemployee spouse is taxable income to nonemployee; employee and nonemployee spouse are both the "distributee" of community earned income, and employee held funds in trust for community)]. This form therefore assumes that the transfer between spouses of a beneficial or legal interest in an ISO will transmute it into an NSO, and thus, with few exceptions, approaches the mechanics of the division (but not necessarily the apportionment) of all ISOs and NSOs alike.

Also, the tax characteristics of NSOs as they relate to a division of the options between divorcing spouses are less than settled. The general rule is that if an NSO does not have a "readily ascertainable market value" when granted (as is typically the case), the employee will not be taxed until the option is disposed of or exercised. In the past, practitioners have struggled with such issues, among other things, as whether the division of an option incident to divorce is a "disposition" for this purpose, particularly if the option is community or quasi-community property [*compare* Letter Rul. 9433010 (division of community interest in NSO not a "transfer" under § 83 because options considered to be owned equally from date of grant); *and Powell v. Commissioner (1993) 101 T.C. 489, 498* with Field Service Advice 200005006 (division of option on divorce is taxable disposition)]. But much of this uncertainty has been removed with the issuance of *Rev. Rul. 2002-22*, in which the IRS clarified that such transfers are covered by *I.R.C. § 1041*, and thus will not trigger tax if "incident to divorce" and that the recipient of the transferred NSO will pay the tax, not the employee, and the tax will be triggered only when the nonemployee spouse exercises the option or otherwise disposes of it.

PRACTICE TIP:

Although *Rev. Rul. 2002-22* has removed many of the issues surrounding the division of NSOs (and with respect to nonqualified deferred compensation plans, for that matter), it is still recommended that any intended transfer be discussed with a tax professional before it is concluded.

PRACTICE TIP:

In dealing with the issue of who is to control the timing of the employee's exercise of the nonemployee spouse's share of NSO rights (in cases in which the option rights have not been assigned), it is easy to overlook the fact that the exercise of NSOs has risk to the employee spouse, which can be substantial in volatile market conditions. This risk comes from the fact that exercise of an NSO generates immediate income tax liability for the employee spouse, as explained in the text above. This liability attaches regardless of whether the stock value subsequently rises or plummets. Assuming the stock has been transferred to the nonemployee spouse on exercise, the employee spouse will then have to hope that enough of the stock is sold in time to generate sufficient funds to pay the taxes, or that the nonemployee spouse has other funds available to cover the tax. Otherwise the "indemnified" employee could be left with a large tax bill and no way to pay it. *Commentary by James M. Crawford, Jr.*

[e] Characterization and Apportionment of Employee Stock Options

Employee Stock options are community property to the extent that they are earned by the time, skill, and effort of a spouse during marriage [*In re Marriage of Harrison (1986) 179 Cal. App. 3d 1216, 1226, 225 Cal. Rptr. 234*]. For options that are earned by the community, at least in part, the fact that they may not vest until after separation does not mean that there is no community interest in the options [*Marriage of Judd (1977) 68 Cal. App. 3d 515, 526, 137 Cal. Rptr. 318*]. However, the fact that the nonemployee spouse may have a community property interest in stock options acquired or vesting during the marriage, or that were acquired during marriage and vesting after separation, does not mean that the options belong entirely to the community. Thus, the determination of the extent to which options belong to the community and separate property estates is typically more a matter of apportionment, rather than characterization.

PRACTICE TIP:

In the aftermath of the Supreme Court's decision in *In re Marriage of Lehman*, there remains considerable uncertainty about whether the *Lehman* characterization test (under which the community has no interest in a defined benefit plan unless the employee accrued some right to benefits during the marriage and prior to separation) should apply to stock option plans [see *In Marriage of Lehman* (1998) 18 Cal. 4th 169, 74 Cal. Rptr. 2d 825, 955 P.2d 451]. If it does, as it arguably should, practitioners should be careful in applying the test not to assume that the community has an interest in any option program just because the grant date occurred during the community period. This is because there is a fundamental difference in the relationship between benefit accrual and vesting as between defined benefit plans and stock option plans. In a typical defined benefit plan, participation begins when the employee has met the eligibility requirements, and the benefits accrue thereafter each year the participant meets the year's minimum service required for accrual, usually 1,000 hours. Once accrued, the right to these retirement benefits becomes protected by the anti-cutback provisions of ERISA or the Internal Revenue Code, even though the participant has not yet become vested [see, e.g., I.R.C. § 411; ERISA § 204]. By contrast, in a typical stock option plan the minimum service necessary for accrual of the right to the benefit is expressed as a vesting requirement (for example, two years). Until a participant is accrued-vested, all that is really held in a stock option plan is the right to accrue and vest by meeting the plan criteria. In a very real sense, then, until a granted option is vested, at least in part, a married employee in a stock option plan is in much the same situation as if he or she were "granted" the right to participate in a defined benefit plan but had not yet met the minimum service required for the first year's benefit accrual prior to separation. In each case, since the right to a benefit did not accrue at least in part during the marriage and prior to separation, under the *Lehman* test, the community would have no interest in the plan. *Commentary by James M. Crawford, Jr.*

Although most stock options are divided by some variation of the time rule fraction [see § 122.220[1][c]], the application, or even suitability of that rule can only be determined by looking closely at the facts and circumstances of each case [see *In re Marriage of Walker* (1989) 216 Cal. App. 3d 644, 650, 265 Cal. Rptr. 32 (no single rule or formula is applicable to every dissolution case involving employee stock options; court should be vested with broad discretion to fashion approach that will achieve most equitable results under facts of each case)]. Relevant inquiry includes, for example, whether the purpose of the option is to compensate for past services, future services, or both; whether the value depends on the individual contribution of the employee, or is more related to the passage of time in service; and whether there is a component of compensation for past compensation from another employer that was foregone to accept the current employment.

Far too often, options are divided without any real understanding of the answers to these issues, which, of course, can doom from the start any attempt to fairly assess the contribution to value attributable to the marital years of service. The California courts have, over the years, struggled with the proper components for a time rule-formula, and with the question of what is the asset to which the formula is to be applied; the option, the stock, or the appreciated value of the stock [see *Marriage of Walker* (1989) 216 Cal. App. 3d 644, 265 Cal. Rptr. 32; *Marriage of Harrison* (1986) 179 Cal. App. 3d 1216, 225 Cal. Rptr. 234; *Marriage of Nelson* (1986) 177 Cal. App. 3d 150, 222 Cal. Rptr. 790; *Marriage of Hug* (1984) 154 Cal. App. 3d 780, 201 Cal. Rptr. 676].

Option grants are frequently not homogeneous in their terms and conditions, and therefore, several different division methodologies might be appropriate for different grants, depending on the circumstances under which they are structured and the reasons for the grant. In addition, it may even be appropriate to approach the division of a single grant in different ways. For example, consider a grant that gives the employee the right to buy 100 shares and that vests and becomes exercisable at the rate of 20 shares every two years. Under the traditional "cumulative method" for dividing this right, one would apply the time-rule formula to each 20 shares as the option vests with regard to those shares. Thus the community interest would extend for the entire 10 years of vesting, with its cumulative share being the sum of ever-decreasing fractions of the vesting blocks. An alternative to this approach might be the "sequential method," under which one would view the option as for five separate blocks of 20 shares each, with each block being

considered to have been granted every two years. In both cases, the benefit is identical in substance, yet the community-interest calculation will be substantially larger under the former than the latter. This form's provisions are designed to allow for each block (or "deemed" block under the sequential method) to have its own division criteria and method.

PRACTICE TIP:

As stock options become a larger part of the typical compensation structure for employees at all levels, courts are increasingly looking at treating unexercised employee stock options as income rather than property, for purposes of support [*see, e.g., In re Marriage of Kerr* (1999) 77 Cal. App. 4th 87, 91 Cal. Rptr. 2d 374] . Thus it may be appropriate in the division negotiations to attempt to resolve any support related issues. If so, practitioners should understand and take into account as appropriate the fact that stock option income (whether deemed or attributable to a forced exercise) carries with it a cost in terms of the risks of loss, whether actual (should the underlying stock subsequently lose value) or in the form of gain foregone (should the stock value increase post-exercise), along with the costs of exercise, tax implications, and potential effect on the employee's future relationship with the employer. *Commentary by James M. Crawford, Jr.*

[f] Valuing Stock Options

Due to unforeseen circumstances, it may not always be possible for the nonemployee spouse to be able to realize his or her interest in an option. For example, a nonemployee spouse may not be able to pay the exercise price. Under these circumstances, it may be necessary or appropriate for the employee spouse to have an opportunity to buy out the nonemployee spouse's interest as part of the overall division of the parties' community estate.

For this reason, this form includes provisions for valuing the employee's stock option rights. Unfortunately, most employee stock options are not publicly tradable and have no readily ascertainable market value. Because factors such as the market price, volatility, the strike price, cost of exercise, tax consequences, and other contingencies (such as vesting), make valuation a difficult proposition at best, it is anticipated that any valuation will be made by one or more experts.

Probably the most widely used valuation method is the computer program known as the Black-Scholes Option Pricing Model, which was originally developed by Fisher Black and Myron Scholes in 1973. It has been modified over the years to reflect changes in the business arena and marketplace. However, other methodologies may be more appropriate to a particular situation. In order to facilitate the valuation process and reduce the opportunity for disparate results, the form allows the parties to agree in advance to the particular methodology to be used.

[2] FORM

Division of Employee Stock Options

Identification of Employee Stock Options Definitions

For purposes of the following provisions, the phrase "during the marriage" refers to the period between the date of marriage and the date of separation. The "Grant Date" is the date the option was granted, or shall be deemed to have been granted for division purposes. The "Exercise Date" is the date the option can first be exercised and the stock acquired by paying the strike (exercise) price. The "Vesting Date" is the date on which the options become nonforfeitable. "Employer" is defined as [specify; include prior employers if applicable].

Identification of Stock Options

The following is a list of employee stock options granted to [employee spouse] during the marriage (whether or not yet vested or exercisable) or that became exercisable or vested during the marriage, regardless of when granted, but excluding options that were exercised during the marriage. The parties recognize that there is a community interest in each of the options below to the extent the option rights are earned at least in part by [employee spouse] during the marriage, and agree that the method to determine that interest shall be as shown for each.

[Repeat the following provisions as many times as necessary to include all stock options granted to the employee spouse. If both Husband and Wife have employee stock options that are subject to division, repeat the entire form for the stock options of each.]

Incentive Stock Options

Option Number: _____

Grant Date: _____

Number of Shares: _____

Strike (Exercise) Price: \$ _____

Vesting Schedule and Conditions: _____

Exercise Conditions: _____

Plan Document Available? (Yes/No): _____

Name of Granting Employer: _____

Method of Division: _____

Nonstatutory Options

Option Number: _____

Grant Date: _____

Number of Shares: _____

Strike (Exercise) Price: \$ _____

Vesting Schedule and Conditions: _____

Exercise Conditions: _____

Plan Document Available? (Yes/No): _____

Name of Granting Employer: _____

Post-Exercise Restrictions On Transfer? (Yes/No):_____

Method of Division:_____

Warranty of Full Disclosure

[*Employee spouse*] represents that, except for any stock options that were exercised during the marriage, all stock options granted by the Employer during the marriage and before separation, and all stock options granted before the marriage that vested or became exercisable after the marriage date have been listed above.

Documentation

[*Nonemployee spouse*] acknowledges that [she/he] has received or has had an opportunity to examine a copy of the current plan document, contract, agreement, or other materials setting forth the terms and conditions of each of the above stock option grants in effect as of the date of this Agreement.

Determination of _____ [*Nonemployee Spouse's*] Interest [*Select one of the following paragraphs for each option listed above.*] [*Time-rule fraction for use for options that were granted in part for past service*]

[*Nonemployee spouse's*] share of [the option or each option or specify option to which fraction is to apply] shall equal 50 percent of the total number of covered shares, multiplied by a fraction, the numerator of which shall be the number of years of employment with the Employer during the marriage and before the _____[Exercise Date or Vesting Date], and the denominator of which shall be the total number of years of employment as of the _____[Exercise Date or Vesting Date].

[*OR: Time-rule fraction for use for options that were granted solely for future services*]

[*Nonemployee spouse's*] share of [the option or each option or specify option to which fraction is to apply] shall equal 50 percent of the total number of covered shares, multiplied by a fraction, the numerator of which shall be the number of years of employment with the Employer during the marriage and between the Grant Date and the _____[Exercise Date or Vesting Date], and the denominator of which shall be the total number of years of employment from the Grant Date to the _____[Exercise Date or Vesting Date].

[*OR: Use if allocation of options to community was individually negotiated rather than according to a time-rule fraction.*]

[*Nonemployee spouse's*] interest in [the option or each option or specify option to which paragraph applies] shall equal _____ percent of the total number of covered shares, which shall be deemed to include any shares resulting from any stock split, additional award, or reissue with respect to the original grant.

[*OR*]

[*Nonemployee spouse's*] interest in [the option or each option or specify option to which paragraph applies] shall be the right to acquire _____ shares, together with any additional covered shares resulting from a stock split, additional award,

or reissue with respect to the shares.

[OR]

[*Nonemployee spouse's*] interest in [the option or each option or *specify option to which paragraph applies*] shall be determined as follows: [*specify*].

Exercise of Options and Delivery of Stock to _____ [*Nonemployee Spouse*] [*Select one of the following paragraphs for each option listed above.*] Recognition of Beneficial Interest-Constructive Trust **CAUTION:** Use of this provision may result in the loss of ISO tax treatment with respect to the interest of the nonemployee spouse [see [1][d], above].

[*Employee spouse*] shall hold and exercise [*nonemployee spouse's*] share of [the option or each option or *specify option to which paragraph applies*] for the benefit of and at the direction of [*nonemployee spouse*], subject to payment to the Employer by [*nonemployee spouse*] of the exercise price in the form and manner required, including any applicable withholding [Add if desired: and delivery by _____ (*nonemployee spouse*) of evidence satisfactory to _____ (*employee spouse*) of (her/his) ability to pay directly, or indemnify _____ (*employee spouse*) against, any resulting tax liability (*optional*: without taking into account the market value of the shares to be acquired)]. [Add if desired: If so directed, _____ (*employee spouse*) shall use for the exercise any financing or "cashless exercise" rights available under the terms of the option.] As soon as is administratively feasible after delivery of the stock attributable to the exercise, [*employee spouse*] shall cause the stock to be transferred to or for the benefit of [*nonemployee spouse*] as [*nonemployee spouse*] may direct. [*Employee spouse*] shall designate an agent authorized to effect this transaction if [*employee spouse*] should be unavailable to do so for more than _____ business day(s).

[OR] Assignment of Option **CAUTION:** Employer cooperation may be required if the option is not assignable by its terms. This alternative is not recommended for ISOs, unless NSO tax treatment is acceptable.

[*Employee spouse*] transfers and assigns to [*nonemployee spouse*] her/his share of [the option or each option or *specify option to which paragraph applies*], which shall thereafter be exercisable directly by [*nonemployee spouse*] as the sole and separate property of [*nonemployee spouse*] in [her/his] discretion in accord with the terms of the option(s).

[OR] Community Interest to be Perfected as Shares are Acquired **CAUTION:** Use of this provision may result in the loss of ISO tax treatment for the interest awarded to the nonemployee spouse to the extent it exceeds one-half of the community interest in the option, determined without regard to any compensating award of other community-owned assets [see [1][d], above].

The identification and recognition of [*nonemployee spouse's*] existing community interest in [the option or each option or *specify option to which paragraph applies*] as set forth above shall not be construed as creating, assigning, or transferring to [*nonemployee spouse*] any new or additional interest, whether beneficial or legal. Instead, at the time when [*employee spouse*] exercises the option (whether or not at the nonbinding request of [*nonemployee spouse*]), [*employee spouse*] shall notify [*nonemployee spouse*] in writing of the exercise. On payment by [*nonemployee spouse*] to [*employee spouse*] of an amount equal to that portion of the exercise price (and any applicable withholding and employment taxes) attributable to [*nonemployee spouse's*] interest in the acquired Employer stock, [*employee spouse*] shall immediately transfer [*nonemployee spouse's*] share to [*nonemployee spouse*]. In the case of a partial exercise of an option, [*nonemployee spouse's*] share of the acquired stock shall be _____ [determined on a pro rata

basis based on the relative interests of the parties in the option or determined as follows: _____. In no event shall [employee spouse] be liable to [nonemployee spouse] for the timing or manner of any exercise of the option, which shall be in the sole discretion of [employee spouse]. Any transfer of stock under this paragraph is intended to be treated as a nontaxable transfer incident to divorce. [Add if desired: If, on receipt of _____ (employee spouse's) notice of intent to exercise, _____ (nonemployee spouse) should fail to timely pay to _____ (employee spouse) the amount as required above, _____ (employee spouse) may, at (his/her) discretion, either not proceed with the exercise, or proceed with the exercise and hold all shares acquired for (his/her) own account. Within _____ days of the delivery of the stock to _____ (employee spouse), _____ (employee spouse) shall then pay to _____ (nonemployee spouse), in full satisfaction of (her/his) interest, an amount, net of any applicable taxes, determined as follows: _____ (specify valuation method)].

Limitations on Liability Before Exercise of Options and Delivery of Shares

The parties understand that they each may have disparate or irreconcilable interests with respect to the vesting, form, timing, and manner of exercise, or other matters pertaining to [the option/any option] until the time when [it is/they are] transferred or exercised as provided above. The parties also recognize that the value of [the option/any option] before it is transferred or exercised may be conditioned on or determined in substantial part based on the performance by [employee spouse] of future services to the Employer or other post-separation actions. The parties intend that [nonemployee spouse's] interest shall also be subject to the risks inherent in [employee spouse's] employee-stock-option grants generally. Therefore, the parties agree that, except as otherwise specifically provided to the contrary in this Agreement, [employee spouse] shall not be liable to [nonemployee spouse] for any post-separation decisions, actions, or failures to act relevant to the manner and timing of vesting or exercise of the interest of [nonemployee spouse] in [the option/any option]. Nor shall [employee spouse] be responsible to [nonemployee spouse] for any loss in value or forfeiture of option rights attributable to changes in the terms of [employee spouse's] employment, including termination, or any failure of [employee spouse] to meet performance or other established goals or objectives required to vest or make [the option/any option] available for exercise, or for any loss in value due to any other act or failure to act relative to satisfying any conditions affecting vesting or exercise rights.

Limitations on _____ [Employee Spouse's] Rights to Modify Option(s)

[Employee spouse] shall not make any voluntary election or otherwise agree to convert, amend, renew, cancel and replace, or otherwise modify [the option/any option], to the extent of [nonemployee spouse's] interest, without the prior written consent of [nonemployee spouse]. [Add if desired: If _____ (nonemployee spouse) does not consent within a reasonable time of receipt of notice, _____ (employee spouse) may take the proposed modification action on payment to _____ (nonemployee spouse) of the value of _____ (nonemployee spouse's) interest as of the election date, determined without regard to the anticipated change. _____ (Nonemployee spouse) shall then have no further interest in the option or in any shares acquired.]

[Include if desired.]

Alternative Minimum Tax

The parties understand that the exercise of an option may give rise to Alternative Minimum Tax (AMT) Income for [employee spouse], which, although not taxable directly, may increase the amount of tax that [he/she] will owe for the

taxable year. [Nonemployee spouse] [shall/shall not] be required to compensate [employee spouse] for any adverse tax effect to the extent attributable to AMT accruing on the exercise of [nonemployee spouse's] interest in [the option/any option], or the disposition of the shares acquired. [The amount to be paid by _____ (nonemployee spouse) in this regard shall be determined as follows:_____.]

[Include if desired.]

Disqualifying Disposition With Respect to ISOs.

Nothing contained in this Agreement shall preclude either party from making a disqualifying disposition (within the meaning of *Internal Revenue Code Section 422(c)*) of his or her respective shares of stock following exercise of [the option/any option].

IRC Section 83(b) Election

Nothing contained in this Agreement shall restrict the right of either party to make an election under *Internal Revenue Code Section 83(b)* for immediate tax on exercise of his or her respective shares of [the option/any option].

Modification, Extension or Renewal

[EITHER]

If [the option/any option] is modified, extended, or renewed after the date of this Agreement, [nonemployee spouse's] share shall be calculated on exercise as provided above without regard to the effect of the change.

[OR]

If [the option/any option] is modified, extended, or renewed after the date of this Agreement, [employee spouse] shall provide [nonemployee spouse] with a copy of the terms of the option as amended, and the parties shall make any adjustments in the calculation of their respective shares as they shall mutually agree so as to effect their intended division of the community interest. The court shall reserve jurisdiction to resolve any issues about which the parties are unable to reach agreement.

Notification of Changes in Circumstance Before Vesting or Exercise

Until such time as [the option/each of the options] shall be 100 percent vested and exercisable, [employee spouse] shall notify [nonemployee spouse] in writing of any change in circumstances that may affect the vesting or the Exercise Date (such as a change in control of the Employer, or a blackout period). If these circumstances are not within the control of [employee spouse], notice shall be given not more than _____ days after [employee spouse] first becomes aware of the changes. In all other cases, notice shall be given not less than _____ days in advance of any election, agreement, consent or other acceptance of the change in circumstances by [employee spouse].

[Include if desired.]

Change in Stock Value After Exercise Date

After the Exercise Date, and until such time as [the option/an option] is actually exercised, [employee spouse] shall notify [nonemployee spouse] of any material change reasonably known to [him/her] in the value of the stock to which the option applies [add if desired: unless the information is reasonable available to _____ (nonemployee spouse)]. For this purpose, a material change shall be a change of at least _____ percent of the value determined as of the most recent date for which a value was publicly available, or a change equal to or exceeding \$ _____ per share. Notice shall be given in writing within _____ days of [employee spouse's] learning of the change in value. Nothing contained in this paragraph shall be construed as requiring [employee spouse] to divulge any information in violation of any securities laws or written agreement of confidentiality.

Valuation of Interest

Should it become necessary to value the interest of [nonemployee spouse], the value shall be deemed equal to [that determined by an independent expert jointly selected by the parties or the average of the values determined by the experts appointed by each of the parties] using _____ [the Black-Scholes Method or the following factors (check all that are applicable):

- _____ Intrinsic Value
- _____ Time to Execution
- _____ Value of Underlying Stock
- _____ Market Interest Rates
- _____ Dividends
- _____ Exercise Price
- _____ Potential for Adjustments in Exercise Price or Date
- _____ Expiration date
- _____ Income Tax Attributes
- _____ Other _____ [specify]

The cost of this valuation shall be _____ [born by _____ (employee spouse) or born by _____ (nonemployee spouse) or shared by the parties in proportion to their respective interests in the option or shared by the parties equally].

Payment of Taxes and Preparation of Tax Returns

Except as may otherwise be specifically provided in the Agreement to the contrary, the parties shall each be solely responsible for payment of all taxes due or that may become due with respect to their respective interests in [the option/all options] divided in this Agreement, or in any stock or other property acquired by any exercise of an option. Each party shall properly report all income, gains or losses, and withholding credits attributable to his or her respective interests in the option, any transfer or other disposition of that interest, and any stock acquired through the exercise of that interest. The parties recognize that the tax implications of the division of employee stock options on divorce are unclear, and therefore, agree to cooperate fully in the preparation of their respective tax returns in order accomplish the intent of this paragraph.

Tax Indemnification

Except as may otherwise be specifically provided in the Agreement to the contrary, each party shall indemnify and hold the other harmless from any tax liability (including but not limited to taxes, penalties, interest, and costs) arising out of any transfer or exercise of the indemnifying party's interest in [the option/any option] as awarded or confirmed in this Agreement, or arising out of the disposition of any stock acquired under [the option/an option].

Remaining Option Rights are Separate Property of _____ [Employee Spouse]

Except for the interests assigned to or recognized as belonging to [nonemployee spouse] in the option(s) identified above, all employee stock options granted to [employee spouse] by the Employer and any stock acquired by exercising the options, shall be the sole and separate property of [employee spouse].

Reservation of Jurisdiction

The court shall reserve jurisdiction to accomplish the intended disposition of the community interest in option(s) set forth above.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General
 Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property
 Distribution Classification General Overview Pensions & Benefits Law Employee Benefit Plans Employee Stock
 Ownership Plans



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 122 PROVISIONS FOR DIVISION OF EMPLOYEE BENEFITS
PART IV. FORMS
A. Division of Retirement Benefits in General

34-122 California Legal Forms--Transaction Guide §§ 122.205-122.219

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

[Reserved]

§§ 122.205[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 122 PROVISIONS FOR DIVISION OF EMPLOYEE BENEFITS
PART IV. FORMS

B. Private Employee Benefit Plans Governed by ERISA

34-122 California Legal Forms--Transaction Guide § 122.220

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.220 Division of Qualified Plans

[1] Comment

[a] Use of Form

The form in [2], *below*, contains complete provisions for the division of an employee benefit plan that is covered by Title 1 of ERISA or "qualified" under *Internal Revenue Code Sections 401(a)* or *403(b)* [*see 29 U.S.C. § 1001 et seq.* (Employee Retirement Income Security Act)]. The employee spouse is usually called the "participant" and the nonemployee spouse whose interest is being determined and distributed under the agreement is called the "alternate payee."

This form may be used with all kinds of employee retirement benefit plans, be they defined contribution plans, defined benefit plans, or other [*see § 122.203[1]*].

[b] Qualified and Nonqualified Plans

A qualified retirement plan is one that meets strict requirements established by the Internal Revenue Code regarding matters such as participation, coverage, nondiscrimination, nonalienation, documentation, and minimum distribution. A qualified plan must be funded by a trust (or an insurance product) for the exclusive benefit of the participants [*see I.R.C. § 401(a)*]. Nonqualified plans are usually "unfunded," (meaning that any funds that the employer might set aside for the payment of benefits, whether in trust or otherwise, must remain the property of the employer) and can be designed in any fashion.

The main tax difference between the two is that in a qualified plan, the employer gets an immediate deduction for amounts contributed to the plan, while the participants are not taxed until they actually receive their benefits. In a nonqualified plan, the deduction is unavailable until the benefits become includible in the employees' gross income. Although both plan types usually have antialienation provisions, they are required for qualified plans [*see 29 U.S.C. §*

1056(d)]. Qualified plans, however, must recognize an exception that allows a family law court to divide benefits between a participant and alternate payee spouse under a Qualified Domestic Relations Order (QDRO) [I.R.C. § 401(a)(13); see 29 U.S.C. § 1056(d)(3) (QDRO provisions)]. In most jurisdictions, benefit division orders for nonqualified plans are also honored notwithstanding the anti-alienation provisions and ERISA preemption concerns, although the theories vary because the statutory QDRO provisions do not actually apply.

[c] Formula for Determining Community Interest in Plan

Although any reasonable method may be used to arrive at a fair determination of the community interest in retirement benefits, qualified plans that have a community character are usually divided either by a variant of the "time rule" (sometimes referred to as the "coverture fraction") or by "tracing." Tracing is typically used for defined contribution plans, in which contributions are allocated to individual accounts over years. The time rule is usually used for defined benefit plans (which have no individual accounts) and for defined contribution plans if there is insufficient information to do the tracing.

Orders may be structured to provide a percent of benefits as of a particular time (with or without subsequent adjustment of actuarial or investment earnings), a fixed dollar amount, or a combination of the two. A "time rule" formula will typically identify the community interest according to a fraction that gives the community a pro rata portion of the total using a ratio based on comparing years of employment (or some other measure of benefit accrual) during marriage to the total credited service. This approach has been held to be appropriate for use if the amount of the retirement benefits is substantially related to the years of service [*In re Marriage of Poppe* (1979) 97 Cal. App. 3d 1, 8-9, 158 Cal. Rptr. 500 ; see *In re Marriage of Lehman* (1998) 18 Cal. 4th 169, 176, 74 Cal. Rptr. 2d 825, 955 P.2d 451] . In constructing a time-rule fraction, the practitioner should insert the measure of benefit accrual for the particular plan involved that most nearly approximates the relative contributions of the period of service during and outside marriage. For example, a fraction based on years of employment may not be appropriate if the participant's benefit was fully accrued in the ten years of service before marriage, and was only augmented by salary increases during marriage. For further discussion of the application of the time rule and of computing the community interest under this formula, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapter 21, *Special Property Characterization and Division Issue* (Matthew Bender).

A tracing approach can be designed in a number of ways, but the objective is to identify the portion of an individual account that is attributable to contributions made for service during the marriage and the earnings on that portion. While tracing is frequently done on a pro rata basis, without differentiating the particular investment returns that were attributable to money contributed during the marriage, that approach is not always appropriate. For example, if the parties self directed the contributions during marriage into a limited partnership investment that sustained substantial losses, it is questionable whether more conservatively invested separate property contributions should have to subsidize that poor performance. Pro rata tracing is often the only feasible method if the assets of the plan are invested on a pooled basis because there simply is no way to trace any one investment to any particular contribution or account allocation. A qualified plan may be required to implement any clearly specified method of division.

Distributions from a defined contribution plan are usually based on the value of the account as of the most recent "valuation date." These dates are established by the terms of the plan, and must be at least annual. In addition to the described date(s), plan fiduciaries are often given the discretion of calling for an interim valuation date if circumstances warrant. Plan tracing methodologies can be difficult for plans that are valued only annually (making midyear allocations impossible unless the parties agree on some deemed earnings rate), and contributions made during a year are often attributable to service in the prior year.

PRACTICE TIP:

Knowing the valuation date is critical in a qualified defined contribution plan because any earnings between the most recent valuation and the pay date could be inadvertently lost. Of course, if the account

has suffered a loss, then that loss would not affect the account if it is distributed before the next valuation date. In plans with daily valuations, this is not an issue. *Commentary by James M. Crawford Jr.*

Another alternative is for the parties to do the calculations themselves and agree on a specific dollar amount that is to be awarded to the alternate payee. However, if the alternate payee does not have immediate access to the money under the plan, provision must be made to adjust for subsequent events. Defined contribution plan adjustments should deal with prospective changes such as retirement subsidies, window benefits, cost of living and actuarial increases, salary increases, and any formula changes. They should also address subsequent investment experience, usually by requiring the plan to create a separate (or deemed separate) account for the alternate payee.

[d] Qualified Domestic Relations Order (QDRO)

Generally speaking, no part of an ERISA-covered or qualified retirement plan may be awarded to an alternate payee spouse or dependent unless a Qualified Domestic Relations Order (QDRO) is first drafted, entered by the court, and accepted by the plan as "qualified" [29 U.S.C. § 1056(d)(3); I.R.C. § 414(p); see Pub. L. No. 109-280, § 1001 (Secretary of Labor to issue regulations clarifying that QDRO does not fail to qualify solely because of time at which it is issued, or because it is issued after, or revises, another domestic relations order or QDRO)]. If the QDRO is prepared simultaneously with the marital settlement agreement, it should be attached and referenced for the specific provisions relating to the division of the plan. If the QDRO will have to be prepared after the agreement, then the agreement should set forth, at a minimum, sufficient dispositive provisions to protect the interests of the parties should either of them die before the QDRO can be entered by the court and accepted by the plan [see 29 U.S.C. § 1056(d)(3)(C) (required contents of QDRO); *Stewart v. Thorpe Holding Co.* (9th Cir. 1999) 207 F.3d 1143, 200 U.S. App. Lexis 5807 (marital dissolution order qualified as QDRO); *Carland v. Metropolitan Life Ins. Co.* (10th Cir. 1991) 935 F.2d 1114 (property settlement agreement that has been incorporated or merged into family law judgment can constitute QDRO); see also [1][e], below]. For some plans, if a participant dies after dissolution without a surviving spouse and before receipt of retirement benefits begins, all benefits otherwise payable revert to the plan [see, e.g., *Samaroo v. Samaroo* (3d Cir. 1999) 193 F.3d 185]. QDRO status can also protect against IRS levy in some cases [see *Agents Pension Plan of Allstate Insurance Company v. Weeks* (1999 N.D. Ill.) 1999 U.S. Dist. LEXIS 6289]. The form in [2], below, contains options for either the attachment of a QDRO or language sufficient to constitute the agreement as a QDRO.

PRACTICE TIP:

In preparing a QDRO, family law practitioners may wish to associate counsel with specialized expertise in employee benefits and ERISA to assist in negotiating and drafting the order. In some cases, particularly with regard to a defined benefit plan, the assistance of an actuary skilled in the evaluation of employee benefit plans can also be helpful. In many cases, the pension plan administrator can provide needed information and may even be able to provide sample forms or provisions. In using this information, it is important to realize that the plan administrator's responsibility is limited to ensuring that any order meets the QDRO requirements, and sample orders may or may not be adequate to effect the division of the plan that best advances the interests of the client. For example, suppose a defined benefit plan uses a sample order based on the time rule, yet includes a benefit that is based in part on employee contributions. If the employee contribution account has no nexus to the marital period of employment, using a time rule would comply with the QDRO requirements certainly, but the order would result in an improper sharing of the benefit portion attributable to separate property contributions. In this case, the drafter would want to separate that portion of the benefit to which the time rule fraction is to apply. *Commentary by James M. Crawford, Jr.*

PRACTICE TIP:

It should always be remembered that the so-called "time rule" is a method for apportioning plans, not determining whether they have a community character that is subject to apportionment. The difference is critical, and it should never be assumed that just because a plan computes benefits based on service

during the period of marriage and prior to separation, that those benefits are in part community owned. The test is not how the benefits are measured, but simply whether the *right* to those benefits arose during the marriage, at least in some part [*In re Marriage of Lehman* (1998) 18 Cal.4th 169, 74 Cal.Rptr.2d 825, 955 P.2d 451] . Thus, a plan in which the employee spouse first participates or accrues a benefit after separation is going to be entirely separate property, even though the rights earned under that plan are measured in part by the employee's prior service during the marriage [*In re Marriage of Frahm* (1996) 45 Cal. App. 4th 536] .

[e] Death and Survivor Benefits

[i] Death of Employee-Participant Spouse

Absent an agreement to the contrary between the spouses, California law provides that a nonemployee spouse has a community interest in death and survivor benefits payable under the employee spouse's retirement plan [see *Fam. Code* § 2610]. However, under the federal law applicable to retirement plans (ERISA and the Internal Revenue Code) surviving spouses are entitled to no less than half of any death benefit that becomes payable if a participant should die before retirement benefits have been paid or begun, regardless of the community interest. The federally protected right of a surviving spouse to a preretirement survivor benefit is known as a QPSA right (Qualified Preretirement Survivor Annuity) [29 U.S.C. § 1055(a)(2), (e); I.R.C. §§ 401(a)(11), 417(c) (rules for qualified preretirement survivor annuities in ERISA and the I.R.C.)].

Any death benefit payable over and above the required QPSA will go to the participant's designated beneficiary, if any, under the Plan. Plans that typically do not pay an annuity, such as profit-sharing plans and 401(k) plans, can avoid having to pay a QPSA, but only if the surviving spouse is the automatic beneficiary of 100 percent, rather than just 50 percent, of the death benefit [see 29 U.S.C. 1055 (b)(1)(C)(i)]. Thus, a participant's surviving spouse has a statutorily created priority to QPSA benefits over everyone, except, of course, the IRS for tax liens [*but cf. U.S. v. Taylor* (8th Cir. 2003) 338 F.3d 947 (QDRO may trump IRS tax lien as alternate payee's interest)].

ERISA and the Internal Revenue Code also protect surviving spouses in another way, by providing that all pension plan retirement benefits (as distinguished from death benefits paid preretirement) must be distributed in the form of a "Qualified Joint and Survivor Annuity" (QJSA) unless the spouse consents in writing to a different form of payment [see 29 U.S.C. § 1055(a)(1), (d)]. However, unlike a QPSA, this protection does not generally extend to profit sharing, 401(k), and similar plans [29 U.S.C. 1055(b)(1)(C)]. These plans can therefore distribute retirement benefits in any nonannuity form (for example, lump sum or installments) without spousal consent.

The federally created right to QPSA and QJSA benefits for surviving spouses creates potential difficulties in effecting a fair division of ERISA-covered plans on divorce. For example, if the participant remarries, the divorcing nonparticipant's community share of a QPSA could be lost to the participant's surviving spouse. On the other hand, if the divorce occurs after a QJSA benefit has commenced, the former spouse will be receiving all of the survivor benefit, but the new spouse and the participant's estate will have no protection at all.

There are two ways in which these problems may be avoided, or at least minimized, as they relate to the death of the participant spouse. First, the participant may waive the right to a QPSA (or a QJSA) with the consent of his or her current spouse, and then name the former spouse as a beneficiary or survivor annuitant for all or a part of the survivor benefits. The waiver must be informed, in writing, and witnessed by a plan representative or notary public [I.R.C. § 417(a); 29 U.S.C. § 1055(c); see I.R.C. § 401(a)(11)(b)(iii) (current spouse); see also 29 U.S.C. § 1055(c)].

Second, although the divorcing spouses may provide by QDRO that the nonparticipant, rather than any potential or theoretical second spouse, will be treated as the participant's surviving spouse for purposes of the QPSA (or QJSA) to the extent provided in the order. 29 U.S.C. § 1056(d)(3)(F)].

PRACTICE TIP:

In dividing pension plans, some practitioners fail to realize, until it is too late, that these plans provide *both* retirement benefits and survivor benefits, and that the division is not complete until both sets of rights are properly addressed. This problem is particularly acute in some defined benefit pension plans, for which the QPSA rules are such that once the dissolution is granted, the nonparticipant spouse's community share of the survivor benefits could be lost entirely if the participant does not remarry, except to the extent provided in a QDRO [see, e.g., *In re Marriage of Padgett* (2009) 172 Cal. App. 4th 830, 836, 848-856, 91 Cal. Rptr. 3d 475 (domestic relations order entered before pension plan participant's death that does not award former spouse any interest at all participant's pension plan, but simply "reserves jurisdiction" over plan, does not provide basis for entry, after participant's death, of nunc pro tunc QDRO or any order determining former spouse's interest in pension plan that later may be qualified as QDRO)]; *Samaroo v. Samaroo* (3d Cir. 1999) 193 F.3d 185 (nunc pro tunc amendment of divorce decree after participant's death to divide QPSA is not valid QDRO)]. *Commentary by James M. Crawford Jr.*

If the participant dies after payments have begun, the QPSA rules no longer apply, and any survivor benefit will be determined and paid in accord with the form elected for the distribution. It has been held that the QJSA survivor annuity is deemed to vest in whoever is the participant's spouse on the date of retirement [*Hopkins v. A.T.&T. Global Information Solutions Co.* (4th Cir. 1997) 105 F.3d 153, 156 (order that attempts to give former spouse interest in QJSA survivor annuity cannot be a QDRO because right has vested in participant's second spouse and is no longer payable "with respect to a participant"); see 29 U.S.C. § 1056(d)(3)(B)(i)(I)]. However, the Ninth Circuit has called this ruling into question [*Trustees of the Dirs. Guild of America-Producer Pension Benefits Plans v. Tise* (9th Cir. 2000) 234 F.3d 415, 424]. Thus, if the participant divorces, remarries, and then retires, the second spouse will receive the QJSA survivor annuity and the former spouse may receive nothing, barring a successful splitting of that interest by QDRO [*Hopkins v. A.T.&T. Global Information Solutions Co.* (4th Cir. 1997) 105 F.3d 153, 156 ; see *In re Marriage of Padgett* (2009) 172 Cal. App. 4th 830, 836, 848-856, 91 Cal. Rptr. 3d 475 (domestic relations order entered before pension plan participant's death that does not award former spouse any interest at all participant's pension plan, but simply "reserves jurisdiction" over plan, does not provide basis for entry, after participant's death, of nunc pro tunc QDRO or any order determining former spouse's interest in pension plan that later may be qualified as QDRO)].

But if the participant retires and commences receiving benefits in the form of a QJSA, divorces, and then dies, the plan will pay a survivor benefit to the former spouse as the joint annuitant, and the current spouse will receive nothing. The reason for these seemingly arbitrary results is that in order to preserve their actuarial integrity, pension plans require, at the time when the payments begin, that the administrator know the life expectancy of the person to receive the survivor benefit in order to calculate the participant's monthly benefit [see *Hopkins v. A.T.&T. Global Information Solutions Co.* (4th Cir. 1997) 105 F.3d 153, 157 n.7].

PRACTICE TIP:

Although careful QDRO drafting may get around many of these problems, if the QDRO process is put off until after a death occurs, it may be too late to do anything that will accomplish the intended division. Although the issuance of *nunc pro tunc* orders may be an answer in some situations [*Patton v. Denver Post Corp.* (10th Cir., 2003) 326 F.3d 1148], it is obviously better to address the problem fully before a death or change in condition occurs [see *In re Marriage of Padgett* (2009) 172 Cal. App. 4th 830, 836, 848-856, 91 Cal. Rptr. 3d 475 (domestic relations order entered before pension plan participant's death that does not award former spouse any interest at all participant's pension plan, but simply "reserves jurisdiction" over plan, does not provide basis for entry, after participant's death, of nunc pro tunc QDRO or any order determining former spouse's interest in pension plan that later may be qualified as QDRO)]. Another possibility is to avoid the issue, by providing the necessary survivor protection through life insurance. *Commentary by James M. Crawford Jr.*

PRACTICE TIP:

Due to the impact of the QPSA and QJSA rules, a participant who marries after accumulating a large account balance or benefit in a qualified retirement plan should understand that any estate or prenuptial plan that would take away the federally protected rights of the new spouse will not have the desired effect, unless the consent of the spouse is obtained after marriage. Because spousal consent cannot be given except by a current spouse, prenuptial consents or waivers of QPSA and QJSA rights are not valid [see *Treas. Reg. 1.401(a)-20*]. *Commentary by James M. Crawford Jr.*

[ii] Death of Nonparticipant Spouse

If the nonparticipant spouse predeceases the participant, the nonparticipant's right to a QPSA or QJSA [see [i], above] terminates and is not subject to testamentary disposition in his or her estate [*Boggs v. Boggs* (1997) 520 U.S. 833, 841-844, 117 S. Ct. 1754, 138 L. Ed. 2d 45 ; see *Branco v. Northern Cal. Employers Joint Pension Plan* (9th Cir. 2002) 279 F.3d 1154] . Further, if the parties remained married at the nonparticipant's death, the rule of ERISA is that the nonparticipant cannot pass his or her community property share in any ERISA-covered plan to a designated beneficiary by will, and any state law that purports to provide for such a testamentary transfer is preempted [*Boggs v. Boggs* (1997) 520 U.S. 833, 117 S. Ct. 1754, 138 L. Ed. 2d 45 (nondissolution case in which wife attempted to devise her right to survivor annuity and community property interest in husband's other employee benefits to her children by prior marriage); *Ablamis v. Roper* (9th Cir. 1990) 937 F.2d 1450, 1454 (nondissolution case in which estate of alternate payee who predeceased participant claimed her community interest in employee plans for trust for benefit of her children of prior marriage)]. The problem in divorce is that the nonparticipant spouse's interest also cannot be redirected to his or her heirs by a QDRO (with one exception discussed below). The theory is that because pensions are intended for the living, the QDRO rules are not equipped to handle what amounts to a testamentary disposition of a marital interest [*Branco v. Northern Cal. Employers Joint Pension Plan* (9th Cir. 2002) 279 F.3d 1154] .

If the parties are divorcing, at least one California court has held that a state court in a dissolution of marriage may not enter an order allowing the nonparticipant spouse to name a "successor in interest" to receive her or his community share of undistributed pension benefits on her or his death unless the successor-beneficiary also meets the definition of an "alternate payee" under ERISA and is so designated in a QDRO [*In re Marriage of Shelstead* (1998) 66 Cal. App. 4th 893, 904, 78 Cal. Rptr. 2d 365 (citing *Boggs v. Boggs* (1997) 520 U.S. 833, 117 S. Ct. 1754, 138 L. Ed. 2d 45, 59-63 ; see 29 U.S.C. § 1156(d)(3)(K) ("alternate payees" under ERISA); see also *In re Rich* (1999) 73 Cal. App. 4th 419, 423, 86 Cal. Rptr. 2d 452 (participant was entitled to restoration of full amount of benefit on death of nonparticipant under terms of plan and QDRO)]. And this sentiment has now been echoed by the Ninth Circuit [*Branco v. Northern Cal. Employers Joint Pension Plan* (9th Cir. 2002) 279 F.3d 1154] . However, both of these cases dealt with the attempt to redirect benefits by a shared interest QDRO to entities or persons who do not meet the QDRO requirement that the alternate payee be a spouse, former spouse, or dependent of the participant [I.R.C. § 414(p)]. If the intended beneficiary does not qualify in this category (although most plans will allow for any dependent of a participant to be an alternate payee, some take the position that the dependent must also be a minor), other approaches will need to be explored.

PRACTICE TIP:

It is generally accepted that a QDRO may permit the alternate payee to designate any beneficiary *under the plan* to receive her or his share when the QDRO divides the benefit into separate accounts, as is possible with nearly all defined contribution plans [see *In re Marriage of Shelstead* (1998) 66 Cal. App. 4th 893, 904-905, 78 Cal. Rptr. 2d 365 (expressly not deciding question)]. This approach may also be feasible if a defined benefit pension plan has been divided by a separate interest QDRO, as long as the participant would have the same option. In both instances, the *Shelstead* and *Branco* concerns appear not to be implicated because beneficiary status is effectively conferred by the operation of the terms of the plan on the separate interest that is created by the QDRO, rather than by the terms of the QDRO itself. Moreover, IRS regulations inferentially sanction the ability of an alternate payee to designate a

beneficiary [*Treas. Reg. § 1.401(a)-13(g)(4)(iii)(C)*; *Treas. Reg. § 1.401(a)(9), Q. & A. 6*]. *Commentary by James M. Crawford, Jr.*

PRACTICE TIP:

Dealing with the possibility of an untimely death of a participant or alternate payee is only one reason to get any anticipated QDROs drafted sooner, rather than later. For example, until a separate account is created in an alternate payee, the full benefit is subject to a tax lien for the separate property liability of the participant spouse [see *Agents Pension Plan of Allstate Insurance Company v. Weeks* (1999 N.D. Ill.) 1999 U.S. Dist. LEXIS 6289, 83 A.F.T.R. 2d (RIA) 2446, 99-1 U.S. Tax Cas. (CCH) P50509 (N.D. Ill. 1999) ; see also *U.S. v. Taylor* (8th Cir 2003) 338 F.3d 947] . *Commentary by James M. Crawford Jr.*

[f] Suspension of Benefits

Some plans, particularly union plans, contain a provision that will result in the suspension of benefits if the participant returns to work in covered employment. Depending on how the plan is drafted, benefit suspensions may be temporary or permanent. In all such cases, care should be taken to understand how any suspension may affect the benefits otherwise payable to an alternative payee. This applies both to benefits that may be forgone, and to the potential for subsequently earned benefits or actuarial increases on the alternate payee's share.

This form contains several options for handling suspension of benefits. The first option is for the participant to make payments directly to the nonparticipant of the amount that is no longer forthcoming because of the suspension of benefits on reemployment. The second option requires the plan to continue payments to the nonparticipant, which is possible only if the plan so provides. The third option is for the nonparticipant to accept the suspension of benefits. The fourth option gives the nonparticipant the choice of deciding at the time of suspension whether to demand direct payment or accept suspension. The fifth option leaves the issue open, and allows the court to reserve jurisdiction to amend the order as may be appropriate.

PRACTICE TIP:

In negotiating QDROs that have an income component, care should be taken, if appropriate, to integrate any such provisions with the issue of support. *Commentary by James M. Crawford Jr.*

[g] Matured Benefits Not Yet Being Paid

[i] Alternate Payee's Right to Immediate Receipt Under *Marriage of Gillmore*

In some instances, an employee spouse's retirement benefits may have matured but are not yet being paid because the employee spouse has chosen to continue working rather than retire. In this situation, the parties may take any of several courses of action. They might, for example, agree that the employee spouse will "cash out" the nonemployee spouse. Alternatively, the parties may decide to make a present division of the benefits in their agreement, but provide that the nonemployee spouse will defer receipt of his or her share of the benefits until the time the employee spouse actually retires, although additional protective orders may be required for the nonemployee spouse's benefit [see, e.g., *In re Marriage of Davis* (2004) 120 Cal. App. 4th 1007, 1015-1017, 16 Cal. Rptr. 3d 220 (under agreement fixing nonemployee spouse's percentage share of employee spouse's retirement benefit, nonemployee spouse was entitled to receive that percentage of enhanced retirement benefit that resulted from employee spouse's postponement of retirement); see also Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 21, *Special Property Characterization and Division Issue* (Matthew Bender)].

A third possibility is for the nonemployee spouse to elect to immediately begin receiving payments of the amount that would be paid as his or her share of benefits if the employee spouse were to retire at the present time, which is sometimes referred to as a *Gillmore* election [*In re Marriage of Gillmore* (1981) 29 Cal. 3d 418, 428 n.9, 174 Cal.

Rptr. 493, 629 P.2d 1] . Amounts paid under a *Gillmore* election to reimburse a nonemployee spouse for his or her share of retirement benefits that would be payable if the employee spouse were retired are treated as part of the spouses' division of property. Thus, even if the employee spouse uses his or her wages as the source of payments to the nonemployee spouse under the latter's *Gillmore* election, the amount of those payments is not excludable from the employee spouse's gross income or deductible as spousal support [*Commissioner v. Dunkin* (9th Cir. 2007) 500 F.3d 1065, 1069-1072] . For discussion of the possible ramifications to the nonemployee spouse of making such an election, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapter 21, *Special Property Characterization and Division Issue* (Matthew Bender) [see generally *In re Marriage of Scott* (1984) 156 Cal. App. 3d 251, 254-255, 202 Cal. Rptr. 716 , cert. denied, 469 U.S. 1035 (1984)] .

After the *Gillmore* case, Congress passed the Retirement Equity Act [Pub. L. No. 98-397], which included a provision that enables alternate payees to obtain their benefits by QDRO once the participant reached the earliest retirement age, even if he or she did not in fact retire [see 29 U.S.C. § 1056(d)(3)(E)]. By regulation, the IRS then allowed plans to provide for distribution to an alternate payee to be made at any time [see 29 U.S.C. 1056(d)(3)(E)]. Except for plans that include an early retirement subsidy, discussed in [ii], below, this change removed any need to make a *Gillmore* election under an ERISA plan.

[ii] *Gillmore* Election of Early Retirement Subsidy

An early retirement subsidy arises if a defined benefit plan allows for a participant to retire early and still receive the same, or only a slightly reduced, benefit from that which would otherwise be payable at regular retirement age. The subsidy is the difference between what would be paid if the benefit were to receive the full actuarial reduction to account for the fact that it is to be paid over a longer period, and the amount that is actually paid. For example, if a participant entitled to a benefit of \$1,000 per month beginning at age 65 (the normal retirement benefit) can retire early and start to receive the same \$1,000 per month, the benefit is said to be fully subsidized.

Although plans can allow an alternate payee to commence receiving a share of the participant's normal retirement benefit at the earliest retirement age, any such benefit must receive the full actuarial reduction until the subsidy is triggered by the participant's actual retirement. Thus, although the alternate payee under a subsidized plan can always get the full value of the awarded share of the participant's benefit, no matter when benefits are started, he or she cannot get a share of any subsidy until the participant effectively earns it by retiring early. Thus, In *Marriage of Oddino*, the California Supreme Court held, in part, that "Rule of 75" early retirement benefits are "an employer subsidy for early retirement" rather than "accrued benefits," so that, under ERISA, a QDRO cannot require a retirement plan to pay the subsidized portion of full "Rule of 75" benefits to a nonemployee former spouse if an employee former spouse does not take early retirement but continues to work [*In re Marriage of Oddino* (1997) 16 Cal. 4th 67, 71, 85-88, 65 Cal. Rptr. 2d 566, 939 P.2d 1266] .

Some practitioners argue that the alternate payee in effect owns a pro rata share of any early retirement subsidy, and therefore, the participant can, under a *Gillmore* type election [see [i], above], be forced to either give up the ability to continue to work until normal retirement, or pay the alternate payee directly his or her share of the same subsidy that would have been paid by the plan had the participant actually retired early. Other practitioners point to the fact that *Gillmore* never contemplated this result and speaks only to the right of the nonparticipant spouse to enjoy retirement benefits that have accrued as of the date of the election, not to ancillary subsidies that come into play only when "earned" by the participant's giving his or her separate property income from continued employment. In this regard, in *Marriage of Lehman*, the California Supreme Court justified a rule that enables an alternate payee to share in post separation plan improvements, by noting that the alternate payees are compelled to take the bad with the good [*In re Marriage of Lehman* (1998) 18 Cal. 4th 169, 74 Cal. Rptr. 2d 825, 955 P.2d 451] . Thus, for example, a participant is free to terminate employment without having to compensate the nonemployee spouse for benefits not yet earned. Because a full early retirement subsidy can, in some cases, equal or exceed the value of a participant's accrued retirement benefit, this debate is likely to continue until the issue is resolved by the courts.

[h] Joinder of Plan as Party

The form in [2], *below*, provides that the employee benefit plan being divided by the spouses either has been or will be joined as a party to the dissolution proceeding. Under *Family Code Section 2060 et seq.*, joinder is a prerequisite to the court's being able to enforce any QDRO issued to the plan. For further discussion of joinder, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 94, *Joinder of Parties* (Matthew Bender).

The issue of whether the Family Code joinder provisions are preempted by ERISA is still somewhat unsettled. Although in California, it has been held that there is no preemption [*In re Marriage of Baker* (1988) 204 Cal. App. 3d 206, 215-219, 251 Cal. Rptr. 126] , the federal courts have yet to settle on a rule [compare *AT[T] Management Pension Plan v. Tucker* (C.D. Cal. 1995) 902 F. Supp. 1168, 1175 n.5 (not reaching issue of preemption of Family Code joinder provisions, but finding that Family Code-authorized attorney fee order against plan is preempted) with *Nasca v. Peoplesoft, Inc.* (N.D. Cal. 1999) 87 F. Supp. 2d 967 (joinder of ERISA-covered plan, alone, does raise question of federal law under ERISA; in absence of issuance by state court of actual order that conflicts with ERISA, action is not removable to federal court under conflict preemption)]. Accordingly, some plans will voluntarily sign the Judicial Council form consenting to joinder, and others will not [see Cal. Judicial Council Form FL-373 (Judicial Council form of Responsive Declaration to Motion for Joinder and Consent Order of Joinder); see also Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 94, *Joinder of Parties* (Matthew Bender)].

For ERISA-covered plans, the fiduciaries are required by federal law to adhere to the plan's published QDRO procedures, which usually contain adequate protection for prospective alternate payees by placing a hold on payment of benefits to the participant without the consent of the nonparticipant [see 29 U.S.C. 1104(a)(1)(D); see also *Schoonmaker v. Employee Sav. Plan of Amoco Corp.*, (7th Cir. 1993) 987 F. 2d. 410] . In these circumstances, the joinder issue becomes essentially moot unless the court refuses to issue an order under the Family Code. If the plan's own procedures are inadequate, however, consideration may be given to seeking a temporary restraining order (in the form of a temporary QDRO) which the legislative history indicates Congress intended be honored [see Conference Report, Tax Reform Act of 1986, PL 99-514]. A notice of adverse interest under *Family Code Section 755* may also be served on the plan.

[i] Assets Allocation and Direction of Investments

The form in [2], *below*, contains provisions for both the allocation of assets and direction of investments. Assets allocation involves the division of the assets of a defined contribution plan into two separate accounts, one for the participant and one for the alternate payee. Direction of investments refers to the decisions that can be made by the parties with regard to the investments of the assets in an account.

This form provides that the QDRO will specify the assets that will be allocated to each of the separate accounts to be established for the parties. If all or a portion of the participant's account is invested in qualifying employer securities (QES), special tax rules will apply if distribution is made in a lump sum, or if the account includes employee contributions [see I.R.C. § 402(e)(4)]. A participant has the right to rollover the distribution of QES to an IRA or another qualified plan, or to take distribution of the securities net of any unrealized appreciation [*Treas. Reg. § 1.402(c)-2 Q[A] 3*]. The result of a distribution is that tax would only be paid on the cost of the securities, with any gain deferred until their actual sale.

PRACTICE TIP:

Because the tax advantages associated with QES distributions may potentially be of more value to one spouse than the other, it presents an opportunity for constructive cooperation, particularly in high net worth cases. *Commentary by James M. Crawford Jr.*

The right of a plan participant to direct the investments of the funds in the participant's account is becoming increasingly popular, either on an actual basis (in the case of defined contribution plan accounts) or on a deemed basis (in the case of a hypothetical cash balance plan account). Usually, a QDRO can provide for the alternate payee to have the same investment control rights as the participant. This form provides an option for the nonparticipant to participate in the investment decisions made in a defined contribution plan.

Special issues may arise if the participant has, after separation but before the QDRO is issued, directed investments imprudently, particularly if the participant is also a plan trustee. Although ERISA provides that if certain conditions are met, plan trustees are not liable for losses attributable to imprudent participant investments made with their accounts, in some cases a participant's exercise of investment control may result in his or her becoming an ERISA plan fiduciary, and thus liable for any imprudence under federal law [*see 29 U.S.C. § 1104(c)*].

PRACTICE TIP:

This is yet another reason not to delay the QDRO process. Until the nonparticipant spouse attains the status of an alternate payee, standing to object to imprudent investments under federal law is unclear, and missing entirely under state law fiduciary rules, which unlike the fiduciary rules of *ERISA* § 404 do not encompass the prudent investor rule [*see Fam. Code §§ 721(b), 100(e), 2102*]. *Commentary by James M. Crawford Jr.*

[j] Present Division Providing for Future Payments

This form establishes a present agreement between the spouses regarding how benefits are to be divided, even though the benefits may not yet be payable. The parties agree that the court will be requested to reserve jurisdiction to make orders regarding the benefits, to the extent necessary to carry out the terms of the agreement between the parties. The agreement also provides for simultaneous execution of a QDRO, or for a QDRO to be prepared reasonably soon after execution of the agreement [*see [d], above*].

This approach is distinguished from one in which the parties do not divide benefits in the agreement at the time of dissolution (or even provide a formula for division), but rather agree to a future determination and division of the benefits by the court at the time the employee spouse retires. Although this approach is arguably permissible under the general authority of the court to divide property at a time later than the dissolution if it reserves its jurisdiction to do so, it is not recommended unless adequate provisions are made for survivor benefits and there is no possibility of adverse IRS tax liens attaching that are in excess of the participant's plan share [*see Fam. Code § 2550*]. For a related discussion of criticism of court's retaining open-ended jurisdiction to adjudicate interests in retirement benefits, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 21, *Special Property Characterization and Division Issue* (Matthew Bender) [*see also In re Marriage of Bergman* (1985) 168 Cal. App. 3d 742, 756-758, 214 Cal. Rptr. 661] .

[k] TEFRA

The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) [P.L. 97-248] among other things, changed the rules of *Internal Revenue Code Section 401(a)(9)* that previously allowed participants to defer receipt of benefits past age 70½ until actual retirement. Section 242(b)(2) of TEFRA includes a provision allowing for a continued recognition of any elections to this effect, made before January 1, 1984, as long as certain conditions are met [I.R.S. Notice 83-23, 1983-2 CB 418 .] These are called "242(b)(2) elections."

In large dollar benefit situations, a 242(b)(2) election can be an important estate planning tool because it allows for the continued deferral of tax past age 70½. However, because of the rule that the elections are revoked if a distribution is not made in the form or at the time originally elected [Prop. Treas. Reg. 1.401(a)(9)-1(j)], an improperly drafted QDRO could inadvertently ruin what would otherwise be a mutually advantageous estate plan. For this reason, the form in [2],

below, provides that if a TEFRA election was previously made, the parties will cooperate in electing the timing and form in which their respective shares in the plan are to be distributed.

[l] Payment of Income Taxes on Distributions

Special rules apply to the taxation of benefits received under qualified plans under a Qualified Domestic Relations Order (QDRO). Although distributions from a pension plan are normally taxable only to the plan participant [see *I.R.C. § 402(a)*], if an "alternate payee" [see *I.R.C. § 414(p)(8)*] under a QDRO is the spouse or former spouse of the plan participant, any amount distributed or paid to the alternate payee is a distribution of income to the alternate payee [see *I.R.C. § 402(e)(1)(A)*]. However, if the alternate payee is a person other than a spouse or former spouse, for example, a dependent child of the plan participant, the plan participant *will* be required to include any distribution to the alternate payee in the participant's gross income [see *I.R.C. § 402(a), (e)(1)(A)*].

This form requires the nonemployee spouse to pay all income taxes on any amounts distributed to him or her from an employee benefit plan. It also requires the nonemployee spouse to indemnify the employee spouse against any tax liability arising from distributions made to the nonemployee spouse either directly by the plan or by the employee spouse. Although the Internal Revenue Service is not bound by such a provision, because it is not a party to the agreement, the provision should be enforceable as between the parties in the family law court [see *Alioto v. Commissioner* (1994) *T.C. Memo* 1994-51] .

For further discussion of the tax consequences of distributions under a pension plan, see Chapters 160 and 12B. For additional general tax provisions in a marital settlement agreement, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 216, *Income Tax, Attorney's Fees, and Related Provisions in Marital Settlement Agreements* (Matthew Bender).

[m] Payment of QDRO-Related Expenses

The Department of Labor in a reversal of position now allows plans to charge divorcing parties for the plan's costs in administering the QDRO process [DOL Field Assistance Bulletin 2003-3]. Accordingly, to the extent appropriate, the QDRO should address the issue of how such expenses are to be allocated between the parties--for example, per capita, or pro rata. While this may be a relatively easy task for individual account plans, it may not be so easy with respect to more complex defined benefit plans.

[2] FORM

Division of Qualified Plans

Determination of Community Interest in _____ **[short title of plan]**

[Use if division of plan will be under time-rule formula.]

The community interest in *[short title of plan]* (the Plan) shall be equal to the fraction whose numerator is the number of [years or months or units] of Service while married and before separation, and whose denominator is the total number of [years or months or units] of Service, multiplied by the employer-funded Accrued Benefit determined under the Plan as of *[nonparticipant spouse's]* benefit commencement date to the extent vested. "Service" for purposes of this formula shall be the [years or months or units] of [covered employment or service credited for benefit accrual under the Plan or service credited for vesting under the Plan or other].

The community interest shall include the additional Accrued Benefit, if any, attributable to employee contributions made during the marriage and before separation, or to the rollover of a distribution of benefits earned during the

marriage and before separation.

[Include to provide for future adjustments to time-rule formula.]

For purposes of the above formula the total Accrued Benefit and/or Service during the marriage shall be adjusted in order that the community portion accurately reflect the community contribution to benefit accrual. The adjustment shall be as follows: *[specify]*.

[Include to reserve jurisdiction over time-rule formula.]

The court shall reserve jurisdiction to modify the above formula to account for changes in the terms of the Plan occurring after the effective date of this Agreement and before entry of the Qualified Domestic Relations Order, as provided for below.

[Add for owner-controlled plan.]

For purposes of the above formula, prior service credit granted under the Plan for periods before the initial plan effective date [shall/shall not] be counted.

[OR: Use if division of plan will be under tracing rule.]

The community interest in *[short title of plan]* shall be that portion of the account balance in the Plan attributable to the sum of (a) employer contributions made on account of service during the marriage and before separation, and (b) employee contributions made during the marriage and before separation; together with all earnings and losses on those amounts, and minus any withdrawals (other than participant loans) during the marriage and before separation, determined as of the applicable valuation date. The applicable valuation date for a division of the community property portion shall be _____ [the date as of which _____ (*nonparticipant spouse's*) percent share is allocated to a separate account in the Plan or distributed to _____ (*nonparticipant spouse*) or the effective date of this Agreement or other date].

[OR: Use if division of plan will be according to method other than time-rule formula or tracing rule.]

The community interest in *[short title of plan]* shall be *[set forth other calculation method]*.

[Continue with:]

_____ **[Nonparticipant Spouse's]** Share of Community Interest

[Nonparticipant spouse's] share of the community interest in *[short title of plan]*, shall be _____ percent.

[Include if nonparticipant will be given a share of participant's separate property interest in plan.]

_____ **[Nonparticipant Spouse's]** Separate Interest

[Nonparticipant spouse's] share of [participant spouse's] separate property interest in [short title of plan] shall be _____ percent.

Disposition

The community interest in [short title of plan] shall be divided between the parties as set forth below.

Any expenses charged by the plan with respect to the administration and approval of this order shall be allocated between the spousal parties, as follows:_____.

[Use if QDRO will be attached to agreement.]

Qualified Domestic Relations Order

The disposition of [short title of plan] shall be effected according to the attached Qualified Domestic Relations Order (QDRO), which is incorporated by reference into this Agreement as though fully set forth at this point. The QDRO shall be submitted to the court forthwith and served on the plan by counsel for [Husband or Wife] immediately after it is issued by the court. In case of any conflict between the provisions of this Agreement and those of the QDRO, the QDRO shall prevail.

[End of form if QDRO is to be attached. If QDRO will be prepared subsequently, continue with the following:]

Qualified Domestic Relations Order

The disposition of [short title of plan] shall be implemented by a separate Qualified Domestic Relations Order (QDRO) using the [shared or separate] interest method. However, this Agreement, when incorporated into a judgment, may be treated as a QDRO with respect to any survivor benefits payable with respect to [participant spouse] under the Plan should [participant spouse] die after marital status is terminated but before entry of a separate QDRO. In case of any conflict between the provisions of this Agreement and those of the QDRO, the QDRO shall prevail.

[Use if expert will be retained to draft QDRO.]

_____ [Name of QDRO expert] shall be engaged as a court-appointed expert to assist in the preparation of the QDRO for review by the respective attorneys for the parties, and if feasible, in obtaining approval of the preliminary draft order from the plan administrator before its submission to the court. The fee charged by the expert shall be [allocated _____ percent to Wife and _____ percent to Husband or shared equally between the parties]. The order as prepared and approved by the expert shall be submitted to the court and served on the plan administrator by counsel for [Husband or Wife].

[OR: Use if attorney for one of parties will draft QDRO.]

Attorney [Husband or Wife] shall prepare or cause to be prepared the initial draft of a QDRO for review by [Wife or

Husband], and if feasible, by the plan administrator. Attorney fees incurred in connection with the review and approval of the QDRO shall be allocated and paid [*specify, e.g., 60 percent by Husband and 40 percent by Wife*]. The order as agreed to by the parties shall be submitted to the court and served on the plan administrator by counsel for [Husband or Wife].

[Continue with:]

Designation of Surviving Spouse

[Nonparticipant spouse] is designated as the surviving spouse/beneficiary of [participant spouse] with respect to any Qualified Preretirement Survivor Annuity (within the meaning of *Section 417 of the Internal Revenue Code*)(QPSA) or other death benefit that may become payable under [*short title of plan*] after the marital status is terminated and before the issuance of the QDRO, but only to the extent that the benefit is attributable to _____ [(nonparticipant spouse's) interest in the benefits accrued to _____ (participant spouse) under the Plan or the community interest in the benefits accrued to _____ (participant spouse) under the Plan, plus _____ (nonparticipant spouse) share of _____ (participant spouse's) separate property interest)]. Should [nonparticipant spouse] predecease [participant spouse] during this same period, _____ [the court shall reserve jurisdiction to make further orders as may be required in order for the estate of _____ (nonparticipant spouse) to receive an amount equal to the value of _____ (nonparticipant spouse's) interest in the benefits accrued or _____ (nonparticipant spouse's) interest in the Plan shall revert to _____ (participant spouse) as (his/her) separate property]. Notwithstanding the above, if the only form of benefit available under the Plan with respect to the death of [participant spouse] is a QPSA (within the meaning of *Section 417 of the Internal Revenue Code*), and if [participant spouse] should die without an actual surviving spouse under the Plan, then [nonparticipant spouse] shall be deemed to be the surviving spouse of [participant spouse] for all purposes without limitation. [Add if desired: The court shall retain jurisdiction to make further order as may be necessary to effect the intended division and disposition of the survivor benefits.] This paragraph shall be deemed incorporated and made a part of any order of status termination, and notice of entry shall be immediately served on the plan administrator.

[Use to provide for insurance on the nonparticipant spouse's life (defined benefit plan).]

[Nonparticipant spouse] shall obtain term insurance on [her/his] life in an amount sufficient to provide an after-tax benefit for [her/his] beneficiaries equivalent to the actuarial present value of [nonparticipant spouse's] share of the community interest in the benefits accrued under the plan with respect to [participant spouse]. The cost of this insurance shall be paid by [participant spouse or the parties equally], and shall be kept in force until such time as [nonparticipant spouse] begins to receive benefits under the Plan.

[Use to provide for insurance on the participant's life.]

[Participant spouse] shall obtain term insurance on [his/her] life in an amount sufficient to provide an after-tax benefit for [his/her] beneficiaries equivalent to the actuarial present value of [participant spouse's] share of the retirement benefits accrued under the Plan with respect to [him/her]. The cost of this insurance shall be paid by [(nonparticipant spouse) or the parties equally], and shall be kept in force until such time as [participant spouse] begins to receive benefits under the Plan.

Beneficiary Designations

The beneficiary designation in effect for *[participant spouse]* under the *[short title of plan]* is as follows: *[specify beneficiary designations]*. *[Add to change beneficiaries: The beneficiary designation shall be changed to the following: _____ (specify new beneficiary designation). The change shall take place _____ (specify time, e.g., forthwith or on dissolution).]* *[Participant spouse]* understands that the termination of marital status or the issuance of a QDRO may not affect this beneficiary *[designation or change]* automatically, and that a new beneficiary designation may need to be filed with the Plan if *[participant spouse]* desires to change beneficiaries following termination of marital status. Nothing contained in this paragraph shall be interpreted as a waiver by *[nonparticipant spouse]* of any right that *[she/he]* may have as a beneficiary designated by *[participant spouse]*, after the effective date of this Agreement. If a beneficiary change is to be made prior to dissolution, *[nonparticipant spouse]* shall cooperate in executing any documents or consent forms required by the Plan in order for the change to be effective.

Suspension of Benefits on Reemployment

[Use if participant will take over payments to nonparticipant.]

The parties understand that *[short title of plan]* includes suspension-of- benefits provisions, which may affect the retirement distributions payable under it if, after retirement and receipt of benefits has commenced, *[participant spouse]* returns to work in covered employment. If a suspension of benefits should occur, *[participant spouse]* shall make the same payments to *[nonparticipant spouse]* that would have been made by the Plan but for the suspension. The payments shall be made from *[participant spouse's]* separate property funds, and shall continue until such time as payments from the Plan are resumed. They shall be made on a net after-tax basis, and shall not be deductible by *[participant spouse]*, nor income to *[nonparticipant spouse]*. They shall have no effect on any support obligation otherwise owing.

[OR: Use if plan will continue to make payments.]

The parties understand that *[short title of plan]* includes suspension-of- benefits provisions, which may affect the retirement distributions payable under it if, after retirement and receipt of benefits has commenced, *[participant spouse]* returns to work in covered employment. The QDRO shall provide that any suspension of benefits on reemployment shall not affect payment to *[nonparticipant spouse]* as alternate payee.

[OR: Use if nonparticipant will accept suspension of benefits.]

The parties understand that *[short title of plan]* includes suspension-of- benefits provisions, which may affect the retirement distributions payable under it if, after retirement and receipt of benefits has commenced, *[participant spouse]* returns to work in covered employment. If a suspension of benefits should occur, the benefit payments to both parties shall be suspended. The community interest in the Plan shall then be recalculated as necessary to take into account the effect of any additional credited service or benefit accrual. If the suspension of benefits results in a new annuity starting date, the QDRO shall grant surviving spouse status to *[nonparticipant spouse]* with respect to *[her/his]* share (or if necessary to avoid a forfeiture if *[participant spouse]* is not then married, the entire benefit) pending the attainment of a new annuity starting date. The court shall reserve jurisdiction over any surviving spouse benefits that may become payable to *[nonparticipant spouse]* if *[participant spouse]* should die during the period of suspension, to the extent that the benefits exceed the amount payable with respect to the share of benefits awarded *[nonparticipant spouse]*.

[OR: Use if nonparticipant will be given option to accept payments or suspension of benefits.]

The parties understand that [short title of plan] includes suspension-of- benefits provisions, which may affect the retirement distributions payable under it if, after retirement and receipt of benefits has commenced, [participant spouse] returns to work in covered employment. If a suspension of benefits should occur, [participant spouse] shall, at the election of [nonparticipant spouse], make the same payments to [nonparticipant spouse] that would have been made by the Plan but for the suspension. This election must be made, if at all, by [nonparticipant spouse] within _____ days of notice of the suspension. If elected, the payments shall be made from [participant spouse's] separate property funds, and shall continue until such time as payments from the Plan are resumed. The payments shall be made on a net after-tax basis, and shall not be deductible by [participant spouse], nor income to [nonparticipant spouse]. They shall have no effect on any support obligation otherwise owing. If continuation of payments is elected, [nonparticipant spouse] shall not share in the value of any benefits accrued under the Plan by reason of [participant spouse's] return to covered service. If this election is not made and the benefit payments to both parties are suspended, then the community share under the Plan shall be recalculated as necessary to take into account the effect of any additional credited service or benefit accrual. If under the Plan the suspension of benefits results in a new annuity starting date, the QDRO shall grant surviving spouse status to [nonparticipant spouse] with respect to [her/his] share (or if necessary to avoid a forfeiture if [participant spouse] is not then married, the entire benefit) pending the attainment of a new annuity starting date. The court shall reserve jurisdiction over any surviving-spouse benefits that may become payable to [nonparticipant spouse] if [participant spouse] should die during the period of suspension, to the extent that the benefits exceed the amount payable with respect to the share of benefits awarded to [nonparticipant spouse]. If [nonparticipant spouse] should die while payments are being made by [participant spouse], then [participant spouse] shall be obligated to pay any death or survivor benefit that would have been payable with respect to [nonparticipant spouse] but for the suspension of benefits, and [nonparticipant spouse] shall have no further interest in [participant spouse's] benefits under the Plan.

[OR: Use if court will reserve jurisdiction over issue.]

The parties understand that [short title of plan] includes suspension-of-benefits provisions, which may affect the retirement distributions payable under it if, after retirement and receipt of benefits has commenced, [participant spouse] returns to work in covered employment. The court shall reserve jurisdiction to make such further orders as may be required to effectuate the division of benefits set forth herein if a suspension of benefits should occur.

[Continue with:]

Disposition of Gillmore Rights

The parties acknowledge that [nonparticipant spouse] has the absolute right to commence the receipt of benefits from [short title of plan] under a QDRO beginning when [participant spouse] reaches "earliest retirement age," whether or not [participant spouse] actually retires and begins to receive benefits as of that date. To the extent that [nonparticipant spouse] is unable to receive the full value of [her/his] interest from the Plan under a QDRO before [participant spouse] retires, [nonparticipant spouse] may be entitled to make an election under *In re Marriage of Gillmore* (1981) 29 Cal. 3d 418 (Gillmore election) to receive payments of that interest directly from [participant spouse].

[nonparticipant spouse] understands that under a Gillmore election, [she/he] will not be entitled to receive the value of any benefit improvements subsequently accruing under the Plan, except to the extent that the improvements would be enjoyed by any similarly situated retiree in pay status as of the election date.

[Use if plan does not provide a subsidized early retirement benefit.]

The Plan currently does not provide a subsidized early retirement benefit. Because [nonparticipant spouse] may, under a QDRO, obtain distribution of the full value of [her/his] interest from the Plan at any time after [participant spouse] reaches "earliest retirement age," [nonparticipant spouse] waives whatever right [she/he] may have under *Gillmore* to require [participant spouse] to make any payment to [her with respect to her/him with respect to his] share of the plan benefits before the time when [participant spouse] terminates employment with the employer. [Add if desired: This waiver shall have no effect if the Plan is later amended to provide a subsidized early retirement benefit.]

[OR: Use if plan includes early retirement subsidy.]

The Plan provides an early retirement subsidy. This subsidy is not part of the accrued retirement benefits of [participant spouse] and will only have value if [he/she] terminates employment early and foregoes [his/her] future separate property earnings and employee benefits from the plan sponsor. The value of the early retirement subsidy shall _____ [be taken into account in determining the amount to be paid to _____ (nonparticipant spouse) as if _____ (participant spouse) had actually retired on the exercise date or not be taken into account in determining the payments required to be paid to _____ [nonparticipant spouse] by _____ (participant spouse) until such time as _____ (participant spouse) actually retires].

[Use if *Gillmore* rights are to be waived.]

[Nonparticipant spouse] acknowledges that [participant spouse] may work past first eligibility to retire and that, although [nonparticipant spouse] has the absolute right to commence the receipt of benefits under the Plan under a QDRO beginning when [participant spouse] reaches "earliest retirement age," the benefits may not be entitled to any early retirement subsidy until such time as [participant spouse] actually retires. In consideration of other provisions of this Agreement, [nonparticipant spouse] waives whatever right [she/he] may have under *Gillmore* to require [participant spouse] to make any payment to [her/him] with respect to [her/his] share of the plan benefits before the time when [participant spouse] terminates employment with the employer.

[OR: Use if *Gillmore* Rights are to be preserved.]

The amount of any payments to be made by [participant spouse] to [nonparticipant spouse] under a *Gillmore* election (*Gillmore* Share) shall be limited to [nonparticipant spouse's] share of the early retirement subsidy; that is, net of [nonparticipant spouse] retirement benefits that are payable directly by the Plan under the QDRO. The *Gillmore* share shall also be net of the amount of tax otherwise payable had the *Gillmore* payments been made by the Plan directly.

[Use to reopen spousal support.]

If [nonparticipant spouse] makes a *Gillmore* election, it shall be treated as an agreement to reopen the issue of spousal support at the election of [participant spouse], notwithstanding any prior agreement or order of nonmodifiability issued with respect to spousal support. The court shall reserve jurisdiction accordingly.

[Use to allow participant to cash-out nonparticipant's *Gillmore* share.]

If [nonparticipant spouse] makes a *Gillmore* election, [participant spouse] shall have the option of paying to [nonparticipant spouse] the actuarial present value of [her/his] *Gillmore* share as of the effective date of the election, or of allowing [nonparticipant spouse] to elect a form of payment available under the Plan, and to pay the present value to

[Use if nonparticipant will participate in making investment decisions regarding plan assets.]

[*Participant spouse*] shall exercise [his/her] rights with respect to the direction of accounts provided by [*short title of plan*] as to any amounts in which the community may have an interest only with the agreement of [*nonparticipant spouse*]. If the parties cannot agree on an investment or investment change, the assets shall be invested in a money-market account or the equivalent pending further order of the court. The court shall retain jurisdiction to resolve any disputes in connection with the management of Plan accounts.

[*IOR: Use if participant alone will make investment decisions regarding plan assets.*]

[*Participant spouse*] shall prudently exercise [his/her] rights with respect to the direction of accounts provided by [*short title of plan*] as to any amounts in which the community may have an interest, applying the following investment criteria: [*specify*].

[*Include if plan provides life insurance on participant's life.*]

Life Insurance Maintained by Plan

[*Short title of plan*] currently maintains insurance on the life of [*participant spouse*]. To the extent that the continuation of this insurance coverage is elective, it shall be [canceled or maintained at the current level or increased to the maximum allowable amount [, and _____ (*name(s)*) shall be designated as the [beneficiary/beneficiaries] of this insurance]. If the Plan should later offer [*participant spouse*] the option of purchasing the policy from the Plan, then [*participant spouse*] shall give notice to [*nonparticipant spouse*] of the offer to purchase. [Husband or Wife] shall have the first right of refusal to purchase the policy as [his/her] separate property. The cost, if any, of this coverage shall be paid [by Husband or by Wife or by the parties equally or _____ percent by Husband and _____ percent by Wife].

[*Use for election Under TEFRA.*]

TEFRA 242(b)(2) Election

The parties understand that [*participant spouse*] has made a valid election under section 242(b)(2) of the Tax Equity and Fiscal Responsibility Act of 1982 (section 242(b)(2) Election) to defer the receipt of benefits under [*short title of plan*] until retirement, even if retirement is delayed past age 70. They further understand that this election is an important feature in their existing tax and estate planning, and that the election may be inadvertently waived by conduct inconsistent with it, giving rise to a potential excise tax. The parties accordingly agree to cooperate in electing the timing and form in which their respective shares in the Plan are to be distributed.

Duty to Pay Income Taxes on Plan Distributions

Each party shall report, pay, and be responsible for all taxes due on amounts received by him or her from any plan set forth above. Under Sections 72 and 402 of the Internal Revenue Code, the nonparticipant spouse shall be treated as the distributee of any distribution or payment made to him or her under a QDRO. As such, all amounts distributed to the nonparticipant from any plan divided above that are otherwise includible in income shall be taxable to the nonparticipant to the extent not rolled over to another qualified plan or Individual Retirement Account. [*Add if support*

will be paid by QDRO: Any amounts payable to the nonparticipant spouse for spousal support shall not be income to, nor deductible by the participant spouse. However, the participant spouse shall report, pay and be responsible for all taxes due on amounts received on behalf of his or her child or other dependent, even if payment is made to the nonparticipant for the benefit of the child or other dependent.] The recipient spouse shall indemnify the nonrecipient spouse for any taxes (including interest and penalties, and "tax on the tax," if any) that the nonrecipient spouse may be required to pay to any taxing authority in connection with any plan distribution. The parties agree to cooperate in filing consistent tax returns in connection with distributions received from the plans divided above. The court shall reserve jurisdiction to resolve any disputes in connection with any tax return. If either spouse should breach his or her reporting or payment obligations, he or she shall indemnify the other spouse for any cost, fee, or other expense (including but not limited to accounting and attorneys fees) incurred by the other spouse in connection with any audit or examination of the other spouse's tax return, relative to accomplishing the tax result described above.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral
 OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty
 DistributionClassificationGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act
 (ERISA)Civil Penalties



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 122 PROVISIONS FOR DIVISION OF EMPLOYEE BENEFITS
PART IV. FORMS

B. Private Employee Benefit Plans Governed by ERISA

34-122 California Legal Forms--Transaction Guide § 122.221

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.221 Division of Nonqualified Plans

[1] Comment

The form in [2], *below*, is for use to divide an employee spouse's interest in a nonqualified employee benefit plan with the nonemployee spouse. A nonqualified plan is one that is generally unfunded (that is, the benefits are typically paid either out of the general assets of the employer, or out of a trust that belongs to the employer) and does not otherwise meet the qualification requirements of the Internal Revenue Code [*see I.R.C. § 401(a)*]. For further discussion of the difference between qualified and nonqualified plans, see § 122.220[1][b].

The possible methods for determining the community interest in nonqualified plans of deferred compensation are much the same as those for a qualified plan of the same type, that is, either defined benefit or defined contribution. Therefore, this form includes many of the same provisions as those in the form used for qualified plans [*see § 122.220*]. It differs, however, in a few noteworthy respects.

First, the ERISA provisions for Qualified Domestic Relations Orders do not technically apply to nonqualified plans [*see 29 U.S.C. § 1056(d)(3)*; § 122.220[1][d]]. Nevertheless, many sponsors of nonqualified plans will still require a QDRO-like order (sometimes referred to as a Benefit Division Order or BDO), which becomes the functional equivalent of a QDRO as far as that plan is concerned.

Second, it is rarely possible with a nonqualified plan for the participant's current spouse to be deemed the surviving spouse with regard to survivor benefits because this can only be accomplished with a QDRO in the absence of a specific plan provision [*see 29 U.S.C. § 1056(d)(3)(F)*; § 122.220[1][e][i]]. Therefore, special provisions have been included in this form to deal with the allocation of survivor benefits. The form provides that, to the extent allowed by the plan, the participant is required to name the nonparticipant as the participant's beneficiary with respect to the nonparticipant's share of the community interest.

Third, nonqualified plans generally do not allow for the nonparticipant to receive payment of benefits directly from the plan if the participant chooses to continue to work past earliest retirement age. Plan distributions can be compelled through a QDRO, but not a BDO [see 29 U.S.C. § 1056(d)(3)(E); § 122.220[1][g][i]]. Therefore, this form provides that the nonparticipant may receive payment of his or her interest directly from the participant if the participant does not retire at the earliest allowable time [see *In re Marriage of Gillmore* (1981) 29 Cal. 3d 418, 174 Cal. Rptr. 493, 629 P.2d 1]. Amounts paid under a *Gillmore* election to reimburse a nonemployee spouse for his or her share of retirement benefits that would be payable if the employee spouse were retired are treated as part of the spouses' division of property. Thus, even if the employee spouse uses his or her wages as the source of payments to the nonemployee spouse under the latter's *Gillmore* election, the amount of those payments is not excludable from the employee spouse's gross income or deductible as spousal support [*Commissioner v. Dunkin* (9th Cir. 2007) 500 F.3d 1065, 1069-1072].

Fourth, in most instances, nonqualified plans are not considered to be separate entities to which a division order may be addressed. Accordingly, the order should be directed to the employer and not the "plan."

Finally, because the taxation of nonqualified benefits payable to the alternate payee may not be clear in all cases, a distribution under a QDRO, the income tax clause has been modified to help ensure that each party pays the income tax on the distributions that he or she receives [see § 122.220[1][i]].

PRACTICE TIP:

Nonqualified retirement plan benefits, including those covered by a "Rabbi Trust" are almost always "unfunded," and thus constitute only a general claim against the assets of the employer. As such, even if they are ERISA-covered, they are not subject to the fiduciary, vesting, and other protections afforded participants and alternate payees under ERISA, including the QDRO provisions. They are, in reality, nothing more than unilateral arrangements, and therefore practitioners should be aware that the normal plan joinder procedures will likely have no legal effect in terms of protecting the interest of a prospective alternate payee. Although ERISA-covered plans are given the status of legal entities capable of suing and being sued [see 29 U.S.C. § 1132(d)], it nevertheless remains questionable whether or not the state joinder statutes can apply in light of the preemptive effect of ERISA [see 29 U.S.C. § 1144].
Commentary by James M. Crawford Jr.

Nonqualified plan benefits cannot be rolled tax-free to an IRA [see § 122.222], and any attempt to do so will subject the IRA owner to an overcontribution excise tax as a nondeductible contribution [see I.R.C. § 4973].

In addition to its other provisions, this form also includes a provision concerning employment taxes [see *IRS Notice 2002-31* (explaining IRS position of treatment of withholding in connection with plans of nonqualified deferred compensation)].

[2] FORM

Division of Nonqualified Plans

Division of Nonqualified Plan

There is a community interest in the benefits earned by [participant spouse] under [short title of plan] (the Plan) attributable to employment during the marriage and before separation with [employer] (the community interest). Accordingly, the court shall enter a Benefit Division Order (BDO) directing the employer to pay to each party his or her respective share of the community interest at such time as plan benefits would otherwise be paid to [participant spouse]. If the employer should instead distribute [nonparticipant spouse's] share to [participant spouse], [participant spouse] shall receive that share as constructive trustee for the benefit of [nonparticipant spouse] and pay it over to [her/him] on receipt, net of any applicable employer withholding.

[Use if division of plan will be under time-rule formula.]

The community interest in *[short title of plan]* shall be equal to the fraction whose numerator is the number of *[years or months or units]* of Service while married and before separation, and whose denominator is the total number of *[years or months or units]* of Service, multiplied by the employer-funded Accrued Benefit determined under the Plan as of *[nonparticipant spouse's]* benefit commencement date to the extent vested. "Service" for purposes of this formula shall be the *[years or months or units]* of *[covered employment or service credited for benefit accrual under the Plan or service credited for vesting under the Plan or other]*.

The community interest shall include the additional Accrued Benefit, if any, attributable to employee contributions made during the marriage and before separation, or to the rollover of a distribution of benefits earned during the marriage and before separation.

[Include to provide for future adjustments to time-rule formula.]

For purposes of the above formula the total Accrued Benefit and/or Service during the marriage shall be adjusted in order that the community portion accurately reflect the community contribution to benefit accrual. The adjustment shall be as follows: *[specify]*.

[Include to reserve jurisdiction over time-rule formula.]

The court shall reserve jurisdiction to modify the above formula to account for changes in the terms of the Plan occurring after the effective date of this Agreement and before entry of the Benefit Division Order, as provided for below.

[Add for owner-controlled plan.]

For purposes of the above formula, prior service credit granted under the Plan for periods before the initial plan effective date *[shall/shall not]* be counted.

[OR: Use if division of plan will be under tracing rule.]

The community interest in *[short title of plan]* shall be that portion of the account balance in the Plan attributable to the sum of (a) employer contributions made on account of service during the marriage and before separation, and (b) employee contributions made during the marriage and before separation; together with all earnings and losses on those amounts, and minus any withdrawals (other than participant loans) during the marriage and before separation, determined as of the applicable valuation date. The applicable valuation date for a division of the community property portion shall be _____ *[the date as of which _____ (nonparticipant spouse's) percent share is allocated to a separate account in the Plan or distributed to _____ (nonparticipant spouse) or the effective date of this Agreement or other date]*.

[OR: Use if division of plan will be according to method other than time-rule formula or tracing rule.]

The community interest in *[short title of plan]* shall be *[set forth other calculation method]*.

[Continue with:]

_____ [Nonparticipant Spouse's] Share of Community Interest

[Nonparticipant spouse's] share of the community interest in [short title of plan], shall be _____ percent.

[Include if nonparticipant will be given a share of participant's separate property interest in plan.]

_____ [Nonparticipant Spouse's Separate Interest]

[Nonparticipant spouse's] share of [participant spouse's] separate property interest in [short title of plan] shall be _____ percent.

Disposition

The community interest in [short title of plan], shall be [distributed to the participant spouse as part of the overall division of the community property of the parties or divided between the parties as set forth below].

[Form ends here if plan is to be distributed entirely to owner; use basic division of community property clause in Chapter 212, § 212.42. If plan is to be divided between the parties, continue with the following:]

[Use if BDO will be attached to agreement.]

Benefit Division Order

The disposition of [short title of plan] shall be effected according to the attached Benefit Division Order (BDO), which is incorporated by reference into this Agreement as though fully set forth at this point. The BDO shall be submitted to the court and served on the plan by counsel for [Husband or Wife] immediately after it is issued by the court. In case of any conflict between the provisions of this Agreement and those of the BDO, the BDO shall prevail.

[End of form if BDO is to be attached. If BDO will be prepared subsequently, continue with the following:]

Benefit Division Order

The disposition of [short title of plan] shall be implemented by a separate Benefit Division Order (BDO) using the [shared or separate] interest method. However, this Agreement, when incorporated into a judgment, may be treated as a BDO with respect to any survivor benefits payable with respect to [participant spouse] under the Plan should [participant spouse] die after marital status is terminated but before entry of a separate BDO. In case of any conflict between the provisions of this Agreement and those of the BDO, the BDO shall prevail.

[Use if expert will be retained to draft BDO.]

_____ *[Name of expert]* shall be engaged as a court-appointed expert to assist in the preparation of the BDO for review by the respective attorneys for the parties, and if feasible, in obtaining approval of the preliminary draft order from the plan administrator before its submission to the court. The fee charged by the expert shall be [allocated _____ percent to Wife and _____ percent to Husband or shared equally between the parties]. The order as prepared and approved by the expert shall be submitted to the court and served on the plan administrator by counsel for [Husband or Wife].

[OR: Use if attorney for one of parties will draft BDO.]

Attorney for [Husband or Wife] shall prepare or cause to be prepared the initial draft of a BDO for review by [Wife or Husband], and if feasible, by the plan administrator. Attorney fees incurred in connection with the review and approval of the BDO shall be allocated and paid [*specify, e.g., 60 percent by Husband and 40 percent by Wife*]. The order as agreed to by the parties shall be submitted to the court and served on the plan administrator by counsel for [Husband or Wife].

Surviving Spouse Protection

The parties recognize that applicable law generally does not allow a Benefit Division Order to designate a former spouse as a current/surviving spouse for purposes of receiving any survivor benefit otherwise payable under a nonqualified plan. Accordingly pending further order of the court, to the extent permitted under the Plan, [*participant spouse*] shall designate [*nonparticipant spouse*] as beneficiary with respect to [her/his] share of the community interest. If [*nonparticipant spouse*] is not so designated, or if [*nonparticipant spouse*] predeceases [*participant spouse*], the court shall reserve jurisdiction to enter further orders as may be necessary to accomplish an equal division of the community interest in the Plan.

[Use to provide for insurance on the participant's life.]

[*Participant spouse*] shall obtain term insurance on [his/her] life in an amount sufficient to provide an after-tax benefit for [his/her] beneficiaries equivalent to the actuarial present value of [*participant spouse's*] share of the retirement benefits accrued under the Plan with respect to [him/her]. The cost of this insurance shall be paid by [(*nonparticipant spouse*) or the parties equally], and shall be kept in force until such time as [*participant spouse*] begins to receive benefits under the Plan.

Beneficiary Designations

The beneficiary designation in effect for [*participant spouse*] under the [*short title of plan*] is as follows: [*specify beneficiary designations*]. [*Add to change beneficiaries: The beneficiary designation shall be changed to the following: _____ (specify new beneficiary designation). The change shall take place _____ (specify time, e.g., forthwith or on dissolution).*] [*Participant spouse*] understands that the termination of marital status or the issuance of a BDO may not affect this beneficiary [designation or change] automatically, and that a new beneficiary designation may need of be filed with the Plan if [*participant spouse*] desires to change beneficiaries following termination of marital status. Nothing contained in this paragraph shall be interpreted as a waiver by [*nonparticipant spouse*] of any right that [she/he] may have as a beneficiary designated by [*participant*

spouse], after the effective date of this Agreement. If a beneficiary change is to be made prior to dissolution, *[nonparticipant spouse]* shall cooperate in executing any documents or consent forms required by the Plan in order for the change to be effective.

Suspension of Benefits on Reemployment

[Use if participant will take over payments to nonparticipant.]

The parties understand that *[short title of plan]* includes suspension-of- benefits provisions, which may affect the retirement distributions payable under it after retirement and receipt of benefits has commenced. If a suspension of benefits should occur, *[participant spouse]* shall make the same payments to *[nonparticipant spouse]* that would have been made by the Plan but for the suspension. The payments shall be made from *[participant spouse's]* separate property funds, and shall continue until such time as payments from the Plan are resumed. They shall be made on a net after-tax basis, and shall not be deductible by *[participant spouse]*, nor income to *[nonparticipant spouse]*. They shall have no effect on any support obligation otherwise owing.

[OR: Use if plan will continue to make payments.]

The parties understand that *[short title of plan]* includes suspension-of- benefits provisions, which may affect the retirement distributions payable under it after retirement and receipt of benefits has commenced. The BDO shall provide that any suspension of benefits on reemployment shall not affect payment to *[nonparticipant spouse]* as alternate payee.

[OR: Use if nonparticipant will accept suspension of benefits.]

The parties understand that *[short title of plan]* includes suspension-of- benefits provisions, which may affect the retirement distributions payable under it after retirement and receipt of benefits has commenced. If a suspension of benefits should occur, the benefit payments to both parties shall be suspended. The community interest in the Plan shall then be recalculated under the BDO as necessary to take into account the effect of any additional credited service or benefit accrual. The court shall reserve jurisdiction over any surviving spouse benefits that may become payable to *[nonparticipant spouse]* if *[participant spouse]* should die during the period of suspension, to the extent that the benefits exceed the amount payable with respect to the share of benefits awarded *[nonparticipant spouse]*.

[OR: Use if nonparticipant will be given option to accept payments or suspension of benefits.]

The parties understand that *[short title of plan]* includes suspension-of- benefits provisions, which may affect the retirement distributions payable under it after retirement and receipt of benefits has commenced. If a suspension of benefits should occur, *[participant spouse]* shall, at the election of *[nonparticipant spouse]*, make the same payments to *[nonparticipant spouse]* that would have been made by the Plan but for the suspension. This election must be made, if at all, by *[nonparticipant spouse]* within _____ days of notice of the suspension. If elected, the payments shall be made from *[participant spouse's]* separate property funds, and shall continue until such time as payments from the Plan are resumed. The payments shall be made on a net after-tax basis, and shall not be deductible by *[participant spouse]*, nor income to *[nonparticipant spouse]*. They shall have no effect on any support obligation otherwise owing. If continuation of payments is elected, *[nonparticipant spouse]* shall not share in the value of any benefits accrued under the Plan by reason of *[participant spouse's]* return to covered service. If this election is not made and the benefit payments to both parties are suspended, then the community share under the Plan shall be recalculated under the BDO as necessary to take into account the effect of any additional credited service or benefit accrual. The court shall reserve jurisdiction over

any surviving-spouse benefits that may become payable to [nonparticipant spouse] if [participant spouse] should die during the period of suspension, to the extent that the benefits exceed the amount payable with respect to the share of benefits awarded to [nonparticipant spouse]. If [nonparticipant spouse] should die while payments are being made by [participant spouse], then [participant spouse] shall be obligated to pay any death or survivor benefit that would have been payable with respect to [nonparticipant spouse] but for the suspension of benefits, and [nonparticipant spouse] shall have no further interest in [participant spouse's] benefits under the Plan.

[Use if Gillmore rights are to be waived.]

Waiver of Gillmore Rights

[Nonparticipant spouse] acknowledges that [participant spouse] may work past the date on which [he/she] is first eligible to retire, and that [participant spouse] has unilateral control over the date when payments under the Plan will be distributed. [nonparticipant spouse] recognizes that because the Plan is "unfunded," any delay in the receipt or commencement of benefits involves some risk. Under *In re Marriage of Gillmore* (1981) 29 Cal. 3d 418, at the time when [participant spouse] becomes eligible to terminate employment and commence the receipt of benefits, [nonparticipant spouse] may require [participant spouse] to make or commence payment of an amount equal to the payments that would be made under the Plan with respect to [nonparticipant spouse's] share of the plan benefits had [participant spouse] retired or otherwise terminated employment on the effective date of the election. In consideration of other provisions of this Agreement, [nonparticipant spouse] waives whatever right [she/he] may have under *Gillmore* to require [participant spouse] to make any payment to [her/him] with respect to [her/his] share of the plan benefits before the time when [participant spouse] terminates employment with the employer.

[OR: Use if Gillmore Rights are to be preserved.]

Gillmore Election

Under [short title of plan], no benefits are payable before the termination of employment of [participant spouse]. Under *In re Marriage of Gillmore* (1981) 29 Cal. 3d 418, [nonparticipant spouse] may have the right to elect to receive direct payment of benefits from [participant spouse] on or after the earliest date that [participant spouse] could retire and commence to receive benefits under the Plan. If this election is made, [participant spouse] shall be responsible for payment of [nonparticipant spouse's] share of the plan benefits from [his/her] separate property funds as if [participant spouse] had actually terminated employment, at least until such time as direct payment of benefits by the Plan may begin. [nonparticipant spouse] acknowledges that if [she/he] makes a *Gillmore* election, [she/he] shall not be entitled to receive the value of any benefit improvements accruing under the Plan after the effective date of the election, except to the extent that the improvements would be enjoyed by any similarly situated retiree in pay status. The court shall retain jurisdiction to make further orders as may be necessary to implement this election. The amount of any of payments made by [participant spouse] directly to [nonparticipant spouse] under the *Gillmore* election shall be reduced by the tax otherwise payable had the payments come from the Plan directly.

[Use to allow participant to cash-out nonparticipant's Gillmore share.]

If [nonparticipant spouse] makes a *Gillmore* election, [participant spouse] shall have the option of paying to [nonparticipant spouse] the actuarial present value of [her/his] share of the accrued benefit as of the effective date of the election, or of allowing [nonparticipant spouse] to elect a form of payment available under the Plan, and to pay the

present value to [nonparticipant spouse] in the form elected.

If at the time when [participant spouse] actually retires, [nonparticipant spouse] has not yet received the actuarial present value of [her/his] share of the accrued benefit, _____ [(participant spouse) shall have the option of continuing to make the remaining payments due to _____ (nonparticipant spouse) from [his/her] separate property funds, or to have the remaining payments made by the Plan under a BDO or the payments shall commence to be made by the Plan under a BDO providing for distribution of the actuarial equivalent of the remaining benefit of _____ (nonparticipant spouse) in the form previously elected]. The court shall reserve jurisdiction to resolve any dispute over the implementation of this paragraph.

The parties understand that if payment to [nonparticipant spouse] is commenced under a *Gillmore* election in a form of benefit available under the Plan, the form of benefit elected shall determine what payments, if any, are due on the death of [nonparticipant spouse], and [nonparticipant spouse] shall not otherwise be entitled to any payments with respect to [her/his] share of the accrued benefit, either from [participant spouse] or from the Plan.

In no event shall [participant spouse] be required to make or continue *Gillmore* payments for any period in which the payments would not have been payable under the Plan had [participant spouse] actually retired, as a result of insolvency of the plan sponsor, or other reasons beyond the control of [participant spouse].

[Use to treat notice served personally or by mail as notice of motion filed with court.]

[nonparticipant spouse] may make a *Gillmore* election by mailing or delivering written notice to [participant spouse]. The election shall be effective as of the date mailed or delivered, and shall be treated for all purposes as if made by noticed motion filed with the court as required by *In re Marriage of Cornejo* (1996) 13 Cal. 4th 381 in order to establish the effective date of the election.

[End of *Gillmore* provisions.]

Joinder

To the extent required for the enforcement of the BDO to be issued, _____ [(short title of plan or plan sponsor, as appropriate) has been joined as a party to or _____ (Husband or Wife) shall cause _____ (short title of plan or plan sponsor) to be joined as a party to and served with a notice of adverse interest in] the parties' proceeding for dissolution of marriage under *Family Code Section 2060 et seq.*

[Include if plan provides life insurance on participant's life.]

Life Insurance Maintained by Plan

[Short title of plan] currently maintains insurance on the life of [participant spouse]. To the extent that the continuation of this insurance coverage is elective, it shall be [canceled or maintained at the current level or increased to the maximum allowable amount [, and _____ (name(s)) shall be designated as the [beneficiary/beneficiaries] of this insurance]. If the Plan should later offer [participant spouse] the option of purchasing the policy from the Plan, then [participant spouse] shall give notice to [nonparticipant spouse] of the offer to purchase. [Husband or Wife] shall have the first right of refusal to purchase the policy as [his/her] separate property. The cost, if

any, of this coverage shall be paid [by Husband or by Wife or by the parties equally or _____ percent by Husband and _____ percent by Wife].

Directions Regarding Plan Investments

[Use if nonparticipant will participate in making "deemed" investment decisions regarding plan assets.]

[Participant spouse] shall exercise [his/her] rights with respect to the direction of accounts provided by [short title of plan] as to any amounts in which the community may have an interest only with the agreement of [nonparticipant spouse]. If the parties cannot agree on an investment or investment change, the assets shall be invested in a money-market account or the equivalent pending further order of the court. The court shall retain jurisdiction to resolve any disputes in connection with the management of Plan accounts.

[IOR: Use if participant alone will make "deemed" investment decisions regarding plan assets.]

[Participant spouse] shall prudently exercise [his/her] rights with respect to the direction of accounts provided by [short title of plan] as to any amounts in which the community may have an interest, applying the following investment criteria: [specify].

Payment of Income Taxes on Plan Distributions

Notwithstanding the manner in which any plan shall report income payable under a BDO, the parties intend and agree that the recipient spouse shall report, pay and be responsible for all taxable income that he or she receives, whether directly or indirectly from any plan, and shall indemnify the nonrecipient spouse for any taxes (including interest and penalties, and "tax on the tax," if any) that the nonrecipient spouse may be required to pay in connection with any distribution. Any amounts payable to the nonparticipant spouse shall be net of applicable withholding, if any, and each spouse shall accordingly report his or her share of withholding to the extent permitted by law. If under applicable law, the nonparticipant is not able to be credited with withholding, then the participant shall immediately reimburse the nonparticipant for the full amount of withholding deductions attributable to the nonparticipant's share. The parties agree to cooperate in filing consistent tax returns in connection with distributions received from a plan. The court shall reserve jurisdiction to resolve any disputes in connection with the taxation of distributions from a plan. If either spouse should breach his or her reporting or payment obligations, he or she shall indemnify the other spouse for any cost, fee, or other expense (including but not limited to accounting, tax preparer, and attorneys fees) incurred by the other spouse in connection with any audit, examination, or amendment of the other spouse's tax return, relative to accomplishing the tax result described above.

Employment Taxes

Nonparticipant spouse's share, as otherwise determined hereunder, shall be adjusted such that each party bears a pro rata share of any taxes due or paid under *I.R.C. § 3121(v)* with respect to benefits accrued under the plan.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property

DistributionClassificationGeneral OverviewLabor & Employment LawGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 122 PROVISIONS FOR DIVISION OF EMPLOYEE BENEFITS
PART IV. FORMS

B. Private Employee Benefit Plans Governed by ERISA

34-122 California Legal Forms--Transaction Guide § 122.222

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.222 Rollover to Individual Retirement Account and Assignment

[1] Comment

The form in [2], *below*, provides for a rollover by the participant spouse of the nonemployee spouse's interest in an employee benefit plan to an Individual Retirement Account (IRA). A rollover to an IRA is a method of distribution that avoids the need for a Qualified Domestic Relations Order (QDRO). A rollover is possible for qualified retirement plans, and *Internal Revenue Code Section 403(b)* annuities [see *I.R.C. § 401(b)(8)*]. It may not be used for most nonqualified plans [see § 122.221], other than governmental plans maintained under *Internal Revenue Code Section 457(b)* [see *I.R.C. § 402(a)(4)* ("eligible rollover distribution" limited to one coming from a 401(a) qualified plan)].

The community interest is determined as it is for a disposition under a QDRO. This form provides the same options for that. However, as in the case with QDROs, there is no requirement that the transferred interest be limited to the community interest.

The participant must initiate the rollover by directing the plan administrator to distribute the nonemployee's share to an IRA in a direct rollover. Although this form provides that the amount to be rolled over is half the community interest, any amount up to 100 percent of the IRA can be transferred. The participant then assigns all of his or her title and interest in the recipient IRA to the nonemployee spouse. This rollover distribution and subsequent transfer are both nontaxable dispositions under *Internal Revenue Code Sections 402* and *408(d)(6)* [see Comment to § 122.202].

This form also provides that if the participant dies before the rollover distribution can take place, the nonparticipant will be deemed to be the surviving spouse for purposes of the Qualified Preretirement Survivor Benefit (QPSA) [see 29 *U.S.C. 1056(d)(3)(F)*]. For further discussion of the QPSA, see § 122.220[1][e][i].

PRACTICE TIP:

In using a rollover transfer rather than a QDRO, care should be taken if the nonemployee spouse may need to spend all or part of the distribution in the near future, and is under age 59½. This is because

money taken out of a rollover IRA does not qualify for the special exception to the 10 percent early distribution additional income tax under *Internal Revenue Code Section 72(t)*, which is available for withdrawals taken directly from a plan under a QDRO and not rolled. *Commentary by James M. Crawford Jr.*

[2] FORM

Rollover to Individual Retirement Account and Assignment

Determination of Community Interest

[Use if division of plan will be under time-rule formula.]

The community interest in *[short title of plan]* shall be equal to the fraction whose numerator is the number of *[years or months or units]* of Service while married and before separation, and whose denominator is the total number of *[years or months or units]* of Service, multiplied by the employer-funded Accrued Benefit determined under the Plan as of *[nonparticipant spouse's]* benefit commencement date to the extent vested. "Service" for purposes of this formula shall be the *[years or months or units]* of *[covered employment or service credited for benefit accrual under the Plan or service credited for vesting under the Plan or other]*.

The community interest shall include the additional Accrued Benefit, if any, attributable to employee contributions made during the marriage and before separation, or to the rollover of a distribution of benefits earned during the marriage and before separation.

[Include to provide for future adjustments to time-rule formula.]

For purposes of the above formula the total Accrued Benefit and/or Service during the marriage shall be adjusted in order that the community portion accurately reflect the community contribution to benefit accrual. The adjustment shall be as follows: *[specify]*.

[Include to reserve jurisdiction over time-rule formula.]

The court shall reserve jurisdiction to modify the above formula to account for changes in the terms of the Plan occurring after the effective date of this Agreement and before entry of the Qualified Domestic Relations Order, as provided for below.

[Add for owner-controlled plan.]

For purposes of the above formula, prior service credit granted under the Plan for periods before the initial plan effective date *[shall/shall not]* be counted.

[OR: Use if division of plan will be under tracing rule.]

The community interest in *[short title of plan]* shall be that portion of the account balance in the Plan attributable to the sum of (a) employer contributions made on account of service during the marriage and before separation, and (b) employee contributions made during the marriage and before separation; together with all earnings and losses on those

amounts, and minus any withdrawals (other than participant loans) during the marriage and before separation, determined as of the applicable valuation date. The applicable valuation date for a division of the community property portion shall be _____ [the date as of which _____ (*nonparticipant spouse's*) percent share is allocated to a separate account in the Plan or distributed to _____ (*nonparticipant spouse*) or the effective date of this Agreement or other date].

[OR: Use if division of plan will be according to method other than time-rule formula or tracing rule.]

The community interest in [short title of plan] shall be [set forth other calculation method].

[Continue with:]

_____ [**Nonparticipant Spouse's**] Share of Community Interest

[Nonparticipant spouse's] share of the community interest in [short title of plan], shall be _____ percent.

[Include if nonparticipant will be given a share of participant's separate property interest in plan.]

_____ [**Nonparticipant Spouse's**] Separate Interest

[Nonparticipant spouse's] share of [participant spouse's] separate property interest in [short title of plan] shall be _____ percent.

Rollover to Individual Retirement Account

The parties have ascertained that [participant spouse] is entitled under [short title of plan] to take an immediate eligible rollover distribution of benefits. To avoid the cost of obtaining a Qualified Domestic Relations Order dividing the community interest in the Plan, [participant spouse] shall, as soon as feasible, cause the Plan to distribute [nonparticipant spouse's] share of the Plan in a direct nontaxable rollover distribution in the name of [participant spouse] to an Individual Retirement Account (IRA) with a custodian or trustee designated by [nonparticipant spouse]. On completion of this rollover, [participant spouse] shall immediately assign all right, title, and interest in the IRA to [nonparticipant spouse] as [her/his] sole and separate property in a nontaxable transfer under *Internal Revenue Code section 408(d)(6)*. In order to facilitate this transfer to [nonparticipant spouse], [nonparticipant spouse] waives any community property interest that [she/he] may have in benefits payable to [participant spouse] under the Plan on the condition that the distribution and transfer is made as described above.

Designation of Surviving Spouse

If the distribution provided for above cannot be completed because of the preretirement death of [participant spouse], then [nonparticipant spouse] is designated as the surviving spouse/beneficiary of [participant spouse] with respect to any Qualified Preretirement Survivor Annuity (within the meaning of *Section 417 of the Internal Revenue Code*)(QPSA) or other death benefit that may become payable under [short title of plan] after the marital status is terminated, but only to the extent that the benefit is attributable to _____ [(nonparticipant spouse's)

interest in the benefits accrued to _____ (*participant spouse*) under the Plan or the community interest in the benefits accrued to _____ (*participant spouse*) under the Plan (, plus _____ (*nonparticipant spouse*) share of _____ (*participant spouse's*) separate property interest)]. Should [*nonparticipant spouse*] predecease [*participant spouse*] during this same period, _____ [the court shall reserve jurisdiction to make further orders as may be required in order for the estate of _____ (*nonparticipant spouse*) to receive an amount equal to the value of _____ (*nonparticipant spouse's*) interest in the benefits accrued or _____ (*nonparticipant spouse's*) interest in the Plan shall revert to _____ (*participant spouse*) as (his/her) separate property]. Notwithstanding the above, if the only form of benefit available under the Plan with respect to the death of [*participant spouse*] is a QPSA (within the meaning of *Section 417 of the Internal Revenue Code*), and if [*participant spouse*] should die without an actual surviving spouse under the Plan, then [*nonparticipant spouse*] shall be deemed to be the surviving spouse of [*participant spouse*] for all purposes without limitation. [Add if desired: The court shall retain jurisdiction to make further order as may be necessary to effect the intended division and disposition of the survivor benefits.] This paragraph shall be deemed incorporated and made a part of any order of status termination, and notice of entry shall be immediately served on the plan administrator.

[Use to provide for insurance on the nonparticipant spouse's life (defined benefit plan).]

Pending completion of the rollover distribution, [*nonparticipant spouse*] shall obtain term insurance on [her/his] life in an amount sufficient to provide an after-tax benefit for [her/his] beneficiaries equivalent to the actuarial present value of [*nonparticipant spouse's*] share of the community interest in the benefits accrued under the plan with respect to [*participant spouse*]. The cost of this insurance shall be paid by [*participant spouse or the parties equally*], and shall be kept in force until such time as [*nonparticipant spouse*] begins to receive benefits under the Plan.

[Use to provide for insurance on the participant's life.]

Pending completion of the rollover distribution, [*participant spouse*] shall obtain term insurance on [his/her] life in an amount sufficient to provide an after-tax benefit for [his/her] beneficiaries equivalent to the actuarial present value of [*participant spouse's*] share of the retirement benefits accrued under the Plan with respect to [him/her]. The cost of this insurance shall be paid by [(*nonparticipant spouse*) or the parties equally], and shall be kept in force until such time as [*participant spouse*] begins to receive benefits under the Plan.

Beneficiary Designations

The beneficiary designation in effect for [*participant spouse*] under the [*short title of plan*] is as follows: [*specify beneficiary designations*]. [Add to change beneficiaries: The beneficiary designation shall be changed to the following: _____ (*specify new beneficiary designation*). The change shall take place _____ (*specify time, e.g., forthwith or on dissolution*).] [*Participant spouse*] understands that the termination of marital status may not affect this beneficiary [designation or change] automatically, and that a new beneficiary designation may need to be filed with the Plan if [*participant spouse*] desires to change beneficiaries following termination of marital status. Nothing contained in this paragraph shall be interpreted as a waiver by [*nonparticipant spouse*] of any right that [she/he] may have as a beneficiary designated by [*participant spouse*], after the effective date of this Agreement. If a beneficiary change is to be made prior to dissolution, [*nonparticipant spouse*] shall cooperate in executing any documents or consent forms required by the Plan in order for the change to be effective.

Duty to Pay Income Taxes on Plan Distributions

[*Nonparticipant spouse*] shall be responsible for payment of any taxes due in respect to any distribution from the IRA to be established for [her/him], as set forth above, including any subsequent earnings on any distribution. The IRA transfer to [*nonparticipant spouse*] is incident to divorce and is intended to be without immediate tax consequence to either party under *Internal Revenue Code Section 408(d)(6)*. If [*participant spouse*] should be required to pay tax on any distribution amount that is directly rolled from the Plan to the IRA to be assigned to [*nonparticipant spouse*] or on any subsequent distribution from the IRA once assigned to [*nonparticipant spouse*], [*nonparticipant spouse*] shall fully indemnify and reimburse [*participant spouse*] for the full amount, including any "tax on the tax," interest or penalties. There shall be no right of reimbursement, however, for any tax, interest, or penalty that results, directly or indirectly, from the failure of [*participant spouse*] to comply fully with the applicable rules and regulations governing eligible rollover distributions from tax-qualified plans.

Legal Topics:

For related research and practice materials, see the following legal topics:

Pensions & Benefits Law
Employee Benefit Plans
Individual Retirement Accounts
Pensions & Benefits Law
Employee Retirement Income Security Act (ERISA)
Participation & Vesting
Qualified Domestic Relations Orders



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Private Employee Benefit Plans Governed by ERISA

34-122 California Legal Forms--Transaction Guide § 122.223

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.223 Special Provisions for Plan Controlled by Business-Owner Spouse

[1] Comment

The form in [2] *below* contains certain provisions that should be included if there is a community interest in employee benefit plans in which a spouse is also an owner of the business that provides the plan. The division of plans that are controlled by a business-owner spouse can present unique planning opportunities because of the ability to amend the plan to take advantage of special rules that might not otherwise be available. Provisions allowing for "in kind" distributions of questionable property, early QDRO distributions, and additional benefit forms are but a few examples. On the other hand, because it is not statistically safe to assume that a small plan will be approved for tax qualification if audited, in many situations, it would be foolhardy to proceed to develop a complex distribution strategy without first determining whether the plan has been subjected to one or more disqualifying defects, and if so, what it might cost to requalify the plan with the IRS.

There have been several cases that highlight other special problems that can plague the QDRO division of plans that are maintained by a closely held business [see, e.g., *Hawkins v. Commissioner* (10th Cir. 1996) 86 F.3d 982 (dispute over which spouse was taxable on equalizing payment made by distribution from spouse-owner-controlled pension plan); *Stewart v. Thorpe Holding Co.* (9th Cir. 1999) 207 F.3d 1143, 200 U.S. App. Lexis 5807]. This form is designed to assist the parties in dealing with issues such as the impact of plan-related liabilities on the community owned business, and the apportionment of any liability for past failures to follow the pension rules, both with respect to plan administration and funding.

PRACTICE TIP:

In small plan situations, a time rule or tracing division is almost certainly not going to produce a fair result if the division does not take into account the extent to which the plan benefits have yet to be funded (or are over-funded) as of the date of separation. For example, if the participant spouse accrues a \$10,000 contribution in a profit-sharing plan immediately prior to separation, technically half of that amount belongs to the nonparticipant spouse. But unless special provision is made in the order, that

benefit is likely not going to be funded until the following year, using the postseparation earnings of the business, which are likely going to be the separate property of the owner. Is such a division still correct? The situation can be considerably worse in the case of a defined benefit plan, unless the unfunded projected liability is accounted for in the business valuation, or the plan is terminated and replaced with a defined contribution plan, or the benefit award is adjusted for the fact that most of the funding for the future benefits to be shared is going to come from postseparation earnings. Of course, the converse is true if the plan is overfunded due to community contributions as of the date of separation. *Commentary by James M. Crawford Jr.*

PRACTICE TIP:

In dealing with small plans, it is almost a certainty due to the complexity of the tax and ERISA rules that must be followed that there have been one or more qualification or fiduciary failures that could be cause for liability for both the participants and the employer on audit, particularly if a QDRO distribution is rolled to an IRA in the mistaken belief that the plan was qualified when payment was made. Because many of these problems can now be corrected voluntarily at a relatively minor cost if found before audit, it may well be prudent in some situations to obtain a "preemptive" audit by a qualified benefits practitioner. This form provides options for the nonparticipant spouse to either require or waive an audit. *Commentary by James M. Crawford Jr.*

PRACTICE TIP:

If a small plan covers only the owner of the business, or the owner and spouse, or only partners and their spouses, the plan is likely not ERISA-covered. In such circumstances, the ERISA preemption that might otherwise be assumed to apply in the post- *Egelhoff* era to preclude state inheritance laws from controlling beneficiary designations will not have any effect. Thus, for example, it may turn out that *Prob. Code § 5600* will invalidate on divorce certain beneficiary designations in one plan of a business, but not another depending on what employees are covered. To make matters worse, practitioners should be aware that the case law is not settled on the issue of whether a plan that is once an ERISA plan remains so, even after all common law employees have been paid out, leaving the owner or the owner's spouse as the only participant. In such circumstances, the only safe way to change a beneficiary designation is to comply with both the rules of the plan and the requirements of *Prob. Code § 5600*. *Commentary by James M. Crawford Jr.*

[2] FORM

Special Provisions for Plan Controlled by Business-Owner Spouse

There is a community interest in _____ [*name of business*] and there is also a community interest in benefits payable under [*short title of plan*] (the Plan), a defined benefit plan in which [*owner-participant spouse*] is both a participant and the controlling owner of the Plan. [*Add if desired: _____ (owner-participant spouse) agrees to amend the Plan to provide as follows: [specify amendments.]*]

The parties understand that the Plan has, or may have, an impact on the valuation of the community's ownership interest in the business.

[*Use if audit has already been performed.*]

[Husband has or Wife has or The parties have] evaluated (or caused to be evaluated by a third party) the funding, investment, operation and administration of the plan for compliance with ERISA and the qualification requirements of the Internal Revenue Code. This evaluation was performed in reliance on the accuracy and completeness of the data, documentation and other information provided or made available by [*owner-participant spouse*]. [*owner-participant*

spouse] warrants that to the best of [his/her] knowledge, all information was true, correct, and accurate as of the date on which it was provided or made available, and that [he/she] is not aware of any material changes in the information since that date. The court reserves jurisdiction to redetermine the value of any community interest in

_____ [name of business], and to make further orders as the interests of justice may require to equalize the division of the community estate, or otherwise, on discovery of any material breach of this warranty. Except as provided in the preceding sentence, the evaluation shall be accepted as final and binding as between the parties, notwithstanding any subsequently discovered errors, omissions, or incorrect assumptions associated with it.

[OR: Use if audit will be performed.]

The parties agree to retain the services of a qualified professional to audit the plan for compliance with ERISA and the tax qualification requirements of the Internal Revenue Code, and to evaluate its current funding status. The parties agree to cooperate in resolving any compliance, funding, or valuation issues that may be disclosed in the course of this audit. The cost of the audit shall be [_____ paid by Husband or paid by Wife or shared equally by the parties or paid _____ percent by Husband and _____ percent by Wife].

The court shall reserve jurisdiction to resolve any dispute between the parties with regard to the evaluation of the Plan, to redetermine the value of the community interest in _____ [name of business], and to make further orders as the interests of justice may require to equalize the division of the community and properly apportion any plan-related liabilities.

[OR: Use if no audit will be performed.]

The parties have, for purposes of agreeing on a valuation of _____ [name of business] assumed that the funding, investment, operation, or administration of the plan is fully in compliance with ERISA and the qualification requirements of the Internal Revenue Code. Although the validity of this assumption has not been verified by independent audit or evaluation, each warrants that he or she has no information to the contrary.

[AND EITHER: if parties will accept risks associated with no audit:]

The parties agree to accept the risk that an unknown but existing and material plan-related liability, claim or funding surplus, or potential employer reversion was not properly taken into account in valuing the community interest in the business, and accept the agreed valuation as final and binding notwithstanding any unknown liability, claim, or surplus. Should any subsequently discovered funding deficiency, operational or qualification defect, including any associated taxes, interest and penalties, give rise to any cost, expense, tax, penalty, or other liability for either party in his or her individual capacity as plan fiduciary, participant, or alternate payee, this liability shall be borne _____ [by the parties jointly in proportion to the community ownership in the business or solely by _____ (owner-participant spouse), who shall fully defend and hold _____ (nonparticipant spouse) harmless from all liability associated with the subsequently discovered cost.

If any uncured funding or other deficiency should result in a decrease in the benefits otherwise available for payment to [nonparticipant spouse], the reduction shall be _____ [shared pro rata based on the amount of plan benefits awarded to each party respectively or charged to _____ (owner-participant spouse's) share only].

[OR: if court will reserve jurisdiction to address matters arising from no audit:]

The court shall reserve jurisdiction to redetermine the value of the community interest in _____ [name of business] and to make further orders as the interests of justice may require to equalize the division of the community, or otherwise, should it later be determined that an existing and material plan-related liability, funding surplus, or reversion was not properly taken into account in valuing the community interest in the business.

[CONTINUE: Use if community has interest in more than one business under common control.]

The parties understand that the community holds an interest in one or more businesses under common control within the meaning of *Section 414 of the Internal Revenue Code*, and agree that the evaluation of plan-related funding or other liabilities shall take into account all plans maintained by any employer in the group.

[Use if owner-spouse will have to fund plan from separate property.]

The funding status of the Plan is such that future benefit accruals will necessarily be funded by the separate property of [owner-participant spouse]. [owner-participant spouse] has the option of terminating the plan and distributing to [nonparticipant spouse] [her/his] share of the community interest in the benefits accrued by [owner-participant spouse] to the date of termination. Should [owner-participant spouse] elect not to terminate the plan, _____ [the division of the plan shall not be affected by these separate property contributions, since this anticipated funding liability has been taken into account in the valuation of the community interest in the business or the interest of _____ (nonparticipant spouse) shall be equal to the present value of [her/his] share of the community interest as of the date of separation, as determined under Paragraph _____ of this Agreement, adjusted (increased or decreased) by the average rate of return on plan assets from that date until the date of distribution to [nonparticipant spouse].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Liability Companies General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Characterization General Overview Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Classification General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 122 PROVISIONS FOR DIVISION OF EMPLOYEE BENEFITS
PART IV. FORMS

B. Private Employee Benefit Plans Governed by ERISA

34-122 California Legal Forms--Transaction Guide § 122.224

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.224 Valuation of Community Interest in Defined Benefit Plans

[1] Comment

The form in [2], *below* addresses issues with regard to the evaluation of a defined benefit pension plan. It provides for either a joint evaluation or separate evaluations by each party. It then sets forth the facts and data on which the valuation is based. For additional considerations in valuing defined benefit plans maintained by the participant spouse as owner, see § 122.223.

Obtaining an accurate value of a retirement plan asset is seldom necessary in order to divide the property successfully. However, if circumstances dictate that some form of buyout of the community interest in the plan is appropriate, valuation becomes an issue. While this can arise in any number of situations, it typically comes into play if the community assets are to be divided in the aggregate rather than in kind, including the situation in which the employee spouse will retain his or her undivided interest in employee benefits and the nonemployee spouse will receive other assets of equal value. It may also be an issue in the event of a *Gillmore* election buyout, in which the participant is effectively forced to choose between buying out the nonemployee spouse's interest in retirement benefits that are not available for distribution because the participant has elected to continue working past earliest possible retirement age, or retiring and letting the plan make the payments directly [see *In re Marriage of Gillmore* (1981) 29 Cal. 3d 418, 428 n.9, 174 Cal. Rptr. 493, 629 P.2d 1 ; see also § 122.220[1][g][i]].

In the case of an individual account plan, whether qualified or nonqualified [see § 122.220[1][b]], the value of the benefit earned is usually fairly easy to determine by looking at the most recent plan account statement. However, in the case of defined benefit plans, which promise only an income stream at retirement and do not have individual accounts, determining the value of those projected benefits is a far more subjective process. Generally, a defined benefit plan valuation requires the assistance of a qualified actuary, who will make assumptions about the future that are by definition guesses (hopefully educated), such as whether the participant will live his or her life expectancy, what interest rates are likely to do, what kind of benefit changes might be expected, and whether the plan will be terminated before

the retirement date, to name just a few. Except in the case of a small plan, how well the plan is invested is not a factor to be considered. This is because defined benefit plan benefits are typically secured by a guarantee of the Pension Benefit Guarantee Corporation, as well as by the general assets of the employer.

Unfortunately, because of the nature of the mathematics involved, small changes in the actuarial assumptions and factors used in the valuation can have a major impact on the result. For example, dropping the interest rate by just 1 percent could easily make a 10 to 20 percent difference in the resulting value. Therefore, a good first step in any successful valuation is for the parties to attempt to define in advance each of the factors and assumptions that will be used.

PRACTICE TIP:

Generally speaking, it is always safer to divide defined benefit plan benefits rather than use them as an offset in the division of other property. There are a number of reasons for this. First, there is the fact that most benefit plan distributions are taxable to the distributee as income (a factor sometimes overlooked in the trading) [*see I.R.C. § 402(a)*]. Second, despite the apparent accuracy indicated by a result that is displayed in dollars and cents, it is almost a certainty that the actual amount received by the owner will vary substantially from what is calculated. This can be important if one spouse gives up the house to keep his or her pension, only to discover a health problem that will preclude that plan from paying anything near what was projected. Third, individual health and employment considerations will not likely be taken into account unless some change to the usual mortality tables and other assumptions is negotiated in advance. Fourth, such plans normally pay benefits in the form of an annuity, which if needed as a part of the recipient's retirement planning, may be less costly to obtain through the plan, than through a commercial annuity provider. Fifth, because pension benefits are both property and income, consideration of the impact of any contemplated buyout or offset on future support obligations will in many cases provide an additional complicating factor. *Commentary by James M. Crawford Jr.*

[2] FORM

Valuation of Community Interest in Defined Benefit Plans

Valuation of _____ [*short title of plan*]

[*Use if each party will retain own evaluator.*]

The parties shall each retain at his and her expense, an independent actuary to value the community interest in [*short title of plan*]. The parties agree to accept the average of the two valuations provided that the resulting values are within _____ percent of each other.

If the valuations are not within _____ percent of each other, the court shall reserve jurisdiction to resolve any disagreement between the parties in connection with the valuation.

[*OR: Use if parties will stipulate to joint evaluation.*]

_____ [*name*] shall be retained to value the community interest in [*short title of plan*]. The cost of this valuation shall be paid [by Husband or by Wife or by the parties equally or _____ percent by Husband and _____ percent by Wife]. _____ [The valuation shall be final and binding on the parties. or The court shall reserve jurisdiction to resolve any disagreement between the parties in connection with the valuation. If judicial proceedings are required to resolve any disagreement, the prevailing party shall be entitled to attorney fees and costs.

If either party obtains a separate valuation of the community interest in the plan from any source, the valuation shall be [disclosed to the other party without regard to any work product or other claim of privilege *or* considered attorney work product and need not be disclosed to the other party].

[*CONTINUE:*]

For purposes of agreeing on a value of the community interest in the _____, the following assumptions and factors shall be used:

Date of Marriage: _____
 Date of Separation: _____
 Date of Employment: _____
 Husband's Date of Birth: _____
 Wife's Date of Birth: _____
 Service During Marriage: _____
 Service Before Marriage or After Separation: _____
 Date of Valuation: _____
 Normal Form of Benefit: _____
 Mortality Table (pre and post retirement): _____
 Post-Retirement Cost of Living Adjustment: _____
Internal Revenue Code section 415 Cost of Living Adjustment: _____
 Current Accrual Compensation: _____
 Compensation History: See Exhibit _____
 Salary Scale (pre and post retirement): _____
 Interest Rate(s): _____
 Treatment of Early Retirement Subsidy: _____
 Other Factors: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Dissolution & Divorce Property
 Distribution Characterization General Overview Family Law Marital Termination & Spousal Support Dissolution &
 Divorce Property Distribution Classification General Overview Pensions & Benefits Law Employee Benefit Plans Defined
 Benefit Plans



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 122 PROVISIONS FOR DIVISION OF EMPLOYEE BENEFITS
PART IV. FORMS
B. Private Employee Benefit Plans Governed by ERISA

34-122 California Legal Forms--Transaction Guide §§ 122.225-122.239

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

[Reserved]

§§ 122.225[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 122 PROVISIONS FOR DIVISION OF EMPLOYEE BENEFITS
PART IV. FORMS
C. State Employee Benefit Plans

34-122 California Legal Forms--Transaction Guide § 122.240

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.240 California Public Employees Retirement System (CalPERS)

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, is for use to divide a state employee's interest in benefits provided by the California Public Employees Retirement System (CalPERS). The Public Employees' Retirement Law (PERL) is found at *Government Code 20000 et seq.* CalPERS must be joined in an action for dissolution or legal separation to obtain a direct award of benefits to the nonemployee spouse under the system [*see generally Fam. Code § 2060; see also Fam. Code § 2610*]. For further discussion of joinder, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 94, *Joinder of Parties* (Matthew Bender).

The three broad categories of membership in CalPERS are State, Local and School members. "State members" include state miscellaneous members, university members, patrol members, state safety members, state industrial members, and state peace officer/firefighter members, as well as National Guard members who elect to become members of the system [*see Gov. Code § 20380.5*]. "Local members" include local miscellaneous members and local safety members. "School members" include all employees within the jurisdiction of a school employer, other than local police officers, school safety members, and members included in a risk pool. The category of membership defines the terms of employment, including the retirement formula, the retirement age, the treatment of vacation pay and sick pay, death and survivor benefits (which may include a survivor continuance), and whether the employee contributes to social security [*see Gov. Code § 20370 et seq.*].

On written request, CalPERS will provide a booklet as to the member's classification, brochures regarding Instructions for Completion of Model Domestic Relations Orders, and model paragraphs for pension orders. All of these booklets may be obtained directly from CalPERS website (www.calpers.ca.gov). With an authorization signed by the member or a subpoena, CalPERS will provide information specific to the member's account. The address is California Public Employees' Retirement System; attn: Community Property Unit; PO Box 2056, Sacramento, CA 95812-2056;

telephone: 916-326-3141; fax: (916) 326-3934. Telecommunication Device for the Deaf: (916) 326-3240.

Each member receives an annual retirement statement. Further, members now have access to a Retirement Planning Calculator to estimate retirement benefits. Information about salary, accrued sick leave, and vacation pay may be obtained from the employing public entity.

PRACTICE TIP:

The report on the Member Statement of Member Contributions is not the entire benefit that is divisible between the Member and the Nonmember. If requested, the Plan may calculate the projected accrued retirement benefit payable at the Member's earliest retirement age; in the alternative, a pension actuary should be able to provide this information. However, a calculation of the projected benefit is not necessary if there is not a buyout of the nonmember's interest. *Commentary by Ann Fallon.*

[b] Other State Employee Benefit Plans and Reciprocity

A member of CalPERS may participate through the employing agency in other deferred-compensation plans or tax-deferred retirement plans [see *Gov. Code § 20894*]. Members of CalPERS may participate in a 457 Deferred Compensation Plan, or a 401(k) Plan through an independent agency known as the Savings Plus Program (website www.sppforu.com). Some university members also participate in a 403(b) Plan through their employers [see *generally, Gov. Code §§ 21670 et seq., 53212 et seq.; see also Gov. Code § 21700 et seq.* (alternative system for school member not eligible for PERS)]. A safety employee in certain bargaining units may also participate in the State Peace Officers' and Firefighter's Defined Contribution Program [*Gov. Code § 22960 et seq.*].

Reciprocity is an agreement between CalPERS and certain other public retirement systems by which an employee remains a member of both systems with benefit rights and obligations to each system. For example, if a member qualifies for reciprocity based on employment under CalPERS and then under the City and County of San Francisco, that member's benefit under each of those retirement systems is computed using the highest salary earned by the member under either system provided the member retires simultaneously under each retirement system [see *Gov. Code § 20350 et seq.*].

[c] Election between Separate Account or Shared-Interest Methods of Division

[i] Shared Interest and Separate Accounts Explained

A nonmember spouse under the PERL (hereafter a "nonmember") is a spouse or former spouse who has a judicially determined community property interest in CalPERS benefits [see *Gov. Code § 21291*]. The nonmember must make an election about whether to receive his or her community property share of the member's retirement benefits as a shared interest or in a separate account.

If the member does not have a vested benefit by having completed at least five years of credited service at the date of dissolution or legal separation, only a return of employee contributions may be payable to the nonmember spouse [*Gov. Code § 21292(g)*].

A shared interest in a member's retirement benefits is payable to a nonmember as a portion of the employee's benefits as it is received over the employee's life. This approach is often accompanied by the election of a survivor option to continue the benefit after the member's death. A separate account is one in which the accumulated contributions and service credits attributable to periods of service during marriage are divided into two separate and distinct accounts in the names of the member and nonmember [*Gov. Code § 21290(b)*]. Both shared interest and separate accounts division methods use a time-share approach in calculating the member's and nonmember's respective interests.

CalPERS publishes model orders for both approaches [see PERS booklet entitled *Model Stipulated Domestic Relations*].

Order Re: Divison of California Public Employees' Retirement System Benefits, available from CalPERS; *see also In re Marriage of Carnall* (1989) 216 Cal. App. 3d 1010, 265 Cal. Rptr. 271] .

[ii] Structure of Benefits Under Separate Account

Specific rules about how and when benefits may be calculated and paid under a separate account are set forth under *Government Code Section 21290 et seq.* The first entitlement of the nonmember under a separate account is to a refund of accumulated contributions [*Gov. Code § 21292(a)*]. This selection ends all other entitlement to CalPERS benefits, including the pension and annuity [*Gov. Code § 21292(d)*]. Further, a return of contributions leaves the service credits that had been in the nonmember's separate account available for buyback by the member [*Gov. Code § 20751.5*].

If a return of contributions is not elected or required, the nonmember is entitled to a retirement allowance when both member and nonmember have reached age 50. The retirement allowance consists of a pension and an annuity payable for the life of the nonmember. The pension is derived from employer contributions and the annuity is derived from the member's accumulated contributions [*Gov. Code § 21298*]. The community has an interest in both [*see Gov. Code § 21290*].

PRACTICE TIP:

Be careful not to accept the member's contributions figure on the member's annual retirement statement as if that were the only component. *Commentary by Ann Fallon.*

The retirement allowance is subject to all cost-of-living increases, ad hoc increases, and increases provided by *Government Code Section 21337* [*Gov. Code § 21298*]. If, prior to the nonmember's retirement, there is an increase in the service retirement formula that applies to service credited to the nonmember, that increase will apply to the applicable service credited to the nonmember, provided that the same increase also applies to the applicable service credited to the member from whose account the nonmember's service was derived [*Gov. Code § 21298(c)*]. The nonmember also has the right to designate a beneficiary for any member contributions that remain payable to the nonmember from the separate account at the time of the nonmember's death [*Gov. Code § 21290(c)(6)*; *see [h], below*].

The nonmember is also entitled to the following, which must be addressed by the court in any Benefit Division Order [*Gov. Code § 21290(c)*]:

1. The right to a retirement allowance, and the consequent right to elect an optional settlement and designate a beneficiary [*see [e], below*];
2. The right to a refund of accumulated contributions.
3. The right to redeposit accumulated contributions that are eligible for redeposit by the member [*see [f], below*];
4. The right to purchase service credit that is eligible for purchase by the member [*see [g], below*];
5. The right to designate a beneficiary to receive the nonmember's accumulated contributions that are payable if death occurs before retirement [*see [h], below*].
6. The right to designate a beneficiary for any unpaid allowance payable at the time of the nonmember's death.
7. The right to elect coverage in the Second Tier for that member's service that is subject to the Second Tier, provided that the election is made within one year of the establishment of the nonmember's account

or prior to the nonmember's retirement, whichever occurs first. Immediately on establishment of a nonmember account, the board must provide, by certified mail, the necessary form and information so that the election may be made.

8. Under certain circumstances, a nonmember whose account is credited with service subject to the Second Tier benefits may make an irrevocable election to have his or her Second Tier service credited under First Tier service, assuming any required contributions are deposited in the System (*see [j], below*) [*Gov Code § 21290(e)(1)*].

9. In the capacity of nonmember, a nonmember who elects a separate account is not entitled to any disability or industrial disability retirement allowance, any basic death benefit, any special death benefit, any monthly allowance for survivors of a member or retired person, any insurance benefit, or retired member lump-sum death benefit. No survivor continuance allowance is payable to a survivor of a nonmember [*Gov. Code § 21290(d)*].

[iii] Advantages and Disadvantages of Separate Account Versus Shared Interest

The advantage of the separate account if a monthly annuity is chosen is that the nonmember spouse may commence receipt of the annuity at any time after the member and nonmember have both reached the member's earliest retirement age, regardless of whether the member has actually retired [*Gov. Code § 21295*]. Further, the member's death before his or her earliest retirement age does not defeat the nonmember's separate account annuity entitlement, as would be the case generally under the shared interest approach. In other words, the nonmember's separate account is her or his alone, and is not affected by conditions related to the member.

Disadvantages of the separate account include the fact that the nonmember is not entitled to any special statutory death benefits, including a portion of the survivor continuance allowance, if one is payable [*Gov. Code § 21290(d)*; *see [ii], above*]. By contrast, the shared-interest approach would include a portion of the community interest in any benefit payable under the plan on account of or on behalf of the member [*see In re Marriage of Carnall (1989) 216 Cal. App. 3d 1010, 265 Cal. Rptr. 271*].

However, the overriding disadvantage of the separate account is in the calculation of the monthly allowance. The allowance formula is a function of service credit, age, and final compensation of the member [*Gov. Code § 21350 et seq.*]. However, for a separate account, "final compensation" is defined as that compensation earned during the three consecutive years, or one year if applicable, before the date of dissolution of marriage or legal separation [*Gov. Code § 21297*]. By contrast, nonmembers who do not chose the separate account will share the member's final benefit, which is calculated using the member's final compensation at the time of the member's retirement.

Limiting the compensation factor in the nonmember's allowance to the member's final compensation as of the date of judgment of dissolution of marriage or legal separation (no matter how much later the nonmember commences that allowance) creates an actuarial inequity. In other words, the later the member retires after the judgment, the higher the compensation factor applied to all member's service credits; and so, the greater the actuarial difference in value between the one-half service credits earned during the marriage awarded to the member and the one-half service credits earned during the marriage awarded to the nonmember under the separate account.

Before January 1, 2004, the plan benefited by absorbing the actuarial difference between the benefit the plan would have paid the member if the member had received the nonmember's one-half service credits earned during marriage, and what is actually payable to the nonmember based on the one-half service credits earned during the marriage. As of January 1, 2004, a member who retires after January 2, 2004, will receive the actuarial difference between the allowance that would have been payable to the member for all service had the division not occurred, and the allowance payable to the nonmember [*Gov. Code § 21251.15*].

One reason a nonmember spouse may have elected a separate account, notwithstanding the disadvantage of the final compensation factor, is a concern that with a shared interest, she or he could lose all but a share of the portion of accumulated contributions if the member dies without a survivor before retirement. Under CalPERS, any preretirement survivor allowance is payable only to statutory beneficiaries, and the statute excludes a former spouse as a statutory beneficiary [*see Gov. Code § 21493; see also Gov. Code § 21570 et seq.*].

The dilemma may be somewhat ameliorated if CalPERS, in practice, allows a nonmember to reverse his or her selection from a shared interest to a separate account for good cause. For example, if a nonmember spouse chooses a shared interest, but that choice becomes unavailable due to the member's death before retirement, CalPERS may accept a subsequent modifying court order awarding the nonmember a separate account. This option should be investigated with CalPERS, and if CalPERS allows it, language reserving the court's jurisdiction to modify the shared interest so as to substitute a separate account should be included in the original order.

Note that the nonmember's choice of a separate account or a shared interest has no impact on the value of the member's remaining benefit. The compensation level applied to service credits awarded the nonmember spouse is the factor that accounts for the difference in value to the nonmember under a separate account as opposed to a shared interest. As discussed above, under a separate account, the final compensation factor applied is that of the member's earnings at or before the date of dissolution [*Gov. Code § 21297*], while under a shared interest, the compensation level is that of the member's highest years' earnings at the date of the member's retirement [*Gov. Code § 21350 et seq.*]. As a practical matter, the nonmember's allocated marital service credits remain with her or him under either system.

[d] Further Considerations Under Shared Interest

[i] Early Retirement Enhancement

Although rare under PERL, there are limited provisions for early retirement enhancements under CalPERS [*see, e.g., Gov. Code § 20901*]. Public agency and school district employers can offer two years of imputed service credit to encourage early retirement if the governing board of a school district or a community college district or a county office of education by formal action determines that the best interest of the school district or county would be served. The imputed service credit is forfeited if the member reinstates employment. There is also a right to receive partial allowance on early retirement and revert to full allowance for normal retirement age. At this time, no legislation enables State agencies including the California State Universities to provide such an early retirement incentive [*see, e.g., Gov. Code § 20903*].

The California Supreme Court has held that a nonemployee spouse has a community property interest in any enhancement of retirement benefits attributable to the employee spouse in which the community otherwise has an interest [*In re Marriage of Lehman* (1998) 18 Cal. 4th 169, 74 Cal. Rptr. 2d 825, 955 P.2d 451] .

[ii] Accumulated Unused Sick Leave

A member's employment contract may provide that accumulated sick leave will be converted to service credits at retirement. The general rule is for 0.004 year of service credit for each unused day of sick leave certified to the board by the employer [*Gov. Code § 20963(a)* (excluding sick leave earned by National Guard members who elect to become members of system pursuant to *Gov. Code § 20380.5*)]. Although there may be alternative methods, the "time rule" approach is the most often used in calculating the parties' respective interests.

[iii] Reduced Worktime for Partial Service Retirement

Reduced worktime for partial service retirement means any arrangement of worktime agreeable to both the employer and the employee that is combined with the concurrent payment of proportionally reduced compensation and

proportionally reduced retirement benefits [*Gov. Code § 21112*]. Not all members are eligible. The reduced service allowance is the amount of the service retirement allowance to which the employee would otherwise have been entitled had he or she fully retired on the effective date of the partial service retirement, reduced by the percentage of the employee's full-time work [*Gov. Code § 21356*].

[iv] Temporary Annuity

The temporary annuity is an additional monthly dollar amount payable from the retirement benefit. It is funded by a reduction in the monthly lifetime retirement allowance [*see Gov. Code § 21461*]. For example, a member who entered CalPERS covered employment after July 1, 1982 who wished to retire at age 56 could elect to receive a monthly temporary annuity of \$500 per month for 12 years. The member's regular monthly lifetime allowance would be reduced by \$350.70 to pay for the temporary annuity. Cost-of-living adjustments would apply to the combined lifetime allowance portion and the temporary annuity portion. CalPERS explains in its booklet on the temporary annuity that the survivor continuance would still be calculated on the retirement allowance before any reduction for temporary annuity. However, by reducing the monthly lifetime allowance in order to receive a temporary annuity, the member would also be reducing the monthly lifetime allowance available to any option beneficiary. If the nonmember spouse has elected a shared interest, the effect of this election should be examined.

[v] Suspension of Benefits on Reemployment

As with employee benefit plans covered by ERISA [*see § 122.220[1][f]*], the PERL provides for the possibility that a member may be reinstated to covered employment after retirement [*see Gov. Code § 21190 et seq.*]. Note that CalPERS must preapprove the reinstatement of a retiree to a permanent position with an employer covered by CalPERS [*Gov. Code § 21196*]. The retirement allowance ceases to be payable on the first day of active employment following CalPERS approval [*Gov. Code § 21200*]. If the member begins employment before CalPERS has approved reinstatement from retirement, CalPERS must be reimbursed for any retirement allowance received by the member during the period of unapproved employment. Further, the employee must pay CalPERS the employee contributions which would have been submitted during the period of "unlawful" employment, plus interest; and the member may be required to reimburse CalPERS for administrative expenses incurred in handling the situation [*see Gov. Code § 21220(b)*]. Further, by choosing to reinstate, the member loses any additional service credit given under a "golden handshake" or other retirement incentive program.

The nonmember spouse who is receiving a share of the member's monthly benefit would need to be protected and indemnified under all these circumstances. Further, a nonmember spouse who is legally separated from the member and still considered a beneficiary of the member on health, dental and vision insurance, if available, will need to clarify the status of these benefits with respect to the reinstatement. For further information, see CalPERS booklets "Reinstatement from Retirement" and "Employment After Retirement."

[e] Optional Settlement for Beneficiary at Retirement

The PERL provides for a member to elect one of four optional settlements, each of which will provide a reduced benefit to the member during his or her lifetime, but with payments continuing to a designated beneficiary (or to designated beneficiaries) on the death of the member [*see Gov. Code § 21451; see also Gov. Code §§ 21455-21458* (the four optional settlements)]. The election of an optional settlement for a beneficiary is also available to a nonmember under a separate account [*see Gov. Code § 21290(c)(1)*].

There is no requirement in the PERL that the member's surviving spouse be named the beneficiary or execute a written waiver of a right to be named beneficiary. A member may designate anyone as the beneficiary of an optional settlement, provided the member's beneficiary designation does not contradict a court order in a marital action [*see Gov. Code § 21490*]. These optional settlements are fully explained in the CalPERS Member booklets.

Each option requires a reduction to the member's monthly allowance to fund the beneficiary's entitlement. Options 2 and 2W allow a single beneficiary to receive the same total monthly payment that the member received before death [see *Gov. Code* § 21456]; Options 3 and 3W allow 50 percent of the member's monthly allowance to a single beneficiary [see *Gov. Code* § 21457].

The option most often elected in marital actions is Option 4 [see *Gov. Code* § 21458]. Option 4 is unique in two ways: (1) under Option 4, the member may specify the dollar amount of the monthly allowance that the beneficiary will receive, limiting the amount of the option to the nonmember spouse's share of the community interest; and (2) Option 4 allows more than one option beneficiary to receive a lifetime benefit. For example, the nonmember spouse may be provided a lifetime allowance equal to that spouse's community property share, reduced for the cost of that option, thus ensuring a fairly level benefit over the nonmember's lifetime. At the same time, under Option 4, a member's current spouse can be provided with a lifetime allowance equal to the member's remaining share of the benefit. CalPERS will provide an estimate for Option 4 calculations on request.

[f] Redeposit of Contributions for Service Credit

Under certain employment conditions, a member may withdraw accumulated contributions with interest [see *Gov. Code* § 20730 *et seq.*]. Subject to regulations of the board, a member may file an election with the board to redeposit in the retirement fund an amount equal to the accumulated contributions withdrawn, and interest that would have been credited to his or her account to the date of completion of payments had the contributions not been withdrawn [see *Gov. Code* §§ 20750, 20752, 21050]. A nonmember spouse is also entitled to participate in the redeposit of contributions for service credit if earned during the marital period regardless of whether the nonmember has elected a separate or a shared account [see *Gov. Code* §§ 20751, 21290(c)(3), 21294]. For discussion of other retirement plans as the source of funds for the redeposit of contributions for service credit, see [j], *below*.

PRACTICE TIP:

A nonmember who has elected a separate account is strongly advised to find out before the judgment and order are prepared whether there are any redeposit rights; then the judgment and order can specify whether the nonmember will exercise his or her right to half of the community right in that respect. Otherwise, there may be consequences. For example, if the nonmember commences receipt of a separate account under the standard language of the statute, PERS will likely interpret that language to be an award of one-half of the right to redeposit even though the parties may not have intended that result. If nonmember commences receipt of a separate account without giving CalPERS notice of an election to redeposit one-half of any community interest in previously withdrawn contributions, the opportunity to exercise the redeposit rights assigned to the nonmember is lost to the nonmember, and possibly to the member, since any right awarded the nonmember may not be exercised by the member even if the nonmember declined the election. Note that the nonmember may exercise this election even if the member declines. Either party should be able to exercise the entire community interest if the other party declines that party's share. But the court order must reflect that arrangement. Further, in weighing whether to redeposit contributions for additional service credits, remember that if the nonmember has elected a separate account, the salary component of the allowance calculation is frozen at the date of dissolution of marriage. Weigh the cost of the service credits against the benefit under this restriction. Make sure your order either waives such rights or awards such rights as the nonmember can afford the contributions required to exercise. Unlike STRS, PERS takes an "all or nothing" approach. Either the nonmember redeposits one half the full community share, or forfeits the right. *Commentary by Ann Fallon.*

[g] Right to Purchase Service Credit

Additional service credit may be purchased by members, and under very limited circumstances, retirees, for specific authorized periods when the member is not actively employed, such as when on active military duty, leave of absence, or part-time employment credit [see *Gov. Code* §§ 20990 *et seq.*, 21020 *et seq.*, 21050]. A nonmember spouse is permitted to purchase additional service credits attributed to the marital period even if the nonmember has elected a separate account [*Gov. Code* § 21290(c)(4)]. The Practice Tip in [f], *above*, also should be referred to in this case. For discussion of other retirement plans as the source of funds for the redeposit of contributions for service credit, see [j], *below*.

[h] Effect of Nonmember Spouse's Death

CalPERS recognizes the right of a nonmember spouse to name a beneficiary for her or his remaining interest on death [see *Gov. Code* § 21491]. If the nonmember had an order for a separate account, the beneficiary would receive a refund of the contributions in the separate account, regardless of whether the nonmember had commenced receipt under the separate account [see *Gov. Code* § 21290(c)(5), (6)]. If the nonmember had an order for a shared interest, the beneficiary would receive the nonmember's community property percent of each payment to the member [see *In re Marriage of Powers* (1990) 218 Cal. App. 3d 626, 640-641, 267 Cal. Rptr. 350 ; see also model paragraphs for domestic relations orders published by CalPERS]. However, if the nonmember was paying for additional service credits by way of deductions to retirement, the board must file a claim against the estate of the deceased to recover benefit payments that exceeded those for which payment was made [*Gov. Code* §§ 21293, 21294].

[i] Election to Obtain Higher Retirement Benefits

Coverage under the First Tier of benefits requires the member to make contributions each pay period in accordance with the category of membership and any applicable contract of employment. Coverage under the Second Tier yields a lower retirement benefit because it requires no member contributions. In order to obtain a higher retirement benefit, a nonmember whose account is credited with service subject to the Second Tier benefits may make an irrevocable election, to be filed with the board, to have his or her Second Tier service credited under *Gov. Code* § 21354.1 (First Tier benefits), if the member is employed by the state on or after January 1, 2000, and, if eligible, the member has made the election under *Gov. Code* § 21073.7 at the time of the nonmember's election.

A nonmember's election to upgrade from Second Tier to First Tier may be made at any time before the retirement of the nonmember or before payment of a refund of the accumulated contributions in the separate account of the nonmember, and will be effective the first of the month following the date the election is received in the system. A nonmember who makes this election must make the contributions specified in *Gov. Code* § 21073.1 [*Gov. Code* § 21290(e)]. For discussion of other retirement plans as a possible source of funds for the contributions required for the upgrade from Second Tier to First Tier service credit, see [j], *below*.

PRACTICE TIP:

In order for the nonmember to elect to deposit contributions to upgrade Second Tier service to First Tier service, the member must not only have been eligible for this upgrade but must also have elected to exercise that option. *Commentary by Ann Fallon.*

[j] Consideration of Rollover Rights

The federal Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) [Pub. L. No. 107-16] enacted a number of federal statutory changes to improve the portability of funds by allowing direct trustee-to-trustee rollovers among different types of retirement plans, including 401(k), 403(b), and 457 plans, IRA's and retirement plans. A client should take steps to qualify through CalPERS to roll over funds from these different types of retirement plans to the CalPERS System in order to purchase permissive service credit, redeposit previously withdrawn contributions, and upgrade Second Tier benefits to First Tier, as may be permitted under CalPERS [see Stats. 2002, ch. 30 (AB 131)].

PRACTICE TIP:

A member and a nonmember should be treated the same with respect to the right to roll over eligible funds for these purposes. However, do not take for granted that a retirement plan qualifies for the rollover to obtain additional service credits. Inquire of CalPERS and obtain approval before any such planning. *Commentary by Ann Fallon.*

[k] Right to Purchase Five Years of "Air Time"

A member with five years of service credit (including state, university, school employer, contracting agency, and certain legislative employees) may elect to make contributions and receive not less than one year and not more than five years--in one-year increments--of additional retirement service in the retirement system. This is a one-time only election that must be made prior to retirement. A member's contribution amount is the full actuarial present value of the increase in the benefit. "Air Time" does not include retirement service credit for public service, military service, leave of absence, or any other time recognized for service credit by the retirement system [*Gov. Code § 20909*].

PRACTICE TIP:

While there is no right created for the nonmember spouse under a separate account with respect to this benefit, to the extent that the Air Time is purchased during marriage, those service credits ought to be available at the time of division under either a separate or shared account. *Commentary by Ann Fallon.*

[l] Effect of Member's Disability or Death on Installment Payment of Contributions for Service Credit

When a member who has elected to pay for service credits by installment dies or becomes disabled, depending on the type of death benefit payable, the payments may be discontinued, may be due in an immediate lump sum, or may continue as installment payments from disability or survivor benefits [*see Gov. Code §§ 20776, 21037, 21039*].

PRACTICE TIP:

A spouse with a shared account interest who is joining in the payments for additional community property service credits will want to inquire about the effect of the member's death or disability on the nonmember's entitlement. Service credits may be irrelevant to a disability retirement award, but those service credits remain relevant to the nonmember's interest. *Commentary by Ann Fallon.*

[2] FORM**California Public Employees Retirement System (CalPERS)****Disposition of Benefits in CalPERS**

A community property interest exists in [*member spouse's*] accrued benefits under the California Public Employees' Retirement System (CalPERS) based on [*his/her*] employment during the marriage for [*employer*]. [*member spouse's*] CalPERS Member category of membership is _____; [*his/her*] date of hire for this employment was _____; and [*his/her*] date of birth is _____. This employment is [*not*] covered employment under FICA for purposes of eligibility for federal Social Security benefits. The date of marriage was _____, and the date of separation was _____. [*Add, if applicable: The date of marital dissolution was _____.*]

[*Use if member has employee benefit plans other than CalPERS.*]

In addition to CalPERS, [*member spouse*] has participated in the following plans during marriage: [*specify other plans*].

A claim of interest under *Family Code Sections 751 and 1100* and Joinder of Pension Plan [has been/will be] filed with respect to each plan in which it has been determined that the community has an interest based on the employment of [member spouse] during marriage. The entitlement of the parties under every plan in which [member spouse] has accrued service credit during the marriage will be committed to orders setting forth the rights and entitlement of each respective party in each plan, and entered on or before, but not later than, entry of the judgment.

Warranties

[Except as listed above,] Each party warrants to the other that he or she is not covered by or entitled to any benefit under an employee benefit plan that is attributable in any way to service with an employer during the marriage and before the date of separation, nor does he or she have any expectation of becoming so covered. Each further warrants that if he or she becomes covered under an amendment to an existing employee benefit plan, that may provide benefits based partly or wholly on service rendered during marriage and before the date of separation, that party shall immediately notify the other and provide a copy of the plan if reasonably available. The court shall retain jurisdiction to make any further orders as may be necessary to divide the community interest, if any, in these benefits. [Each party further warrants that he or she has provided to the other a complete, current, and accurate disclosure and accounting of the following with respect to each listed plan: (1) the current value of all benefits accrued (not solely employee contributions); (2) "window" elections that have been made or that are currently available; (3) beneficiary designations; (4) any opportunity to purchase service credit or redeposit previously refunded contributions related to the marital period; (5) any community funds used to purchase service credits related to a period of service outside of the marriage; and (6) any elections or waivers of benefits.] Pending the disposition of each of the plans listed above, each party further warrants that he or she shall not make any election that may affect the nature, form, value, or timing of any benefits payable under the plan without express prior written notice to the other party.

Preservation of Right to Omitted Assets

Any plan in which [member spouse] may have accrued service credits during the marriage that is not divided by this Agreement or assigned to either party as part of the overall division of their community property, may be considered a missed asset subject to further division in this matter. [member spouse] shall indemnify [nonmember spouse] against the loss of any benefits in which [nonmember spouse] would have had an interest if benefits are no longer payable directly from the plan.

Available Retirement Benefits

The parties understand for member service that is subject to the First Tier, that there are two components to CalPERS retirement benefits; the pension, derived from employer contributions (which is a function of compensation, age, and service credit) and the annuity, which is derived from employee contributions. The community has an interest in both components.

Election of Form of Benefit

As long as [member spouse] has not retired, [nonmember spouse] has the right to choose either a separate account or a shared interest approach to [her/his] benefit interest. That choice will be set forth in an order to be presented to CalPERS on or before the entry of judgment. However, the parties understand that under some circumstances, as long as [nonmember spouse] has not commenced receipt of [her/his] benefit interest, the choice of a shared interest or separate account may be reversed. The parties agree that [nonmember spouse] may take steps to change the election,

and both will cooperate in the entry of an amended court order in that respect, as long as [nonmember spouse's] change of election has no impact on the value of [member spouse's] remaining benefit.

[Use to divide into separate accounts.]

Separate Accounts (Choice of)

[Nonmember spouse] elects to receive [her/his] share of [member spouse's] retirement benefit as a separate account in accordance with *Family Code Section 2610(a)(3)*. The parties acknowledge that [nonmember spouse] shall be entitled to all applicable rights permitted under a separate account interest as set forth in *Section 21290(c) of the Government Code*.

[Nonmember spouse] has the funds with which to make these deposits of contributions and will do so in a timely manner pursuant to the deadlines set by CalPERS. [Nonmember spouse] understands that if the Plan allows an election for installment payments, at the death of Nonmember, the board shall file a claim against [Nonmember spouse]'s estate to recover benefit payments that exceeded those for which payment was made.

Separate Account Pension

The court order shall state that the accumulated contributions and service credits attributable to periods of service from the date of marriage to the date of separation be divided into two separate and distinct accounts in the names of Husband and Wife, respectively. Any service credits or accumulated contributions that are not explicitly awarded by the judgment or court order shall be deemed the separate property of [member spouse].

Member Contributions Under Separate Account

The parties understand that [member spouse] made contributions to CalPERS during the marriage, [specify portion, e.g., one- half] of which will be deposited into [nonmember spouse's] separate account. These contributions will be used to fund an annuity that will also be part of the total benefit payable to [nonmember spouse] at [her/his] retirement provided that these contributions are not withdrawn.

[IF member was not yet vested in CalPERS at end of marital period:]

Refund of Contributions

Because [member spouse] does not have the necessary service credits to qualify for retirement at the time of [dissolution of marriage/legal separation], [nonmember spouse] understands that in choosing a separate account, [she/he] will receive only a refund of that portion of [her/his] interest that represents [member spouse's] contributions, and any interest accrued to those contributions, as soon as administratively practicable following the date an account is established.

[IF member was vested, but Nonmember still elects a refund of contributions:]

(Nonmember Spouse's) Election of Refund of Contributions

[*Nonmember spouse*] elects to receive a refund of [*member spouse*] contributions assigned to [*nonmember spouse's*] separate account. [*Nonmember spouse*] understands that by electing to take a cashout or refund of member contributions, [*nonmember spouse*] will be deemed to have permanently waived all rights to a pension allowance and all rights to any future retirement benefits pertaining to the service credits in the separate account when the refund becomes effective. Likewise, by electing a refund of accumulated contributions, [*nonmember spouse*] will have no right to elect to redeposit the refunded accumulated contributions from [*her/his*] account after the refund is effective, and will have no right to redeposit contributions under *Government Code Section 20750 or 20752*, or to purchase service credit under Article 4 (commencing with Section 20990) or Article 5 (commencing with *Section 21020 of Chapter 11 of the Government Code*) after the refund becomes effective.

[*Nonmember spouse*] understands that by electing a refund of contributions from [*her/his*] separate account, [*she/he*] will forfeit any right to a pension from the separate account based on service credits. As a result, [*nonmember spouse*] will have provided [*member spouse*] with the opportunity afforded by the Public Employees' Retirement Law to repurchase the service credits in [*nonmember spouse's*] account.

[*IF member is vested and Nonmember does not elect refund of contributions, continue with:*]

(Nonmember spouse's) Election of Separate Account Pension

[*Nonmember spouse*] understands that by electing the separate accounts method of division, [*she/he*] is entitled to a pension benefit payable when both parties have reached [*member spouse's*] earliest retirement age. [As of the date of [dissolution of marriage/legal separation], [*member spouse*] is entitled to an estimated accrued benefit of \$[*amount*] per month payable at [*his/her*] earliest retirement age, which is [*earliest retirement age*].]

[*Nonmember spouse*] understands that in the capacity of a nonmember under a separate account, [*she/he*] shall not be entitled to any disability or industrial disability retirement allowance, any basic death benefit, any special death benefit, any monthly allowance for survivors of a member or retired person, any insurance benefit, or retired member lump-sum death benefit. No survivor continuance allowance is payable to a survivor of a nonmember.

[*Nonmember spouse*] understands that under the separate-accounts method of division, [*she/he*] will receive, in a separate account, [part or percent] of the service credits attributed to the marital period. [*Nonmember spouse*] further understands that, regardless of [*member spouse's*] actual salary at the time when [*nonmember spouse's*] pension becomes payable, the pension portion of the benefit payable to [*nonmember spouse*] will be calculated using [*member spouse's*] salary at the date of dissolution.

[*EITHER, if Nonmember will reserve right to recover actuarial loss resulting from salary-factor disadvantage, include:*]

Because the actuarial value lost to [*nonmember spouse*] due to the salary-factor disadvantage will be party of [*member spouse's*] retirement allowance, the parties shall consult an actuary to determine the manner in which the economic benefit can be recovered by [*nonmember spouse*].

[*OR, if Nonmember will accept salary-factor disadvantage, include:*]

Notwithstanding any disadvantage of the salary factors to *[nonmember spouse]* in the calculation of *[her/his]* separate property pension share, as set forth above, *[nonmember spouse]* agrees to the separate accounts method of division for the reason that *[Reasons]*.

[If there are service credits available for reinstatement based on Nonmember's right to redeposit contributions previously refunded during marriage, include:]

Redeposit of Previously Refunded Contributions

[Nonmember spouse] *[elects to exercise/waives]* the right to obtain additional service credits attributable to the marital period by redepositing previously refunded accumulated contributions.

[If right of redeposit is exercised:]

[Nonmember spouse] shall have the right to redeposit *[part or percent]* of previously refunded contributions. The parties understand that once *[nonmember spouse]* has been assigned the right to redeposit, even if *[nonmember spouse]* fails to complete a refund of accumulated contributions, *[member spouse]* may not reclaim any right to the service credits subject to redeposit.

[Nonmember spouse] has the funds with which to make these redeposits of contributions, and will do so in a timely manner according to the deadlines set by CalPERS. *[nonmember spouse]* understands that if CalPERS allows an election for installment payments, at *[her/his]* death, the board will file a claim against *[nonmember spouse's]* estate to recover benefit payments that exceeded those for which payment was made.

[If member made redeposits with community funds for credits attributable to the nonmarital period:]

[Member spouse] shall reimburse the community for any community property funds (plus interest) used to redeposit contributions that relate to service credit attributable to *[member spouse's]* employment during any period other than during marriage.

[If there are service credits available for purchase attributable to employment during marital period, include:]

Right to Purchase Additional Service Credits

[Nonmember spouse] *[elects to exercise/waives]* the right to purchase available additional service credits based on covered employment during the marital period.

[If right to purchase is exercised:]

[Nonmember spouse] shall have the right to purchase *[Part or Percent]* of all service credits available to *[member spouse]* for purchase. The parties understand that once *[nonmember spouse]* has been assigned the right to purchase these additional service credits, even if *[she/he]* does not complete the purchase, *[member spouse]* may not reclaim any

right to purchase the credits assigned to [nonmember spouse].

[Nonmember spouse] has the funds with which to purchase these credits, and will do so in a timely manner according to the deadlines set by CalPERS. [Nonmember spouse] understands that if CalPERS allows an election for installment payments, at [her/his] death, the board will file a claim against [nonmember spouse's] estate to recover benefit payments that exceeded those for which payment was made.

[IF member is eligible to elect to have Second Tier service credited as First Tier, include:]

Upgrade of Second Tier Credits

Each party shall have equal opportunity to upgrade that party's share of the community service from Second Tier to First Tier when [member spouse] elects to upgrade.

Death of Either Party

The parties acknowledge that under a separate account, [nonmember spouse] has the right to elect an optional settlement and designate an option beneficiary.

[Nonmember spouse] understands that if she/he dies before the refund or payout of all accumulated contributions and interest without having designated an option beneficiary, [nonmember spouse's] beneficiaries will receive any balance in her/his contribution account and any unpaid allowance payable at the time of [nonmember spouse's] death.

The parties acknowledge that the death of [member spouse] shall have no effect on [nonmember spouse's] rights and interest under the separate account.

[End of provisions limited to separate accounts method of division.]

[Use to establish shared interests instead of separate accounts.]

Shared Interest

[Nonmember spouse] elects to receive [her/his] share of [member spouse's] CalPERS retirement benefit as a shared interest in accordance with *Family Code Section 2610*.

The community interest shall be equal to the fraction whose numerator is [member spouse's] credited service in the system from the date of marriage to the date of separation, and whose denominator is [member spouse's] total credited service in the system. [Nonmember spouse's] share will be 50 percent of the community interest in [member spouse] retirement benefits computed at the time of [member spouse's] actual retirement. Under this shared-interest method, no benefits will be payable by CalPERS to [nonmember spouse] before [member spouse's] actual retirement. [Cross refer, as appropriate, to paragraph entitled "Gillmore Rights," below.]

The community interest in [member spouse's] retirement benefits shall include any refund of accumulated retirement contributions, any service retirement benefits, any disability retirement benefits, any industrial disability retirement

benefits and any death benefits.

[Include to adjust the computation of unused sick leave:]

Accumulated Unused Sick Leave

[EITHER, "Tracing Method":]

The parties understand that member's final benefit may include service credits based on unused sick leave accumulated as of the date of retirement, and that without an agreement to the contrary, such additional credits would be included in the denominator of the time rule formula. The member's employer has provided the information that there were _____ hours of unused sick leave accumulated as of the date of separation attributable to the marital period. The service credits based on the marital unused sick leave will be included in the numerator of the time-rule formula. However, the unused sick leave credits in the numerator shall not exceed those included in the denominator of the formula.

[OR, "Proportionate Method":]

Neither the numerator nor the denominator of the time-rule formula will include any service credits related to accumulated unused sick leave. Instead, the community percentage that otherwise applies to the member's benefits in general will apply to any increase in the final benefit due to accumulated unused sick leave at the time of retirement.

[Include if desired.]

Gillmore Rights

[Nonmember spouse] [waives or reserves] the right to make an election under *In re Marriage of Gillmore (1981) 29 Cal. 3d 418* for benefits to be paid directly by [member spouse] if [member spouse] does not retire at [his/her] earliest retirement date. However, nothing in this paragraph is intended to predetermine whether the nonmember spouse should be required to elect a separate account rather than precipitate a payment directly from the member under the authority of *In re Marriage of Gillmore (1981) 29 Cal. 3d 418*. The issue is reserved for the court's determination in the event that it should arise at some future time prior to the member's retirement.

Death of _____ [Member spouse] Before Retirement

[Nonmember spouse] understands that there are limited benefits payable to a former spouse from CalPERS under the shared-interest method if [member spouse] dies during the preretirement period.

[Include one or both of following two paragraphs:]

If [member spouse] dies before [his/her] retirement and [nonmember spouse] does not elect a separate account, [nonmember spouse] will be entitled to whichever of the following is elected by [member spouse's] statutory beneficiaries, if any:

a. one-half of the contributions made during marriage and before separation, including earnings and losses on those amounts, determined as of the applicable valuation date; or

b. a prorated interest in accordance with the time-rule formula of any death and survivor benefits payable to (Member Spouse's) statutory beneficiaries.

The court reserves jurisdiction to issue an order for a separate account in the event that the nonmember wishes to change from a shared-interest to a separate account interest, provided that CalPERS so allows.

[To provide for life insurance in addition to, or instead of, rights created in previous paragraph:]

[Until *[member spouse's]* retirement, *[nonmember spouse]* shall remain the irrevocable beneficiary of a life insurance policy on the life of *[member spouse]* with a death benefit amount of \$_____. The premiums on this policy shall be paid [by Husband or by Wife or by the parties equally or _____ percent by Husband and _____ percent by Wife] until _____ (*member spouse's*) retirement.] (This life insurance shall constitute *[nonmember spouse's]* sole rights under the shared interest method of distribution, and [she/he] shall have no further right or remedy with regard to the interests of *[member spouse's]* statutory beneficiaries.)]

Effect of _____ *[Nonmember spouse's]* Death

[EITHER:]

If *[nonmember spouse]* dies before the time by which [she/he] would have received some or all of [her/his] interest under CalPERS, and benefits are payable to *[member spouse]* at the time of *[nonmember spouse's]* death, *[nonmember spouse's]* beneficiary shall receive *[nonmember spouse's]* interest directly from CalPERS. *[nonmember spouse]* shall designate a beneficiary in the Benefit Division Order to be prepared. If *[nonmember spouse's]* beneficiary is not living, then *[nonmember spouse's]* share shall be paid to *[designate beneficiary]* in accordance with Section 21493 of the Government Code.

[OR:]

For valuable consideration, namely, *[specify, e.g., in return for payment of the reduction of optional settlement interest of the nonmember]*, *[nonmember spouse]* shall designate *[member spouse]* as [her/his] beneficiary if *[nonmember spouse]* is not living at the time when benefits are payable on [her/his] behalf.

[Use to address partial retirement.]

Partial Retirement

The court reserves jurisdiction over any issues that may arise in the event that *[member spouse]* elects partial retirement for service under Government Code section 21117 et seq.

[Use to provide for a temporary annuity.]

Temporary Annuity

The court reserves jurisdiction over whether *[member spouse]* may choose a temporary annuity, in that the decision may have an impact on payment of *[nonmember spouse's]* interest and the amount of the option settlement available. If *[member spouse]* wishes to elect a certain temporary annuity, at least nine months before *[his/her]* anticipated retirement date, *[he/she]* shall request from CalPERS an estimate of the retirement allowance payable, including the temporary annuity, and the effect of the temporary annuity on that option settlement ordered for the benefit of *[nonmember spouse]*.

Suspension of Benefits on Reemployment

[Use if member will take over payments to nonmember.]

The parties understand that CalPERS includes suspension-of-benefits provisions, which may affect the retirement distributions payable under it if, after retirement and receipt of benefits has commenced, *[member spouse]* returns to work in covered employment. If a suspension of benefits should occur, *[member spouse]* shall make the same payments to *[nonmember spouse]* that would have been made by CalPERS but for the suspension. The payments shall be made from *[member spouse]* separate property funds, and shall continue until such time as payments from CalPERS are resumed. They shall be made on a net after-tax basis, and shall not be deductible by *[member spouse]*, nor income to *[nonmember spouse]*. They shall have no effect on the amount payable to *[nonmember spouse]* once *[member spouse]* returns to employment, except for the inclusion of cost-of-living increases. Further, they shall have no effect on any support obligation otherwise owing.

[OR: Use if nonparticipant will accept suspension of benefits.]

The parties understand that CalPERS includes suspension-of-benefits provisions, which may affect the retirement distributions payable under it if, after retirement and receipt of benefits has commenced, *[member spouse]* returns to work in covered employment. If a suspension of benefits should occur, the benefit payments to both parties shall be suspended. The community interest in CalPERS shall then be recalculated as necessary to take into account the effect of any additional credited service or benefit accrual, including the effect on any optional settlement for survivor benefits. The court shall reserve jurisdiction to make any orders necessary to give effect to this paragraph. If *[member spouse]* should die during the period of suspension, to the extent that the benefits are recalculated under this Paragraph, that recalculation shall identify *[nonmember spouse's]* prorated interest in any death and survivor benefits payable under the terms of CalPERS.

[OR: Use if nonmember will be given option to accept payments or suspension of benefits.]

The parties understand that CalPERS includes suspension-of-benefits provisions, which may affect the retirement distributions payable under it if, after retirement and receipt of benefits has commenced, *[member spouse]* returns to work in covered employment. If a suspension of benefits should occur, *[member spouse]* shall, at the election of *[nonmember spouse]*, make the same payments to *[nonmember spouse]* that would have been made by CalPERS but for the suspension. This election must be made, if at all, by *[nonmember spouse]* within _____ days of notice of the suspension. If elected, the payments shall be made from *[member spouse's]* separate property funds, and shall continue until such time as payments from CalPERS are resumed. The payments shall be made on a net after-tax basis, and shall not be deductible by *[member spouse]*, nor income to *[nonmember spouse]*. They shall have no effect on any support

obligation otherwise owing. If continuation of payments is elected, *[nonmember spouse]* shall not share in the value of any benefits accrued under CalPERS by reason of *[member spouse's]* return to covered service. If this election is not made and the benefit payments to both parties are suspended, then the community share under CalPERS shall be recalculated as necessary to take into account the effect of any additional credited service or benefit accrual. If *[nonmember spouse]* should die during the period of suspension, *[nonmember spouse's]* prorated share of any death or survivor benefits shall be recalculated under this paragraph. The court shall reserve jurisdiction over any death or survivor benefits that may become payable on behalf of *[nonmember spouse]* in the event of the death of either party.

[If *[member spouse]* begins employment before CalPERS has approved reinstatement from retirement, *[member spouse]* shall indemnify *[nonmember spouse]* from any loss of basic or special benefits in effect at the time of *[his/her]* retirement, and shall hold *[nonmember spouse]* harmless from the reimbursement to CalPERS for (1) any retirement allowance received by *[nonmember spouse]* during the period of *[member spouse's]* unapproved employment, (2) employee contributions that would have been submitted during the period of "unlawful" employment, plus interest; and (3) any required reimbursement to CalPERS for administrative expenses incurred in handling the situation.]

[Use if statutory optional settlement will be selected.]

Optional Settlement for Beneficiary at Retirement

In order to ensure that a benefit is payable to *[nonmember spouse]* in the event of the death of *[member spouse]* after retirement, at the time of *[his/her]* retirement, *[member spouse]* shall designate *[nonmember spouse]* as beneficiary for an Optional Settlement *[number]*.

The reduction to *[member spouse]* benefit in order to provide an Optional Settlement for *[nonmember spouse]* shall be charged against the benefit to be received by *[Husband or Wife or both parties]*.

[Include if Optional Settlement 4 is selected.]

In electing Option 4, it is intended that *[nonmember spouse's]* community property share of the benefit shall be payable under this option as a level benefit for *[her/his]* life.

[Include if the member spouse is already retired.]

The optional form of settlement chosen for *[nonmember spouse]* at the time of *[her/his]* retirement shall remain payable to *[nonmember spouse]* notwithstanding the parties' *[dissolution of marriage/legal separation]*.

[If no optional settlement will be selected, EITHER:]

At the death of *[member spouse]*, since *[nonmember spouse]* will not be entitled to a monthly allowance in *[her/his]* own right, *[nonmember spouse]* will be entitled to receive from CalPERS *[her/his]* percent of interest in any lump sum death benefit, any remaining member contribution, or any monthly allowance otherwise payable, including any survivor continuance, for as long as the benefit is payable to another beneficiary or survivor of *[member spouse]*.

[OR:]

[*Nonmember spouse*] waives any interest in the survivor benefits payable under the Plan.

[*Use to address redeposit of contributions for service credit.*]

Right to Redeposit of Contributions

[*IF parties are unsure whether there are service credits available for reinstatement based on nonmember's right to redeposit contributions previously refunded during marriage, include following two paragraphs:*]

[*Member spouse*] shall initiate an inquiry to CalPERS with respect to the available redeposit rights related to the marital period, and the cost, and shall provide [*nonmember spouse*] with that information.

The court reserves jurisdiction to assign to each party the right to redeposit all or a portion of [*member spouse's*] refunded accumulated retirement contributions when that information becomes known to the parties, and in accordance with each party's respective ability to comply with the cost of redeposit.

[*IF parties have necessary information and Nonmember will waive redeposit rights, include:*]

[*Nonmember spouse*] waives the opportunity to increase [her/his] share of [*member spouse's*] available service credit and will not share in the redeposit of refunded accumulated contributions. Any service credit restored with separate property funds of [*member spouse*] shall be [his/her] separate property.

[*IF parties have necessary information and Nonmember will exercise redeposit rights, include:*]

[*Nonmember spouse*] will receive [part or percent] of the service credit available for reinstatement based on [her/his] reimbursement to [*member spouse*] for [*member spouse's*] redeposit of accumulated retirement contributions previously refunded during the marital period. Any portion of [*nonmember spouse's*] share of accumulated retirement contributions previously refunded during the marriage not reimbursed to [*member spouse*] by [*nonmember spouse*] shall be deemed the exclusive property of [*member spouse*].

[*To address redeposits for nonmarital period made by member with community property:*]

[*Member spouse*] shall reimburse the community for any community property funds (plus interest) used to redeposit contributions that relate to service credits attributable to [*member spouse's*] employment during any period other than during marriage.

[*To address purchase of additional service credits:*]

Right to Purchase Additional Service Credits

[*IF parties are unsure whether there are service credits available for purchase attributable to covered employment*

during marital period, include following two paragraphs:]

[*Member spouse*] shall initiate an inquiry to CalPERS with respect to any additional service credits available for purchase attributable to [*member spouse's*] employment during the marital period, and the cost, and shall provide [*nonmember spouse*] with that information.

The court shall reserve jurisdiction to assign to each party the right to purchase all or a portion of the additional service credit available due to [*member spouse's*] performance of service during marriage, and in accordance with each party's respective ability to comply with the cost of purchase.

[IF parties have the necessary information and Nonmember will waive purchase rights, include:]

[*Nonmember spouse*] waives the right to purchase additional service credits that are available on account of [*member spouse's*] employment during the marital period. Any additional service credits purchased with separate-property funds of [*member spouse*] shall be [his/her] separate property.

[IF parties have necessary information and nonmember will exercise additional credit purchase rights, include:]

[*Nonmember spouse*] shall receive [Part or percent] of the service credit available for purchase due to [*member spouse's*] performance of eligible services during the marital period. [[*nonmember spouse*] will present evidence of the ability to purchase additional service credit before the entry of any order assigning this right to [her/him] so that only that portion that [*nonmember spouse*] elects to fund will be assigned to [her/him].] Any right to purchase additional service credit not explicitly awarded to [*nonmember spouse*] shall be deemed the exclusive property of [*member spouse*].

[Include if Member has Second Tier Service.]

Upgrade of Second Tier Credits

Each party shall have equal opportunity to upgrade that party's share of the community service from Second Tier to First Tier, if the member is eligible for that election. The court reserves jurisdiction to adjust the community interest of the parties in the event that the member elects to upgrade service credits from Second Tier to First Tier and that upgrade is the product of contributions made disproportionately by the parties with respect to upgrading the service credits accumulated during the marital years.

[End of provisions limited to shared interest method of division.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral OverviewPensions & Benefits LawGovernmental EmployeesGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
 CHAPTER 122 PROVISIONS FOR DIVISION OF EMPLOYEE BENEFITS
 PART IV. FORMS
 C. State Employee Benefit Plans

34-122 California Legal Forms--Transaction Guide § 122.241

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.241 State Teachers Retirement System (CalSTRS)

[1] Comment

[a] Use of Form

The form in [2], *below*, is for use to divide a community interest in benefits under the California State Teachers' Retirement System (CalSTRS). CalSTRS is administered by the CalSTRS Teachers' Retirement Board under The Teachers' Retirement Law [*Educ. Code § 22000*].

On written or voicemail request, CalSTRS will provide booklets, models, and Instructions for Completion of Domestic Relations Orders. They may also be obtained directly from CalSTRS website (www.CalSTRS.ca.gov). With an authorization signed by the member or a subpoena, CalSTRS will provide information specific to the member's account. The CalSTRS mailing address is P.O. 15275, Sacramento, CA 95851-0275; telephone: 1-800-228-5453; Telecommunications for Hearing Impaired 916-229-3541.

Each member receives an annual retirement statement from CalSTRS. Information about salary, accrued sick leave, unused educational leave, and vacation pay may be obtained from the employing public entity. The Practice Tip in § 122.240[1][f], *above*, also should be referred to in this case. For discussion of other retirement plans as the source of funds for the redeposit of contributions for service credit, see [j], *below*.

[b] CalSTRS Plans and Programs

The California State Teachers' Retirement System (CalSTRS) administers a retirement plan consisting of the Defined Benefit Program and the Cash Balance Benefit Program [*see Educ. Code § 26000 et seq.*]. The Cash Balance Benefit Program is for persons who perform creditable service for less than 50 percent of the full-time equivalent for the position. A merger of these two programs in 1999 established a single retirement plan known as the State Teachers Retirement Plan [*Educ. Code § 22001.5*].

The Defined Benefit Program is financed by employee and employer contributions of a statutory percent of the member's creditable compensation [see *Educ. Code* §§ 22901, 22950]. Twenty-five percent of each member's contributions are credited to the member's Defined Benefit Supplement Account [*Educ. Code* § 22901.5].

The Defined Benefit Program provides a member with an annual allowance, payable in monthly installments on retirement, equal at normal retirement age (60) to 2 percent of final compensation for each year of credited service. If the member retires at less than normal retirement age (i.e., between early retirement age [55] [see *Educ. Code* § 22128 (early retirement age)] and normal retirement age [60] [see *Educ. Code* § 22148 (normal retirement age)]], the allowance is reduced [see *Educ. Code* § 24202(a)(1)].

A member with 30 years of credited service may retire as early as age 50 and receive the same 2 percent of final compensation for each year of credited service [see *Educ. Code* § 24203; see also *Educ. Code* §§ 24203.5, 24303.6 (career bonuses for members with 30 or more years of credited service)]. If the member also had accumulated annuity deposit contributions, the member will also receive an annuity that is the actuarial equivalent of the accumulated annuity deposit contributions standing to the credit of the member's account at the time of retirement [*Educ. Code* § 24202(a)(2)]. Annuity deposit contributions are additional contributions made by a member before July 1, 1972 above those required for credited service, for the purpose of providing additional retirement income [*Educ. Code* § 22106]. Additionally, a vested member, other than a retired member, may request to purchase up to five years of credit for nonqualified service (that is, for time during which creditable service is not performed) [*Educ. Code* § 22826].

Legislation effective January 1, 2001, established the Defined Benefit Supplement Program (DBSP), by which members who retire, become disabled, or die under the Defined Benefit Program are entitled to an additional lump sum or annuity [see *Educ. Code* § 25009 *et seq.* (Stats. 2000, ch. 74 (AB 1509, amending and renumbering *Ed. Code* § 25000 *et seq.*))].

Twenty-five percent of each member's contributions to the Teachers' Retirement Fund--to be allocated to the Defined Benefit Supplement Program with a guaranteed interest rate. Additional contributions credited may include contributions for summer school, overtime, money paid for service in excess of one year of service credit, and other services not counted under the Defined Benefit Program [*Educ. Code* § 22119.2(b)]. This allocation to the DBSP does not affect the benefit payable under the Defined Benefit Program [see *Educ. Code* §§ 22905, 22119.2(b)]. The court may order a separated account under the Defined Benefit Supplemental Program, as well as under the Defined Benefit Program [*Educ. Code* § 22652]. A member's beneficiary designation for benefits payable under the Defined Benefit Program, including a designation made under *Educ. Code* § 24300, also applies to benefits payable under the Defined Benefit Supplement Program. Be aware when designing the community interest formula, that the benefit payable under DBSP is based on the balance of credits in a member's DBSP account, not on service credits [*Educ. Code* §§ 25000 *et seq.*, 22122.7, 22166.5, 22901.5 *et seq.*]. If the member designates multiple annuity beneficiaries under the DBSP, the member must specify the percentage of the annuity payable to each annuity beneficiary on the death of the member. If the member's death occurs before an annuity under the DBSP becomes payable, the final benefit must be an amount equal to the balance of credits in the member's DBSP account on the date of the member's death. Note that *Educ. Code* § 25021 allows a beneficiary, other than an entity, to elect an annuity [*Educ. Code* §§ 23300, 25015, 25020].

The Replacement Benefits Program [see *Educ. Code* § 22164] was established to provide a fund to hold that portion of employer contributions appropriated to pay to members or their beneficiaries that portion of the annual benefit otherwise payable to the member that exceeds the limitations on the dollar amount of annual benefit payable to that member from the Teachers' Retirement Fund under *I.R.C.* § 415 [see *Educ. Code* § 24250 *et seq.*]. Further, no member contributions are paid on any compensation in excess of the annual compensation limitations prescribed by *I.R.C.* § 401(a)(17) [*Educ. Code* § 22317.5].

The Board may develop one or more deferred compensation plans under *I.R.C.* § 457 that an employer may choose to establish and offer to its employees who are members or participants of the Defined Benefit Program or the Cash

Balance Program [*Educ. Code* § 24975]. In addition, CalSTRS offers members of the Defined Benefit Program and the Cash Balance Benefit Program a 403(b) deferred compensation retirement savings plan called the Voluntary Investment Program (VIP), similar to 401(k) plans available to workers in private industry [*Educ. Code* § 24950].

PRACTICE TIP:

The Defined Benefit Program, Defined Benefit Supplement Program, and Cash Balance account division should be set forth separately in one order addressed to the State Teacher's Retirement System. The 457 and 401(k) plans should be set forth separately in one order addressed to 457 and 401(k) Thrift Plans, State of California Department of Personnel Administration 1800 -15th Street, Sacramento, CA 95814 (telephone: (916) 445 9814). For 403(b) plans counsel will likely need a separate order, as these are usually offered through employers. *Commentary by Ann Fallon.*

[c] Joinder Required

No judgment or court order is binding on CalSTRS until the plan has been joined as a party to the action and has been served with a certified copy of the judgment or court order [*Educ. Code* § 22656].

[d] Division of Community Interest; Separate Account or Shared Interest

In a dissolution of marriage, the court may make whatever orders are necessary or appropriate to ensure that each party receives his or her full community property share in any benefits under CalSTRS [*Fam. Code* § 2610(a); *see Educ. Code* § 22650 *et seq.*]. The nonmember spouse may receive his or her community interest in one of two ways. First, there is the separate account. If the nonmember agrees, the court may order that the accumulated retirement contributions and service credits attributable to periods of service during marriage be divided into two separate and distinct accounts in the name of the member and nonmember spouses [*Educ. Code* § 22652(b); *Fam. Code* § 2610(a)(3)(B)]. A separate account is not available to the nonmember spouse if the member has already retired [*see Educ. Code* § 22655].

The alternative is the traditional "shared interest" approach, which calculates a fractional interest in the member's final benefit at the time of the member's retirement, usually with an option for a survivor benefit. The Education Code limits the interest of a nonmember spouse to a shared interest in the case of a member who is already retired at the time of dissolution [*see Educ. Code* § 22655]. CalSTRS also recognizes the right of a nonmember to a shared interest if the member has not already retired. CalSTRS considers that *Fam. Code* § 2610(a), which requires that each party receive his or her full community property share in any retirement plan, public or private, as authority for the right of the nonmember spouse to elect a shared interest in all cases to provide for the separate account as an additional alternative for parties involved in a dissolution or legal separation action [*see Community Property Information Brochure*, published by STRS November 1990, discussing effect of amendments to former *Civ. Code* § 4800.8 (now *Fam. Code* § 2610)]. STRS states in that brochure: "The recent amendments to the Civil Code did not change previous community property law affecting STRS, but did provide an additional alternative to parties involved in a dissolution or legal separation action." Because of the disadvantages of the separate account [*see [e][i], below*], it cannot be said that a separate account guarantees that the nonmember will receive his or her full community property interest [*see Fam. Code* § 2610(a)(3) (separate account cannot be ordered without consent of nonemployee spouse)].

[e] Considerations Under Separate Account

[i] Disadvantages and Advantages

The separate account has features that might have made that approach an excellent choice for all former spouses. For example, if minimum service credit requirements have been met, the separate account method allows a nonmember to commence receipt of a retirement allowance based on the awarded service credits when the nonmember reaches age 55, regardless of the member's actual retirement date or death (although the member's receipt of a disability allowance may

cause a delay) [*Educ. Code* § 22664(a); *see Educ. Code* §§ 22664(e), 22666 (legislative intent indicates that separate account was established to abolish any remaining application of terminable interest doctrine in California relating to division of public retirement benefits of member in the event of dissolution of marriage or death)].

However, the election of a separate account is rarely advisable. The great disadvantage is that the nonmember's service retirement allowance must be calculated using the member's compensation at the parties' date of separation [*Educ. Code* § 22664(c)(5)], rather than the member's actual final compensation on retirement [*see Educ. Code* § 22134].

Nevertheless, there may be times when the separate account is advantageous. For example, if the parties separate when the member is near retirement, the final compensation factor may not be significantly different under the separate account than under the shared interest. Further, the separate account may be advantageous if the member dies before retirement without a designated survivor option [*see* [f][v], *below*]. With a separate account, the member's preretirement death has no effect on the rights of the nonmember. In contrast, under the shared interest, there is a preretirement survivor option that may be elected once the member reaches earliest retirement age [*see Educ. Code* § 24307, discussed at [f][v], *below*].

But if the member has not reached earliest retirement age, or if no preretirement survivor option has been selected, no preretirement survivor benefit is payable to a former spouse. The only benefits payable would be a court-ordered share of a modest death benefit [*see Educ. Code* §§ 23300, 23801, 23851, 23880], or a court-ordered "resulting trust" share of any family allowance or survivor allowance, depending on which disability and death benefit coverage was in effect for the member [*see Educ. Code* §§ 22133, 23800, 23804, 23850; *In re Marriage of Carnall* (1989) 216 Cal. App. 3d 1010, 265 Cal. Rptr. 271]. If there is no eligible survivor to trigger the family allowance or survivor allowance (a former spouse is not an eligible survivor for these benefits) then the remaining contributions in the member's account will be paid to the Member's beneficiary [*see Educ. Code* § 23300; *see also* Member Handbook, Chapter VII: Benefits for Survivors].

PRACTICE TIP:

Notwithstanding that a nonmember has a court order for a shared interest, CalSTRS has a policy that allows a nonmember to obtain an order for a separate account after the death of the member. The nonmember would want a separate account if it were more valuable than a mere share of the employee contributions in the account. Check with CalSTRS before assuming that this policy will be available in the future; and put a provision into your order that acknowledges this policy. *Commentary by Ann Fallon.*

The member is neither advantaged nor disadvantaged by the nonmember's choice of a separate account because the value of the service credits awarded to the nonmember remains unavailable to the member. Any savings to CalSTRS based on the reduced value of the retirement allowance payable to the nonmember spouse under a separate account remains with CalSTRS and does not inure to the benefit of the member.

[ii] Nonmember's Right to Designate Beneficiary

Under CalSTRS, a nonmember spouse who is awarded a separate account has the right to designate a beneficiary to receive the nonmember's accumulated retirement contributions under the Defined Benefit Program on the death of the nonmember. The nonmember may also designate a payee to receive any accrued allowance under the Defined Benefit Program attributable to the separate account that is unpaid on the death of nonmember, as well as the accumulated Defined Benefit Supplement account balance under the Defined Benefit Supplement Program remaining in the separate account of the nonmember on the date of the nonmember's death [*Educ. Code* §§ 25022.5, 22660(a); *see Educ. Code* §§ 23300-23304]. However, the nonmember with a separate account is not permitted to elect an option that would provide an actuarially modified retirement allowance payable throughout the life of the nonmember and a designated option beneficiary [*Educ. Code* §§ 25011(c), 22660(b); *see Educ. Code* § 24300; [f][iv], *below* (options for member and

designated beneficiary)).

[f] Considerations Under Shared Interest

[i] Time-Rule Formula

Under the shared interest approach, the community interest is defined as a portion of the member's unmodified service retirement at the time of the member's retirement. The portion is measured by a fraction, the numerator of which is the years of credited service during the marriage to the date of separation; and the denominator of which is the total years of credited service on which the member's final service is based.

The unmodified allowance is the monthly benefit that the member would receive if he or she retires without electing an option for a survivor [see *Educ. Code* § 24300; [iv], *below* (survivor options)]. The member's maximum service retirement benefit is the unmodified allowance calculated as the product of years of credited service, age and final compensation.

Under *Fam. Code* § 2610, the nonmember spouse is entitled to his or her full community property share in any survivor and death benefits. But with respect to the community fraction, even if there will be a survivor option selected for the former spouse, the community share is stated as a percentage of the unmodified allowance to avoid reductions for any options being provided to other beneficiaries. If an option will be provided for the nonmember, separate provisions should be made in the court order as to which party will bear the reduction for the nonmember's option benefit [see [iv], *below*].

[ii] Enhanced Early Retirement

Certificated or academic employees may receive two years of imputed service credit to encourage early retirement if the governing board of a school district or a community college district or a county office of education by formal action determines that the best interest of the school district or county would be served. The employer pays for the actuarial increase. The imputed service credit is forfeited if the member reinstates employment [see *Educ. Code* § 22714; see also *Educ. Code* 22715 (early retirement enhancement for state employees covered by CalSTRS)]. There is also a right to receive partial allowance on early retirement and revert to full allowance for normal retirement age unless the member has applied for a service retirement pending a determination of his or her application for disability [see *Educ. Code* § 24205; see also *Educ. Code* § 24201.5 (service retirement pending determination of application for disability)].

Note that under *In re Marriage of Lehman*, the California Supreme Court held that a nonemployee spouse has a community property interest in any enhancement of retirement benefits attributable to the employee spouse in which the community otherwise has an interest [*In re Marriage of Lehman* (1998) 18 Cal. 4th 169, 179-180, 74 Cal. Rptr. 2d 825, 955 P.2d 451] . Under the *Lehman* analysis, the years of imputed service should not be added to the denominator of the community fraction to benefit the separate property of the member at the expense of the community [*In re Marriage of Lehman* (1998) 18 Cal. 4th 169, 186-188, 74 Cal. Rptr. 2d 825, 955 P.2d 451] .

PRACTICE TIP:

Service credits which are gained by redepositing previously refunded contributions or contributions used to purchase eligible service credits would appear in the timerule fraction in the numerator and/or denominator, depending upon whether these service credits were attributed to community or separate property, and further depending on which spouse had funded the contributions to establish the additional service credit. *Commentary by Ann Fallon.*

[iii] Accumulated Unused Leave

[A] Unused Sick Leave

A member is granted credit at service retirement for each day of accumulated and unused leave of absence for illness or injury for which full salary is allowed to which the member was entitled on the member's final day of employment with the employer by which the member was last employed to perform creditable service subject to coverage by the Defined Benefit Program [*Educ. Code § 22717(a)*; see *Educ. Code § 22156.1* (present value of unused excess sick leave days)]. The amount of service credit to be granted is determined by dividing the number of days of accumulated and unused leave of absence for illness or injury by the number of days of service the employer requires the member's class of employees to perform in a school year during the member's final year of creditable service subject to coverage by the Defined Benefit Program. The number of days does not include school and legal holidays [*Educ. Code § 22717(b)*; see *Educ. Code § 22724* (determination of excess sick leave days at retirement)]. When the member applies for service retirement, the employer must certify to the board, within 30 days following the effective date of the member's service retirement, the number of days of accumulated and unused leave of absence for illness or injury that the member was entitled to on the final day of employment. The board may assess a penalty on delinquent reports [*Educ. Code § 22717(c)*].

[B] Unused Educational Leave of Absence

An eligible member must receive service credits at retirement for each day of accumulated and unused leave of absence for education for which full salary is allowed. The amount of service credit to be granted is 0.004 years of service for each unused day of educational leave credit [*Educ. Code § 22717.5*].

PRACTICE TIP:

Information as to the unused days of accumulated sick leave and unused educational leave during the marital period should be sought from the employer, not from the retirement system. *Commentary by Ann Fallon.*

[iv] Retirement Options for Beneficiaries

Before retirement, a member may elect an option that will provide an actuarially modified retirement allowance payable throughout the life of the member and the member's option beneficiary [*Educ. Code §§ 24300(a), 24300.1(a)*]. Choice of an option will reduce the member's monthly allowance, depending on the option chosen and the age of the beneficiary. CalSTRS offers seven options (Option 2 through 8) as set forth in *Educ. Code § 24300*, plus four further options set forth in *Educ. Code § 24300.1*. None of the options provide survivor benefits should the member die before retirement [*but see [v], below* (preretirement option may be elected at earliest retirement age)]. If the option beneficiary predeceases the member, the member may elect a new option or option beneficiary [*Educ. Code § 24306(a)*].

Option 8 under *Educ. Code § 24300* and the "Compound Option" under *Educ. Code § 24300.1* are the only options that have been designed to allow the member to name two or more option beneficiaries [*see Educ. Code §§ 24300(a)(7)(A), 24300.1(a)(4)*]. These options allow a member to "tailor" a former spouse's survivor option to the exact percentage of that former spouse's time rule share. For example, there is no other option that will allow an odd "23 percent" of the benefit to continue as a level benefit under a survivor option for the nonemployee after the death of the member. By permitting this precise tailoring, these options allow a subsequent spouse or other beneficiary of the member to receive an option independent of the option awarded the former spouse.

Although Option 8 generally requires the designation of multiple beneficiaries [*see Educ. Code § 24300(a)(7)(A)*] it does permit the designation of a single beneficiary under limited circumstances. If the member is a party to an action for legal separation or dissolution of marriage, and he or she is required by court order to designate a spouse or former spouse as an option beneficiary, the member may designate that person as a sole beneficiary under Option 8. In such a case, the member must specify the option selected for the spouse or former spouse and the percentage of his or her unmodified allowance to be modified under the option, consistent with the court order. The percentage of the member's

unmodified allowance that is not modified under the option will remain an unmodified allowance payable to the member [*Educ. Code § 24300(a)(7)(C)*]. Therefore, if the member has no subsequent spouse or desired second beneficiary, but wishes to use Option 8 to tailor the former spouse's option interest to the time rule apportionment, the marital settlement agreement and accompanying order should direct that the member designate the former spouse as an option beneficiary.

A member's allowance must be reduced to provide funding for the survivor option, which is payable over the lifetime of the beneficiary following the member's death. The amount of the reduction is a function of the member's age and the age of the option beneficiary.

PRACTICE TIP:

When an option will be elected for the nonmember, how is an equal division of the community share of the benefit derived? There are two generally practiced approaches. *Assigning the Cost of the Survivor Option:* To effect an equal division under the "cost" analysis, the reduction for the former spouse's share of the option should be charged to the former spouse's share of the allowance. *Assign the Value of the Benefit:* An alternative method to achieve equal division is to assign the actuarial value of the survivor benefit to the nonmember, and offset that value against the nonmember's share of the community portion so that the nonmember takes less than 50 percent of the community share while the member is alive, and enjoys the survivor benefit when the member is no longer alive. *Commentary by Ann Fallon.*

There may be spousal support or other considerations that would obligate the member to pay a portion or all of the allowance reduction for the option. For example, the former spouse may have agreed to name the member as the former spouse's beneficiary. Actuarial assistance should be sought if measuring the value of such a trade-off.

If a married member has previously selected an option for his or her spouse, the option may be canceled if the marriage is dissolved before the member retires [*Educ. Code § 24305(a)*]. On notification to the board, the retired member may elect (1) to receive the unmodified retirement allowance from the date of receipt of the notification; or (2) a new joint and survivor option and may designate a new option beneficiary. However, election of a new joint and survivor option or the designation of a new option beneficiary must be consistent with the final decree of dissolution [*Educ. Code § 24305(c)*]. Therefore, the nonmember's spouse's community interest must be protected in the court order.

If the dissolution occurs after the member retires, and the retired member is receiving an allowance that has been actuarially modified [*see Educ. Code §§ 24300, 24300.1*], or a joint and survivor annuity [*see Educ. Code §§ 25011, 25011.1, 25018, 25018.1*], the court must order only one of the following:

- (1) That the retired member maintain the retirement allowance or joint and survivor annuity, or both, without change.
- (2) That the retired member cancel the option that modified the retirement allowance and elect a new joint and survivor option or designate a new beneficiary, or both. In such a case, CalSTRS must pay the nonmember spouse his or her community-property share of the retirement allowance payable to the retired member, the option beneficiary, or both.
- (3) That the retired member cancel the joint and survivor annuity under which the retirement benefit is being paid, and elect a new joint and survivor annuity or designate a new annuity beneficiary or both, based on the actuarial equivalent of the member's canceled annuity. In such a case, CalSTRS will pay the nonmember spouse his or her community-property share of the retirement benefit payable to the retired member, the annuity beneficiary, or both.
- (4) That the retired member take the action specified in both paragraphs (2) and (3).

(5) That the retired member cancel the option that modified the retirement allowance and elect an unmodified retirement allowance. In such a case, CalSTRS will pay the nonmember spouse his or her community-property share of the retired member's retirement allowance.

(6) That the retired member cancel the joint and survivor annuity under which the retirement benefit is being paid, and elect a single life annuity. In such a case, CalSTRS will pay the nonmember spouse his or her community property share of the retirement benefit payable to the retired member.

(7) That the retired member take the action specified in both paragraphs (5) and (6).

[v] Preretirement Options

A member who qualifies to apply for retirement may make a preretirement election of an option [see [iv], above] generally without right of revocation or change after the effective date of retirement [Educ. Code § 24307(a); see Educ. Code §§ 24201, 24203 (qualification for application)]. However, if the member is already retired at the time of dissolution, the member may change his or her original option, unless a court order is in effect directing that option for the former spouse [see Educ. Code §§ 22655(c), 24305].

Without the protection of an option in the preretirement period, the former spouse is not assured of receiving an allowance if the member dies before retirement. The member is not disadvantaged by electing a preretirement option for a spouse or former spouse because the age 55 option reduction factors are more favorable than those at age 60. If the member elects a preretirement option at the member's age 55, the reduction for the option will remain the same, even when the member reelects the same option for the same beneficiary at the member's retirement [see Educ. Code § 24307.5]. In other words, modification of the service retirement allowance under the option elected is based on the ages of the member and the beneficiary designated under the option at the age the original election was made [see Educ. Code § 24307(e)].

A member who makes a preretirement option election for a former spouse may subsequently make a second preretirement option election under the umbrella of the Compound Option under Educ. Code § 24300.1(a)(4). The member's effecting dual option coverage under the Compound Option allows the member to retain the same option and the same option beneficiary as named in the prior preretirement election [Educ. Code § 24307(b)].

If the member dies before retiring, each designated option beneficiary will receive an allowance calculated under the specific option chosen for that person under the Compound Option. The option benefit will be calculated under the assumption that the member retired from service on the date of death [Educ. Code § 24307(c)].

The member may cancel a preretirement option at any time before retirement [Educ. Code § 24309(a)]. If the designated option beneficiary predeceases the member before the member's retirement, the option is automatically canceled [Educ. Code § 24309(b)]. A canceled preretirement option may be subsequently reelected before retirement [Educ. Code § 24310].

A member who has selected Option 8 [see Educ. Code § 24300(a)(7)] or the Compound Option [see Educ. Code § 24300.1(a)(4)] may cancel the designation of an option beneficiary. If the member cancels the designation of an option beneficiary, or an option beneficiary predeceases the member prior to the member's retirement, the member may elect to receive that portion of the retirement allowance without modification for the option or elect one or multiple new or existing option beneficiaries [Educ. Code § 24309(c); see Educ. Code § 24307]. A change or cancellation of the option beneficiary will result in a reduction of the retirement allowance [Educ. Code § 24309(c)].

[vi] Death of Nonmember

Under the principles of California family law, the nonmember's right to designate a beneficiary for his or her community portion of a shared interest is guided by cases indicating this is possible under a resulting trust arrangement. The right to make this designation may well require a court order [see *In re Marriage of Powers* (1990) 218 Cal. App. 3d 626, 640-641, 267 Cal. Rptr. 350 ; *In re Marriage of Carnall* (1989) 216 Cal. App. 3d 1010, 265 Cal. Rptr. 271] .

With regard to a member who has already retired at the time of dissolution, the Teacher's Retirement Law provides that the right of the nonmember spouse to receive his or her community property share of the retirement allowance or retirement benefit or both terminates on the death of the nonmember spouse. However, the nonmember spouse may designate a beneficiary under the Defined Benefit Program and a payee under the Defined Benefit Supplement Program to receive his or her community property share of the retired member's accumulated retirement contributions and accumulated Defined Benefit Supplement account balance if there are any remaining accumulated retirement contributions and any remaining balance of credits in the member's Defined Benefit Supplement account to be paid on the death of the nonmember spouse [Educ. Code § 22655(e)].

[vii] Suspension of Benefits on Reemployment

A retired member may reinstate to covered employment, in which case his or her service retirement allowance is terminated [Educ. Code § 22163; see Educ. Code § 24208 (termination of retirement allowance)]. Termination of the service retirement allowance does not cancel any survivor option elected. The option remains in effect unchanged and is reapplied to the allowance payable on the subsequent service retirement [Educ. Code § 24303; see Educ. Code §§ 24300, 24300.1 (survivor options, discussed at [iv], *above*)]. Further, any survivor option elected and in effect at the time of reinstatement is considered to be a preretirement election of an option elected as of the effective date of that retirement [Educ. Code § 24302; see Educ. Code § 24307 (preretirement survivor options, discussed at [v], *above*)].

The parties may wish to determine or reserve the issue of whether, on reinstatement the former spouse's interest, will continue to be paid by the member out of pocket under the principles of *Marriage of Gillmore*, or whether the former spouse's interest will also be suspended with the expectation that the community fraction will be applied to the new higher benefit which results from the reemployment [see *In re Marriage of Gillmore* (1981) 29 Cal. 3d 418, 174 Cal. Rptr. 493, 629 P.2d 1 ; see also § 122.220[1][g][i]].

[g] Refund of Contributions

On the termination of a member's employment by any cause other than death, disability, or retirement, the member may elect to be paid his or her accumulated retirement contributions and an amount equal to the balance of credits in his or her Defined Benefit Supplement account [Educ. Code § 23100(a)]. On receiving the refund of contributions, all rights to benefits pertaining to the service credit represented by those contributions are forfeited. Those rights and benefits, based on service performed before the refund, can be restored by redeposit [Educ. Code § 23101; see [h], *below*].

A nonmember spouse who has elected a separate account has the right to a refund of accumulated retirement contributions in the account under the Defined Benefit Program and the lump-sum payment of an amount equal to the balance of credits in the member's Defined Benefit Supplement account that were awarded to the nonmember [Educ. Code §§ 22652(c)(2), 22661(a)]. If the total service credit in the nonmember's separate account is less than two and one-half years, the refund of contributions is mandatory [Educ. Code § 22661(h)].

By taking a refund under a separate account, the nonmember is deemed to have permanently waived all rights and benefits pertaining to the service credit, accumulated retirement contributions, and the accumulated Defined Benefit Supplement account balance when the refund and lump-sum payment become effective [Educ. Code § 22661(e)]. The election to take a refund of contributions is irrevocable once it is effective [Educ. Code § 22661(f); see Educ. Code § 22661(c) (when refund is effective)]. It is possible to rollover eligible funds by a direct trustee-to-trustee transfer to an

IRA or another qualified plan if applicable [*Educ. Code* § 22661(d)].

After the refund under a separate account is effective, the nonmember spouse will have no right (1) to elect to redeposit the refunded accumulated retirement contributions from the nonmember's separate account, (2) to redeposit contributions previously refunded to the member based on service during the marriage, or (3) to purchase additional service credit based on service during the marriage [*Educ. Code* § 22661(g); *see Educ. Code* §§ 22662, 22663]. If the nonmember withdraws accumulated contributions, the member may elect to buy back the service credits awarded the nonmember by redepositing a sum equal to those contributions [*Educ. Code* § 23200(b)]. This election may be made any time before the effective date of the member's retirement [*Educ. Code* § 23202(a)].

[h] Redeposit of Previously Refunded Contributions

If a former member whose accumulated retirement contributions were refunded is rehired and again becomes a member of the Defined Benefit Program, the person may regain forfeited service credits by electing to redeposit those contributions with regular interest from the date of refund to the date of payment. The person may elect to regain some or all of the forfeited service credits by redepositing all or a portion of those contributions [*Educ. Code* § 23200]. Before 2001, only a redeposit of all previously refunded contributions was possible. For discussion of other retirement plans as possible sources of funding for the redeposit of previously refunded contributions, see [j], *below*.

An election to redeposit accumulated retirement contributions may be made by a member any time before retirement [*Educ. Code* § 23202(a)]. If any payment is not received within 120 days of its due date, the election is canceled and any payments that have been made can be returned [*Educ. Code* § 23202(c)]. If the election is canceled, the member may at any time before the effective date of retirement again elect to redeposit accumulated retirement contributions previously withdrawn or returned [*Educ. Code* § 23202(d); *cf. Educ. Code* § 22662(d), discussed *below* (nonmember loses right to redeposit if election is canceled)].

A nonmember spouse who is awarded a separate account under the Defined Benefit Program, and who has not elected a refund of contributions in that account, may redeposit accumulated retirement contributions previously refunded to the member in accordance with the determination of the court [*Educ. Code* §§ 22652(c)(3), 22662]. The nonmember spouse may redeposit only those accumulated retirement contributions that were previously refunded to the member and in which the court has determined the nonmember spouse has a community property interest [*Educ. Code* § 22662(a)].

To redeposit, the nonmember must repay all or a portion of the member's refunded accumulated retirement contributions that were awarded to the nonmember along with regular interest from the date of the refund to the date payment of the redeposit is completed [*Educ. Code* § 22662(c)]. Note that it is now possible to elect to redeposit only some of the previously refunded contributions. Before 2001, only a redeposit of all previously refunded contributions was possible.

The difficulty is that under current law, the nonmember spouse is under strict deadlines. The nonmember spouse must inform CalSTRS in writing of his or her intent to redeposit within 180 days after the judgment or court order that specifies the redeposit rights of the nonmember spouse is entered. The nonmember spouse's election to redeposit must be made within 30 days after CalSTRS mails an election form and the billing [*Educ. Code* § 22662(b)]. Redeposit may be made in one sum or in up to 120 monthly installments, not to exceed 10 years, so long as no installment except the final one is less than \$25 [*Educ. Code* §§ 22662(e), 23203(c)]. All payments must have been received before the nonmember's retirement [*Educ. Code* § 22662(d)].

The member does not have a right to redeposit the share of previously refunded accumulated retirement contributions awarded to the nonmember, whether or not the nonmember spouse elects to redeposit. However, any accumulated retirement contributions previously refunded and not explicitly awarded to the nonmember spouse by the judgment or court order are deemed the exclusive property of the member [*Educ. Code* § 22662(f)].

PRACTICE TIP:

It would be prudent to find out before the judgment is entered whether the member is eligible for any redeposit so each party has an opportunity to realistically assess whether he or she can afford the redeposit, particularly if retirement is not imminent. Ask CalSTRS to confirm the redeposit opportunities associated with the marital period and the amount of contributions that must be redeposited. At any rate, be careful not to use language such as "equally divide" or "one-half of," which might predetermine the issue, until the parties have had a chance to decide how much each can afford. For potential sources of funding by roll over from other plans, see [j], *below*. *Commentary by Ann Fallon.*

PRACTICE TIP:

If a nonmember has elected a separate account, in weighing whether to redeposit contributions for additional service credits, remember the salary component of the allowance calculation is frozen at the date of dissolution of marriage. Weigh the cost of the service credits against the benefit under this restriction. *Commentary by Ann Fallon.*

[i] Purchase of Additional Service Credit

A CalSTRS member may purchase additional service credit for periods when he or she was in the military or was previously excluded from membership, or was performing other specified services not otherwise made creditable [see *Educ. Code § 22800 et seq.*]. A court order must recognize the right of the nonmember spouse under a separate account to purchase his or her community interest in the additional service credit that the member is eligible to purchase, and must specify the shares of the additional service credit awarded to the member and the nonmember spouse [*Educ. Code §§ 22652(c)(4), 22663(a)*]. Purchase is not available if the nonmember has elected a refund of contributions from his or her separate account [*Educ. Code § 22663(d)*; see [g], *above*]. The member has no right to purchase the community interest of the nonmember [*Educ. Code § 22663(e)*].

Purchase requires depositing the contributions plus interest that would have been in the system had the service credits been awarded when earned [*Educ. Code § 22663(c)*]. First, there must be a court order awarding the nonmember a portion of the potential service credits related to the marital period. The court order should then be presented to STRS. The nonmember spouse must inform CalSTRS in writing of his or her intent to redeposit within 180 days after the judgment or court order that specifies the purchase rights of the nonmember spouse is entered. The nonmember spouse's election to purchase must be made within 30 days after CalSTRS mails an election form and the billing [*Educ. Code § 22663(b)*]. Payment may be made in one sum or in up to 120 monthly installments, but no installment except the final one may be less than \$25 [*Educ. Code § 22663(c)(1)(A)*]. For discussion of possible sources of funds from other retirement plans to purchase additional service credit, see [j], *below*.

PRACTICE TIP:

Be cautious about reserving this issue because an order failing to define the nonmember spouse's entitlement may be treated as a forfeiture. It is not clear whether specifically reserving the issue without stating how much of the potential community service credit purchase is awarded to the former spouse will preserve that right under the statute. If it is necessary to reserve the issue, unless you know that the nonmember spouse has the funds and is willing to purchase one-half of the community's potential credits, do not state that the former spouse is entitled to one-half of any available service credit subject to repurchase. This caution is based on current law, by which any additional service credit eligible for purchase that is not explicitly awarded to the nonmember spouse by the judgment or court order shall be deemed the exclusive property of the member, and at the same time the member loses the right to repurchase any additional service credit awarded the nonmember spouse whether or not the nonmember spouse elects to purchase the additional service credit [*Educ. Code § 22663(e)*]. *Commentary by Ann Fallon.*

PRACTICE TIP:

If a nonmember has elected a separate account, in weighing whether to purchase additional service credits, remember the salary component of the allowance calculation is frozen at the date of dissolution of marriage. Weigh the cost of the service credits against the benefit under this restriction. *Commentary by Ann Fallon.*

[j] Consideration of Rollover Rights

The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) [Pub. L. No. 107-16] enacted federal statutory changes to improve the portability of funds by allowing direct trustee-to-trustee rollovers among different types of retirement plans, as discussed in § 122.240[1][j]. Check with CalSTRS for application of the tax rules to a member or nonmember who rolls over funds from different types of retirement plans to the CalSTRS System [see Stats. 2001, ch. 803 (amending Education Code to authorize rollovers for these purposes)].

[2] FORM

State Teachers Retirement System (CalSTRS)

Disposition of Benefits in CalSTRS

A community property interest exists in [member spouse's] accrued benefits under the CalSTRS Defined Benefit Program (DBP) [and the CalSTRS Defined Benefit Supplement Program (DBSP)] based on [his/her] employment during the marriage for _____. [name of employer]. For privacy considerations, [member spouse's] Member's Identification Number and each party's social security number and date of birth will not be included in this Agreement but will be referenced on the letter transmitting this Agreement to the Plan. _____ [Member spouse's] date of hire for this employment was _____. [Member spouse] is covered under Survivor Benefit and Disability Program [A or B]. CalSTRS employment is not covered employment under FICA for purposes of eligibility for federal Social Security benefits. The date of marriage is _____, and the date of separation is _____.

[Include if the member has other employee benefits plans:]

In addition to the CalSTRS DBP [and DBSP], [member spouse] has participated in the following plans during marriage: [specify other plans].

A claim of interest under *Family Code sections 751 and 1100* and Joinder of Plan [has been/will be] filed with respect to each plan in which it has been determined that the community has an interest based on the employment of [member spouse] during marriage. The entitlement of the parties under every plan in which [member spouse] has accrued service credit during the marriage will be committed to orders setting forth the rights and entitlement of each party in each plan as described in this Agreement. The orders will be filed with the court, and served on the plan.

Warranties

[Except as listed above,] Each party warrants to the other that he or she is not covered by or entitled to any benefit under an employee benefit plan that is attributable in any way to service with an employer during the marriage and before the date of separation, nor does he or she have any expectation of becoming so covered. Each further warrants that if he or she becomes covered under an amendment to an existing employee benefit plan, that may provide benefits based partly or wholly on service rendered during marriage and before the date of separation, that party shall immediately notify the other and provide a copy of the plan if reasonably available. The court shall retain jurisdiction to make any further orders as may be necessary to divide the community interest, if any, in these benefits. [Each party further warrants that

he or she has provided to the other a complete, current, and accurate disclosure and accounting of the following with respect to each listed plan: (1) if known, the current value of all benefits accrued (not solely employee contributions); (2) "window" elections that have been made or that are currently available; (3) beneficiary designations; (4) any opportunity to purchase service credit or redeposit previously refunded contributions related to the marital period, (5) any community funds used to purchase service credits related to a period of service outside of the marriage, and (6) any elections or waivers of benefits.] Pending the disposition of each of the plans listed above, each party further warrants that he or she shall not make any election that may affect the nature, form, value, or timing of any benefits payable under the plan without express prior written notice to the other party.

Preservation of Right to Omitted Assets

Any plan in which *[member spouse]* may have accrued service credit during the marriage that is not divided by this Agreement or assigned to either party as part of the overall division of their community property, may be considered a missed asset subject to further division in this matter. *[member spouse]* shall indemnify *[nonmember spouse]* against the loss of any benefits in which *[nonmember spouse]* would have had an interest if benefits are no longer payable directly from the plan.

[Include if the member also participates in other plans under CalSTRS:]

Other CalSTRS Plans and Programs

The parties understand that *[member spouse]* also participates in the following programs or plans, which shall be addressed in a separate order: *[Include all that apply.]*

Replacement Benefit Program

Tax Sheltered Annuity

457 Plan

403(b) Plan

Annuity attributable to _____ *[member spouse's]* accumulated annuity deposit contributions]

They intend that the community interest as defined in this Agreement, will extend to the annuity form of benefit and to any other death benefit that may be payable under that additional plan or program. Separate orders will be prepared for each program or plan as may be required by CalSTRS to effect this intent.

[Include if the member has not already retired:]

_____ ***[Nonmember Spouse's]*** Benefit Elections

[Nonmember spouse] has the right to choose either a separate account or a shared interest approach to *[nonmember spouse's]* benefit interest. The election will be set forth in an order to be presented to CalSTRS. However, the parties understand that under some circumstances, as long as *[nonmember spouse]* has not commenced receipt of *[her/his]* benefit interest, CalSTRS may allow the choice of a shared interest or separate account to be reversed. The parties agree that, should CalSTRS allow, *[nonmember spouse]* may take steps to change the election, and both will cooperate in the entry of an amended court order to that effect, as long as *[nonmember spouse's]* receipt of a shared account rather than a separate interest, or vice versa, does not have a significant impact on the value of *[member spouse's]* remaining benefit.

Nothing in this paragraph is intended to act as a guarantee that CalSTRS will accept such a change, and the parties affirm that they have been advised to seek written reassurance from CalSTRS.

[Use the following paragraphs to elect a separate account for the nonmember:]

Establishment of Separate Accounts

The benefit division court order shall state that the accumulated retirement contributions and service credit under the DBP [and an amount equal to the balance of credits in _____ (*member spouse's*) DBSP account] that are attributable to periods of service from the date of marriage to the date of separation be divided into two separate accounts, in the name of Husband and Wife respectively, in accordance with *Family Code Section 2610(a)(3)(B)*. The parties acknowledge that [*nonmember spouse*] shall be entitled to all applicable rights permitted under a separate account as set forth in *Education Code Section 22652 et seq.* Any service credit and accumulated retirement contributions under the DBP [and accumulated DBSP account balance] that are not explicitly awarded by the judgment or court order shall be deemed the exclusive property of [*member spouse*].

Member Contributions and Service Credit

The parties understand that [*member spouse*] made contributions to the Defined Benefit Program [and the Defined Benefit Supplement Program] during the marriage, one-half of which will be deposited into [*nonmember spouse's*] separate account. These contributions will partially fund an allowance payable to [*nonmember spouse*] provided that these contributions are not withdrawn.

Member Service Credit

The parties further understand that [*member spouse*] has accumulated service credit during marriage under the Defined Benefit Program, one-half of which shall be attributed to [*nonmember spouse's*] separate account, including [*specify how any early retirement incentive granted to Member will be handled*].

[Use if there is insufficient service credit in the separate account for retirement benefits:]

Refund of Contributions

[*Nonmember spouse*] understands that because the service credit in [*nonmember spouse's*] separate account is less than two and one-half years, under *Education Code Section 22661(h)*, [*nonmember spouse*] will receive only a refund of the accumulated retirement contributions in the account.

[Use if there is sufficient service credit in the separate account for retirement benefits:]

[*Nonmember spouse's*] Election of Refund of Contributions

[*Nonmember spouse*] elects to receive a refund of the accumulated retirement contributions under the DBP [and a return

of the DBSP account balance] assigned to [her/his] separate account. [Nonmember spouse] understands that by electing to take a cashout or refund of member contributions [and a return of the DBSP account balance], [nonmember spouse] is deemed to have permanently waived all rights and benefits pertaining to the allowance based on service credit when the refund [and lump sum payment under the DBSP] becomes effective. This election is irrevocable after it is effective. Likewise, [nonmember spouse] will have no further right under CalSTRS to do any of the following: (1) elect to redeposit [her/his] share in any previously refunded accumulated retirement contributions under *Education Code Section 22662* even if [member spouse] is permitted to redeposit [his/her] portion of previously refunded contributions; (2) purchase any additional service credit available to the community under *Education Code Section 22663* after the refund is effective; and (3) redeposit the accumulated DBSP account balance after the lump-sum payment under that Program becomes effective].

[Nonmember spouse] understands that as a result of the election to take a refund of contributions, [nonmember spouse] is providing [member spouse] the opportunity afforded by *Education Code Section 23200* to repurchase the service credit in [nonmember spouse's] account.

[If refund of contributions is not elected:]

[Nonmember spouse's] Election of Separate Account

[Nonmember spouse] understands that by electing the separate account method of division, [she/he] is entitled to a retirement allowance payable under the DBP [and the DBSP] when [nonmember spouse] will have reached age 55, regardless of [member spouse's] retirement status, unless [member spouse] is receiving a disability allowance, in which case the timing and amount of [nonmember spouse's] eligibility to retire and benefit amount are governed by the termination of [member spouse's] disability allowance as set forth in *Education Code Section 22664(e)*.

With respect to the DBP allowance payable to [nonmember spouse], even though [nonmember spouse] must wait until [she/he] has reached age 55 to receive an allowance, the allowance payable to [nonmember spouse] will be calculated using [member spouse's] salary at the date of separation. This is so, notwithstanding [member spouse's] actual salary at the time when [nonmember spouse's] allowance becomes payable under the DBP separate account.

[Include to set forth the election of the nonmember of separate account despite salary computation disadvantage:]

Notwithstanding the disadvantage of the salary factors to [nonmember spouse] in the calculation of [her/his] allowance under the DBP as set forth above, [nonmember spouse] elects to receive [her/his] share of [member spouse's] retirement benefit as a separate account in accordance with *Family Code Section 2610(a)(3)(b)*. The parties acknowledge that [nonmember spouse] shall be entitled to all applicable rights permitted under a separate account interest as set forth in *Education Code Section 22652*.

[Add, if redeposit opportunity exists and is elected.]

[Nonmember spouse] makes the following elections:

[Select as relevant:]

[elects to exercise or waives] the right to redeposit [specify portion, e.g., one-half] of previously refunded contributions that are community property;

[elects to exercise or waives] the right to purchase [*specify portion, e.g., one-half*] of the service credits available based on community property service;

[*Continue, if right to make deposit(s) is elected.*]

Nonmember acknowledges that he or she has or will have the funds with which to make these deposits of contributions and will do so in a timely manner pursuant to the deadlines set by CalSTRS.

Nonmember acknowledges that to redeposit previously refunded contributions, the nonmember must repay all or a portion of the member's refunded accumulated retirement contributions that were awarded to the nonmember along with regular interest from the date of the refund to the date payment of the redeposit is completed. The nonmember spouse must inform CalSTRS in writing of his or her intent to redeposit within 180 days after the judgment or court order that specifies the redeposit rights of the nonmember spouse is entered. The nonmember spouse's election to redeposit must be made within 30 days after CalSTRS mails an election form and the billing and must be paid in full before the nonmember's retirement.

Nonmember acknowledges that purchase requires depositing the contributions plus interest that would have been in the system had the service credits been awarded when earned. The nonmember spouse must inform CalSTRS in writing of his or her intent to redeposit within 180 days after the judgment or court order that specifies the purchase rights of the nonmember spouse is entered. The nonmember spouse's election to purchase must be made within 30 days after CalSTRS mails an election form and the billing and all payments must have been received before the nonmember's retirement.

[*If there are previously refunded contributions subject to right of redeposit or if member has used community property to redeposit previously refunded contributions attributable to nonmarital period:*]

Redeposit of Previously Refunded Contributions

[*Nonmember spouse*] [elects to exercise/waives] the right to obtain additional service credits attributable to the marital period by redepositing previously refunded accumulated contributions.

[*If right of redeposit is exercised:*]

[*Nonmember spouse*] shall have the right to redeposit [Part] of all previously refunded contributions. [*Nonmember spouse*] acknowledges that [she/he] has or will have the funds with which to make these redeposits of contributions and will do so in a timely manner under the deadlines set by CalSTRS. The parties understand that once [*nonmember spouse*] has been assigned the right to redeposit, even if [she/he] fails to complete a refund of accumulated contributions, [*member spouse*] may not reclaim any right to the service credits subject to redeposit.

[*Nonmember spouse*] acknowledges that to redeposit previously refunded contributions, [she/he] must repay all or a portion of [*member spouse's*] refunded accumulated retirement contributions that were awarded to [*nonmember spouse*], along with regular interest from the date of the refund to the date payment the redeposit is completed. [*Nonmember spouse*] must inform CalSTRS in writing of [her/his] intent to redeposit within 180 days after the judgment or court order that specifies the redeposit rights of [*nonmember spouse*] is entered. [*Nonmember spouse's*] election to redeposit must be made within 30 days after CalSTRS mails an election form and the billing and must be paid in full before [

nonmember spouse's] retirement.

[If member made redeposits with community funds for credits attributable to nonmarital period:]

[Member spouse] shall reimburse the community for any community property funds (plus interest) used to redeposit contributions that relate to service credit attributable to *[member spouse's]* employment during any period other than during marriage.

[If there are service credits available for purchase attributable to employment during marital period:]

Right to Purchase Additional Service Credits

[Nonmember spouse] [elects to exercise/waives] the right to purchase additional service credits available attributable to the marital period.

[IF right to purchase is exercised:]

[Nonmember spouse] shall have the right to purchase [part or percent] of all service credits available for purchase. *[Nonmember spouse]* acknowledges that purchase requires depositing the contributions plus interest that would have been in the system had the service credits been awarded when earned. *[Nonmember spouse]* must inform CalSTRS in writing of [her/his] intent to purchase within 180 days after the judgment or court order that specifies [her/his] purchase rights is entered. *[Nonmember spouse's]* election to purchase must be made within 30 days after CalSTRS mails an election form and the billing, and all payments must have been received before *[nonmember spouse's]* retirement.

Death of Either Party

[Nonmember spouse] acknowledges that under the separate account method of division, [she/he] will have no right to elect to modify a retirement allowance in order to provide a survivor option under the DBP [or to elect a joint and survivor annuity under the DBSP]. However, election of a separate account will allow *[nonmember spouse]* to designate a beneficiary to receive any accumulated retirement contributions remaining in [her/his] account or accrued unpaid allowance [and to designate a payee to receive the accumulated DBSP account balance remaining in (her/his) separate account or any accrued benefit payable to (her/him) under the DBSP] on the date of [her/his] death.

The parties acknowledge that the death of *[member spouse]* will have no effect on *[nonmember spouse's]* rights and interest under the separate account.

[END of provisions for separate account.] [Use the following paragraphs to elect a shared interest for the nonmember instead of a separate account:]

Election of Shared Interest

[Nonmember spouse] elects to receive [her/his] interest in *[member spouse's]* DBP allowance [and the DBSP annuity] as a shared interest as authorized by *Family Code Section 2610(a)(1) and (2)* and by *Education Code Section 22651*. The

community interest in the DBP allowance [and DBSP annuity] shall be the accrued benefit attributable to the service credit and contributions earned during marriage.

The community interest shall be the fraction whose numerator is [member spouse's] credited service in CalSTRS from the date of marriage to the date of separation and whose denominator is [member spouse's] total credited service in the system. [Nonmember spouse's] share will be _____ percent of the community interest in [member spouse's] retirement benefits computed at the time of [member spouse's] actual retirement. Under this shared-interest method, no benefits will be payable by CalSTRS to [nonmember spouse] before [member spouse's] retirement or death.

[Include if there is an early retirement enhancement:]

Additional Service Imputed to Enhance Early Retirement

[EITHER, if Nonmember is to share in early retirement enhancement:]

[Nonmember spouse] shall share in the benefit improvement provided by way of any imputed additional service credit granted to [member spouse] as part of an incentive to promote [his/her] early retirement. Further, any imputed additional years of credited service shall not be included in the denominator as actual years of credited service in making the calculation of the community interest as set forth above.

[OR, if Nonmember is not to share in early retirement enhancement:]

[Nonmember spouse] shall not share in any additional service credit granted to [member spouse] as part of an incentive to promote [his/her] early retirement.

[Include to address accumulated unused sick or educational leave:]

Accumulated Unused Sick Leave

[EITHER:]

The parties understand that [member spouse's] final benefit may include service credits based on unused [sick and/or educational] leave accumulated as of the date of retirement, and that these additional credits will be included in the denominator of the time rule formula. The parties agree that there were _____ hours of unused _____ [sick and/or educational] leave accumulated as of the date of separation attributable to the marital period. Additional service credits based on the marital unused [sick and/or educational] leave will be included in the numerator of the time-rule formula when the order is prepared. However, the unused [sick and/or educational] leave credits in the numerator shall not exceed those included in the denominator of the formula.

[OR:]

Neither the numerator nor the denominator of the time-rule formula will include any service credit related to accumulated unused _____ [sick and/or educational] leave. Instead, the community percent that

otherwise applies to _____ [member spouse's] benefits in general will apply to any increase in the final benefit due to accumulated unused _____ [sick and/or educational] leave at the time of retirement.

[OR:]

The denominator but not the numerator of the time-rule formula shall include any service credit related to accumulated unused _____ [sick and/or educational] leave that may be available to _____ [member spouse] at _____ [his or her] retirement.

[Include to address rights under Marriage of Gillmore:]

Gillmore Rights

_____ [Nonmember spouse] _____ [reserves or waives] the right to petition the court under *In re Marriage of Gillmore (1981) 29 Cal. 3d 418* for benefits to be paid directly by _____ [member spouse] if _____ [he or she] does not retire at _____ [his or her] earliest retirement date. However, nothing in this paragraph is intended to predetermine whether the nonmember spouse should be required to elect a separate account rather than precipitate a payment directly from the member under the authority of *In re Marriage of Gillmore (1981) 29 Cal. 3d 418*. The issue is reserved for the court's determination in the event that it should arise at some future time prior to the member's retirement.

Selection of Option for Survivor Benefits

[Use if the member has already retired, but no survivor option was chosen:]

The parties acknowledge at the time of _____ [member spouse's] retirement, no option under Education Code Section 24300 or 24300.1 providing for benefits to _____ [member spouse's] beneficiary at _____ [his or her] death was selected. Consequently, _____ [nonmember spouse] will be awarded a shared interest in _____ [member spouse's] DBP allowance, but can have no survivor option elected. However, _____ [nonmember spouse] will retain an interest in any survivor continuance payable on behalf of any eligible survivor of _____ [member spouse].

[If the member has already retired, and a survivor option was chosen,
EITHER:]

The parties acknowledge at the time of _____ [member spouse's] retirement, _____ [specify statutory option] under _____ [Education Code Section 24300 or Education Code Section 24300.1], providing for benefits to _____ [name or names of option beneficiary or beneficiaries] as _____ [member spouse's] designated _____ [beneficiary or beneficiaries] at _____ [his or her] death, was selected. This survivor option shall remain in place, without change but the reduction to provide the survivor option will be charged solely to the nonmember's benefit share.

[OR:]

The parties acknowledge at the time of _____ [*member spouse's*] retirement, _____ [*specify statutory option*] under _____ [Education Code Section 24300 or Education Code Section 24300.1], providing for benefits to _____ [*name or names of option beneficiary or beneficiaries*] as _____ [*member spouse's*] designated _____ [beneficiary or beneficiaries] at _____ [his or her] death, was selected. _____ [*Member spouse*] will cancel this survivor option and select an unmodified retirement allowance. CalSTRS shall pay _____ [*nonmember spouse*] _____ [her or his] share, but only until the death of _____ [*member spouse*].

[OR:]

The parties acknowledge at the time of _____ [*member spouse's*] retirement, _____ [*specify statutory option*] under _____ [Education Code Section 24300 or Education Code Section 24300.1], providing for benefits to _____ [*name or names of option beneficiary or beneficiaries*] as _____ [*member spouse's*] designated _____ [beneficiary or beneficiaries] at _____ [his or her] death, was selected. _____ [*Member spouse*] will cancel this survivor option and select a new option as shall be subsequently agreed to by the parties.

[OR:]

The parties acknowledge at the time of _____ [*member spouse's*] retirement, _____ [*specify statutory option*] under _____ [Education Code Section 24300 or Education Code Section 24300.1], providing for benefits to _____ [*name or names of option beneficiary or beneficiaries*] as _____ [*member spouse's*] designated _____ [beneficiary or beneficiaries] at _____ [his or her] death, was selected. _____ [*Member spouse*] will cancel this survivor option and beneficiary designation. _____ [*Member spouse*] may choose any survivor option provided that _____ [*nonmember spouse*] is entitled to receive an amount after _____ [*member spouse's*] death equal to the full community property interest in the Option 3 allowance.

[OR:]

The parties acknowledge at the time of _____ [*member spouse's*] retirement, _____ [*specify statutory option*] under _____ [Education Code Section 24300 or Education Code Section 24300.1], providing for benefits to _____ [*name or names of option beneficiary or beneficiaries*] as _____ [*member spouse's*] designated _____ [beneficiary or beneficiaries] at _____ [his or her] death, was selected. _____ [*Member spouse*] will cancel this survivor option and shall select _____ [*specify statutory option*] and name _____ [*name or names of new beneficiary or beneficiaries*] as the option _____ [beneficiary or beneficiaries].

The reduction to _____ [*member spouse's*] benefit in order to provide a survivor option for _____ [*nonmember spouse*] shall be charged against the benefit to be received by _____ [Husband or Wife or both parties].

[Use to provide for a survivor option if the member has not yet retired:]

In order to ensure that a survivor benefit is payable to _____ [*nonmember spouse*] at the death of _____ [*member spouse*], _____ [*member spouse*] will elect Option 8 under Education Code Section 24300 and name _____ [*nonmember spouse*] as irrevocable beneficiary. This

election shall be made at the time when _____ [member spouse] reaches _____ [his or her] earliest retirement age and then again at the time of _____ [his or her] actual retirement. _____ [Member spouse] may choose any survivor option under Option 8, subject to the following conditions:

- a. _____ [nonmember spouse] shall be entitled to receive an amount after _____ [member spouse's] death equal to the nonmember's community property interest in the Option 2 allowance;
- b. _____ [nonmember spouse] or _____ [her or his] named beneficiary, shall be entitled to receive an amount during _____ [member spouse's] lifetime equal to one-half of the community property interest in the member's unmodified allowance.

The reduction to _____ [member spouse's] benefit in order to provide a survivor option for _____ [nonmember spouse] shall be charged against the benefit to be received by _____ [Member or Nonmember or both parties].

If there is only one beneficiary and _____ [member spouse] fails to select a survivor option, _____ [member spouse] will be deemed to have elected Option Number 2 under Option 8 and to have named _____ [nonmember spouse] as irrevocable beneficiary for the nonmember's community property interest in the Option 2 allowance.

If there are two or more option beneficiaries, and _____ [member spouse] fails to select a survivor option, _____ [member spouse] will be deemed to have elected Optional Settlement number 2 under Option 8 for _____ [nonmember spouse's] share of the community interest in that Option. In this manner, _____ [nonmember spouse] will receive the actuarial equivalent of _____ [member spouse's] share for _____ [her or his] lifetime, regardless of whether _____ [member spouse] predeceases _____ [nonmember spouse].

The parties are free to make any other arrangement that may be permitted by the plan.

[Use to waive the survivor option if the member is not yet retired:]

_____ [Nonmember spouse] waives any interest in the survivor benefits payable under CalSTRS [for the following reason: _____ (specify)].

Death of _____ [Member Spouse] Before Earliest Retirement Age

_____ [Nonmember spouse] understands that until _____ [member spouse] reaches _____ [his or her] earliest retirement age and elects a survivor option naming _____ [nonmember spouse] as beneficiary, the only benefit payable to _____ [nonmember spouse] on the death of _____ [member spouse] is a share of the return of contributions or a pro rata share of any family allowance or survivor allowance that may become payable to an eligible survivor of _____ [member spouse].

The parties acknowledge that CalSTRS may allow _____ [nonmember spouse] to elect a separate account should _____ [member spouse] die before the election of a preretirement survivor option, even if _____ [nonmember spouse] had previously elected a shared interest.

However, _____ [*nonmember spouse*] is not limited to relying on this possibility alone as a remedy for lost benefits in the event of the death of _____ [*member spouse*] during this period.

[*To provide life insurance against the possibility that there will be no survivor option for the nonmember, EITHER:*]

_____ [*Nonmember spouse*] shall be named as the irrevocable beneficiary of life insurance on the life of _____ [*member spouse*] with a death benefit amount of \$ _____. All premiums and other costs of the policy shall be paid by [*Husband or Wife or the parties equally*]. [The policy shall remain in effect at least until _____ (*member spouse's*) election of a survivor option at (his/her) earliest retirement age.]

[*OR:*]

[*Nonmember spouse*] will be permitted to obtain a life insurance policy at [her/his] own expense against the life of [*member spouse*]. [*Member spouse*] will cooperate with taking a physical and allowing any testing that may be needed in order to obtain the insurance.

Effect of _____ [*Nonmember Spouse's*] Death

[*EITHER:*]

If [*nonmember spouse*] dies before [she/he] has received all of [her/his] interest under the DBP [and DBSP], [*nonmember spouse*] may designate a beneficiary to receive [her/his] share of the community interest in [*member spouse's*] benefit.

[*OR:*]

[*Nonmember spouse*] shall designate [*member spouse*] as [her/his] beneficiary if [*nonmember spouse*] is not living at the time when benefits are payable on [her/his] behalf [in return for the following consideration: _____ (*specify*)].

Reservation of Jurisdiction Over Other CalSTRS Programs

The court reserves jurisdiction over any issues that may affect the rights of [*nonmember spouse*] if [*member spouse*] elects:

- a. election to receive a lump-sum payment and reduced monthly retirement allowance under *Education Code Section 24221*.
- b. the workload reduction program, under *Education Code Section 22713*.
- c. the option to receive partial allowance on early retirement and revert to full allowance for normal retirement age under *Education Code Section 24205*.

Suspension of Benefits on Reemployment

[Use to continue payments to nonmember:]

The parties understand that CalSTRS includes suspension-of-benefits provisions, which may affect the retirement distributions payable under it if, after retirement and receipt of benefits has commenced, *[member spouse]* returns to work in covered employment. If a suspension of benefits should occur, *[member spouse]* shall make the same payments to *[nonmember spouse]* that would have been made by CalSTRS but for the suspension. The payments shall be made from *[member spouse's]* separate property funds, and shall continue until such time as payments from CalSTRS are resumed. They shall be made on a net after-tax basis, and shall not be deductible by *[member spouse]*, nor income to *[nonmember spouse]*. They shall have no effect on the amount payable to *[nonmember spouse]* once *[member spouse]* returns to employment, except for the inclusion of cost-of-living increases. Further, they shall have no effect on any support obligation otherwise owing.

[OR: Use to suspend payments to the nonmember also:]

The parties understand that CalSTRS includes suspension-of-benefits provisions, which may affect the retirement distributions payable under it if, after retirement and receipt of benefits has commenced, *[member spouse]* returns to work in covered employment. If a suspension of benefits should occur, the benefit payments to both parties shall be suspended. The community interest in CalSTRS shall then be recalculated as necessary to take into account the effect of any additional credited service or benefit accrual, including the effect on any optional settlement for survivor benefits. The court shall reserve jurisdiction to make any orders necessary to give effect to this paragraph. If *[member spouse]* should die during the period of suspension, to the extent that the benefits are recalculated under this Paragraph, that recalculation shall identify *[nonmember spouse's]* prorated interest in any death and survivor benefits payable under the terms of CalSTRS.

[OR: Use to give the nonmember an election:]

The parties understand that CalSTRS includes suspension-of-benefits provisions, which may affect the retirement distributions payable under it if, after retirement and receipt of benefits has commenced, *[member spouse]* returns to work in covered employment. If a suspension of benefits should occur, *[member spouse]* shall, at the election of *[nonmember spouse]*, make the same payments to *[nonmember spouse]* that would have been made by CalSTRS but for the suspension. This election must be made, if at all, by *[nonmember spouse]* within _____ days of notice of the suspension. If elected, the payments shall be made from *[member spouse's]* separate property funds, and shall continue until such time as payments from CalSTRS are resumed. The payments shall be made on a net after-tax basis, and shall not be deductible by *[member spouse]*, nor income to *[nonmember spouse]*. They shall have no effect on any support obligation otherwise owing. If continuation of payments is elected, *[nonmember spouse]* shall not share in the value of any benefits accrued under CalSTRS by reason of *[member spouse's]* return to covered service. If this election is not made and the benefit payments to both parties are suspended, then the community share under CalSTRS shall be recalculated as necessary to take into account the effect of any additional credited service or benefit accrual. If *[nonmember spouse]* should die during the period of suspension, *[nonmember spouse's]* prorated share of any death or survivor benefits shall be recalculated under this paragraph. The court shall reserve jurisdiction over any benefits that may become payable on behalf of *[nonmember spouse]* in the event of the death of either party.

[Continue with:]

If *[member spouse]* begins employment before CalSTRS has approved reinstatement from retirement, *[member spouse]* shall indemnify *[nonmember spouse]* from any loss of basic or special benefits in effect at the time of retirement, and

shall hold *[nonmember spouse]* harmless from the reimbursement to CalSTRS for (1) any retirement allowance received by *[nonmember spouse]* during the period of *[member spouse's]* unapproved employment, (2) employee contributions that would have been submitted during the period of "unlawful" employment, plus interest; and (3) any required reimbursement to CalSTRS for administrative expenses incurred in handling the situation.

Right to Redeposit Previously Refunded Contributions

[IF parties do not know if there is right to redeposit:]

[Member spouse] shall initiate an inquiry to CalSTRS with respect to the available redeposit rights related to the marital period, and the cost, and shall provide *[nonmember spouse]* with that information.

The court shall reserve jurisdiction to assign to each party the right to redeposit all or a portion of *[member spouse's]* refunded accumulated retirement contributions when that information becomes known to the parties, and in accordance with each party's respective ability to comply with the cost of redeposit.

[To waive redeposit:]

[Nonmember spouse] waives the opportunity to increase *[her/his]* share of Member's available service credit and will not share in the redeposit of refunded accumulated contributions. Any service credit restored with separate property funds of *[member spouse]* shall be *[his/her]* separate property.

[OR: Use to provide for redeposit:]

[Nonmember spouse] will receive *[part or percent]* of the service credit available for reinstatement based on *[her/his]* reimbursement to *[member spouse]* for *[member spouse's]* redeposit of accumulated retirement contributions previously refunded during the marital period. Any portion of *[nonmember spouse's]* share of accumulated retirement contributions previously refunded during the marriage not reimbursed to *[member spouse]* by *[nonmember spouse]* shall be deemed the exclusive property of *[member spouse]*.

[IF member has used community property funds to make previous redeposits:]

[Member spouse] shall reimburse the community for any community property funds (plus interest) used to redeposit contributions that relate to service credit attributable to *[member spouse's]* employment during any period other than marriage.

[IF there are or may be rights to purchase additional service credits attributable to employment during marital period:]

Right to Purchase Additional Service Credit

[IF parties do not know if there is right to purchase additional credits:]

[*Member spouse*] shall initiate an inquiry to CalSTRS with respect to any additional service credits available for purchase attributable to [*member spouse's*] employment during the marital period, and the cost, and shall provide [*nonmember spouse*] with that information.

The court shall reserve jurisdiction to assign to each party the right purchase all or a portion of the additional service credit available due to [*member spouse's*] performance of service during marriage, and in accordance with each party's respective ability to comply with the cost of purchase.

[*To waive right to purchase additional service credits:*]

[*Nonmember spouse*] waives the right to purchase additional service credits that are available on account of [*member spouse's*] employment during the marital period. Any additional service credits purchased with separate-property funds of [*member spouse*] shall be [his/her] separate property.

[*To provide for nonmember to purchase additional service credit:*]

[*Nonmember spouse*] shall receive [part or percent] of the service credit available for purchase due to [*member spouse's*] performance of eligible services during the marital period. [[*Nonmember spouse*] will present evidence of the ability to purchase additional service credit before the entry of any order assigning this right to [her/him] so that only that portion that [*nonmember spouse*] elects to fund will be assigned to [her/him].] Any right to purchase additional service credit not explicitly awarded to [*nonmember spouse*] shall be deemed the exclusive property of [*member spouse*] under *Education Code Section 22663(e)*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsGeneral OverviewPensions & Benefits LawGovernmental EmployeesTeacher Pensions



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CHAPTER 122 PROVISIONS FOR DIVISION OF EMPLOYEE BENEFITS
PART IV. FORMS
C. State Employee Benefit Plans

34-122 California Legal Forms--Transaction Guide §§ 122.242-121.249

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

[Reserved]

§§ 122.242[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 122 PROVISIONS FOR DIVISION OF EMPLOYEE BENEFITS
PART IV. FORMS
D. Federal Employee Benefit Plans

34-122 California Legal Forms--Transaction Guide § 122.250

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.250 Federal Employees Retirement System (FERS) and Civil Service Retirement System (CSRS)

[1] Comment

[a] Use of Forms

The forms in [2] and [3], *below*, are for use to divide the community interest in federal retirement benefits between the parties. Nearly all federal civilian employees are covered by one of two retirement systems, the Federal Employees Retirement System [FERS; [2], *below*] and the Civil Service Retirement System [CSRS; [3], *below*]. CSRS includes most employees who were hired before January 1, 1984 [5 U.S.C. § 8331(1)]. However, the majority of federal employees are now covered by FERS, which applies to employees hired on or after January 1, 1984, as well as some former CSRS employees who elected to transfer to FERS [5 U.S.C. § 8401(11)]. CSRS statutory provisions are found generally at Title 5 *United States Code*, Section 8331 *et seq.* FERS statutory provisions are found generally at Title 5 *United States Code*, Section 8401 *et seq.* Regulations for both are found at Title 5 Code of Federal Regulations, Parts 831 and 838.

All FERS employees are also covered automatically by Social Security and the federal Thrift Savings Plan [see § 122.251]. CSRS employees are usually not covered by Social Security, but may elect to contribute to the Thrift Savings Plan.

FERS and CSRS are "governmental plans" as defined in Title 29 *United States Code*, Section 1002(32), and are therefore exempt from the Employee Retirement Income Security Act (ERISA) [29 U.S.C. § 1001 *et seq.*; see sbpt. 2, *above*]. Accordingly, FERS and CSRS do not use ERISA qualified domestic relations orders (QDROs). A court order for FERS and CSRS benefits is correctly referred to as a "court order acceptable for processing" (COAP) [see 5 C.F.R. § 838.103].

There are numerous distinctions between COAPs and QDROs. One example is that a COAP cannot require that payments to the former spouse commence before the employee actually begins to receive benefits [5 C.F.R. §

838.211(a)(3)]. For additional information, see the publication Handbook for Attorneys on Court-Ordered Retirement, Health Benefits and Life Insurance at the website for the federal Office of Personnel Management (OPM), www.opm.gov/retire/htm/library/other.asp. This book may also be ordered from the U.S. Government Printing Office.

OPM's mailing address for a COAP is: Office of Personnel Management, Retirement & Insurance Group, P.O. Box 17, Washington, D.C. 20044-0017. Further information may be found at Title 5 *Code of Federal Regulations*, Section 838.221 and Part 838 Subpart A, Appendix A.

[b] Division of Retirement Annuity and Annuity Supplement

The FERS or CSRS "annuity" is the lifetime monthly pension paid to a retired federal employee and is subject to division as community property [5 U.S.C. §§ 8345(j), 8467; see 5 C.F.R. § 838.201 (OPM must comply with state court orders awarding portion of employee annuity to former spouse)]. The terms "self-only," "gross," and "net" annuity have technical meanings under OPM regulations and should be used carefully. In most cases, the marital settlement agreement and Court Order Acceptable for Processing (COAP) should divide the self-only (that is, the unreduced) employee annuity [see [a], above]. The misleading term gross annuity actually means the self-only annuity minus the cost of all survivor annuities, if any. The net annuity is the gross annuity minus the employee's health and life insurance premiums, federal and state income tax withholding, etc. [see 5 C.F.R. § 838.103].

Under FERS, the typical annuity paid to a retired employee is known as a "basic annuity," as distinguished from the "annuity supplement," which some retired employees also receive [see 5 U.S.C. § 8412]. The annuity supplement is a temporary annuity paid, in addition to the basic annuity, to a federal employee who retires before age 62. It terminates at age 62, when the employee becomes eligible for social security [5 U.S.C. § 8421]. It is also subject to division as community property.

[c] Salary and Cost-of-Living Adjustments

Unless the court expressly orders otherwise, an award of a percent, fraction, or amount according to a formula of the employee annuity will automatically be adjusted to provide for increases due to salary adjustments through the date of retirement, as well as postretirement cost-of-living adjustments [5 C.F.R. § 838.622(b)(1); see 5 U.S.C. §§ 8340, 8462]. A court order that awards a specific dollar amount prevents the former spouse from any salary or cost-of-living adjustments, unless the court expressly orders their inclusion [5 C.F.R. § 838.622(b)(2)].

[d] Former Spouse Survivor Annuity

[i] Regular Survivor Annuity

[A] Postretirement Death of Employee

Both FERS and CSRS provide for a reduction in the federal employee's annuity in order to provide for a survivor annuity payable to a former spouse on the postretirement death of the employee [5 U.S.C. §§ 8341(h), 8445; see 5 U.S.C. §§ 8339(j)(2), 8417]. For FERS, the maximum basic former spouse survivor annuity is 50 percent of the unreduced (self-only) annuity of the retired employee [5 U.S.C. § 8442(a)(1); see 5 U.S.C. § 8445(b)(2)]. A supplementary survivor annuity is also paid in addition to the basic survivor annuity until the surviving former spouse reaches age 60 and is presumably eligible for a social security survivor benefit [5 U.S.C. § 8442(f)]. For CSRS, the maximum possible survivor annuity is 55 percent of the unreduced (self-only) annuity of the retired employee [5 U.S.C. § 8341(b)(1); see 5 U.S.C. § 8341(h)(2)(B)].

The former spouse may be awarded all or a portion of the maximum possible survivor annuity. The former spouse survivor annuity may be elected by the employee or provided for in the Court Order Acceptable for Processing (COAP) [5 U.S.C. §§ 8341(h)(1), 8445(a); see 5 C.F.R. § 838.801 *et seq.*; see also [a], above].

[B] Preretirement Death of Employee

A former spouse survivor annuity may also be available if the employee dies before retiring [5 U.S.C. §§ 8341(h)(1), 8445(a); *see* 5 U.S.C. §§ 8341(d), 8442(b)]. Under FERS, if the employee dies before retirement but after completing at least ten years of service, the former spouse survivor annuity is 50 percent of the annuity that would have been payable to the employee based on service and earnings up to the date of death [5 U.S.C. § 8442(b)(1)(B)]. A separate lump-sum death benefit is provided if the employee dies after completing at least 18 months of service [*see* 5 U.S.C. § 8442(b)(1)(A)]. Under CSRS, the former spouse survivor annuity in the case of the preretirement death of the employee is 55 percent of the annuity that would have been payable to the active employee based on service and earnings up to the date of death, provided that the employee completed at least 18 months of service [5 U.S.C. § 8341(d)]. Preretirement survivor benefits must be provided by COAP; they cannot be elected by the employee because elections are made at retirement [*see* 5 U.S.C. §§ 8339(j)(2), 8417(b)(2)].

Under CSRS, no former spouse survivor annuity is payable to the former spouse of an employee (except for a Member of Congress) who leaves federal employment before retirement age and then dies before applying for an annuity [5 U.S.C. § 8341(h)(1); *see* 5 U.S.C. § 8331(2) ("Member" refers to members of Congress)]. FERS does provide for an annuity under these circumstances [*see* 5 U.S.C. § 8445(a) (applicable to employees with at least 10 years of service); *see also* 5 U.S.C. §§ 8413, 8442(c); *[e]*, *below*].

[C] Employee Already Retired at Dissolution

On retirement, a married federal employee's annuity will be reduced to provide a survivor annuity for his or her spouse unless the right to the survivor annuity is waived. A waiver can only be made with the consent of the spouse [5 U.S.C. §§ 8339(j)(1), 8416(a)(1); *see* 5 C.F.R. § 831.611(a)]. If the spouses subsequently divorce, they cannot then provide for a former spouse survivor annuity in an amount that is inconsistent with any joint designation or waiver made at the time of retirement [5 U.S.C. §§ 8341(h)(5), 8445(e); 5 C.F.R. § 831.632(b)(3)(ii)]. This means, for example, that if the nonemployee spouse waived half the survivor annuity while the parties were married, then he or she would be entitled to receive no more than half the survivor annuity following a divorce.

Notwithstanding that the employee may have provided for a survivor annuity for his or her spouse at the time of retirement while the marriage was intact, the reduction is terminated on dissolution of marriage unless a court order provides for a former spouse survivor annuity or the employee makes a timely post-divorce election [*see* 5 U.S.C. §§ 8339(j)(5)(A)(ii), 8419(b)(1)(B)].

[D] Restrictions on Payment of Survivor Annuities

There are a number of situations in which no survivor annuity can be paid to the nonemployee spouse. The most frequently-applied restriction is that the reduction of the employee's annuity to provide a former spouse survivor annuity terminates when the surviving spouse dies or remarries before reaching age 55 [5 U.S.C. §§ 8339(j)(5)(B), 8341(h)(3)(B)(i), 8445(c)(2)]. However, remarriage before age 55 does not terminate the right to a survivor annuity if the duration of the marriage to the employee was 30 years or more [5 U.S.C. §§ 8341(k)(1), 8445(h)(1)].

Other restrictions include:

1. The nonemployee spouse previously consented to waive the survivor annuity when the employee retired [5 U.S.C. §§ 8341(h)(5), 8445(e)];
2. For CSRS, the marriage terminated before May 7, 1985 [5 C.F.R. § 838.802(a)];
3. For CSRS, the marriage terminated on or after May 7, 1985, but the employee retired before that date

without electing a survivor annuity at retirement to benefit that spouse [5 C.F.R. § 838.802(b)].

This last rule may prevent payment of a former spouse survivor annuity to a nonemployee spouse who married the employee after retirement.

Although a former spouse's remarriage before age 55 normally terminates the right to the survivor annuity, this may not be the case if the former spouse remarries the retiree. A retiree who remarries a former spouse under age 55 who is entitled to a survivor annuity is deemed to have elected to continue the reduction to provide a current spouse survivor annuity unless the retiree requests in writing that OPM terminate the reduction [5 C.F.R. § 831.644(d)(3)]. The forms in [2] and [3], *below*, contain an optional paragraph to avoid this unilateral election.

[E] Importance of Timely Court Order

Counsel should not delay preparation of the COAP if the nonemployee spouse is to receive a survivor annuity. The award of a former spouse survivor annuity will only be honored if it is provided for in the FIRST ORDER dividing the marital property of the retiree and the former spouse [5 C.F.R. § 838.1004(e)(1)]. OPM may not accept an "amended" order relating to a survivor annuity that is entered after the retirement or death of the divorced employee [5 U.S.C. §§ 8341(h)(4), 8445(d); 5 C.F.R. § 838.806]. For example, OPM would typically reject a court order as being amended if it awards a survivor annuity and is entered after the date of entry of a decree of dissolution that approves a property settlement agreement dividing any marital property [see 5 C.F.R. § 838.1004(e)(4) ("first order" defined)]. As a fallback when it is not feasible to obtain a timely court order, counsel may submit to OPM the decree of dissolution or court-approved property settlement itself as a COAP awarding a survivor annuity if it contains sufficiently detailed language.

[F] Cost of Survivor Annuity

The cost for the postretirement survivor annuity is charged through a reduction in the employee annuity beginning at retirement [see 5 U.S.C. §§ 8339(j)(1), (4), 8417, 8419]. The cost of the former spouse survivor annuity may be allocated via the COAP all to one spouse or the other, or divided in any fashion between the two spouses. If the nonemployee spouse is to pay any portion of the cost, that spouse must also be awarded a share of the employee's annuity sufficient to cover the spouse's cost. There is no cost for a preretirement survivor annuity under FERS or CSRS.

[ii] Insurable Interest Survivor Annuity

At the time of retirement, a federal employee may elect an "insurable interest survivor annuity" for a current or former spouse [5 U.S.C. §§ 8339(k)(1), 8420]. However, the nonemployee spouse is not entitled to receive both a regular survivor annuity and an insurable interest annuity [5 C.F.R. § 831.613(c)(5)(i)].

The maximum insurable interest survivor annuity is equal to 55 percent of the employee's annuity after the survivor reduction is applied [5 U.S.C. §§ 8341(c), 8444; cf. [i], *above*. (maximum regular former spouse survivor annuity is 50 percent of the employee annuity before any reduction for FERS and 55 percent of employee annuity before reduction for CSRS)]. The reduction for the cost of the insurable interest survivor annuity ranges from 10 percent to 40 percent of the employee annuity, depending on how much younger the nonemployee spouse is compared to the employee.

The advantage of the insurable interest survivor annuity for the nonemployee spouse is that it does not terminate on remarriage before age 55.

The disadvantages are numerous and, for that reason, this benefit should be considered only as a last resort for the nonemployee spouse. The drawbacks include [5 C.F.R. § 838.912(c)(2); see 5 U.S.C. §§ 8339(k)(2)(B), 8416(b)(3), (c)(2)]:

1. It must be elected by the employee; OPM will not enforce a court order requiring an insurable interest survivor annuity;
2. It may be elected only at the time of the employee's retirement, not during service or after retirement;
3. The employee making the election must not be retiring on disability and must be in good health; and
4. The employee may cancel the election at will if the employee remarries after retirement and elects a regular survivor annuity for a current spouse.

[iii] Survivor Annuity for Health Insurance Eligibility

A nonemployee spouse may be eligible to continue coverage indefinitely under the Federal Health Employee Benefits Program as a former spouse as long as he or she has the current or future right to receive a portion of the employee's annuity or survivor annuity [5 C.F.R. § 890.803(a)]. A minimum award of a survivor annuity of \$1.00 a month is sufficient to meet this requirement, as long as the nonemployee spouse pays the monthly health insurance premiums and does not remarry before age 55 [see generally 5 C.F.R. Pt. 890, sbpt. H].

[e] Refund of Contributions on Termination of Government Employment Before Retirement

An employee who leaves government employment before reaching retirement age may request a lump-sum refund of his or her employee contributions. The employee's receipt of a lump-sum refund extinguishes all annuity rights, including the nonemployee spouse's entitlement to any portion of the employee's annuity or survivor annuity [5 U.S.C. §§ 8342(a), 8424(a)]. However, the employee's right to a refund is subject to any court order that addresses a former spouse's right to a portion of the benefits to be refunded [5 U.S.C. §§ 8342(j)(1)(B), 8424(b)(1)(B)]. The COAP may direct OPM not to pay the employee a refund in contributions in order to preserve the nonemployee spouse's court-awarded entitlement to a portion of an employee annuity or to a former spouse survivor annuity [5 C.F.R. § 838.401(a)(2); see 5 C.F.R. § 838.505]. In the alternative, the COAP may award all or a portion of the refund to the nonemployee spouse should the employee make an application [5 C.F.R. § 838.401(a)(1)]. A COAP may not require the employee to take a refund.

[f] Employee's Receipt of Payments before COAP is Entered

It is possible that the employee spouse may have already retired and commenced receiving annuity payments before a COAP can be entered awarding the nonemployee spouse his or her share. In this case, OPM will honor a COAP requiring the payment of an arrearage to the nonemployee spouse as long as the order applies only to employee's future annuity payments [5 C.F.R. § 838.234].

[g] Death of Nonemployee

If the nonemployee spouse predeceases the employee, the nonemployee spouse's share of the annuity terminates on death and automatically reverts to the employee, unless the COAP directs otherwise. The COAP may provide that the remaining share be paid to the court, to the nonemployee spouse's estate, or to the child or children of the employee [5 C.F.R. § 838.237].

PRACTICE TIP:

A pension actuary should be consulted as to the effect on the actuarial value each party would receive if there is a reversion of the former spouse's share to the employee. There are ways to balance the respective values, including the measure of and allocation of the cost of the survivor annuity.
Commentary by Ann Fallon.

[h] Suspension of Benefits on Reemployment

There are several situations in which the employee's annuity payments will be terminated or suspended on reemployment [see 5 C.F.R. §§ 837.202, 837.203]. Most notably, payments will be terminated if an employee who retired on disability returns to work before age 60 [5 C.F.R. §§ 831.1209(a), 837.202(a), (b)(1)(i), 837.403]. Also payments will be terminated if an involuntarily retired CSRS employee returns to work [5 C.F.R. § 837.202(b)(1)(ii)].

Payments from OPM to a former spouse will be discontinued whenever the employee's annuity payments are suspended or terminated. If annuity payments to the employee are restored, payment to the nonemployee spouse will also resume [5 C.F.R. § 838.232].

This form contains three options for handling suspension of benefits. The first option is for the employee to make payments directly to the nonemployee of the amount that is no longer forthcoming because of the suspension of benefits on reemployment. The second option is for the nonemployee to accept the suspension of benefits. The third option gives the nonemployee the choice of deciding at the time of suspension whether to demand direct payment or accept suspension.

[2] FORM--Federal Employees Retirement System (FERS)**Federal Employees Retirement System (FERS) Benefits****Federal Employees Retirement System Benefits**

A community property interest exists in [employee spouse's] accumulated benefit under the Federal Employees System (FERS), administered by the United States Office of Personnel Management (OPM) based on [his/her] employment during the marriage for the United States government.

A Court Order Acceptable for Processing (COAP) will be prepared by counsel for [Husband or Wife] setting forth the rights and entitlement of [nonemployee spouse] as set forth in this Agreement.

If the order as entered by the court is not found to be acceptable for processing by OPM, the parties will cooperate in a timely manner in the preparation of a subsequent stipulation and order, as long as that subsequent order does not substantively change the rights and obligations of each party from those in this Agreement. The court shall reserve jurisdiction to amend the COAP as necessary should OPM determine that order is not acceptable.

[Employee Spouse] shall take no act that might interfere with [nonemployee spouse's] right to receive [her/his] full community interest in all benefits under FERS.

Annuity Division

[Nonemployee Spouse] shall receive a share, as set forth below, of [employee spouse's] [self-only or gross or net] monthly basic annuity and annuity supplement under FERS directly from OPM.

[Use to provide the nonemployee spouse with a dollar amount:]

[Nonemployee Spouse's] share shall be \$_____ per month from [employee spouse's] federal retirement benefits. [Any Cost-of-Living Adjustments (COLA's) that are applied to_____ (employee spouse's) retirement benefits shall also be applied to_____ (nonemployee spouse's) share.]

[OR: Use to provide the nonemployee spouse with a percent according to the time-rule formula:]

That portion of the [self-only or gross or net] annuity and annuity supplement to be awarded to [nonemployee spouse] is one-half of the community share fraction whose numerator is the number of months of creditable federal civilian and military service performed by [employee spouse] during the marriage through the date of separation, and whose denominator is the total number of months of creditable federal civilian and military service performed by [employee spouse]. The date of marriage is _____, and the date of separation is _____.

[OR: Use to provide the nonemployee spouse's share according to another formula:]

That portion of the [self-only or gross or net] annuity and annuity supplement to be awarded [nonemployee spouse] shall be determined according to the following formula: [specify formula].

Survivor Annuity

[Use to provide for a regular survivor annuity if the employee is already retired:]

[Nonemployee Spouse] shall be entitled to receive a FERS survivor annuity and supplemental survivor annuity [in the same amount to which _____ (nonemployee spouse) would have been entitled if the divorce had not occurred or of _____ percent of the maximum possible survivor annuity].

[Use if regular survivor annuity was not elected at retirement and therefore is waived:]

[Nonemployee Spouse] is not entitled to a FERS survivor annuity (including any supplemental survivor annuity) in that [she/he] waived the right to the annuity at the time of [employee spouse's] retirement.

[Use one of the following to provide for a regular survivor annuity if the employee is not yet retired:]

In the event of the death of [employee spouse], whether before or after retirement, [nonemployee spouse] shall be entitled to receive a FERS survivor annuity, and any supplementary survivor annuity or basic employee death benefit that may be payable. [Nonemployee Spouse's] share shall be equal to one-half of the community share fraction (as set forth above) of the maximum possible survivor annuity, and of the supplementary survivor annuity or basic employee death benefit.

[OR]

In the event of the death of [employee spouse], whether before or after retirement, [nonemployee spouse] shall be entitled to receive a FERS survivor annuity in the amount of \$_____ per month, [increased or not increased] by any cost-of-living adjustments occurring before the death of [employee spouse].

[OR]

In the event of the death of [employee spouse], whether before or after retirement, [nonemployee spouse] shall be

entitled to receive a FERS survivor annuity, and any supplementary survivor annuity or basic employee death benefit that may be payable. The survivor annuity shall be equal to _____ percent of the maximum possible survivor annuity, and of the supplementary survivor annuity or basic employee death benefit.

[OR]

In the event of the death of [employee spouse], whether before or after retirement, [nonemployee spouse] shall be entitled to receive a FERS survivor annuity, and any supplementary survivor annuity or basic employee death benefit that may be payable. The amount payable to [nonemployee spouse] shall be the portion of [employee spouse's] maximum possible survivor annuity, and of the supplementary survivor annuity or basic employee death benefit, computed as follows: [specify formula].

[OR]

In the event of the death of [employee spouse], whether before or after retirement, [nonemployee spouse] shall be entitled to receive a FERS survivor annuity, and any supplementary survivor annuity or basic employee death benefit that may be payable. The amount payable to [nonemployee spouse] shall be the maximum possible survivor annuity, and supplementary survivor annuity or basic employee death benefit under FERS, unless [employee spouse] remarries before retirement. If [employee spouse] remarries before retirement, [nonemployee spouse] shall be entitled to one-half of the community share fraction (as set forth above) of the maximum possible benefits.

[OR]

In the event of the death of [employee spouse], whether before or after retirement, [nonemployee spouse] shall be entitled to receive a FERS survivor annuity, and any supplementary survivor annuity or basic employee death benefit that may be payable. The amount payable to [nonemployee spouse] shall be the maximum possible survivor annuity, and supplementary survivor annuity or basic employee death benefit under FERS, unless [employee spouse] remarries before retirement. If [employee spouse] remarries before retirement, [nonemployee spouse] shall be entitled to the full community share; that is, 100 percent of the community share fraction (as set forth above) of the maximum possible benefits. In consideration for receipt of the maximum possible survivor benefits, or in the alternative, the full community share of the maximum possible survivor annuity, [employee spouse] shall be entitled to receive _____ [nonemployee spouse's] remaining share of the life annuity and annuity supplement, should [nonemployee spouse] predecease [employee spouse].

[Continue with:]

[Employee Spouse] agrees to make whatever elections are required under this Agreement.

[Nonemployee Spouse] shall immediately notify [employee spouse] of any event that causes [her/him] to lose eligibility for the survivor annuity, for example, on [her/his] remarriage before age 55.

[Use to provide for an insurable interest annuity instead of a regular survivor annuity:]

Insurable-Interest Survivor Annuity

At such time as [employee spouse] applies for retirement, [he/she] shall indicate on the application the intention to make an election of an "insurable interest survivor annuity" on behalf of [nonemployee spouse].

The amount of the insurable interest shall be [the maximum 55 percent of the reduced annuity or equal to the entire community interest fraction of the reduced annuity or equal to one-half of the community interest fraction of the reduced annuity].

[Employee Spouse] shall cooperate in a timely manner to provide evidence of good health, and any other requirements for an insurable interest survivor election that OPM may prescribe through regulation or other issuances.

If [employee spouse] fails to qualify for an insurable interest annuity, due to health or otherwise, [he/she] shall maintain [nonemployee spouse] as the beneficiary on \$[amount of death benefit] of life insurance if available to [employee spouse] through FERS or otherwise. The cost, if any, of this coverage shall be paid [by Husband or by Wife or by the parties equally or _____ percent by Husband and _____ percent by Wife]. Should [employee spouse] fail to qualify for both the insurable interest annuity and life insurance, the court shall reserve jurisdiction to adjust [nonemployee spouse's] share of the retirement annuity as may be appropriate.

[Use to provide for only a token survivor annuity to retain eligibility for federal health insurance instead of a regular or insurable interest survivor annuity:]

Survivor Annuity Requirement for Health Insurance Eligibility

[Nonemployee Spouse] shall be entitled to a survivor annuity in the amount of \$1.00 per month in order to qualify for the Federal Employees Health Insurance for Former Spouses.

[Use to charge nonemployee's share of annuity to pay cost of survivor annuity:]

Cost of the Survivor Annuity

To the extent that [nonemployee spouse's] portion of [employee spouse's] annuity is sufficient to pay the cost associated with providing the former spouse survivor annuity, [nonemployee spouse's] share may be reduced to pay [the entire cost or _____ percent of the cost].

[Include if the employee spouse is not yet retired:]

Order Preventing Payment of Lump Sums

[EITHER;]

The COAP will direct OPM not to pay [employee spouse] a refund of employee contributions as this would extinguish [nonemployee spouse's] right to a portion of an employee annuity and survivor annuity.

[OR;]

The COAP will direct that if [employee spouse] becomes eligible and applies for a refund of employee contributions, [nonemployee spouse] is entitled one-half of the community share fraction of the refund of employee contributions.

Death of _____ [Nonemployee Spouse]

The COAP will direct OPM that if [nonemployee spouse] predeceases [employee spouse], [nonemployee spouse's] share of [employee spouse's] retirement benefits will _____[revert to _____ (employee spouse) or be paid to the court or be paid to _____ (nonemployee spouse's) estate or be paid to _____ (employee spouse's)(child/children)].

[Include if the employee spouse is retired and receiving annuity payments, but has not been making estimated payments to the nonemployee spouse:]

Payment of Arrearage

An arrearage exists because [employee spouse] began receiving retirement benefits effective on _____[date] and has not shared the monthly annuity payments with [nonemployee spouse]. If [employee spouse] has not cured the full arrearage by the time [nonemployee spouse] receives a first annuity payment directly from OPM, either party may request that the court issue a new or revised court order that increases [nonemployee spouse's] entitlement prospectively to cure the arrearage.

[OR: Include if the employee spouse is retired and has been making estimated payments to the nonemployee spouse:]

Estimated Payments

[Employee Spouse] began receiving retirement benefits effective on _____[date] and has paid to [nonemployee spouse] a total of \$_____ as [nonemployee spouse's] estimated share of all benefits already received. [Employee Spouse] will continue to pay to [nonemployee spouse] this estimated amount until FERS commences payment to [nonemployee spouse] directly. If the amount that [nonemployee spouse] receives directly from FERS under a COAP differs from the estimated payment, taking into account the tax effects of the arrangement for payment between the parties, the parties will cooperate to cure any overpayment or underpayment of the benefit share, including by modification of the COAP.

Suspension of Benefits on Reemployment

[Use if the employee spouse will take over payments to nonemployee:]

The parties understand that FERS includes suspension-of-benefits provisions, which may affect the retirement distributions payable under it if, after retirement and receipt of benefits has commenced under an involuntary retirement, [employee spouse] returns to work in covered employment or recovers from a disability before age 60. If a suspension of benefits should occur for any reason, [employee spouse] shall make the same payments to [nonemployee spouse] that would have been made by FERS but for the suspension. The payments shall include cost-of-living increases and shall be made from [employee spouse's] separate property funds. The payments shall continue until such

time as payments from FERS are resumed. They shall be made on a net after-tax basis, and shall not be deductible by [employee spouse], nor income to [nonemployee spouse]. The payments shall have no effect on the amount payable to [nonemployee spouse] once [employee spouse] retires permanently, except for the inclusion of cost-of-living increases. Further, they shall have no effect on any support obligation otherwise owing.

[OR: Use if the nonemployee spouse will accept suspension of benefits:]

The parties understand that FERS includes suspension-of-benefits provisions, which may affect the retirement distributions payable under it if, after retirement and receipt of benefits has commenced under an involuntary retirement, [employee spouse] returns to work in covered employment or recovers from a disability before age 60. If a suspension of benefits should occur for any reason, the benefit payments to both parties shall be suspended. The community interest in FERS shall then be recalculated as necessary to take into account the effect of any additional credited service or benefit accrual, including any supplemental annuity. If [employee spouse] should die during the period of suspension, to the extent that the benefits are recalculated under this paragraph, the recalculation shall identify [nonemployee spouse's] prorated interest in any survivor benefit payable under the terms of FERS. The court shall reserve jurisdiction to make any orders necessary to give effect to this paragraph.

[OR: Use if the nonemployee spouse will be given option to accept payments or suspension of benefits:]

The parties understand that FERS includes suspension-of-benefits provisions, which may affect the retirement distributions payable under it if, after retirement and receipt of benefits has commenced under an involuntary retirement, [employee spouse] returns to work in covered employment or recovers from a disability before age 60. If a suspension of benefits should occur for any reason, [employee spouse] shall, at the election of [nonemployee spouse], make the same payments to [nonemployee spouse] that would have been made by FERS but for the suspension. This election must be made, if at all, by [nonemployee spouse] within _____ days of notice of the suspension. If elected, the payments shall be made from [employee spouse's] separate property funds, and shall continue until such time as payments from FERS are resumed. The payments shall be made on a net after-tax basis, and shall not be deductible by [employee spouse], nor income to [nonemployee spouse]. They shall have no effect on any support obligation otherwise owing. If continuation of payments is elected, [nonemployee spouse] shall not share in the value of any benefits accrued under FERS by reason of [employee spouse's] return to covered service. If this election is not made and the benefit payments to both parties are suspended, then the community share under FERS shall be recalculated as necessary to take into account the effect of any additional credited service or benefit accrual, including any supplemental annuity. If [employee spouse] should die during the period of suspension, to the extent that the benefits are recalculated under this paragraph, the recalculation shall identify [nonemployee spouse's] prorated interest in any survivor benefits payable under the terms of FERS. The court shall reserve jurisdiction to make any orders necessary to give effect to this paragraph.

Transmittal of Order to OPM

A certified copy of the final order will be mailed by counsel for [Husband or Wife] to the component of OPM responsible for processing court orders for a determination that the court order will be acceptable as a COAP under Title 5 Code of Federal Regulations, section 838.103. A copy of the transmittal of that certified order will be provided by the sender to each party.

[Use to reserve jurisdiction should the parties remarry each other:]

Remarriage to Each Other

The parties shall ask the court to reserve jurisdiction to amend the COAP as the parties may agree, and as may be permitted by FERS, should the parties remarry each other. In the event of remarriage, *[employee spouse]* shall not take any unilateral action that will abridge the right of *[nonemployee spouse]* to survivor benefits under FERS.

[3] FORM--Civil Service Retirement System (CSRS)

Civil Service Retirement System (CSRS) Benefits

Civil Service Retirement System Benefits

A community property interest exists in *[employee spouse's]* accumulated benefit under the Civil Service Retirement System (CSRS), administered by the United States Office of Personnel Management (OPM) based on *[his/her]* employment during the marriage for the United States government.

A Court Order Acceptable for Processing (COAP) will be prepared by counsel for *[Husband or Wife]* setting forth the rights and entitlement of *[nonemployee spouse]* as set forth in this Agreement.

If the order as entered by the court is not found to be acceptable for processing by OPM, the parties will cooperate in a timely manner in the preparation of a subsequent stipulation and order, as long as that subsequent order does not substantively change the rights and obligations of each party from those in this Agreement. The court shall reserve jurisdiction to amend the COAP as necessary should OPM determine that order is not acceptable.

[Employee Spouse] shall take no act that might interfere with *[nonemployee spouse's]* right to receive *[her/his]* full community interest in all benefits under CSRS.

Annuity Division

[Nonemployee Spouse] shall receive a share, as set forth below, of *[employee spouse's]* *[self-only or gross or net]* monthly annuity under CSRS directly from OPM.

[Use to provide the nonemployee spouse with a dollar amount:]

[Nonemployee Spouse's] share shall be \$_____ per month from *[employee spouse's]* civil service retirement benefits. *[Any Cost-of-Living Adjustments (COLA's) that are applied to_____ (employee spouse's) retirement benefits shall also be applied to_____ (nonemployee spouse's) share.]*

[OR: Use to provide the nonemployee spouse with a percent according to the time-rule formula:]

That portion of the *[self-only or gross or net]* annuity to be awarded to *[nonemployee spouse]* is one-half of the community share fraction whose numerator is the number of months of creditable federal civilian and military service performed by *[employee spouse]* during the marriage through the date of separation, and whose denominator is the total number of months of creditable federal civilian and military service performed by *[employee spouse]*. The date of marriage is_____, and the date of separation is_____.

[OR: Use to provide the nonemployee spouse's share according to another formula:]

That portion of the [self-only or gross or net] annuity to be awarded [nonemployee spouse] shall be determined according to the following formula: [specify formula].

Survivor Annuity

[Use to provide for a regular survivor annuity if the employee is already retired:]

[Nonemployee Spouse] shall be entitled to receive a CSRS survivor annuity [in the same amount to which _____ (nonemployee spouse) would have been entitled if the divorce had not occurred or of _____ percent of the maximum possible survivor annuity].

[Use if regular survivor annuity was not elected at retirement and therefore is waived:]

[Nonemployee Spouse] is not entitled to a CSRS survivor annuity in that [she/he] waived the right to the annuity at the time of [employee spouse's] retirement.

[Use one of the following to provide for a regular survivor annuity if the employee is not yet retired:]

[Nonemployee Spouse] shall be entitled to receive a CSRS survivor annuity, whether [employee spouse] dies before or after retirement. The survivor annuity shall be equal to one-half of the community share fraction (as set forth above) of the maximum possible survivor annuity.

[OR]

[Nonemployee Spouse] shall be entitled to receive a CSRS survivor annuity, whether [employee spouse] dies before or after retirement. The survivor annuity shall be equal to \$ _____ per month, [increased or not increased] by any cost-of-living adjustments occurring before the death of [employee spouse].

[OR]

[Nonemployee Spouse] shall be entitled to receive a CSRS survivor annuity, whether [employee spouse] dies before or after retirement. The survivor annuity shall be equal to _____ percent of the maximum possible survivor annuity.

[OR]

[Nonemployee Spouse] shall be entitled to receive a CSRS survivor annuity, whether [employee spouse] dies before or after retirement. The survivor annuity shall be the portion of [employee spouse's] maximum possible survivor annuity computed as follows: [specify formula].

[OR]

[Nonemployee Spouse] shall be entitled to receive a CSRS survivor annuity, whether [employee spouse] dies before or

after retirement. The survivor annuity shall be the maximum possible survivor annuity under CSRS unless *[employee spouse]* remarries before retirement. If *[employee spouse]* remarries before retirement, *[nonemployee spouse]* shall be entitled to one-half of the community share fraction (as set forth above) of the maximum possible survivor annuity.

[OR]

[Nonemployee Spouse] shall be entitled to receive a CSRS survivor annuity, whether *[employee spouse]* dies before or after retirement. The survivor annuity shall be the maximum possible survivor annuity under CSRS unless *[employee spouse]* remarries before retirement. If *[employee spouse]* remarries before retirement, *[nonemployee spouse]* shall be entitled to the full community share; that is, 100 percent of the community share fraction (as set forth above) of the maximum possible survivor annuity. In consideration for receipt of the maximum possible survivor annuity, or in the alternative, the full community share of the maximum possible survivor annuity, *[employee spouse]* shall be entitled to receive *[nonemployee spouse's]* remaining share of the life annuity, should *[nonemployee spouse]* predecease *[employee spouse]*.

[Continue with:]

[Employee Spouse] agrees to make whatever elections are required under this Agreement.

[Nonemployee Spouse] shall immediately notify *[employee spouse]* of any event that causes *[her/him]* to lose eligibility for the survivor annuity, for example, on *[her/his]* remarriage before age 55.

[Use to provide for an insurable interest annuity instead of a regular survivor annuity:]

Insurable-Interest Survivor Annuity

At such time as *[employee spouse]* applies for retirement, *[he/she]* shall indicate on the application the intention to make an election of an "insurable interest survivor annuity" on behalf of *[nonemployee spouse]*.

The amount of the insurable interest shall be *[the maximum 55 percent of the reduced annuity or equal to the entire community interest fraction of the reduced annuity or equal to one-half of the community interest fraction of the reduced annuity]*.

[Employee Spouse] shall cooperate in a timely manner to provide evidence of good health, and any other requirements for an insurable interest survivor election that OPM may prescribe through regulation or other issuances.

If *[employee spouse]* fails to qualify for an insurable interest annuity, due to health or otherwise, *[he/she]* shall maintain *[nonemployee spouse]* as the beneficiary on \$*[amount of death benefit]* of life insurance if available to *[employee spouse]* through CSRS or otherwise. The cost, if any, of this coverage shall be paid *[by Husband or by Wife or by the parties equally or _____ percent by Husband and _____ percent by Wife]*. Should *[employee spouse]* fail to qualify for both the insurable interest annuity and life insurance, the court shall reserve jurisdiction to adjust *[nonemployee spouse's]* share of the retirement annuity as may be appropriate.

[Use to provide for only a token survivor annuity to retain eligibility for federal health insurance instead of a regular or insurable interest survivor annuity:]

Survivor Annuity Requirement for Health Insurance Eligibility

[*Nonemployee Spouse*] shall be entitled to a survivor annuity in the amount of \$1.00 per month in order to qualify for the Federal Employees Health Insurance for Former Spouses.

[*Use to charge nonemployee's share of annuity to pay cost of survivor annuity:*]

Cost of the Survivor Annuity

To the extent that [*nonemployee spouse's*] portion of [*employee spouse's*] annuity is sufficient to pay the cost associated with providing the survivor annuity, [*nonemployee spouse's*] share may be reduced to pay [the entire cost or _____ percent of the cost].

[*Include if the employee spouse is not yet retired:*]

Order Preventing Payment of Lump Sums

[*EITHER;*]

The COAP will direct OPM not to pay [*employee spouse*] a refund of employee contributions as this would extinguish [*nonemployee spouse's*] right to a portion of an employee annuity and survivor annuity.

[*OR;*]

The COAP will direct that if [*employee spouse*] becomes eligible and applies for a refund of employee contributions, [*nonemployee spouse*] is entitled one-half of the community share fraction of the refund of employee contributions.

Death of _____ [*Nonemployee Spouse*]

The COAP will direct OPM that if [*nonemployee spouse*] predeceases [*employee spouse*], [*nonemployee spouse's*] share of [*employee spouse's*] retirement benefits will _____[revert to _____ (*employee spouse*) or be paid to the court or be paid to _____ (*nonemployee spouse's*) estate or be paid to _____ (*employee spouse's*)(child/children)].

[*Include if the employee spouse is retired and receiving annuity payments, but has not been making estimated payments to the nonemployee spouse:*]

Payment of Arrearage

An arrearage exists because [*employee spouse*] began receiving retirement benefits effective on _____[*date*] and has not shared the monthly annuity payments with [*nonemployee spouse*]. If [

employee spouse] has not cured the full arrearage by the time *[nonemployee spouse]* receives a first annuity payment directly from OPM, either party may request that the court issue a new or revised court order that increases *[nonemployee spouse's]* entitlement prospectively to cure the arrearage.

[OR: Include if the employee spouse is retired and has been making estimated payments to the nonemployee spouse:]

Estimated Payments

[Employee Spouse] began receiving retirement benefits effective on _____ *[date]* and has paid to *[nonemployee spouse]* a total of \$_____ as *[nonemployee spouse's]* estimated share of all benefits already received. *[Employee Spouse]* will continue to pay to *[nonemployee spouse]* this estimated amount until CSRS commences payment to *[nonemployee spouse]* directly. If the amount that *[nonemployee spouse]* receives directly from CSRS under a COAP differs from the estimated payment, taking into account the tax effects of the arrangement for payment between the parties, the parties will cooperate to cure any overpayment or underpayment of the benefit share, including by modification of the COAP.

Suspension of Benefits on Reemployment

[Use if the employee spouse will take over payments to nonemployee:]

The parties understand that CSRS includes suspension-of-benefits provisions, which may affect the retirement distributions payable under it if, after retirement and receipt of benefits has commenced under an involuntary retirement, *[employee spouse]* returns to work in covered employment or recovers from a disability before age 60. If a suspension of benefits should occur for any reason, *[employee spouse]* shall make the same payments to *[nonemployee spouse]* that would have been made by CSRS but for the suspension. The payments shall include cost-of-living increases and shall be made from *[employee spouse's]* separate property funds. The payments shall continue until such time as payments from CSRS are resumed. They shall be made on a net after-tax basis, and shall not be deductible by *[employee spouse]*, nor income to *[nonemployee spouse]*. The payments shall have no effect on the amount payable to *[nonemployee spouse]* once *[employee spouse]* retires permanently, except for the inclusion of cost-of-living increases. Further, they shall have no effect on any support obligation otherwise owing.

[OR: Use if the nonemployee spouse will accept suspension of benefits:]

The parties understand that CSRS includes suspension-of-benefits provisions, which may affect the retirement distributions payable under it if, after retirement and receipt of benefits has commenced under an involuntary retirement, *[employee spouse]* returns to work in covered employment or recovers from a disability before age 60. If a suspension of benefits should occur for any reason, the benefit payments to both parties shall be suspended. The community interest in CSRS shall then be recalculated as necessary to take into account the effect of any additional credited service or benefit accrual, including any supplemental annuity. If *[employee spouse]* should die during the period of suspension, to the extent that the benefits are recalculated under this paragraph, the recalculation shall identify *[nonemployee spouse's]* prorated interest in any survivor benefit payable under the terms of CSRS. The court shall reserve jurisdiction to make any orders necessary to give effect to this paragraph.

[OR: Use if the nonemployee spouse will be given option to accept payments or suspension of benefits:]

The parties understand that CSRS includes suspension-of-benefits provisions, which may affect the retirement distributions payable under it if, after retirement and receipt of benefits has commenced under an involuntary retirement, [employee spouse] returns to work in covered employment or recovers from a disability before age 60. If a suspension of benefits should occur for any reason, [employee spouse] shall, at the election of [nonemployee spouse], make the same payments to [nonemployee spouse] that would have been made by CSRS but for the suspension. This election must be made, if at all, by [nonemployee spouse] within _____ days of notice of the suspension. If elected, the payments shall be made from [employee spouse's] separate property funds, and shall continue until such time as payments from CSRS are resumed. The payments shall be made on a net after-tax basis, and shall not be deductible by [employee spouse], nor income to [nonemployee spouse]. They shall have no effect on any support obligation otherwise owing. If continuation of payments is elected, [nonemployee spouse] shall not share in the value of any benefits accrued under CSRS by reason of [employee spouse's] return to covered service. If this election is not made and the benefit payments to both parties are suspended, then the community share under CSRS shall be recalculated as necessary to take into account the effect of any additional credited service or benefit accrual, including any supplemental annuity. If [employee spouse] should die during the period of suspension, to the extent that the benefits are recalculated under this paragraph, the recalculation shall identify [nonemployee spouse's] prorated interest in any survivor benefits payable under the terms of CSRS. The court shall reserve jurisdiction to make any orders necessary to give effect to this paragraph.

Transmittal of Order to OPM

A certified copy of the final order will be mailed by counsel for [Husband or Wife] to the component of OPM responsible for processing court orders for a determination that the court order will be acceptable as a COAP under Title 5 *Code of Federal Regulations*, section 838.103. A copy of the transmittal of that certified order will be provided by the sender to each party.

[Use to reserve jurisdiction should the parties remarry each other:]

Remarriage to Each Other

The parties shall ask the court to reserve jurisdiction to amend the COAP as the parties may agree, and as may be permitted by CSRS, should the parties remarry each other. In the event of remarriage, _____ [employee spouse] shall not take any unilateral action that will abridge the right of _____ [nonemployee spouse] to survivor benefits under CSRS.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support
 Dissolution & Divorce Property Distribution
 General Overview Family Law Marital Termination & Spousal Support
 Dissolution & Divorce Property Distribution
 Classification Retirement Benefits General Overview
 Pensions & Benefits Law Governmental Employees U.S.
 Civil Service Retirement System General Overview
 Pensions & Benefits Law Governmental Employees U.S.
 Civil Service Retirement System Benefit Entitlements



115 of 115 DOCUMENTS

California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 122 PROVISIONS FOR DIVISION OF EMPLOYEE BENEFITS
PART IV. FORMS
D. Federal Employee Benefit Plans

34-122 California Legal Forms--Transaction Guide § 122.251

AUTHOR: Editorial Consultants: James M. Crawford, Jr., Esq., R. Ann Fallon, Esq., and Anne E. Moss, Esq.

§ 122.251 Thrift Savings Plan (TSP)

[1] Comment

[a] Use of Form

All Federal Employee Retirement System (FERS) [*see* § 122.250] employees and many Civil Service Retirement System (CSRS) [*see* § 122.250] employees have Thrift Savings Plan (TSP) accounts [*see* 5 U.S.C. § 8351(a)(1)]. The TSP was established under Subchapter III and VII of the Federal Employee Retirement System Act of 1986 [5 U.S.C. §§ 8351, 8401 *et seq.* (establishing FERS)]. The federal statutes applicable to TSP domestic relations orders are found at Title 5 *United States Code Sections 8431 et seq.* Regulations are at Title 5 Code of Federal Regulations Part 1600 *et seq.* The Plan is administered by the Federal Retirement Thrift Investment Board.

The TSP is a "governmental plan" as defined in Title 29 *United States Code* § 1002(32), and is exempt from the Employee Retirement Income Security Act (ERISA) [29 U.S.C. § 1001 *et seq.*]. Accordingly, the ERISA requirements for Qualified Domestic Relations Orders (QDRO's) are not applicable to the TSP, although distributions and payments from the TSP are accorded the same special tax treatment as private sector plans [*see* 5 U.S.C. § 8440].

The Federal Retirement Thrift Investment Board uses the term "Retirement Benefits Court Order" when describing a state court order that divides TSP benefits [*see* 5 C.F.R. § 1653.1 *et seq.*]. For further information, see publication "Information About Court Orders" on the Thrift Savings Plan's website at www.tsp.gov. The TSP's website also provides the current address of the TSP record keeper, to which Retirement Benefits Court Orders should be submitted [5 C.F.R. § 1653.3(b)].

[b] Distribution of Community Interest to Nonemployee Spouse

The employee's interest in the TSP is subject to the community property rights of the nonemployee spouse as presented in a Retirement Benefits Court Order [*see* 5 U.S.C. § 8435(c)]. An award to a former spouse may be for a specified

dollar amount, or a stated percentage or fraction [5 C.F.R. § 1653.2(a)(3)(i), (ii)]. A date from which interest will accrue should be given if a dollar amount or percent is selected if earnings are to be included. Earnings on the nonemployee spouse's share will be paid only if the order so states [5 C.F.R. § 1653.4(d)]. A lump sum distribution under a Retirement Benefits Court Order will be paid to the former spouse as soon as practicable following TSP's receipt of an acceptable order [see 5 C.F.R. § 1653.5]. The former spouse may roll over her or his payment to an IRA or other tax deferred retirement plan [5 C.F.R. § 1653.5(b)].

PRACTICE TIP:

Requiring TSP to make a tracing calculation, which must be done manually, may cause delay in payment to the nonemployee. Alternatively, the parties are advised to make their own calculation in advance. For this purpose, the employee should request the TSP to provide copies of all benefit statements issued since the date of the marriage. *Commentary by Anne Moss.*

The only deferred distribution method available to a former spouse is in the form of a survivor annuity [see 5 U.S.C. § 8435(d); 5 C.F.R. § 1653.2(a)(3)(iii)]. If the court order explicitly awards a survivor annuity, the Board will purchase an annuity from TSP's annuity vendor for the former spouse; monthly payments will be made at the appropriate time. This manner of distribution is rarely used by divorcing spouses.

If an employee dies with funds in his or her TSP account, the funds are payable in the form of a death benefit to the employee's designated beneficiary [5 C.F.R. §§ 1651.1, 1651.2(a)]. If there is no designated beneficiary, the regulations provide for an order of alternative beneficiaries [see 5 C.F.R. § 1651.2(a)]. A former spouse is given no statutory rights as beneficiary of the preretirement death benefit, and TSP will not honor an order requiring the employee to name the nonemployee spouse as beneficiary [see 5 C.F.R. Pt. 1653 (no provision compelling former spouse to be designated beneficiary of death benefit by court order)]. A former spouse may, however, be made a joint annuitant with the employee, and will receive the employee's annuity payments if she or he survives the employee [5 U.S.C. § 8434(a)(2)(E); 5 C.F.R. § 1650.12(a)(4)].

[2] FORM

Thrift Savings Plan (TSP)

Thrift Savings Plan

A community property interest exists in _____ [employee spouse's] account under the Federal Retirement Thrift Savings Plan (TSP) based on contributions made by and/or on behalf of _____ [employee spouse] through employment during the marriage with the United States government.

A Retirement Benefits Court Order will be prepared by counsel for _____ [Husband or Wife] setting forth the entitlement of _____ [nonemployee spouse] to a portion of _____ [employee spouse's] TSP account balance.

If the order as entered by the court is not found to be acceptable by TSP, the parties will cooperate in a timely manner in the preparation of a subsequent stipulation and order, as long as the subsequent order does not substantively change the rights or obligations of each party from those in this Agreement.

[Use to award the nonemployee spouse a specified dollar amount from the TSP:]

_____ [Nonemployee Spouse] is awarded \$ _____ from _____ [employee spouse's] TSP [, plus earnings on the amount of the entitlement as payable by TSP under the order from _____ (date), or the nearest TSP valuation date, until payment is made].

[Use to award the nonemployee spouse a specified percent of the TSP:]

_____ [Nonemployee Spouse] is awarded _____ percent of _____ [employee spouse's] TSP as of _____ [date], or the nearest TSP valuation date _____ [plus earnings on the amount of the entitlement as payable by TSP under the order from _____ (date) until payment is made].

[Use to define the nonemployee's spouse's share according to the tracing rule:]

_____ [Nonemployee Spouse] is awarded one-half of the community interest in _____ [employee spouse's] TSP account. The community interest is defined as the sum of all contributions by _____ [employee spouse] or [his or her] agency made on account of service from the date of marriage to the date of separation (or to the last day of the month in which the date of separation occurs), together with all earnings and losses on these amounts, and minus any withdrawals (not including employee loans) through the month before payment. _____ [Employee Spouse] agrees to cooperate in obtaining the necessary documentation from TSP to calculate _____ [nonemployee spouse's] share.

_____ [Nonemployee Spouse] is considered the distributee for any distribution and may rollover some or all of the lump sum to an Individual Retirement Account or other tax qualified plan.

A certified copy of the final order will be mailed by counsel for _____ [Husband or Wife] to the component of TSP responsible for processing court orders for a determination that the court order will be acceptable as a "Retirement Benefits Order" under Title 5 Code of Federal Regulations, section 1650. A copy of the transmittal of that certified order will be provided by the sender to each party.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution General Overview
 Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Classification Retirement Benefits General Overview Pensions & Benefits Law Governmental Employees U.S. Civil Service Retirement System General Overview Pensions & Benefits Law Governmental Employees U.S. Civil Service Retirement System Benefit Entitlements



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 123 SPOUSAL AND CHILD SUPPORT PROVISIONS

34-123 California Legal Forms--Transaction Guide 123.syn

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

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§ 123.05 Law Reviews and Periodicals

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[3] Additional Text References

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§ 123.12 Family Support

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§ 123.101 Spousal Support Provisions

Scope

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[2] FORM

Basic Provision for Periodic Payment of Child Support

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[2] FORM

Amount of Child Support Under Statewide Uniform Guideline Formula

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[1] Comment--Use of Form

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Stipulation to Child Support Below Guideline Formula Amount

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[1] Comment--Use of Form

[2] FORM

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[1] Comment--Use of Form

[2] FORM

Cost-of-Living Increase

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[1] Comment--Use of Form

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Percent Increase in Support Based on Obligor's Income

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[1] Comment--Use of Form

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No Current Child Support Order Appropriate

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[1] Comment--Use of Form

[2] FORM

Allocation of Support Among Two or More Children

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Continuation of Duty of Support Beyond Minority for Higher Education

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[1] Comment--Use of Form

[2] FORM

Extension of Support Beyond Age of Majority for Incapacitated Child

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[1] Comment

[2] FORM

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[1] Comment

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[2] FORM

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[1] Comment--Use of Form

[2] FORM

Specific Amount Payable Periodically for Indefinite Period

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[1] Comment--Use of Form

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[1] Comment--Use of Form

[2] FORM

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[1] Comment--Use of Form

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Amount as Percentage of Income

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[1] Comment--Use of Form

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Percentage of Potential Future Additional Income

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[2] FORM

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[2] FORM

S Payment of Mortgage Obligation

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[1] Comment

[2] FORM

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COBRA: Maintenance of Health Care Coverages, Election, and Payment of Premiums

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[1] Comment

[2] FORM

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[2] FORM

Nonmodifiable Amount

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[1] Comment--Use of Form

[2] FORM

Conditional Nonmodifiability

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[1] Comment--Use of Form

[2] FORM

Event Does Not Constitute Change of Circumstances

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[1] Comment--Use of Form

[2] FORM

Modification Only by Written Agreement

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[1] Comment--Use of Form

[2] FORM

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[1] Comment--Use of Form

[2] FORM

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[1] Comment--Use of Form

[2] FORM

Statements of Current Circumstances For Spousal Support

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[1] Comment

[2] FORM

Notice of Occurrence of Contingencies

§ 123.295 Provision for Nondischargeability of Support Obligations in Bankruptcy

[1] Comment--Use of Form

[2] FORM

Provision for Nondischargeability of Support Obligations in Bankruptcy

Editorial Consultants: Kathryn Kirkland, Esq.,
Ira Lurvey, Esq., and Diana Richmond, Esq.n*

FOOTNOTES:

(n170)Footnote *. Ms. Kirkland, Mr. Lurvey, and Ms. Richmond are Certified Family Law Specialists practicing in California. They are also editorial consultants for Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed. (Matthew Bender), as well as editorial board members for the California Family Law Monthly (Matthew Bender).



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DIVISION VII: PERSONAL TRANSACTIONS CHAPTER 123 SPOUSAL AND CHILD SUPPORT PROVISIONS

34-123 California Legal Forms--Transaction Guide Scope

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

Scope

Editorial Consultants: Kathryn Kirkland, Esq.,
Ira Lurvey, Esq., and Diana Richmond, Esq.n* Scope

This chapter contains forms for use in marital settlement agreements and other child support agreements to set forth provisions for the payment of spousal support and child support. The Legal Background contains a brief summary of the major considerations involved in drafting provisions related to support, and a discussion of related tax considerations. The Transaction Guide sets out a checklist of spousal and child support provisions. The Forms part contains a variety of forms for child and spousal support.

In *In re Marriage Cases*, the California Supreme Court held that differential treatment of opposite-sex and same-sex couples in California's marriage statutes violated the California Constitution's guarantees of privacy, due process, and equal protection [*In re Marriage Cases* (2008) 43 Cal. 4th 757, 784, 847-856, 76 Cal. Rptr. 3d 683, 183 P.3d 384] . That holding was superseded by the subsequent adoption of Proposition 8, which amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California [see Cal. Const. art. I, § 7.5 (eff. Nov. 5, 2008)]. The Supreme Court upheld Proposition 8 against a constitutional challenge, but in doing so the Court reaffirmed the continuing validity of same-sex marriages entered into before November 5, 2008, the effective date of Proposition 8 [Strauss v. Horton (2009) 46 Cal. 4th 364, 470-474, 93 Cal. Rptr. 3d 591, 207 P.3d 48 (estimating 18,000 same-sex marriages lawfully entered into before Proposition 8 took effect)]. If a form in this chapter is used in the context of a same-sex marriage lawfully entered into before that date, the language in the form should be modified accordingly. For example, the names of the parties may be used instead of terms like "Husband" and "Wife."

The forms set forth in this chapter are intended to be used in conjunction with the complete marital settlement agreements set forth in Ch. 120, *Complete Marital Settlement Agreements* . The child support provisions in this chapter may be used in any agreement between parents, such as one resolving a parentage determination under the Uniform Parentage Act [see Fam. Code § 7600 et seq.], or any other proceeding in which child support may be ordered. Forms pertaining to child custody and visitation are set forth in Ch. 124, *Provisions for Child Custody and Visitation* , and forms regarding filing of income tax returns and payment of income taxes, attorney's fees, and costs are set forth in Ch. 125, *Provisions for Payment of Income Taxes, Attorney's Fees, and Costs* .

For a detailed discussion of support-related matters, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapters 40- 52 (Matthew Bender).

FOOTNOTES:

(n171)Footnote *. Ms. Kirkland, Mr. Lurvey, and Ms. Richmond are Certified Family Law Specialists practicing in California. They are also editorial consultants for Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed. (Matthew Bender), as well as editorial board members for the California Family Law Monthly (Matthew Bender).



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CHAPTER 123 SPOUSAL AND CHILD SUPPORT PROVISIONS
PART I. RESEARCH GUIDE
A. Primary Sources

34-123 California Legal Forms--Transaction Guide § 123.01

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.01 California Statutes

Definitions and general provisions. *Fam. Code §§ 3500-3557.*

Support agreements. *Fam. Code §§ 3580-3593.*

Spousal and child support during pendency of proceeding. *Fam. Code §§ 3600-3604.*

Expedited child support order. *Fam. Code §§ 3620-3634.*

Modification or termination of support. *Fam. Code §§ 3650-3694.*

Health insurance. *Fam. Code §§ 3750-3782.*

Deferred Sale of Home Order. *Fam. Code §§ 3800-3810.*

Software used to determine support. *Fam. Code § 3830.*

Duty of parent to support child. *Fam. Code §§ 3900-3952.*

Court-ordered child support. *Fam. Code §§ 4000-4203.*

Spousal support.

Duty to support spouse. *Fam. Code §§ 4300-4303.*

Factors to be considered in ordering support. *Fam. Code §§ 4320-4325.*

Spousal support upon dissolution or legal separation. *Fam. Code §§ 4330-4339.*

Provision for support after death. *Fam. Code § 4360.*

Enforcement of support orders.

General provisions. *Fam. Code §§ 4500-4507.*

Deposit of money to secure future child support payments. *Fam. Code §§ 4550-4573.*

Deposit of assets to secure future child support payments. *Fam. Code §§ 4600-4641.*

Child support delinquency reporting. *Fam. Code §§ 4700, 4701.*

Civil penalty for child support delinquency. *Fam. Code §§ 4720-4733.*

Uniform Reciprocal Enforcement of Support Act. *Fam. Code §§ 4800-4854.*

Enforcement by writ of execution. *Fam. Code §§ 5100-5104.*

Earnings assignment order. *Fam. Code §§ 5200-5295.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGeneral
OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 123 SPOUSAL AND CHILD SUPPORT PROVISIONS
PART I. RESEARCH GUIDE
A. Primary Sources

34-123 California Legal Forms--Transaction Guide § 123.02

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.02 Federal Sources

[1] Statutes

Nondischargeability in bankruptcy of domestic support obligations. *11 U.S.C. §§ 101(14A), 523(a)(5)*.

Tax statutes.

Head-of-household filings. *I.R.C. §§ 2(b), (c), 7703(b)*.

Child care credit. *I.R.C. § 21*.

Alimony and separate maintenance payments. *I.R.C. § 71*.

Allowance of deductions for personal exemptions. *I.R.C. § 151*.

Dependency exemptions. *I.R.C. § 152*.

Medical care deductions. *I.R.C. § 213*.

Alimony and separate maintenance payments as deductions. *I.R.C. § 215*.

Personal, living, and family expenses not deductible. *I.R.C. § 262(a)*.

Determination of marital status. *I.R.C. § 7703*.

[2] Regulations

Determination of marital status. *Treas. Reg. § 1.153-1*.

Medical, dental, and other expenses. *Treas. Reg. § 1.213-1*.

Periodic alimony, and other payments. *Treas. Reg. § 1.215-1*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGeneral
OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview



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A. Primary Sources

34-123 California Legal Forms--Transaction Guide §§ 123.03-123.04

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 123.03[Reserved]



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34-123 California Legal Forms--Transaction Guide § 123.05

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

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Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview



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34-123 California Legal Forms--Transaction Guide § 123.06

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.06 Annotations

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Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview



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34-123 California Legal Forms--Transaction Guide § 123.07

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.07 Text References

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Ch. 220, *Dissolution of Marriage and Related Proceedings*.

Ch. 394, *Parent and Child*.

Ch. 412, *Paternity*.

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Ch. 2, *Detailed Agreements*.

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[3] Additional Text References

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Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview



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34-123 California Legal Forms--Transaction Guide §§ 123.08-123.09

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 123.08[Reserved]



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34-123 California Legal Forms--Transaction Guide § 123.10

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.10 General Overview of Support Planning

Support agreements between spouses or unmarried parents are generally permitted [*see Fam. Code § 3580*], subject to Chapter 3 of Division 9 of the Family Code [*Fam. Code § 3580 et seq.*]. Support planning must take into account not only the subjective goals of the parties concerning support, but also the extent to which a court may order support if the parties fail to agree on the support issues.

In formulating a plan to provide for spousal or child support by agreement, counsel should initially keep in mind the following (nonstatutory) broad-based, practical considerations:

- The specific legal obligation each party has to support the other party [*see Fam. Code § 720*] and the parties' children [*see Fam. Code §§ 3900-3902*] in the absence of an agreement for support [*see Ch. 100, Control, Custody, and Support of Minors*].
- The probable support order that a court would make in the absence of an agreement, and conditions under which a court would approve a support agreement if it were submitted for approval [*see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 41, Child Support Orders*, and Ch. 51, *Spousal Support Orders* (Matthew Bender)].
- The objective factors that the parties should consider in reaching a support agreement, including, for example:
 - The anticipated or agreed-on living arrangements for each party and the parties' children, during and following a marital dissolution.
 - The actual short-term and long-term needs of each party and of the parties' children, in view of the totality of their circumstances.

- The financial ability of each party to be self-supporting and to support the other party and the parties' children, given the health, educational and employment background, and existing and expected financial resources of each party.
- The goals of each party in paying or receiving support, whether these concern obtaining income tax-related benefits or otherwise.

The forms in this chapter are designed to help implement the parties' support plans, and include provisions for long-term support under a variety of circumstances. Provisions are included for support that varies in amount over time, or are based on the happening of particular contingencies, along with provisions to secure the payment of support, and to provide support in alternative forms, such as by providing life insurance coverage, and by paying medical, educational, or other expenses. Also included are provisions concerning spousal support modification.

Income tax considerations may play a substantial role in structuring support payments [*see, e.g., I.R.C. §§ 71, 215*], and these should be investigated by counsel before drafting support provisions. In this chapter, tax provisions are set forth in several forms, and the important tax effects of particular provisions are briefly summarized in form comments, as appropriate.

Spousal and child support obligations under a marital settlement agreement generally are not dischargeable in bankruptcy. Specifically, the Bankruptcy Code provides that a "domestic support obligation" is not dischargeable [*see 11 U.S.C. § 523(a)(5)*]. A "domestic support obligation" for bankruptcy purposes includes any debt (whether accruing before or after bankruptcy proceedings are commenced), including interest accruing on that debt, that satisfies all of the following conditions [*11 U.S.C. § 101(14A)*]:

- The debt is owed to or recoverable by (1) the bankruptcy debtor's spouse, former spouse, or child; (2) the parent, legal guardian, or responsible relative of the bankruptcy debtor's child; or (3) a governmental unit.
- The debt is in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of the bankruptcy debtor's spouse, former spouse, child, or child's parent, regardless of whether the debt is expressly designated as alimony, maintenance, or support [*see Shaver v. Shaver (9th Cir. 1986) 736 F.2d 1314, 1315-1316* (whether obligation imposed by marital settlement agreement is actually "in the nature of alimony, maintenance, or support," is to be determined by bankruptcy court based on all circumstances; construing former *11 U.S.C. § 523(a)(5)*, which contained substantially similar language to that of current *11 U.S.C. § 101(14A)*)].
- The debt is established or subject to establishment before or after the commencement of the bankruptcy proceedings, by reason of a separation agreement, divorce decree, property settlement agreement, court order, or determination made in accordance with nonbankruptcy law by a governmental unit.
- The debt has not been assigned to a nongovernmental entity, unless the assignment was voluntarily made by the bankruptcy debtor's spouse, former spouse, child, or child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

The Bankruptcy Code includes other provisions designed to ensure that a debtor's domestic support obligations are satisfied [*see, e.g., 11 U.S.C. §§ 522(c)(1), (f)(1)(A), 547(c)(7), 1129(a)(14), 1208(c)(10), 1225(a)(7), (b)(2)(A), 1228(a), 1307(c)(11), 1322(a)(4), 1325(a)(8), 1328(a)*]. For example, unsecured domestic support obligations are given first priority among unsecured debts [*11 U.S.C. § 507(a)(1)*].

Even if it does not qualify as a "domestic support obligation," a debt owed to a spouse, former spouse, or child of the bankruptcy debtor will not be dischargeable in bankruptcy if it was incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or determination made in accordance with state or territorial law by a governmental unit [*11 U.S.C. § 523(a)(15)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral Overview



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34-123 California Legal Forms--Transaction Guide § 123.11

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.11 Preliminary Financial Disclosures

In order to plan for support, the parties must have a complete knowledge of each other's financial circumstances. As in the case of issues relating to property, this information may be obtained both through informal means, or if necessary, by formal discovery.

Once family law proceedings have commenced, the parties are subject to special disclosure requirements and must exchange preliminary and final declarations of disclosure, together with a current income and expense declaration, on the required Judicial Council forms [see *Fam. Code § 2100 et seq.*]. For further discussion, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 92, *Petitioning for Dissolution or Legal Separation*, Ch. 111, *Pretrial Procedures* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures



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34-123 California Legal Forms--Transaction Guide § 123.12

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.12 Family Support

Family support, as defined by the Family Code, is a type of support payment made under an agreement between the parties, or an order or judgment, that combines child support and spousal support without designating the amount allocated to each [*Fam. Code* § 92]. Under the Family Code, including the statewide uniform child support guideline, family support agreements are permitted [*see Fam. Code* § 3586, 4066, 4074]. However, family support is an income-tax shifting device designed to confer alimony tax treatment under *Internal Revenue Code Sections 71 and 215* (deductible to payor; income to payee) for payments that might otherwise be treated as child support. As such, the effectiveness of a family support agreement is not affected by the Family Code, but depends entirely on whether it conforms to the requirements of Internal Revenue statutes, regulations, and other IRS rulings.

For further discussion of the effect of the guideline on family support agreements, see § 123.21[2]. For coverage of alimony tax treatment, see §§ 123.30-123.33.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview



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34-123 California Legal Forms--Transaction Guide § 123.13

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.13 Use of Forms in This Chapter

The forms in this chapter are provisions that are designed to be used in a marital settlement agreement or other support agreement. The forms assume that the children of the relationship have been identified by name, birthdate, and gender in an introductory provision of the agreement. Because child support agreements are not limited to marital proceedings, the parties in the child support provisions are generally identified in this chapter as "the father" and "the mother." The designations may be changed to "Husband and Wife" or "Petitioner" and "Respondent" to conform to the general form of the agreement. The designations of "Husband and Wife" are used in the spousal support provisions. For examples of complete marital settlement agreements, see Chapter 120.

There is a mandatory Judicial Council form of Stipulation to Establish or Modify Child Support and Order [see Cal. Judicial Council Form FL-350]. Whether this form must be used in lieu of, or in addition to the child support provisions of a complete marital settlement or other support agreement has not been determined. For discussion as to how to incorporate the child support provisions of this chapter into the Judicial Council form, see § 123.21[3]. For an illustrated version of that form, see *California Forms of Pleading and Practice, Ch. 224, Dissolution of Marriage: Child Support, § 224.210* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Settlements Settlement Agreements General Overview Family Law Child Support Obligations General Overview Family Law Marital Termination & Spousal Support Spousal Support Obligations General Overview



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34-123 California Legal Forms--Transaction Guide §§ 123.14-123.19

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 123.14[Reserved]



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34-123 California Legal Forms--Transaction Guide § 123.20

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.20 Parents' Ability to Contract Regarding Child Support

In general, the parents of minor children, or children with respect to whom there is otherwise a support obligation imposed by statute, may enter into an agreement for the support of those children, subject to court approval [*see Fam. Code § 3580*; *In re Marriage of Bereznak & Heminger* (2003) 110 Cal. App. 4th 1062, 1067-1070, 2 Cal. Rptr. 3d 351 (parties' agreement to submit child-support issues to binding arbitration does not prevent judicial review of merits of arbitrator's award)]. The codification of this rule, *Fam. Code § 3580*, refers to "husband and wife" rather than "parents." This is almost certainly an oversight on the part of the Law Revision Commission in drafting the Family Code, rather than a rule limiting support agreements to married parents in dissolution proceedings. The structure of the Family Code is designed to effect a single standard of child support law regardless of the marital status of the parents [*see, e.g., Fam. Code § 3600*]. No other child support statute appears to be limited to married parents.

The parents may also provide for the support of children past the age of majority; such an agreement is binding [*Fam. Code § 3587*]. They cannot, however, contract away the child's right to support from either parent [*see Elkind v. Byck* (1968) 68 Cal. 2d 453, 457, 67 Cal. Rptr. 404, 439 P.2d 316], nor can they preclude, on a proper showing, a subsequent modification of child support by the terms of their agreement [*see Fam. Code §§ 3585, 3651*; *In re Marriage of Alter* (2009) 171 Cal. App. 4th 718, 726-730, 89 Cal. Rptr. 3d 849 (court always has power to modify child support order, upward or downward, regardless of parents' agreement to contrary)]. Furthermore, they cannot obtain court approval for a stipulated amount of support that falls below the amount required under the statewide uniform support guideline, unless they make a prescribed declaration attesting to the propriety of the agreed-on amount [*see Fam. Code § 4065*, discussed in § 123.21].

As noted above, any agreement the parties make with respect to child support is subject to court approval. Child support provisions of an agreement are deemed to be separate and severable from other provisions of the agreement, and all orders for child support based on the agreement are law-imposed and made under the power of the court to order child support [*Fam. Code § 3585*]. This means essentially that child support agreements are enforceable by all remedies available to enforce a court order, not just by contract remedies [*see Tilghman v. Superior Court* (1974) 40 Cal. App.

3d 599, 611-612, 115 Cal. Rptr. 195] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral Overview



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34-123 California Legal Forms--Transaction Guide § 123.21

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.21 Support Agreements Under Statewide Uniform Child Support Guideline

[1] Validity and Amount

The statewide uniform child support guideline sets forth a formula [*see Fam. Code § 4055(a)*] and standards for the computation of child support based on a variety of factors. Application of the formula results in a presumptively correct amount [*Fam. Code § 4057(a)*]. Courts may not order less than the presumptively correct amount unless a specific rebuttal factor exists [*Fam. Code § 4057*], but a stipulation of the parties is one such rebuttal factor [*Fam. Code § 4057(b)(1)*]. Under the guideline, parents may stipulate to a child support amount, subject to the approval of the court, unless prohibited by applicable federal law [*Fam. Code § 4065(a)*].

However, the court may not approve an agreement for a support amount that falls below the presumptively correct amount unless the parties declare all of the following [*Fam. Code § 4065(a)*]:

- (1) They are fully informed of their rights concerning child support;
- (2) The order is being agreed to without coercion or duress;
- (3) The agreement is in the best interests of the children involved;
- (4) The needs of the children will be adequately met by the stipulated amount; and
- (5) The right to support has not been assigned to the county under *Welfare and Institutions Code Section 11477*, and no public assistance application is pending.

Further, if the local child support agency is providing services pursuant to *Fam. Code § 17400*, a stipulated agreement of child support is not valid unless the agency has joined in the stipulation by signing it. The agency may not stipulate to

a child support order below the guideline amount if the children are receiving assistance under the CalWORKs program, if an application for public assistance is pending, or if the parent receiving support has not consented to the order [*Fam. Code* § 4065(c)]. For related discussion, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2d ed., Ch. 141, *Special Remedies for Enforcement of Support* (Matthew Bender).

If the parties to an agreement stipulate to an order below the guideline amount, no change of circumstances need be demonstrated to obtain a modification of the child support order to the applicable guideline level or above [*Fam. Code* § 4065(d)].

For further discussion of the statewide guideline, including the possible difference in interpretation between "guideline amount" and "formula amount," see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2d ed., Chapter 41, *Child Support Orders* (Matthew Bender).

[2] Treatment of Family Support

Orders and stipulations otherwise in compliance with the statewide guideline may designate as "family support" an unallocated total sum for support of the spouse and any children without specifically labeling all or any portion as "child support," as long as the amount is adjusted to reflect the effect of additional deductibility [*see* § 123.12]. The amount of the order must be adjusted to maximize the tax benefits for both parents [*Fam. Code* § 4066]. However, another statute in the guideline requires the court to state in writing or on the record the amount of support that would have been ordered under the guideline's formula whenever the court is ordering an amount for support that differs from the formula amount under the article [*Fam. Code* § 4056(a)(1)]. This provision is required by federal law [45 C.F.R. § 302.56(g)].

Compliance with this provision may risk losing alimony tax treatment [*see* §§ 123.12, 123.52] for family support because such tax treatment is not available with regard to the part of any payment that is fixed as child support by the terms of the divorce or separation instrument [*I.R.C.* § 71(c)(1); *Treas. Reg.* § 1.71-1(e); *cf.* *I.R.C.* § 71(c)(2) (reduction of amount of family support to be paid based on contingency specified in instrument relating to child will result in that part of payment being treated as child support, as discussed in § 123.33 [3])]. The IRS considers any part of family support that has been identified by the court or agreed to by the parties as actually for the support of children, such as the amount found by the court to be due as child support under the guideline's formula, as nondeductible child support. However, there is no apparent risk of losing alimony tax treatment if the allocation is only *suggested* and not ordered by the court or agreed to by the parties--as when a court, in the context of ruling on a stipulated support order, has merely posed a possible segregation of amounts between child and spousal support without formally setting these forth in the order [*Ambrose (Evelyn R.) v. Commissioner*, 71 T.C.M. (CCH) 2429, T.C. Memo. 1996-128 (alimony tax treatment upheld); *cf.* *Simpson v. Commissioner*, T.C. Memo. 1999-251 (because court order did not specifically fix portion of undesignated monthly payment as child support, entire amount of such payments were treated as alimony, even though monthly amount was less than what could have been ordered under Pennsylvania child support guideline; federal tax court will not look beyond language of the support order and need not examine underlying state law to construe nature of payments)].

PRACTICE TIP:

To minimize the risk, no findings as to the amount of formula support should be included in an agreement for family support. Counsel may also wish to argue that findings are not required under *Fam. Code* § 4056 with regard to family support. *Fam. Code* §§ 4066 and 4074 make it clear that family support is available under the guideline. It may be contended that Section 4056 findings are required only if the total amount of support is less than the formula amount; with regard to family support, the total ordered would exceed the formula amount. *Commentary by the Publisher's Editorial Staff.*

[3] Use of Judicial Council Stipulation Form

A Judicial Council form of Stipulation to Establish or Modify Child Support and Order [Cal. Judicial Council Form FL-350] has been adopted for mandatory use in child support proceedings. Use of this form appears to be necessary in all proceedings in which the parties stipulate to an amount of child support, including a stipulated modification of a previous order. The form contains preprinted language to declare that the agreement rebuts the presumptively correct amount under the statewide guideline [*see* [1], *above*], but has additional checkoff boxes to set forth "other" orders and rebuttal factors. For an illustrated version of that form, see *California Forms of Pleading and Practice*, Ch. 224, *Dissolution of Marriage: Child Support*, § 224.210 (Matthew Bender).

However, use of the form does not appear to preclude use of a written agreement concerning child support as an attachment or exhibit to the form. In that case, the terms of the agreement concerning support should probably be separately recited on a page or pages attached to the form with reference to the attachment made in the designated checkoff box for "other" orders. Counsel should consult local rules of practice and procedure to ascertain whether the court requires or prefers a particular method of setting forth the terms of the parties' agreement in relation to this form, particularly if a complete marital settlement agreement has been prepared.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGuidelines



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DIVISION VII: PERSONAL TRANSACTIONS
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 B. Drafting Child Support Provisions

34-123 California Legal Forms--Transaction Guide § 123.22

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.22 Related Issues for Agreement

[1] Health Care Coverage

The court must require that health insurance coverage for the supported children be maintained by either or both parents if the insurance is available at no cost or at reasonable cost to the parent [*Fam. Code § 3751(a)(2)*; *see Fam. Code § 4006*]. If the court determines that health insurance coverage is not available at no cost or at a reasonable cost, the court's order for support must require that health insurance coverage be obtained if it becomes available at no cost or at a reasonable cost [*Fam. Code § 3751(b)*]. "Health insurance coverage" is broadly defined and includes vision care and dental care coverage, whether a part of existing health insurance coverage or issued as a separate policy or plan [*see Fam. Code § 3750(a)*]. It also includes all kinds of health care delivery systems, including health maintenance organizations (HMO's) [*see Fam. Code § 3750(b)*]. Health Insurance coverage is rebuttably presumed to be reasonable in cost if it is employment-related group health insurance or other group health insurance, regardless of the service delivery mechanism [*Fam. Code § 3751(a)(2)*].

The court's order for support must also require the parent who, at the time of the order or subsequently, provides health insurance coverage for the child seek continuation of coverage for the child after attainment of the limiting age for a dependent child, if the child continues to be dependent on the parent and has a physically or mentally disabling injury, illness, or condition [*Fam. Code § 3751(c)*; *see Health & Safety Code § 1373*; *Ins. Code §§ 10277, 10278*].

If the coverage is available and the obligated parent fails or refuses to provide it as ordered, a party or the district attorney can apply to the court for a "health insurance coverage assignment order" [*Fam. Code §§ 3760(b), 3761(a)*]. For further discussion of the requirements of maintaining health coverage, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 41, *Child Support Orders* (Matthew Bender).

Assuming that the requisite coverage is available, a provision requiring maintenance of coverage for the benefit of the children for whom support is required should be included in an agreement for child support [*see § 123.206*]. Note that a

checkoff box on the Judicial Council form of Stipulation to Establish or Modify Child Support and Order [Cal. Judicial Council Form FL-350; see § 123.21[3]] provides a place in which to indicate a court order to maintain the insurance. Terms of an agreement could be listed in the box for "other" orders or reference to an attached agreement could possibly be made there. An illustrated version of that form is set forth in *California Forms of Pleading and Practice*, Ch. 224, *Dissolution of Marriage: Child Support*, § 224.210 (Matthew Bender).

A provision of the Employee Retirement Income Security Act (ERISA) requires employer-provided group health plans to provide benefits in accordance with the applicable requirements of any "qualified medical child support order (QMCSO)" [see 29 U.S.C. § 1169(a)(1)]. A child of a plan participant must be enrolled in the plan as a beneficiary if the order complies with the requirements of ERISA [see 29 U.S.C. § 1169(a)(1)(C), (7)(A)]. For a provision requiring a QMCSO, see § 123.206[2].

[2] Effect of Death of Obligor

A parent's child support obligation that is fixed by a court decree or a property settlement agreement does not cease on the parent's death; it survives as a charge against his or her estate [*Taylor v. George* (1949) 34 Cal. 2d 552, 556, 212 P.2d 505 ; *In re Marriage of O'Connell* (1992) 8 Cal. App. 4th 565, 572, 10 Cal. Rptr. 2d 334] . If there is no support order or agreement, it has been held that the estate of a parent is generally not liable for the support of a minor child, other than for a family allowance [*Jacobs v. Gerecht* (1970) 6 Cal. App. 3d 808, 811-813, 86 Cal. Rptr. 217 ; but see *Fam. Code* § 3952 (if parent chargeable with support of child dies, leaving it chargeable to county or state and parent's estate is sufficient for child's support, county or state may bring civil action for child's support)]. Once there is a child support order, it is doubtful that the parties can provide in the agreement for termination by death of a parent's support obligation unless they make other provisions for the child's support [see *Taylor v. George* (1949) 34 Cal. 2d 552, 212 P.2d 505] .

However, a parent's post-death support obligation may be discharged in a specified manner, such as by a testamentary provision or through the proceeds of life insurance [*Taylor v. George* (1949) 34 Cal. 2d 552, 558, 212 P.2d 505 ; *Estate of Schumacher* (1971) 18 Cal. App. 3d 146, 150-153, 95 Cal. Rptr. 572 ; see *In re Marriage of O'Connell* (1992) 8 Cal. App. 4th 565, 571-572, 10 Cal. Rptr. 2d 334] . The court must find that the provision is sufficient to discharge the support obligation before it can deny recovery for the support against the estate [*Stein v. Hubbard* (1972) 25 Cal. App. 3d 603, 605, 102 Cal. Rptr. 303 (will's residual clause did not discharge support obligation because estate was not sufficient)].

For forms regarding life insurance requirements, see § 123.215. For further discussion of the effect of death on support obligations, see Ch. 100, *Control, Custody, and Support of Minors* .

[3] Stay of Service of Earnings Assignment Order

An earnings assignment order must be issued for all child support orders, including, presumably, orders made according to the parties' agreement or stipulation [see *Fam. Code* § 5230(a)], but service of the assignment on the obligor's employer may be stayed for good cause, as defined by statute [*Fam. Code* § 5260], or if the parties agree in writing to an "alternative arrangement" to ensure that support will be paid [*Fam. Code* § 5260(b)(2)].

An alternative arrangement for staying an earnings assignment order requires a written agreement between the parties that provides for payment of the support obligation as ordered other than through the immediate service of the order. Any agreement between the parties that includes the staying of a service of an earnings assignment must include the concurrence of the local child support agency in any case in which support is ordered to be paid through a county officer designated for that purpose. The execution of an agreement pursuant to this requirement does not preclude a party from thereafter seeking an earnings assignment on violation of the agreement [*Fam. Code* § 5260(b)(2)].

Note that a checkoff box on the Judicial Council form of Stipulation to Establish or Modify Child Support and Order [Cal. Judicial Council Form FL-350; *see* § 123.21 [3]] provides preprinted language to agree to stay of the earnings assignment, but appears to require inclusion of the details of the "alternative arrangement" the parties have made for payment.

For forms staying service of the earnings assignment order, *see* § 123.280. For further discussion, *see* Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 141, *Special Remedies for Enforcement of Support* (Matthew Bender).

[4] Waiver of Security Account

A child support security account may be required in all cases unless expressly waived by the obligee [*see Fam. Code* § 4560(a), (b)]. Such an account is important security for a obligee whose obligor has an irregular source of income and no employer on whom a wage assignment can be served. The account has less value if the obligor's income can be reached by earnings assignment. A waiver could be set forth as part of an agreement for child support. If the Judicial Council form of Stipulation to Establish or Modify Child Support and Order is used, the waiver might be set forth in the checkoff box marked "other" for orders, or apt reference to an attached agreement containing the waiver might be made there [*see* § 123.21 [3]]. For forms requiring and waiving a child support security deposit account, *see* § 123.281. For further discussion, *see* Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 141, *Special Remedies for Enforcement of Support* (Matthew Bender).

Legal Topics:

For related research and practice materials, *see* the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGeneral OverviewFamily LawChild SupportObligationsTypesMedical Support



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34-123 California Legal Forms--Transaction Guide §§ 123.23-123.29

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 123.23[Reserved]



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C. Drafting Spousal Support Provisions

34-123 California Legal Forms--Transaction Guide § 123.30

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.30 Parties' Ability to Contract Regarding Spousal Support

[1] In General

Spouses may validly enter into agreements regarding spousal support, including a waiver of support [see [2], *below*], in negotiating the terms of their permanent separation or the dissolution of their marriage [*Fam. Code* § 3580]. The parties' agreement may be set forth in a marital settlement agreement, in a separation agreement [see § 123.230], in a separate written stipulation filed with the court, or in an oral stipulation made in open court.

An agreement of the parties regarding spousal support is subject to judicial review to determine that it is fair and not tainted by fraud, compulsion, collusion, or undue influence. But if there is no reason for questioning the validity or fairness of the agreement, the court may not withhold its approval [*Garrett v. Garrett* (1968) 258 Cal. App. 2d 407, 416-417] .

The provisions of an agreement for the support of either party are deemed separate and severable from any provisions relating to property, and an order for support based on the agreement is considered law-imposed and made under the power of the court to order support [*Fam. Code* § 3590]. This rule means essentially that support agreements are enforceable by all remedies available to enforce a court order, not just contract remedies [see *Tilghman v. Superior Court* (1974) 40 Cal. App. 3d 599, 611-612, 115 Cal. Rptr. 195] .

[2] Waivers of Support

One or both parties may waive the right to spousal support in a separation or marital settlement agreement [see *Estate of Kalal* (1981) 121 Cal. App. 3d 841, 851, 175 Cal. Rptr. 582 ; *Cochrum v. Cochrum* (1958) 162 Cal. App. 2d 825, 831-832, 328 P.2d 1000 ; see also *In re Marriage of Paboojian* (1987) 189 Cal. App. 3d 1434, 1437-1439, 235 Cal. Rptr. 65 (postjudgment oral waiver of support)]. However, such a waiver is subject to particular scrutiny because waiver of a right favored in law is not lightly found [see *In re Marriage of Moore* (1980) 113 Cal. App. 3d 22, 27, 169 Cal. Rptr. 619] .

Language constituting a waiver must clearly and explicitly manifest that intention [*In re Marriage of Moore* (1980) 113 Cal. App. 3d 22, 28, 169 Cal. Rptr. 619] . Waiver must be a voluntary act, knowingly done with sufficient awareness of the relevant circumstances and likely consequences. Contract formation defenses such as fraud, compulsion, or breach of fiduciary duty, may render the agreement invalid [see *In re Marriage of Moore* (1980) 113 Cal. App. 3d 22, 27, 169 Cal. Rptr. 619] . Finally, marital settlement agreements may be set aside if the court finds them inequitable even though not induced through fraud or compulsion [*In re Marriage of Moore* (1980) 113 Cal. App. 3d 22, 32, 169 Cal. Rptr. 619] . For a provision waiving spousal support, see § 123.231.

[3] Retention of Jurisdiction

In a marriage of long duration [see *Fam. Code* § 4336(b)], the court retains jurisdiction over spousal support indefinitely unless the parties agree in writing to the contrary or there is a court order terminating support [*Fam. Code* § 4336(a)]. This rule means that if support has been ordered only for a limited term, it may be subsequently extended beyond that term [see *Fam. Code* § 4335]. In a marriage of short duration, the burden is reversed; that is, the retention of jurisdiction must affirmatively appear in the language of the order [*Fam. Code* § 4335]. Therefore, every spousal support agreement should consider the question of retention of jurisdiction and include express language on the point, particularly if the intent is to reverse the otherwise applicable consequences under the statutes.

Jurisdiction over spousal support is a complex subject, considered in detail in Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 51, *Spousal Support Orders* (Matthew Bender).

[4] Provisions for Nonmodification

An agreement or order for spousal support may not be modified or revoked to the extent that a written agreement, or if no written agreement, an oral agreement entered into in open court, specifically provides that the support is not subject to modification (or termination) [*Fam. Code* §§ 3591(c), 3651(d)]. In other words, the parties may agree that spousal support may not be modified or terminated by court order [see *Fam. Code* §§ 3591(c), 3651(d)], and the court ordinarily must abide by that agreement [*In re Marriage of Carletti* (1975) 53 Cal. App. 3d 989, 995, 126 Cal. Rptr. 1] . However, the parties' agreement will not prevent the court from terminating support if the payee spouse suffers a criminal conviction for an act of domestic violence perpetrated against the payor spouse [see *Fam. Code* § 4325(a) (conviction of interspousal domestic violence within five years prior to filing of dissolution proceeding, or at any time thereafter, creates rebuttable presumption that no award of spousal support should be made to abusive spouse)]. In such a case, the significant public policy against domestic violence outweighs any interest in enforcement of the nonmodifiable spousal support agreement [*In re Marriage of Cauley* (2006) 138 Cal. App. 4th 1100, 1105-1108, 41 Cal. Rptr. 3d 902] .

Provisions regarding the modification and termination of spousal support are set forth in §§ 123.260-123.266.

[5] Provisions Concerning Effect of Death, Remarriage, or Cohabitation

In the absence of a written agreement of the parties, the death of either party or the remarriage of the supported spouse terminates the support obligation of the supporting spouse by operation of law [*Fam. Code* § 4337; see *In re Marriage of Glasser* (1984) 181 Cal. App. 3d 149, 153, 226 Cal. Rptr. 229] . In addition, there is a rebuttable presumption affecting the burden of proof that the supported spouse has a decreased need for spousal support if he or she is cohabiting with a person of the opposite sex [*Fam. Code* § 4323(a); see also *In re Marriage of Geraci* (2006) 144 Cal. App. 4th 1278, 1299, 51 Cal. Rptr. 3d 234 (presumption under *Fam. Code* § 4323 applies in making initial support order as well in modifying order based on changed circumstances)].

However, these legal effects of death, remarriage, and cohabitation may be avoided by a written agreement of the

parties [*Fam. Code* §§ 4323(a), 4337]. For such provisions, see §§ 123.264-123.266. Even if an agreement does not expressly extend support beyond remarriage or death, an extension may be implied if that was the clear intent of the parties [*see, e.g., Lucas v. Elliott* (1992) 3 Cal. App. 4th 888, 893-894, 4 Cal. Rptr. 2d 746 (finding provision in agreement requiring payor to maintain life insurance in amount of present value of support obligation as such an agreement, despite lack of express language continuing support obligation after death); *In re Marriage of McGhee* (1982) 131 Cal. App. 3d 408, 414-415, 182 Cal. Rptr. 456 (language of interlocutory agreement and nature of agreement implied extension beyond remarriage)].

There is some division of authority about whether a general nonmodifiability clause avoids termination by operation of law on remarriage under *Fam. Code* § 4337. One court has held that remarriage does not terminate spousal support if the parties' agreement states that support is not modifiable *on any ground* and fails to expressly provide an exception for remarriage [*see In re Marriage of Sherman* (1984) 162 Cal. App. 3d 1132, 1135-1139, 208 Cal. Rptr. 832 ; *cf. In re Marriage of Cesnalis* (2003) 106 Cal. App. 4th 1267, 1272-1274, 131 Cal. Rptr. 2d 436 (agreement that spousal support will end before specified duration only if either party dies is reasonably seen as declaration of intent that support should continue beyond remarriage)]. However, another court held that an agreement providing that spousal support was "nonmodifiable for any reason whatsoever" did not preclude automatic termination by operation of law on the remarriage of the supported spouse [*see In re Marriage of Glasser* (1986) 181 Cal. App. 3d 149, 151-153, 226 Cal. Rptr. 229]. The cases are perhaps distinguishable in that in the first case, there was evidence, both in the agreement and extrinsic, that nontermination on remarriage was the intent of the parties. For further discussion of termination of support by death or remarriage, and of the effect of cohabitation, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 52, *Modification and Termination of Spousal Support Orders* (Matthew Bender).

PRACTICE TIP:

Because of this conflict in the cases, and because appellate courts carefully scrutinize the language used in spousal support agreements, counsel should always specifically state whether spousal support does or does not terminate on the remarriage of the supported spouse. *Commentary by Diana Richmond.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures



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34-123 California Legal Forms--Transaction Guide § 123.31

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.31 Temporary Versus Permanent Support

Parties engaged in family law litigation frequently are not able to come to a resolution of permanent support issues at the outset of the litigation, but may be able to agree to a temporary support order pending resolution of other issues in the case. Thus, in drafting provisions for spousal support, counsel should distinguish between the need for temporary support during the course of family law litigation, and the need for a permanent support order.

With respect to support that is ordered by a court, the purpose of a temporary support award is to maintain the status quo of the parties until trial or other settlement of the case, in order to pay creditors and to enable a spouse to live in substantially the same manner to which he or she has been accustomed pending disposition of the case [*In re Marriage of Winter* (1992) 7 Cal. App. 4th 1926, 1932, 10 Cal. Rptr. 2d 225 ; see *In re Marriage of Smith* (1990) 225 Cal. App. 3d 469, 494 n.16, 274 Cal. Rptr. 911 ; *Estate of Fawcett* (1965) 232 Cal. App. 2d 770, 784, 43 Cal. Rptr. 160 ; *Whelan v. Whelan* (1948) 87 Cal. App. 2d 690, 692, 197 P.2d 361] . In light of this purpose, an order based solely on the respective incomes of the parties is appropriate [*In re Marriage of Winter* (1992) 7 Cal. App. 4th 1926, 1932-1933, 10 Cal. Rptr. 2d 225] . No factual findings under *Fam. Code* § 4320 are required for an order of temporary spousal support [*In re Marriage of Czapar* (1991) 232 Cal. App. 3d 1308, 1316, 285 Cal. Rptr. 479] .

In contrast, an order of permanent spousal support requires consideration of numerous factors besides the income of the parties. If temporary support has been ordered, the determination of permanent spousal support at trial must be de novo, based on the circumstances existing at the time of the trial. More or less spousal support than the temporary amount may be ordered as permanent support without a showing of changed circumstances [see *In re Marriage of McNaghten* (1983) 145 Cal. App. 3d 845, 849-850, 194 Cal. Rptr. 176] . In determining the amount of a permanent award a court will evaluate the circumstances of the parties in light of the factors set forth in *Fam. Code* § 4320 [see *In re Marriage of Geraci* (2006) 144 Cal. App. 4th 1278, 1296-1298, 51 Cal. Rptr. 3d 234 (court must weigh all factors listed in *Fam. Code* § 4320, and mere statement that factors favor award of support is insufficient if not accompanied by analysis of factors)]. Note, however, that these factors are to be considered by the court in setting spousal support if there has been *no agreement* of the parties [*In re Marriage of Carletti* (1975) 53 Cal. App. 3d 989, 995, 126 Cal. Rptr. 1 ; *In re*

Marriage of Hawkins (1975) 48 Cal. App. 3d 208, 212, 121 Cal. Rptr. 681] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary Support



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34-123 California Legal Forms--Transaction Guide § 123.32

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.32 Stay of Service of Earnings Assignment Order

Whenever a court orders a party to pay spousal support, including, presumably, an order based on the parties' agreement, it must include in its order an earnings assignment order directed at the obligor's employer. The earnings assignment order directs the employer to withhold the amount of support from the obligor's earnings and to pay it directly to the obligee [*Fam. Code § 5230(a)*; see *Fam. Code § 150* ("support" as used in Family Code includes spousal support)]. For further discussion, see § 123.22[3]. For a form staying service of the wage assignment order, see § 123.280.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination
& Spousal SupportSpousal SupportObligationsGeneral Overview



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34-123 California Legal Forms--Transaction Guide §§ 123.33-123.39

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 123.33[Reserved]



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34-123 California Legal Forms--Transaction Guide § 123.40

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.40 Income Tax Treatment of Child Support

Unlike spousal support, child support is neither income of the payee parent nor deductible by the payor parent. If the payor makes support payments directly to the child, or to a third party (instead of to the other parent) on behalf of the child, the payments are not deductible because they are personal or family expenses for which the Internal Revenue Code does not otherwise allow a deduction [see *I.R.C. §§ 71(c)(1), 262(a); Treas. Reg. § 1.71-1(e); Bay (John B.) v. Commissioner, T.C. Memo 1994-389*]. California income tax treatment of child support is the same as that provided by federal income tax law [*Rev. & Tax Code §§ 17201, 17801*]. Payments that are in fact for the benefit of children may receive alimony tax treatment if they can properly be characterized as "family support," as discussed in § 123.52[2].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportTaxation



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34-123 California Legal Forms--Transaction Guide § 123.41

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.41 Dependency Exemption

[1] When Permitted

A taxpayer is permitted a personal exemption deduction for each dependent who is the taxpayer's child or stepchild, who is younger than the taxpayer, and who is either (1) under age 19 at the close of the taxable year, or (2) a student who is under age 24 at the close of that year [I.R.C. §§ 151(c), 152(a)(1), (c), (f)(1)]. A personal exemption deduction is also allowed for certain kidnapped children [I.R.C. §§ 151(c), 152(c), (f)(6)]. A Taxpayer Identification Number (TIN) for each dependent must be included on the taxpayer's return [I.R.C. §§ 151(e), 6109(d), 7701(a)(41); *Kocher (J. Erik) v. Commissioner, T.C. Memo. 2000-238* (dependency exemptions disallowed when parents refused to obtain and provide Social Security numbers for children)]. To qualify as a dependent, a person must receive over half of his or her support from the taxpayer for the taxable year, and must not have filed a joint return with his or her spouse (other than solely to claim a refund) for the taxable year beginning in the calendar year in which the taxpayer's taxable year begins [I.R.C. § 152(c)(1)(D),(E), (d)(1)(C); see [2], below].

PRACTICE TIP:

Other individuals related to the taxpayer, in addition to children and stepchildren, may be dependents [see I.R.C. § 152(d)]. Technically the requirements for dependency status are phrased in terms of qualifying in "the calendar year in which the taxable year of the taxpayer begins." Individuals are required to use the calendar year as the taxable year unless the IRS permits use of another taxable year in a particular case [see I.R.C. § 441], and virtually no such case has been described in court opinions and IRS rulings. Therefore, references in this discussion are simplified to "the taxable year" for convenience. In a rare case, counsel may need to apply the distinction between calendar year and taxable year.
Commentary by Publisher's Editorial Staff.

If the dependent is not a child of the taxpayer, or is a child of the taxpayer but is over the age of 18 and not a qualifying student, the taxpayer is allowed an exemption only if the gross income of the dependent is less than the exemption

amount for the taxable year [I.R.C. § 152(d)(1)(B)]. Amounts received that are nontaxable, such as gifts, inheritances, and certain insurance proceeds, are not considered in determining whether the dependent has gross income in excess of the exemption amount [see Treas. Reg. § 1.151-2(a)].

A qualifying student must be an individual who, during each of five months in the taxable year, is a full-time student or is pursuing a full-time course of on-farm training [I.R.C. § 152(f)(2); see *Kaechele v. Commissioner*, T.C. Memo. 1992-457 (dependency exemptions for grown children of divorced parents are allowable only on basis of financial support, not on basis of custody)]. No exemption may be claimed by a parent for a married child who files a joint return with his or her spouse [I.R.C. § 152(b)(2)].

Special rules apply to parents who are divorced or legally separated, or are separated under a written separation agreement, or live apart at all times during the last six months of the year [see I.R.C. § 152(e)]. For discussion, see [3], below.

[2] Support Requirement

A taxpayer must furnish more than half of the dependent's support for the year in question [I.R.C. § 152(c)(1)(D), (d)(1)(C); Treas. Reg. § 1.152-1(a)(1)]. Also, the dependent must not have filed a joint return with his or her spouse (other than solely to claim a refund) for the taxable year beginning in the calendar year in which the taxpayer's taxable year begins [I.R.C. § 152(c)(1)(E)].

In determining whether the taxpayer provided over half of the support of an individual for a given year, the entire amount of support that the individual received from all sources must be considered, including support that the individual supplied for himself or herself and income that ordinarily is excludable from gross income [Treas. Reg. § 1.152-1(a)(2); see *Mares (Guadalupe) v. Commissioner*, T.C. Memo. 2001-216 (taxpayer who paid substantial share of family's support was denied dependency exemptions for parents and siblings)]. Support includes food, clothing, medical and dental care, education, the fair market value of shelter or lodging, and like items. Thus, in computing the amount expended for support, taxpayers are not limited to the actual expenses of maintaining a house [see Treas. Reg. § 1.152-1(a)(2)(i)], such as electricity, heat, taxes, repairs, and interest payments on a mortgage. Rather, the measure is what the dependent receives, which is the fair rental value of the lodging [see, e.g., *Carter v. Commissioner* (1974) 62 T.C. 20; *Blarek v. Commissioner* (1955) 23 T.C. 1037, 1038-1039; *Flachner v. Commissioner*, T.C. Memo. 1978-417; *Rev. Rul. 58-302*, 1958-1 C.B. 62]. IRS rulings have indicated that transportation, holiday gifts, church contributions, and expenses for entertainment and recreation are included in support. Although health insurance premium payments are treated as payments for medical expenses, any benefits provided under the policy are not considered support [see, e.g., *McGuire v. Commissioner* (1981) 77 T.C. 765, 774; *Rev. Rul. 64-223*, 1964-2 C.B. 50].

Certain items of a nonrecurring nature, such as the cost of a car, furniture, or appliances, may or may not qualify as support, depending on the particular circumstances of each case [see *Rev. Rul. 77-282*, 1977-2 C.B. 52]. None of the following, however, can be treated as items of support:

- The cost of life insurance premiums paid by the taxpayer on a policy he or she owns that lists the dependent as a beneficiary [see, e.g., *Vance v. Commissioner* (1961) 36 T.C. 547, 550; *Rempert v. Commissioner*, T.C. Memo. 1970-226];
- Costs associated with the dependent's use of an automobile owned by the taxpayer, except to the extent that the owner's payment of automobile operating expenses benefits the dependent [*Rev. Rul. 77-282*, 1977-2 C.B. 52];
- Loans made by the taxpayer to the dependent [*Gatling v. Commissioner*, T.C. Memo. 1959-224];

- The value of services rendered by the taxpayer to the dependent [*see, e.g., Markarian v. Commissioner* (7th Cir. 1965) 352 F.2d 870 , cert. denied, 384 U.S. 988 ; *Beck v. Commissioner, T.C. Memo. 1970-153*] ;
- Liability insurance proceeds paid to a third party for an accident caused by the dependent [*Kincheloe v. Commissioner, T.C. Memo. 1971-35*] ;
- The cost of tools to make a dependent's assigned chores easier [*Rev. Rul. 77-282, 1977-2 C.B. 52*], or, because the benefit is deemed too remote to be counted as support, the cost of items purchased to benefit children as they grow older [*Gajda v. Commissioner* (1965) 44 T.C. 783 , acq., 1966-2 C.B. 4] ;
- The dependent's funeral expenses [*Rev. Rul. 65-307, 1965-2 C.B. 40*] ;
- The dependent's payment of his or her own income taxes [*Rev. Rul. 58-67, 1958-1 C.B. 62*] ;
- Expenses incurred for an induced abortion, even if the child is born alive [*Rev. Rul. 85-118, 1985-2 C.B. 59*] ; or
- The costs associated with exercising visitation with the dependent [*Hopkins v. Commissioner* (1970) 55 T.C. 538, 541-542 ; *Vance v. Commissioner* (1961) 36 T.C. 547] .

Payments made by an institution to assist in furthering a child's education may or may not constitute support payments. For example, amounts received as scholarships for study at an educational institution are not considered in determining whether the taxpayer furnishes more than half of the support for the child [*Treas. Reg. § 1.152-1(c)*]. These scholarships may include payments for tuition, books, travel, meals, and lodging [*Commissioner v. Ide* (3d Cir. 1964) 335 F.2d 852, 854-855 ; *Rev. Rul. 58-338, 1958-2 C.B. 54*]. Similarly, room, board, and tuition payments made by the state for developmentally challenged persons qualify as scholarship payments and are not counted toward support if the children qualify as students and the institution qualifies as an educational institution [*Rev. Rul. 71-347, 1971-2 C.B. 114* ; *Rev. Rul. 64-221, 1964-2 C.B. 46* ; *Rev. Rul. 61-186, 1961-2 C.B. 30* ; *Rev. Rul. 60-190, 1960-1 C.B. 51*]. Student loans, however, generally constitute support even though they are scholarship-related [*McCauley v. Commissioner* (1971) 56 T.C. 48, 50] .

[3] Children of Divorced or Separated Parents

[a] General Rule--Custodial Parent Entitled to Exemption

Only one taxpayer is entitled to an exemption for a given dependent. Although this limitation is of no concern to married taxpayers filing a joint return, dependency exemptions may be an issue for divorced or separated parents with minor children. To address the issue, *I.R.C. § 152(e)* reflects the general rule that the custodial parent is considered as providing more than one half of the support for a child during the calendar year. The custodial parent is the parent who has custody for the greater portion of the calendar year [*I.R.C. § 152(e)(4)*].

This general rule applies if all of the following conditions are satisfied [*I.R.C. § 152(e)(1)*]:

- A child or stepchild receives over half of his or her support during the taxable year from his or her parents together.
- The child is in the custody of one or both the parents for more than half of the year.
- The parents are divorced or legally separated under a decree of divorce or separate maintenance, or

are separated under a written separation agreement, or live apart at all times during the last six months of the year.

In determining whether the parents together have provided more than half of the support of the child, support received from a parent's new spouse is treated as received from the parent [*I.R.C. § 152(e)(6)*; see *Schneier v. Commissioner* (9th Cir. 1984) 735 F.2d 375, 377] .

Legal custody only may be considered in determining whether the child is in the custody of one or both parents for more than half of the year [see *Stanford (Sharron Kay W.) v. Commissioner T.C. Memo 1995-78* (dependency exemption allowed to parent who had legal custody only, but who furnished more than half of child's support to unrelated third persons who had actual physical custody)]. A divorced parent does not qualify for a dependency exemption for a child who is in both the legal and physical custody of grandparents [*Penny v. Commissioner, T.C. Memo. 1985-590* (Tax Court refused to consider grandparents as parents for purposes of dependency exemption); cf. *Stanford (Sharron Kay W.) v. Commissioner T.C. Memo 1995-78*] .

The noncustodial parent may claim the dependency exemption if (1) the custodial parent has released the claim to the exemption for the relevant year; (2) a qualifying pre-1985 instrument provides that the noncustodial parent may claim the exemption, and the noncustodial parent pays at least \$600 for the support of the child; or (3) more than half of the child's support is provided pursuant to a multiple support agreement [*I.R.C. § 152(e)(2),(3),(5)*; see *I.R.C. § 152(d)(3)*]. For discussion, see [b], [c], and [4], *below*.

[b] Custodial Parent's Release of Exemption

The noncustodial parent may claim the dependency exemption for a tax year beginning in a given calendar year if both of the following conditions are met [*I.R.C. § 152(e)(2)*]:

- The custodial parent signs a written declaration (in the manner and form prescribed by Treasury Regulations) that he or she will not claim the child as a dependent for any taxable year beginning in the calendar year.
- The noncustodial parent attaches the written declaration to his or her return for the taxable year beginning during that calendar year.

PRACTICE TIP:

If the custodial parent has agreed to release the exemption to the noncustodial parent, counsel should ensure that the form or written declaration releasing the claim clearly indicates the specific years to which the release applies. *Commentary by Publisher's Editorial Staff.*

EXAMPLE: On January 5, 1990, a custodial parent fills out only Part II of IRS Form 8332, which is labelled "Release of Claim to Exemption for Future Years," stating that she agrees not to claim an exemption for her three children for "all future years." The noncustodial parent attaches this form to his 1989 income tax return. However, he was not entitled to the exemption for 1989 because Part I of the form, which is labelled "Release of Claim to Exemption for Current Year," was uncompleted and left completely blank, and because the form did not specify that it was applicable to the 1989 tax year [*Cafarelli v. Commissioner* (1994) 67 T.C.M. 3077, T.C. Memo. 1994-265] .

The California Supreme Court has held that the court may order the custodial parent to execute the form to release the right to the dependency exemption to the noncustodial parent over the custodial parent's objection. Allocation of the exemption in order to obtain maximum tax savings to the parents makes more money available for the children. Child support should be increased to offset the cash value of the exemption [*Monterey County v. Cornejo* (1991) 53 Cal. 3d

1271, 1275-1281, 283 Cal. Rptr. 405, 812 P.2d 586] . The case in which the issue was decided was brought by a district attorney under the child support enforcement provisions pertaining to the federally mandated "Title IV-D" program [see former Welf. & Inst. Code §§ 11350, 11350.1, 11475.1; now see Fam. Code § 17400 et seq.], in which the court's jurisdiction is limited to determining paternity and child support [see Fam. Code § 17404; former Welf. & Inst. Code § 11350.1]. However, the court's holding was that allocation of the dependency exemption is a determination that is pertinent to child support, meaning that it may be addressed in any proceeding in which child support is at issue, such as one for dissolution of marriage [*Monterey County v. Cornejo* (1991) 53 Cal. 3d 1271, 1282-1284, 283 Cal. Rptr. 405, 812 P.2d 586 (Court specifically noted parent's right to independent determination of issue under former Family Law Act, now Family Code); see former Welf. & Inst. Code § 11350.1(b)].

PRACTICE TIP:

The judicial shifting of dependency exemptions to a payor spouse, along with increased child support, is common. Counsel for the custodial-payee parent should consider offering to sign the exemption over to the payor parent whenever she or he stands to gain more from increased support than will be lost by surrendering the exemption (typically the case with a low-income payee). Conversely, counsel for the payor parent should avoid raising the issue if his or her exposure to increased support will outweigh the benefit of claiming the exemption. Computer software programs that calculate support, including the effect on support of exemption-shifting, are now in wide-spread use by both family law courts and counsel. If the custodial parent has agreed to release the exemption to the noncustodial parent, counsel should ensure that the form or written declaration releasing the claim clearly indicates the specific years to which the release applies. *Commentary by the Publisher's Editorial Staff.*

PRACTICE TIP: The dependency exemption should be addressed in any settlement agreement or stipulated judgment, particularly if it is to be allocated to the parent with the lesser period of physical custody. When a transfer is to be made, the agreement or stipulation should spell it out clearly and require execution and delivery of a copy of the actual form of waiver that will be submitted to the IRS. *Commentary by Ira H. Lurvey.*

PRACTICE TIP: The value of the dependency exemption is important to middle-income and lower-income taxpayers. Counsel representing clients with modest incomes should always compare the value of the exemption to one spouse with the value to the other spouse. To a parent receiving AFDC, the exemption is practically worthless. The exemption should be claimable by the spouse who will benefit more from it. *Commentary by Hon. Thomas Murphy.*

There is an issue of whether the requirement that the parent claiming the exemption contribute more than half of the child's support [see I.R.C. § 151(a)] can be ignored in transferring the exemption to the noncustodial parent. The custodial parent's voluntary release of the exemption under I.R.C. § 152(e)(2) requires only that she or he agree not to claim the exemption; no affirmation that the other parent has, in fact, provided more than half of the child's support is required [see *Valarian (James L.) v. Commissioner, T.C. Memo 1996-511* (because custodial parent is treated as having provided over half of support absent written waiver of exemption, and had not waived it, noncustodial parent was denied exemption); see also *Roberts (Charles R.) v. Commissioner, T.C. Memo 1996-467*] . However, if the court compels the parent to transfer the exemption involuntarily, it appears that the court must first find that the noncustodial parent has contributed, or at least will contribute, more than half of the support of the child. An involuntary transfer of the exemption solely to maximize tax savings, without the support requirement having been met, would seem to not be permitted by the Internal Revenue Code.

A form for use as a provision in a marital settlement agreement allocating the dependency exemption to the noncustodial parent is set forth in § 123.216.

[c] When Rules Do Not Apply

The rules regarding the dependency exemption for divorced or separated parents [see [a], [b], *above*] do not apply if the right to the dependency exemption is governed by a multiple support agreement with respect to the child [I.R.C. § 152(e)(5); see I.R.C. § 152(d)(3)]. See [4], *below*, for discussion of multiple support agreements.

In addition, the noncustodial parent may claim the exemption if (1) a qualified pre-1985 instrument between the parents provides that the noncustodial parent will be entitled to any deduction allowable under I.R.C. § 151 for the child, and (2) the noncustodial parent provides at least \$600 for the support of the child during the relevant calendar year [I.R.C. § 152(e)(3)(A); see I.R.C. § 152(e)(3)(B) (requirements for "qualified pre-1985 instrument")]. For purposes of the \$600-support test, amounts expended for the support of the child are treated as received from the noncustodial parent to the extent that he or she provided amounts for support [I.R.C. § 152(e)(3)(A)(ii); see *Zion v. Commissioner*, T.C. Memo. 1991-119 (custodial parent provided more than half of children's support, but noncustodial parent paid more than \$600 per child and was entitled to dependency exemptions granted under pre-1985 settlement agreement)].

The rules are not applicable if the parents are not yet divorced, but are living in separate parts of the family household. Under these circumstances, there is no custodial or noncustodial parent within the rules of I.R.C. § 152(e), and the right to the dependency exemption is determined under I.R.C. §§ 151(c), 152(c) based on which parent has provided more than half of the support for the dependents [see *Dawkins v. Commissioner*, T.C. Memo. 1991-225 ; *contra* *Sydney v. Commissioner* (8th Cir. 1978) 577 F.2d 60] .

[4] Multiple Support Agreements

If no single person contributes more than half of the support of an individual, but over half of the individual's support is received from persons each of whom would have been permitted to claim the individual as a dependent had the person contributed more than half of the support, all such persons may agree to give the dependency exemption to any one of them who contributes at least 10 percent of the dependent's support [I.R.C. § 152(d)(3)]. Although this arrangement is referred to as a "multiple support agreement," there is no requirement of a written agreement other than a declaration on IRS Form 2120.

This rule applies only in those cases in which no single person provided more than half of the support of the dependent. Thus, if after divorce or separation one parent provides more than half of a child's support, a multiple support agreement cannot be used to shift the exemption to the other parent or to anyone else. If one parent provides more than half of the child's support, however, the special rules for divorced or separated parents apply, and the custodial parent receives the deduction unless he or she waives it in favor of the noncustodial parent [I.R.C. § 152(e); see [3][b], *above*]. If both parents together provide more than half of the support of a child, but neither alone supplies more than half of the child's support, the special rules for divorced or separated parents apply [see I.R.C. § 152(e)(1)(A)], and a multiple support agreement is available as well. Thus, the custodial parent may release the exemption to the noncustodial parent [I.R.C. § 152(e)(2)], or, under the multiple support agreement rules, both parents may transfer the exemption to any person, including the noncustodial parent, who provides more than 10 percent of the child's support [I.R.C. § 152(d)(3), (e)(5)]. If the parents together do not supply half of the child's support, and no other person provides over half of the child's support, a multiple support agreement is the only way that any person, including either parent, who supplies more than 10 percent of the child's support can take the dependency exemption.

[5] Related Tax Credits

A special tax credit is available for each qualifying child of a taxpayer under age 17 [see I.R.C. § 24(a)]. To qualify, a child must be under age 17 and must qualify as a dependent of the taxpayer [I.R.C. §§ 24(c)(1), 152(c) ("qualifying child" for dependency exemption must be child or descendant of taxpayer, or brother, sister, stepbrother, or stepsister of taxpayer or descendant of any such relative, and must meet other specified conditions)]. A child does not qualify, however, if he or she is not a citizen or national of the United States and resides outside the United States [I.R.C. §

24(c)(2)]. The amount of the credit per qualifying child is \$1,000 [*I.R.C. § 24(a)*]. The child tax credit is refundable (whether or not the taxpayer pays any federal income tax) to the extent of 15 percent of the taxpayer's earned income in excess of \$10,000 [*I.R.C. § 24(d)(1)*]. The \$10,000 amount is indexed for inflation beginning after 2001 [*I.R.C. § 24(d)(3)*; *see I.R.C. § 24(d)(4)* (\$10,000 amount replaced by \$8,500 for any taxable year beginning in 2008)]. Families with three or more children are allowed a refundable credit for the amount by which the taxpayer's social security taxes exceed the taxpayer's earned income credit [*see I.R.C. § 32*], if that amount is greater than the refundable credit based on the taxpayer's earned income in excess of the \$10,000 amount indexed as described in the preceding sentence [*I.R.C. § 24(d)(1)(B)*]. The refundable portion of the child tax credit does not constitute income and is not treated as resources for purposes of determining eligibility or the amount or nature of benefits or assistance under any Federal program or any State or local program financed with Federal funds [Pub. Law 107-16, § 203]. The child tax credit is allowed to the extent of the full amount of the individual's regular income tax and alternative minimum tax [*I.R.C. § 24(b)(3)*].

In addition, an earned income credit is available to a taxpayer with a qualifying child who has either earned income (such as wages or self-employment income) or an adjusted gross income that falls below a threshold income level [*I.R.C. § 32*]. To qualify, a child must meet requirements pertaining to relationship, age, and residency, and the taxpayer's tax return must include identifying information for the child [*I.R.C. §§ 32(c)(3), 152(c)*].

There is also a credit for post-secondary education to cover certain tuition [*I.R.C. § 25A*]. Coverdell Education Savings Accounts [*I.R.C. § 530*] and qualified tuition programs [*I.R.C. § 529*] can also be useful in providing for educational benefits. These measures are beyond the scope of this chapter, but may figure into the overall planning needed by divorcing couples with respect to the education of their children.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportTaxation



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DIVISION VII: PERSONAL TRANSACTIONS
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34-123 California Legal Forms--Transaction Guide § 123.42

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.42 Deduction for Medical Expenses

A taxpayer may deduct his or her medical expenses, including those of a dependent child, to the extent that they exceed 7.5 percent of adjusted gross income [*I.R.C. § 213(a)*]. In the case of divorced or separated parents, if (1) both parents together provide more than half of the child's support during the taxable year and (2) the child is in the custody of one or both of the parents for six months of the year, the child is deemed to be a dependent of both parents for purposes of the medical expense deduction [*I.R.C. §§ 152(e), 213(d)(5)*]. Therefore, despite the fact that only one parent is entitled to a dependency exemption for a child, each parent may include the child's medical expenses that he or she has paid in determining whether the 7.5 percent threshold has been met. The same rule applies to the income exclusion for medical expenses paid by an employer for a dependent child [*see I.R.C. § 105(b)*].

If the above requirements are not met, only the individual who supplies more than half of the child's support may consider the child as a dependent (if otherwise qualifying by affinity with the child) and be entitled to a medical expense deduction for amounts expended on medical care for the child [*I.R.C. §§ 152(c), 213(a)*]. Further, if the dependency exemption is determined under a multiple support agreement [*see § 123.41[4]*], only the taxpayer entitled to the dependency exemption is entitled to the deduction or exclusion [*I.R.C. §§ 105(b), 152(d)(3), 213(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

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34-123 California Legal Forms--Transaction Guide § 123.43

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.43 Child Care Credit

A parent who pays child care expenses that enable him or her to be gainfully employed, and whose child is a qualifying individual, is allowed a tax credit for a percentage of the amount paid [*I.R.C. § 21(a)(1)*].

A child who is under the age of 13 is a qualifying individual if the child is a dependent of the taxpayer [*I.R.C. § 21(b)(1)(A)*; *see I.R.C. § 152(a)(1)*]. Other dependents who are physically or mentally incapable of caring for themselves, and who have the same principal place of abode as the taxpayer for more than half of the taxable year, are also qualifying individuals [*I.R.C. § 21(b)(1)(B),(C)*]. However, because this standard requires a physical or mental defect [*see Treas. Reg. § 1.21-1(b)(4)*], it does not appear to include a child age 13 or older who the parent believes is not yet able to stay home without child care.

The credit may be up to 35 percent of a limited amount of employment-related expenses [*I.R.C. § 21(a)(2)*]. The percentage is reduced, but not below 20 percent, by 1 percentage point for each \$2,000 (or fraction thereof) by which the taxpayer's adjusted gross income for the taxable year exceeds \$15,000 [*I.R.C. § 21(a)(2)*]. Eligible employment-related expenses are limited to \$3,000 if there is one qualifying individual or \$6,000 if there are two or more qualifying individuals. Thus, the maximum credit is \$1,050 (35 percent of \$3,000) if there is one qualifying individual and \$2,100 (35 percent of \$6,000) if there are two or more qualifying individuals [*I.R.C. § 21(c)*]. The applicable dollar limit of otherwise eligible employment-related expenses is reduced by any amount excluded from income under an employer-provided dependent care assistance program [*I.R.C. § 21(c)*; *see I.R.C. § 129*]. An earned income limitation also applies to limit the expenses that are eligible for the credit. For an unmarried individual, the expenses eligible for the credit cannot exceed that individual's earned income for the year. For a married individual, the expenses eligible for the credit cannot exceed the lesser of that individual's earned income or the earned income of the spouse for the year [*I.R.C. § 21(d)(1)*]. For this purpose, a spouse who is a full-time student or incapable of caring for himself [*see I.R.C. § 21(b)(1)(C)*] is deemed to be gainfully employed and to have earned income for that month of \$250 if there is one qualifying individual and \$500 if there is more than one qualifying individual [*I.R.C. § 21(d)(2)*].

Unlike the dependency exemption [see § 123.41[3]], the child care credit is not transferable to the noncustodial parent, even if he or she is the one who is paying all or most of the child care expenses [I.R.C. § 21(e)(5); see I.R.C. § 152(e)(4)(A) (defining custodial parent as one who has custody for greater portion of calendar year); see also 1.21-1(b)(5)(ii)]. Thus, the right to claim a child care credit for a child remains with the custodial parent even if the dependency exemption is released to the noncustodial parent [I.R.C. § 21(e)(5); see § 123.41[3][b]].

PRACTICE TIP:

Under California's statewide uniform child support guideline, the court must order child care costs related to employment or training for employment to be paid as additional child support [Fam. Code § 4062(a)(1)]. The costs are to be divided evenly between the parents unless either parent requests a different apportionment [Fam. Code § 4061(a)]. Thus, a higher-earning noncustodial parent will be required to pay at least half of child care costs without being able to claim the child care credit. If the court determines that a 50-50 apportionment of child care costs is inappropriate, it must apportion them according to a formula based on the parents' respective incomes, thereby allocating even a higher share to the higher earner [see Fam. Code § 4061(b)]. While a proportionate allocation is certainly appropriate in cases involving great disparity in parental income, the fact that only the custodial parent may claim the child care credit is an argument for not making a different apportionment in cases in which the disparity is not so great. *Commentary by the Publisher's Editorial Staff.*

For further discussion of the child support guideline and the child care add-on, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 41, *Child Support Orders* (Matthew Bender).

The credit is available to a married taxpayer only if the taxpayer and his or her spouse file a joint return [I.R.C. § 21(e)(2)]. However, an individual who is legally separated from his or her spouse under a decree of divorce or legal separation is not considered as married [I.R.C. § 21(e)(3)]. In the absence of such a decree, a married taxpayer who files a separate return may claim the child care credit if he or she (1) lived apart from his or her spouse for the last six months of the taxable year, (2) maintained a household that was the child's principal place of abode for more than half of the taxable year, and (3) furnished over half the cost of maintaining the household during the taxable year [I.R.C. § 21(e)(4)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewTax LawFederal Taxpayer GroupsIndividualsAdjustments to Income (IRC secs. 62, 71, 215, 911)Child Support Payments



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34-123 California Legal Forms--Transaction Guide § 123.44

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.44 Head of Household Filing Status

[1] Status as Head of Household; Qualifying Persons

The tax rates that apply to the liability of a person who qualifies as a head of household are more favorable than the rates for a person who files as a single person [*compare I.R.C. § 1(b) with I.R.C. § 1(c)*]. A head of household is a taxpayer who, at the close of the taxable year, is not married (*but see* [4], *below*), is not a surviving spouse, and who maintains a household that constitutes the principal place of abode of one or more qualifying persons [*I.R.C. § 2(b)(1); Treas. Reg. § 1.2-2(b)(1)*].

Qualifying persons include the taxpayer's child or stepchild, descendants of a child, and any other person for whom the taxpayer may take a dependency deduction [*I.R.C. § 2(b)(1)(A); Treas. Reg. § 1.2-2(b)(3)*]. Qualifying persons also include the taxpayer's parent if the taxpayer would be entitled to a dependency exemption for the parent [*I.R.C. § 2(b)(1)(B); Treas. Reg. § 1.2-2(b)(4)*]. Under no circumstances, may the same person be used to qualify more than one person as a head of household for the same taxable year [*Treas. Reg. § 1.2-2(b)(2)*].

A taxpayer who was a nonresident alien at any time during the taxable year may not be considered to be a head of household [*I.R.C. § 2(b)(3)(A)*]. Also, head-of-household status is unavailable if the person claimed as a dependent is unrelated to the taxpayer or is deemed a dependent under a multiple support agreement [*I.R.C. § 2(b)(3)(B); see I.R.C. § 152(d)(2)(H), (3); see § 123.41[4]* (multiple support agreements)].

[2] Cohabitation Requirements

In order for a taxpayer to be considered as maintaining a household for a child for purposes of the filing status, the household must actually constitute the home of the taxpayer. It is not sufficient that the taxpayer maintain the household without being its occupant [*Treas. Reg. § 1.2-2(c)(1); see Stanford (Sharron Kay Wirges) T.C. Memo 1995-78 ; McDonald (Lillie B.) T.C. Memo 1991-242* (taxpayer who maintained separate principal residences for self and son did

not qualify for head of household status)]. Apparently it need not be the taxpayer's sole or principal place of abode, as long as there is a substantial period of cohabitation with the child [see *Smith v. Commissioner* (9th Cir. [T.C.] 1964) 332 F.2d 671, 673, reversing 40 T.C. 591 (1963); see also *Grace v. Commissioner* (5th Cir. [T.C.] 1969) 421 F.2d 165, 166, aff'd, 51 T.C. 685 (1969); *Muse v. United States* (4th Cir. 1970) 434 F.2d 349, 352-353]. There is no cohabitation requirement if the qualifying person is the taxpayer's parent [I.R.C. § 2(b)(1)(B); *Treas. Reg.* § 1.2-2(b)(1), (c)(1)].

The household must constitute the principal place of abode of the child for more than one half of the taxable year [I.R.C. § 2(b)(1)(A)]. Thus, unlike the dependency exemption [see § 123.41[3][b]], head-of-household filing status is not a tax benefit that may be transferred by the custodial parent to the noncustodial parent based on the payment of more than half of a child's support [see *Grace v. Commissioner* (5th Cir. [T.C.] 1969) 421 F.2d 165, 166; see also [3], below]. Note that *Treas. Reg.* § 1.2-2(c)(1) requires that the taxpayer and his or her child must occupy the home for the entire taxable year. However, the regulation has not been revised in light of the amendments made to I.R.C. § 2 by Pub. Law 98-369 (DEFRA), § 423(c)(2), which changed the cohabitation requirement from the entire year to more than half of the year. DEFRA applies to taxable years beginning after December 31, 1984.

Temporary absences from the household due to special circumstances do not disqualify the taxpayer under the cohabitation requirement. A custody agreement under which a child is absent from the taxpayer's home for less than six months of the year is considered a temporary absence due to special circumstances [*Treas. Reg.* § 1.2-2(c)(1)].

In order to establish a temporary absence, the taxpayer or child must be reasonably expected to return to the household, and the taxpayer must continue to maintain the household in anticipation of the return [*Treas. Reg.* § 1.2-2(c)(1); see *Addison (Beverly P) T.C. Memo 1992-349* (mother did not meet requirements for head-of-household filing status because daughter's absence from home to attend school was not deemed temporary)]. For example, a taxpayer will not be denied head of household status if the qualifying person is temporarily maintained in a mental institution and the household is held open for his or her return [*W.J. Hein* (1957) 28 T.C. 826, 835]. Head of household status will be denied a parent whose child leaves the family household and establishes a separate residence for more than half the year [see *Prendergast v. C.I.R.* (9th Cir. [T.C.] 1973) 483 F.2d 970, 971 (decided under prior law requiring taxpayer's home to be child's principal place of residence for entire year)].

The fact that the person for whom the abode is furnished is born or dies within the taxable year will not prevent the taxpayer from qualifying as a head of household if the household constitutes the principal place of abode for the dependent for the remaining or preceding part of the taxable year [*Treas. Reg.* § 1.2-2(c)(1)].

[3] Costs of Maintaining Household

A taxpayer will be considered as maintaining a household only if he or she pays more than one half of the cost of the household for the taxable year [I.R.C. § 2(b)(1)]. Cost "includes property taxes, mortgage interest, rent, utility charges, upkeep and repairs, property insurance, and food consumed on the premises. Maintenance costs do not include such items as clothing, education, medical treatment, vacations, life insurance, and transportation [*Treas. Reg.* § 1.2-2(d)].

The cost of maintaining the household must be distinguished from the costs of supporting the child or other qualifying person. In the case of divorced parents, there is no requirement that the parent claiming head-of-household status pay more than half of the support for the child, as long as he or she pays over half the cost of maintaining the household [*Treas. Reg.* § 1.2-2(b)(3)(i)]. A custodial parent may release the dependency exemption for a child to a noncustodial parent who pays more than half of the child's support, but still claim head-of-household status [I.R.C. § 2(b)(1)(A)(i); see I.R.C. § 152(e)(2), discussed in § 123.41[3][b]].

[4] Rights of Certain Married Persons to Head of Household Filing Status

Head-of-household status ordinarily is limited to single persons [*I.R.C. § 2(b)(1)*; compare *I.R.C. § 1(b)* with *I.R.C. § 1(d)* (tax rates of head of household and married individuals filing separately)]. However, an individual who is legally separated from his or her spouse under a decree of divorce or of separate maintenance is not considered as married [*I.R.C. § 2(b)(2)(A)*].

In addition, a married taxpayer who is living apart from his or her spouse is not deemed married, and therefore is eligible to file as a head of household if he or she otherwise qualifies, provided the individual meets all of the following requirements [*I.R.C. §§ 2(c), 7703(b)*; *Rev. & Tax. Code §§ 17021.5, 17042*; see *Treas. Reg. § 1.2-2(e)*]:

1. Files a separate income tax return;
2. Maintains as his or her home a household that is, for more than half of the taxable year, the principal place of abode of a dependent child or stepchild [see *I.R.C. § 152(f)(1)*; [2], *above*];
3. Is entitled to a dependency deduction for the child or stepchild;
4. Furnishes more than half of the cost of maintaining the household [see [3], *above*]; and
5. Does not have, for the last six months of the taxable year, his or her spouse as a member of the household.

Although spouses can be living separate and apart under California law and yet reside under the same roof, the Tax Court refuses to follow this approach, holding instead that a married taxpayer living in the same household with his or her spouse while obtaining a divorce is not eligible to file as a head of household [*Hopkins v. Commissioner, T.C. Memo. 1992-326* (head of household status denied taxpayer who occasionally allowed former spouse to sleep in living room because of former spouse's inability to secure housing for himself); *Dawkins v. Commissioner, T.C. Memo. 1991-225* (filing status of divorcing taxpayer who lived in separate quarters under same roof with spouse was "married filing separate," not "head of household")]. As a result, because the Ninth Circuit has not specifically addressed this issue, the current rule is that both spouses cannot live under the same roof and be deemed living separate and apart [see *Hopkins v. Commissioner, T.C. Memo. 1992-326* ; but see *Sydney v. Commissioner (8th Cir. 1978) 577 F.2d 60, 62* (in case involving tax treatment of support payments, Eighth Circuit rejected this strict standard for "separated and living apart")].

The taxpayer's spouse will be considered a member of the household during a period in which the spouse is absent from the household temporarily. For example, the spouse will be considered a household member during periods that he or she is away from the household due to illness, educational activities, business, vacation, or military service [*Treas. Reg. § 1.143-1(b)(5)* (regulation does not reflect change in requirement regarding former spouse's residence from entire taxable year to last six months of taxable year)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewTax LawFederal Taxpayer GroupsIndividualsFiling Status (IRC secs. 1-2)



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DIVISION VII: PERSONAL TRANSACTIONS
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D. Tax Considerations
1. Tax Consequences Related to Children

34-123 California Legal Forms--Transaction Guide § 123.45

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.45 Gift and Estate Tax Consequences of Child Support

[1] Gift Tax

Payments made to satisfy a child support obligation do not constitute taxable gifts [*see Commissioner v. Converse* (2d Cir. 1947) 163 F.2d 131 ; *Hooker v. Commissioner* (1948) 10 T.C. 388 , *aff'd*, (5th Cir. 1949) 174 F.2d 863 ; *see also Rev. Rul. 68-379, 1968-2 C.B. 414*]. Payments made in excess of reasonable support obligations, however, or payments to adult children to whom the payor owes no obligation of support, constitute taxable gifts [*see Rosenthal v. Commissioner* (2d Cir. 1953) 205 F.2d 505 ; *Spruance v. Commissioner* (1973) 60 T.C. 141, 150-153 , *aff'd without op.*, (3d Cir. 1974) 505 F.2d 731] .

Under the Internal Revenue Code, specified support payments are exempted from gift taxation. Payments that provide reasonable allowance for support for the transferor's issue during their minority are not gifts if the transfers are made under a written marital settlement agreement entered into between the parents within two years before or one year after the final decree of divorce. The agreement need not be approved by the divorce decree [*I.R.C. § 2516*]. This rule applies only to the children of the marriage being dissolved but includes legally adopted children [*Treas. Reg. § 25.2516-2*]. Furthermore, an unlimited exclusion from gift tax applies to all direct payments made for an individual's medical or tuition expenses [*I.R.C. § 2503(e)*].

[2] Estate Tax

Payments made to support a child are not subject to federal estate tax. Claims for the support of children are deductible from the decedent's gross estate to the extent of the decedent's support obligation [*see I.R.C. § 2053*]. The deduction from the gross estate should not exceed the amount that the decedent was obligated to pay, but failed to pay, during his or her life [*see Estate of Satz v. Commissioner* (1982) 78 T.C. 1172 ; *see also Rev. Rul. 71-67, 1971-1 C.B. 271*]. For discussion of the liability of a parent's estate for child support on the basis of a preexisting court order for support or a settlement agreement, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure,

Ch. 40, *Duty to Support Children and Jurisdiction to Order Support*, § 40.09[3].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportTaxationTax LawFederal Taxpayer
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34-123 California Legal Forms--Transaction Guide §§ 123.46-123.49

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 123.46[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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34-123 California Legal Forms--Transaction Guide § 123.50

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.50 Background and Purpose of Current Law

[1] Federal Law

Payments that qualify as alimony or separate maintenance payments are deductible by the payor-spouse [*I.R.C. § 215*] and includible in the income of the payee-spouse [*I.R.C. § 71*]. Thus, the payor-spouse is treated as a conduit of income to the payee-spouse, unless the payments are made pursuant to an agreement that expressly designates that they are not to be deductible or includible as alimony [*see Richardson v. Commissioner (1995) 70 T.C.M. 1390 ; see also Keegan (Kirk A., Jr.) v. Commissioner, T.C. Memo 1997-359 ; Daugharty (John F.) v. Commissioner, T.C. Memo 1997-349*].

This tax treatment of qualifying payments has remained unchanged for many years, but the requirements for qualification were fundamentally revised in 1984 and were amended in 1986 [*see Tax Reform Act of 1984, Pub. L. No. 98-369, § 422(a), as amended by Tax Reform Act of 1986, Pub. L. No. 99-514, §§ 1843(b), 1881 (eliminating retroactively, to operative date of Tax Reform Act of 1984, rule that instrument must expressly provide for termination of obligation on death); see also [3], below, for discussion*]. Current and prior law distinguish spousal support from both child support and payments made in consequence of a division of property. The law allows alimony tax treatment only for true spousal support and attempts to define alimony in a way that conforms to general notions of what types of payments constitute alimony [*H.R. Rep. No. 432, 98th Cong., 2d Sess. 1494-1497 (1984); see § 123.51*]. Payments not meeting the objective test of current law will fail to qualify for alimony tax treatment regardless of whether they were intended by both spouses to constitute spousal support.

PRACTICE TIP:

Many of these cases arise when the I.R.S. matches the payor's and payee's returns, and finds one deducting the payment while the other omits it from income. *Commentary by Susan Jeffries.*

PRACTICE TIP: An obligation that qualifies as alimony or spousal support for purposes of income tax deductibility generally will also qualify as a "domestic support obligation," which is not dischargeable in

bankruptcy [see 11 U.S.C. § 523(a)(5)]. A "domestic support obligation" for bankruptcy purposes includes any debt payable to a bankruptcy debtor's spouse or former spouse "in the nature of alimony, maintenance, or support" of that spouse, former spouse, child, or child's parent under a separation agreement, divorce decree, or property settlement agreement [11 U.S.C. § 101(14A) ("domestic support obligation" does not include obligation assigned to nongovernmental entity unless voluntarily assigned for purpose of collecting that debt)]. Whether an obligation imposed by a marital settlement agreement is actually "in the nature of alimony, maintenance, or support," and therefore should not be discharged in bankruptcy, will be determined by the bankruptcy court based on all of the circumstances of the parties [see *Shaver v. Shaver* (9th Cir. 1986) 736 F.2d 1314, 1315-1316 (construing former 11 U.S.C. § 523(a)(5), which contained substantially similar language to that of current 11 U.S.C. § 101(14A))]. The Bankruptcy Code's policy against discharge of the debtor's domestic support obligations "departs from the general policy of absolution, or 'fresh start,' that is embodied in the federal Bankruptcy Act. It enforces an overriding public policy favoring the enforcement of familial obligations" [*Shaver v. Shaver* (9th Cir. 1986) 736 F.2d 1314, 1315-1316] . Therefore, when a property division has been categorized by the spouses at the time of dissolution as "support" (to enable the obligor to claim a tax deduction), and the judgment or marital settlement agreement expressly provides that the "support" obligation will be nonmodifiable, the spouses should anticipate the possibility of the obligor's bankruptcy. The obligee, in the event of the obligor's bankruptcy, may argue that the payment provisions are nondischargeable as being in the nature of "spousal support." To avoid unintended consequences, the spouses should frankly state, in the settlement agreement, their intent as to whether the payments are to be deemed for bankruptcy purposes as in the nature of support (and thus nondischargeable). *Commentary by Ira H. Lurvey.*

The requirements for alimony tax treatment imposed as a result of the Tax Reform Act of 1984 generally apply only to divorce or separation instruments executed after 1984. Counsel should be aware, however, that any amendment or change in the terms of a pre-1985 divorce or separation instrument may bring it under current law. For example, in one private letter ruling issued before enactment of the Tax Reform Act of 1986, the IRS indicated that alimony treatment might be lost if the amended agreement failed to state that liability for spousal support would cease on the death of the payee spouse [Letter Rul. 8624125 (Mar. 20, 1986); *but see* Tax Reform Act of 1986, Pub. L. No. 99-514, §§ 1843(b), 1881 (eliminating retroactively, to operative date of Tax Reform Act of 1984, rule that instrument must expressly provide for termination of obligation on death); *see also* § 123.51 for discussion].

PRACTICE TIP:

The payments must terminate upon the death of the payee; otherwise the obligor is not entitled to a deduction. While the decree or agreement need not state this crucial element, it is safer always to state it expressly in any tax-sensitive agreement providing for alimony. *Commentary by Ira H. Lurvey.*

[2] California Law

California's income tax treatment of spousal support specifically incorporates the federal tax treatment of alimony [Rev. & Tax. Code §§ 17081, 17201(b); *see* I.R.C. §§ 71, 215 (inclusion of alimony in gross income; itemized deduction for alimony payments)].

[3] Effective Dates

Current federal law applies to payments made under dissolution or separation instruments signed, filed, and executed after 1984. If a decree of dissolution or legal separation entered after 1984 incorporates or adopts without change the terms of the alimony or separate maintenance payments under a dissolution or separation instrument executed before 1985, the decree is treated as entered before 1985. A change in the amount of alimony or separate maintenance payments or the period over which the payments are to continue, or the addition or deletion of any contingencies or

conditions relating to such payments, is a change of terms [Temp. Treas. Reg. § 1.71-1T(e), Q&A 26].

EXAMPLE:

In November 1984, H and W executed a written separation agreement. In February 1985, a decree of dissolution was entered in substitution of the written separation agreement. The decree did not change the terms of the spousal support obligation from H to W. Generally, the decree is treated as entered before 1985, and prior law governs whether the payments qualify for alimony tax treatment. However, if the amounts or the period of the spousal support payments are not specified in the written separation agreement, or if the decree changed the amount or terms of the payments, the decree is considered as entered after 1984, and the payments are governed by current law [see Temp. Treas. Reg. § 1.71-1T(e), Q&A 26].

Current federal law also applies to instruments executed or entered into (or treated as executed or entered into) before 1985 that are modified after 1984, if the modification expressly provides that *Internal Revenue Code Section 71*, as amended by the Tax Reform Act of 1984, is to apply to the instrument as modified [Temp. Treas. Reg. § 1.71-1T(e), Q&A 26; see Letter Rul. 8634040 (Aug. 22, 1986)]. One court has held that an "express reference" is not limited to a "formulaic recitation of buzzwords" (for example, the law's formal statutory title). Any clear indication that the "new law" would apply is sufficient [*Christoph v. United States* (S.D. Ga 1995) 931 F. Supp. 1564 (nunc pro tunc "clarification" to invoke new law was upheld, but a retroactive "modification" would not likely be upheld if it affected rights of federal government)].

One private letter ruling indicates that the IRS may take a relatively narrow view of the circumstances under which a modification after 1984 of a pre-1985 divorce decree will subject the decree to post-1984 tax law. In that ruling, the IRS stated that such a modification would not subject a pre-1985 decree to post-1984 tax law unless the modification expressly states that post-1984 law is to apply [Letter Rul. 8634040 (Aug. 22, 1986); see Temp. Treas. Reg. § 1.71-1T(e), Q&A 26; see also *Libman v. Commissioner*, T.C. Memo. 1990-629 (pre-1984 award of unallocated family support retained alimony treatment when 1988 modification for "child support" lacked express statement that post-1984 law applied)]. The IRS reasoned that, for purposes of applying the term "divorce or separation instrument" [see I.R.C. § 71(b)(2)] in ascertaining which tax laws apply, the underlying decree (or instrument) that establishes the obligation of paying support, rather than a modification decree, is determinative [Letter Rul. 8634040 (Aug. 22, 1986)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview



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34-123 California Legal Forms--Transaction Guide § 123.51

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.51 Requirements for Alimony Tax Treatment

[1] Qualified Payments

The Internal Revenue Code uses the term "alimony or separate maintenance payment" to characterize a payment that qualifies for alimony tax treatment, that is, one that is deductible by the payor and includible in the payee's gross income [I.R.C. §§ 71(a), 215(a)]. A payment qualifies as an alimony or separate maintenance payment if all of the requirements specified in [2]-[6], *below*, are met. Notwithstanding these requirements, however, payments do not qualify if the spouses file a joint return for the taxable year in which the payments are made [see I.R.C. § 71(e)]. For discussion of filing joint returns generally, see Ch. 125.

In general, state court adjudications that retroactively designate divorce-related payments as alimony or child support are ignored for purposes of federal tax liability [see, e.g., *Engelhardt v. Commissioner* (1972) 58 T.C. 641, *acq.*, 1978-1 C.B. 1]. An exception to this rule may be made, however, when the retroactive order is entered to correct a decree that mistakenly failed to reflect the true intention of the court at the time the decree was entered. In such cases, a *nunc pro tunc* order may be honored for federal tax purposes if it is held to have clarified the true intent of the original decree [*Johnson v. Commissioner*, T.C. Memo. 1989-415 ; see *Christoph v. United States* (S.D. Ga 1995) 931 F. Supp. 1564].

Some types of expenditures have been found ineligible for alimony tax treatment. For example, expenses incurred by a father to discover the whereabouts of his child and former spouse were held not to be deductible alimony [*Marian v. Commissioner*, T.C. Memo. 1985-554]. Although the case was decided under prior law, because current law retains the requirement that alimony payments must be made pursuant to a divorce decree or written separation instrument [see [3], *below*], the result should not be changed under current law.

If a lump-sum payment is made in settlement of both past and future support obligations, an allocation must be made

between both types for income tax purposes. In the absence of an unequivocal allocation between these components, the lump sum is to be treated as paid in settlement of arrearages to the extent that they exist, with the balance allocated to the satisfaction of future obligations. The amount allocated to arrearages retains the tax character that would have applied to timely payments made under the divorce or separation instrument. The tax character of the amount allocated to future obligations must be determined separately [*Bernard v. Commissioner* (1986) 87 T.C. 1029] .

[2] Payment in Cash

The payment must be made in cash [I.R.C. § 71(b)(1)]. Checks and money orders payable on demand qualify. Transfers of services or property (including debt instruments of a third party or an annuity contract), execution of a debt instrument by the payor, or the use of the payor's property do not qualify as alimony or separate maintenance payments [Temp. Treas. Reg. § 1.71-1T(a)(5), (6), (b), Q&A 5; cf. *Daley v. Commissioner*, T.C. Memo. 1991-555 (in case involving indirect alimony under pre-1985 law, rent-free use of house by taxpayer's former spouse was not deductible as alimony when evidence indicated use was intended either as child support or was in lieu of interest payments owing to former spouse)].

[3] Received Under Instrument

The payment must be received [see I.R.C. § 71(a); see also *Feldman v. Commissioner*, T.C. Memo. 1991-153 (payee spouse not taxed on alimony overpayments received but ordered refunded to payor spouse under divorce decree); *Coleman v. Commissioner*, T.C. Memo. 1988-442 (payee spouses using cash method of accounting taxed on alimony arrearages in year of receipt, not year originally due)] by or on behalf of a spouse or former spouse [I.R.C. § 71(d); see I.R.C. § 71(a)] under a "divorce or separation instrument" [I.R.C. § 71(b)(1)(A)] that does not expressly designate the payment as one that is (1) not includible in the payee's gross income and (2) not allowable as a deduction from the payor's gross income [see I.R.C. § 71(b)(1)(B); Temp. Treas. Reg. § 1.71-1T(a), Q&A 2; see also I.R.C. § 71(b)(2)(A) (qualified divorce and separation instruments); *Ewell v. Commissioner*, T.C. Memo. 1996-253 ; 71 T.C.M. 3134 ; *Richardson v. Commissioner* (1995) 70 T.C.M. 1390 ; cf. *Harris v. Commissioner*, T.C. Memo. 1991-375 (in noncommunity property state, husband was taxable on withdrawals from IRA even though they were used to pay former wife's income taxes pursuant to divorce decree; decree as not otherwise satisfying alimony income-shifting rules, and husband as not required to transfer his interest in IRA to wife in lieu of portion of his obligation to pay her taxes); see § 123.54].

The term "divorce or separation instrument" means a decree of divorce or separate maintenance, a written instrument incident to such a decree, a written separation agreement, or a decree requiring a spouse to make payments for the support and maintenance of the other spouse (for example, a decree awarding temporary spousal support) [I.R.C. § 71(b)(2); see *Estate of Felt v. Commissioner*, T.C. Memo. 1987-465 (effect of foreign divorce); cf. *Landreth (Barbara A.) v. Commissioner*, T.C. Memo 1997-169 (judge's handwritten docket sheet entry constituted "decree" for purposes of alimony tax treatment)]. The IRS has privately ruled that a written transcription of an oral stipulation made in court qualifies as a written instrument [Letter Rul. 8821069 (Mar. 1, 1988)]. Similarly, the Tax Court has held that a letter from one spouse's attorney containing a proposed spousal and child support offer, signed and returned by the other spouse, constituted a written separation agreement for purposes of federal tax law [see *Azenaro v. Commissioner*, T.C. Memo. 1989-224 (applying former I.R.C. § 71(a)(2)); see also I.R.C. § 71(b)(2)(B)].

PRACTICE TIP:

Occasionally, especially in the early stages of a dissolution, the supporting spouse voluntarily makes substantial temporary support payments to the other spouse. Counsel should advise the paying spouse that voluntary payments will not qualify for income tax treatment as alimony. The spouses may be willing to execute a written agreement for temporary support, and in that case, the payments will be treated as alimony. However, the paying spouse then will be bound to make the payments as agreed. Also, the agreement may provide a guideline for a court order setting or modifying support. *Commentary*

by Ira H. Lurvey.

PRACTICE TIP:

It is also a good idea to obtain an order for pendente lite spousal support. In addition to unequivocally setting a specific commencement date for the prejudgment, separation-period spousal support, the IRS will treat such a stipulated order as presumptively valid; therefore, the order will avoid any questions that might be raised by a marital settlement agreement purporting to set pendente lite spousal support, particularly if such a document has been inartfully drafted by the parties [see *Ewell v. Commissioner*, T.C. Memo 1996-253 ; 71 T.C.M. 3134 ; *Richardson v. Commissioner* (1995) 70 T.C.M. 1390] . Further, the stipulated order removes any incentive the parties might otherwise have to prepare a marital settlement agreement immediately before the tax filing deadline, or to involve counsel or a tax preparer in the preparation or submission of an agreement that backdates the commencement of support payments. *Commentary by Publisher's Editorial Staff*.

The label that the parties attach to payments required under their marital termination agreement is not controlling. Therefore, merely stating in the agreement that a particular payment is to be treated as alimony will be ignored by the IRS if the payment does not meet the requirements for alimony tax treatment [*Heffron v. Commissioner* T.C. Memo 1995-253 (payment of debts did not qualify as alimony, despite parties' label, because obligation did not cease on death or remarriage of supported spouse)]. Nor is the particular meaning of the term "alimony" under state law relevant if it is different from its meaning under federal tax law [*Hoover v. Commissioner* T.C. Memo 1995-183] .

If a state court rewords the provisions of a separation agreement in its divorce decree, the separation agreement may be superseded by the decree for purposes of determining whether payments properly constitute child support or alimony. In one case, for example, a divorce court reworded provisions of a separation agreement providing for family support (combined child and spousal support; see § 123.52[2]) to specify particular amounts for each type of support. The Tax Court held that the divorce decree superseded the agreement because the spouses intended that the agreement be merged into the decree, thereby making the child support amount nondeductible. The court noted, however, that even if no merger had occurred, the decree still would supersede the agreement because alimony tax treatment is precluded for amounts fixed as child support in a divorce or separation instrument, and fixing the amounts for child support in the decree "overrides the lack of specificity in the separation agreement" [*Platt v. Commissioner*, T.C. Memo. 1985-592 ; see I.R.C. § 71(c)(1)]. For discussion of the limitations under current law imposed on deducting combined child and spousal support, see § 123.52.

PRACTICE TIP:

The critical step here, it would seem, is to be sure that the court does not rewrite or otherwise materially modify an agreement between the spouses addressing particular tax consequences that one or both of the spouses had in mind when making the agreement. *Commentary by Ira H. Lurvey*.

PRACTICE TIP: The risk of the final decree overriding the tax benefits contemplated in a pretrial agreement between the parties generally is not a problem. If the parties have provided for specific tax consequences of support in a marital settlement agreement or pretrial stipulated order, they will usually agree to a final decree containing consistent terms. The danger, if any, will more often lie with attorney oversights in consistency in drafting. If the dissolution matter proceeds to trial as a contested matter, however, counsel should be prepared to emphasize to the court the adverse tax consequences that will result from the rendering of a decree that departs from previous specific support agreements between the parties. In this regard, it is important to call the court's attention to the fact that family support remains an option under the statewide uniform child support guideline, and the court should not feel compelled by

the guideline [*see Fam. Code § 4066*] to designate a specific amount for child support. *Commentary by Publisher's Editorial Staff.*

Payments made to a supported spouse in anticipation that a court will retroactively order them do not qualify for alimony tax treatment. An amendment to a state court decree cannot be given retroactive effect for tax purposes unless the amendment merely corrects computational or clerical errors in the original order, or is a "nunc pro tunc" order that merely clarifies the intent of the court in the original order [Letter Rul. 8645072 (Nov. 7, 1986); *Christoph v. United States* (S.D. Ga 1995) 931 F. Supp. 1564; *Johnson v. Commissioner, T.C. Memo. 1989-415* ; *see Zurn v. Commissioner, T.C. Memo 1996-386* (Tax Court honored state court order that retroactively ("nunc pro tunc") changed alimony award from \$1.00, to \$1,000, per month)]. In contrast, payments made according to the terms of a temporary support order that has been stayed may be subject to alimony tax treatment, depending on the legal effect of a stay on the support order in the jurisdiction involved [*see LaBow v. Commissioner, T.C. Memo. 1987-191* (stay did not render judgment ineffective under Connecticut law); *see also Richardson v. Commissioner* (1995) 70 T.C.M. 1390 (agreement that is unenforceable or invalidated does not change deductibility or inclusion of prior payments that otherwise qualify as alimony)].

Voluntary payments made under an oral agreement that is never incorporated into a divorce decree or reduced to writing do not qualify for alimony tax treatment, and neither income tax returns nor checks written to the supported spouse will suffice to constitute the necessary written agreement [*see O'Donnell v. Commissioner, T.C. Memo. 1991-74*] . Further, a unilateral written statement that a person is willing to pay a certain sum as spousal support does not constitute a divorce or separation instrument. An agreement between the parties must be reduced to writing and signed by both parties [*Mercurio v. Commissioner, T.C. Memo 1995-312*] . Overpayments of amounts required by the written instrument are not deductible [*see Ritchie v. Commissioner, T.C. Memo. 1989-426*] , and voluntary increases that maintain support at a fixed percentage of the payor's income are not deductible if the written instrument requires a lower dollar amount [*see Ellis v. Commissioner, T.C. Memo. 1990-456*] .

[4] Payments to Third Parties

Payments to third parties qualify as alimony payments made on behalf of the payee-spouse if they are made under the terms of the divorce or separation instrument, or if they are made under a written request, consent, or ratification by the payee-spouse. The request, consent, or ratification must state that the parties intend the payment to be treated as an alimony or separate maintenance payment subject to *Internal Revenue Code Section 71* [*but see Heffron v. Commissioner, T.C. Memo 1995-253* (statement alone is insufficient if payment does not otherwise meet requirements of federal tax law)]. It must be received by the payor-spouse before the filing date of the payor's first tax return for the taxable year in which payment is made. To qualify, payment actually must be "on behalf" of the payee-spouse. For example, cash payments of the payee-spouse's rent, mortgage, tax, or tuition liabilities qualify [*see §§ 123.242, 123.243*]. Premiums paid by the payor-spouse for term or life insurance on the payor's life under the terms of a divorce or separation instrument also qualify as payments on behalf of the payee-spouse to the extent that the payee-spouse is the owner of the policy [*see § 123.246*]. Payments to maintain property owned by the payor-spouse and used by the payee-spouse (including mortgage payments, real estate taxes, and insurance premiums) are not properly deemed payments on behalf of a spouse [Temp. Treas. Reg. § 1.71-1T(b), Q&A 6, 7; *see Letter Rul. 8710089* (Mar. 11, 1987)(payments under temporary support order qualify for alimony tax treatment only to extent not used to maintain payor-spouse's property); *see § 123.243*].

However, the payor can deduct mortgage interest and taxes paid on jointly held property if paid with separate property even if he or she has a right to reimbursement [*Ewell v. Commissioner, T.C. Memo. 1996-253* ; 71 T.C.M. 3134] . Further, it should be made clear that the obligation to make the payments terminates on the death or remarriage of the spouse on whose behalf they are to be made [*see Heffron v. Commissioner, T.C. Memo 1995-253* ; *see also Ewell v. Commissioner, T.C. Memo. 1996-253* ; 71 T.C.M. 3134 ; *Israel v. Commissioner* (1995) 70 T.C.M. 1037 ; [6], below].

[5] Spouses Not Members of Same Household**[a] Legal Separation**

In the case of an individual legally separated from his or her spouse under a decree of divorce or separate maintenance, the payment qualifies for alimony tax treatment only if the payor and payee are not members of the same household at the time the payment is made [I.R.C. § 71(b)(1)(C)]. For purposes of this requirement, a dwelling unit formerly shared by both spouses is not considered as two separate households even if the separated spouses physically separate themselves within the dwelling unit. The separated spouses are not treated as members of the same household if one spouse is preparing to depart from the household of the other spouse on the date the payment is made, however, and he or she does depart no more than one month after that date [Temp. Treas. Reg. § 1.71-1T(b), Q&A 9].

[b] Temporary Spousal Support

A payment of temporary spousal support under a written separation agreement or temporary support order qualifies for alimony tax treatment regardless of whether the spouses occupy the same household if the spouses are not legally separated under a decree of divorce or separate maintenance [Temp. Treas. Reg. § 1.71-1T(b), Q&A 9; *cf. Coltman v. Commissioner, T.C. Memo. 1991-127* (under pre-1985 law, divorcing spouses must live in separate residences to qualify for alimony tax treatment)].

[6] No Liability After Payee-Spouse's Death

To qualify payments for alimony treatment, no liability to make any payments, whether in cash or property, must exist after the death of the payee-spouse [I.R.C. § 71(b)(1)(D); *see Sroufe v. Commissioner, T.C. Memo 1995-256* (alimony tax treatment denied because payments were required to be guaranteed and secured by payor, meaning that he would have been required to continue payments to payee's estate after her death); *Stokes v. Commissioner, T.C. Memo. 1994-456* (taxpayer denied alimony tax treatment because payments could have extended beyond wife's death and language in agreement showed specific intent that payments continue after wife's death)]. If the payor-spouse is required to make payments after the death of the payee-spouse, none of the payments (whether made before or after the death of the payee) can be treated as alimony [Temp. Treas. Reg. § 1.71-1T(b), Q&A 10].

Termination of spousal support on the death of the supported spouse is achieved by operation of law in California unless the parties agree to the contrary [Fam. Code § 4337]. Under provisions of the Tax Reform Act of 1984 that were eliminated retroactively in the Tax Reform Act of 1986 [see Pub. L. No. 99-514, § 1881; *see also 1987-1 C.B. 421, Notice 87-9*; *see § 123.51*], the divorce or separation instrument was required to expressly state that the liability to pay support would terminate on the death of the recipient, otherwise the payment would not be deductible as alimony [Former I.R.C. § 71(b)(1)(D), before amendment by Tax Reform Act of 1986, Pub. L. No. 99-514, § 1843(b); *see Letter Rul. 8551012* (Sept. 19, 1985)]. This requirement having been eliminated retroactive to the operative date of the Tax Reform Act of 1984, the failure to include such a provision in an instrument does not affect the deductibility of support payments [I.R.C. § 71(b)(1)(D)]. Nevertheless, the provision may be added merely to clarify that all support obligations will terminate on the recipient's death and that the payments, therefore, are deductible [see I.R.C. § 71(b)(1)(D)].

PRACTICE TIP:

Although not required under current law, inclusion in a written agreement or decree of a provision expressly stating that liability to pay support terminates on the payee's death safeguards the payor's right to deduction of support payments if the law changes in the future and issues of retroactivity arise.
Commentary by Publisher's Editorial Staff.

The requirement that liability for payment must terminate on the supported spouse's death establishes an objective test to distinguish spousal support from child support or property settlement payments, which are not contingent on the survival of the payee-spouse. To prevent violation of this rule, no liability to make payments must survive after the

death of the payee-spouse as a substitute for pre-death payments that otherwise would qualify as alimony or separate maintenance payments. If liability to make substitute payments exists, none of the otherwise qualifying payments can be treated as alimony [see *I.R.C. § 71(b)(1)(D)*; Temp. Treas. Reg. § 1.71-1T(b), Q&A 13]. The divorce or separation instrument need not state, however, that no liability to make substitute payments exists [Temp. Treas. Reg. § 1.71-1T(b), Q&A 13]. The determination as to whether post-death payments constitute substitute payments, and the amount of the pre-death payments for which they are a substitute, will depend on all of the facts and circumstances in each case [Temp. Treas. Reg. § 1.71-1T(b), Q&A 14].

EXAMPLE:

Under the terms of a divorce decree, H is obligated to make annual spousal support payments to W of \$30,000, terminating either on the expiration of six years or the death of W. W maintains custody of the couple's minor children. The decree provides that on the death of W, if there are minor children remaining, H will be obligated to make annual payments of \$10,000 to a trust, the income and corpus of which are to be used for the benefit of the children until the youngest attains the age of majority.

H's liability to make \$10,000 annual payments to the trust after W's death is a substitute for \$10,000 of each \$30,000 annual pre-death payment. In effect, the circumstances indicate that \$10,000 of each annual pre-death payment is intended for child support rather than spousal support. Thus, only \$20,000 of each \$30,000 annual payment qualifies for alimony tax treatment [see Temp. Treas. Reg. § 1.71-1T(b), Q&A 14, Example 1].

EXAMPLE: Under the terms of a divorce decree, H is obligated to make annual spousal support payments to W of \$30,000, terminating after 15 years or on the death of W. The divorce decree provides that if W dies before the expiration of the 15-year period, H will pay to W's estate the difference between the total amount that H would have paid had W survived and the amount actually paid. For example, if W dies at the end of the tenth year in which payments are made, H must pay $\$150,000 = \$450,000 - \$300,000$ to W's estate.

H's liability to make a lump-sum payment to W's estate after her death is a substitute for the full amount of each \$30,000 annual pre-death payment. In effect, the circumstances indicate that the annual payments are installment payments in satisfaction of W's property rights rather than spousal support. None of the annual payments can be treated as alimony. The result is the same if the lump sum payable at W's death is discounted by an appropriate interest factor to account for the prepayment [see Temp. Treas. Reg. § 1.71-1T(b), Q&A 14, Example 2].

Legislative history indicates that amounts payable under a life insurance contract on the life of the payee-spouse are not properly treated as a liability that would affect the status of other payments made by the payor-spouse [H.R. Rep. No. 432, 98th Cong., 2d Sess. 1494-1497 (1984)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Spousal Support Obligations General Overview Family Law Marital Termination & Spousal Support Taxation Tax Law Federal Taxpayer Groups General Overview



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2. Tax Aspects of Spousal Support

34-123 California Legal Forms--Transaction Guide § 123.52

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.52 Alimony Compared to Other Payments

[1] Child Support

Alimony tax treatment does not apply to any part of any payment that under the divorce or separation instrument is payable for the support of the children of the payor-spouse [*I.R.C. § 71(c)(1)*; *Treas. Reg. § 1.71-1(e)*]. Child support is neither deductible by the payor nor includible in the gross income of the payee. If any payment is less than the amount specified for child and spousal support in the divorce or separation instrument, only the amount of the payment in excess of the amount payable for child support may receive alimony tax treatment. For example, if the divorce decree specifies that \$500 a month is to be paid for child support and \$1,000 a month is to be paid for spousal support, and if only \$1,200 is paid in a given month, then \$500 is treated as child support and \$700 may qualify for alimony tax treatment. If only \$400 is paid, the entire amount is child support, and none of the payment is deductible by the payor [*see I.R.C. § 71(c)(3)*; *see also Blair v. Commissioner, T.C. Memo. 1988-581* (reduced monthly payments to former spouse treated as child support despite contrary oral agreement)].

[2] Family Support

[a] Current and Prior Law Contrasted

"Family support" is a provision in an agreement between the spouses for the payment of combined child and spousal support without designating the amount to be paid for each [*Fam. Code § 92*; *see Fam. Code § 3586*]. The primary purpose behind a family support agreement is to obtain alimony tax treatment for payments that are, in fact, child support [*see [1], above*].

In construing prior law, the Supreme Court held that a payment was not to be treated as child support unless explicitly so designated in the divorce or separation instrument [*Commissioner v. Lester (1961)* 366 U.S. 299, 81 S. Ct. 1343, 6 L. Ed 2d 306 ; *see, e.g., Walstatter v. Commissioner, T.C. Memo. 1992-152* ; *Libman v. Commissioner, T.C. Memo.*

1990-629 (payee spouse required to treat pre-1984 award of "unallocated family support" as alimony despite 1988 modification referencing "child support"). Under this rule, taxpayers were able to disguise child support payments as spousal support and could obtain alimony tax treatment for all payments while providing for a cut-back in spousal support on the death or emancipation of a child. This treatment was attractive if the payor-spouse, as usually was the case, was subject to higher tax rates than the payee-spouse.

Current law greatly restricts, but does not completely eliminate, this potentially advantageous tax treatment of family support [see *I.R.C. § 71(c)(2)*; see also [b]-[e], below]. Now, if an amount specified in the divorce or separation instrument will be reduced on the happening of a contingency relating to a child, such as attainment of a specified age, marriage, death, leaving school, or similar contingency, an amount equal to the amount of the reduction must be treated as fixed for child support [*I.R.C. § 71(c)(2)(A)*; cf. *Murphy (Ronald J.) v. Commissioner, T.C. Memo. 1996-258* (payments of "family support" did not qualify for alimony tax treatment when payments might have continued after death of former wife)]. Although the intent is not specifically set forth in the statute, it is clear that only contingencies relating to a child of the payor-spouse, rather than a child of the payee alone, are intended [see *Temp. Treas. Reg. § 1.71-1T(c)*, Q&A 16; cf. *Treas. Reg. § 1.71-1(e)*].

EXAMPLE:

A divorce decree provides for spousal support payments of \$1,500 a month. On the death or emancipation of the couple's minor child, however, the payments are to be reduced to \$1,000 a month. The difference of \$500 a month is treated as fixed for child support, and only \$1,000 a month may qualify for alimony tax treatment [see *I.R.C. § 71(c)(2)*].

[b] Under Statewide Uniform Child Support Guideline

Under the statewide uniform child support guideline, orders and stipulations otherwise in compliance with the guideline may designate as "family support" an unallocated total sum for support of the spouse and any children without specifically labeling all or any portion as "child support," as long as the amount is adjusted to reflect the effect of additional deductibility. The amount of the order must be adjusted to maximize the tax benefits for both parents [*Fam. Code § 4066*; see *Fam. Code § 4074*]. For further discussion of family support under the guideline, see § 123.21[2].

[c] When Contingency Relates to Child

A contingency relates to a child of the payor-spouse if it depends on any event relating to that child, regardless of whether the event is certain or likely to occur. Such events include the child's attaining a specified age or income level, dying, marrying, leaving school, leaving the spouse's household, and gaining employment [*Temp. Treas. Reg. § 1.71-1T(c)*, Q&A 17].

The IRS has privately ruled that reductions for each week that a child has uninterrupted visitation with the noncustodial parent constitute reductions on the happening of a contingency relating to a child. As a result, the reduction in payments reduced the amount treated as alimony. Although the agreement did not allocate a portion of the fixed payments as child support, a provision that payments not be reduced by a specific amount for each week that the children visited with the noncustodial parent led the IRS to conclude that the total amount of the weekly reduction constituted child support, not deductible by the noncustodial parent nor taxable to the custodial parent [Letter Rul. 8746085 (Aug. 21, 1987)].

[d] Presumptions Regarding Reductions

A reduction in payments is treated as fixed for child support if the reduction will occur at a time that clearly can be associated with a contingency relating to a child [*I.R.C. § 71(c)(2)(B)*]. A reduction is presumed clearly associated with the happening of a contingency relating to a child of the payor under either of the following circumstances [*Temp. Treas. Reg. § 1.71-1T(c)*, Q&A 18].

- The payments are to be reduced no more than six months before or after the date the child is to attain the age of 18, 21, or the local age of majority.

- The payments are to be reduced on two or more occasions that occur no more than one year before or after a different child of the payor-spouse attains a certain age between the ages of 18 and 24, inclusive. The certain age must be the same for each child but need not be a whole number of years.

In all other situations, reductions will not be treated as clearly associated with the happening of a contingency relating to a child of the payor [Temp. Treas. Reg. § 1.71-1T(c), Q&A 18; *see* Letter Rul. 9625050 (termination on "expected retirement date"); Letter Rul. 8820052 (Feb. 19, 1988)(alimony treatment allowed when presumptions are avoided)]. Even a dissolution judgment order allowing reduction of spousal support in an amount equal to any increase in court-ordered child support is not a contingency relating to the payor's child that precludes alimony tax treatment of spousal support payments under the order [*Heller v. Commissioner, T.C. Memo 1994-463*].

EXAMPLE:

H and W are divorced on July 1, 1992, when their children, C (born July 15, 1977) and D (born September 23, 1979) are 14 and 12, respectively. Under the divorce decree, H is to make alimony payments of \$2,000 a month to W. The payments are to be reduced to \$1,500 a month on January 1, 1998, and to \$1,000 a month on January 1, 2002. On January 1, 1998, C will be 20 years, 5 months and 17 days old. On January 1, 2002, D will be 22 years, 3 months and 9 days old. Each of the reductions is to occur no more than one year before or after a different child of H attains the age of 21 years and 4 months. (Actually, the reductions are to occur no more than one year before or after C and D attain any of the ages 21 years, 3 months and 9 days through 21 years 5 months and 17 days.) Therefore, the reductions are presumed to be clearly associated with a contingency relating to C and D. Unless the presumption is rebutted, \$1,000 a month must be treated as fixed for child support and will not receive alimony tax treatment [*see* Temp. Treas. Reg. § 1.71-1T(c), Q&A 18].

In contrast, in cases in which an original child support order was lacking, an amount fixed for spousal support under a marital settlement agreement remains fully deductible even though the agreement requires that the amount to be paid must be reduced if the supported spouse obtains a later order for a "contingency relating to a child" within the meaning of *Internal Revenue Code Section 71(c)*. If a child support order were obtained under those circumstances, however, only the reduced spousal support, rather than the child support, would remain deductible [*Letter Rul. 8633040 (Aug. 15, 1986)*].

PRACTICE TIP:

Family support is an income tax planning tool that should be considered in all dissolutions. Child support can still be disguised as spousal support as long as everyone follows the rules. When parents are in different tax brackets, a family support order almost always increases the "pot" of net income. The benefits are available to taxpayers at all income levels, as long as everyone involved in the case (the spouses, the attorneys, and the court) can work together. *Commentary by Hon. Thomas Murphy.*

[e] Rebuttal of Presumptions

Either the IRS or the taxpayers may rebut the presumptions by showing that the time at which the payments are to be reduced was determined independently of any contingencies relating to the children of the payor. Thus, for example, the presumption may be rebutted by showing that spousal support payments are to be made for a period customarily provided in the local jurisdiction, such as a period equal to half of the duration of the marriage [Temp. Treas. Reg. § 1.71-1T(c), Q&A 18; *see ill v. Commissioner, T.C. Memo. 1996-179* (payments were alimony as I.R.S. proved that termination date was determined independently)].

[3] Property Settlement Payments

Payments made by one spouse to another in settlement of property rights, unlike alimony payments, are not tax deductible to the payor [I.R.C. §§ 71, 215]. The characterization of payments as either alimony or property settlement is a question of federal, not state law. However, state law regarding property and support, and a state court's intent in ordering the payment, are relevant in making the determination [*Prater v. C.I.R.* (10th Cir. 1995) 55 F.3d 527, 529-530] .

In deciding whether payments are alimony or property settlement payments, the Tax Court in *Shirley Jean Beard* delineated the following factors [*Beard v. Commissioner* (1981) 77 T.C. 1275, 1284-1285] :

- (1) whether the parties intended the payments to divide assets;
- (2) whether the payee spouse relinquished property rights to receive the payments;
- (3) whether the payment amount is fixed and not contingent on events such as the payee's death or remarriage; and
- (4) whether the payments together with other property awarded to the payee spouse equal, more or less, one-half of the property acquired by the spouses during the marriage.

Although the case was decided under the versions of *Internal Revenue Code Sections 71* and *215* before the Tax Reform Act of 1984, later Tax Court decisions have continued to consider at least some, if not most, of these factors in determining whether payments are alimony or nondeductible as property settlement payments [see, e.g., *Walstatter v. Commissioner* (1992) T.C. Memo 1992-152 (payment terms were more akin to property settlement than support despite judgment's characterization of payments as alimony); cf. *Spector v. Commissioner*, T.C. Memo 1996-298 (payments to ex-wife labelled as "alimony" were allocated between alimony and property settlement on basis of all facts and circumstances); *Prater v. C.I.R.* (10th Cir. 1995) 55 F.3d 527, 529 (similar, but not identical list of factors in 10th Circuit)].

Legal Topics:

For related research and practice materials, see the following legal topics:

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34-123 California Legal Forms--Transaction Guide § 123.53

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.53 Rules to Prevent Front-Loading of Payments

[1] Purpose

The anti-front-loading rules are designed to prevent support payments from being structured in such a way that large payments are received in the first few years and greatly decreased thereafter. In the past property settlement payments were sometimes combined with support payments in this manner. The larger payments were designed to compensate the payee-spouse for a division of property and, by treating the property settlement payments as alimony, produce an overall tax advantage as between the two spouses.

Because there are other non-tax-reduction reasons for front-loading payments to a payee spouse, the anti-front-loading rules provide a safe harbor test for the decrease in alimony/support payments that may be made over the first three years. If payments decrease more than the safe harbor amount then the payor spouse must take the excess into income in the third post-separation year, and the payee spouse is allowed a deduction for the same amount [*I.R.C. § 71(f)*]. The safe harbor must be followed, however, because payor spouses who deduct alimony payments can be subjected to substantial penalties for understatement of tax if their payments are later found to be ineligible for alimony tax treatment [*see Magnus v. Commissioner, T.C. Memo. 1990-596* (25-percent penalty under former *I.R.C. § 6661* for lump-sum payment not qualified under pre-1984 rules)].

[2] Post-Separation Years Defined

The "first post-separation year" is the first calendar year in which the payor spouse paid to the payee spouse alimony or separate maintenance payments to which *Internal Revenue Code Section 71* applies. The second and third post-separation years are defined as the first and second succeeding calendar years, respectively [*I.R.C. § 71(f)(6)*].

[3] Excess Alimony Payments

Excess alimony payments in the first and second post-separation years will trigger recapture of alimony deductions in the third post-separation year [I.R.C. § 71(f)(1)]. For the first post-separation year, the excess payments are the amount, if any, by which the first-year payments exceed \$15,000 plus the average of the following [I.R.C. § 71(f)(3)]: (1) the total payments made in the second post-separation year reduced by any excess payments for that year [I.R.C. § 71(f)(3)(B)(i)(I)]; and (2) the total payments made in the third post-separation year. Excess payments for the second post-separation year are the amount, if any, by which the total of second-year payments exceeds the sum of (1) \$15,000 plus (2) the total third-year payments [I.R.C. § 71(f)(4)].

For the algebraically inclined: where Y1 = total year one spousal support payments; Y2 = year two; Y3 = year three; Y1x = year one excess; Y2x = year two excess; and R = amount recaptured, the computations may be expressed as follows:

$$\begin{aligned} R &= Y2x + Y1x \\ Y2x &= Y2 - (Y3 + 15,000) \\ Y1x &= \frac{(Y2 - Y2x) + Y3}{2} + 15,000 \end{aligned}$$

[4] Recapture Rule

Recapture is required if there are excess alimony payments. Excess alimony deductions must be recaptured and included in the payor spouse's gross income for the taxable year beginning in the third post-separation year [I.R.C. § 71(f)(1)(A), (2)]. The payee spouse is allowed a deduction for the amount of the excess payments in computing adjusted gross income for the taxable year beginning in the third post-separation year [I.R.C. § 71(f)(1)(B)].

EXAMPLE:

A payor spouse pays \$50,000 in alimony in the first year and none in the second and third years. Although no second-year excess exists, the first-year excess must be recaptured. The excess amount included in the payor spouse's gross income for the third year is \$35,000 = (\$50,000 - 0) - \$15,000. A corresponding deduction is allowed to the payee spouse for the same year [see H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-849 (1986); see also I.R.C. § 71(f)].

EXAMPLE: A payor spouse pays no support in the first year, \$35,000 in the second year, and \$10,000 in the third year. The payor spouse has no first-year excess. The payor spouse must include the second-year excess of \$10,000 = (\$35,000 - \$10,000) - \$15,000 in gross income for the third year [see H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-849 (1986); see also I.R.C. § 71(f)].

EXAMPLE: A payor spouse pays \$50,000 support in the first year, \$20,000 in the second year, and nothing in the third year. The payments generate both first-year and second-year excesses. In the second year, the amount of excess is \$5,000 = (\$20,000 - 0) - \$15,000. To determine the first-year excess, the \$5,000 second-year excess must be subtracted from the payor's \$20,000 second-year payment, yielding \$15,000. Thus, the average of the adjusted second-year payments and the third-year payments is \$7,500 = (\$15,000 + 0) / 2. The first-year excess is \$27,500 = (\$50,000 - \$7,500) - \$15,000. In the third year, the payor spouse must include \$32,500 in gross income, namely, the \$5,000 second-year excess amount plus the \$27,500 first-year excess amount [see H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-849 (1986); see also I.R.C. § 71(f)].

[5] Exceptions to Recapture

There are three exceptions to the recapture rule. First, the recapture rule does not apply to payments made under a decree awarding temporary spousal support [I.R.C. § 71(f)(5)(B)]. Second, recapture is not required if payments cease

because of the death of the payor or payee or because of the remarriage of the payee-spouse before the close of the third post-separation computation year [*I.R.C. § 71(f)(5)(A)*; Temp. Treas. Reg. § 1.71-1T(d), Q&A 25].

EXAMPLE:

Under a divorce decree, W is required to make payments of \$30,000 to H in each of the years 1990 through 1995. W makes a \$30,000 payment in 1990 and a \$15,000 payment in 1991. H remarries in 1991 and W's spousal support obligation ceases. The recapture rule does not apply for 1991 or any subsequent year [*see I.R.C. § 71(f)(5)(A)*; Temp. Treas. Reg. § 1.71-1T(d), Q&A 25]. The duration of spousal support imposed by the decree is not significant for purposes of applying this exception to the recapture rule. The duration would be significant, however, in determining whether the decree met the requirements for alimony tax treatment under prior law, which imposed a "minimum-term" rule [*see former I.R.C. § 71(f)(1)*; *see* [4], *above*].

The third exception to the recapture rule applies to payments made pursuant to a continuing liability to pay a fixed portion of the income from a business or property, or from compensation for unemployment or self-employment. Recapture does not apply to the extent that payments are made pursuant to such a fluctuating measure of liability beyond the payor-spouse's control [*I.R.C. § 71(f)(5)(C)*].

[6] Unplanned Events Triggering Recapture

The exceptions noted in [5], *above*, are the only recognized exceptions to the recapture rule. Regulations issued under prior law suggested that recapture may be triggered by a decline in payments for any other reason, including the payor's failure to make timely payments, a modification of the divorce or separation instrument, a reduction in the support needs of the payee, or a reduction in the ability of the payor to provide support [Temp. Treas. Reg. § 1.71-1T(d), Q&A 25]. As a result of changes by the Tax Reform Act of 1986, however, which eliminated the "minimum-term" rule [*see* [4], *above*] and made other changes to the recapture rule [*see* [5], *above*], it is not clear whether all of the events suggested in the regulations would still trigger recapture.

PRACTICE TIP:

Counsel would do well to advise clients that recapture is a continuing possibility, even if recapture could not occur under the arrangement originally worked out in the divorce or separation instrument. When there may be a significant recapture problem if support is reduced, the payor asking for a modification may want to consider some other form of relief that minimizes or eliminates the problem of recapture. Counsel should be aware of the recapture rules and deal with them from the outset in planning what, if any, modification the payor should seek. *Commentary by Ira H. Lurvey.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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2. Tax Aspects of Spousal Support

34-123 California Legal Forms--Transaction Guide § 123.54

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.54 Election to Forgo Alimony Tax Treatment

The spouses may designate in the divorce or separation instrument that payments that otherwise would qualify for alimony tax treatment are nondeductible by the payor and excludible from the gross income of the payee [Temp. Treas. Reg. § 1.71-1T(b), Q&A 8; *see I.R.C. § 71(b)(1)(B)*]. If the spouses have executed a written separation agreement, any writing signed by both spouses that expressly designates otherwise qualifying alimony or separate maintenance payments as nondeductible and excludible, and that refers to the written separation agreement, is sufficient to elect out of alimony tax treatment. If the spouses are subject to temporary spousal support orders, the designation must be made in the original or a subsequent temporary order. A copy of the instrument containing the designation of payments as nondeductible and excludible must be attached to the payee's first filed tax return for each year in which the designation applies [Temp. Treas. Reg. § 1.71-1T(b), Q&A 8; *see Richardson v. Commissioner (1995) 70 T.C.M. 1390*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportTaxation



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34-123 California Legal Forms--Transaction Guide § 123.55

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.55 Payor Must Include Payee's TIN

The payor-spouse must include the payee's social security number on his or her tax return for the taxable year in which payment is made. Failure to comply with this requirement does not cause the deduction to be lost but does subject the payor to a \$50 penalty. The penalty is waived, however, if the failure to comply was due to reasonable cause rather than willful neglect. A similar penalty is imposed on any spouse who fails to provide his or her tax identification number to the payor for reporting purposes [*I.R.C. § 215(c)*; Temp. Treas. Reg. § 1.215-1T, Q&A 1; see *I.R.C. §§ 6723, 6724(a)*; former *I.R.C. § 6676*, repealed by Pub. L. No. 101-239, § 7711(b)(1)].

PRACTICE TIP:

The IRS began an Alimony Compliance Pilot Program in 1987, to identify taxpayers who have claimed alimony deductions but have failed to report the social security numbers of the recipients. A database is to be established to compare amounts deducted by payors to the amounts not reported by recipients.

Commentary by Publisher's Editorial Staff.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportTaxation



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34-123 California Legal Forms--Transaction Guide § 123.56

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.56 Income Tax Treatment of Spousal and Child Support Under California Law

California personal income tax law incorporates federal law [see § 123.50 [2]] in that qualifying spousal support/alimony payments are deductible by the payor-spouse and includible in the income of the payee-spouse [see *Rev. & Tax. Code* §§ 17081, 17201(b); *I.R.C.* §§ 71, 215; see also former *Rev. & Tax. Code* §§ 17090(b), 17201, 17205]. Until passage of 1987 legislation, California had not adopted the federal requirements for determining whether a particular payment qualifies for alimony tax treatment [see former *Rev. & Tax. Code* § 17090(a), repealed by Stats. 1987, ch. 1138]. Instead, California followed rules essentially the same as those that existed under federal law before the 1984 and 1986 amendments to *Internal Revenue Code Section 71* [compare former *Rev. & Tax. Code* § 17090(b)-(e) with *I.R.C.* § 71, before amendment by Pub. L. No. 98-369, § 422].

California also incorporates federal law in that alimony tax treatment is not allowed to that part of a payment that is payable for the support of the children of the payor spouse [see *I.R.C.* § 71(c)(1); *Rev. & Tax. Code* § 17081; former *Rev. & Tax. Code* § 17090(c) (applying to "decree, instrument, or agreement")]. California law also incorporates *Internal Revenue Code Section 71(c)*, including its specialized treatment of reductions in support related to contingencies associated with children [*Rev. & Tax. Code* § 17081; see § 123.52[2]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportTaxationFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportTaxation



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34-123 California Legal Forms--Transaction Guide § 123.57

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.57 Alimony Trusts

[1] Nature and Purpose

A trust can be used to ensure that spousal support payments are made on time. In the absence of special rules applicable to alimony trusts, the supporting spouse would be required, under the grantor trust rules, to include in gross income the trust income paid to the supported spouse, because that income is used to satisfy the support obligation of the supporting spouse [*I.R.C. §§ 677, 678; Treas. Reg. § 1.682(a)-1(a)(3)*]. If the spouses are divorced or separated under a decree of divorce or separate maintenance or a written separation agreement, however, trust income that the supported spouse is entitled to receive is includible in his or her income, and not in the income of the supporting spouse, regardless of the grantor trust rules [*I.R.C. § 682(a); cf. I.R.C. § 672(e)(2)* (person legally separated from spouse under decree of divorce or separate maintenance not considered married for purpose of applying "spousal attribution" provisions of grantor trust rules)]. The supported spouse is treated as a beneficiary of the trust, subject to the rules generally applicable to trust beneficiaries [*I.R.C. § 682(b)*]. Thus, the supported spouse is taxable only on distributions from the trust made out of the trust's distributable net income and not out of trust corpus [*I.R.C. §§ 652(a), 662(a)*]. The tax character of the trust income distributed (for example, as capital gains, or tax-exempt income, and so forth) is retained in the hands of supported spouse [*I.R.C. §§ 652(b), 662(b)*]. No deduction is allowed to the supporting spouse for trust distributions included in the income of the supported spouse, because these amounts are not included in the supporting spouse's income in the first place and, therefore, do not need to be deducted [*I.R.C. § 215(d); see Treas. Reg. § 1.682(a)-1(a)(3)*].

A transfer of property to create the trust, in contrast to income derived from the trust, should be examined with an eye toward whether gain or loss must be recognized on the transfer. In general, transfers of property into an alimony trust [*see I.R.C. § 682*] may be made without recognition of gain or loss [*see I.R.C. § 1041(a)*], except to the extent that the sum of the liabilities assumed and the liabilities to which the property is subject exceeds the total adjusted basis in the property [*see I.R.C. § 1041(e)*] and as long as the property transferred in trust is not an installment obligation [*I.R.C. §§ 453B(g), 1041(a)*]. For a general discussion of the tax treatment of transfers of property between spouses, see *Chapter*

121, § 121.30.

[2] When Amount Fixed as Payable for Child Support

The tax treatment afforded alimony trusts is not available to the extent that the decree, written separation agreement, or trust instrument fixes an amount of the trust income as payable for child support. If trust income is less than the amount necessary to pay both spousal and child support, all income is first allocated to child support [I.R.C. § 682(a)]. Thus, trust income fixed for child support is taxable to the supporting parent under the grantor trust rules, as under the regular alimony rules [see § 123.52].

PRACTICE TIP:

Under the regular alimony rules as amended in 1984, the amount deemed to be fixed for child support includes any amount otherwise qualifying as alimony that will be reduced on the happening of a contingency related to a child [I.R.C. § 71(c)(2)]. Before enactment of that amendment, it was possible to achieve alimony tax treatment for child support by combining it with spousal support as a single obligation and causing the payments to be reduced on the death or emancipation of the child [see § 123.52]. The 1984 amendment to the alimony rules was not added to the alimony trust rules. As a result, it is unclear whether prior law still governs in this area. If it does, it appears that amounts received from a trust for child support are taxable to the supported spouse rather than the supporting spouse if they are not specifically designated as child support, even if they are to be eliminated upon the death or emancipation of the child. No reported decision, however, has interpreted the trust provisions in this manner after the 1984 amendment. *Commentary by Publisher's Editorial Staff.*

[3] Effect and Applicable Date

The establishment of an alimony trust appears to permit the spouses to avoid the rules and requirements governing spousal support paid outside of a trust [see §§ 123.51, 123.52]. For example, there is no requirement that payments must terminate on the death of the payee-spouse or that payments must be made in cash [I.R.C. §§ 71(b), 682(a)]. In addition, no front-loading rules apply to alimony trusts [see I.R.C. §§ 71(f), 682(a); see § 123.53]. The sole requirement for alimony trust treatment is that the spouses be divorced or separated under a decree or written separation agreement [I.R.C. § 682(a)]. Current law applies to divorce or separation instruments executed after 1984 and also to instruments executed before 1985 if modified after 1984 to expressly provide for the applicability of current law [see § 123.51].

PRACTICE TIP:

It is not clear why there is a separate rule for dealing with alimony trusts. On the face of it, the same policies applicable to individual taxpayers should apply to trusts. Yet, since trusts apparently have escaped some of the more stringent tests now applied to individual taxpayers, trusts seem to fare better. When sufficient assets are available to establish an alimony trust, therefore, it may be wise to consider its use. *Commentary by Ira H. Lurvey.*

[4] Relevance of Prior Law

Prior law continues to govern arrangements under earlier instruments. Only two types of alimony trusts were recognized under prior law--Section 71 trusts and Section 682 trusts. The boundary line between these two trusts was unclear, but the regulations state that *Internal Revenue Code Section 71* applied to a trust if the payments from the trust qualified for alimony tax treatment under then-current law [see § 123.57]. Section 682 trusts were those whose payments did not qualify for alimony tax treatment under Section 71. The regulations also indicate that Section 682 governed preexisting trusts that were created for another purpose but were used to fund support obligations at the time of divorce or separation. Section 71 trusts, on the other hand, were those created to fund spousal support [see *Treas. Reg. § 1.682(a)-1(a)(2)*].

The proper tax treatment of these two types of trusts also was unsettled. The IRS takes the position that all payments received from a Section 71 trust are taxable as ordinary income to the recipient spouse, regardless of whether they are made out of trust income or out of corpus [*Treas. Reg. § 1.71-1(c)(3)*]. Under *Internal Revenue Code Section 682(b)*, however, which formerly specifically stated its application to both Section 71 trusts and Section 682 trusts, the recipient spouse is treated as a beneficiary of the trust and thus is taxable only to the extent that trust distributions are made out of distributable net income [*see I.R.C. §§ 652(a), 662(a)*]. Furthermore, the tax character of trust income is passed through to the recipient, as a trust beneficiary. Thus, for example, tax-exempt trust income remains tax-exempt in the hands of the recipient spouse [*Ellis v. United States (6th Cir. 1969) 416 F.2d 894 ; see I.R.C. §§ 652(b), 662(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview



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34-123 California Legal Forms--Transaction Guide § 123.58

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.58 Estate and Gift Tax Consequences of Spousal Support

[1] Gift Tax

Payments made in satisfaction of support rights, whether in the form of periodic payments or as a lump sum, do not constitute taxable gifts. A taxable gift results, however, to the extent that the payments exceed the value of the support rights [*Jones v. Commissioner (1943) 1 T.C. 1207* ; *Rev. Rul. 68-379, 1968-2 C.B. 414*]. If the spouses are still married at the time of the payment, the entire amount is exempted from gift tax if made in a form qualifying for the unlimited marital deduction, regardless of whether the amount of the payment exceeds the value of the support rights relinquished [see *I.R.C. § 2523(a)*], subject to special rules concerning disallowance of the deduction when the recipient spouse is not a United States citizen [see *I.R.C. § 2523(i)*].

The interests of all transferees must be valued for gift tax purposes, however, when one spouse gives up his or her support rights in exchange for a transfer benefiting that spouse and other adults. The value of the support rights offsets the value of what the spouse receives, but any value in excess of the support rights is deemed a gift. The taxation of any transfer to an adult other than the spouse is not ordinarily affected by the released support rights [*Rev. Rul. 77-314, 1977-2 C.B. 349*].

EXAMPLE:

H and W executed a separation agreement and were divorced three years later. W released support rights worth \$50,000 in exchange for H's placing \$100,000 in trust when the divorce became final. W had a life income interest worth \$60,000, while the remainder, worth \$40,000, belonged to an adult child. H is deemed to have made (1) a gift to W of \$10,000 = \$60,000 - \$50,000 and (2) a gift to the child of \$40,000 [see *Rev. Rul. 77-314, 1977-2 C.B. 349*].

If the value of the spouse's support rights exceeds the value of what the spouse receives, however, the excess may serve as consideration for the transfer to persons other than the spouse. The donor spouse must show that the other spouse

specifically released the support rights to have the donor make the transfer to a third party. If the spouse releasing support rights actively bargained for the transfer, the value of the transferor's gift to the third party is reduced by the amount of the support rights that were released. The spouse releasing support rights, however, is deemed to have made a gift to the third party to the extent that support rights are released for that party's benefit [*Rev. Rul. 79-363, 1979-2 C.B. 345* ; *Rev. Rul. 77-314, 1977-2 C.B. 349*]. If the spouse releasing marital rights did not intend to benefit a third party, the release of support rights is not deemed consideration for a transfer to the third party. If one spouse accepts less than the value of his or her support rights from the other spouse, a gift to the donor spouse results [*Rev. Rul. 77-314, 1977-2 C.B. 349*]. An exchange of support rights in violation of public policy results in the transfer of property being deemed a gift [*Ellis v. Commissioner (1968) 51 T.C. 182* , *aff'd*, (9th Cir. 1971) 437 F.2d 442].

[2] Estate Tax

The same rule of nontaxability that applies for purposes of the gift tax [see [1], *above*] applies also for purposes of the estate tax. Claims for support of the surviving spouse or former spouse are deductible from the decedent's gross estate [see *I.R.C. § 2053(a)(3)*]. Because the obligation of support exists only during the payor's life, however, the deduction is allowed only to the extent that payments made during life were less in the aggregate than what the payee-spouse was entitled to receive under state law [*Rev. Rul. 71-67, 1971-1 C.B. 271* ; see *Estate of Fenton v. Commissioner (1978) 70 T.C. 263* ; *Rev. Rul. 68-379, 1968-2 C.B. 414*]. Similarly, when a payment is made out of an estate to a former spouse for support rights, consideration for the payment exists only to the extent that the former spouse forwent support payments during his or her life. Thus, a deduction from the gross estate is allowed only to the extent of forgone support payments [*Estate of Scholl v. Commissioner (1987) 88 T.C. 1265* (payment to decedent's former wife); *cf. Estate of Nesselrodt v. Commissioner, T.C. Memo. 1986-286* (divorce decree provided for payment of decedent's obligation in installments; only present value of installments on date of death was allowed as deduction even though estate paid out full amount of all future payments)].

When payments required to be made under the terms of a divorce decree are to continue until the death or remarriage of the former spouse, the amount of the deduction is computed by using actuarial tables based on the probability of death [*Estate of Maresi v. Commissioner (1946) 6 T.C. 582* , *aff'd*, (2d Cir. 1946) 156 F.2d 929]. When support payments required under a separation agreement are to be paid in part by a trust set up by the decedent, the amount of the deduction is the value of the remaining payments actuarially computed less the value of the trust assets [*Sherman v. United States (5th Cir. 1974) 492 F.2d 1045*].

All amounts passing to the surviving spouse in a form qualifying for the unlimited marital deduction are deductible from the decedent's gross estate if the spouses are still married at the time of death [see *I.R.C. §§ 2056(d), 2056A*]. Special rules disallow the marital deduction for gifts to surviving spouses who are not United States citizens, unless a prescribed trust is used. The gift tax marital deduction for transfers of benefits under a joint and survivor annuity has been extended to include such gifts to noncitizen spouses [*I.R.C. § 2056(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law
General Overview
Family Law
Marital Termination & Spousal Support
Spousal Support
Obligations
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34-123 California Legal Forms--Transaction Guide §§ 123.59-123.99

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 123.59[Reserved]



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PART III. TRANSACTION GUIDE
A. Drafting Guide

34-123 California Legal Forms--Transaction Guide § 123.100

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.100 Child Support Provisions

1. Assemble relevant child support provisions.

a. Provisions for payment, including one or more of the following:

i. Child support to be paid periodically [*see § 123.200*];

ii. Child support as percentage of payor's income [*see § 123.207*];

iii. Percentage increase in child support based on payor's income [*see § 123.209*];

iv. Provision for cost-of-living increase [*see § 123.208*];

v. Provision that no child support order is appropriate under current circumstances [*see § 123.210*];

vi. Provision that support is to be reduced or abated for lengthy periods when obligor has physical custody of children [*see § 123.217*].

vii. Provision for payment of child support from an employee benefit plan through a Qualified Domestic Relations Order [*see § 123.219*].

viii. Provision for payment of child support from a trust [*see § 123.220*].

b. Provisions related to computation of support under statewide uniform child support guideline,

including the following:

- i. Provisions for determining how gross and net income will be computed [see § 123.203];
 - ii. Provision setting forth amount of support under guideline's formula [see § 123.201];
 - iii. Provision stipulating to amount that differs from formula amount, if applicable [see § 123.202];
 - iv. Provisions specifying applicable factors rebutting presumption that formula amount is amount that should be ordered [see § 123.204];
 - v. Provisions for additional child support amounts, such as child care, uninsured medical expenses, and special educational costs [see § 123.205].
- c. Provisions requiring one or both parents to provide health care coverage for children [see § 123.206];
 - d. Provision allocating amount of support to be paid among two or more children [see § 123.211];
 - e. Provisions stating when obligations of support under agreement are to terminate [see § 123.212];
 - f. Provisions extending support obligations past age of majority for:
 - i. Higher education [see § 123.213];
 - ii. Incapacitated Child [see § 123.214].
 - g. Life insurance provisions to secure support in the event of death of either parent [see § 123.215].
 - h. Provision allocating dependency exemption to obligor parent, if appropriate [see § 123.216].
 - i. Provision requiring both parents to keep other informed of current employer [see § 123.218].
 - j. Provisions related to security for payment, such as:
 - i. Stay of service of earnings assignment order [see § 123.280];
 - ii. Establishment or waiver of child support security deposit account [see § 123.281].

2. Combine appropriate portions of provisions with complete marital settlement agreement. Note that these provisions may be substituted, in an appropriate case, for the child support provisions set forth in Chapter 121, which contains complete forms of agreement; or may be assembled together with other relevant alternative provisions in Chapters 121-125 to form a complete agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Family LawChild SupportObligationsGeneral Overview



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A. Drafting Guide

34-123 California Legal Forms--Transaction Guide § 123.101

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.101 Spousal Support Provisions

1. Assemble relevant spousal support provisions.

a. Include provision for basic support, such as:

- i. Payment of specific amount at particular intervals [*see* § 123.233];
- ii. Payment of support in lump sum [*see* § 123.241];
- iii. Payment of percentage of income, or fixed amount plus percentage of supplemental income [*see* §§ 123.239, 123.240];
- iv. Reservation of jurisdiction only [*see* § 123.232].

b. Include appropriate duration of period of support payments and jurisdiction language, for example:

- i. Open-ended as to duration and jurisdiction [*see* § 123.233];
- ii. Support for limited period with jurisdiction retained indefinitely [*see* § 123.234];
- iii. Support for limited period with jurisdiction retained until termination date (Richmond order) [*see* § 123.235];
- iv. Support for limited period with jurisdiction terminated to extend period [*see* § 123.236];

v. Support for consecutive limited periods with step-down or step-up provision, for periodic increase or decrease of amount [*see* § 123.238];

vi. Support until happening of contingent event [*see* § 123.237].

c. Provide for manner of payment:

i. Directly to supported spouse;

ii. To third party creditor or provider of service on behalf of spouse [*see* § 123.242];

iii. To mortgagee to make supported spouse's housing payment [*see* § 123.243].

iv. From pension or other employee benefit through Qualified Domestic Relations Order (QDRO) [*see* § 123.244].

d. Consider ways of providing for health care coverage for supported spouse [*see* § 123.245].

e. Provide for continuation of support beyond death of supporting spouse by life insurance, annuity, or trust [*see* § 123.246].

f. Include nonmodification provision, if desired [*see* §§ 123.260-123.263].

g. Change statutory effect with regard to remarriage, cohabitation, and death, if desired [*see* §§ 123.264-123.266].

h. Specify extent to which intent of agreement is to obtain alimony tax treatment [*see* § 123.291].

i. Set forth facts and circumstances on which spousal support provisions are based [*see* § 123.293].

j. Include security provisions if desired [*see* §§ 123.280, 123.282, 123.283].

k. Provide method for parties to verify each others' income [*see* § 123.290].

2. Assemble complete marital settlement agreement, including applicable portions of foregoing provisions. Note that these provisions may be substituted, in an appropriate case, for the spousal support provisions set forth in Chapter 120, which contains complete forms of agreement; or may be assembled together with other relevant alternative provisions in Chapters 121, 122, 124, and 125 to form a complete agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Spousal Support Obligations General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 123 SPOUSAL AND CHILD SUPPORT PROVISIONS
PART III. TRANSACTION GUIDE
A. Drafting Guide

34-123 California Legal Forms--Transaction Guide §§ 123.102-123.199

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 123.102[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 123 SPOUSAL AND CHILD SUPPORT PROVISIONS
PART IV. FORMS
A. Child Support Provisions

34-123 California Legal Forms--Transaction Guide § 123.200

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.200 Basic Provision for Periodic Payment of Child Support

[1] Comment--Use of Form

The form in [2], *below*, is the basic provision requiring one parent to make periodic payments of child support to the other. This provisions will be used in nearly all support agreements. The most common payment period is monthly, although some shorter period may be used to correspond to the obligor's pay period, particularly if an earnings assignment order will be served and used to obtain direct payment from the obligor's employer.

Use of a periodic-payments clause, alone, in a support agreement may not pass judicial scrutiny unless the basis for the amount of support to be paid can be determined and compared with the amount that would be due under the statewide uniform child support guideline [*see Fam. Code § 4055*]. Therefore, the selected provision should be supplemented with the appropriate information and data [*see §§ 123.201-123.205*], although it might be set forth in the court's findings as required by *Family Code Section 4056*, rather than in the agreement itself.

This form contains optional language designed to terminate the support payments on the happening of specified events that will terminate the duty of support. For alternative and additional termination provisions, see § 123.212.

[2] FORM

Basic Provision for Periodic Payment of Child Support

Child Support

_____. _____ [Payor parent, e.g., Father] shall pay the sum of \$_____ every [period, e.g., month] to _____ [payee parent, e.g., Mother] as child support for their minor child. Payment shall be due by the [e.g., fifth day of the month] beginning _____ [date]. [Add if desired, or see § 123.212. Payments shall continue until the child dies, marries, is emancipated, attains the age of 18 years (or if the

child is still a full-time student, until the child graduates from high school or attains the age of 19 years, whichever come first), or until further order of the court.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsTypesGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 123 SPOUSAL AND CHILD SUPPORT PROVISIONS
PART IV. FORMS
A. Child Support Provisions

34-123 California Legal Forms--Transaction Guide § 123.201

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.201 Amount of Child Support Under Statewide Uniform Guideline Formula

[1] Comment--Use of Form

The form in [2], *below*, sets forth the amount of child support as computed under the formula of the statewide uniform child support guideline [*see Fam. Code § 4055(a)*], and the numerical components used in the formula to obtain the number [*see Fam. Code § 4055(b)*]. This form is not required in all agreements. However, the court may not approve an agreement for an amount of support below the formula amount unless the parties have included provisions complying with *Family Code § 4065* [*see § 123.202*]. Further, the court is required to make written findings regarding the amount that would have been ordered under the formula if the amount actually ordered differs from the formula amount [*Fam. Code § 4056(a)(1)*]. Therefore, the parties may wish to include this provision in their agreement. Alternatively, the parties may wish to attach a computer printout of the numbers generated by running a child support computer software program [*see Fam. Code § 3830*]. This form should not be used with regard to family support [*see §§ 123.12, 123.21[2]*].

The variables in the formula are the net monthly income of both parents (variables HN and TN) [*see Fam. Code §§ 4055(b)(1)(C), (E); 4058, 4059*], the K factor, or percentage of parental income to be allocated to child support [*see Fam. Code § 4055(b)(1)(B), (3)*], and the H factor, or approximate percentage of time that the higher earning parent has primary physical responsibility for the children [*see Fam. Code § 4055(b)(1)(D); see DaSilva v. DaSilva (2004) 119 Cal. App. 4th 1030, 1033-1035, 15 Cal. Rptr. 3d 59* (for purposes of calculating "H" factor, time child is not physically with either parent may be credited to parent who is primarily responsible for child during that time)]. If neither parent has primary physical responsibility for the child--for example, if an adult child has moved away to college--the formula, by its own terms, is inapplicable [*Edwards v. Edwards (2008) 162 Cal. App. 4th 136, 143-144, 75 Cal. Rptr. 3d 458*]. The formula, and these factors, are considered in detail in Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 41, *Child Support Orders* (Matthew Bender).

An additional factor under the guideline is the multi-child multiplier [*see Fam. Code § 4055(b)(4)*]. For a form that

involves allocation of support among more than one child under the guideline, see § 123.211.

[2] FORM

Amount of Child Support Under Statewide Uniform Guideline Formula

Amount of Support Under Statewide Guideline Formula

_____. The parties affirm that the amount of support that would be due for their child under the statewide uniform child support guideline formula is \$ _____ per month, payable by _____ [e.g., Mother] to _____ [e.g., Father]. This amount has been computed based on the following numerical data:

1. Formula variable HN, the

_____ [higher earner parent, e.g., mother's] net monthly disposable income, is \$ _____ ;

2. Formula variable TN, the parties total net monthly disposable income, is \$

_____ ;

3. Formula variable H, the approximate percentage of time that the

_____ [higher earner parent, e.g., mother will have/has primary physical responsibility for the children is

_____ percent;

4. Formula variable K, the percentage of parental income allocated to child support, is

_____ percent;

- [5. The multi-child multiplier is

_____ .]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGuidelines



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DIVISION VII: PERSONAL TRANSACTIONS
 CHAPTER 123 SPOUSAL AND CHILD SUPPORT PROVISIONS
 PART IV. FORMS
 A. Child Support Provisions

34-123 California Legal Forms--Transaction Guide § 123.202

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.202 Stipulation to Child Support Below Guideline Formula Amount

[1] Comment--Use of Form

The form in [2], *below*, includes the language required by *Family Code Section 4065* if the parties are stipulating to an amount of child support below the amount computed under the statewide uniform child support guideline formula [*see § 123.11[1]*]. In such a case, this form is required even if the *form in § 123.201* setting forth the amount of support as computed under the formula is not included in the agreement.

If the parties are agreeing to below formula support, they may still be stipulating to support under the guideline if they agree that one of the rebuttal factors in *Family Code § 4057(b)* applies, and that support should be lower for this reason. In such a case, the parties should combine this form with the appropriate *form in § 123.204* regarding rebuttal factors.

[2] FORM

Stipulation to Child Support Below Guideline Formula Amount

Declaration for Below Formula Child Support

_____. The parties recognize that the amount of child support required under this agreement is less than the amount that would be payable under the statewide uniform child support formula. In this regard, the parties declare all of the following:

- (1) Both parties are fully informed of their rights concerning child support;
- (2) Each freely assents to the child support provisions of this Agreement without coercion or duress;
- (3) The Agreement is in the best interests of the children involved;

(4) The needs of the children will be adequately met by the stipulated amount; and

(5) The right to support has not been assigned to the county under *Welfare and Institutions Code Section 11477*, and no public assistance application is pending.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGuidelines



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 123 SPOUSAL AND CHILD SUPPORT PROVISIONS
PART IV. FORMS
A. Child Support Provisions

34-123 California Legal Forms--Transaction Guide § 123.203

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.203 Computation of Net Income

[1] Comment--Use of Forms

The *forms* in § 123.203[2] and [3] illustrate some of the ways in which the parties may be able to stipulate as to how net monthly disposable income is to be computed under the statewide uniform child support guideline [*see Fam. Code § 4055(b)(1)(C), (E)*]. These provisions are useful to set forth the circumstances on which the agreement and resulting child support order are based, so that it may be more easily determined in the future whether there has been a change of circumstances supporting modification. Also, some such provisions can be used to resolve potential future disputes as to how net income is to be computed. The *form* in § 123.203[4] sets forth the resulting gross and net monthly income figures for both parents.

The guideline sets forth rules for what is to be included in gross income [*see Fam. Code § 4058*], and what deductions are allowed to determine net income [*see Fam. Code § 4059; see also Fam. Code §§ 4070-4073* (hardship deduction)]. Parents probably cannot stipulate to ignore these rules entirely; for example, a stipulation that bonus and overtime income will not be considered would probably not be approved by the court because it would deprive the child of his or her right to support commensurate with the parents' standard of living. However, there are a number of different ways in which the parties may stipulate as to how these rules are to operate.

One possibility is simply to stipulate that a particular source of income or allowable deduction exists and its amount. The first alternative form in both § 123.203[2] and [3] exemplify this kind of provision.

Another possibility is to stipulate with regard to a matter that is discretionary under the guideline or cases interpreting the guideline. For example, whether the cash value of employment benefits or self-employment benefits will or will not be considered as income is left to the discretion of the court by the guideline [*see Fam. Code § 4058(a)(3)*]. Allowance of job-related expenses as a deduction from income is similarly discretionary [*see Fam. Code § 4059(f)*]. Also, the court has discretion to treat recurrent gifts as income for purposes of calculating child support [*In re Marriage of Alter*

(2009) 171 Cal. App. 4th 718, 736-737, 89 Cal. Rptr. 3d 849 (trial court properly treated monthly \$6,000 gifts received by obligor parent from his mother as income for purposes of calculating obligor's child support obligation)].

A third possibility is to stipulate as to a matter that is not specifically addressed in the guideline or in cases interpreting the guideline [see, e.g., *Asfaw v. Woldberhan* (2007) 147 Cal. App. 4th 1407, 1417, 1425-1426, 55 Cal. Rptr. 3d 323 (depreciation of rental property, although not expressly mentioned in *Fam. Code* §§ 4058 and 4059, is not deductible from spouse's annual gross income for purposes of calculating child support)]. While the guideline considers income from whatever source derived [see *Fam. Code* § 4058(a)], it may not be clear what is income and what is an employment benefit. For example, earnings that are sheltered in a voluntary deferred-income device, such as an IRA (individual retirement account), an employer program under *Internal Revenue Code Section 401(k)*, or a tax-deferred annuity might be treated as either [cf. *Fam. Code* § 4059(b) (FICA deduction allowed or equivalent amount for person not subject to FICA)]. Earnings that are not actually received by the parent are obviously not available for the support of children; on the other hand, such a voluntary plan is subject to potential abuse to shelter income not only from taxes but also from child support if allowed as a deduction from income. One of the alternative forms in § 123.203[2] allows each party to shelter up to a fixed percent of gross income in a deferred-earnings financial device, such as an IRA, a 401k plan, a tax-deferred annuity, or other such device.

As another example, the parties may wish to make a stipulation regarding the proceeds of a spouse's pending or completed personal-injury claim against a third party. In the absence of an agreement between the spouses, the entirety of an unallocated personal-injury settlement or award, whether payable as a lump sum or in periodic annuity payments, will not be treated as income for purposes of computing child support. In contrast, if the personal-injury verdict or settlement is apportioned among the various elements of damages, or if the spouse seeking an allocation presents sufficient evidence to support a rational apportionment, the portion of the verdict or settlement that represents compensation for lost income and earning capacity may be considered income available for the payment of child support [*In re Marriage of Rothrock* (2008) 159 Cal. App. 4th 223, 230-235, 70 Cal. Rptr. 3d 881 ; *In re Marriage of Heiner* (2006) 136 Cal. App. 4th 1514, 1520-1526, 39 Cal. Rptr. 3d 730] . Presumably, an agreement between the spouses allocating the proceeds of the personal-injury claim would constitute sufficient evidence to support a rational apportionment of an otherwise unallocated damages award.

Such a voluntary tax shelter should be distinguished from the deduction allowed for Social Security (FICA) or for amounts used to secure retirement or disability benefits for a parent whose employment is not within the Social Security System. This deduction is allowed under the guideline up to the amount allowed under FICA [see *Fam. Code* § 4059(b)]. Often, such excluded employment is subject to its own mandatory retirement plan.

[2] Gross Income

Computation of Net Income

Computation of Gross Income

[Existence of item of income affirmed:]

_____ [e.g., Mother] affirms that she/he is receiving income in the form of _____ [e.g., spousal support from a prior spouse] in the amount of \$_____ per month. This income has been included in determining the amount of child support provided for in this agreement. [Add if desired: _____ (e.g., Mother's) net disposable income under the statewide uniform child support guideline includes this income in determining the amount of support that would be due under the guideline's formula.]

[Stipulation as to amount of self-employment business income:]

_____ [e.g., Father] affirms that his/her net disposable income includes income from his/her business, which is conducted as a _____ [e.g., sole proprietorship] under the name of _____ [specify]. _____ [e.g., Mother] affirms that she/he has received full disclosure and discovery of all pertinent facts regarding this business in order to make a reasonable evaluation of _____ [e.g., Father's] net income from the business. Therefore, the parties affirm and agree that _____ [e.g., Father's] net disposable income from this business for _____ [year] is \$_____, and that this income has been included in determining the amount of child support provided for in this Agreement. [Add if desired: _____ (e.g., Father's) net disposable income under the statewide uniform child support guideline includes this income in determining the amount of support that would be due under the guideline's formula.]

[Deferred-receipt earnings:]

Each party shall be entitled to defer receipt of up to _____ percent of his or her annual gross earnings in a voluntary retirement plan such as an Individual Retirement Account, 401(k) plan, tax-deferred annuity, or other such voluntary tax-planning device. Any earnings so deferred shall not be considered as income for purposes of computing child support until actually received.

[Add if applicable: Father affirms that he is currently deferring receipt of \$_____ per month in _____ (e.g., an IRA account). Mother affirms that she is currently deferring receipt of \$_____ per month in _____ (e.g., her employer's 401(k) plan). These amounts have not been included in the parties' gross income in determining the amount of child support provided for in this Agreement. Further, the parties' gross income under the statewide uniform child support guideline does not include this income in determining the amount of support that would be due under the guideline's formula.]

[Cash value of employment benefits:]

_____ [e.g., Mother] affirms that from her/his employment, she/he receives _____ [specify employment benefit, e.g., free use of a company vehicle for both business and nonbusiness purposes], as a result of which _____ [specify how benefit causes reduction in living expenses, e.g., she does not incur any further personal expense for transportation]. Therefore, in determining the child support provided for in this Agreement, _____ [e.g., Mother's] gross income has been increased by the amount of \$_____ in consideration of this benefit. [Add if desired: _____ (e.g., Mother's) net disposable income under the statewide uniform child support guideline includes this income in determining the amount of support that would be due under the guideline's formula.]

[Recovery on personal-injury claim:]

_____ [e.g., Father] has received an unallocated lump sum of \$_____ pursuant to _____ [e.g., final judgment on or settlement of] a personal-injury claim in _____ [identify personal-injury case by title, court, and docket number]. The parties agree that _____ [e.g., 20 percent of the net proceeds of the judgment, after payment of attorneys fees and costs of suit,] constitutes compensation for lost income and earning capacity. Therefore, the sum of \$_____ has been included in _____ [e.g., Father's] gross income in determining the amount of child support provided for in this Agreement.

[3] Deductions From Gross Income**Deductions From Gross Income****Computation of Net Income**

[Existence of deduction affirmed:]

_____ [e.g., Mother's] gross income has been reduced by the amount of \$ _____ per month on account of a deduction for _____ [e.g., mandatory union dues]. This deduction has been included in determining the amount of child support provided for in this Agreement. *[Add if desired: _____ (e.g., Mother's) net disposable income under the statewide uniform child support guideline includes this deduction in determining the amount of support that would be due under the guideline's formula.]*

[Child support deduction:]

_____ [e.g., Father's] gross income has been reduced by the amount of \$ _____ per month on account of a deduction for child support actually paid to _____ [name] on account of a child of another relationship. This support is/is not paid under an existing court order [, a copy of which is attached as Exhibit _____ to this Agreement]. _____ [e.g., Mother] affirms that she has received sufficient proof of actual payment of this support. This deduction has been included in determining the amount of child support provided for in this Agreement. *[Add if desired: _____ (e.g., Father's) net disposable income under the statewide uniform child support guideline includes this deduction in determining the amount of support that would be due under the guideline's formula.]*

[Hardship deduction; children of other relationships:]

_____ [e.g., Mother's] gross income has been reduced by the amount of \$ _____ per month on account of a deduction for the minimum basic living expenses of her/his child from another relationship whom she/he has a duty to support and who lives with her/him. This deduction has been included in determining the amount of child support provided for in this Agreement. *[Add if desired: _____ (e.g., Mother's) net disposable income under the statewide uniform child support guideline includes this deduction in determining the amount of support that would be due under the guideline's formula.]*

[Hardship deduction; extraordinary health expenses:]

_____ [e.g., Father's] gross income has been reduced by the amount of \$ _____ per month on account of a deduction for extraordinary health expenses for which he/she is financially responsible. These expenses are payable to _____ [specify creditor] on account of _____ [specify, e.g., the balance due on hospitalization for open heart surgery in light of health insurance limited to 75 percent coverage]. The total amount of \$ _____, is due and payable at \$ _____ per month. _____ [e.g., Mother] affirms that she/he has received sufficient proof of actual payment of this monthly amount. This deduction has been included in determining the amount of child support provided for in this Agreement. *[Add if desired: _____ (e.g., Father's) net disposable income under the statewide uniform child support guideline includes this deduction in determining the amount of support that would be due under the guideline's formula.]*

[*Job-related expenses:*]

_____ [e.g., Mother's] gross income has been reduced by the amount of \$ _____ per month on account of a deduction for [*specify job-related expense, e.g., the monthly rental of a computer and printer for home use*]. This expense is required by her/his employer as a condition of employment, but is not reimbursed. This deduction has been included in determining the amount of child support provided for in this Agreement. [*Add if desired:* _____ (e.g., Mother's) net disposable income under the statewide uniform child support guideline includes this deduction in determining the amount of support that would be due under the guideline's formula.]

[4] Gross and Net Monthly Income Totals

Gross and Net Monthly Income Totals

Gross and Net Monthly Income

_____. The child support payable under this Agreement is based on the following:

1. Father's gross monthly income is \$

_____ ;

2. Mother's gross monthly income is \$

_____ ;

3. Father's net monthly income is \$

_____ ;

4. Mother's net monthly income is \$

_____ .

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 123 SPOUSAL AND CHILD SUPPORT PROVISIONS
PART IV. FORMS
A. Child Support Provisions

34-123 California Legal Forms--Transaction Guide § 123.204

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.204 Rebuttal Factors Under Guideline

[1] Comment--Use of Forms

The forms in [2]-[6], *below*, affirm that the various rebuttal factors under the statewide uniform child support guideline apply to either increase or decrease support. Under the guideline, the amount of support computed under the guideline's formula is presumptively the amount that should be ordered by the court [*see Fam. Code § 4057(a)*]. This evidence may then be rebutted by evidence that one of the rebuttal factors set forth in *Family Code Section 4057(b)* is applicable to the parents' situation.

The first rebuttal factor is the fact that the parents have agreed to a different amount without expressly directing the reasons for the agreement [*Fam. Code § 4057(b)(1)*; *see Fam. Code § 4065*]. This factor must be addressed by use of the *form in § 123.202*. The forms in this section address the other rebuttal factors.

Another rebuttal factor is for cases in which the children have *special* medical or *other needs* that could require child support greater than the formula amount [*Fam. Code § 4057(b)(5)(C)*]. Note that a different statute in the guideline permits additional child support amounts for costs related to the educational or *other special needs* of the children [*Fam. Code § 4062(b)(1)*]. Form [4], *below*, provides for special medical needs as a rebuttal factor, and the *form in § 123.205[5]* provides for special educational needs as an additional child support amount. However, there does not appear to be any real substantive difference between a rebuttal factor for higher support and an additional child support amount. Therefore, any special need may be characterized as either, and either kind of form may be used in the case of a child with a special need.

Another rebuttal factor broadly addresses "special circumstances in the particular case." Certain such special circumstances are enumerated, although the list is not meant to be exclusive [*see Fam. Code § 4057(b)(5)*]. One court called on to construe this provision has done so broadly, approving consideration of high consumer debt as a special circumstance [*see County of Lake v. Antoni (1993) 18 Cal. App. 4th 1102, 1105-1106, 22 Cal. Rptr. 2d 804*].

[2] Deferred Sale of Home**Rebuttal Factors Under Guideline--Deferred Sale of Home**

Rebuttal Factor; Deferred Sale of Home

_____. The amount of child support provided for in this Agreement is less than the presumptively correct amount under the statewide uniform child support guideline's formula [as set forth in paragraph ____] because the sale of the family home has been deferred under *Family Code Section 3800 et seq.* and the _____ [payee parent, e.g., Mother] and the child will continue to reside in the home. The amount of support has been reduced by \$_____ per [e.g., month], which amount does not exceed the amount by which the fair rental value of the residence [\$_____] exceeds the total of the mortgage payments, property taxes, and homeowners' insurance [\$_____].

[3] Extraordinarily High Income**Rebuttal Factors Under Guideline--Extraordinarily High Income**

Rebuttal Factor; Extraordinarily High Income

_____. The amount of child support provided for in this Agreement is less than the presumptively correct amount under the statewide uniform child support guideline's formula [as set forth in paragraph ____] because the _____ [payor parent, e.g., father] has extraordinarily high income, and the amount determined under the formula would exceed the reasonable needs of the child.

[4] Shared Physical Custody; Disparate Costs of Housing**Rebuttal Factors Under Guideline--Shared Physical Custody; Disparate Costs of Housing**

Rebuttal Factor; Disparate Costs of Housing

_____. The amount of child support provided for in this Agreement is [less than *or* more than] the presumptively correct amount under the statewide uniform child support guideline's formula [as set forth in paragraph ____] because the parties have substantially equal periods of primary physical responsibility for the children, but substantially different costs of housing. [As set forth in paragraph ____ of this Agreement,] Father has primary physical responsibility for the child approximately [number should be reasonably close to 50] percent of the time, and Mother has primary physical responsibility for the child approximately [100 minus father's percent] percent of the time. Father's [specify housing costs, e.g., payments for mortgage, property taxes, insurance, and home maintenance] are approximately \$_____ per [e.g., month], which is approximately ____ percent of his net income. Mother's [specify housing costs, e.g., rental payments] are approximately \$_____ per [e.g., month], which is approximately ____ percent of her net income. Each parent affirms that the other's housing costs are reasonable in light of the needs of the child.

[5] Special Medical Needs**Rebuttal Factors Under Guideline--Special Medical Needs**

Rebuttal Factor; Special Medical Needs

_____. The amount of child support provided for in this agreement is more than the presumptively correct amount under the statewide uniform child support guideline's formula [as set forth in paragraph ____] because _____ [name of child] has special medical needs that require additional expenses. These medical needs

are _____. [specify, e.g., the need for trained professional nursing care due to his epileptic condition between the hours of 3:00 p.m., when school is out, until 5:30 p.m. every day, when the mother is available to provide this care]. [Add if desired: The current monthly cost required to meet this need is \$_____.]

[6] Special Circumstances in Particular Case

Rebuttal Factors Under Guideline--Special Circumstances in Particular Case

Rebuttal Factor; Special Circumstances

_____. The amount of child support provided for in this Agreement is [less than *or* more than] the presumptively correct amount under the statewide uniform child support guideline's formula [as set forth in paragraph ____] because _____ [specify special circumstance in case not otherwise provided for in guideline, e.g., the father must make monthly payments of approximately \$_____ per month on his credit cards and revolving charge accounts for reasonable costs incurred in providing for the reasonable needs of his household].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGuidelines



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 123 SPOUSAL AND CHILD SUPPORT PROVISIONS
PART IV. FORMS
A. Child Support Provisions

34-123 California Legal Forms--Transaction Guide § 123.205

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.205 Additional Child Support Amounts Under Guideline

[1] Comment--Use of Forms

The forms set forth in [2]-[6], *below*, are provisions for the allocation of additional child support amounts provided for under the statewide uniform child support guideline [*see Fam. Code § 4062*]. *Fam. Code § 4062* sets forth four categories of expenses that the court must or may order as additional child support amounts. The parties, of course, may agree to treat other expenses as additional child support.

Fam. Code § 4061(a) provides for an equal sharing of these amounts between parents unless a parent requests a different apportionment and presents evidence demonstrating that a different apportionment would be more appropriate [*see In re Marriage of Fini (1994) 26 Cal. App. 4th 1033, 1039-1040, 31 Cal. Rptr. 2d 749* (whether to make different apportionment is within discretion of court, at least if parents' respective incomes are not greatly divergent)]. If this burden is met, *Fam. Code § 4061(b)* essentially provides for apportionment according to the respective incomes of the parents, after the basic child support obligation under the guideline's formula has been computed. There would seem to be no reason why an equal apportionment of any additional costs should be appropriate if the parents have significantly different incomes. The form in [2], *below* is a stipulation that the percentage allocation under the guideline is to apply, rather than equal division.

Designation of an expense as additional child support should be undertaken with caution. The result may be to convert a conventional debt into a "domestic support obligation," which is not dischargeable in bankruptcy [*see 11 U.S.C. § 523(a)(5)*; *see also 11 U.S.C. § 101(14A)* ("domestic support obligation" includes debt in nature of alimony, maintenance, or support of bankruptcy debtor's spouse, former spouse, child, or child's parent under separation agreement, divorce decree, or property settlement agreement)].

This concern is particularly acute with regard to uninsured health care costs, which are a mandatory child support add-on to the extent that they are "reasonable" [*see for in [4], below*]. A child might incur catastrophic uninsured health

care costs, which might be rendered nondischargeable in bankruptcy with regard to either parent by this provision of the child support guideline. For this reason, the clause makes labelling payments toward uninsured medical costs as additional child support optional. Payment of medical expenses, uninsured and otherwise, is discussed in more detail in Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 41, *Child Support Orders* (Matthew Bender).

The medical expense income tax deduction may also be a consideration in allocating the cost of uninsured medical expenses [see *I.R.C. § 213*]. For discussion, see § 123.40[2].

Forms [3]-[6] include optional language allowing for payment directly to providers. At least with regard to uninsured medical expenses, the court would seem to have the authority to order payment directly to the provider [see *Fam. Code § 4063(b)*]. 1994 legislation repealed a provision that expressly allowed direct payment to providers of all child-support add-ons under *Fam. Code § 4062* [see Stats. 1994, ch. 466, § 2, repealing former *Fam. Code § 4063* and replacing it with new version limited to medical expenses]. Whether this repealer was intended to prohibit the payment of child support in the form of direct payments to providers is not clear. The court in a dissolution proceeding has general authority to order either parent to pay an obligation, or any portion thereof, directly to a creditor if the court determines that the payment would benefit a minor child of the parties [*Fam. Code § 2023*; see *Fam. Code § 2000* (provision limited to proceedings for dissolution of marriage, legal separation, and nullity of marriage)]. The general provision would allow direct-payment orders under the court's jurisdiction to divide community debts, but would not necessarily provide for a child support credit for payments made to providers, such as for child care, on an ongoing basis. Nevertheless, nothing prohibits the parties from agreeing to such a manner of payment of support.

[2] Allocation of Additional Child Support Amounts

Additional Child Support Amounts Under Guideline--Allocation of Additional Child Support Amounts

Allocation of Additional Child-Related Costs

_____. The parties agree that the costs of _____ [specify, e.g., child care] shall be allocated between them according to their respective net incomes as set forth in *Family Code Section 4061(b)-(d)*, rather than equally. Under their current circumstances, the costs are allocated _____ percent to Father and _____ percent to Mother. These percentages shall be adjusted periodically by the parties to conform to any material change in the net income of either. Wherever in this Agreement a cost is allocated to a parent or the parents according to stated percentages, those percentages shall be so adjusted.

[3] Child Care

Additional Child Support Amounts Under Guideline--Child Care

Child Care

_____. _____ [obligor parent, e.g., Mother] shall pay as additional child support, \$_____ monthly for the cost of child care. This amount is _____ percent of the total current cost of child care. This payment shall be in addition to the amount of child support to be paid under Paragraph _____ of this Agreement, and not in lieu of any part of it. This amount shall be paid to _____ [either: obligee parent, e.g., Father, who will then be responsible for complete payment of all child care costs directly to the provider or directly to _____ (name of provider)]. The parties affirm that this cost of child care is required due to their respective [employment and/or education and training necessary to obtain employment skills.]

[4] Uninsured Medical Expenses

Additional Child Support Amounts Under Guideline--Uninsured Medical Expenses

Uninsured Health Care Costs

[One party pays all costs:]

_____. _____ [Obligor parent, e.g., Father] shall be responsible for the payment of all past and future medical expenses, including dental, vision, orthodontic, and mental health care expenses, incurred for the children that are not within the health care coverage available to either party. [These payments shall be considered as additional child support only to the extent that they are made to _____ [obligee parent, e.g., Mother] to reimburse her/him for payments that she/he has actually paid to a medical provider.

[Parties share all costs equally:]

The parties shall share equally the cost of all past and future medical expenses, including dental, vision, orthodontic, and mental health care expenses, incurred for the children that are not within the health care coverage available to either party. [Each party shall pay his or her share of each obligation directly to the medical providers or _____ (e.g., Father) shall pay his/her share directly to _____ (e.g., Mother) who shall then pay the costs directly to the medical providers]. [These payments shall be considered as additional child support only to the extent that they are made to the other party in reimbursement for costs that he or she has actually paid to a medical provider.

[Parties share all costs in specified percents:]

Father shall pay _____ percent and Mother shall pay _____ percent of all past and future medical expenses, including dental, vision, orthodontic, and mental health care expenses, incurred for the children that are not within the health care coverage available to either party. [Each party shall pay his or her share of each obligation directly to the medical providers or _____ (e.g., Father) shall pay his/her share directly to _____ (e.g., Mother) who shall then pay the costs directly to the medical providers]. [These payments shall be considered as additional child support only to the extent that they are made to the other party in reimbursement for costs that he or she has actually paid to a medical provider.

[Payment of designated costs already incurred:]

The parties have incurred the following uninsured medical expenses to providers of health care services on behalf of the children, which remain unpaid and are subject to the obligations set forth in Paragraph _____, above:

1.

_____ [provider]; \$

_____ [amount]

2.

_____ [provider]; \$

_____ [amount]

[Reimbursement of percentage of costs already incurred:]

_____ [Parent who has paid uninsured medical expenses, e.g., Father] has paid the following reasonable uninsured medical expenses to providers of health care services on behalf of the children:

1.

_____ [provider]; \$

_____ [amount]

2.

_____ [provider]; \$

_____ [amount]

_____ [e.g., Mother] shall pay to _____ [e.g., Father], as additional child support, the amount of \$_____ in reimbursement for her/his share of the above payments. This payment shall be in addition to the amount of child support to be paid under Paragraph _____ of this Agreement, and not in lieu of any part of it.

[5] Special Educational Costs

Additional Child Support Amounts Under Guideline--Special Educational Costs

Educational Costs

[One party pays all costs:]

_____. _____ [Obligor parent, e.g., Father] shall pay all reasonable costs associated with the private education of the children, including tuition, books, activities' fees, and other charges.

[Parties share all costs equally:]

The parties shall share equally all reasonable costs associated with the private education of the children, including tuition, books, activities' fees, and other charges. [Each party shall pay his or her share of each obligation directly to the educational providers or _____ (e.g., Father) shall pay his/her share directly to _____ (e.g., Mother) who shall then pay the costs directly to the educational providers].

[Parties share all costs in specified percents:]

Father shall pay _____ percent and Mother shall pay _____ percent of all reasonable costs associated with the private

education of the children, including tuition, books, activities' fees, and other charges. [Each party shall pay his or her share of each obligation directly to the educational providers or _____ (e.g., Father) shall pay his/her share directly to _____ (e.g., Mother) who shall then pay the costs directly to the educational providers].

[One party to make monthly payments to the other:]

_____ [Obligor parent, e.g., Mother] shall pay \$_____ monthly toward the reasonable costs associated with the private education of the children. This payment shall be in addition to the amount of child support to be paid under Paragraph _____ of this Agreement, and not in lieu of any part of it. This amount shall be paid to _____ [obligee parent, e.g., Father], who will then be responsible for complete payment of all educational expenses to the educational providers.

[Payment of designated costs already incurred:]

The parties have incurred the following costs to educational providers on behalf of the children, which remain unpaid and are subject to the obligations set forth in Paragraph _____, above:

1.

_____ [provider]; \$

_____ [amount]

2.

_____ [provider]; \$

_____ [amount]

[Reimbursement of percentage of costs already incurred:]

_____ [Parent who has paid educational expenses, e.g., Father] has paid the following costs to educational providers on behalf of the children:

1.

_____ [provider]; \$

_____ [amount]

2.

_____ [provider]; \$

_____ [amount]

_____[*e.g.*, Mother] shall pay to _____[*e.g.*, Father] \$_____ in reimbursement for her/his responsibility for the above payments. This payment shall be in addition to the amount of child support to be paid under Paragraph _____ of this Agreement, and not in lieu of any part of it.

[6] Costs of Special Activities

Additional Child Support Amounts Under Guideline--Costs of Special Activities

Costs of Child's Activities

_____. From time to time, the child may participate in special activities, such as summer camp, youth sports, cultural activities, art classes, or other meaningful enrichment experiences. _____[*obligor parent, e.g.*, Father] shall pay _____ percent of all reasonable costs associated with any such activity that the parents may agree is beneficial for and in the best interests of the child. This payment shall be in addition to the amount of child support to be paid under Paragraph _____ of this Agreement and not in lieu of any part of it. Payments shall be paid to _____[*either: obligee parent, e.g.*, Mother, who will then be responsible for complete payment of all such costs directly to the provider or directly to the activities providers].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild

SupportObligationsComputationGuidelinesFamily LawChild SupportObligationsModificationGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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34-123 California Legal Forms--Transaction Guide § 123.206

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.206 Health Care Coverage

[1] Comment--Use of Forms

The forms in [2]-[5], *below*, represent various provisions for use in allocating the cost of health care coverage for the children of the relationship. In any child support proceeding, the court must consider the parties' health insurance coverage [*Fam. Code § 4006*]. Health insurance coverage must be ordered to be maintained for a dependent child by either or both parents if it is available at no cost or at reasonable cost to a parent. Health insurance coverage is rebuttably presumed to be reasonable in cost if it is employment-related group health insurance or other group health insurance, regardless of the service delivery mechanism [*see Fam. Code § 3751(a)(2)*]. If the court determines that health insurance coverage is not available at no cost or at a reasonable cost, the court's order for support must require that health insurance coverage be obtained if it becomes available at no cost or at a reasonable cost [*Fam. Code § 3751(b)*]. The court's order for support must also require the parent who, at the time of the order or subsequently, provides health insurance coverage for the child seek continuation of coverage for the child after attainment of the limiting age for a dependent child, if the child continues to be dependent on the parent and has a physically or mentally disabling injury, illness, or condition [*Fam. Code § 3751(c)*; *see Health & Safety Code § 1373*; *Ins. Code §§ 10277, 10278*].

Assuming that the requisite coverage is available, a provision requiring maintenance of coverage for the benefit of the children for whom support is required should be included in an agreement for child support. The cost of coverage is treated as a deduction from income under the statewide uniform child support guideline [*see Fam. Code § 4059(d)*]. Health insurance coverage is broadly defined under the Family Code [*see Fam. Code § 3750*; § 123.22[1]]. It includes vision care and dental care coverage, whether a part of existing health insurance coverage or issued as a separate policy or plan [*see Fam. Code § 3750(a)*]. It also includes all kinds of health care delivery systems, including health maintenance organizations (HMO's) [*see Fam. Code § 3750(b)*].

Form [2] requires that the child be enrolled in one or both parents' employer-provided health coverage plans. The court

is then to issue a "qualified medical child support order" (QMCSO) under ERISA (the Employee Retirement Income Security Act), which will require the plan to enroll the child as a beneficiary in the plan [*see 29 U.S.C. § 1169(a)*].

Health care coverage is discussed in more detail, and a form for a QMCSO is provided, in Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapter 41, *Child Support Orders* (Matthew Bender).

[2] Enrollment of Children in Employer-Provided Plan

Health Care Coverage--Enrollment of Children in Employer-Provided Plan

Health Care Coverage

[*One parent to maintain coverage through employment:*]

_____. _____ [*e.g., Father*] shall maintain the child as a covered dependent under medical, dental, vision, and other health care coverage plans provided by his/her employer. _____ [*e.g., Father*] shall notify _____ [*e.g., Mother*] immediately on any termination or other material change of coverage. The parties shall stipulate to entry of a Qualified Medical Child Support Order (QMCSO), as defined in the Employee Retirement Income Security Act (ERISA), Title 29 *United States Code*, Section 1169(a), identifying each such plan in which the child is to be enrolled.

[*Both parents to maintain coverage through employment:*]

_____. Father shall maintain the child as a covered dependent under the following coverages provided by his employer: _____ *specify father's coverages or plans*. Mother shall maintain the child as a covered dependent under the following coverages provided by her employer: _____ *specify mother's coverages or plans*. Each shall notify the other immediately on any termination or other material change of coverage. [*Add if desired With regard to medical coverage, _____ (e.g., Father's) plan shall be the primary coverage, and _____ (e.g., Mother's) plan shall be the secondary coverage.*] The parties shall stipulate to entry of a Qualified Medical Child Support Order (QMCSO), as defined in the Employee Retirement Income Security Act (ERISA), Title 29 *United States Code*, Section 1169(a), identifying each such plan in which the child is to be enrolled.

[3] Purchase of Health Care Coverage

Health Care Coverage--Purchase of Health Care Coverage

Health Care Coverage

[*One parent to purchase and maintain coverage:*]

_____. _____ [*e.g., Mother*] shall purchase and maintain in full force and effect one or more health insurance policies or other health care coverage plans or programs providing medical coverage for the child [, including dental and vision coverage]. _____ [*e.g., Mother*] shall notify _____ [*e.g., Father*] immediately on any termination or other material change of coverage.

[*Cost to be shared according to parents' respective net incomes:*]

_____. The parties shall purchase and maintain in full force one or more health insurance policies or other health care coverage plans or programs providing medical coverage for the child [, including dental and vision coverage]. The cost of this coverage shall be allocated to the parties _____ percent to Father and _____ percent to Mother. These percentages shall be adjusted periodically by the parties to conform to any material change in the net income of either.

[4] Assignment of Right to Reimbursement

Health Care Coverage--Assignment of Right to Reimbursement

Assignment of Health Plan Reimbursement Rights

_____. _____ [*Parent covered by health plan, e.g., Father*] shall assign to _____ [*e.g., the mother*] all of his/her rights for reimbursement under each health care plan in which the children are enrolled to the extent that reimbursement is for payments actually made by _____ [*noncovered party, e.g., Mother*]. This assignment is also limited to reimbursement for covered health care services received in the manner required by the plan and provided to the child. _____ [*e.g., Father*] shall notify each plan of the assignment.

[5] Duration of Health Care Coverage Obligations

Health Care Coverage--Duration of Health Care Coverage Obligations

Termination of Duties Regarding Health Care

_____. The parents' duties with regard to health care coverage for the child under this Agreement shall terminate when the obligation of child support terminates under Paragraph _____, or until the child is no longer a qualified and eligible dependent under any health care plan available to either parent at no or reasonable cost.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsTypesMedical Support



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34-123 California Legal Forms--Transaction Guide § 123.207

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.207 Child Support as Percent of Obligor's Income

[1] Comment--Use of Form

The form in [2], *below*, is a child support provision in which child support is fixed as a percentage of the income of the supporting parent, with a guaranteed minimum amount set at that percent of current income. It may be used instead of a fixed amount of support as provided in § 123.200.

This type of provision is designed to keep pace with changes in the supporting spouse's ability to pay child support without the need for future modification proceedings. The parents may select any percentage of their choosing; however, the statewide uniform child support guideline sets forth the statutory percentages at different income levels [*see Fam. Code § 4055(a), (b)(1)(B), (3)* (formula variable K represents percent of both parents' income to be allocated for child support)].

Under the guideline, any change in either parent's income will produce a change in the amount of child support under the guideline's formula [*see Fam. Code § 4055(a), (b)(1)(E)* (formula variable TN represents sum of both parents' net incomes)]. Therefore, this kind of provision would only conform to the guideline as long as the *obligee* parent's income does not change, which will be the case only if he or she has no or very minimal income. It will also conform only as long as the parties time-share arrangement does not change, as any significant increase or decrease in the time that the obligor parent spends with the child will also produce a change in the support due under the formula [*see Fam. Code § 4055(a), (b)(1)(D)* (formula variable H represents higher earner's physical custodial time)]. Of course the court always has the power to modify child support, so this provision may be used subject to potential modification should the obligee parent's income or the parents' time share arrangement change significantly in the future [*see Fam. Code § 3651(a); In re Marriage of Alter* (2009) 171 Cal. App. 4th 718, 726-730, 89 Cal. Rptr. 3d 849 (court always has power to modify child support order, upward or downward, regardless of parents' agreement to contrary)].

Another disadvantage of this type of form is that it is probably impossible for an enforceable earnings assignment order

to be issued to the obligor parent's employer [see *Fam. Code* § 5230(a) (whenever court orders party to pay *amount* for child support, earnings assignment order must be issued)]. Therefore, its use is most appropriate for a self-employed obligor with fluctuating income. Earnings assignments are discussed in detail in Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 141, *Special Remedies for Enforcement of Support* (Matthew Bender).

[2] FORM

Child Support as Percent of Obligor's Income

Child Support

_____. _____ [Obligor parent, e.g., Father] shall pay _____ percent of his/her [gross or net] income every [period, e.g., month] to _____ [e.g., Mother] for the support, maintenance, and education of their child. No monthly payment shall be less than \$[specify amount that is equal to selected percent of current income, or other amount as agreed to by the parties]. [Add if parents wish to set an upper limit: However, in no event shall _____ (e.g., Father) pay more than \$_____ per month.] These payments shall be made by the [e.g., fifth] day of every month, beginning on _____ [date].

Gross income [either: shall include all income from whatever source derived as provided by the statewide uniform child support guideline, *Family Code* § 4058 or shall be defined under Paragraph _____ of this Agreement (see § 123.203)]. [Add if designated percentage of net income is used: Net income shall be determined _____ (either: by deducting from gross income all amounts allowed under the statewide uniform child support guideline, *Family Code* § 4059 or shall be defined under Paragraph _____ of this Agreement (see § 123.203).]

[Continue with provisions regarding termination of support; see § 123.212.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGeneral Overview



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34-123 California Legal Forms--Transaction Guide § 123.208

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.208 Cost-of-Living Increase

[1] Comment--Use of Form

The form in [2], *below*, is a provision for a cost-of-living increase. Its purpose is to allow for future increases in support without modification proceedings.

A cost-of-living clause is based on the view that child-support is need-based. Under the statewide uniform child support guideline, need is not the focus. Rather, child support is viewed more as the child's entitlement to a certain percentage of parental income, regardless of the cost of living [*see Fam. Code § 4053*]. If income goes up, then support should go up, regardless of whether the child (or the payee parent) can establish increased needs. Conversely, the mere fact that the cost of living has risen does not support an increase in support absent a concomitant increase in the parent's ability to pay. Nevertheless, the parties may wish to agree to such a clause if parental income is adequate and predictable, particularly if the payor parent is reasonably likely to receive cost-of-living increases in earnings.

[2] FORM

Cost-of-Living Increase

Cost of Living Increase

_____. The amount of child support provided for under Paragraph _____ of this Agreement shall be adjusted to reflect changes in the Consumer Price Index of the United States Bureau of Labor Statistics for [*geographical region*], using the latest available published index figure for the date of this Agreement as the base index figure. An adjustment in child support payments shall be made every [*number and period of time, e.g., six months*] after the execution of this Agreement. No adjustment shall be made unless index figure on the adjustment date is at least _____ percent higher or lower than the base index figure.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGeneral
OverviewFamily LawChild SupportObligationsModificationGeneral Overview



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34-123 California Legal Forms--Transaction Guide § 123.209

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.209 Percent Increase in Support Based on Obligor's Income

[1] Comment--Use of Form

The form in [2], *below*, is a child support provision that requires a percentage increase in child support whenever there is an increase in the annual income of the obligor parent. This provision avoids frequent requests to the court for modification because of changed circumstances.

This provision is similar to setting support as a fixed percentage of income [*see* § 123.207]. However, it begins with a fixed amount due periodically and merely provides for an additional percent of increased income. Therefore, it is to be used in conjunction with, and not instead of, the provision in § 123.200.

It is, however, subject to difficulties under the statewide uniform child support guideline if there are substantial changes in either the obligee parent's income or the parents' time-share arrangement [*see Fam. Code* § 4055(a), (b)(1)(D), (E)]. For discussion, see § 123.207[1].

The base fixed amount is undoubtedly subject to enforcement by earnings assignment, but it is unlikely that an earnings assignment order can be structured to provide for percent increase [*see Fam. Code* § 5230(a), *see also* Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 141, *Special Remedies for Enforcement of Support* (Matthew Bender)].

[2] FORM

Percent Increase in Support Based on Obligor's Income

Increase in Child Support

_____. Should _____[obligor parent, e.g., Mother] receive an increase of at least

\$_____ in her/his direct compensation, including both salary and bonus, over her/his present [gross or net] [monthly or annual] income, then the amount of child support shall be increased by an amount equal to _____ percent of the net increase. [*Add if desired to set an upper limit:* But in no event shall the amount of child support exceed \$_____ per month.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGeneral OverviewFamily LawChild SupportObligationsModificationChanged Circumstances



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34-123 California Legal Forms--Transaction Guide § 123.210

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.210 No Current Child Support Order Appropriate

[1] Comment--Use of Form

The form in [2], *below*, is a provision stating that no child support order is appropriate in light of the current situation of the parties and the children. The use of such a provision will be rare, and parents who agree to such a provision should expect heightened judicial scrutiny of their agreement before it is approved by the court. Any such provision should be supported with extremely detailed Income Declarations [see Cal. Judicial Council Form FL-150]. For an illustrated version of that form, see California Forms of Pleading and Practice, Ch. 221, *Dissolution of Marriage* Procedure § 221.332 (Matthew Bender).

The statewide uniform child support guideline operates off of two primary factors; parental income, and custodial time-share [see *Fam. Code* § 4055]. If both of these factors are equal, that is, if both parents have approximately equal net incomes as defined by the guideline [see *Fam. Code* §§ 4058, 4059], and they have approximately equal periods of actual physical custody, then the guideline's formula will not generate a child support obligation to be paid by one parent to the other. Similarly, the formula will produce no child support obligation as long as the higher earner's custodial time equals his or her percent of total net income. For example, if the higher earning parent has 60 percent of total parental net income and primary physical responsibility for the children 60 percent of the time, CS (child support) will be zero under the formula. This dynamic of the guideline is explained in detail in Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 41, *Child Support Orders* (Matthew Bender).

Note that the guideline may produce a child support amount even if the noncustodial parent has no income. If the custodial parent has some income, then the guideline will produce a child support amount to be paid by the custodial parent to the noncustodial parent unless the noncustodial parent has no time-share [see *Fam. Code* § 4055(b)(5)]. In such a case, the parties may wish to use this provision to express their intent that the custodial parent need not pay any support to the noncustodial parent. Such a provision is likely to obtain court approval unless the economic circumstances of the parties are greatly divergent, the noncustodial parent needs financial assistance to exercise

visitation, and the noncustodial parent is acting in good faith. An example in which support would be expected is if the higher earner is the primary custodial parent while the other is pursuing education or job training.

If neither parent has primary physical responsibility for the child--for example, if an adult child has moved away to college--the statewide uniform child support guideline, by its own terms, is inapplicable [*Edwards v. Edwards* (2008) 162 Cal. App. 4th 136, 143-144, 75 Cal. Rptr. 3d 458] .

[2] FORM

No Current Child Support Order Appropriate

Child Support

_____. Based on the custodial time-sharing arrangements as set forth in this Agreement, and the current financial status of the parties, neither party shall be obligated, at this time, to pay child support to the other party. Mother shall pay all of the regular expenses for the child while the child is in her custody, and Father shall pay all of the regular expenses for the child while the child is in his custody. The Court shall reserve jurisdiction to make an appropriate child support order in the future on proper application by either party.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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34-123 California Legal Forms--Transaction Guide § 123.211

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.211 Allocation of Support Among Two or More Children

[1] Comment--Use of Form

The form in [2], *below*, gives effect to the statutory method of allocating child support if there is more than one child who is to be supported under the agreement and resulting court order. Absent such an allocation, the obligor parent cannot, without court modification, proportionately reduce support payments as each child reaches the age of majority [*Spivey v. Furtado* (1966) 242 Cal. App. 2d 259, 262-263, 51 Cal. Rptr. 362] .

Under the statewide uniform child support guideline, unless the court orders otherwise, the amount of support for the youngest child is the amount of support for one child, and the amount for the next youngest child is the difference between that amount and the amount for two children. There are then to be similar allocations for additional children [*Fam. Code § 4055(b)(8)*].

The reason for this manner of allocation is that, as a general rule, certain costs, such as housing and utilities, do not vary proportionately with the number of children. For example, housing for two children is not twice as expensive as housing for one. Therefore, under the statewide uniform child support guideline, support for two children is not twice the amount of support for one. The guideline includes a multi-child multiplier table for up to 10 children [*see Fam. Code § 4055(b)(4)*].

Consequently, when the oldest child reaches the age of majority or otherwise is no longer entitled to child support [*see Fam. Code §§ 3900, 3901*], support should not be reduced by the fraction corresponding to the number of children supported by the order (for example, an order supporting two children should not be reduced by half). Rather, the order should be reduced only by the incremental percentage decrease in the multi-child multiplier (e.g., if four children are supported by the order and the oldest turns 18, support should be reduced by the amount by which 2.3 times the one-child amount exceeds two times that amount) [*see Fam. Code § 4055(b)(4)*].

[2] FORM

Allocation of Support Among Two or More Children

Allocation of Support Among Children

_____. The amount of support provided for in Paragraph _____ of this Agreement is allocated [between or among] the children of the parties as follows:

1. \$

_____ [amount equal to amount of child due for one child under guideline's formula, or other amount appropriately adjusted for stipulated increase or decrease of guideline amount] is allocated to

_____ [name of youngest child];

2. \$

_____ [amount approximately equal to 0.6 times amount on line 1] is allocated to

_____ [name of next youngest child];

3. \$

_____ [amount approximately equal to 0.4 times amount on line 1] is allocated to

_____ [name of next youngest child];

4. \$

_____ [amount approximately equal to 0.3 times amount on line 1] is allocated to

_____ [name of next youngest child];

5. \$

_____ [amount approximately equal to 0.2 times amount on line 1] is allocated to

_____ [name of next youngest child];

6. \$

_____ [amount approximately equal to 0.125 times amount on line 1] is allocated to

_____ [name of next youngest child];

7. \$

_____ [amount approximately equal to 0.125 times amount on line 1] is allocated to

_____ [name of next youngest child];

8. \$

_____ [amount approximately equal to 0.063 times amount on line 1] is allocated to

_____ [name of next youngest child];

9. \$

_____ [amount approximately equal to 0.031 times amount on line 1] is allocated to

_____ [name of next youngest child];

10. \$

_____ [amount approximately equal to 0.016 times amount on line 1] is allocated to

_____ [name of next youngest child].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
 CHAPTER 123 SPOUSAL AND CHILD SUPPORT PROVISIONS
 PART IV. FORMS
 A. Child Support Provisions

34-123 California Legal Forms--Transaction Guide § 123.212

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.212 Termination of Child Support Payments

[1] Comment--Use of Forms

The forms in [2]-[4], *below*, are provisions that determine when the child support payments otherwise provided for in the agreement are to terminate. Use of both forms is recommended in most cases.

As long as there is a duty of support, the parents cannot agree between themselves to terminate support entirely [*see Fam. Code § 3651(a)*; *In re Marriage of Lackey* (1983) 143 Cal. App. 3d 698, 705, 191 Cal. Rptr. 309 ; § 123.20]. Thus, for example, parents cannot agree to terminate support when a child reaches age 16 [*see Fam. Code § 3900* (parental duty to support minor children)].

The parties can, however, provide that the particular amount of child support provided for in their agreement will no longer be due (and thus not accruing arrearages in the event of nonpayment) under certain conditions. *Family Code Section 4007* (discussed *below*) produces this result with regard to certain specified terminating events. In other cases, an express provision in the agreement or a modification proceeding is required to terminate the obligation to pay support under the existing order [*see Lehrer v. Lehrer* (1976) 63 Cal. App. 3d 276, 279-280, 133 Cal. Rptr. 709 ; *but see In re Marriage of Okum* (1987) 195 Cal. App. 3d 176, 182, 240 Cal. Rptr. 458 (equitable defense allows arrearages to be reduced to reflect de facto change in custody)].

Under *Family Code Section 4007*, a parent's obligation to pay child support under a court order for support "during the child's minority, or until the child is married or otherwise emancipated" terminates on the happening of the contingency [*Fam. Code § 4007(a)*]. In the original support order (and agreement), the court (and the parties) may require the obligee to notify the obligor (or his or her attorney of record) of the happening of the event [*see Fam. Code § 4007(a)*]. If the notice is not given, the obligee must refund any money received that accrued after the happening of the event. However, the overpayments must first be applied to any arrearages [*Fam. Code § 4007(b)*].

Family Code Section 4007, while it cannot be ignored, contains some traps for the unwary drafter. By specifying minority, marriage, and emancipation as contingencies causing automatic termination, it is both over-inclusive and imprecise with regard to conditions that terminate the duty of support by operation of law. First, the duty of support does not automatically terminate when a child turns 18 [see *Fam. Code § 3901* (extending duty of support past age 18 to complete high school)]. Even if the agreement and order specify that the obligor is to pay support until the child reaches the age of majority, the obligation to make the payments provided in the order continues as long as the statutory extension of the duty of support applies [*Politzer v. Himmelsbach* (1989) 212 Cal. App. 3d 295, 297-299, 260 Cal. Rptr. 450] .

Second, "emancipation" is a term with various components, not all of which have the same effect. Emancipation under the Emancipation of Minors Law [*Fam. Code § 7000 et seq.*] terminates the parental duty of support by operation of law [*Fam. Code § 7050(a)*]. However, statutory emancipation occurs only under three situations; marriage, active duty in the armed forces, and entry of a judgment of emancipation [*Fam. Code § 7002*]. A minor may become "emancipated" for some purposes in other ways, such as by moving into an apartment, obtaining employment, and paying some or all of his or her living expenses, without triggering an automatic termination of the duty of support under the Emancipation of Minors Law. In these cases involving emancipation by conduct or agreement, which turn on their particular facts, a provision in a support agreement and order that support is to terminate on emancipation is insufficient to terminate the payments required under the order until there has been a judicial determination that such emancipation has, in fact, occurred [see *Lehrer v. Lehrer* (1976) 63 Cal. App. 3d 276, 279-280, 133 Cal. Rptr. 709 ; *In re Marriage of Hancock* (1973) 32 Cal. App. 3d 264, 266-267, 107 Cal. Rptr. 897] . Emancipation of minors is considered in Volume 17, Chapter 100, *Control, Custody, and Support of Minors*.

The actual major area of concern to the drafter involves a de facto material change in the actual physical custody of the child, whether through emancipation or otherwise. Usually, if a child support agreement and order is based on a particular custodial arrangement in which the obligee parent's home is the child's primary residence, child support should be adjusted if the child moves out. This is the case whether the child moves into his or her own residence, moves in with the obligor parent, or goes to live with some third party. These situations, in turn, should be distinguished from some less significant adjustment in the parents' time share arrangement, under which one of the parties should be expected to initiate modification discussions and proceedings if he or she feels that the amount of child support is no longer appropriate.

The form in [2], *below*, avoids these possible misconceptions of the effect of *Family Code Section 4007* by simply tying the obligation to make the child support payments to the duty of support. The form in [3], *below*, terminates the obligation to make the child support payments if the child no longer lives with the obligee parent. It should be used to supplement Form [2].

Two courts have held that a child support order does not terminate by operation of law on the death of the payee-custodial parent, and that the payor parent must obtain a judicial modification or termination of the order to avoid accruing liability for arrearages under it [see *In re Marriage of McCann* (1994) 27 Cal. App. 4th 102, 106, 32 Cal. Rptr. 2d 639 *In re Marriage of Gregory* (1991) 230 Cal. App. 3d 112, 115-117, 281 Cal. Rptr. 188] . Therefore, it would seem that every child support order should now provide for automatic termination on the death of the payee parent. The form in [4], *below*, is such a provision.

Termination of support provisions should also be addressed separately from extension of the duty of support. Parents may agree to provide additional support after the child is no longer a minor [*Fam. Code § 3587*; see *Fam. Code § 3901(b)*]. Provisions to extend the duty of support to provide for college are common. For these forms, see § 123.213. The duration of the duty of support is considered in Volume 17, Chapter 100, *Control, Custody, and Support of Minors*.

[2] Payments Terminate When Duty of Support Terminates

Termination of Child Support Payments--Payments Terminate When Duty of Support Terminates

Termination of Child Support by Operation of Law

_____. The child support payments provided for in Paragraph _____ of this Agreement shall continue with regard to each child for as long as there is a legal duty of parental support of the child or until further order of the court. The payments shall terminate automatically, without further court order or agreement, when this legal duty of support terminates, whether by the child's attaining sufficient age, or by prior statutory emancipation by marriage, active duty in the armed forces, or judicial declaration of emancipation. _____[*obligee parent, e.g., Mother*] shall notify _____[*obligor parent, e.g., Father*] of the happening of any such event that terminates the duty of support.

[3] Payments Terminate on Child's Change of Residence

Termination of Child Support Payments--Payments Terminate on Child's Change of Residence

Termination of Child Support on Child's Change of Residence

_____. The child support payments provided for in Paragraph _____ of this Agreement shall continue with regard to each child for as long as the child continues to maintain his/her primary residence with _____[*obligee parent, e.g., Father*]. Should the child no longer live with _____[*e.g., Father*], the obligation to make the payments shall terminate automatically, without further court order or agreement. A child shall be considered as maintaining his or her primary residence with _____[*e.g., Father*] as long as he/she has primary physical responsibility for the child at least [*select percentage that is different enough from existing time-share arrangement so as to permit modification reducing primary parent's time without triggering this termination provision, e.g., if obligee parent has 80 percent physical custody under agreement, make triggering percent at about 50 percent*] percent of the time.

[4] Payments Terminate on Death of Payee Parent

Termination of Child Support Payments--Payments Terminate on Death of Payee Parent

Termination of Child Support on Payee Parent's Death

_____. If _____[*obligee parent, e.g., Mother*] dies while the children are still minors and in his/her primary physical custody, _____[*obligor parent, e.g., Father*]'s obligation to make the child support payments provided for in Paragraph _____ of this Agreement shall terminate automatically, without further court order or agreement. The court may then make a new child support order as appropriate based on the new circumstances regarding the children and their care and custody.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsTerminationGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 123 SPOUSAL AND CHILD SUPPORT PROVISIONS
PART IV. FORMS
A. Child Support Provisions

34-123 California Legal Forms--Transaction Guide § 123.213

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.213 Extension of Child Support Beyond Age of Majority for Higher Education

[1] Comment--Use of Forms

The forms in [2]-[6], *below*, are various provisions that extend the duty of child support or the obligation to make the payments provided in the agreement, or both, beyond a child's 18th birthday for higher education. Notwithstanding any other provision of law, the court has the authority to approve a stipulated agreement by the parents to pay for the support of an adult child or for the continuation of child support after a child attains the age of 18 years, and to make a support order to effectuate the agreement [*Fam. Code* § 3587; *see Fam. Code* § 3901(b)].

No provision in the agreement is required to extend the duty of support to allow a child to finish high school. By statute, the duty of support continues as to an unmarried child who has attained the age of 18 years, is a full-time high school student, and who is not self-supporting, until the child completes the 12th grade or attains the age of 19 years, whichever occurs first [*Fam. Code* § 3901(a); *Politzer v. Himmelsbach* (1989) 212 Cal. App. 3d 295, 297-299, 260 Cal. Rptr. 450]. However, any extension of the duty of support for higher education must be by agreement; a court may not unilaterally extend the duty to require a parent to pay college expenses [*see Jones v. Jones* (1986) 179 Cal. App. 3d 1011, 1016-1017, 225 Cal. Rptr. 95]. Such a provision may be treated as a nondischargeable support obligation for purposes of federal bankruptcy laws, even if the parties do not expressly refer to the payment of the college expenses as "support," because of the bankruptcy court's authority to construe the parties' intentions [*see In re Seixas* (9th Cir. B.A.P. 1999) 239 B.R. 398, 403-404].

There are several possible approaches to providing support for adult children for educational purposes exemplified in the forms *below*. The appropriate approach depends on the age of the child and the parents' economic situation. Each approach involves selecting specific conditions related to choice of schools, years of study, curriculum, progress toward graduation, and any other conditions that the parents may wish to impose on their children.

First, the agreement may simply provide that the child support payments are to continue beyond majority under the

specified conditions [Form [2]]. This approach is probably only appropriate if the child will continue living with the obligee parent.

Second, the agreement may require one or both parents to pay all, or specified percentages, of a child's costs associated with higher education, regardless of the amount [Form [3]]. This approach is only appropriate in higher income situations. A related approach is to require a parent who has extraordinarily high income to set aside funds for higher education during the children's minority [Form [4]]. Extraordinarily high income is a rebuttal factor allowing for less support than the amount computed under the statewide uniform child support guideline [*Fam. Code* § 4057(b)(3); see § 123.204[3]], but the parents may agree to set the surplus aside for the children's education. The fund may simply be a savings account, or a more sophisticated deferred-income device such as a trust or annuity. For appropriate forms to establish a trust, see Ch. 70, *Complete Revocable Trust Forms*.

Finally, the parents may simply agree to extend the duty of support as long as designated conditions related to education are met without stipulating anything with regard to amount [Form [5]]. The question of how much support each parent is to pay will be based on the parents' circumstances when the child turns 18. This approach is appropriate for very young children.

Careful attention to drafting is important, and combining more than one of the various approaches is not recommended. In one case, the agreement contained ambiguous language that appeared to continue the obligor parent's duty of support [see *In re Marriage of Smith & Maescher* (1993) 21 Cal. App. 4th 100, 104, 26 Cal. Rptr. 2d 133]. The language could have been construed as continuing the obligation to make the specific support payments to the other parent required by the agreement. However, the court rejected this construction because the agreement also contained other language placing a very general duty on the parent to pay for the children's college education [see *In re Marriage of Smith & Maescher* (1993) 21 Cal. App. 4th 100, 108-110, 26 Cal. Rptr. 2d 133].

Forms [3]-[5] make the children express third-party beneficiaries of the higher education provision. The particular parental obligations that are created are then enforceable by the child against an obligor parent as long as the conditions are met [*In re Marriage of Smith & Maescher* (1993) 21 Cal. App. 4th 100, 105-106, 26 Cal. Rptr. 2d 133]. The parties may prefer not to make the child a third party beneficiary and to permit enforcement only by themselves because they may take a stricter view than the child as to whether the performance conditions toward the educational objective are being met. In such a case, express language denying the child third-party beneficiary status should be included.

[2] Continuation of Current Support Payments

Continuation of Current Support Payments for Higher Education

Continued Support for Higher Education

_____. The child support payments for each child provided for in this Agreement shall continue past the child's 18th birthday for as long as the child continues to reside with _____ [obligee parent, e.g., Mother] and the following conditions are met: _____ [specify conditions related to higher education, job training, or other career development program, e.g., the child is a full-time student at an accredited public or private community college, college, or university and is enrolled and making satisfactory progress in a program of courses leading to an associate or undergraduate degree]. The obligation to make these continued payments shall terminate automatically should any of the above-stated conditions no longer be met, without the need for judicial proceedings or order of court. In any event, the obligation shall terminate _____ [specify terminating time or event related to reasonable projected completion of course of studies, e.g., no later than the child's 23rd birthday]. _____ [obligee parent, e.g., Mother] shall notify _____ [obligor parent, e.g., Father] of the happening of any condition that terminates this continuing obligation. The amount of support shall/shall not be modifiable beyond the child's 18th birthday based on changed circumstances of either party.

[3] Obligation to Pay All Costs of Higher Education**Obligation to Pay All Costs of Higher Education**

Costs of Higher Education

[One parent to pay all costs:]

_____. _____ [e.g., Father] shall pay all of each child's costs of higher education, even though the child has reached the age of majority, provided that the following conditions are met: _____ [specify conditions related to higher education, job training, or other career development program, e.g., the child is a full-time student at an accredited California public community college, college, or university and is enrolled and making satisfactory progress in a program of courses leading to an associate or undergraduate degree]. Costs covered under this Paragraph include [specify, e.g., tuition, housing, books, fees, and a reasonable allowance for living expenses and transportation]. Payments may be made directly to the child, or by direct payment to providers, including the college or university, at the option of _____ [e.g., Father]. _____ [e.g., Father's] obligation to pay these expenses shall terminate automatically should any of the above-stated conditions no longer be met, without the need for judicial proceedings or order of court. In any event, the obligation shall terminate _____ [specify terminating time or event related to reasonable projected completion of course of studies, e.g., no later than the child's 23rd birthday]. _____ [e.g., Father's] obligation under this Paragraph shall/shall not be modifiable after the child's 18th birthday based on a change of circumstances. The parties agree that _____ [each child shall be a designated third-party beneficiary of this Paragraph, and entitled to enforce its provisions as long as the specified conditions are met or no child shall be a designated third-party beneficiary of this Paragraph who is entitled to enforce its provisions].

[OR, parents to share costs by percentages:]

_____. The parties shall pay all of each child's costs of higher education as set forth below, provided that the following conditions are met: _____ [specify conditions related to higher education, job training, or other career development program, e.g., the child is a full-time student at an accredited California public community college, college, or university and is enrolled and making satisfactory progress in a program of courses leading to an associate or undergraduate degree]. Each parent shall pay that percent of the costs that corresponds to his or her percent of the parties total net income [as defined under Paragraph _____ of this Agreement]. As of the date of execution of this Agreement, Father shall pay _____ percent and Mother shall pay _____ percent of the costs. These percentages shall be adjusted from time to time as required to reflect any change in either party's net income. Costs covered under this Paragraph include [specify, e.g., tuition, housing, books, fees, and a reasonable allowance for living expenses and transportation]. Payments may be made directly to the child, or to providers, including the college or university, at the option of each parent individually. The parties' obligations to pay these expenses shall terminate automatically should any of the above-stated conditions no longer be met, without the need for judicial proceedings or order of court. In any event, the obligations shall terminate _____ [specify terminating time or event related to reasonable projected completion of course of studies, e.g., no later than the child's 23rd birthday]. The parties agree that _____ [each child shall be a designated third-party beneficiary of this Paragraph, and entitled to enforce its provisions as long as the specified conditions are met or no child shall be a designated third-party beneficiary of this Paragraph who is entitled to enforce its provisions].

[OR, one parent to pay designated amount to other, who shall then pay all costs:]

_____. The parties shall pay all of each child's costs of higher education as set forth below, even though the child has reached the age of majority, provided that the following conditions are met: _____[*specify conditions related to higher education, job training, or other career development program, e.g., the child is a full-time student at an accredited California public community college, college, or university and is enrolled and making satisfactory progress in a program of courses leading to an associate or undergraduate degree*]. _____[*e.g., Mother*] shall pay the sum of \$_____ per month to _____[*e.g., Father*], who shall then be responsible for payment of all of costs. Costs covered under this Paragraph include [*specify, e.g., tuition, housing, books, fees, and a reasonable allowance for living expenses and transportation*]. _____[*e.g., Father's*] payments may be made directly to the child, or by direct payment to providers, including the college or university, at his/her option. The parties' obligations to pay these expenses shall terminate automatically should any of the above-stated conditions no longer be met, without the need for judicial proceedings or order of court. In any event, the obligations shall terminate _____[*specify terminating time or event related to reasonable projected completion of course of studies, e.g., no later than the child's 23rd birthday*]. _____[*e.g., Mother's*] amount of support shall/shall not be modifiable beyond the child's 18th birthday based on her/his changed circumstances. The parties agree that _____[each child shall be a designated third-party beneficiary of this Paragraph, and entitled to enforce its provisions as long as the specified conditions are met or no child shall be a designated third-party beneficiary of this Paragraph who is entitled to enforce its provisions].

[4] Higher Education Fund Established During Minority

Higher Education Fund Established During Minority

Fund for Higher Education

_____. In addition to the periodic payments of child support required by Paragraph _____ of this Agreement, _____[*obligor parent, e.g., Father*] shall _____[*specify manner of establishing fund, e.g., deposit the sum of \$_____ each month into a long-term interest-bearing savings account*] for the purpose of providing for the higher education of the children. This obligation shall continue _____[*specify duration, e.g., until the youngest child of the parties attains the age of 18 years, and beyond that date for as long as at least one child of the parties meets the conditions specified for receipt of disbursements from the fund*]. However, the amount of contributions required shall be modifiable during the minority of any child based on changed circumstances.

[EITHER]

_____ [e.g., Father] shall have the right to establish such reasonable terms and conditions as may be necessary to ensure that the funds are used solely for the purpose of providing for higher education and to retain a right of reversion to the funds set aside should the conditions not be met.

[OR]

Each child shall have a right to receive disbursements of principal and interest from the fund for as long as _____[*conditions, e.g., he or she is a full-time student at an accredited California public community college, college, or university and is enrolled and making satisfactory progress in a program of courses leading to an associate, undergraduate, or graduate degree*].

[Add for more than one child:]

Each of the three children shall have a right to [*fraction or percent, e.g., one-third*] of the amount of the fund on the date that the oldest child attains the age of 18 years, and to [*e.g., one-third*] of all accumulations to the fund accruing after that date, as long as the child meets all of the established conditions. Should any child fail to meet the conditions, the shares of the remaining children shall be increased proportionately.

[5] Continuation of Duty of Support Beyond Minority for Higher Education

Continuation of Duty of Support Beyond Minority for Higher Education

Continued Duty of Support for Higher Education

_____. Each parent shall have a duty of support with regard to each child beyond the child's minority as long as the child meets the following conditions: _____ [*specify conditions related to higher education, job training, or other career development program, e.g., the child is a full-time student at an accredited public or private community college, college, or university and is enrolled and making satisfactory progress in a program of courses leading to an associate or undergraduate degree*]. This extended duty of support with regard to any child shall terminate automatically should any of the above-stated conditions no longer be met, without the need for judicial proceedings or order of court. In any event, the extended duty shall terminate _____ [*specify terminating time or event related to reasonable projected completion of course of studies, e.g., no later than the child's 23rd birthday*]. The obligations of each parent shall be determined as of the time when a child reaches the age of majority, based on the respective economic circumstances of the parties at that time. The parties agree that _____ [each child shall be a designated third-party beneficiary of this Paragraph, and entitled to enforce its provisions as long as the specified conditions are met *or* no child shall be a designated third-party beneficiary of this Paragraph who is entitled to enforce its provisions].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsModificationAttainment of Majority



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DIVISION VII: PERSONAL TRANSACTIONS
 CHAPTER 123 SPOUSAL AND CHILD SUPPORT PROVISIONS
 PART IV. FORMS
 A. Child Support Provisions

34-123 California Legal Forms--Transaction Guide § 123.214

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.214 Extension of Support Beyond Age of Majority for Incapacitated Child

[1] Comment--Use of Form

The form in [2], *below*, extends support with regard to an adult child who is incapacitated from earning a living and without sufficient means. There is a parental duty to support such a child, whether or not the parents so agree [*see Fam. Code § 3910(a)*; *see* Ch. 100, *Control, Custody, and Support of Minors*]. However, an express provision is probably required to automatically impose an obligation with regard to such an adult child [*see Fam. Code § 3587*; § 123.213 [1]], even though in a different context, it has been held that a statutory duty of support beyond age 18 is self-operative to extend an existing support obligation without the need for a hearing [*see Politzer v. Himmelsbach* (1989) 212 Cal. App. 3d 295, 299, 260 Cal. Rptr. 450] . The need to determine that a child meets the statutory requirements probably precludes a court from extending the duty of support automatically past the child's 18th birthday unless the parents agree that support or the duty of support is to continue.

The form, *below*, acknowledges that the child meets the statutory definition, and that the duty of support will continue with regard to the child. It then continues the support payments provided in the agreement for the child indefinitely past the child's 18th birthdate. This approach is appropriate as long as the child is living with the other parent. Any of the approaches illustrated in § 123.213 with regard to extending the duty of support for higher education may also be adapted for use with regard to an incapacitated child.

The living arrangements and the ability of the child to manage his or her own finances should be considered. It may be necessary to appoint a conservator of the person and the estate of the adult child under *Probate Code Section 1800 et seq.* The effect of any such provision of the adult child's entitlement to any public benefits should also be considered.

[2] FORM

Extension of Support Beyond Age of Majority for Incapacitated Child

Continued Support for Incapacitated Child

_____. The parties acknowledge that their child _____[*name*], who will reach the age of majority on _____[*date*], is incapacitated from earning a living because of [*specify mental or physical disability*], and that the parental duty to support him/her will extend beyond the age of minority. In order to discharge the duty of support to this child, the support payments provided for in Paragraph _____ of this Agreement shall not terminate on the above-stated date, but shall continue until further agreement or order of court. This support obligation shall be subject to future modification based on changed circumstances related to either parent or to the child.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsModificationAttainment of Majority



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DIVISION VII: PERSONAL TRANSACTIONS
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34-123 California Legal Forms--Transaction Guide § 123.215

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.215 Maintenance of Life Insurance

[1] Comment--Use of Forms

The forms in [2]-[4], *below*, are life insurance clauses that are designed to meet the obligor's support obligation should he or she die before all of the children have reached the age of majority [see § 123.22[2]]. Form [2], *below*, provides for maintenance of one or more existing life insurance policies. Existing policies may have particular economic value that should be preserved because of the potential difficulty for the insured parent to obtain equivalent replacement coverage as he or she grows older. The forms in [3], *below*, require one or both parents to obtain and maintain life insurance coverage.

As a child approaches the age of majority, the parent is obligated for fewer years of support. The parents may agree to decrease the amount of insurance proceeds that the child will receive on the parent's death. Form [4] permits the supporting parent to name a second beneficiary, such as a subsequent spouse or child, and to transfer a percentage of the death benefit to that person each year.

For provisions related to health insurance coverage, see § 123.206.

[2] Maintenance of Existing Life Insurance Policies

Maintenance of Existing Life Insurance Policies

Maintenance of Life Insurance for Benefit of Children

_____. As security for his/her duty of support to the children, _____ [obligor parent, e.g., Mother] shall maintain in full force and effect by timely payment of premiums the current life insurance policies listed below, and shall designate _____ [the children of the parties or other parent, e.g., Father or other person such as guardian or trustee] as the primary beneficiary/beneficiaries of the policies.

[illegible]

The obligation to maintain these policies shall continue until such time as all obligations of child support terminate under Paragraph _____ of this Agreement. The policies may be term life insurance policies as long as the total terms for automatic renewal exceed the duration of the support obligation. _____ [e.g., Father] shall provide evidence of the continuing effectiveness of the policies and of the beneficiary designation to _____ [e.g., Mother] on reasonable request. _____ [e.g., Father] shall not borrow against the policies so as to reduce the death benefit actually payable to or on behalf of the children during the time that

the obligation to maintain these policies continues. If _____ [e.g., Father] fails to maintain any policy as required, the death benefit payable on the policy shall be a charge against his/her estate.

[OR, both parents to obtain life insurance]

_____. Both parents shall purchase and maintain in full force and effect by timely payment of premiums one or more life insurance policies on his or her life. _____ [The children of the parties or The other parent or other person such as guardian or trustee] shall be the designated primary beneficiary/beneficiaries of the policies. The total value of the death benefits of all policies to be procured and maintained by Father shall be \$_____; the total value of the death benefits of all policies to be procured and maintained by Mother shall be \$_____.

The obligation to maintain these policies shall continue until such time as all obligations of child support terminate under Paragraph _____ of this Agreement. The policies may be term life insurance policies as long as the total terms for automatic renewal exceed the duration of the support obligation. Each party shall provide evidence of the continuing effectiveness of the policies and of the beneficiary designation to the other party on reasonable request. Neither party shall borrow against the policies so as to reduce the death benefit actually payable to or on behalf of the children during the time that the obligation to maintain these policies continues. If either party fails to maintain any policy as required, the death benefit payable on the policy shall be a charge against his or her estate.

[4] Annual Transfer of Right to Proceeds to Other Beneficiary

Annual Transfer of Right to Proceeds to Other Beneficiary

[Add the following optional provision, if desired:]

_____. _____ [Parent required to maintain life insurance, e.g., Father] shall have the right to change the designation of primary beneficiary entitled to receive the death benefits payable on all life insurance policies required under this Agreement with regard to _____ percent of the benefit per year, beginning _____ [specify, e.g., January 1 of the first year following the date of the execution of this Agreement]. This provision shall not be construed as reducing the face amount payable at any time unless _____ [e.g., Father] has executed change-of-beneficiary designations acceptable to the insurance company involved. The annual percents that may be released to another beneficiary may be accumulated and released in multiple year amounts rather than annually at the election of _____ [e.g., Father].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsTypesGeneral OverviewInsurance LawLife InsuranceGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 123 SPOUSAL AND CHILD SUPPORT PROVISIONS
PART IV. FORMS
A. Child Support Provisions

34-123 California Legal Forms--Transaction Guide § 123.216

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.216 Dependency Exemption

[1] Comment--Use of Form

The form in [2], *below*, specifies which parent will be entitled to claim the supported children as dependents on his or her federal and state income tax returns. There is no requirement that the right to claim tax exemptions for children be assigned in a decree of marital dissolution or a marital settlement agreement. The parent who has custody for greater portion of calendar year is entitled to claim the dependency exemption [*I.R.C. § 152(e)(1), (4)(A)*]. However, the custodial parent may release the right to claim the exemption to the noncustodial parent [*I.R.C. § 152(e)(2)*].

In order for the noncustodial parent to claim the dependency exemption, the custodial parent must execute a declaration, on Internal Revenue Service Form 8332, declaring that the custodial parent will not claim the child as a dependent for the tax year in question [*I.R.C. § 152(e)(2)(A)*].

The California Supreme Court has held that a family law court may order the custodial parent to execute the form to release the right to the dependency exemption to the noncustodial parent over the custodial parent's objection in order to obtain maximum tax savings to the parents, and thus, more money available for the children. Child support should be increased to offset the cash value of the exemption [*Monterey County v. Cornejo* (1991) 53 Cal. 3d 1271, 1275-1281, 283 Cal. Rptr. 405, 812 P.2d 586] .

PRACTICE TIP:

The judicial shifting of dependency exemptions to a payor spouse, along with increased child support, is common. Counsel for the custodial-payee parent should consider offering to sign the exemption over to the payor parent whenever she or he stands to gain more from increased support than will be lost by surrendering the exemption (typically the case with a low-income payee). Conversely, counsel for the payor parent should avoid raising the issue if his or her exposure to increased support will outweigh the benefit of claiming the exemption. Computer software programs that calculate support, including the effect on support of exemption-shifting, are now in wide-spread use by both family law courts and

counsel. If the custodial parent has agreed to release the exemption to the noncustodial parent, counsel should ensure that the form or written declaration releasing the claim clearly indicates the specific years to which the release applies.

EXAMPLE: On January 5, 2000, a custodial parent fills out only Part II of IRS Form 8332, which is labeled "Release of Claim to Exemption for Future Years," stating that she agrees not to claim an exemption for her three children for "all future years." The noncustodial parent attaches this form to his 1999 income tax return. However, he was not entitled to the exemption for 1999 because Part I of the form, which is labeled "Release of Claim to Exemption for Current Year," was uncompleted and left completely blank, and because the form did not specify that it was applicable to the 1999 tax year [Nancy L. Cafarelli, T.C.M. 1994-265 (CCH)].

Different rules apply for determining dependency under a multiple support agreement [see *I.R.C. § 152(d)(3), (e)(5)*], and with regard to pre-1985 instruments [see *I.R.C. § 152(e)(3)*]. For further discussion of the tax consequences of child support payments, see §§ 123.40-123.42.

[2] FORM

Dependency Exemption

Income Tax Dependency Exemption

_____. _____ [Obligor parent, e.g., Father] shall be entitled to claim the dependency exemption for _____ [names of children] on his/her federal and state income tax returns for _____ [specify period of time, e.g., for all taxable years beginning _____ (date)], provided that he/she has paid by the end of the year all amounts of child support required by this Agreement or by any subsequent support order. _____ [obligee parent, e.g., Mother] shall execute the waiver of the dependency exemption (IRS Form 8332, any successor form, and any corresponding state forms) and deliver the executed waiver to _____ [e.g., Father] no later than _____ days after the end of the year. Any party who claims a dependency exemption in violation of this Paragraph shall indemnify the other for all costs incurred by the other arising from the violation, including any increased taxes assessed against the other party, attorney fees, and accountant fees required to remedy the violation.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsTypesGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesGeneral Overview



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34-123 California Legal Forms--Transaction Guide § 123.217

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.217 Adjustment of Support for Periods When Obligor Parent Has Physical Custody

[1] Comment--Use of Forms

The forms in [2] and [3], *below*, are alternative provisions for reduction or abatement of child support during periods when the obligor parent has the primary physical custody of the child. In most cases, such a provision is unnecessary because the obligor parent's time-share is addressed by the "H" factor in the statewide uniform child support guideline formula. This factor represents the approximate percentage of the time that the higher-earning parent has primary physical responsibility for the child [*see Fam. Code § 4055(b)(1)(D)*; *see DaSilva v. DaSilva (2004) 119 Cal. App. 4th 1030, 1033-1035, 15 Cal. Rptr. 3d 59* (for purposes of calculating "H" factor, time child is not physically with either parent may be credited to parent who is primarily responsible for child during that time)]. Therefore, no adjustment or abatement will be required for any child support amount that has been derived from the formula as long as "H" has been appropriately valued.

However, if the parents' time-share arrangement calls for extended periods of physical custody, for example, if one parent has the children during the school year and the other all summer, the parties may wish to agree to separate child support provisions for each period of time. One way is to compute the amount under the formula for the longer period (e.g., the school year) without considering the shorter period (e.g., the summer) as within the H factor, and then reduce or abate the amount of support for those periods during which the children are living with the obligor parent.

In most cases, a reduction is probably more appropriate than a total abatement. The primary custodial parent's child-related expenses do not entirely disappear simply because the children are temporarily absent. Principally, the cost of housing is not reduced, so child support should not be abated or reduced below an amount that will allow the primary custodian to make rent or mortgage payments.

A nonabatement provision is probably unnecessary as nonabatement is implicit in any case in which the H factor has reduced support to reflect the obligor's custodial time. It would also be unusual for support not to be reduced at all for

extended periods, such as an entire summer, when the obligor has physical custody, if the period was not included as part of the H factor.

[2] Reduction of Support

Reduction of Support During Obligor's Custodial Period

Reduction of Support During Obligor's Custodial Period

_____. The child support payments provided under Paragraph _____ of this Agreement shall be reduced to the amount of \$ _____ per month each year beginning [date, e.g., June 20] and ending [date, e.g., August 20] during which _____ [obligor parent, e.g., Father] shall have primary physical responsibility for the children as provided in Paragraph _____ of this Agreement. _____ [e.g., Father's] obligations under the other support provisions of this Agreement are unchanged during the above period.

[3] Abatement of Support

Abatement of Support During Obligor's Custodial Period

Abatement of Support During Obligor's Custodial Period

_____. The child support payments provided under Paragraph _____ of this Agreement shall abate and not be due each year beginning [date, e.g., June 20] and ending [date, e.g., August 20] during which time, _____ [obligor parent, e.g., Mother] shall have primary physical responsibility for the children as provided in Paragraph _____ of this Agreement. _____ [e.g., Mother's] obligations under the other support provisions of this agreement are unchanged during the above period.

[4] Nonabatement of Support

Nonabatement of Support During Obligor's Custodial Periods

Nonabatement of Support During Obligor's Custodial Periods

_____. _____ [Obligor parent, e.g., Father's] obligation to pay child support as provided in Paragraph _____ of this Agreement shall not abate or be reduced in any way during those periods of time when he/she has primary physical responsibility for the children as provided in Paragraph _____ of this Agreement, including the extended period from [beginning date, e.g., June 20 of each year] and ending [ending date, e.g., August 20 of each year].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsModificationGeneral Overview



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34-123 California Legal Forms--Transaction Guide § 123.218

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.218 Notification of Current Employment

[1] Comment--Use of Form

The form in [2], *below*, requires each parent to notify the other of the name and address of his or her current employer. This provision must appear in the court's child support order [*see Fam. Code § 4014*].

[2] FORM

Notification of Current Employment

Notification Regarding Employment

_____. Each party shall notify the other of the name and address of his or her current employer, for as long as they have a legal duty to support their children.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGeneral OverviewFamily LawChild SupportObligationsModificationGeneral Overview



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34-123 California Legal Forms--Transaction Guide § 123.219

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.219 Payment of Child Support Through Qualified Domestic Relations Order (QDRO)

[1] Comment

The form *below* is a provision for use in a marital settlement agreement to obtain child support payments directly from the payor's interest in an employee benefit plan governed by ERISA [*see* 29 U.S.C. § 1001 *et seq.* (Employee Retirement Income Security Act of 1974)], such as a pension or a 401k plan. It requires the entry of a Qualified Domestic Relations Order (QDRO), which is a court order directed to the plan and specifying payments that are to be made to the employee-participant's spouse or children, referred to as alternate payees [*see* I.R.C. § 414(p); chs. 122, *Judgment of Dissolution or Legal Separation*. Under the 1984 Retirement Equity Act (REA), the assignment of pension interests is not limited to property divisions, but can also include alimony and child support obligations [I.R.C. § 414(p)(1)(B)(i)].

Several issues arise when the division of a pension is approached as an alimony or child support arrangement. The fact that it is an alimony or support division does not make the funds available any sooner than if it were a property division. Thus, if a pension is not in "pay status" or presently transferable to the payee, the payee will not have present use of the funds. If the pension is in pay status, then the assignment of a portion of the payments being made, subject to a QDRO, enables the recipient to receive the payments directly from the plan, much in the same manner as a wage garnishment.

For clauses for use to divide property interests in employee benefits, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapter 122, *Judgment of Dissolution or Legal Separation*. (Matthew Bender).

[2] FORM

Payment of Child Support Through Qualified Domestic Relations Order (QDRO)

Payment of Child Support by Qualified Domestic Relations Order

_____. The parties have ascertained that the child support due under Paragraph _____ of this Agreement may be paid directly from _____ [supporting parent, e.g., Father's] share of the benefits provided by _____ [name of employee benefit plan] (the Plan). The parties agree to cooperate in obtaining a Qualified Domestic Relations Order (QDRO) providing for the payments to be made periodically by the Plan to [e.g., Wife] on behalf of the children. [e.g., Husband] understands that this distribution will be taxable income to him/her [add if desired and agrees that the sums to be distributed by the plan shall (within the limit of the available funds) be increased by an amount sufficient to satisfy the Plans mandatory federal and state income tax withholding obligations, if any, with respect to the payments]. The direct payments of support provided above shall have no effect on the determination of the community interest in the Plan.

This provision shall have no affect on any support arrearage that may have accrued before the date as of which payments under the QDRO are commenced.

For purposes of any applicable limit on wage assignment by QDRO, the amount to be distributed under a QDRO as support shall be deemed not to exceed _____ percent of [e.g., Husband's] disposable earnings, taking all other sources of income into account.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportProceduresPensions & Benefits
LawEmployee Retirement Income Security Act (ERISA)Participation & VestingQualified Domestic Relations Orders



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34-123 California Legal Forms--Transaction Guide § 123.220

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.220 Payment of Child Support Through Trust

[1] Comment

The form in [2], *below*, provides for the creation of a trust for the payment of child support. Child support trusts are not common, but might be appropriate in the case of a payor parent with extraordinarily high income, but whose high earning potential is likely to be limited to a short term, for example, a professional athlete. In such a case, a current transfer of property in trust sufficient to generate enough income to pay appropriate child support throughout the minority of the children might be the best way to ensure that a reasonable standard of living will be maintained.

Unlike alimony or spousal support, amounts payable for the support of children of the payor are not included in the payee parent's taxable income or deductible to the payor [*I.R.C. §§ 71(c), 215*].

The same is true with regard to payments made from trust income that the terms of a decree, separation agreement, or trust instrument fix as payable for the support of the children of the payor [*I.R.C. § 682(a)*; *see § 123.247*]. With regard to direct payments, unallocated payments for the support of both an ex spouse and children may be qualified for alimony tax treatment as family support [*I.R.C. § 71(c)(2)*; *Fam. Code §§ 92, 4066*; *see §§ 123.12, 123.21[2], 123.292*]. It is not clear whether a "family support" trust can be structured to make the payee parent taxable on unallocated distributions of income for the support of both an ex spouse and children. It may be argued that as long as no amount is fixed as for child support in any decree, agreement, or instrument, tax treatment under *Internal Revenue Code Section 682* should be available [*see I.R.C. § 682(a)*].

[2] FORM

Payment of Child Support Through Trust

Payment of Child Support by Trust

_____. _____ [Payor Parent, *e.g.*, Father] shall establish a child support trust (the Trust) naming the [child/children] of the parties as [beneficiary/beneficiaries] and [trustee, *e.g.*, an institutional fiduciary] as trustee.

[Concurrently with or Within _____ days of] the execution of this Agreement, _____ [e.g., Father] shall execute [a trust instrument or the trust instrument attached to this Agreement as Exhibit _____ and incorporated by reference], and shall transfer to the Trust [property having a current value of no less than \$_____ or the property set forth in Schedule _____, which is attached to this Agreement and incorporated by reference].

In addition to whatever other terms _____ [e.g., Father] may deem necessary and appropriate for the establishment and operation of the Trust, the trust instrument will provide that:

a. For the support and benefit of the minor [child/children] of the parties, the Trustee shall pay to

_____ [Payee Parent, *e.g.*, Mother] the sum of \$

_____ per

_____ [e.g., month] from the Trust. Payment shall be due by the

_____ [e.g., fifth day of the month] beginning

_____ [date]. [Add if more than one child: The allocation of the payments [between/among] the children shall be as set forth in Paragraph

_____ (see § 123.211)]. The amount of these payments shall be subject to future modification by the court or the parties.

b. Payments shall continue [with regard to each child] until

_____ [Specify terminating events, *e.g.*, the child dies, marries, is emancipated, attains the age of 18 years (or if the child is still a full-time student, until the child graduates from high school or attains the age of 19 years, whichever come first), or until further order of the court or see § 123.212].

c. The principal fund of the Trust shall, at all times, be sufficient to generate income to make the payments to

_____ [e.g., Mother]. However,

_____ [e.g., Mother]. shall be entitled to the above monthly amount whether or not there is sufficient income from which the payment may be made.

d.

_____ [e.g., Father] shall contribute all amounts as the Trustee may request, from time to time, to maintain an adequate principal fund to generate income sufficient to make the required payments. These contributions may be made in cash or by the transfer of income-producing securities or other property.

e. To the extent not paid from surplus income,

_____ [e.g., Father] shall be liable for the payment of the costs of the Trust and the fees of the Trustee.

f.

_____ [e.g., Father] shall not terminate the Trust before the occurrence of a terminating event as set forth above without the written consent of

_____ [e.g., Mother] and an order of the court.

g. On the occurrence of a terminating event as set forth above, the Trust shall

_____ [*specify remainder interest, e.g., terminate and the trust property shall revert to Father*].

_____ [e.g., Father] shall provide _____ [e.g., Mother] with a copy of the executed Trust deed or instrument.

Until the Trust is created and the Trustee makes the first payment to _____ [e.g., Mother],
 _____ [e.g., Father] shall be liable to make the payments required as set forth above directly to
 _____ [e.g., Mother].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawChild SupportProcedures



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34-123 California Legal Forms--Transaction Guide §§ 123.221-123.229

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 123.221[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Spousal Support Payment and Jurisdiction Provisions

34-123 California Legal Forms--Transaction Guide § 123.230

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.230 Acknowledgment of Separation and Provisions Regarding Temporary Spousal Support

[1] Comment--Use of Form

Set forth in [2], *below*, are provisions for temporary spousal support. Although it is not common, it is possible that the parties are still not ready to agree to a permanent support order by the time that they are otherwise ready to execute their settlement agreement. For further discussion of temporary spousal support, see § 123.31.

These provisions protect the supported spouse from any claim that the other's duty of support was suspended under *Family Code Section 4302*, which provides that a person is not liable for support of the person's spouse when the person is living separate from the spouse by agreement unless support is stipulated in the agreement. In the first set of alternative paragraphs, the supported spouse agrees to hold the supporting spouse harmless for his or her debts incurred during the period of separation in exchange for periodic payments of support. The second set of alternative paragraphs provide for no current support order, but clarify that by so agreeing, the parties do not intend to permanently waive their right to support from each other. The operation of the statute will achieve the same result in the absence of the clarifying language, but it is always preferred to directly express the intent of the parties [*see London Guarantee & Acci. Co. v. Industrial Acci. Com.*, (1919) 181 Cal. 460, 466467, 184 P. 864]. For further discussion, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 23, *Debt Liability and Division and Related Reimbursement Issues* (Matthew Bender).

[2] FORM

Acknowledgment of Separation and Provisions Regarding Temporary Spousal Support

Temporary Spousal Support

[*EITHER, if temporary support will be paid:*]

During the period of separation, [e.g., Husband] shall pay to [e.g., Wife] the sum of \$_____ monthly for her/his support. Payments shall be made on or before the [e.g., fifth] day of the month, beginning _____[date]. This obligation shall continue until further agreement of the parties or order of the court.

These payments shall be considered as complete satisfaction of [e.g., Husband's] duty to support [e.g., Wife]. Each party agrees to indemnify and hold the other harmless from any liability to third persons for debts and obligations incurred solely by the party during the period of separation.

These payments of temporary support shall be without prejudice to either party to seek any appropriate order or judgment regarding spousal support, including an order or judgment denying spousal support and permanently terminating jurisdiction to award spousal support, in any subsequent legal proceeding related to the marriage of the parties.

[OR, if no temporary support will be paid:]

During the period of separation, the parties' mutual duty to support each other shall be suspended, and neither shall have any right to receive support from the other. The duties of support shall remain suspended until further agreement of the parties or order of the court.

Each party agrees to indemnify and hold the other harmless from any liability to third persons for debts and obligations incurred solely by the party during the period of separation.

This mutual suspension of the duty of support shall be without prejudice to either party to seek any appropriate order or judgment regarding spousal support, including an order or judgment denying spousal support and permanently terminating jurisdiction to award spousal support, in any subsequent legal proceeding related to the marriage of the parties.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary SupportFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Spousal Support Payment and Jurisdiction Provisions

34-123 California Legal Forms--Transaction Guide § 123.231

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.231 Waivers of Spousal Support; Jurisdiction Terminated

[1] Comment--Use of Forms

The forms in [2] and [3], *below*, are alternate provisions for the waiver of spousal support by either or both parties to a marital settlement agreement, including permanent waivers of retention of jurisdiction. Form [2] is a provision for one party to permanently waive the right to support from the other. Form [3] provides for mutual waivers of each party's right to support from the other. In a marriage of long duration, such a provision could probably be ordered only on the agreement of the parties. *Family Code Section 4336* appears to require indefinite retention of the court's jurisdiction over support in a long-term marriage, except on written agreement of the parties to the contrary [*see Fam. Code § 4336(a)*].

For a general discussion of waivers of support, see § 123.30[2].

[2] Waiver by One Party

Waivers of Spousal Support; Jurisdiction Terminated--Waiver by One Party

Waiver of Spousal Support

_____. [*e.g.*, Wife] waives the right ever to obtain spousal support from [*e.g.*, Husband]. [*e.g.*, Wife] understands that by waiving spousal support, she/he will never be able to return to court to request spousal support ever again, regardless of any change of circumstances that may occur. This waiver is knowingly, intelligently, and voluntarily made. The court's jurisdiction to order spousal support to be paid by [*e.g.*, Husband] to [*e.g.*, Wife] at any time is terminated.

[3] Mutual Waivers

Waivers of Spousal Support; Jurisdiction Terminated--Mutual Waivers

Waiver of Spousal Support

_____. Each party waives the right to ever obtain spousal support from the other. Each understands that by waiving spousal support, he or she will never be able to return to court to request spousal support ever again, regardless of any change of circumstances that may occur. This waiver is knowingly, intelligently, and voluntarily made. The court's jurisdiction to order spousal support to be paid by either party to the other at any time is terminated.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportSpousal SupportJurisdictionFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Spousal Support Payment and Jurisdiction Provisions

34-123 California Legal Forms--Transaction Guide § 123.232

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.232 Reservation of Jurisdiction Only

[1] Comment--Use of Form

The form in [2], *below*, is a provision that retains jurisdiction to order spousal support in the future even though the parties agree that under the current circumstances, no spousal support is appropriate. They have agreed that neither is entitled to support under the standards of *Family Code Section 4320*.

The rule has been that if no spousal support is ordered, jurisdiction is lost unless retained expressly in the order or by agreement [*see Cochran v. Cochran (1970) 13 Cal. App. 3d 339, 344, 91 Cal. Rptr. 630*]. However, it appears that in a marriage of long duration under *Family Code Section 4336*, jurisdiction is retained indefinitely without the need for any express language in the judgment. But because of some uncertainty over the construction of this statute, it is recommended that express language reserving jurisdiction be included regardless of the length of the marriage, if the agreement of the parties is that jurisdiction should be reserved. Jurisdiction to order spousal support is considered in detail in Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 51, *Spousal Support Orders* (Matthew Bender).

Traditionally, a token amount, such as \$1.00 per year, was ordered for the purpose of reserving jurisdiction if the court or the parties felt that one party might be in need of support at a later date [*see In re Marriage of Forcum (1983) 145 Cal. App. 3d 599, 605, 193 Cal. Rptr. 596*; *In re Marriage of Boseman (1973) 31 Cal. App. 3d 372, 378, 107 Cal. Rptr. 232*]. However, jurisdiction may be retained by a simple recitation in the order without making a token award [*see, e.g., In re Marriage of Liss (1992) 10 Cal. App. 4th 1426, 1428, 13 Cal. Rptr. 2d 397*; *In re Marriage of Wells (1988) 206 Cal. App. 3d 1434, 1436, 254 Cal. Rptr. 185*]. Such a recitation has the advantage of clarifying that jurisdiction is being retained to order support to either party in the future, not just to the party to whom the dollar is awarded.

[2] FORM

Reservation of Jurisdiction Only

Jurisdiction Over Spousal Support

[To reserve jurisdiction to order support to both parties:]

_____. The parties agree that while no spousal support shall be currently paid by either to the other, the court shall retain jurisdiction to award spousal support to either party in the future _____ *[specify duration, e.g., until the party's death, remarriage, or further order of this court].*

[To reserve jurisdiction to order support for one party only:]

_____. Although no spousal support order in favor of [*e.g., Wife*] is currently necessary or appropriate, the court shall retain jurisdiction to award spousal support to him/her in the future _____ *[specify duration, e.g., until the party's death, remarriage, or further order of this court].*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Spousal Support Jurisdiction Family Law Marital Termination & Spousal Support Spousal Support Obligations General Overview Family Law Marital Termination & Spousal Support Spousal Support Procedures



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B. Spousal Support Payment and Jurisdiction Provisions

34-123 California Legal Forms--Transaction Guide § 123.233

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.233 Specific Amount Payable Periodically for Indefinite Period

[1] Comment--Use of Form

The forms in [2], *below*, set forth provisions for the payment of spousal support in a specific amount at different particular intervals. They illustrate the most frequently used method of providing for spousal support: periodic payments terminating only on death of either spouse or the remarriage of the supported spouse under *Family Code Section 4337* [see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 52, *Modification and Termination of Spousal Support Orders* (Matthew Bender)]. There are four alternatives regarding the time of payment: monthly, semi-monthly, biweekly, and weekly. For alternative provisions for termination that avoid some of the statutory effects of Section 4337, see §§ 123.264 and 123.265.

An order for support without a termination date contains within it a reservation of jurisdiction regardless of the length of the marriage [see *Dahlstet v. Dahlstet* (1969) 272 Cal. App. 2d 174, 178, 77 Cal. Rptr. 45 ; see also *Fam. Code § 4336* (court retains jurisdiction indefinitely if marriage is of long duration)]. Because no specific language of nonmodifiability is included, this order is subject to future modification or termination on changed circumstances. Any such termination or modification generally will not affect amounts that may have accrued before the date of the filing of the notice of motion or order to show cause to modify or terminate [*Fam. Code §§ 3591(a), (b), 3651(a), (c)*]. However, a supporting spouse who has been activated to United States military duty or National Guard service and deployed outside California may instead file and serve a notice of activation and request to modify the support order; in such a case, unless the court for good cause orders otherwise, any modification will be retroactive to the date of service of the notice of activation or the date of deployment, whichever is latest [*Fam. Code § 3651(c)(2),(g)(2)(B)*; see *Fam. Code § 3653(c)*].

For further discussion of spousal support orders in general, see § 123.30 and Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapter 51, *Spousal Support Orders* (Matthew Bender).

[2] FORM

Specific Amount Payable Periodically for Indefinite Period**Spousal Support**[*Monthly payments:*]

[*Supporting spouse, e.g., Husband*] shall pay spousal support to [*supported spouse, e.g., Wife*] in the sum of \$_____ per month, beginning _____[*date*]. Payments shall be due on or before the [*specify day, e.g., fifth*] of each month. Payments shall continue until the death of either party or the remarriage of [*e.g., Wife*] or until further order of the court.

[*Semi-monthly payments:*]

[*Supporting spouse, e.g., Husband*] shall pay spousal support to [*supported spouse, e.g., Wife*] in the sum of \$_____ twice each month, beginning _____[*date*]. Payments shall be due on or before the [*specify days, e.g., fifth and twentieth*] of each month. Payments shall continue until the death of either party or the remarriage of [*e.g., Wife*] or until further order of the court.

[*Biweekly payments:*]

[*Supporting spouse, e.g., Husband*] shall pay spousal support to [*supported spouse, e.g., Wife*] in the sum of \$_____ every other week, beginning _____[*date*]. Payments shall be due on or before [*specify day, e.g., Tuesday*] of each week in which payment is due. Payments shall continue until the death of either party or the remarriage of [*e.g., Wife*] or until further order of the court.

[*Weekly payments:*]

[*Supporting spouse, e.g., Husband*] shall pay spousal support to [*supported spouse, e.g., Wife*] in the sum of \$_____ every week, beginning _____[*date*]. Payments shall be due on or before [*specify day, e.g., Tuesday*] of each week. Payments shall continue until the death of either party or the remarriage of [*e.g., Wife*] or until further order of the court.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Spousal Support Obligations General Overview Family Law Marital Termination & Spousal Support Spousal Support Obligations Periodic Support



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 123 SPOUSAL AND CHILD SUPPORT PROVISIONS
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B. Spousal Support Payment and Jurisdiction Provisions

*34-123 California Legal Forms--Transaction Guide § 123.234***AUTHOR:** Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.**§ 123.234 Support for Limited Period; Jurisdiction Retained Indefinitely****[1] Comment--Use of Form**

The form in [2], *below*, is a spousal support provision for support for a limited period that includes specific language retaining jurisdiction indefinitely. The express language retaining jurisdiction is required to accomplish this result in a short-term marriage [*see Fam. Code § 4335*]. The language is probably not necessary to retain jurisdiction in a marriage of long duration under *Family Code Section 4336*. But because of some uncertainty as to the meaning and construction of that statute, this language should probably be included in all cases in which an open-ended reservation of jurisdiction is appropriate [*see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 51, Spousal Support Orders (Matthew Bender)*]. For similar orders that retain jurisdiction only for a limited time, see §§ 123.235 and 123.236.

The parties should include appropriate language as to whether support will terminate under *Family Code Section 4337* by operation of law before the stated termination date on the death of either party or the remarriage of the supported spouse [*see §§ 123.264, 123.265*]. An agreement for support for a fixed period may be construed as an agreement that the statute will not operate if the terminating event happens before the end of the period.

[2] FORM**Support for Limited Period; Jurisdiction Retained Indefinitely**

Spousal Support

_____. [*Supporting spouse, e.g., Husband*] shall pay spousal support to [*supported spouse, e.g., Wife*] in the sum of \$ _____ [per month or twice every month or every other week or every week]. for a period of [*e.g., five years*], beginning on _____ [date], and ending with the payment to be made on _____ [date]. Payments shall be due on or before [*day of month or week, e.g., the fifth day of each*

month]. The court shall reserve jurisdiction indefinitely to modify the amount of, extend the duration of, reinstate, or terminate support payments and jurisdiction over support on a proper showing made to the court. Spousal support shall/shall not terminate on the death of either party or the remarriage of [*e.g.*, Wife] before _____ [*restate above ending date*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Spousal Support Obligations General Overview Family Law Marital Termination & Spousal Support Spousal Support Obligations Temporary Support



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B. Spousal Support Payment and Jurisdiction Provisions

34-123 California Legal Forms--Transaction Guide § 123.235

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.235 Richmond Order; Support for Limited Period With Limited Reservation of Jurisdiction

[1] Comment--Use of Form

The form in [2], *below*, is a provision agreeing to a so-called "Richmond order" [see *In re Marriage of Richmond* (1980) 105 Cal. App. 3d 352, 164 Cal. Rptr. 381]. A Richmond order is one that sets spousal support for a presumptively fixed period based on evidence that the supported spouse will be self-supporting by the end of the period, but retains jurisdiction to modify the amount and to extend the term as long as the supported spouse acts before the date of termination [*In re Marriage of Prietsch & Calhoun* (1987) 190 Cal. App. 3d 645, 665-666, 235 Cal. Rptr. 587]. The effect of the order is to shift the burden to the supported spouse to show cause to extend the order [*In re Marriage of Stallworth* (1987) 192 Cal. App. 3d 742, 755, 237 Cal. Rptr. 829; *In re Marriage of Prietsch & Calhoun* (1987) 190 Cal. App. 3d 645, 665-666, 235 Cal. Rptr. 587]. The failure to achieve self-sufficiency by the expected date can constitute the change of circumstances necessary to support extension of the spousal support obligation [*In re Marriage of Pekar* (1985) 173 Cal. App. 3d 367, 369-372, 218 Cal. Rptr. 823].

A Richmond order differs from the limited-term/reserved jurisdiction provision *set forth in* § 123.234 in that, under a Richmond order, jurisdiction is reserved only until the termination date. If that date passes without the supported spouse having moved to extend the term, jurisdiction is terminated and the court has no further power to extend or order spousal support [see *In re Marriage of Prietsch & Calhoun* (1987) 190 Cal. App. 3d 645, 665, 235 Cal. Rptr. 587; *In re Marriage of Segel* (1986) 177 Cal. App. 3d 1030, 1040-1041, 223 Cal. Rptr. 430]. In the provision in § 123.234, jurisdiction is reserved indefinitely, so that the court may reinstate support after the period expires, even if the supported spouse has taken no action by that date to seek additional support.

It is important to specify that jurisdiction may be extended as long as the proceedings are initiated before the termination date. Otherwise, the court's order extending jurisdiction must be entered before the termination date or jurisdiction is lost [see *In re Marriage of Carter* (1994) 26 Cal. App. 4th 1024, 1030, 33 Cal. Rptr. 2d 1 (jurisdiction was to terminate on July 1; party moved to extend on June 17, but matter was not heard until September 29. Court's

ruling that jurisdiction terminated on July 1 and it had no jurisdiction to order spousal support on September 29 was affirmed based on lack of proper Richmond order language)].

The parties should include appropriate language as to whether support will terminate under *Fam. Code* § 4337 by operation of law before the stated termination date on the death of either party or the remarriage of the supported spouse [see §§ 123.264, 123.265]. An agreement for support for a fixed period may be construed as an agreement that the statute will not operate if the terminating event happens before the end of the period. For further discussion of Richmond orders, including possible limitations on their use, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 51, *Spousal Support Orders* ; Ch. 52, *Modification and Termination of Spousal Support Orders* (Matthew Bender) [see *Fam. Code* §§ 4320(l), 4330(b) (concerning goal that parties become self-supporting and need for admonition to that effect by court)]. For a form that sets forth the circumstances of the parties in reaching a support agreement, see § 123.293.

[2] FORM

Richmond Order; Support for Limited Period With Limited Reservation of Jurisdiction

Spousal Support

_____. [Supporting spouse, e.g., Husband] shall pay spousal support to [supported spouse, e.g., Wife] in the sum of \$_____ [period, e.g., per month] for a period of [duration, e.g., five years], beginning on _____[date], and ending with the payment to be made on _____[date]. Payments shall be due on or before [e.g., the fifth day of each month].

The court shall reserve jurisdiction to modify the amount of, extend the duration of, or extend jurisdiction over spousal support on a proper showing made to the court in proceedings initiated on or before _____[restate above ending date]. If support or jurisdiction over support is not extended beyond that date by motion or order to show cause brought on or before that date, the court's jurisdiction over spousal support shall terminate on that date, and thereafter, the court shall no longer have jurisdiction to award any additional spousal support to [supported spouse, e.g., Wife], regardless of any subsequent change in circumstances.

Spousal support shall/shall not terminate on the death of either party or the remarriage of [e.g., Wife] before _____[restate above ending date].

Legal Topics:

For related research and practice materials, see the following legal topics:

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34-123 California Legal Forms--Transaction Guide § 123.236

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.236 Fixed Amount for Limited Period; No Reservation of Jurisdiction to Extend Duration of Support

[1] Comment--Use of Form

The form in [2], *below*, is a provision for support for a limited term in which the court will not retain jurisdiction to extend support beyond the stated termination date. This provision is most appropriate in a short-term marriage [see *In re Marriage of Wilson* (1988) 201 Cal. App. 3d 913, 918-919, 247 Cal. Rptr. 522]. It would not be imposed in a long-term marriage absent an agreement of the parties [see *In re Marriage of Christie* (1994) 28 Cal. App. 4th 849, 859, 34 Cal. Rptr. 2d 135; Fam. Code § 4336]. Nevertheless, it is possible to validly include such a provision in an agreement involving a long-term marriage, although in such a marriage, the rules of construction in favor of retaining jurisdiction over spousal support make it a risky proposition [see *In re Marriage of Brown* (1995) 35 Cal. App. 4th 785, 787-791, 41 Cal. Rptr. 2d 506; see also Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., ch. 51, *Spousal Support Orders* (Matthew Bender)]. The payor-spouse should always be advised that there is some possibility that regardless of what language is used, a court will find it insufficient to terminate jurisdiction.

Unless the parties agree that the amount of support is to be nonmodifiable [see § 123.260], the court will have jurisdiction to modify the amount of support until the termination date. However, under this provision, the court will have no jurisdiction to extend the duration beyond that date, even if the supported spouse moves before that date to extend the duration [see *In re Marriage of Zlatnik* (1988) 197 Cal. App. 3d 1284, 1286, 1291, 243 Cal. Rptr. 454; *In re Marriage of Foreman* (1986) 183 Cal. App. 3d 129, 133-134, 228 Cal. Rptr. 4].

The parties should include appropriate language as to whether support will terminate under *Family Code Section 4337* by operation of law before the stated termination date on the death of either party or the remarriage of the supported spouse [see §§ 123.264, 123.265]. An agreement for support for a fixed period may be construed as an agreement that the statute will not operate if the terminating event happens before the end of the period.

[2] FORM

Fixed Amount for Limited Period; No Reservation of Jurisdiction to Extend Duration of Support

Spousal Support

_____. [Supporting spouse, e.g., Husband] shall pay spousal support to [supported spouse, e.g., Wife] in the sum of \$_____ [period, e.g., per month] for a period of [duration, e.g., five years], beginning on _____ [date], and ending with the payment due on _____ [date]. Payments shall be due on or before [e.g., the fifth of the month].

Spousal support shall be modifiable as to amount only by further order of this court on a showing of changed circumstances. However, jurisdiction to extend the duration of spousal support is terminated, and in no event, shall [e.g., Husband] be obligated to pay spousal support after _____ [restate above ending date], regardless of whether proceedings are commenced before or after that date.

Spousal support shall/shall not terminate on the death of either party or the remarriage of [e.g., Wife] before _____ [restate above ending date].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Spousal Support Jurisdiction Family Law Marital Termination & Spousal Support Spousal Support Obligations Periodic Support



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34-123 California Legal Forms--Transaction Guide § 123.237

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.237 Support for Contingent Period of Time

[1] Comment--Use of Form

The form in [2], *below*, is a provision for spousal support for a contingent period of time until the happening of some event. The event should be one other than the death of either party or the remarriage of the supported spouse, which are events that terminate support by operation of law absent an agreement to the contrary [*see Fam. Code § 4337*].

In an order to pay support for a contingent period of time, liability terminates on the occurrence of that contingency. The order should contain a requirement that the supported spouse notify the supporting spouse of the happening of the contingency [*Fam. Code § 4334(a)*; *see § 123.294*]. If proper notice is not given, the supported spouse must refund all overpayments after first applying such overpayments to any support payments that are in default [*Fam. Code § 4334(b)*].

The parties should also address whether the amount of support is to be nonmodifiable [*see § 123.260*], whether support is to terminate on the death of either party or the remarriage of the supported spouse before the happening of the contingency [*see §§ 123.264, 123.265*], and whether the court will have jurisdiction to eliminate the contingency limitation.

[2] FORM

Support for Contingent Period of Time

Spousal Support

_____. [*Supporting spouse, e.g., Husband*] shall pay spousal support to [*supported spouse, e.g., Wife*] in the sum of \$ _____ [*e.g., per month*] beginning _____ [*date*], and continuing thereafter until such time as [*e.g., Wife*] [*specify contingency, e.g., begins receiving her \$1,000 monthly payments under her annuity*]

contract]. [E.g., Wife] shall notify [e.g., Husband] within _____ days of the happening of this event. Payments shall be due on or before [e.g., the fifth of each month].

[Either]

The court shall retain jurisdiction to modify the amount of spousal support payments until the happening of the contingent event and change the effect of the happening of the contingent event and to provide for support beyond the date on which the event occurs.

[Or]

The court shall not retain jurisdiction to modify the amount of spousal support payments until the happening of the contingent event or to change in any way the effect of the happening of the contingent event or to provide for support beyond the date on which the event occurs.

Spousal support shall/shall not terminate on the death of either party or the remarriage of [e.g., Wife] before the occurrence of the specified terminating event.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Spousal Support Obligations Periodic Support



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B. Spousal Support Payment and Jurisdiction Provisions

34-123 California Legal Forms--Transaction Guide § 123.238

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.238 Substantive Step-Down or Step-Up in Amount

[1] Comment--Use of Form

The form in [2], *below*, may be used as either a step-down or step-up spousal support order; that is, one that requires payment of a specified amount for a fixed period and specified lesser or greater amounts thereafter for an additional period or periods.

Such an order must address the question of jurisdiction at the end of the last term specified in the order. Jurisdiction may either be terminated without further recourse on that date or retained indefinitely after the date passes, or terminated on that date unless the supported spouse moves to extend duration before that date [*see* Richmond Order in § 123.235]. Whether the amounts of the various levels of payments are subject to future modification should also be addressed [*see In re Marriage of Jones (1990) 222 Cal. App. 3d 505, 509-511, 271 Cal. Rptr. 761* (step-down order is not per se nonmodifiable)], as should the question of whether support should terminate on the death of either party or the remarriage of the supported spouse before the last date on which payments are due [*see Fam. Code § 4337*]. Nonmodifiability must be by agreement and expressed in the order [*Fam. Code §§ 3591(c), 3651(d)*]. Otherwise, the order is subject to future modification and termination [*Fam. Code §§ 3591(a), 3651(a)*].

For further discussion of step-down spousal support orders, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapter 51, *Spousal Support Orders* (Matthew Bender).

[2] FORM

Substantive Step-Down or Step-Up in Amount

Spousal Support

_____. [*Supporting spouse, e.g., Husband*] shall pay to spousal support to [*supported spouse, e.g., Wife*] as follows:

The sum of \$_____ [e.g., per month] for a period of [duration, e.g., two years], beginning on _____ [date], and ending with the payment due on _____ [date].

[Repeat the following paragraph for as many steps as desired.]

Thereafter, the sum of \$_____ [e.g., per month] for a period of [duration, e.g., two years], beginning on _____ [date], and ending with the payment due on _____ [date].

The amount of spousal support payments for these periods shall/shall not be subject to future modification or termination.

Spousal support shall/shall not terminate on the death of either party or the remarriage of [e.g., Wife] before _____ [restate ending date of last period of support].

[Either: to terminate duration jurisdiction:]

Jurisdiction to extend the duration of spousal support is terminated, and in no event, shall [Supporting Spouse, e.g., Husband] be obligated to pay spousal support after the date of the last payment stated above, regardless of whether proceedings are commenced before or after that date.

[OR: to provide for indefinite retention of duration jurisdiction:]

Jurisdiction to extend the duration of spousal support is retained indefinitely, and payments may be ordered beyond the date of the last payment stated above on a proper showing made to the court.

[OR: to provide for Richmond extension of duration jurisdiction:]

Jurisdiction to extend the duration of spousal support is retained on a proper showing made to the court in proceedings initiated on or before the date of the last payment stated above. If support or jurisdiction over support is not extended beyond that date by motion or order to show cause brought on or before that date, the court's jurisdiction over spousal support shall terminate on that date, and thereafter, the court shall no longer have jurisdiction to award any additional spousal support to [Supported Spouse, e.g., Wife], regardless of any subsequent change in circumstances that might occur.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures



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B. Spousal Support Payment and Jurisdiction Provisions

34-123 California Legal Forms--Transaction Guide § 123.239

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.239 Amount as Percentage of Income

[1] Comment--Use of Form

The form in [2], *below*, is a provision making spousal support a percentage of the supporting spouse's income, rather than a fixed dollar amount. Support based on a percentage of income may be appropriate if the payor's income is subject to fluctuations (such as real estate sales, or other commissions).

The form may also be appropriate under some circumstances if the payor's income is due to increase substantially because he or she is about to obtain a professional degree and a highly compensated position. Although there is no basic right of one former spouse to share in the increased wealth of the other after dissolution [*In re Marriage of Hopwood* (1989) 214 Cal. App. 3d 1604, 1607-1608, 263 Cal. Rptr. 401 ; see *Modglin v. Modglin* (1966) 246 Cal. App. 2d 411, 417, 54 Cal. Rptr. 582 (Fleming, J., concurring)], there are situations in which such a sharing is appropriate and likely to be ordered by the court. One situation is if the supported spouse contributed to the attainment of an education, training, a career position, or a license by the supporting party [*Fam. Code* § 4320(b)]. Another is if the amount of support that the supporting spouse can pay at the time of separation is insufficient to meet the reasonable needs of the supported spouse as measured by the standard of living attained during marriage [see *In re Marriage of Hoffmeister* (1987) 191 Cal. App. 3d 351, 363-364, 236 Cal. Rptr. 543 (" *Hoffmeister II*"); *In re Marriage of Hoffmeister* (1984) 161 Cal. App. 3d 1163, 1172-1175, 208 Cal. Rptr. 345 ("Hoffmeister I")]. On these facts, the parties may agree to a support order that provides for a percentage of the supporting spouse's future income.

Use of this form will require the parties to be in regular contact in order to exchange financial information, and this may not be desirable or feasible if there is substantial friction between them. Additionally, the supporting spouse may not want to inform the other of his or her future earnings, and may resist supplying the required information. Therefore, it is recommended that basing support on a percentage of income be used only if the parties are acting in good faith and likely to cooperate. The alternative is to use a substantive step-up provision with support amounts increasing to reflect the payor's anticipated increased ability to pay [see § 123.238].

This provision must contain specific language as to what is considered income to which the percentage applies, particularly in the case of a self-employed payor. Forms for use in defining income with regard to child support are *set forth in § 123.203*, and may be adapted for use in defining income for spousal support purposes. Appropriate duration, jurisdiction, and modification provisions should also be included. For related provisions setting a fixed dollar amount of support and providing for a percentage of future income, see § 123.240.

[2] FORM

Amount as Percentage of Income

Spousal Support

[*Supporting spouse, e.g., Husband*] shall pay as spousal support to [*Supported spouse, e.g., Wife*] [*period, e.g., each month*] an amount equal to _____ percent of his/her [gross or net] monthly income for the [*e.g., month*] preceding payment. Payments shall be due on the [*e.g., fifth day of each month*], beginning _____ [*date*], and shall continue _____ [until further order of the court or for a period of _____ (*duration, e.g., three years*), ending with the payment due on _____ [*date*].

[Gross or Net] monthly income shall include [*specify, e.g., gross receipts from Husband's business, Widgets, Associated without deduction for any business expenses*]. On request, [*e.g., Husband*] shall provide proof of his/her income. Proof shall consist of _____ [*e.g., payroll statements, annual or quarterly tax returns*], or other evidence of income as agreed to by the parties.

The percent of income to be paid as spousal support shall/shall not be subject to future modification or termination.

Spousal support shall/shall not terminate on the death of either party or the remarriage of [*e.g., Wife*].

[*If support is for a limited term, include one of the following:*]

[*EITHER: to terminate duration jurisdiction:*]

Jurisdiction to extend the duration of spousal support is terminated, and in no event, shall [*Supporting Spouse, e.g., Husband*] be obligated to pay spousal support after the date of the last payment stated above, regardless of whether proceedings are commenced before or after that date.

[*OR: to provide for indefinite retention of duration jurisdiction:*]

Jurisdiction to extend the duration of spousal support is retained indefinitely, and payments may be ordered beyond the date of the last payment stated above on a proper showing made to the court.

[*OR: to provide for Richmond extension of duration jurisdiction:*]

Jurisdiction to extend the duration of spousal support is retained on a proper showing made to the court in proceedings initiated on or before the date of the last payment stated above. If support or jurisdiction over support is not extended beyond that date by motion or order to show cause brought on or before that date, the court's jurisdiction over spousal

support shall terminate on that date, and thereafter, the court shall no longer have jurisdiction to award any additional spousal support to [*Supported Spouse, e.g., Wife*], regardless of any subsequent change in circumstances that might occur.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures



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B. Spousal Support Payment and Jurisdiction Provisions

*34-123 California Legal Forms--Transaction Guide § 123.240***AUTHOR:** Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.**§ 123.240 Percentage of Potential Future Additional Income****[1] Comment--Use of Form**

The form in [2], *below*, provides for additional spousal support as a percentage of future income. It may be used in conjunction with a basic order for a fixed amount of support payable periodically [see § 123.233]. A spousal support order may be fashioned to provide for payment of a percentage of future income, the receipt of which or the amount of which is uncertain at the time when the order is made. For example, if the supporting spouse customarily receives periodic and substantial employment bonuses. In such a case, a percentage of the bonuses, when received, may be made payable to the supported spouse as additional support [*In re Marriage of Smith Ostler* (1990) 223 Cal. App. 3d 33, 41-42, 46-50, 272 Cal. Rptr. 560] .

[2] FORM**Percentage of Potential Future Additional Income**

Additional Spousal Support

_____. As additional spousal support, [supporting spouse, e.g., Husband] shall pay to [supported spouse, e.g., Wife] _____ percent of the net amount of all supplemental income received from _____ [specify source of contingent future income, e.g., his employment with Giantco, Inc.]. This percent shall/shall not be modifiable on a showing of changed circumstances. No later than _____ [date] of each year, beginning in [e.g., 2000], [e.g., Husband] shall provide [e.g., Wife] with a written accounting of all supplemental income received during the previous calendar year and shall attach a copy of his/her prior year W-2 form received from his/her employer. Payment of _____ percent of the income shall accompany the accounting. However, [e.g., Husband], at his/her option may pay _____ percent of supplemental income to [e.g., Wife] when received. For purposes of this order, supplemental income means _____ [specify, e.g., all monetary compensation received by Husband from Giantco, Inc., regardless of how designated, except for his base annual salary].

_____[Specify terminating events, e.g., this provision shall terminate when Husband's other spousal support obligations terminate under this agreement, or on termination of his employment with Giantco Inc., whichever is earlier].

Legal Topics:

For related research and practice materials, see the following legal topics:

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B. Spousal Support Payment and Jurisdiction Provisions

*34-123 California Legal Forms--Transaction Guide § 123.241***AUTHOR:** Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.**§ 123.241 Lump-Sum Payment****[1] Comment--Use of Form**

The form in [2], *below*, is an alternative spousal support payment provision requiring the supporting spouse to make a single lump sum payment. A lump-sum payment is appropriate if the parties wish to settle any obligation for support with a single payment and avoid an ongoing relationship. Lump-sum payments, however, will subject the parties to additional federal and state tax liability for "excess front loading," which is designed to prevent the parties from disguising sums that are actually in settlement of their property rights as alimony [*see* § 123.53]. Therefore, lump-sum spousal support should not be considered unless the parties are willing to accept the tax consequences of front-loading.

[2] FORM**Lump-Sum Payment**

Spousal Support

_____. In complete settlement of his/her duty of support, [*supporting spouse, e.g., Husband*] agrees to pay [*supported spouse, e.g., Wife*] the sum of \$ _____ in a single payment, due on _____ [*date*]. On receipt of payment, neither party shall have the right to request any further support from the other, and no court shall have jurisdiction with regard to spousal support for any purpose, including jurisdiction to impose additional support obligations or to modify the amount of the support payment required by this Paragraph. [*Add if desired* The obligation to make this payment shall survive the death of _____ (*supporting spouse, e.g., Husband*)]. [*Add to avoid alimony tax treatment* The amount of the payment shall be neither deductible to _____ (*supporting spouse, e.g., Husband*) nor taxable income to _____ (*supported spouse, e.g., Wife*)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportSpousal SupportObligationsLump Sum SupportFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Spousal Support Payment and Jurisdiction Provisions

34-123 California Legal Forms--Transaction Guide § 123.242

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.242 Direct Payment to Creditors

[1] Comment--Use of Forms

The forms in [2]-[4], *below*, are various provisions for payment of spousal support in the form of payment to a creditor of the supported spouse [see *Fam. Code § 2023(a)*]. Form [2] is for use to require the supporting spouse to pay an existing debt of the supported spouse. Form [3] requires the supporting spouse to pay the educational expenses of the supported spouse, and Form [4] requires payment of extraordinary uninsured medical expenses. Any of these provisions may be adapted to provide for reimbursement to the supported spouse rather than direct payment to creditors.

Even in the absence of an agreement, the court, on a determination that payment of an obligation of a party would benefit either party or a child, may order one party to pay the obligation directly to the creditor [*Fam. Code § 2023(a)*]. The creditor will have no right to enforce the order directly against the spouse making the payment; but the creditor's rights are in no way affected by the order [*Fam. Code § 2023(b)*]. Ordering direct payment protects the supporting spouse by assuring that the debt is paid [see *In re Marriage of Higgason (1973) 10 Cal. 3d 476, 488, 110 Cal. Rptr. 897, 516 P.2d 289*, *overruled*, *17 Cal. 3d 342, 131 Cal. Rptr. 3 (disapproved on another point in In re Marriage of Dawley (1976) 17 Cal. 3d 342, 352, 131 Cal. Rptr. 3, 551 P.2d 323*)].

Direct payments to creditors for the benefit of the supported spouse can be structured as part of the supporting spouse's spousal support obligation [*In re Marriage of Smith (1978) 79 Cal. App. 3d 725, 748, 145 Cal. Rptr. 205*] . If all of the applicable requirements are met, payments to a third party on behalf of a spouse may properly be characterized as spousal support and given alimony tax treatment [Temp. Treas. Reg. § 1.71-1T(b), Q-6, Q-7; see *I.R.C. § 71(b)(1)(A)*]. For further discussion of alimony tax treatment, see § 123.51 [see also Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 160, *Tax Effects of Dissolution* (Matthew Bender)].

Provision may be made for either overdue or future obligations [see *In re Marriage of Chala (1979) 92 Cal. App. 3d 996, 1000, 155 Cal. Rptr. 605*] . With regard to periodic obligations to fall due in the future, the payments to creditors

plus payments directly to spouse should constitute a reasonable total spousal support amount [*In re Marriage of Chala* (1979) 92 Cal. App. 3d 996, 1002, 155 Cal. Rptr. 605 ; see *In re Marriage of Garcia* (1990) 224 Cal. App. 3d 885, 892, 274 Cal. Rptr. 194 (payment of continuing debt to third party is form of spousal support if related to living expenses); *In re Marriage of Smith* (1978) 79 Cal. App. 3d 725, 748, 145 Cal. Rptr. 205] .

Characterizing direct payment of past obligations incurred during marriage (community obligations) as spousal support is not recommended. Such a provision constitutes part of the division of the parties' community estate, as well as a provision for spousal support, and may be inappropriate [see *In re Marriage of Brown* (1976) 15 Cal. 3d 838, 848, 126 Cal. Rptr. 633, 544 P.2d 561 ; see also *In re Marriage of Marx* (1979) 97 Cal. App. 3d 552, 557-558, 159 Cal. Rptr. 215 ; *In re Marriage of Chala* (1979) 92 Cal. App. 3d 996, 1003, 155 Cal. Rptr. 605] . Because the parties are entitled to an equal division of the net community estate (community assets minus community obligations) [see *In re Marriage of Fonstein* (1976) 17 Cal. 3d 738, 748, 131 Cal. Rptr. 873, 552 P.2d 1169] , any direct payment of community debts must be in lieu of part or all of a reasonable spousal support obligation, rather than in addition to it [see *In re Marriage of Marx* (1979) 97 Cal. App. 3d 552, 558, 159 Cal. Rptr. 215] . Further, alimony tax treatment will be denied unless there is no liability to make the payment for any period after the death of the payee spouse [I.R.C. § 71(b)(1)(D)], which is usually not the intent of the payee spouse with regard to an existing community debt [see *In re Marriage of Marx* (1979) 97 Cal. App. 3d 552, 558-559, 159 Cal. Rptr. 215 ; see also Fam. Code § 4337].

An additional tax-related problem with payment of existing debt (either community or separate) is that it may constitute excessive front-loading of alimony in the first years of divorce and be subject to the recapture rules [see I.R.C. § 71(f)]. For further discussion, see § 123.53[2] [see also Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 160, *Tax Effects of Dissolution* (Matthew Bender)].

[2] Existing Debt

Direct Payment to Creditors--Existing Debt

Payment of Debt

_____. As additional spousal support, [supporting spouse, e.g., Husband] shall pay directly to _____ [name of creditor] on behalf of [supported spouse, e.g., Wife] her/his current debt in the amount of \$_____ for [specify, e.g., home furnishings for her new residence]. This payment shall be made on or before _____ [date].

[3] Educational Expenses

Direct Payment to Creditors--Educational Expenses

Payment of Educational Expenses

_____. As additional spousal support, [supporting spouse, e.g., Husband] shall pay directly to [educational institution] on behalf of [supported spouse, e.g., Wife] the actual cost of [specify, e.g., Wife's tuition and fees], beginning _____ [date], and continuing as long as [e.g., Wife] is a full-time student in good standing and making satisfactory progress toward a degree, but no later than _____ (date). [E.g., Husband's] total obligation for additional support under this Paragraph shall not exceed \$_____. Payments shall be made on or before _____ [specify, e.g., the due date for payment of tuition each semester as established by the University of California]. [E.g., Husband's] liability to make any payment under this Paragraph shall terminate should [e.g., Wife] die or remarry before this date.

[Add if desired:]

[*E.g.*, Wife] agrees to provide [*e.g.*, Husband] with a transcript at the end of every term that she/he completes, or to sign the necessary documents so that [*e.g.*, Husband] can obtain a transcript directly. If the transcript does not establish that [*e.g.*, Wife] completed the term as a full-time student with passing grades, [*e.g.*, Husband] shall not be obligated to make this payment for the succeeding term.

[4] Extraordinary Medical Expenses

Direct Payment to Creditors--Extraordinary Medical Expenses

Payment of Extraordinary Medical Expenses

_____. As additional spousal support, [*supporting spouse, e.g.*, Husband] shall pay on behalf of [*supported spouse, e.g.*, Wife] the actual cost of all extraordinary medical expenses to the extent that the expenses are not covered by insurance or other health care coverage. "Extraordinary medical expenses" are defined as [*specify, e.g.*, the costs of all reasonable medical, surgical, nursing, hospitalization, and medication expenses, including dental and vision care]. [*E.g.*, Husband's] obligation under this Paragraph shall not exceed \$_____ annually. Further, [*E.g.*, Husband's] liability to make any payment under this Paragraph shall terminate on [*e.g.*, Wife's] death or remarriage.

Monthly Statement and Medical Bills

[*e.g.*, Wife] shall present [*e.g.*, Husband] with a monthly statement listing all extraordinary expenses incurred for the previous month. [*e.g.*, Husband] shall directly pay the provider who rendered the medical services. Payment shall be made within _____ days of receiving the statement. [*E.g.*, Husband] shall incur no liability for extraordinary medical expenses under the above Paragraph _____ unless the expense is set forth on a monthly statement and properly presented to him/her. [*E.g.*, Wife] will, on [*e.g.*, Husband's] request, furnish him/her with bills or copies of the bills verifying any extraordinary medical expenses set forth on a monthly statement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Spousal Support Payment and Jurisdiction Provisions

34-123 California Legal Forms--Transaction Guide § 123.243

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.243 Payment of Mortgage Obligation

[1] Comment--Use of Form

The form in [2], *below*, provides for the supporting spouse to pay a monthly amount equal to the amount of the supported spouse's monthly mortgage payment. Spousal support will be reduced by that amount on the sale or retirement of the mortgage on the parties' former dwelling. It is designed for marital settlement agreements in which the supported spouse acquires the family dwelling as part of the equal division of the community property, or is granted the exclusive right to occupy it until it is sold or some other specified event occurs, usually the children attaining the age of majority. The mortgage payment may be made directly to the mortgagee, or included within the monthly payment to the supported spouse.

If the supporting spouse does not retain an interest in the former marital residence, the mortgage payments may be structured to receive alimony tax treatment under the Internal Revenue Code, meaning that the amount will be income to the supported spouse and deductible to the supporting spouse [*I.R.C. §§ 71(b)(1), (e), 215; Temp. Treas. Reg. § 1.71-1T(b), A-6*]. The payments must meet all of the other definitions of alimony, including the requirement that the obligation to make the mortgage payment terminate on the death of the supported spouse [*see I.R.C. § 71(b)(1)(D)*]. If the supporting spouse retains an interest in the former residence, the mortgage payments will not be given alimony treatment [*Temp. Treas. Reg. § 1.71-1T(b), A-6*]. In this case, having retained ownership, the supporting spouse is not so much providing support to the payee as preserving his or her own investment or property interest.

[2] FORM

S Payment of Mortgage Obligation

Payment of Mortgage

_____. Under Paragraph _____ of this Agreement, [*supported spouse, e.g., Wife*] has been granted the right to sole and

exclusive occupancy of the family dwelling for a limited period of time. The dwelling is subject to a [*specify encumbrance, e.g., deed of trust or mortgage*] securing a note that provides for monthly payments in the amount of \$_____. The note will be paid in full on _____[*date*].

_____ [*Either* The amount of support otherwise provided for in this agreement includes a sum allocated to the full monthly payment on the note, and _____ (*e.g., Wife*) shall make the monthly payments on that note from that amount. *or* _____ (*Supporting spouse, e.g., Husband*) shall make the monthly payment on this note directly to the mortgagee on or before the _____ (*e.g., fifth*) day of each month until the above-stated date.]

[*Include if monthly support payment includes amount allocated to mortgage payment.*]

Reduction of Support

On the earlier of (1) the above-stated date on which the mortgage obligation will be retired, or (2) the date on which [*e.g., Wife*] is no longer entitled to the exclusive occupancy of the family residence under Paragraph _____ of this agreement, or (3) the date of any sale of the family residence, [*e.g., Husband's*] monthly support obligation shall be reduced to \$[*amount of support minus amount allocated to mortgage payment*]. However, [*e.g., Husband*] shall not be entitled to a reduction if he/she is in arrears in making the support payments required by this Agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Spousal Support Obligations General Overview Family Law Marital Termination & Spousal Support Spousal Support Procedures



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B. Spousal Support Payment and Jurisdiction Provisions

*34-123 California Legal Forms--Transaction Guide § 123.244***AUTHOR:** Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.**§ 123.244 Payment of Spousal Support by Qualified Domestic Relations Order (QDRO)****[1] Comment**

The form in [2], *below*, is a provision for use in a marital settlement agreement to obtain spousal support payments directly from the payor's interest in an employee benefit plan governed by ERISA [*see* 29 U.S.C. § 1001 *et seq.* (Employee Retirement Income Security Act of 1974)], such as a pension or a 401k plan. It requires the entry of a Qualified Domestic Relations Order (QDRO), which is a court order directed to the plan and specifying payments that are to be made to the employee-participant's spouse or children, referred to as alternate payees [*see* I.R.C. § 414(p); ch. 122]. Under the 1984 Retirement Equity Act (REA), the assignment of pension interests is not limited to property divisions, but can also include alimony and child support obligations [I.R.C. § 414(p)(1)(B)(i)].

For further discussion, see the Comment to § 123.219. For discussion of ERISA and QDRO's, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapter 213, *Employee Benefits Provisions in Marital Settlement Agreements* (Matthew Bender).

[2] FORM**Payment of Spousal Support by Qualified Domestic Relations Order (QDRO)**

Payment of Spousal Support by QDRO

The parties have ascertained that the spousal/family support due under Paragraph _____ of this Agreement may be paid directly from [supporting spouse, e.g., Husband's] share of the benefits provided by _____ [name of employee benefit plan] (the Plan). The parties agree to cooperate in obtaining a Qualified Domestic Relations Order (QDRO) providing for the payments to be made periodically by the Plan to [supported spouse, e.g., Wife] as alternate payee. The parties understand that this distribution will be made by the Plan with pre-tax dollars, that it is neither income to nor deductible by [supporting spouse, e.g., Husband], and that it is reportable by the plan as taxable income

to [*supported spouse, e.g., Wife*] to the extent not rolled over to another eligible retirement plan or Individual Retirement Account. The direct payments of support provided above shall have no effect on the determination of the community interest in the Plan.

[*Include if attorney fees are to be included.*]

The periodic payments for support shall be increased by \$_____ per month to be applied toward payment of attorney fees owed by [*supporting spouse, e.g., Husband*] to [*supported spouse, e.g., Wife*]. These fees are in the nature of, and awardable as spousal/family support. This component of the periodic payments shall terminate once a total of \$_____ has been paid from the Plan on account of attorney fees.

For purposes of any applicable limit on wage assignment by QDRO, the amount to be distributed under a QDRO as support shall be deemed not to exceed _____ percent of [*supporting spouse, e.g., Husband's*] disposable earnings, taking all other sources of income into account.

This provision shall have no effect on any support arrearage that may have accrued before the date as of which payments under the QDRO are commenced.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Spousal Support Obligations General Overview Family Law Marital Termination & Spousal Support Spousal Support Procedures Pensions & Benefits Law Employee Retirement Income Security Act (ERISA) Participation & Vesting Alienation & Assignment of Benefits



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B. Spousal Support Payment and Jurisdiction Provisions

34-123 California Legal Forms--Transaction Guide § 123.245

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.245 Health Care Coverage Provisions

[1] Comment--Use of Forms

The forms in [2]-[4], *below*, are various provisions regarding health care coverage for the supported spouse. Form [2] requires the supporting spouse to incur the entire cost of procuring health care coverage for the supported spouse. Form [3] is a waiver of any obligation of one spouse to procure health care coverage for the other.

Form [4] is for use under COBRA [the Consolidated Omnibus Budget Reconciliation Act of 1985; Pub. L. 99-272]. Most employer-provided health care plans terminate dependent coverage for a former spouse once a divorce is final. However, COBRA requires the employer to offer continuing coverage to "qualified beneficiaries," such as a former spouse, on the occurrence of a "qualifying event," such as dissolution of marriage [29 U.S.C. §§ 1161, 1163(3), 1167(3)(a)(i)]. Continuation coverage must be offered for a period of 36 months [29 U.S.C. § 1162(2)(A)(iv)], and the employer may require payment of a premium for any period of continuation [29 U.S.C. § 1162(3)].

The first paragraph of Form [4] requires the supporting spouse to maintain employer-provided health care coverage until the decree of dissolution is final. If the spouse's coverage terminates before that time, it may be impossible for her or him to elect continuing coverage under COBRA [*see* 29 U.S.C. § 1167(3)(a) (COBRA coverage requires that person be covered under plan on day before qualifying event)]. The second paragraph requires the supporting spouse to assist in making an election for COBRA coverage and allocates the payment of premiums. COBRA is extremely complex and is considered in detail in Bacon, Prater & Tucker, *Employee Benefit Guide* (Matthew Bender).

Any health care coverage provision should be carefully drafted to define the scope of the obligation. There are many new and different health care delivery systems available, such as health maintenance organizations (HMO's), so that the use of the term "insurance" is no longer recommended [*see Fam. Code § 3750* (health care coverage definitions regarding child support)]. Whether dental, vision, and prescription medication plans are to be included within the obligation should also be considered. Further, any limitations on the financial obligation should be carefully considered.

An open-ended obligation may become an impossible burden to the supporting spouse due to the continually rising costs of coverage. Conversely, a monetary limit on the supporting spouse's obligation may mean that the coverage will no longer be required because the cost will soon exceed the limit.

Payment of health coverage costs is a form of spousal support, and the obligation to make the payments will terminate by operation of law on the death of the supported spouse unless the agreement expressly continues the payments. A general nonmodification clause will not be sufficient to continue the obligation [*In re Marriage of Benjamins* (1994) 26 Cal. App. 4th 423, 433, 31 Cal. Rptr. 2d 313 ; see Fam. Code § 4337].

[2] Supporting Spouse to Provide Coverage

Supporting Spouse to Provide Health Care Coverage

Payment of Health Care Coverage

_____. As additional spousal support, [*supporting spouse, e.g., Husband*] shall pay the actual costs of obtaining appropriate health care coverage for [*supported spouse, e.g., Wife*]. "Health care coverage" means a plan or plans providing for the delivery of health care services by insurance coverage, a fee for service, health maintenance organization, preferred provider organization, or any other type of health care delivery system. It includes prescription medications, vision care and dental care. [*E.g., Husband*] may elect to pay all costs required under this Paragraph directly to each plan providing health care coverage or to reimburse [*e.g., Wife*] at his/her option. Payment shall be made within _____ days of receiving a notice of premium or other amount due from [*e.g., Wife*]. The selection of appropriate health care coverage shall be made by [*Husband or Wife*]. [*Add if desired: The annual cost of all health care coverage required under this Paragraph shall not exceed \$_____.*]

[3] Mutual Waivers

Waivers of Health Care Coverage

Waivers of Health Care Coverage

Neither party shall be obligated to procure, pay for, or otherwise maintain any plan or policy of health care coverage or insurance for the benefit of the other party.

[4] COBRA: Maintenance of Coverages, Election, and Payment of Premiums

COBRA: Maintenance of Health Care Coverages, Election, and Payment of Premiums

COBRA: Maintenance of Health Care Coverage

The parties affirm that on account of their marriage, [*supported spouse, e.g., Wife*] is a covered family member under the following health care plans provided by [*supporting spouse, e.g., Husband's*] employment: [*specify all medical, dental, vision, prescription medicines, and other plans through which coverage was provided to supported spouse*]. These coverages are dependent on the existence of the marital relationship and will terminate on the termination of their marriage. [*E.g., Husband*] shall maintain [*e.g., Wife's*] coverage under all of the above plans, and shall pay all costs associated with this maintenance, until the termination of the parties' marriage.

COBRA: Election and Payment of Premium

Immediately on entry of the judgment of dissolution of the parties' marriage, [*supporting spouse, e.g., Husband*] shall notify his/her employer and all employer-provided health care plan administrators of the fact and date of judgment. [

E.g., Husband] shall obtain all forms and other documents and information necessary, and shall provide all requested assistance, to allow [*e.g.*, Wife] to elect continuation coverage under all such plans under the requirements of 29 *United States Code Section 1161* (COBRA). [*specify, e.g.*, Husband] will pay the cost of all premiums assessed with regard to continuation health care coverages under COBRA.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsTypesMedical SupportFamily LawChild SupportProcedures



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B. Spousal Support Payment and Jurisdiction Provisions

34-123 California Legal Forms--Transaction Guide § 123.246

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.246 Provisions for Support After Death of Supporting Spouse

[1] Comment--Use of Forms

The forms in [2]-[4], *below*, are spousal support provisions intended to continue support after the death of the supporting spouse [*see Fam. Code § 4360; In re Marriage of O'Connell* (1992) 8 Cal. App. 4th 565, 572, 10 Cal. Rptr. 2d 334 ; *cf. Fam. Code § 4337* (support generally terminates on death of supporting spouse)]. In structuring spousal support, the court may order the supporting spouse to purchase an annuity [*see* [2], *below*], maintain life insurance [*see* [3], *below*], or establish a trust [*see* [4], *below*] for the benefit of the supported spouse so that the supported spouse will not be left without means for support if spousal support is otherwise terminated by the death of the supporting spouse [*Fam. Code § 4360(a)*]. Unless the agreement specifies the contrary, the court may modify or terminate the obligation at any time before the death of the supporting spouse [*Fam. Code § 4360(b)*].

Payments of premiums by a spouse for life insurance on the payor's life made under the terms of a divorce decree or separation agreement may qualify for alimony tax treatment as payments on behalf of the payee spouse to the extent that the payee spouse is the owner of the policy [Temp. Treas. Reg. § 1.71-1T(b), Q-6]. Therefore, the premium payments are deductible by the supporting spouse and includable in the income of the supported spouse only if the supported spouse is made the owner of the policy [*see I.R.C. §§ 71(a), 215(a)*]. While maintenance of life insurance is considered a form of spousal support under California law, the fact that it is so designated in the agreement is not dispositive for federal tax purposes; the requirements of tax law must be met [*see In re Marriage of Benjamins* (1994) 26 Cal. App. 4th 423, 430-431 n.2, 31 Cal. Rptr. 2d 313]. If alimony tax treatment is not desired, the supporting spouse may be the owner of the policy. For further discussion of the tax treatment of alimony payments, see § 123.51 [*see also* Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 160, *Tax Effects of Dissolution* (Matthew Bender)].

For further discussion of provisions for support beyond the death of the supporting spouse and life insurance provisions, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Chapter 51,

Spousal Support Orders (Matthew Bender). For additional life insurance provisions providing for child support that may be adapted for use with regard to spousal support, see § 123.215. For a provision creating an inter vivos trust for spousal support, see § 123.247.

[2] Purchase of Annuity

Provisions for Support After Death of Supporting Spouse--Purchase of Annuity

Purchase of Annuity

_____. [As additional spousal support,] [e.g., Husband] shall purchase, within _____ days of the date of this Agreement, an annuity contract for the benefit of [e.g., Wife]. The annuity shall provide for payments to [e.g., Wife] in a minimum amount of \$_____ per month, beginning _____[date]. The court shall/shall not have jurisdiction to modify or terminate the obligation imposed by this Paragraph at any time before the death of [supporting spouse, e.g., Husband]. This obligation shall/shall not be terminated should _____ (e.g., Wife) remarry during _____ (e.g., Husband's) lifetime.

[3] Maintenance of Life Insurance

Provisions for Support After Death of Supporting Spouse--Maintenance of Life Insurance

Life Insurance

_____. As additional spousal support, [e.g., Husband] shall purchase, within _____ days of the date of this Agreement, a term life insurance policy on his/her life, naming [e.g., Wife] as sole primary beneficiary, and providing for a death benefit of not less than \$_____. [E.g., Husband] shall maintain this insurance in effect for a minimum term of _____ years from the date of purchase. [Wife or Husband] shall be the sole owner of the policy. The court shall/shall not have jurisdiction to modify or terminate the obligation imposed by this Paragraph at any time before the death of [supporting spouse, e.g., Husband]. This obligation shall/shall not be terminated should _____ (e.g., Wife) remarry during _____ (e.g., Husband's) lifetime.

[4] Establishment of Testamentary Trust

Provisions for Support After Death of Supporting Spouse--Establishment of Testamentary Trust

Testamentary Trust to Continue Support

_____. To secure continuation of spousal support after his/her death, [e.g., Husband] shall establish, by will, a testamentary trust, naming [e.g., Wife] as sole primary beneficiary and _____[(name) or an institutional fiduciary] as trustee. This trust shall be initially funded with property worth not less than \$_____. The trust instrument shall provide for distributions of principal and income to [e.g., Wife] for her/his support to commence on the death of [e.g., Husband].

The court shall/shall not have jurisdiction to modify or terminate the obligation imposed by this Paragraph at any time before the death of [supporting spouse, e.g., Husband]. This obligation shall/shall not be terminated should [e.g., Wife] remarry during [e.g., Husband's] lifetime.

On the death of [e.g., Wife], the trust shall terminate and _____[specify disposition, e.g., the remaining trust property shall be distributed to the children of the marriage in equal shares]. Should [e.g., Wife] predecease [e.g., Husband], this provision, and the provisions of [e.g., Husband's] will creating the trust, shall be revoked.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law
Marital Termination & Spousal Support
Spousal Support
Modification & Termination
Death
Family Law
Marital Termination & Spousal Support
Spousal Support
Obligations
General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Spousal Support Payment and Jurisdiction Provisions

34-123 California Legal Forms--Transaction Guide § 123.247

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.247 Alimony Trust

[1] Comment

The establishment of a trust to provide support for a dependent spouse has long been sanctioned by the law. Support trusts originally were devised as a way to circumvent the common law's dislike for separation agreements. As the law began to recognize separation agreements, it became acceptable for parties to incorporate into their agreements provisions establishing trusts [see, e.g., *Brown v. Brown* (1927) 83 Cal. App. 74, 256 P. 595 ; *Simmons v. Briggs* (1924) 69 Cal. App. 447, 231 P. 604] . Today, although alimony trusts are not common, one might be used in the case of a payor with a high earning capacity that is not likely to continue long term, for example, a professional athlete. There are also special tax rules for payments from a trust to a former spouse, discussed below, that might make them preferable to direct payments of spousal support in some cases [see *I.R.C.* 682].

Taxation of spousal support paid by trust is governed by *Internal Revenue Code Section 682* and not by the alimony tax treatment rules of *Internal Revenue Code Sections 71* and *215* [see H. Rep. 98-432, Pt. 2, p. 1492]. The rules for taxation of alimony trusts were revised in the Tax Reform Act of 1984, P.L. 98-369, by deleting all references to payments from trust in §§ 71 and 215 [P.L. 98-369 § 422]. The changes are applicable to divorce or separation instruments executed after 1984, and to instruments executed before but modified after 1985, if the modification expressly provides that the amendments made by T.R.A. 1984 are to apply [P.L. 98-369 § 422(e)]. Previously, trusts for the payment of alimony created in contemplation of dissolution of marriage were governed by *I.R.C.* § 71. Regulations under both Sections 71 and 682 still reflect this prior law [see Treas. Reg. §§ 1.71-1(c)(3), 1.682(a)-1(a)(2)].

Under *Internal Revenue Code Section 682*, distributions of income from a trust to a former spouse are income to the recipient and are not income to the payor regardless of the otherwise applicable rules for trust taxation. Despite references in Section 682 to "Husband" and "Wife", the statute is to be read as gender neutral [*I.R.C.* § 682(c); see *I.R.C.* 7701(a)(17) ("Husband" and "Wife" to be read as interchangeable)]. Because the amount of the payments are excludable from the payor's income, there is no deduction for the payor under *Internal Revenue Code Section 215* [see

Treas. Reg. § 1.682(a)-1(a)(4) (Example 1)].

The payee spouse is considered a beneficiary of the trust for purposes of computing the taxable income of the trust or of the spouse [*I.R.C. § 682(b)*]. Consequently, trust income is not taxable to the beneficiary as alimony, but is taxable in the same manner that it is taxable to the trust. If the trust income is tax exempt, the beneficiary reports it as tax-exempt income rather than alimony. Thus, the supported spouse can be given tax-free support by funding the trust with tax-exempt assets, such as municipal bonds. Further, the beneficiary is taxable only on distributions of income; payments from principal do not result in any tax liability to her or him [*I.R.C. § 682(a)* (distributions of income)]. If she or he received spousal support payments directly, the entire amount would be taxable regardless of the source. Other limitations on alimony tax treatment under *Internal Revenue Code Section 71* also may not be applicable, such as the requirement that all payments terminate on the death of the supported spouse [*see I.R.C. § 71(b)(1)(D)*], and the frontloading and recapture rules [*see I.R.C. § 71(f)*; Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 160, *Tax Effects of Dissolution* (Matthew Bender)].

For further discussion of alimony trusts under Section 682, see *Modern Estate Planning* (Matthew Bender), Chapters 6A and 11. For forms for revocable trusts, see Chapter 70, *Complete Revocable Trust Forms*.

[2] FORM

Alimony Trust

Alimony Trust

[*Supporting Spouse, e.g., Husband*] shall establish an Alimony Trust under *Internal Revenue Code Section 682* (the Trust) naming [*Supported Spouse, e.g., Wife*] as beneficiary and [*trustee, e.g., an institutional fiduciary*] as trustee.

[Concurrently with or Within ____ days of] the execution of this Agreement, [*e.g., Husband*] shall execute [a trust instrument or the trust instrument attached to this Agreement as Exhibit ____ and incorporated by reference], and shall transfer to the Trust [property having a current value of no less than \$____ or the property set forth in Schedule ____, which is attached to this Agreement and incorporated by reference].

In addition to whatever other terms [*e.g., Husband*] may deem necessary and appropriate for the establishment and operation of the Trust, the trust instrument will provide that:

- a. _____ [*e.g., Wife*] shall receive payments of \$_____ per _____ [*e.g., month*] from the Trust until _____ [*termination date or other terminating event, e.g., her death or remarriage or further order of the court*]. The amount of these payments [shall/shall not] be subject to future modification by the court or the parties.
- b. The principal fund of the Trust shall, at all times, be sufficient to generate income to make the payments to _____ [*e.g., Wife*]. However, _____ [*e.g., Wife*] shall be entitled to the above monthly amount whether or not there is sufficient income from which the payment may be made.
- c. _____ [*e.g., Husband*] shall contribute all amounts as the Trustee may request, from time to time, to maintain an adequate principal fund to generate income sufficient to make the required payments. These contributions may be made in cash or by the transfer of income-producing securities or other property.
- d. To the extent not paid from surplus income, _____ [*e.g., Husband*] shall be liable for

the payment of the costs of the Trust and the fees of the Trustee.

e. _____ [e.g., Husband] shall not terminate the Trust before the time set forth above without the written consent of _____ [e.g., Wife].

f. The court [shall or shall not] retain jurisdiction over spousal support for the purpose of amending the terms of the Trust or terminating the Trust before it would otherwise terminate as set forth above.

g. On the death of _____ [e.g., Wife], the Trust shall _____ [specify remainder interest, e.g., terminate and the trust property shall revert to Husband].

_____ [e.g., Husband] shall provide _____ [e.g., Wife] with a copy of the executed Trust deed or instrument.

Until the Trust is created and the Trustee makes the first payment to _____ [e.g., Wife], _____ [e.g., Husband] shall be liable to make the payments required as set forth above directly to _____ [e.g., Wife].

The failure of _____ [e.g., Husband] to establish the Trust shall constitute a material breach of this Agreement, and _____ [e.g., Wife] may then rescind this Agreement or seek other available remedies.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Trusts General Overview Family Law Marital Termination & Spousal Support Spousal Support Obligations General Overview Family Law Marital Termination & Spousal Support Spousal Support Procedures



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PART IV. FORMS

B. Spousal Support Payment and Jurisdiction Provisions

34-123 California Legal Forms--Transaction Guide §§ 123.248-123.259

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 123.248[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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C. Spousal Support Modification and Termination Provisions

34-123 California Legal Forms--Transaction Guide § 123.260

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.260 Nonmodifiable Amount

[1] Comment--Use of Form

The form in [2], *below*, is a provision to make the amount of spousal support nonmodifiable. In general, a support order may be modified or terminated at any time unless the parties have agreed to the contrary [*see Fam. Code §§ 3591, 3651; but see In re Marriage of Cauley (2006) 138 Cal. App. 4th 1100, 1105-1108, 41 Cal. Rptr. 3d 902 (under Fam. Code § 4325(a), parties' agreement for nonmodifiable support will not prevent court from terminating support if payee spouse is convicted of domestic violence offense perpetrated against payor spouse)*].

Modification of amount should be considered in conjunction with retention of jurisdiction to extend the duration of support if it is otherwise to terminate on a given date [*see §§ 123.234-123.236*]. Commonly, one party will agree to pay a nonmodifiable amount of support in exchange for a definite termination of support after a given period of time. However, the parties might agree that support should be both for an open-ended period of time [*see § 123.233*] and also nonmodifiable, or for a limited period subject to extension [*see §§ 123.235, 123.236*], but nonmodifiable as to amount during the period stated.

Modification should also be considered in conjunction with whether support should terminate by operation of law or be continued by agreement on the death of either party or on the remarriage of the supported spouse [*see Fam. Code § 4337; §§ 123.264, 123.265*]. One court construed nonmodification provisions in the parties' agreement as overriding the statute and continuing support beyond the remarriage of the supported spouse; there was ample evidence in the case that that was, in fact, the intent of the parties [*see In re Marriage of Sherman (1984) 162 Cal. App. 3d 1132, 1134-1139, 208 Cal. Rptr. 832; but see In re Marriage of Benjamins (1994) 26 Cal. App. 4th 423, 432-433, 31 Cal. Rptr. 2d 313 (opposite result; nonmodifiable clause does not extend duty to pay medical insurance premiums beyond death of supported-insured spouse); In re Marriage of Glasser (1986) 181 Cal. App. 3d 149, 152-153, 226 Cal. Rptr. 229 (opposite result; offer of proof of extrinsic evidence of intent not allowed)*]. For this reason, it is recommended that a nonmodifiable clause be followed by language reaffirming that support is to terminate by operation of law under *Fam.*

Code § 4337, if that is the intent of the parties. For further discussion, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 51, *Spousal Support Orders* (Matthew Bender).

The effect of cohabitation and *Fam. Code § 4323* should also be considered [see § 123.266]. It has also been held that support may not be reduced on account of the supported spouse's cohabitation if the agreement provided that it is not modifiable on any ground [see *In re Marriage of Sasson* (1982) 129 Cal. App. 3d 140, 147, 180 Cal. Rptr. 815] .

If support is made nonmodifiable by agreement, it also cannot be "terminated" in the sense of being modified down to \$0 [*In re Marriage of Bennett* (1983) 144 Cal. App. 3d 1022, 1025-1026, 193 Cal. Rptr. 113] . Such a modification is not necessarily a termination of support; it is a different matter from termination of jurisdiction and termination by operation of law [see *In re Marriage of Benjamins* (1994) 26 Cal. App. 4th 423, 433, 31 Cal. Rptr. 2d 313] , and the drafter must consider the intent of the parties on all three issues. For further discussion of termination of support, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 52, *Modification and Termination of Spousal Support Orders* , Part C (Matthew Bender).

[2] FORM

Nonmodifiable Amount

Modification of Spousal Support

_____. The amount of the periodic payments of spousal support provided for in this Agreement may not be modified either upward or downward or terminated by any court in the future, regardless of any change of circumstances that might occur.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview



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C. Spousal Support Modification and Termination Provisions

34-123 California Legal Forms--Transaction Guide § 123.261

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.261 Conditional Nonmodifiability

[1] Comment--Use of Form

The form in [2], *below*, is a provision that makes spousal support nonmodifiable unless a particular condition occurs. If an agreement provides that it may only be modified under certain circumstances, the agreement will not be modifiable by the court under any other circumstances [see *In re Marriage of Sasson* (1982) 129 Cal. App. 3d 140, 144, 147, 180 Cal. Rptr. 815] .

[2] FORM

Conditional Nonmodifiability

Subsequent Modification

_____. The amount of the periodic payments of spousal support provided for in this Agreement shall not be subject to modification or termination unless _____[set forth condition, e.g., Husband is involuntarily terminated from his current employment]. Should this condition occur, the court may consider whether the changed circumstance justifies modification of the amount of support, as the court deems proper.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview



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C. Spousal Support Modification and Termination Provisions

34-123 California Legal Forms--Transaction Guide § 123.262

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.262 Event Does Not Constitute Change of Circumstances

[1] Comment--Use of Form

The form in [2], *below*, is a variation on a nonmodification clause. It specifies that the occurrence of a particular event will not constitute a change of circumstances allowing for a modification of spousal support. Ordinarily, the court may modify spousal support based on changed circumstances unless the parties have agreed to the contrary [*see Fam. Code §§ 3591(c), 3651*]. For example, the parties may wish to specify that the court should not treat the termination of child support as a basis for increasing spousal support [*see Fam. Code § 4326* (until 2011, termination of child support pursuant to *Fam. Code 3901(a)* on child's completion of 12th grade or attainment of age 19 may be treated as change of circumstances justifying modification of spousal support)]. Also, a provision that a particular event does not constitute a change of circumstances may be used to tie together the property division and support provisions of the agreement [*In re Marriage of Rabkin* (1986) 179 Cal. App. 3d. 1071, 1078-1082, 225 Cal. Rptr. 219 (agreement provided that sale of marital residence could not constitute substantial change of circumstances on which to base motion for change in spousal support)].

[2] FORM

Event Does Not Constitute Change of Circumstances

Change of Circumstances

_____. The amount of the periodic payments of spousal support agreed to by the parties has been established taking into account _____ [*specify, e.g., the termination of child support payments when the minor child completes 12th grade or attains age 19, whichever occurs first or Wife's expected receipt of an inheritance of approximately \$_____ from her Great Aunt Margaret*]. The occurrence of this event shall not constitute a change of circumstances justifying future modification or termination of the amount of support. [*Add if appropriate: However, the nonoccurrence of this event shall constitute such a change of circumstances.*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral
OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationChanged
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C. Spousal Support Modification and Termination Provisions

34-123 California Legal Forms--Transaction Guide § 123.263

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.263 Modification Only by Written Agreement

[1] Comment--Use of Form

The form in [2], *below*, is an alternative modification provision for use if spousal support is to be nonmodifiable unless the parties agree to the contrary in writing. This approach reverses the statutory operation, which ordinarily makes support modifiable unless the parties agree to the contrary [see *Fam. Code* §§ 3591, 3651; but see *In re Marriage of Cauley* (2006) 138 Cal. App. 4th 1100, 1105-1108, 41 Cal. Rptr. 3d 902 (under *Fam. Code* § 4325(a), parties' agreement for nonmodifiable support will not prevent court from terminating support if payee spouse is convicted of domestic violence offense perpetrated against payor spouse)]. For further discussion, [see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 51, *Spousal Support Orders* (Matthew Bender)].

[2] FORM

Modification Only by Written Agreement

Modification of Spousal Support

_____. The amount of the periodic payments of spousal support provided for in this Agreement shall not be modifiable except by the subsequent written agreement of the parties. Any such agreement may be submitted to the court and an order entered directing modification of spousal support payments in accordance with the terms of that agreement. Neither party shall otherwise apply directly to any court for modification of the amount of support.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Spousal Support Modification & Termination General

OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview



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C. Spousal Support Modification and Termination Provisions

34-123 California Legal Forms--Transaction Guide § 123.264

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.264 Nontermination on Remarriage

[1] Comment--Use of Form

The form in [2], *below*, is a provision in a support agreement that provides that support will continue even if the supported spouse remarries. Use of this provision will avoid termination that will otherwise occur by operation of law on the remarriage of the supported spouse [*see Fam. Code § 4337* (absent agreement, remarriage of supported spouse terminates support)]. It has been held that such express language is required to negate the operation of the statute [*see In re Marriage of Glasser (1986) 181 Cal. App. 3d 149, 152-153, 226 Cal. Rptr. 229*]. Although there is authority to the effect that a general nonmodifiable clause [*see § 123.242*] is sufficient [*see In re Marriage of Sherman (1984) 162 Cal. App. 3d 1132, 1134-1139, 208 Cal. Rptr. 832*], use of this form will resolve any ambiguity. For further discussion, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapter 51, *Spousal Support Orders* (Matthew Bender).

PRACTICE TIP:

Sometimes, in order to provide an incentive to remarry, the supporting spouse will offer to pay spousal support for some limited period, for example, one or two years, after the supported spouse's remarriage. The form, *below*, can easily be adapted to so provide. *Commentary by Diana Richmond.*

[2] FORM

Nontermination on Remarriage

Termination of Support; Effect of Remarriage

_____. The payments of spousal support provided for in this agreement, and the court's jurisdiction to order spousal support, shall not terminate should [*supported spouse, e.g., Wife*] remarry, but instead will continue until the death of either party or further order of the court.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Spousal Support Modification & Termination Remarriage Family
Law Marital Termination & Spousal Support Spousal Support Obligations General Overview



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C. Spousal Support Modification and Termination Provisions

34-123 California Legal Forms--Transaction Guide § 123.265

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.265 Nontermination on Death of Supporting Spouse

[1] Comment--Use of Forms

The forms in [2] and [3], *below*, are provisions to continue support after the death of the supporting spouse. In the absence of such a provision, support terminates by operation of law on the death of either spouse [*Fam. Code* § 4337]. *Family Code Section 4337* raises the possibility of an agreement to extend support beyond the death of the *supported* party [see *In re Marriage of Benjamins* (1994) 26 Cal. App. 4th 423, 31 Cal. Rptr. 2d 313 (nonmodification clause insufficient to extend obligation to pay medical insurance premiums beyond death of supported-insured spouse)]. However, any such requirement will mean that the payments are not considered as alimony for purposes of obtaining alimony tax treatment [*I.R.C.* § 71(b)(1)(D); see § 123.51[6][a]].

Form [2] provides that support will continue after the death of the supporting spouse and is payable from his or her estate. The more common approach to continuing support after the death of the supporting spouse is to include a life insurance provision under *Family Code Section 4360* [see § 123.243]. Form [3] is for use in conjunction with such a provision. It clarifies that the obligation of support terminates on the supporting spouse's death, but that the life insurance provision is enforceable against the supporting spouse's estate if he or she does not obtain the required coverage during his or her lifetime [see *Tintocalis v. Tintocalis* (1993) 20 Cal. App. 4th 1590, 1594-1596 ; *Lucas v. Elliott* (1992) 3 Cal. App. 4th 888, 893-894, 4 Cal. Rptr. 2d 746] .

[2] Death of Supporting Spouse

Termination of Support; Effect of Death of Supporting Spouse

Termination of Support; Effect of Death

_____. The payments of spousal support provided for in this Agreement, and the court's jurisdiction to order spousal support, shall not terminate on the death of [*supporting spouse, e.g., Husband*], but shall continue until the death or

remarriage of [*supported spouse, e.g., Wife*] or until further order of the court. _____ [*E.g., Husband's* obligation of support after death shall be enforceable as a claim against his/her estate.

[3] Life Insurance Requirement Enforceable Against Estate

Termination of Support; Enforceability of Life Insurance

Termination of Support; Enforceability of Life Insurance

The payments of spousal support provided for in this Agreement, and the court's jurisdiction to order spousal support, shall terminate on the death of either party or on the remarriage of [*supported spouse, e.g., Wife*]. However, the requirement that [*supporting spouse, e.g., Husband*] procure life insurance as set forth in Paragraph _____ of this Agreement shall be an enforceable obligation and claim against his/her estate, should he/she predecease [*e.g., Wife*] and fail to have procured the required life insurance coverage.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Spousal Support Modification & Termination Death Family Law Marital Termination & Spousal Support Spousal Support Obligations General Overview



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C. Spousal Support Modification and Termination Provisions

34-123 California Legal Forms--Transaction Guide § 123.266

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.266 Effect of Subsequent Cohabitation

[1] Comment--Use of Forms

The forms in [2]-[4], *below*, address the effect of the supported spouse's subsequent cohabitation on the support obligation. Form [2] provides that the support obligation set forth in the agreement will not be affected should the supported spouse begin cohabiting with a person of the opposite sex. Use of this provision will avoid the operation of *Family Code Section 4323(a)*, which provides for a rebuttable presumption of decreased need for support if the supported spouse is cohabiting. One court has held that this presumption is overcome by a clause in the agreement that support is not modifiable on any ground [*see In re Marriage of Sasson (1982) 129 Cal. App. 3d 140, 147, 180 Cal. Rptr. 815 ; see also § 123.260*]. However, the safer practice is to include a specific provision in the agreement directed to the statute.

Form [3] provides that spousal support will terminate should the supported spouse cohabit with a person of the opposite sex. Such a provision has been judicially recommended [*see In re Marriage of Sasson (1982) 129 Cal. App. 3d 140, 150, 180 Cal. Rptr. 815* (concurring opinion of Hanson, J.)], but requires careful drafting to identify exactly the conduct that will lead to termination of support. Otherwise, a supported spouse might lose her support payments by sharing a home with a sibling of the opposite sex.

Note that while the statutory presumption is limited to opposite sex cohabitation, the parties may agree to broaden their agreement and base it on economic factors rather than sexual conduct. The better view is to focus on the effect of cohabitation on need, rather than on conduct. In this regard, the parties may agree to terminate (or not terminate) support based on any form of cohabitation, regardless of the gender of the cohabitants and regardless of the sexual relationship between them. Form [4] is such a provision.

[2] Cohabitation to Have No Effect

Cohabitation to Have No Effect

Effect of Subsequent Cohabitation

_____. The spousal support payments provided for in this Agreement shall not be subject to future modification or termination should [*supported spouse, e.g., Wife*] begin cohabiting with a person of the opposite sex. This paragraph constitutes a writing within the meaning of *Family Code Section 4323*, which section shall not apply to the support obligation created by this Agreement.

[3] Termination of Support on Cohabitation

Termination of Support on Cohabitation

Effect of Subsequent Cohabitation

_____. The spousal support payments provided for in this Agreement, and the court's jurisdiction to order spousal support, shall terminate forever should [*supported spouse, e.g., Wife*] begin cohabiting with a person of the opposite sex. For purposes of this Paragraph, cohabitation will occur _____ [*specify conditions, e.g., when Wife has been living for a period of six consecutive months with a man with whom she is engaging in sexual relations*].

[4] Shared Residency as Change of Circumstances

Shared Residency as Change of Circumstances

Effect of Subsequent Shared Residency

The spousal support payments provided for in this Agreement shall not automatically terminate or be reduced should [*supported spouse, e.g., Wife*] begin cohabiting with a person of the opposite sex. However, if [*e.g., Wife*] shares a residence with any person in the future, regardless of the gender of that person and regardless of the existence of or lack of a sexual relationship between them, that shared residency may constitute a change of circumstances supporting a reduction or termination of spousal support and termination of jurisdiction to order spousal support. Any such modification or termination of spousal support shall be based on the effect of the shared residency on [*e.g., Wife's*] need for support.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law
Marital Termination & Spousal Support
Spousal Support
Modification & Termination
Cohabitation
Family Law
Marital Termination & Spousal Support
Spousal Support
Obligations
General Overview



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C. Spousal Support Modification and Termination Provisions

34-123 California Legal Forms--Transaction Guide §§ 123.267-123.279

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 123.267[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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D. Security for Support Payments

34-123 California Legal Forms--Transaction Guide § 123.280

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.280 Stay of Service of Earnings Assignment Order

[1] Comment--Use of Forms

The forms in [2] and [3], *below*, are provisions to stay service of the mandatory earnings assignment order. An earnings assignment order must be issued for all support orders, including, presumably, orders made according to the parties' agreement or stipulation [*see Fam. Code § 5230(a)*]; §§ 123.22[3], 123.32], but service of the assignment on the obligor's employer may be stayed for good cause, as defined by statute [*see Fam. Code § 5260*], or if the parties agree in writing to an "alternative arrangement" to ensure that support will be paid [*Fam. Code § 5260(b)(2)*].

An alternative arrangement for staying an earnings assignment order requires a written agreement between the parties that provides for payment of the support obligation as ordered other than through the immediate service of the order. Any agreement between the parties that includes the staying of a service of an earnings assignment must include the concurrence of the district attorney in any case in which support is ordered to be paid through a county officer designated for that purpose. The execution of an agreement under this requirement does not preclude a party from thereafter seeking an earnings assignment on violation of the agreement [*Fam. Code § 5260(b)(2)*].

There is nothing in *Family Code § 5260(b)(2)* to suggest any limitation on what is a sufficient alternative arrangement. Presumably, a mere statement that the obligor will make payment by check or money order sent through regular mail is sufficient [Form [2]]. Form [3] provides for payment by directly electronic transfer from the obligor's account to the obligee's account.

[2] Payment By Mail

Stay of Service of Earnings Assignment Order--Payment By Mail

Alternative Arrangement for Payment; Stay of
Earnings Assignment Order

_____. _____[*Obligor parent, e.g., Father*] shall make the support payments required by this Agreement by check or money order, sent by regular first class mail, with postage fully paid, to _____[*e.g., Mother*] at her/his home address, to arrive on or before the due date each month. _____[*e.g., Mother*] accepts this manner of payment as a sufficient alternative arrangement to service of the mandatory earnings assignment order on _____[*e.g., Father's*] employer. The parties, therefore, agree that immediate service of the earnings assignment order shall be stayed.

[3] Payment by Electronic Transfer

Stay of Service of Earnings Assignment Order--Payment by Electronic Transfer

Alternative Arrangement for Payment; Stay of
Earnings Assignment Order

_____. _____[*Obligor parent, e.g., Mother*] shall make the support payments required by this Agreement by direct electronic transfer from her/his account at the _____ Bank, account number _____, to _____[*obligee parent, e.g., Father's*] account at the _____ Bank, account number _____. Either party may change his or her bank and account number on reasonable notice to the other. _____[*e.g., Father*] accepts this manner of payment as a sufficient alternative arrangement to service of the mandatory earnings assignment order on _____[*e.g., Mother's*] employer. The parties, therefore, agree that immediate service of the earnings assignment order shall be stayed.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Spousal Support Enforcement General Overview Family Law Marital Termination & Spousal Support Spousal Support Obligations General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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34-123 California Legal Forms--Transaction Guide § 123.281

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.**§ 123.281 Child Support Security Deposit Account****[1] Comment--Use of Forms**

The forms in [2] and [3], *below*, are provisions regarding the statutory child support security deposit [see *Fam. Code* § 4560; § 123.22[4]]. Form [2] requires that a security deposit account be established; Form [3] waives such an account.

Family Code Section 4560(b) states, "Unless expressly waived by the child support obligee, the court *may* order the establishment of a child support trust account ..." This language would appear to make the account discretionary; nevertheless, if the parties agree that it is unnecessary, it is recommended that an express waiver provision be included in their agreement.

[2] Account Required**Child Support Security Deposit Account**

Child Support Security Deposit Account

_____. The _____ [Obligor parent, *e.g.*, Father] shall deposit the sum of \$[*amount equal to one year's child support required under agreement*] in an interest-bearing trust account for the benefit of the children in the _____ Bank on or before _____ [date]. These funds shall be held as security for full payment of all child support amounts required by this agreement or by any subsequent, superseding court order for child support, whether by agreement or otherwise. In the event of any nonpayment of support, the _____ [obligee parent, *e.g.*, Mother] shall be entitled to apply for disbursement and replenishment of funds in the account in the manner provided by *Family Code Section 4570*. At such time as all child support has been paid and all child support obligations have terminated under Paragraph _____ of this Agreement or otherwise by operation of law, the account shall be dissolved and the remaining funds returned to the _____ [e.g., Father], as provided by *Family Code Section 4563*.

[3] Account Waived**Waiver of Child Support Security Deposit Account**

Waiver of Child Support Security Deposit Account

_____. The _____[*obligee parent, e.g., Father*] waives the establishment of any child support security deposit account or child support trust account that might otherwise be required under *Family Code § 4550 et seq.* for as long as the _____[*obligor parent, e.g., Mother*] is not in arrears with regard to any payment of child support required by this agreement or by any subsequent, superseding court order for child support, whether by agreement or otherwise.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral Overview



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34-123 California Legal Forms--Transaction Guide § 123.282

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.282 Security for Support Payments by Pledge of Stocks or Bonds

[1] Comment--Use of Form

The form in [2], *below*, provides for pledged securities to be held by an individual or financial institution as security for the supporting parent's or spouse's support obligations. This pledge provides tangible security to supplement the support obligee's right to go to court to enforce the support obligation. For discussion of pledges in general and appropriate forms, see Volume 9, Chapter 42, *Secured Transactions*.

[2] FORM

Security for Support Payments by Pledge of Stocks or Bonds

Security for Support Obligations

_____. In order to secure [*e.g.*, Wife's] performance of her/his support obligations under this Agreement, she/he shall, on execution of this Agreement, deliver to _____ [*specify name of bank, trust company, or escrow agent*] certain stocks and bonds that shall be held according to the terms of a pledge agreement, a copy of which is attached to this agreement as Exhibit _____ and is incorporated into this Agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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34-123 California Legal Forms--Transaction Guide § 123.283

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.283 Support Trust as Security for Support Payments

[1] Comment--Use of Form

The form in [2], *below*, provides for a trust to serve as security for the payment of support by the obligor parent or spouse. The trust will terminate when all of the obligor's duties of child and spousal support terminate, at which time, the trust property is to be returned to the obligor. Alternatively, the trust corpus could be reduced as support obligations with regard to particular persons (children or spouse) terminate.

Forms for dispositive provisions when the trust is to continue for the benefit of the children are included in Ch. 70, *Complete Revocable Trust Forms*. For a discussion of the tax consequences and forms for support trusts, see Rabkin & Johnson, *Current Legal Forms*, Chapter 10.

[2] FORM

Support Trust as Security for Support Payments

Trust to Secure Support

_____. In order to secure the performance of his/her support obligations under this Agreement, [*obligor spouse or parent, e.g., Husband*] shall, simultaneously with the execution of this Agreement, execute a trust agreement, a copy of which is attached as Exhibit _____ and incorporated into this Agreement, and shall transfer to the trust the following property: [*describe property transferred to trust*]. The trust shall provide for all income to be payable to [*obligor parent or spouse, e.g., Husband*] as long as he/she is not in default in any amount that is required to be paid for support under this Agreement. If [*e.g., Husband*] is in default of his/her support payments, the amount of the default shall be paid [*specify source, e.g., from net income of the trust to the extent available, and otherwise income and corpus*]. This trust shall continue until all of [*e.g., Husband's*] support obligations have terminated under this Agreement, or otherwise by operation of law. On termination, the trustee shall distribute the balance of the trust to _____ [*e.g.,*

Husband or *specify other dispositions, such as a division of the trust into separate shares for each of the children with income to them until they reach a certain age and distribution of trust property when they attain that age*]. This trust shall continue until all of [e.g., Husband's] child and spousal support obligations have terminated under paragraphs _____ of this agreement, or otherwise by operation of law. On termination, the trustee shall distribute the balance of the trust to _____ [e.g., Husband or *specify other dispositions, such as a division of the trust into separate shares for each of the children with income to them until they reach a certain age and distribution of trust property when they attain that age*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawTrustsGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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34-123 California Legal Forms--Transaction Guide §§ 123.284-123.289

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 123.284[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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34-123 California Legal Forms--Transaction Guide § 123.290

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.290 Verification of Income

[1] Comment--Use of Forms

The forms in [2]-[3], *below*, are provisions by which a party may verify the income of the other party. Form [2] provides for verification by exchange of tax returns. Form [3] provides for exchange of statements of earnings from employment.

Verification of future changes in the income of either party can be important because change in income may be a changed circumstance justifying an increase or decrease in the amount ordered. This is always the case with regard to child support [see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 42, *Modification of Child Support Orders* (Matthew Bender)]. Tax returns are subject to discovery in any child support proceeding [*Fam. Code* § 3552].

Ordinarily, spousal support is modifiable based on future changes in income unless the parties agree to the contrary [see *Fam. Code* §§ 3591, 3651; but see *In re Marriage of Cauley* (2006) 138 Cal. App. 4th 1100, 1105-1108, 41 Cal. Rptr. 3d 902 (under *Fam. Code* § 4325(a), parties' agreement for nonmodifiable support will not prevent court from terminating support if payee spouse is convicted of domestic violence offense perpetrated against payor spouse)]. Therefore, verification of income is appropriate unless support is to be nonmodifiable.

Verification is especially appropriate to the extent that support is to be based on a percentage of the payor's income [see §§ 123.209, 123.239, 123.240] because changes in income actually affect the amount of support due, not just the question of modification.

In the case of parties whose income comes primarily or exclusively from wages or earnings through employment, exchange of statements of earnings may be sufficient (Form [3]), although a tax return may show other sources of income of which the other party is unaware.

[2] Exchange of Tax Returns**Verification of Income--Exchange of Tax Returns****Exchange of Tax Returns**

_____. No later than _____ [e.g., May 1] of each year, the parties shall exchange copies of their federal and state income tax returns for the preceding taxable year. The copies shall be exact photocopy reproductions of the returns as signed and filed with the Internal Revenue Service and the Franchise Tax Board by the parties.

[3] Exchange of Statements of Earnings**Verification of Income--Exchange of Statements of Earnings****Exchange of Statements of Earnings**

_____. Each party shall provide the other, on reasonable request, with a copy of any statement of earnings issued to the party by any employer of the party. A request made within six months of a prior request shall not be considered reasonable unless there are specific facts that lead a party to believe that the other has experienced a material increase in income. A party who alleges that he or she has suffered a material decrease in income shall immediately provide the other with a statement of earnings verifying the decrease.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview



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34-123 California Legal Forms--Transaction Guide § 123.291

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.291 Tax Treatment of Spousal Support Payments

[1] Comment--Use of Forms

The forms in [2]-[4], *below*, are several marital settlement agreement provisions covering the tax treatment of payments made for the support of a spouse. They may be used by the parties to expressly state their intent that the payments be afforded alimony tax treatment; that is, the amount is income to the supported spouse and deductible to the supporting spouse [see *I.R.C. §§ 71, 215*], as well as to maximize the likelihood that the IRS will accept that intent. The taxation of spousal support is *considered in §§ 123.50-123.58* [see also Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 160, *Tax Effects of Dissolution* (Matthew Bender)].

The form in [2], *below*, is a provision confirming the parties' understanding of the tax consequences of their agreement by providing that the support payments will be deductible by the payor and included in the gross income of the payee. The form in [3], *below*, is a "hold harmless" provision by which the supported spouse indemnifies the supporting spouse from any income tax liability from his or her failure to report spousal support as income.

The forms in [4], *below*, are two possible approaches if the IRS denies alimony tax treatment for payments that the parties intend to be characterized as spousal support. The spousal support provisions may either become void and subject to further negotiation between the parties, or the amount of the payments may be reduced by a specified percent.

[2] Alimony Tax Treatment

Tax Treatment of Spousal Support Payments--Alimony Tax Treatment

Tax Treatment

_____. All payments to or on behalf of _____ [supported spouse, e.g., Wife] for her/his support are intended to qualify as alimony under *Internal Revenue Code Sections 71 and 215*, and are to be included in

_____. [e.g., Wife's] gross income and deducted by _____ [e.g., Husband] as provided in those Code sections.

[3] Hold Harmless

Tax Treatment of Spousal Support Payments--Hold Harmless

Hold Harmless

_____. _____ [Supported spouse, e.g., Wife] agrees that [she or he] will report as income on her/his federal and state income tax returns for the year of receipt all sums paid to [her or him] or on [her or his] behalf by _____ [e.g., Husband] under this Agreement, and that [she or he] shall pay any resulting taxes due.

_____ [E.g., Wife] agrees to indemnify and hold _____ [e.g., Husband] harmless from any federal and state income tax obligation that [he or she] may incur by reason of _____ [e.g., Wife's] failure to report as income and pay the taxes due on sums paid to [her or him] or on [her or his] behalf as spousal support under this Agreement.

[4] Effect of Denial of Alimony Treatment by IRS

Tax Treatment of Spousal Support Payments--Effect of Denial of Alimony Treatment by IRS

[EITHER]

Agreement Void if IRS Finds Support Not Deductible

_____. If the Internal Revenue Service determines that the sums payable by _____ [supporting spouse, e.g., Husband] to _____ [supported spouse, e.g., Wife] under this Agreement, are not deductible from [his or her] income as alimony, the spousal support provisions of this Agreement shall be void, and the issue of spousal support shall be subject to future negotiation, agreement, or order of court.

[OR]

Payments Reduced if IRS Finds Support Not Deductible

_____. If the Internal Revenue Service determines that the sums payable by _____ [supporting spouse, e.g., Husband] to _____ [supported spouse, e.g., Wife] under this agreement, are not deductible from his/her income as alimony, then the amount payable shall be reduced by _____ percent, beginning on the first payment due date following that determination.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Spousal Support Obligations General Overview Family Law Marital Termination & Spousal Support Taxation



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34-123 California Legal Forms--Transaction Guide § 123.292

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.292 Family Support

[1] Comment--Use of Form

The form in [2], *below*, is a provision for family support, which combines child support and spousal support without designating the amount allocated to each [*Fam. Code* § 92; *see Fam. Code* §§ 3586, 4066, 4074]. Family support is an income-tax shifting device designed to receive alimony tax treatment under *I.R.C.* §§ 71 and 215 (deductible to payor; income to payee) for payments that might otherwise be treated as child support. As such, the effectiveness of a family support agreement depends entirely on whether it conforms to the requirements of Internal Revenue statutes, regulations, and other IRS rulings.

Alimony tax treatment is not available with regard to the part of any payment that is fixed as child support by the terms of the divorce or separation instrument [*I.R.C.* § 71(c)(1); *Treas. Reg.* § 1.71-1(e)]. If any amount of the support specified will be reduced on the happening of a contingency specified in the agreement related to a child, such as attaining a specified age, marrying, dying, or leaving school, or at a time that can clearly be associated with such a contingency, the amount of the reduction will be treated as child support and will not receive alimony tax treatment [*I.R.C.* § 71(c)(2); *see Temp. Treas. Reg.* § 1.71-1T(c)]. Therefore, no part of family support may terminate when child support payments otherwise would be expected to terminate [*see* § 123.212]. A possible approach to structuring family support is to provide for a step down in support [*see* § 123.238] at periodic intervals unrelated to the age of the children.

For discussion of the effect of the statewide uniform child support guideline on family support agreements, *see* § 123.21 [2]. For detailed discussion of alimony tax treatment, *see* § 123.51 [*see also* Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 160, *Tax Effects of Dissolution* (Matthew Bender)].

[2] FORM

Family Support

Family Support

_____. For the support of _____ [e.g., Wife] and for the support of the minor children of the marriage _____ [supporting spouse, e.g., Husband] shall pay family support to _____ [supported spouse, e.g., Wife] as follows:

The sum of \$ _____ [period, e.g., per month] for a period of _____ [e.g., five years], beginning on _____ [date] and ending with the payment due on _____ [date].

[Repeat the following paragraph for as many steps as desired.]

Thereafter, the sum of \$ _____ [period, e.g., per month] for a period of [e.g., five years], beginning on _____ [date] and ending with the payment due on _____ [date].

Payment shall be due on or before _____ [e.g., the fifth day of the month].

The amount of spousal support payments for these periods shall/shall not be subject to future modification or termination.

[EITHER: to terminate duration jurisdiction:]

Jurisdiction to extend the duration of spousal support is terminated, and in no event, shall _____ [supporting spouse, e.g., Husband] be obligated to pay spousal support after the date of the last payment stated above, regardless of whether proceedings are commenced before or after that date.

[OR: to provide for indefinite retention of duration jurisdiction:]

Jurisdiction to extend the duration of spousal support is retained indefinitely, and payments may be ordered beyond the date of the last payment stated above on a proper showing made to the court.

[OR: to provide for Richmond extension of duration jurisdiction:]

Jurisdiction to extend the duration of spousal support is retained on a proper showing made to the court in proceedings initiated on or before the date of the last payment stated above. If support or jurisdiction over support is not extended beyond that date by motion or order to show cause brought on or before that date, the court's jurisdiction over spousal support shall terminate on that date, and thereafter, the court shall no longer have jurisdiction to award any additional spousal support to _____ [supported spouse, e.g., Wife], regardless of any subsequent change in circumstances that might occur.

The payments of family support, and the court's jurisdiction to order spousal support shall terminate on the death of _____ [supported spouse e.g., Wife] before _____ [restate ending date of last period of support]. Family support shall/shall not terminate on the death of _____ [supporting spouse, e.g., Husband] or the remarriage of _____ [supported spouse e.g., Wife].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview



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34-123 California Legal Forms--Transaction Guide § 123.293

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.293 Statements of Current Circumstances For Spousal Support

[1] Comment--Use of Form

The form in [2], *below*, has statements that set forth the current circumstances of the parties that underlie the spousal support provisions of the agreement. They are not intended to present an all-inclusive list of all factors that must be considered in support of the terms agreed to; rather, they are examples of some of the most common issues involved in determining spousal support.

The purpose of provisions such as these is to give guidance to the court in modification proceedings. Only if there is a clear record of the facts and circumstances on which the original support provisions were based can a reviewing court determine whether there has been a material change of circumstances justifying a modification of support [*see In re Marriage of Laube (1988) 204 Cal. App. 3d 1222, 1226, 251 Cal. Rptr. 745*]. The failure to make an adequate record supporting the order can be fatal to success on appeal, because it means that the support order appealed from will be presumed correct with all presumptions indulged to support it on matters on which the record is silent [*In re Marriage of Laube (1988) 204 Cal. App. 3d 1222, 1226, 251 Cal. Rptr. 745*]. In lieu of including them in the agreement, statements such as these may be cast as findings supporting the court's order giving effect to the agreement [*Fam. Code § 4332* (court required to make specific finding regarding standard of living during marriage and may make other factual determination)]. For consideration of and forms for findings, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 51, *Spousal Support Orders* (Matthew Bender).

Statements regarding the factors under *Fam. Code § 4320* that are critical in determining spousal support should be set forth as findings or in the agreement [*see In re Marriage of Geraci (2006) 144 Cal. App. 4th 1278, 1296-1298, 51 Cal. Rptr. 3d 234* (court must weigh all factors listed in *Fam. Code § 4320*, and mere statement that factors favor award of support is insufficient if not accompanied by analysis of factors); *In re Marriage of Fenton (1982) 134 Cal. App. 3d 451, 457-458, 184 Cal. Rptr. 597* (remanding for reconsideration and appropriate findings); *but see In re Marriage of Lucero (1981) 118 Cal. App. 3d 836, 845, 173 Cal. Rptr. 680* (court not required to make separate findings regarding

each factor in statute)]. Certain other issues have been noted by reviewing courts as particularly important to clarify at the time of the original order. If the amount of support agreed to is insufficient to meet the supported spouse's needs at the marital standard of living, the order should so specify [*In re Marriage of Smith* (1990) 225 Cal. App. 3d 469, 491-493, 274 Cal. Rptr. 911] . Such a statement is crucial to the power of the court to increase support in the future based solely on the supporting spouse's increased income [*In re Marriage of Hoffmeister* (1987) 191 Cal. App. 3d 351, 363-364, 236 Cal. Rptr. 543] . For further discussion, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 52, *Modification and Termination of Spousal Support Orders* (Matthew Bender).

If the agreement is structured based on a particular expectation, for example, that the supported spouse will become self-sufficient by a particular time, the expectation should be set forth in a finding or in the agreement. This will assist a future court in determining whether to modify or terminate support based on either the fulfillment or failure of the expectation [see *In re Marriage of Biderman* (1992) 5 Cal. App. 4th 409, 413-414, 6 Cal. Rptr. 2d 791 ; see also *Fam. Code* §§ 4320(l), 4330(b) (concerning goal that parties become self-supporting and need for admonition to that effect by court)]. For a related discussion, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 52 (Matthew Bender).

[2] FORM

Statements of Current Circumstances For Spousal Support

Facts and Circumstances Regarding Spousal Support

_____. The parties affirm that the following facts are true as of the date of this Agreement, and that the spousal support provisions of this Agreement are made in consideration of these facts:

1. The parties were married on _____ [date] and separated on _____ [date]. The duration of the marriage is _____ years, _____ months. Therefore, this [is or is not] a marriage of long duration within the meaning of *Family Code Section 4336*. [If marriage is of long duration This Agreement is/is not intended to avoid the otherwise applicable effects of that statute regarding indefinite retention of jurisdiction over spousal support in a marriage of long duration.]
2. Husband is _____ years old and Wife is _____ years old.
_____. [Specify facts concerning factors affecting appropriateness and amount of spousal support, e.g., Both are in good health. The children of the marriage are in high school, and both parties may engage in gainful employment without unduly interfering with the interests of the children. From 1974 through 1979, Wife was employed outside of the home and provided Husband's sole support so that he could obtain a professional degree in Optometry].
3. Wife is currently _____ [employed or self-employed or unemployed [add if employed or self-employed as a _____ (job title) by _____ (employer) at _____ (employer or business address)]. Her gross monthly income from all sources is \$ _____ and his monthly expenses are \$ _____.
4. Husband is currently _____ [employed or self-employed or unemployed [add if employed or self-employed as a _____ (job title) by _____ (employer) at _____ (employer or business address)]. His gross monthly income from all sources is \$ _____ and his monthly expenses are \$ _____.

[Include if support will be based on actual earnings rather than earning capacity]

5. The parties' current incomes, as set forth above, are a reasonable reflection of their earning capacities, and the spousal support provisions of this Agreement are based on their actual earnings, not on their earning capacity.

6. The marital standard of living was _____ [*describe generally, e.g., middle class; comfortable, but not lavish*]. Total marital net monthly income at the time of separation was approximately \$ _____. _____ [*Supporting spouse, e.g., Husband's*] current income [*is or is not*] sufficient to maintain both parties separately at the marital standard of living.

7. _____ [*Specify facts concerning supported spouse's ability to support himself or herself, e.g., Wife has a bachelor of arts degree from the University of California, but was unemployed during the marriage until 1991 to devote time to domestic duties. Since 1991, Wife has worked part time as a graphic designer*]. _____ [*supported spouse, e.g., Wife's*] current net monthly income is insufficient to support [*herself or himself*] at the marital standard of living.

8. _____ [*Supported spouse, e.g., Wife's*] reasonable needs to maintain [*herself or himself*] at the marital standard of living, considering the cost of living as of the date of this Agreement, require approximately \$ _____ per month of total net disposable income]. The support provided for in this Agreement, together with Wife's reasonably anticipated income, [*is or is not*] sufficient to meet [*her or his*] reasonable needs.

9. _____ [*Specify facts regarding underlying assumptions on which support provisions are based, e.g., Support for a limited term, as set forth in this Agreement, is based on Wife's intention to attend community college to obtain additional training as a computer programmer, which she anticipates will allow her to become self-supporting in approximately two years*].

10. [*Include if supported spouse will be expected to become self-supporting at some time in future, at which time, support payments will terminate* _____ (*Supported spouse, e.g., Wife*) understands and acknowledges the goal of becoming self-supporting within a reasonable time period, that [*she or he*] must make reasonable, good faith efforts to become self-supporting within a reasonable time period, and that a failure to make such efforts may be a factor a court will consider in modifying or terminating support, as provided in *California Family Code Sections 4320 and 4330*.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures



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34-123 California Legal Forms--Transaction Guide § 123.294

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.294 Notice of Occurrence of Contingencies

[1] Comment

The form in [2], *below*, requires both parties to give notice to the other on the occurrence of any contingency that affects the duty to pay support, or the amount of support. In an order to pay spousal support for a contingent period of time, liability terminates on the occurrence of that contingency [*Fam. Code § 4334(a)*; *see § 123.237*]. If proper notice is not given, the supported spouse must refund all overpayments after first applying overpayments to any support payments that are in default [*Fam. Code § 4334(b)*].

There is a similar statutory rule with regard to child support [*see Fam. Code § 4007*]. For further discussion of this statute, *see § 123.212[1]*.

[2] FORM

Notice of Occurrence of Contingencies

Notice of Occurrence of Contingencies

_____. Husband and Wife shall each notify the other promptly and in writing of the happening of any contingency that affects the right or duty of either party to receive or make support payments under the terms of this Agreement. Any overpayments of support made by [*supporting parent or spouse, e.g., Husband*] after the occurrence of such a contingency and before receipt of the notice shall be immediately refunded by [*supported parent or spouse, e.g., Wife*] after first applying overpayments to any support amounts that are in default.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures



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CHAPTER 123 SPOUSAL AND CHILD SUPPORT PROVISIONS
PART IV. FORMS
E. Miscellaneous Provisions

34-123 California Legal Forms--Transaction Guide § 123.295

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 123.295 Provision for Nondischargeability of Support Obligations in Bankruptcy

[1] Comment--Use of Form

The form in [2], *below*, may be used to set forth the parties' agreement and understanding that the payor spouse's support obligations under the marital settlement agreement will not be dischargeable in bankruptcy.

An express provision of this type is not a prerequisite to nondischargeability of a domestic support obligation [*see 11 U.S.C. §§ 101(14A), 523(a)(5)*]. However, it may be useful to clarify the parties' intent that the support obligations created in their marital settlement agreement be treated as a nondischargeable domestic support obligation in the event of the payor spouse's subsequent bankruptcy [*see Sloan v. Mitchell (1972) 28 Cal. App. 3d 47, 51, 104 Cal. Rptr. 418* (whether obligation is intended as support is determined by intent of parties, as expressed in their agreement)].

The Bankruptcy Code provides that a "domestic support obligation" is not dischargeable in bankruptcy [*see 11 U.S.C. § 523(a)(5)*]. A "domestic support obligation" for bankruptcy purposes includes any debt (whether accruing before or after bankruptcy proceedings are commenced), including interest accruing on that debt, that satisfies all of the following conditions [*11 U.S.C. § 101(14A)*]:

- The debt is owed to or recoverable by (1) the bankruptcy debtor's spouse, former spouse, or child; (2) the parent, legal guardian, or responsible relative of the bankruptcy debtor's child; or (3) a governmental unit.
- The debt is in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of the bankruptcy debtor's spouse, former spouse, child, or child's parent, regardless of whether the debt is expressly designated as alimony, maintenance, or support [*see Shaver v. Shaver (9th Cir. 1986) 736 F.2d 1314, 1315-1316* (whether obligation imposed by marital settlement agreement is actually "in the nature of alimony, maintenance, or support," is to be determined by bankruptcy court

based on all circumstances; construing former *11 U.S.C. § 523(a)(5)*, which contained substantially similar language to that of current *11 U.S.C. § 101(14A)*).

- The debt is established or subject to establishment before or after the commencement of the bankruptcy proceedings, by reason of a separation agreement, divorce decree, property settlement agreement, court order, or determination made in accordance with nonbankruptcy law by a governmental unit.

- The debt has not been assigned to a nongovernmental entity, unless the assignment was voluntarily made by the bankruptcy debtor's spouse, former spouse, child, or child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

Even if it does not qualify as a "domestic support obligation," a debt owed to a spouse, former spouse, or child of the bankruptcy debtor will not be dischargeable in bankruptcy if it was incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or determination made in accordance with state or territorial law by a governmental unit [*11 U.S.C. § 523(a)(15)*].

[2] FORM

Provision for Nondischargeability of Support Obligations in Bankruptcy

Nondischargeability of Support Obligation in Bankruptcy

_____. The parties agree and understand that the payments of _____ [spousal support or child support or spousal and child support or family support] under this Agreement shall not be subject to discharge in bankruptcy and shall be treated as a nondischargeable domestic support obligation of [*supporting parent or spouse, e.g., Husband*], whether accruing before or after the commencement of bankruptcy proceedings.

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy Law Discharge & Dischargeability Nondischarge of Individual Debts Alimony, Divorce Settlements & Support Family Law Marital Termination & Spousal Support Spousal Support Obligations General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 124 PROVISIONS FOR CHILD CUSTODY AND VISITATION

34-124 California Legal Forms--Transaction Guide 124.syn

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.syn Synopsis to Chapter 124: PROVISIONS FOR CHILD CUSTODY AND VISITATION

§ 124.01 California Statutes

§ 124.02 Federal Statutes

§§ 124.03-124.04 [Reserved]

§ 124.05 Law Reviews and Periodicals

§ 124.06 Annotations

§ 124.07 Text References

[1] Matthew Bender Sources

[2] Legal Encyclopedias

[3] Additional Text References

§§ 124.08-124.09 [Reserved]

§ 124.10 Validity of Parties' Agreements on Custody and Visitation

[1] In General

[2] Effect of Agreement for Temporary Custody

[3] Effect of Agreement for Joint Custody

§ 124.11 Terminology

§§ 124.12-124.99 [Reserved]

§ 124.100 Custody and Visitation Provisions

Scope

§§ 124.101-124.199 [Reserved]

§ 124.200 Legal Custody

[1] Comment--Use of Forms

[2] Sole Legal Custody to One Parent

Sole Legal Custody to One Parent

[3] Joint Legal Custody

Joint Legal Custody

[4] Religious Training

Legal Custody--Religious Training

[5] Choice of Schools

Legal Custody--Choice of Schools

[6] Nonemergency Medical Treatment

Legal Custody--Nonemergency Medical Treatment

[7] Emergency Decisions

Legal Custody--Emergency Decisions

[8] Notification and Access in Case of Illness or Accident

Legal Custody--Notification and Access in Case of Illness or Accident

[9] Entitlement to Participation

Legal Custody--Entitlement to Participation

[10] Entitlement to Complete Information

Legal Custody--Entitlement to Complete Information

§ 124.201 Shared Physical Custody

[1] Comment--Use of Forms

[2] General Structure of Shared Physical Custody Plan

General Structure of Shared Physical Custody Plan

[3] Physical Custody Alternating Periodically

Shared Physical Custody--Physical Custody Alternating Periodically

[4] Physical Custody Divided Based on School Year

Physical Custody Divided Based on School Year

[5] Traditional Custodial Plan in Shared-Custody Terminology

Traditional Custodial Plan in Shared-Custody Terminology

[6] Visitation During Other Parent's Custodial Time

Shared Physical Custody--Visitation During Other Parent's Custodial Time

[7] Designation of Primary Caretaker and Primary Home

Shared Physical Custody--Designation of Primary Caretaker and Primary Home

[8] Percent Time-Share for Child Support Guideline

Percent Time-Share for Child Support Guideline

§ 124.202 Traditional Physical Custody Arrangements

[1] Comment--Use of Forms

[2] Sole Physical Custody

Traditional Physical Custody Arrangements--Sole Physical Custody

[3] Joint Physical Custody

Traditional Physical Custody Arrangements--Joint Physical Custody

§ 124.203 Split Physical Custody

[1] Comment--Use of Form

[2] FORM

Split Physical Custody

§ 124.204 Custody to Nonparent

[1] Comment--Use of Form

[2] FORM

Custody to Nonparent

§§ 124.205-124.219 [Reserved]

§ 124.220 Unspecified "Reasonable" Visitation

[1] Comment--Use of Form

[2] FORM

Unspecified "Reasonable" Visitation

§ 124.221 Visitation According to Specific Schedule

[1] Comment--Use of Forms

[2] Weekends

Visitation According to Specific Schedule--Weekends

[3] Midweek

Visitation According to Specific Schedule--Midweek

[4] Summer Vacation

Visitation According to Specific Schedule--Summer Vacation

[5] Three-Day Weekends

Visitation According to Specific Schedule--Three-Day Weekends

[6] Thanksgiving Day and Vacation

Visitation According to Specific Schedule--Thanksgiving Day and Vacation

[7] Christmas Eve and Day

Visitation According to Specific Schedule--Christmas Eve and Day

[8] Christmas Vacation

Visitation According to Specific Schedule--Christmas Vacation

[9] Spring Vacation

Visitation According to Specific Schedule--Spring Vacation

[10] Birthdays and Other Holidays

Visitation According to Specific Schedule--Birthdays and Other Holidays

[11] Jewish Observance

Visitation According to Specific Schedule--Jewish Observance

[12] Notice of Changed Plans

Visitation According to Specific Schedule--Notice of Changed Plans

[13] Oral Modification Allowed

Visitation According to Specific Schedule--Oral Modification Allowed

§ 124.222 Supervised Visitation

[1] Comment--Use of Form

[2] FORM

Supervised Visitation

§ 124.223 Increasing Visitation as Children Grow Older

[1] Comment--Use of Form

[2] FORM

Increasing Visitation as Children Grow Older

§ 124.224 Pickup, Return, and Travel

[1] Comment--Use of Forms

[2] Pickup and Return

Pickup and Return of Children

[3] Travel Arrangements

Travel Arrangements

[4] Residential Privacy

Residential Privacy

[5] Early Return

Early Return

§ 124.225 Visitation for Nonparents

[1] Comment--Use of Forms

[2] Visitation for Nonparents--Visitation Schedule

Custody and Visitation Provisions for Marital Settlement Agreements

[3] Travel Arrangements and Costs

Visitation for Nonparents--Travel Arrangements and Costs

[4] Disparagement Prohibited

Visitation for Nonparents--Disparagement Prohibited

§§ 124.226-124.239 [Reserved]

§ 124.240 Change of Residence and Removal of Child From State

[1] Comment--Use of Forms

[2] Notice of Change of Residence

Notice of Change of Residence

[3] Change of Residence Restricted

Change of Residence Restricted

[4] Taking Children Outside of State

Taking Children Outside of State

§ 124.241 Notice of Whereabouts

[1] Comment--Use of Form

[2] FORM

Notice of Whereabouts

§ 124.242 Children's Surnames

[1] Comment--Use of Form

[2] Change of Children's Surname Prohibited

Change of Children's Surname Prohibited

[3] Change of Children's Surname Required

Change of Children's Surname Required

§ 124.243 Right to Telephone Contact With Children

[1] Comment--Use of Forms

[2] Reasonable Telephone Contact

Right to Telephone Contact With Children--Reasonable Telephone Contact

[3] Restricted Telephone Contact

Right to Telephone Contact With Children--Restricted Telephone Contact

§ 124.244 Encouragement of Love and Affection and Prohibition of Disparagement

[1] Comment--Use of Form

[2] FORM

Encouragement of Love and Affection and Prohibition of Disparagement

§ 124.245 Anti-Abduction Provisions

[1] Comment--Use of Form

[2] FORM

Anti-Abduction Provisions

Editorial Consultants: Kathryn Kirkland, Esq.,
Ira Lurvey, Esq., and Diana Richmond, Esq.n*

FOOTNOTES:

(n173)Footnote *. Ms. Kirkland, Mr. Lurvey, and Ms. Richmond are Certified Family Law Specialists practicing in California. They are also editorial consultants for Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure(Matthew Bender 2d ed.), as well as editorial board members for the California Family Law Monthly(Matthew Bender).



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DIVISION VII: PERSONAL TRANSACTIONS CHAPTER 124 PROVISIONS FOR CHILD CUSTODY AND VISITATION

34-124 California Legal Forms--Transaction Guide Scope

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

Scope

Editorial Consultants: Kathryn Kirkland, Esq.,
Ira Lurvey, Esq., and Diana Richmond, Esq.^{n*} Scope

This chapter contains forms for use in marital settlement agreements and other custody agreements to set forth provisions for child custody and visitation. The Legal Background contains a brief summary of the major considerations involved in drafting provisions related to custody. The Transaction Guide sets forth a drafting guide to assist in the selection of appropriate provisions. The Forms include provisions governing custody and visitation by parents and nonparents, as well as related general provisions.

In *In re Marriage Cases*, the California Supreme Court held that differential treatment of opposite-sex and same-sex couples in California's marriage statutes violated the California Constitution's guarantees of privacy, due process, and equal protection [*In re Marriage Cases* (2008) 43 Cal. 4th 757, 784, 847-856, 76 Cal. Rptr. 3d 683, 183 P.3d 384] . That holding was superseded by the subsequent adoption of Proposition 8, which amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California [see Cal. Const. art. I, § 7.5 (eff. Nov. 5, 2008)]. The Supreme Court upheld Proposition 8 against a constitutional challenge, but in doing so the Court reaffirmed the continuing validity of same-sex marriages entered into before November 5, 2008, the effective date of Proposition 8 [Strauss v. Horton (2009) 46 Cal. 4th 364, 470-474, 93 Cal. Rptr. 3d 591, 207 P.3d 48 (estimating 18,000 same-sex marriages lawfully entered into before Proposition 8 took effect)]. If a form in this chapter is used in the context of a same-sex marriage lawfully entered into before that date, the language in the form should be modified accordingly. For example, the names of the parties may be used instead of terms like "Husband" and "Wife."

The forms set forth in this chapter are intended to be used in conjunction with the complete forms of marital settlement agreement set forth in Chapter 120. Coverage of provisions for spousal and child support is set forth in Chapter 123, and coverage of provisions for payment of income taxes, attorney's fees, and costs is the subject of Chapter 125. For more extensive coverage of the parent-child relationship, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, Chapters 30- 35 (Matthew Bender 2d ed.).

FOOTNOTES:

(n174)Footnote *. Ms. Kirkland, Mr. Lurvey, and Ms. Richmond are Certified Family Law Specialists practicing in

California. They are also editorial consultants for Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure(Matthew Bender 2d ed.), as well as editorial board members for the California Family Law Monthly(Matthew Bender).



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PART I. RESEARCH GUIDE
A. Primary Sources

34-124 California Legal Forms--Transaction Guide § 124.01

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.01 California Statutes

Children and parents. "Age of minority" defined. *Fam. Code §§ 6500-6502.*
Emancipation of Minors Law. *Fam. Code §§ 7000-7143.*
Adoption. *Fam. Code § 8500 et seq.*

Custody of children.
Rules governing Indian child custody proceedings in which parent may be deprived of custody. *Fam. Code § 170 et seq.*
Definitions and general provisions. *Fam. Code § 3000-3011.*
Authority of court to make custody order. *Fam. Code § 3022.*
Matters to be considered in granting custody. *Fam. Code §§ 3040-3043.*
Temporary custody during pendency of proceeding. *Fam. Code §§ 3060-3064.*
Joint custody. *Fam. Code §§ 3080-3089.*
Visitation rights. *Fam. Code §§ 3100-3104.*
Custody investigation and report. *Fam. Code §§ 3110-3116.*
Action for exclusive custody. *Fam. Code § 3120.*
Location of missing party or child. *Fam. Code §§ 3130-3134.*
Check to determine whether child is missing person. *Fam. Code § 3140.*
Appointment of counsel to represent child. *Fam. Code §§ 3150-3153.*
Mediation of visitation or custody issues. *Fam. Code §§ 3160-3186.*
Counseling of parents and child. *Fam. Code §§ 3190-3192.*

Uniform Child Custody Jurisdiction and Enforcement Act. *Fam. Code § 3400 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawFamily Protection & WelfareChildrenGeneral Overview



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A. Primary Sources

34-124 California Legal Forms--Transaction Guide § 124.02

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.02 Federal Statutes

Parental Kidnapping Prevention Act. *28 U.S.C. § 1738A*.

Tax statutes.

Head-of-household filings. *I.R.C. §§ 2(b), (c), 7703(b)*.

Child care credit. *I.R.C. § 21*.

Allowance of deductions for personal exemptions. *I.R.C. § 151*.

Dependency exemptions. *I.R.C. § 152*.

Medical care deductions. *I.R.C. § 213*.

Personal, living, and family expenses not deductible. *I.R.C. § 262(a)*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyInterferenceParental Kidnapping Prevention ActFamily LawFamily Protection & WelfareChildrenGeneral Overview



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A. Primary Sources

34-124 California Legal Forms--Transaction Guide §§ 124.03-124.04

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 124.03[Reserved]



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34-124 California Legal Forms--Transaction Guide § 124.05

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.05 Law Reviews and Periodicals

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Benson, *The Child Dependency Exemption and Divorced Parents: What Is "Custody?"* 18 Cap. U. L. Rev. 57 (1989).

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Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyGeneral Overview



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PART I. RESEARCH GUIDE
B. Secondary Sources

34-124 California Legal Forms--Transaction Guide § 124.06

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.06 Annotations

Annot., Child Custody and Visitation Rights of Persons Infected With AIDS, 86 A.L.R.4th 211 (1991).

Annot., Parental Rights of Man Who Is Not Biological or Adoptive Father of Child But Was Husband or Cohabitant of Mother When Child Was Conceived or Born, 84 A.L.R.4th 655 (1991).

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Annot., Right of Parent to Regain Custody of Child After Temporary Conditional Relinquishment of Custody, 35 A.L.R.4th 61 (1985).

Annot., Effect of Remarriage of Spouses to Each Other on Child Custody and Support Provisions of Prior Divorce Decree, 26 A.L.R.4th 325 (1983).

Annot., Removal by Custodial Parents of Child From Jurisdiction in Violation of Court Order as Justifying Termination, Suspension, or Reduction of Child Support Payments, 8 A.L.R.4th 1231 (1981).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyGeneral OverviewFamily LawChild CustodyVisitationGeneral Overview



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B. Secondary Sources

34-124 California Legal Forms--Transaction Guide § 124.07

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.07 Text References

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Ch. 412, *Paternity*.

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Ch. 1, *Short Agreements*;

Ch. 2, *Detailed Agreements*.

[2] Legal Encyclopedias

27C C.J.S., Divorce, §§ 611-760.

[3] Additional Text References

Witkin, Summary of California Law, vol. 10, *Parent and Child*; vol. 11, *Husband and Wife* (10th ed. 2005).

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyGeneral OverviewFamily LawChild CustodyInterferenceGeneral Overview



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B. Secondary Sources

34-124 California Legal Forms--Transaction Guide §§ 124.08-124.09

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 124.08[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 124 PROVISIONS FOR CHILD CUSTODY AND VISITATION
PART II. LEGAL BACKGROUND

34-124 California Legal Forms--Transaction Guide § 124.10

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.10 Validity of Parties' Agreements on Custody and Visitation

[1] In General

In general, parents of minor children may validly enter into agreements regarding the legal and physical custody of those children, subject to the approval of a court having jurisdiction to determine custody issues. However, parental agreements regarding custody of their children are *not binding* on the court. Rather, the best interests of the child control custody determinations, regardless of the parents' agreement [*In re Marriage of Weiss* (1996) 42 Cal. App. 4th 106, 109-111, 49 Cal. Rptr. 2d 339, cert. denied, 136 L. Ed 2d 399; *Adoption of Matthew B.* (1991) 232 Cal. App. 3d 1239, 1258-1259, 284 Cal. Rptr. 18; *Stewart v. Stewart* (1955) 130 Cal. App. 2d 186, 193, 278 P.2d 441]. Thus, courts will not approve arrangements that would result in the placement of a child in a situation of physical or emotional harm, or otherwise be deleterious to what might objectively be considered the child's best interests.

Nevertheless, in most cases parental agreements will be approved by the court. Ordinarily, it is preferable that the parents come to some resolution of custody themselves rather than litigate the issue for determination by the court, and courts will frequently observe the parties' wishes regarding their custody arrangements, assuming that the arrangements appear to be in the best interests of the children involved.

Parties cannot as such confer jurisdiction on the court to entertain their custody matter; the court must have jurisdiction under the provisions of applicable statutes [see *Fam. Code § 2010*; see also Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 32, *Jurisdiction to Determine Custody and Visitation* (Matthew Bender)]. Likewise, agreements between parents that attempt to divest the court of continuing jurisdiction over child custody are void and unenforceable regardless of any possible estoppel argument [*In re Marriage of Goodarzirad* (1986) 185 Cal. App. 3d 1020, 1026, 230 Cal. Rptr. 203 (stipulation to give up custody rights and agree to termination of parental rights in exchange for forbearance on child support)]. A court acts in excess of its jurisdiction if it approves such a stipulation [*In re Marriage of Goodarzirad* (1986) 185 Cal. App. 3d 1020, 1030, 230 Cal. Rptr. 203]; see also *In re Marriage of Jackson* (2006) 136 Cal. App. 4th 980, 990-994, 39 Cal. Rptr. 3d 365 (judgment terminating parental rights is voidable if entered by court solely on basis of parties' stipulation and without judicial

determination of child's best interests).

Custody issues may arise in various contexts, including, for example, disputes between unmarried parents, disputes during marriage, and more commonly, in the context of traditional family law proceedings (dissolution, separation, and annulment). They may also take place in parentage, guardianship, domestic violence and adoption proceedings [see *Fam. Code § 3021* (proceedings to which Family Code custody provisions apply)] and in juvenile court dependency proceedings [see California Forms of Pleading and Practice, Ch. 328, *Juvenile Courts: Dependency Proceedings* (Matthew Bender)]. Thus, while the provisions for agreements contained in this chapter focus on the traditional family law setting, counsel should keep in mind that there may be other situations in which the various forms are applicable.

In addition, note that many agreements on custody are reached through the participation of court mediators [see *Fam. Code § 3160 et seq.*] or private mediators. While this chapter does not concern mediation proceedings, counsel should keep in mind that the forms set forth herein may have application both in composing a complete marital settlement agreement with parties who agreed from the outset regarding custody matters, as well as parties who reached agreement after mediation.

[2] Effect of Agreement for Temporary Custody

In any proceeding in which child custody is at issue [see *Fam. Code § 3021*], a petition for a temporary custody order may be included with the initial filing or may be filed at any time after the initial filing [*Fam. Code § 3060*]. The Uniform Child Custody Jurisdiction and Enforcement Act Declaration [*Fam. Code § 3429*] must be included [see *Fam. Code § 3060*].

If the parties have agreed to or reached an understanding on the custody or temporary custody of their children, a copy of the agreement (or a declaration as to their understanding) must be attached to the petition or moving papers. As promptly as possible after filing, the court must, except in exceptional circumstances, enter an order granting temporary custody in conformity with the agreement or understanding, or in accordance with any stipulation of the parties [*Fam. Code § 3061*]. For discussion of the effect of the temporary custody order on the permanent custody determination, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure 2d ed., Ch. 33, *Custody and Visitation Orders* (Matthew Bender).

[3] Effect of Agreement for Joint Custody

As discussed in § 124.10[1], because the primary factor in deciding custody and visitation matters is the best interests of the child [see *Fam. Code §§ 3011, 3040(a)*], stipulations or agreements between parents that attempt to decide the permanent custody of their minor children or divest the court of jurisdiction to make or modify that decision are not binding on the court [*Van der Vliet v. Van der Vliet* (1927) 200 Cal. 721, 722, 254 P. 945 ; *In re Marriage of Goodarzirad* (1986) 185 Cal. App. 3d 1020, 1026, 230 Cal. Rptr. 203] . However, if the parents have agreed to an order of joint custody or agree to such an order in open court, there is a presumption affecting the burden of proof that joint custody is in the best interests of the child. This presumption is subject to the statutory considerations governing determination of the best interests of the child [*Fam. Code § 3080*; see *Fam. Code § 3011*].

In making an order of joint legal custody, the court must specify the circumstances under which both parents must consent in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent in those circumstances. In all other circumstances, either parent acting alone may exercise legal control of the child. However, an order of joint legal custody may not be construed to permit an action that is inconsistent with the physical custody order unless that action is expressly authorized by the court [*Fam. Code § 3083*].

In making an order of joint physical custody, the court must specify the rights of each parent to physical control of the child in sufficient detail to enable a parent deprived of that control to implement laws for relief of child snatching and

kidnapping [*Fam. Code § 3084*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyAwardsGeneral OverviewFamily LawChild CustodyVisitationAwardsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 124 PROVISIONS FOR CHILD CUSTODY AND VISITATION
PART II. LEGAL BACKGROUND

34-124 California Legal Forms--Transaction Guide § 124.11

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.11 Terminology

There is an evolving practice of avoiding the use of certain terms in custody agreements and orders that have become associated with "winners" and "losers" in custody disputes, and that have specific gender association. The courts have taken the leadership in this practice, through the judges themselves, through mediation arms, such as Family Court Services, and through investigators, counselors, and evaluators. The family law bar is also moving strongly in this direction.

The term "award" is to be avoided. The courts now make custody "orders" and "grant" custody to a particular person. If at all possible, the parents are encouraged to agree to a "shared physical custody" plan or arrangement in which each parent has periods of "primary physical responsibility" for the child. Under a shared physical custody arrangement, it is unnecessary to label one parent as "custodial" and the other as "noncustodial." The arrangement may involve any particular percentage "time-share" that is appropriate, of which 50-50 is just one possibility. Therefore, it is not necessary to label the plan as one of "joint" or "sole" physical custody [*cf. Fam. Code § 3004* (joint physical custody means that each parent has *significant* periods of physical custody)]. Further, the time that the parent with the lesser time-share spends with the child does not have to be labelled as "visitation."

The forms in this chapter conform to this terminology to the extent possible. Nevertheless, there are some situations that can only be characterized under the traditional nomenclature of "custodial parent" and "visitation." When necessary, these terms are still used in the chapter.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyAwardsGeneral OverviewFamily LawChild CustodyAwardsStandardsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 124 PROVISIONS FOR CHILD CUSTODY AND VISITATION
PART II. LEGAL BACKGROUND

34-124 California Legal Forms--Transaction Guide §§ 124.12-124.99

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 124.12[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 124 PROVISIONS FOR CHILD CUSTODY AND VISITATION
PART III. TRANSACTION GUIDE
A. Drafting Guide

34-124 California Legal Forms--Transaction Guide § 124.100

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.100 Custody and Visitation Provisions

NOTE:

The forms in this chapter are provisions that are designed to be used in a marital settlement agreement or other custody agreement in the case of unmarried parents. The forms assume that the children of the relationship have been identified by name, birthdate, and gender in an introductory provision of the agreement. Because parent-child agreements are not limited to marital proceedings, the parties are generally identified in this chapter as "the father" and "the mother." The designations may be changed to "Husband and Wife" or "Petitioner" and "Respondent" to conform to the general form of the agreement. For examples of complete marital settlement agreements, as well as checklists of additional provisions that may be included in a marital settlement agreement, see Ch. 120, ***Complete Marital Settlement Agreements***.

1. Include following information:

- a. Whether legal custody will be joint or sole, and if sole, which parent will have legal custody [see § 124.200].
- b. The manner in which the parents will share primary physical responsibility (physical custody) for the child [see § 124.201].
- c. If one parent will be designated as the primary or sole physical custodian, the times during which the other parent will have primary physical responsibility for the child (visitation).
 - (1) If "reasonable visitation" rights or similar nonspecific description is used [see §

124.220], procedure for notifying primary parent of intent to exercise rights, including method of giving notice, and how far in advance notice must be given.

(2) For detailed schedule [see § 124.221], include:

(a) Times;

(b) Circumstances under which visitation will be postponed, rescheduled, or canceled, such as a child's illness, or on holidays; and

(c) Procedure for notifying custodial parent of intent not to exercise visitation rights.

(3) Time-share schedule for holidays, including:

(a) Summer vacation.

(b) Other school holidays.

(c) Religious holidays.

(d) Thanksgiving Day.

(e) Christmas/Hanukkah.

(f) Mother's Day.

(g) Father's Day.

(h) Birthdays.

(4) Any restrictions on visitation rights [see § 124.222].

d. Transportation arrangements for implementing shared physical custody plan [see § 124.224].

(1) Type of transportation between parents' homes or other location where physical custodial rights will be exercised.

(2) Who will pay transportation expenses.

(3) Where child will be picked up and dropped off.

(4) Whether child must be accompanied by parent or other responsible person en route.

e. Which parent will be entitled to claim dependency exemption for income tax purposes [see Ch. 125, *Provisions for Payment of Income Taxes, Attorneys' Fees, and Costs*].

2. Include any of following provisions desired by client:

a. Provision for visitation rights by any persons other than parents [see § 124.225].

b. Provision prohibiting change of child's residence and/or removal of child from California or particular

county [see § 124.240].

c. Provision prohibiting change of child's surname [see § 124.242].

d. Provision preserving noncustodial parent's right to communicate with children by telephone [see § 124.243].

e. Provision concerning each parent's duty to encourage child's respect and affection for other parent [see § 124.244].

3. Review custody and visitation provisions with client.

4. Incorporate custody and visitation provisions into complete agreement.

5. Check for internal consistency of agreement.

a. Confirm that names and birthdates of children in general recitations portions of agreement match names and birthdates of them in custody provision.

b. Confirm that custody or visitation rights granted to each parent and to any nonparents do not conflict.

c. Confirm that child support provisions [see ch. 123] are appropriately tailored to custody and visitation arrangements.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyAwardsGeneral OverviewFamily LawChild CustodyVisitationAwardsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 124 PROVISIONS FOR CHILD CUSTODY AND VISITATION
PART III. TRANSACTION GUIDE
A. Drafting Guide

34-124 California Legal Forms--Transaction Guide §§ 124.101-124.199

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 124.101[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 124 PROVISIONS FOR CHILD CUSTODY AND VISITATION
PART IV. FORMS
A. Custody Provisions

34-124 California Legal Forms--Transaction Guide § 124.200

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.200 Legal Custody

[1] Comment--Use of Forms

The forms in [2]-[10], *below*, are various marital settlement agreement provisions related to legal custody. Legal custody refers to the right and responsibility to make the decisions relating to the health, education, and welfare of the child [*see Fam. Code §§ 3003, 3006*]. If both parents have those rights, they have joint legal custody [*Fam. Code § 3003*]; if only one parent has the rights, that parent has sole legal custody [*Fam. Code § 3006*]. The court may grant joint legal custody without granting joint physical custody [*Fam. Code § 3085*].

The parties should select either form [2] (sole legal custody) or form [3] (joint legal custody), according to their agreement. They should then select any of the more specific provisions from forms [4]-[10] to carry out any specific agreements about various components of legal custody.

In making an order for joint legal custody, the court must specify the circumstances under which the consent of both parents is required to be obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent. In all other circumstances, either joint legal custodian-parent, acting alone, may exercise legal control of the child [*Fam. Code § 3083*]. Therefore, if the parents want different authority for different aspects of joint custody (for example, religion, schools, medical treatment), they should include specific provisions as to those aspects from the forms, *below*.

The parents may, perhaps, agree that only one of them will have the authority of legal custody, but that in a particular matter, that authority will be restricted by the agreement. For example, they might agree that the child will only be reared in a particular religion, but in all other aspects, only one parent will have the decision-making authority. In such a case, they may elect to identify their plan as sole legal custody [*see [2], below*] and include a specific religion restriction clause [*see [4], below*]. If they elect to identify the plan as joint legal custody because the authority of the parent has been restricted [*see Fam. Code § 3006*], they should then specify that in all other matters, the indicated parent has the

sole decision-making authority.

With respect to an agreement on religious upbringing, counsel should keep in mind that such a provision may well be *unenforceable*, in light of the principle that a parent will not be enjoined from involving a child with that parent's religious activities in the absence of a clear, affirmative showing of harm to the child [*In re Marriage of Weiss* (1996) 42 Cal. App. 4th 106, 109, 111, 117, 49 Cal. Rptr. 2d 339, cert. denied, 136 L. Ed. 2d 399 (premarital agreement purporting to govern religious upbringing of child held unenforceable, as discussed in § 111.51)]. Therefore, if the clause set forth in [4], *below*, is used to articulate the parties' desires and intentions regarding the religious upbringing of their child, counsel should inform the client that there are likely enforcement problems.

Joint legal custody only works as long as the parents can agree. Each should understand that a stalemate will ultimately require the court to terminate joint legal custody and select one parent as the sole legal custodian. For this reason, they should consider alternate provisions for resolving any matter on which they cannot agree. Agreeing to mediation or designating a named mediator is one possible approach.

For discussion of the statutory prohibitions against awarding custody to persons convicted of certain felonies [see *Fam. Code* § 3030], see § 124.222[1].

For discussion of the factors that a court will consider in making a custody order, including matters that are within the scope of legal custody, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 33, *Custody and Visitation Orders* (Matthew Bender).

[2] Sole Legal Custody to One Parent

Sole Legal Custody to One Parent

Sole Legal Custody

_____. Mother/Father shall have sole legal custody of the minor children of the parties. She/He shall have the sole authority and control, right and responsibility to make all decisions regarding the children's health, education, and welfare.

[3] Joint Legal Custody

Joint Legal Custody

Joint Legal Custody

_____. Each of the parties recognizes that both have the right to fully participate in determining all important matters pertaining to the children's health, welfare, education, and upbringing. The parties agree that they shall have joint legal custody of the children. All decisions regarding the health, education, and welfare of the children shall be made jointly by the parties. The health, education, and welfare of the children includes, but is not limited to, medical and dental care, choice of schools, choice of child care facilities, religion, recreational activities, vacation plans, and travel. The parties shall each make good faith efforts to reach agreement on these issues. [Add method to resolve disputes, if desired: If the parties cannot agree concerning any issue, they shall, on the request of either of them, _____ (e.g., consult a family counselor or private or court-appointed mediator to assist them in resolving their differences and shall agree to follow the recommendation of the mediator or counselor).]

[4] Religious Training

CAUTION:

One appellate court has held that a premarital agreement on religious upbringing is not enforceable [see [1], *above*; § 111.51]. This ruling potentially applies to the clause that follows. While the parties may wish to memorialize their intentions on religious upbringing, they should be informed of the likely enforcement problems.

Legal Custody--Religious Training

Choice of Religious Faith

_____. The children shall be brought up in the [*specify, e.g., Jewish*] faith, and both parties shall provide the children with the opportunity to participate in the religious services and activities of that faith. [*Optional if one parent is not of that faith: Father/Mother agrees to cooperate fully in the religious upbringing of the children and to ensure their attendance at religious services that may fall during periods when he/she has the children. Father/Mother agrees to encourage them to participate in the religious services and activities of the faith, and to take part in any other activities of the faith that are likely to increase their appreciation and understanding of the faith.*]

[OR]

Exposure to Two Religions

_____. Each party may provide the children with religious training and instruction, including attendance at religious services and activities, during the periods that the children are in his or her actual physical custody. However, the children shall not be baptized, confirmed, or otherwise enrolled as a member of any particular religious faith, denomination, or organization until such time as they are capable of deciding for themselves their religion of choice, which time shall not be before a child attains the age of _____ years. Each party agrees not to make disparaging remarks to the children about the religion of the other.

[5] Choice of Schools

Legal Custody--Choice of Schools

Choice of Schools

_____. All decisions regarding the children's education, including the decision as to what school a child will attend, shall be made jointly by the parties. The parties shall each make good faith efforts to reach agreement on these decisions. [*Add method for resolving disputes, if desired: If the parties cannot agree concerning any educational decision, they shall, on the request of either of them, _____ (e.g., consult a professional educational counselor, to mediate and assist them in resolving their differences. They shall agree to follow the recommendation of the mediator).*].

[6] Nonemergency Medical Treatment

Legal Custody--Nonemergency Medical Treatment

Medical Treatment

_____. In the absence of an emergency, all decisions regarding medical treatment for the children shall be made jointly by the parties. Medical treatment includes, but is not limited to, doctor's services for illness, injury, and health maintenance, dental, and optometric services. The parties shall each make good faith efforts to reach agreement on these decisions. [*Add method for resolving disputes, if desired: If the parties cannot agree concerning any decision regarding*

medical treatment, they shall, on the request of either of them, _____ (e.g., consult their family pediatrician, to mediate and assist them in resolving their differences. They shall agree to follow the recommendation of the mediator)].

[7] Emergency Decisions

Legal Custody--Emergency Decisions

Emergency Decisions

_____. The parties understand that some decisions regarding the children's welfare must be made immediately; that is, before there is time for the parents to meet and agree. In such a case, each party acknowledges that he or she has full confidence in the other's ability to make a unilateral decision for the children's welfare. Decisions concerning the children's emergency medical care shall be made by the parent with the actual physical responsibility for the child at the time of the emergency. The person making the unilateral decision shall notify the other parent as soon as reasonably possible in connection with the emergency and the decision.

[8] Notification and Access in Case of Illness or Accident

Legal Custody--Notification and Access in Case of Illness or Accident

Notification and Access in Case of Illness or Accident

_____. If one party has any knowledge of any illness or accident or other circumstance seriously affecting a child's health or general welfare, that party will promptly notify the other of the situation. The party who is notified shall have immediate access to the child notwithstanding where the child may be or which party has physical responsibility for the child at that time.

[9] Entitlement to Participation

Legal Custody--Entitlement to Participation

Entitlement to Participation

_____. Both parties shall be entitled to participate in and attend any special activities in which a child is engaged regardless of which parent has physical responsibility for the child at the time of the activity. Special activities include, but are not limited to, religious activities, school programs, sports events, and other extracurricular activities and programs.

[10] Entitlement to Complete Information

Legal Custody--Entitlement to Complete Information

Entitlement to Complete Information

_____. Each party shall be entitled to complete information from any medical professional, including a pediatrician, physician, dentist, consultant, or specialist, who examines or treats a child for any reason whatsoever, and to be furnished with copies of any medical reports or other written information prepared with regard to the child. Each shall be entitled to complete information from any educational professional, including a teacher, counselor, and other school personnel, who is involved in a child's educational program. Each shall be be furnished with copies of any educational reports, evaluations, or other written information prepared with regard to the child.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyAwardsLegal CustodyGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 124 PROVISIONS FOR CHILD CUSTODY AND VISITATION
PART IV. FORMS
A. Custody Provisions

34-124 California Legal Forms--Transaction Guide § 124.201

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.201 Shared Physical Custody

[1] Comment--Use of Forms

The forms in [2]-[8], *below*, are for use to set forth the actual physical custodial plan of the parties. These forms are drafted in the terminology of "shared physical custody" rather than in the traditional form of sole or joint physical custody [*see* § 124.11].

A shared physical custody plan may be, but need not be, what has been traditionally called joint physical custody. By statute, joint physical custody means that each of the parents has significant periods of physical custody [*Fam. Code* § 3004; *cf. Fam. Code* § 3007 (sole physical custody means that child lives with and is under supervision of one parent, subject to other parent's right of visitation)]. In contrast, a shared physical custody plan may involve any percentage sharing of physical custody. Even a minimal visitation right may be characterized as shared physical custody in which one parent has primary physical responsibility for the children for something like 5 percent of the time. The term "primary physical responsibility for" was introduced into the statutes through the statewide uniform child support guideline, which avoids considering parents as "custodial" or "noncustodial" and makes the time-share a variable in the child support formula [*see Fam. Code* § 4055(a), (b)(1)(D)]. Under the formula, there is no line between sole custody and joint custody; rather child support varies according to the parents' time-sharing plan.

The form in [2], *below*, specifies the particular times when each parent will have physical custody of the children. Form [3] provides for alternating periods of actual physical custody, such as weekly or monthly. The length of the appropriate period depends on the proximity of the parents' residences, whether they live in the same school district, and the age of the children. Form [4] gives one parent physical custody during the school year and the other physical custody during designated school vacation periods. This kind of arrangement minimizes disruption to the children's schooling, and the parents need not live near each other for it to work. The form in [5] specifies particular times when one parent will have physical custody and gives the other parent physical custody at all other times. This form may be used to express a more traditional primary custody with visitation arrangement in the terminology of shared physical custody. Forms [2]

through [5] all provide for the transfer of the children from one home to the other at the beginning and end of each custodial period [see also § 124.224].

The form in [6], *below*, provides for one parent's visitation during the custodial period of the other. Visitation rights should usually be provided if the respective custodial periods are lengthy, such as if one parent has the school year and the other the summer. Also, the parties may want to specify visitation rights for holidays that might fall within the other parent's custodial time.

The form in [7], *below*, designates one parent as the *primary caretaker* of the child and one home as the primary home of the child for determining eligibility for public assistance [see *Fam. Code* § 3086]. In non-AFDC cases, such a provision might be necessary if there is some benefit that the parties wish the children to receive that depends on residency, for example, attendance in a particular school district. If there is no such benefit, there is no real need to designate either parent as *primary*, and efforts to do so may prove counterproductive in helping the parties reach agreement.

The form in [8], *below*, sets forth the parents' time-sharing plan in percents for purposes of the statewide uniform child support guideline. The guideline's formula requires that the custodial arrangement be quantified in terms of percents for the approximate time that each parent has primary physical responsibility for the children. The percents must total 100 percent [see *Fam. Code* § 4055(a), (b)(1)(D)].

[2] General Structure of Shared Physical Custody Plan

General Structure of Shared Physical Custody Plan

Physical Custody

_____. The parents shall share the physical custody of the children according to the following schedule: Mother shall have primary physical responsibility for the children _____ [specify all times during which mother will have physical custody]. Father shall have primary physical responsibility for the children [specify].

For each change of primary physical responsibility provided for in this Agreement, _____ [specify day and time of transfer, e.g., the transferring parent will deliver the children to the other by 9:00 p.m. on the day of the transfer].

[3] Physical Custody Alternating Periodically

Shared Physical Custody--Physical Custody Alternating Periodically

Alternating Physical Custody

_____. The parents shall share the physical custody of their children. The actual physical custody of the children shall alternate between the parties [specify interval, e.g., weekly], beginning _____ [date], at which time, _____ [e.g., Mother] shall have physical custody.

For each change of primary physical responsibility provided for in this Agreement, _____ [specify day and time of transfer, e.g., the transferring parent will deliver the children to the other by 9:00 p.m. every Sunday night].

[4] Physical Custody Divided Based on School Year

Physical Custody Divided Based on School Year

Alternating Physical Custody

_____. The parents shall share the physical custody of their children. The actual physical custody of the children shall alternate between the parties according to the school vacation schedule. _____ [e.g., Father] shall have physical custody of the children during [specify periods of school vacation, e.g., Christmas and Easter vacations and for two months during the summer vacation]. _____ [e.g., Mother] shall have physical custody of the children at all other times. The vacation periods referred to shall be those of the school that each child is attending at the time of each vacation.

[Specify beginning and ending dates of parent's vacation custodial time, e.g., For the Christmas vacation, Father's custody shall begin not later than two days after the beginning of the vacation and terminate no sooner than two days before the end of that vacation. For the Easter vacation, Father's custody shall begin not later than one day after the beginning of the vacation and terminate no sooner than one day before the end of that vacation. For the summer vacation, Father's custody shall be for any continuous two-month period as may be agreed to by the parties].

For each change of primary physical responsibility provided for in this Agreement, _____ [specify day and time of transfer, e.g., the transferring parent will deliver the children to the other by 12:00 p.m. on the first or last day of the custodial period].

[5] Traditional Custodial Plan in Shared-Custody Terminology

Traditional Custodial Plan in Shared-Custody Terminology

Physical Custody

_____. The parties shall share the physical custody of the children. _____ [parent with what are essentially visitation rights, e.g., Father] shall have primary physical responsibility for the children [specify all times during which parent will have visitation (see forms in subpart 2), e.g., every Saturday from 9:00 a.m. to 9:00 p.m., for one week during the month of July every year, and for at least six hours on Christmas Day, and on his and the children's birthdays]. _____ [other parent, e.g., Mother] shall have primary physical responsibility for the children at all other times.

For each change of primary physical responsibility provided for in this Agreement, _____ [specify arrangements for transfer, e.g., Father shall pick up the children at Mother's residence at the beginning of the period and return them to her home at the end of the period].

[6] Visitation During Other Parent's Custodial Time

Shared Physical Custody--Visitation During Other Parent's Custodial Time

Visitation

_____. Each parent shall have the right to visitation with the children during the time when the other has primary physical responsibility for the children according to the following schedule: [specify, e.g., between the hours of 5:00 on Friday until 10:00 a.m. on Saturdays]. If the children are living with the other parent on any of the specified days, the parent without physical custody on that day shall be entitled to visitation as follows: _____ [include provision for special occasions and holidays, e.g., Father shall have the right to visitation with the children all day on his birthday and on Father's Day, and Mother shall have the right to visitation all day on her birthday and on Mother's Day. Each parent shall have a right of visitation for at least six hours on Thanksgiving and Christmas Day]. If a party intends not to exercise his or her rights to visitation as to any date when the children are living with the other parent, he or she must notify the other parent at least _____ hours in advance of the specified pick-up time.

[7] Designation of Primary Caretaker and Primary Home**Shared Physical Custody--Designation of Primary Caretaker and Primary Home**

Primary Home and Caretaker

_____. The parties agree that Mother/Father shall be designated as the primary caretaker of the children, and that her/his home shall be the primary home of the children for purposes of determining legal domicile for any purpose [, including eligibility for public assistance.]

[8] Percent Time-Share for Child Support Guideline**Percent Time-Share for Child Support Guideline**

Time-Sharing Percents for Child Support Guideline

_____. For purposes of the statewide uniform child support guideline, Mother shall be deemed to have primary physical responsibility for the children _____ percent of the time, and Father shall be deemed to have primary physical responsibility _____ percent of the time (*percentages must equal 100*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family Law Child Custody Awards Physical Custody Joint Physical Custody



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 124 PROVISIONS FOR CHILD CUSTODY AND VISITATION
PART IV. FORMS
A. Custody Provisions

34-124 California Legal Forms--Transaction Guide § 124.202

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.202 Traditional Physical Custody Arrangements

[1] Comment--Use of Forms

The forms in [2], *below*, express the parents' custodial agreement in the traditional terms of sole or joint physical custody. Although the use of these terms is diminishing [*see* § 124.11], they still have statutory meaning [*see Fam. Code §§ 3004, 3007*].

Form [2] provides that one parent will have sole physical custody while the other has visitation rights. Sole physical custody means that a child will reside with and under the supervision of one parent, subject to the other parent's visitation rights [*see Fam. Code § 3007*]. The appropriate visitation provisions from Subpart 2 should be included [*see § 124.220 et seq.*].

Form [3] provides that the parents will have joint physical custody, which means that each parent will have significant periods of physical custody [*see Fam. Code § 3004*]. Therefore, appropriate time-sharing provisions in § 124.201 should be included. By statute, an order of joint physical custody must specify the rights of each parent to physical control of the child in sufficient detail to enable a parent deprived of that control to implement laws for relief of child snatching and kidnapping [*Fam. Code § 3084*]. The components of form [3] that express the parties' actual time-share arrangement should meet this specificity requirement.

[2] Sole Physical Custody

Traditional Physical Custody Arrangements--Sole Physical Custody

Physical Custody

_____. Mother/Father shall have the sole/primary physical custody of the children, subject to Father's/Mother's [right of reasonable visitation *or* visitation rights as set forth in Paragraphs _____, *below*].

[3] Joint Physical Custody**Traditional Physical Custody Arrangements--Joint Physical Custody**

Joint Physical Custody

_____. The parties shall have joint physical custody of the children. Mother shall have the actual physical custody and control of the children during the following times: *[specify, or select appropriate time-sharing provisions from § 124.201]*. Father shall have the actual physical custody and control of the children during the following times: *[specify, or select appropriate time-sharing provisions from § 124.201]*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyAwardsPhysical CustodyGeneral Overview



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A. Custody Provisions

34-124 California Legal Forms--Transaction Guide § 124.203

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.203 Split Physical Custody

[1] Comment--Use of Form

The form in [2], *below* is a provision for split physical custody, an arrangement by which each parent receives the primary physical custody of one of the children of the marriage. This form is cast in the preferred language of a shared-custody plan for each child [see §§ 124.11, 124.201]. However, the form may be modified to give the primary parent the sole physical custody of a child and the other parent a right of visitation with that child [see §§ 124.202; 124.220 et seq.].

Generally, split custody is not favored; it is preferable to keep siblings together [*In re Marriage of Heath* (2004) 122 Cal. App. 4th 444, 449-451, 18 Cal. Rptr. 3d 760 (sibling bond should be preserved whenever possible); *but see In re Marriage of Steiner* (2004) 117 Cal. App. 4th 519, 529, 11 Cal. Rptr. 3d 671 (keeping siblings together is weighty but not dispositive factor, and trial court must also consider for each child which parent, as primary custodian, will best facilitate child's good relationship with other parent)]. However, older children may each have an informed preference to live with a different parent [see *Fam. Code* § 3042 (court must consider preference of child of sufficient age and reasoning capacity); *see also In re Marriage of Rosson* (1986) 178 Cal. App. 3d 1094, 1103, 224 Cal. Rptr. 250] . Unless the agreement discloses that split custody is the preference of the children and that they are old enough to make reasoned decisions, the parties may expect some heightened judicial scrutiny of the agreement.

The parents should also address the legal custody of each child. They may wish to retain joint legal custody, or grant each parent the sole legal custody of the child for whom that parent assumes primary physical responsibility. The appropriate provisions from § 124.200 should be selected for each child.

For purposes of child support under the statewide uniform child support guideline in a case of split custody, the formula uses the average of the approximate percentages of time that the higher earner parent has primary physical responsibility for each child [see *Fam. Code* § 4055(b)(1)(D); *see also* Kirkland, Lurvey, Richmond and Wagner, California Family

Law Practice and Procedure, 2nd ed., ch. 41, *Child Support Orders* (Matthew Bender)].

[2] FORM

Split Physical Custody

Physical Custody

_____. Mother shall have primary physical responsibility for [*name of first child, e.g., John*] at the following times: [*specify*]; and Father shall have primary physical responsibility for [*e.g., John*] at the following times: [*specify*]. For purposes of the statewide uniform guideline, Mother shall be deemed to have primary physical responsibility for [*e.g., John*] _____ percent of the time, and Father shall be deemed to have primary physical responsibility for [*e.g., John*] _____ percent of the time.

Father shall have primary physical responsibility for [*name of second child, e.g., Mary*] at the following times: [*specify*]; and Mother shall have primary physical responsibility for [*e.g., Mary*] at the following times: [*specify*]. For purposes of the statewide uniform guideline, Mother shall be deemed to have primary physical responsibility for [*e.g., Mary*] _____ percent of the time, and Father shall be deemed to have primary physical responsibility for [*e.g., Mary*] _____ percent of the time. (*Percentages for each child must equal 100.*)

The average of the percentages of time that _____ [*higher earning parent, e.g., the father*] has primary physical responsibility for the children is _____ percent.

The parties recognize that the children have achieved a sufficient level of emotional and intellectual maturity to have a voice in the matter of their physical custody. This custodial plan has been agreed to in accordance with the best interests of the children and their own preferences.

[*Add other provisions regarding shared custody from § 124.201 as desired for each child.*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyAwardsPhysical CustodyGeneral OverviewFamily LawChild CustodyAwardsPhysical CustodyJoint Physical Custody



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DIVISION VII: PERSONAL TRANSACTIONS
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34-124 California Legal Forms--Transaction Guide § 124.204

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.204 Custody to Nonparent

[1] Comment--Use of Form

The form in [2], *below* is a custody provision that grants the custody of the children of the parties to a nonparent. Such a provision will be rarely used, but there are instances in which neither parent will be able to assume responsibility for the care and control of the children. In such a case, they may be able to agree on an appropriate relative or other third person to take primary physical custody.

This provision provides that the nonparent custodian will be joined as a party to the proceeding for dissolution of marriage, and is a third-party beneficiary of the marital settlement agreement with respect to the provisions in the agreement relating to child custody [*see Fam. Code § 2021; Cal. Rules of Ct., Rules 5.154, 5.158*]. The parties may or may not want to agree to formalize the arrangement further by consenting to the appointment of the custodial nonparent as the legal guardian of the person of the children [*see Prob. Code § 1500 et seq.*]. Letters of guardianship will give the custodian clear indicia of custodial authority sufficient to obtain law enforcement assistance in retaining the child pending further court orders. However, law enforcement authorities will probably also enforce a court order granting the nonparent custody according to the parents' agreement [*see Bookstein v. Bookstein (1970) 7 Cal. App. 3d 219, 223, 86 Cal. Rptr. 495* (appearance at proceedings by nonparent custodian counsel's signature on child custody stipulation held sufficient to render order enforceable as to all parties)]. In representing the nonparent, it is advised to petition for letters of guardianship regardless of the terms of the parents' agreement. Custody disputes between parents and nonparents are considered in detail in Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 33, *Custody and Visitation Orders* (Matthew Bender).

In agreeing to give custody to a third party, the parents must understand that neither may be able to automatically obtain custody of the children in the future on demand. Although there is both a statutory and a constitutionally based parental preference for custody [*see Fam. Code § 3040(a)(1); Stanley v. Illinois (1972) 405 U.S. 645, 649-659, 92 S. Ct. 1208, 31 L. Ed. 2d 551*], the preference is defeated by a finding that granting custody to a parent would be detrimental to the

child, which must be supported by clear and convincing evidence [see *Fam. Code* § 3041(a),(b)]. The requisite clear and convincing proof of detriment may consist of a showing that the child has been in a stable home with a nonparent who has assumed the role of parent for a substantial period of time, a showing that may be made by a preponderance of the evidence [*Fam. Code* § 3041(c),(d); see *H.S. v. N.S.* (2009) 173 Cal. App. 4th 1131, 1137-1143, 93 Cal. Rptr. 3d 470 (upholding *Fam. Code* § 3041 against constitutional challenge)]. Thus, courts are inclined to find that it is detrimental to remove a child from a custodial home where he or she is well adjusted and well cared for, regardless of the improvement of the conditions of a parent [see *In re Volkland* (1977) 74 Cal. App. 3d 674, 679-680, 141 Cal. Rptr. 625 ; *In re Reyna* (1976) 55 Cal. App. 3d 288, 302-303, 126 Cal. Rptr. 138 ; see also *Guardianship of Marino* (1973) 30 Cal. App. 3d 952, 956-961, 106 Cal. Rptr. 655] .

If a voluntary guardianship is established, it may be terminated if the court finds that it is in the child's best interests to terminate the guardianship [*Prob. Code* § 1601]. However, the burden in a guardianship termination proceeding is on the parent to show his or her overall fitness sufficient to overcome the inherent trauma of removing the child from a successful caregiver [*Guardianship of Simpson* (1998) 67 Cal. App. 4th 914, 921, 930-933, 79 Cal. Rptr. 2d 389 ; *Guardianship of Cassandra H.* (1998) 64 Cal. App. 4th 1228, 1236, 1238-1240, 75 Cal. Rptr. 2d 668 (standard of *Prob. Code* 1601 requires review of totality of evidence bearing on natural parent's fitness)].

Appropriate visitation provisions from the forms in Subpart 2 should be selected for each parent [see § 124.220 *et seq.*]. Special consideration should be given to whether the factors that make it impossible for a parent to have custody also indicate that unspecified "reasonable" visitation is also inappropriate. For example, a parent may have unsuitable living arrangements, in which case it might be appropriate to prohibit overnight visitation. It may also be appropriate to prohibit either parent from removing the children from the state during visitation time [see § 124.240[4]].

[2] FORM

Custody to Nonparent

Child Custody and Parental Visitation

_____. The parties have concluded that neither of them is able to exercise proper care and custody of the children at this time. Therefore, they both agree that [*name of custodian*] ("Custodian") shall have the legal and physical custody and control of the children, with the right and responsibility to make all decisions relating to their health, education, and welfare, subject to the parties' rights of reasonable visitation as set forth below.

The Custodian shall be joined as a party to the parents' pending proceedings for dissolution of marriage. Further, the parties affirm that the Custodian is an intended third-party beneficiary of this Paragraph of this agreement, and is entitled to enforce its custody provisions by all lawful means. [The parties further agree to consent to the appointment of the Custodian as the guardian of the person (and estate) of the children in proceedings to be initiated by the Custodian in the Probate Division of the Superior Court of _____ County.]

The parties affirm that each has been advised [by his or her counsel] that by so agreeing they are creating a legal right to the custody of their children in the Custodian. They further affirm that although they recognize that this custody agreement is subject to future modification, they understand that neither is automatically entitled to the custody of the children on demand at any time in the future, and that a court may continue to grant custody of the children to the Custodian if it finds that granting custody to a parent would be detrimental to the children and that continuing custody with the Custodian is required to serve the best interests of the children. [Further, they understand that a voluntarily established legal guardianship may be terminated only if a court determines that it is no longer necessary that the children have a guardian or that it is in the children's best interests to terminate the guardianship.]

[Add at end of complete separation agreement.]

Custodian's Consent to Terms of Agreement

I, *[name of custodian]*, am the person designated to receive custody of the children under Paragraph _____ of this agreement. I agree to accept the custody of the minor children of the parties and to give my best efforts for their care, custody, maintenance, and welfare. I agree to allow and to cooperate with visitation by the parents as set forth in this agreement.

_____ *[date]*
_____ *[signature of Custodian]*
_____ *[typed name]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyAwardsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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PART IV. FORMS
A. Custody Provisions

34-124 California Legal Forms--Transaction Guide §§ 124.205-124.219

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 124.205[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Visitation Provisions

34-124 California Legal Forms--Transaction Guide § 124.220

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.220 Unspecified "Reasonable" Visitation

[1] Comment--Use of Form

The in [2], *below*, form provides for unspecified reasonable visitation with the children of the parties. It is for use if the parents have agreed to formulate their custody plan in the traditional terms of a sole physical custodial parent and a noncustodial parent with visitation rights [*see* § 124.202[2]]. For a provision that treats visitation as simply a time-sharing component of the parents' shared custody plan, *see* § 124.201[5].

An unspecified right of visitation is appropriate if the parents are able to communicate and cooperate, and feel that it is unnecessary to restrict the visitation rights of the noncustodial parent. This approach provides for flexibility, and allows the parents and children the opportunity to share time in a more natural and spontaneous manner.

Such a provision should be included with caution, however. A provision for reasonable but unspecified visitation cannot be enforced. If the parents subsequently cannot agree on the exercise of visitation rights, a further proceeding for modification will be required to establish a specific visitation schedule. Nevertheless, a flexible visitation arrangement based on adult communication and cooperation is usually in the best interests of the children, and if there is a reasonable possibility that the parents will be able to cooperate with each other, they should be given the opportunity to try. They should, however, be advised of the consequences, including the expenditure of additional attorney's fees for modification, if the plan does not work.

Visitation is a parental right, and will be ordered by the court unless it is shown that it would be detrimental to the best interests of the child [*see Fam. Code* § 3100(a); *see* Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., ch. 32, *Jurisdiction to Determine Custody and Visitation*, and ch. 33, *Custody and Visitation Orders* (Matthew Bender)].

[2] FORM

Unspecified "Reasonable" Visitation

Visitation

_____. _____[*Noncustodial parent, e.g., Father*] shall have the right of reasonable visitation at times and places to be agreed to by the parties on _____ hours'/days' advance notice. _____[*custodial parent, e.g., Mother*] shall not unreasonably refuse to permit visitation as requested, and _____[*e.g., Father*] shall not exercise his/her visitation rights in a manner that interferes with the children's school attendance or other previously scheduled activities.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyVisitationGeneral OverviewFamily LawChild CustodyVisitationAwardsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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B. Visitation Provisions

34-124 California Legal Forms--Transaction Guide § 124.221

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.221 Visitation According to Specific Schedule

[1] Comment--Use of Forms

The forms set forth in [2]-[13], *below* are a series of provisions illustrating various components of a schedule for specific visitation rights for the noncustodial parent. These forms are worded for use by parents who have agreed to formulate their custody plan in the traditional terms of a sole physical custodial parent and a noncustodial parent with visitation rights [*see* § 124.202[2]]. However, they may be reworded for use in a shared physical custody plan in which visitation is treated as simply a time-sharing component of the plan [*see* § 124.201[5]] by changing "shall be entitled to exercise visitation with" to "shall have physical responsibility for."

If it appears that the parents are unlikely to cooperate and communicate regarding visitation, or if enforceability is the primary concern, it will be necessary to establish a specific schedule. The variations on scheduled visitation are as numerous as there are different fact situations to accommodate. It is best to be as specific as possible, setting forth exact pick up and return times for the noncustodial parent. Moreover, it is best to keep the schedule as simple and regular as possible. Sometimes parties and their counsel, in an effort to reach a compromise agreement, end up with a schedule that is far too complex to be practical. Schedules that have too many alternatives and variables are also difficult to enforce.

Counsel for the custodial parent should impress on the client the legal enforceability of the visitation agreement and the need for compliance and cooperation. Often the custodial parent holds the mistaken belief that the noncustodial parent may exercise visitation during the designated times only as long as the child wants to go or the family has no conflicting plans. The custodial parent must realize that visitation during the periods set aside for that purpose is a legal right, and that other plans and activities must give way to this right.

[2] Weekends

Visitation According to Specific Schedule--Weekends

Visitation

_____. _____ [Noncustodial parent, e.g., Father] shall be entitled to exercise visitation with the children [every other weekend or on _____ weekend[s] each month or any other alternative that the parties may agree to]. Each weekend visitation period shall begin on [specify day of week and time, e.g., Friday at 4:00 p.m.] and shall end on [e.g., Sunday evening at 8:00 p.m.]. _____ [e.g., Father] shall pick up the children at the residence of _____ [e.g., Mother] at the beginning of the visitation period, and shall return the children to her/his residence at the end of the visitation period [or alternate pick-up and delivery provision from § 124.224].

[3] Midweek**Visitation According to Specific Schedule--Midweek**

Visitation

_____. _____ [Noncustodial parent, e.g., Mother] shall be entitled to exercise visitation with the children every week beginning [specify day or days of week, e.g., Wednesday] at [time, e.g., 5:00 p.m.] and ending at [e.g., 9:00 p.m.].

[OR, if visitation period is overnight:]

The _____ [noncustodial parent, e.g., mother] shall be entitled to exercise visitation with the children every week beginning [specify day or days of week, e.g., Wednesday] at [time, e.g., 5:00 p.m.] and ending [e.g., Thursday] morning at [e.g., 8:00 a.m.].

[Continue with pick-up and delivery provision; see § 124.224.]

[4] Summer Vacation**Visitation According to Specific Schedule--Summer Vacation**

Visitation

[Fixed period of time with specific beginning and ending dates and times:]

_____. _____ [Noncustodial parent, e.g., Father] shall be entitled to exercise visitation with the children in his/her home for [weeks or months] of the children's summer vacation period. This period shall begin on [specify month, day of week, and time, e.g., the first Saturday in July at 9:00 a.m.] and shall end on [e.g., the third Friday in August at 9:00 p.m.].

[OR: Fixed number of weeks and months with period to be arranged:]

_____ [noncustodial parent, e.g., Father] shall be entitled to exercise visitation with the children in his/her home for [weeks or months] of the children's summer vacation period. Summer vacation shall be defined according to the children's school schedule. The beginning and ending dates and times of this visitation period shall be mutually agreed to by the parties in good faith according to their respective schedules.

[OR: Unspecified period of time to coincide with parent's vacation:]

_____ [Noncustodial parent, e.g., Father] shall be entitled to exercise visitation with the children in his/her home for that portion of the children's summer vacation that coincides with his/her own vacation period for that year. Summer vacation shall be defined according to the children's school schedule. _____ [e.g., Father] will give notice to _____ [e.g., Mother] at least [specify period of time, e.g., one month] before the beginning of this visitation period of the exact beginning and ending dates of the period.

[Continue with pick-up and delivery provision; see § 124.224.]

[5] Three-Day Weekends

Visitation According to Specific Schedule--Three-Day Weekends

Visitation

_____. A three-day weekend shall be defined as one for which either a Friday or a Monday is a holiday both for the children and for the _____ [noncustodial parent, e.g., mother]. At the beginning of each year, the parties shall determine which weekends are three-day weekends for that year.

[Right to every other three-day weekend:]

_____ [Noncustodial parent, e.g., Mother] shall be entitled to exercise visitation with the children on every other three-day weekend during the year, beginning with [specify, e.g., Labor Day weekend of 2000]. The visitation period shall begin on the first day of the three day weekend at [time, e.g., 9:00 a.m.], and shall end on the third day of the three-day weekend at [e.g., 8:00 p.m.].

[OR, visitation for part of every three-day weekend:]

_____ [noncustodial parent, e.g., Mother] shall be entitled to exercise visitation with the children during each three-day weekend from [beginning day and time, e.g., 9:00 a.m. on the first day of the weekend] until [ending day and time, e.g., 8:00 p.m. on the second day of the weekend].

[OR, visitation on specified three-day weekends:]

_____ [noncustodial parent, e.g., Mother] shall be entitled to exercise visitation with the children during the following three-day weekends each year: [specify, e.g., Presidents' Day, Memorial Day, Independence Day, and Labor Day]. The visitation period shall begin on the first day of the three day weekend at [time, e.g., 9:00 a.m.], and shall end on the third day of the three-day weekend at [e.g., 8:00 p.m.].

[Continue with pick-up and delivery provision; see § 124.224.]

[6] Thanksgiving Day and Vacation

Visitation According to Specific Schedule--Thanksgiving Day and Vacation

Visitation

[Visitation on alternating Thanksgiving vacations:]

_____. _____ [Noncustodial parent, e.g., Father] shall be entitled to exercise visitation with the children on every other Thanksgiving vacation beginning with Thanksgiving [year, e.g., 2000]. The Thanksgiving vacation period shall begin [day and time, e.g., Thanksgiving Day at 2:00 p.m.] and shall end [day and time, e.g., the Sunday after Thanksgiving at 6:00 p.m.].

[OR: visitation for part of every Thanksgiving vacation:]

_____ [Noncustodial parent, e.g., Father] shall be entitled to exercise visitation with the children during Thanksgiving vacation each year beginning [day and time, e.g., 4:00 p.m. on the Wednesday before Thanksgiving] and ending [ending day and time, e.g., 2:00 p.m. on Thanksgiving Day].

[OR: visitation on Thanksgiving Day only:]

_____ [Noncustodial parent, e.g., Father] shall be entitled to exercise visitation with the children _____ on [every or every other] Thanksgiving Day. The visitation period shall begin at [time, e.g., 9:00 a.m.], and shall end at [e.g., 8:00 p.m.]. [Add if desired: The three-day period including the Friday, Saturday, and Sunday after Thanksgiving shall be considered as a three-day weekend under Paragraph _____ of this agreement.]

[Continue with pick-up and delivery provision; see § 124.224.]

[7] Christmas Eve and Day

Visitation According to Specific Schedule--Christmas Eve and Day

Visitation

[Visitation every Christmas Eve and Christmas morning:]

_____ [Noncustodial parent, e.g., Mother] shall be entitled to exercise visitation with the children every year from [time, e.g., 4:00 p.m.] on December 24th until [e.g., 12:00 p.m.] on December 25th.

[OR: visitation every Christmas Day:]

_____ [Noncustodial parent, e.g., Mother] shall be entitled to exercise visitation with the children on Christmas Day (December 25th) from [time, e.g., 12:00 p.m.] until [e.g., 8:00 p.m.].

[OR: alternating Christmas Eve and Christmas Day:]

_____. _____ [Noncustodial parent, e.g., Mother] shall be entitled to exercise visitation with the children on December 24 and December 25 every year as follows: in even-numbered years, from [time, e.g., 4:00 p.m.] on December 24th until [e.g., 12:00 p.m.] on December 25th; in odd-numbered years, from [time, e.g., 12:00 p.m.] until [e.g., 8:00 p.m.] on December 25th.

[Continue with pick-up and delivery provision; see § 124.224.]

[8] Christmas Vacation**Visitation According to Specific Schedule--Christmas Vacation**

Visitation

_____. Christmas vacation shall be defined as beginning [*e.g.*, at 9:00 a.m. on the Saturday immediately after the last day of school before Christmas], until [*e.g.*, 8:00 p.m. on the Sunday immediately before the first day of school of the next calendar year].

[*Dividing Christmas vacation; alternating Christmas Day:*]

_____. [Noncustodial parent, *e.g.*, Father] shall be entitled to exercise visitation with the children during Christmas vacation every year as follows: in even-numbered years, during the first week of Christmas vacation from [*beginning of first week of vacation, e.g.*, 9:00 a.m. on the first Saturday immediately after the last day of school before Christmas] until [*end of first week of vacation, e.g.*, 8:00 p.m. on the following Saturday]; in odd-numbered years, from [*beginning of second week, e.g.*, 9:00 a.m. on the second Sunday of Christmas vacation] until [*end of second week of vacation, e.g.*, 8:00 p.m. on the following Sunday].

[*OR: alternating Christmas vacation yearly:*]

_____. [Noncustodial parent, *e.g.*, Father] shall be entitled to exercise visitation with the children during Christmas vacation every other year, beginning [year].

[*Continue with pick-up and delivery provision; see § 124.224.*]

[9] Spring Vacation**Visitation According to Specific Schedule--Spring Vacation**

Visitation

_____. _____ [Noncustodial parent, *e.g.*, Mother] shall be entitled to exercise visitation with the children during Spring vacation _____ [every or every other] year, beginning [year]. The Spring vacation visitation period shall begin [*beginning day and time, e.g.*, 9:00 a.m. on the first Saturday of the vacation period] and shall end [*ending day and time, e.g.*, 5:00 p.m. on Wednesday of the period].

[*Continue with pick-up and delivery provision; see § 124.224.*]

[10] Birthdays and Other Holidays**Visitation According to Specific Schedule--Birthdays and Other Holidays**

Visitation

[*Children's birthdays:*]

_____. _____ [Noncustodial parent, *e.g.*, Father] shall be entitled to exercise visitation with each child on the child's birthday [every or every other] year from [*time, e.g.*, 9:00 a.m.] until [*time, e.g.*, 5:00 p.m.].

[Parents' birthdays:]

_____ [Noncustodial parent, e.g., Father] shall be entitled to exercise visitation with the children on his/her birthday each year beginning at [time, e.g., 5:00 p.m.] until [time, e.g., 8:00 p.m.]. _____ [e.g., Father] shall not exercise visitation with the children on _____ [custodial parent, e.g., Mother's] birthday even though he/she might otherwise be entitled to do so on that day under some other visitation provision of this agreement.

[Mother's Day/Father's Day:]

_____ [Noncustodial parent, e.g., Father] shall be entitled to exercise visitation with the children on _____ [match gender, e.g., Father's Day] each year beginning at [time, e.g., 9:00 a.m.] until [time, e.g., 5:00 p.m.]. _____ [e.g., Father] shall not exercise visitation with the children on _____ [e.g., Mother's Day] even though he/she might otherwise be entitled to do so on that day under some other visitation provision of this agreement.

[Easter or other single-day religious or other holiday:]

_____ [Noncustodial parent, e.g., Father] shall be entitled to exercise visitation with the children [each year or every other year] on [specify holiday(s), e.g., Easter] from [time, e.g., 6:00 a.m.] until [time, e.g., 3:00 p.m.].

[11] Jewish Observance

Visitation According to Specific Schedule--Jewish Observance

Visitation

[Shabbat:]

_____. _____ [Noncustodial parent, e.g., Mother] shall be entitled to exercise visitation with the children [each week or every other week] from Friday at [sundown or specify time e.g., 5:00 p.m.] until Saturday at [sundown or specify time e.g., 5:00 p.m.].

[Passover:]

_____ [Noncustodial parent, e.g., Mother] shall be entitled to exercise visitation with the children each year during Passover beginning [specify, e.g., from sundown of the first night] until [e.g., sundown of the second night].

[High holy days:]

_____ [Noncustodial parent, e.g., Mother] shall be entitled to exercise visitation with the children during the high holy days [each year or every other year] at the following times: [e.g., from sundown on the day before Rosh Hashanah until sundown on Rosh Hashanah and from sundown on the day before Yom Kippur until sundown on

Yom Kippur].

[Hanukkah:]

_____. [Noncustodial parent, e.g., Mother] shall be entitled to exercise visitation with the children each year during Hanukkah at the following times: [specify].

[12] Notice of Changed Plans

Visitation According to Specific Schedule--Notice of Changed Plans

Notice of Changed Plans

_____. If for any reason _____ [noncustodial parent, e.g., Father] determines that he/she will be unable to exercise visitation at any time during which he/she is entitled to do so under this Agreement, he/she shall give _____ [custodial parent, e.g., Mother] _____ [hours or days] prior oral notice of his/her unavailability. Any inability or other failure to exercise visitation shall not be considered a waiver of any right to visitation as set forth in this Agreement. However, should _____ [e.g., Father] regularly fail to exercise visitation rights during any period as authorized in this schedule, he/she shall give reasonable notice before again exercising visitation rights during that period. In the absence of this notice, the _____ [e.g., mother] shall not be obligated to permit the visitation.

[13] Oral Modification Allowed

Visitation According to Specific Schedule--Oral Modification Allowed

Modification of Schedule

_____. Nothing in this agreement precludes the parties from mutually agreeing to additional visitation for _____ [noncustodial parent, e.g., Mother] at whatever times and in whatever manner may be deemed appropriate. The parties may agree orally at any time to extend or to reduce this schedule. However, should at any time the parties fail to agree on the extent, instances, or times of visitation, either party may give notice to the other that the original schedule shall be reinstituted strictly in accordance with the schedule as set forth in this Agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyVisitationAwardsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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34-124 California Legal Forms--Transaction Guide § 124.222

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.222 Supervised Visitation

[1] Comment--Use of Form

The form in [2], *below*, is a provision restricting visitation with the children to situations in which a third party is present. This provision might be appropriate in cases involving domestic violence, or if there is a reasonable concern about child abduction. It may be used to restrict the visitation rights of either parent, or the rights of a grandparent, stepparent, or other (nonparent) who is granted visitation rights [*see* § 214.225].

If a domestic violence protective order is in place [*see Fam. Code* § 6218], the court must consider whether visitation should be limited to situations in which a third person is present [*Fam. Code* § 3100(b); *see Fam. Code* § 3022(b) (corroboration of reports of abuse); *see also* Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure 2d ed., Ch. 96, *Injunctive Relief Against Domestic Violence* (Matthew Bender)]. In making its decision, the court must consider the nature of the acts from which the parent was enjoined and the amount of time that has elapsed since the protective order was issued. A parent may submit to the court the name of a person that he or she deems suitable to be present during visitation [*Fam. Code* § 3100(b)].

If the court orders visitation in a case in which domestic violence is alleged and an emergency protective order, protective order, or other restraining order has been issued, the visitation order must specify the time, day, place, and manner of transfer of the child, so as to limit the child's exposure to potential domestic conflict or violence and to ensure the safety of all family members. If a criminal protective order has been issued [*see Penal Code* § 136.2], the visitation order must refer to and acknowledge the precedence of enforcement of any criminal protective order [*Fam. Code* § 3100(c)].

A court may not grant unsupervised visitation, or physical or legal custody, to a person who is required to register as a sex offender [*see Penal Code* § 290 *et seq.*] for an offense in which the victim was a minor, or who has been convicted of certain offenses against any child [*see Penal Code* § 273a (child endangerment and infliction of unjustifiable

physical pain or mental suffering), *Penal Code* § 273d (cruel or inhuman corporal punishment resulting in traumatic condition), *Penal Code* § 647.6 (child molestation)], unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record [*Fam. Code* § 3030(a)(1)]. The child may not be placed in a home in which that person resides, nor permitted to have unsupervised visitation with that person, unless the court states the reasons for its findings in writing or on the record [*Fam. Code* § 3030(a)(1)]. Similarly, a court may not grant unsupervised visitation, or physical or legal custody, to a person if anyone residing in that person's household is required to register as a sex offender [*see Penal Code* § 290 *et seq.*] for a felony offense in which the victim was a minor, unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record [*Fam. Code* § 3030(a)(2)]. The child may not be placed in a home in which that person resides, nor permitted to have unsupervised visitation with that person, unless the court states the reasons for its findings in writing or on the record [*Fam. Code* § 3030(a)(2)]. For these purposes, the fact that a child is permitted unsupervised contact with a person who is required to register as a sex offender for a felony offense in which the victim was a minor is *prima facie* evidence that the child is at significant risk. When making a determination regarding significant risk to the child, this *prima facie* evidence creates a presumption affecting the burden of producing evidence. However, this presumption will not apply if there are factors mitigating against its application, such as whether the other party seeking visitation or custody is also required to register as a sex offender for a felony in which the victim was a minor [*Fam. Code* § 3030(a)(3)].

Further, a court may not grant any visitation with, or custody of, a child to a person who has been convicted of rape [*see Penal Code* § 261], if the child was conceived as a result of that violation [*Fam. Code* § 3030(b)].

Finally, a court may not grant unsupervised visitation or custody to a person who has been convicted of the first-degree murder [*see Penal Code* § 189] of the other parent of the child, unless the court finds that there is no risk to the child's health, safety, and welfare, and states the reasons for its finding in writing or on the record. In making its finding, the court may consider, among other things, the following [*Fam. Code* § 3030(c)]:

- The wishes of the child, if the child is of sufficient age and capacity to reason so as to form an intelligent preference.
- Credible evidence that the convicted parent was a victim of abuse [*see Fam. Code* § 6203] committed by the deceased parent. This evidence may include, but is not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of domestic abuse.
- Testimony of an expert witness that the convicted parent experienced intimate partner battering [*see Evid. Code* § 1107].

Unless and until a custody or visitation order is issued, the convicted parent may not visit or have custody of the child without the consent of the child's custodian or legal guardian [*Fam. Code* § 3030(c)].

If the foregoing circumstances do not exist, the public policy favoring children's frequent and continuing contact with both parents, as limited by the supervening policy of assuring a child's health, safety, and welfare [*Fam. Code* § 3020], limits the courts' authority to impose conditions not directly related to the child's best interests on the exercise of parental visitation rights [*see In re Marriage of Oldfield* (1979) 94 Cal. App. 3d 259, 261-262, 156 Cal. Rptr. 224 (no abuse of discretion to order noncustodial parent to pick up and deliver children at grandparents' home when there had been one previous altercation between parents)]. For further discussion of the standards, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure 2d ed., Ch. 33, *Custody and Visitation Orders* (Matthew Bender).

[2] FORM

Supervised Visitation**Supervised Visitation**

_____. Visitation between _____ [*noncustodial parent, e.g., Father or name of person whose visits are to be supervised*] and the children shall take place only in the presence of _____ [*name of third party approved by court or agreed to by parents*]. All costs associated with supervised visitation shall be paid by _____ [*parent who will pay, or divide equally or by specified percents*]. The failure of _____ [*e.g., Father or name of person whose visits are to be supervised*] to comply with this requirement shall cause [him or her] to forfeit all visitation rights granted to [him or her] under this Agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyVisitationAwardsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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34-124 California Legal Forms--Transaction Guide § 124.223

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.**§ 124.223 Increasing Visitation as Children Grow Older****[1] Comment--Use of Form**

The form in [2], *below*, sets forth several steps providing a gradual transition from limited to increased visitation rights for the noncustodial parent. In some cases, a parent may be incapable of caring properly for infants and very small children, or may be unwilling to do so. In those cases, the parties may be able to agree to limit that parent's visitation rights while the child is very young, and to increase visitation as the child grows older. By the time the child is old enough so that there are no perceived limitations on the noncustodial parent's capacity to provide proper care during the visitation period, a full visitation schedule may be instituted. This form uses a child's entry into kindergarten, usually at age 5, as that point.

[2] FORM**Increasing Visitation as Children Grow Older**

Visitation Rights

_____. _____ [Noncustodial parent, e.g., Father] shall have visitation rights with the child as follows:

1. From the effective date of this Agreement until the child's _____ [e.g., first] birthday, for a period of _____ [specify, e.g., every Saturday from 10:00 a.m. to 2:00 p.m.], to be exercised exclusively in the home of _____ [specify, e.g., the child's paternal grandparents].
2. From the child's _____ [e.g., first] birthday until the child's _____ [e.g., third] birthday, _____ [specify, e.g., from 10:00 a.m. to 7:00 p.m. every Saturday]. During this period, the child shall at all times be in the company of a person

capable of providing fully for the proper care of the child, as well as in the company of _____ [e.g., Father].

3. From the child's _____ [e.g., third] birthday until the child enters kindergarten, _____ [specify period including overnight visitation, e.g., every other weekend beginning at 10:00 a.m. Saturday until 5:00 p.m. Sunday].

4. After the child enters kindergarten, _____ [specify complete visitation schedule; see § 124.221].

Legal Topics:

For related research and practice materials, see the following legal topics:
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34-124 California Legal Forms--Transaction Guide § 124.224

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.224 Pickup, Return, and Travel

[1] Comment--Use of Forms

The forms in [2]-[5], *below*, are provisions regarding the transfer of physical responsibility from one parent to the other. All custody provisions should address the transfer of responsibility at the beginning and the end of any period in which the children will be moving from one parent to the other. These provisions allow for all combinations of responsibilities between the sending and receiving parents, including delivering the children to school in the morning after overnight visitation.

These forms are drafted in the traditional language of a "custodial" parent and a "noncustodial" parent with visitation rights. They may be adapted for use in shared physical custody plans [see §§ 124.11, 124.201] by substituting "transfer of physical responsibility" for "period of visitation" and using terms such as "delivering" and "receiving" parents.

[2] Pickup and Return

Pickup and Return of Children

Pickup and Return of Children

[Entire responsibility on noncustodial parent:]

_____. For each period of visitation provided for in this Agreement, the _____ [noncustodial parent, e.g., Father] shall pick the children up at the designated time at _____ [specify place, e.g., the home of Mother] and return them at the designated time to [specify place].

[OR: entire responsibility on custodial parent:]

_____. For each period of visitation provided for in this Agreement, _____ [custodial parent, e.g., Mother] shall deliver the children at the designated time to _____ [specify place, e.g., the home of Father] and pick them up at the designated time at [specify place].

[OR: custodial parent delivers and noncustodial parent returns:]

_____. For each period of visitation provided for in this Agreement, _____ [e.g., Mother] shall deliver the children at the designated time to _____ [specify place, e.g., the home of Father] and _____ [e.g., Father] shall return them at the designated time to [specify place].

[OR: each parent picks up children from the other:]

_____. For each period of visitation provided for in this Agreement, _____ [e.g., Father] shall pick up the children at the designated time at _____ [specify place, e.g., the home of Mother] and _____ [e.g., Mother] shall pick up the children at the end of the period at the designated time at [specify place].

[OR: delivery to school after overnight:]

_____. For each period of overnight visitation provided for in this Agreement, _____ [e.g., Father] shall pick up the children at the designated time at _____ [specify place, e.g., the home of Mother] and shall take the children to their school on the following morning. _____ [e.g., Mother] shall then pick up the children at the end of the school day. [Add if desired to clarify which parent is responsible in case of emergency during school day: During the school day, _____ [e.g., Mother] shall be considered as having the physical custody of, and responsibility for, the children.]

[3] Travel Arrangements

Travel Arrangements

Travel Arrangements

[Entire responsibility on noncustodial parent:]

_____. For each period of visitation provided for in this Agreement, _____ [noncustodial parent, e.g., Mother] shall arrange and pay for the cost of round-trip transportation for the children from and back to the home of _____ [custodial parent, e.g., Father]. [add if children are too young to travel alone: _____ (e.g., Father) or a mutually agreed to adult companion shall accompany the children at all times during each trip].

[OR: entire responsibility on custodial parent:]

_____. For each period of visitation provided for in this Agreement, _____ [custodial parent, e.g., Father] shall arrange and pay for the cost of round-trip transportation for the children to the home of _____ [noncustodial parent, e.g., Mother] and back to his/her home. [Add if children are too young to

travel alone: _____ (e.g., Father) or a mutually agreed to adult companion shall accompany the children at all times during each trip].

[OR: *each bears responsibility one way:*]

_____. For each period of visitation provided for in this Agreement, _____ [noncustodial parent, e.g., Mother] shall arrange and pay for the cost of transportation from the home of _____ [custodial parent, e.g., Father] to her/his home at the beginning of the period. _____ [custodial parent, e.g., Father] shall arrange and pay for the cost of return transportation to his/her home at the end of the period. [Add if children are too young to travel alone: Each parent (or a mutually agreed to adult companion) shall accompany the children at all times during the trip that he or she has arranged.]

[4] Residential Privacy

Residential Privacy

Residential Privacy

_____. Neither parent shall enter the residence of the other without permission in the course of picking up the children from or returning them to the other parent's home.

[5] Early Return

Early Return

Early Return

_____. _____ [noncustodial parent, e.g., Father] shall not return the children earlier than the designated time for the end of any visitation period without _____ [custodial parent's, e.g., Mother's] prior consent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family Law Child Custody Visitation Awards General Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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34-124 California Legal Forms--Transaction Guide § 124.225

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.225 Visitation for Nonparents

[1] Comment--Use of Forms

The forms in [2]-[4], *below* provide for visitation rights for nonparents. Nonparents, of course, may be granted any of the specific visitation schedule times that might be granted to parents [*see* § 124.221]. However, nonparents commonly receive shorter and less frequent visitation periods, unless the nonparent will be exercising essentially a parental role. If visitation is for an extended period, such as for an entire summer, the child support provisions should also be addressed for the period. Some reduction of support is appropriate, although because the obligee parent's rent or mortgage payments are obviously not suspended, a total elimination of support for the period is usually not appropriate.

In most circumstances it is preferable to expect grandparents and other relatives to spend time with the children while the related parent is exercising rights to custody or visitation. However, the Family Code gives the court the discretion to grant visitation to any person having an interest in the welfare of the child [*Fam. Code* § 3100(a)]. Specific statutes provide visitation rights for grandparents [*Fam. Code* §§ 3103, 3104], stepparents [*Fam. Code* § 3101], and relatives of a deceased parent [*Fam. Code* § 3102]. These statutes are discussed in Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Chapters 32, *Jurisdiction to Determine Custody and Visitation* and 33, *Custody and Visitation Orders* (Matthew Bender).

Although parents may provide for visitation for any nonparent in their agreement, custody and visitation agreements cannot be enforced by contract remedies [*see Curiale v. Reagan* (1990) 222 Cal. App. 3d 1597, 1600, 272 Cal. Rptr. 520]. There is no nonstatutory vehicle by which a nonparent can obtain visitation rights with a child [*see White v. Jacobs* (1988) 198 Cal. App. 3d 122, 124, 243 Cal. Rptr. 597; *see also In re Marriage of Lewis & Goetz* (1988) 203 Cal. App. 3d 514, 518, 250 Cal. Rptr. 30 (stepparent); *Curiale v. Reagan* (1990) 222 Cal. App. 3d 1597, 1600, 272 Cal. Rptr. 520 (parent's lesbian partner)]. Therefore, if the parents rescind their agreement on visitation, the nonparent would have to seek an enforceable visitation order within the scope of one of the specific statutes. If, however, the visitation agreement is included in a court order, it is enforceable, but is subject to termination or modification, as with

any other custody or visitation order [*Bookstein v. Bookstein* (1970) 7 Cal. App. 3d 219, 222-223, 86 Cal. Rptr. 495 ; see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., ch. 35, *Modification of Custody Orders and Change of Child's Residence* (Matthew Bender)].

Visitation rights granted to a stepparent or a grandparent must not conflict with the visitation or custody rights of a parent who is not a party to the proceeding [*Fam. Code* §§ 3101(c), 3103(e)]. Therefore, in an agreement terminating the marriage of a parent and stepparent of a child, any visitation granted to the stepparent cannot conflict with the other birth parent's custodial or visitation time.

One court has held that a trial court's *application of Fam. Code § 3101* was unconstitutional, in that it violated the parent's substantive due process right to the care, custody and control of his child by failing to apply a presumption that a parent's decision regarding visitation is in the best interest of the child. The court did not conclude, however, that the statute was facially unconstitutional [*In re Marriage of W.* (2003) 114 Cal. App. 4th 68, 74-75, 7 Cal. Rptr. 3d 461] .

After the entry of a judgment dissolving the marriage and awarding custody of the child, *Fam. Code § 3104* specifies the procedure and prerequisites for a grandparent to seek an order granting reasonable visitation [*In re Marriage of Harris* (2004) 34 Cal. 4th 210, 219-223, 17 Cal. Rptr. 3d 842, 96 P.3d 141] . In such a case, if one parent has been granted sole custody and objects to visitation by the grandparent, the statute creates a rebuttable presumption affecting the burden of proof that grandparent visitation is not in the child's best interest [*Fam. Code § 3104(f)*]. The California Supreme Court has held that *Fam. Code § 3104* may constitutionally be applied to grant visitation to paternal grandparents with the approval of the father but over the objection of the mother, who had been awarded sole custody of the child, so long as the trial court considers the statute's rebuttable presumption that grandparent visitation is not in the child's best interest [*In re Marriage of Harris* (2004) 34 Cal. 4th 210, 223-230, 17 Cal. Rptr. 3d 842, 96 P.3d 141] .

[2] Visitation for Nonparents--Visitation Schedule

Custody and Visitation Provisions for Marital Settlement Agreements

Visitation Rights of _____ [e.g., Grandparents]

_____. The parties recognize that their children have established a relationship with _____ [full name or names of nonparent(s)], who are/is the children's [specify relationship, e.g., maternal grandparents], and agree that the continuation of that relationship will be in the children's best interests. Therefore, the above-named [e.g., grandparents] shall have the right to visitation with the children as described in the following paragraphs.

[Select appropriate provision(s):]

[Weekends:]

[E.g., The grandparents] shall have the right to visitation with the children at their/his/her home during _____ weekends each [e.g., year], from [beginning day and time, e.g., 6:00 p.m. on Friday] until [ending day and time, e.g., 6:00 p.m. on Sunday]. The specific weekends for visitation shall be arranged by agreement of the parents and the [e.g., grandparents], to take place at their mutual convenience.

[Summer vacation:]

[E.g., The Grandparents] shall have the right to visitation with the children at their/his/her home during the children's school summer vacation for a period of at least [e.g., one month]. The precise beginning and ending dates and times of

these visits shall be arranged by the parents and the [e.g., grandparents] each year during the month of [e.g., April].

[3] Travel Arrangements and Costs

Visitation for Nonparents--Travel Arrangements and Costs

Travel and Expenses

_____. [E.g., The Grandparents] shall arrange and pay for the children's round-trip transportation between _____ [custodial parent, e.g., Mother's] home and their/his/her home for purposes of visitation. [Add if appropriate: _____ (E.g., One or both grandparents) shall personally accompany the children during any travel.] [E.g., The Grandparents] agree to assume all expenses for maintaining the children during visitation periods.

Return of Children

_____. When a visitation period has ended, [e.g., the Grandparents] shall promptly return the children to the custody of the parent then entitled to custody of the children under the terms of this Agreement.

[4] Disparagement Prohibited

Visitation for Nonparents--Disparagement Prohibited

Maintenance of Respect for Parents

_____. [E.g., The Grandparents] shall encourage the children's respect and affection for both parents, and shall not disparage or criticize either of them in the children's presence. The parents shall each encourage the children's respect and affection for [e.g., the Grandparents], and neither shall disparage or criticize them in the children's presence.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family Law Child Custody Visitation Awards Third Parties Nonparents



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DIVISION VII: PERSONAL TRANSACTIONS
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34-124 California Legal Forms--Transaction Guide §§ 124.226-124.239

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 124.226[Reserved]



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DIVISION VII: PERSONAL TRANSACTIONS
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C. Related General Provisions

34-124 California Legal Forms--Transaction Guide § 124.240

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.240 Change of Residence and Removal of Child From State

[1] Comment--Use of Forms

The forms in [2]-[4], *below*, illustrate provisions regarding the right of one or both parents to change residences or to otherwise remove the children from the state. The form in [4], *below*, limits the amount of time that the custodial parent may take the child out of California in a situation that does not involve a change of residence. If any ex parte custody order is issued, the court must also restrain the person granted custody from removing the child from the state [*Fam. Code § 3063*].

Advance notice of any proposed change of residence may be required [*Fam. Code § 3024*]. The form in [2], *below*, requires a parent who intends to move to give timely notice to the other parent.

As a general rule, a parent entitled to the custody of a child may change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child [*Fam. Code § 7501(a)*]. The forms in [3], *below*, address limitations on one or both parents to change residences. The first alternative limits both parents from changing residences to a place that is more than a specified number of miles away from the other parent's home without the consent of the other or a court order. This alternative may be used with either primary physical custody or shared or joint physical custody plans. The second alternative places this limitation only on the parent with primary physical custody. The third alternative allows either parent to change residences without restriction, but recognizes that any proposed change of residence is a material change of circumstances that will require a modification of custody to give primary physical custody to one of them or the other. The fourth alternative states that any change of residence within a limited area is allowed and is not a change of circumstances.

Even a parent with sole legal and physical custody may be restrained from changing the child's residence, if the court determines that the change would be detrimental to the child's welfare [*Fam. Code § 7501(a)*; *In re Marriage of Brown & Yana* (2006) 37 Cal. 4th 947, 955-959, 38 Cal. Rptr. 3d 610, 127 P.3d 28] . However, in *In re Marriage of*

Burgess, the California Supreme Court construed *Fam. Code* § 7501 to severely limit the right of a noncustodial parent to prevent the custodial parent from changing his or her residence and that of the child [*In re Marriage of Burgess* (1996) 13 Cal. 4th 25, 51 Cal. Rptr. 2d 444, 913 P.2d 473 (custodial parent is entitled to change child's residence unless move is detrimental to child); see *Fam. Code* § 7501(b) (reaffirming holding of *Burgess*); see also Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 35, *Modification of Custody Orders and Change of Child's Residence* (Matthew Bender)]. Therefore, any of the above change-of-residence clauses may be unenforceable to the extent that they operate to limit the primary custodial parent's right to move as articulated in *Burgess*. However, *Burgess* did not address the right of the parties to alter its otherwise applicable result by limiting a parent's right to move in their agreement. Therefore, the question of whether the parties may accomplish by agreement what they could not otherwise ask the court to do is open and unresolved.

In a 2004 decision, *In re Marriage of LaMusga*, the California Supreme Court lessened the severe burden impliedly placed on the noncustodial parent by its decision in *Burgess*, and clarified that a noncustodial parent does not have a burden of establishing that a change of custody is *essential* to prevent detriment to the children from the planned move [*In re Marriage of LaMusga* (2004) 32 Cal. 4th 1072, 1078, 12 Cal. Rptr. 3d 356, 88 P.3d 81 (appellate court misapplied *Burgess* in stating that custodial parent with good faith reason to move cannot be prevented, directly or indirectly, from exercising right to change child's residence, unless noncustodial parent makes substantial showing that change of custody is essential to prevent detriment to child)]. Instead, a noncustodial parent who opposes a proposed move has an initial burden of showing that the move would cause detriment to the children, requiring a reevaluation of the children's custody. The likely impact of the proposed move on the noncustodial parent's relationship with the children is a relevant factor in determining whether the move would cause detriment to the children. When considered in light of *all* relevant factors, it may be sufficient to justify a change in custody [*In re Marriage of LaMusga* (2004) 32 Cal. 4th 1072, 1078, 1101, 12 Cal. Rptr. 3d 356, 88 P.3d 81 (factors court should consider); *In re Marriage of Melville* (2004) 122 Cal. App. 4th 601, 611-613, 18 Cal. Rptr. 3d 685 (applying *Burgess* and *LaMusga*; when custodial parent decides to move, court has discretion to order change in custody if substantial evidence establishes that relocating would cause detriment to child)]. In making this determination, the court need not conduct an evidentiary hearing if the noncustodial parent's allegation or showing that the planned move would be detrimental to the child is insubstantial in light of all the circumstances of case (or is otherwise legally insufficient) [*In re Marriage of Brown & Yana* (2006) 37 Cal. 4th 947, 959-963, 38 Cal. Rptr. 3d 610, 127 P.3d 28] .

The limitations of *Burgess* do not apply in a case of true shared custody, in which each parent has substantial physical custody [*In re Marriage of Burgess* (1996) 13 Cal. 4th 25, 32, 40 n.12, 51 Cal. Rptr. 2d 444, 913 P.2d 473 ; see *Niko v. Foreman* (2006) 144 Cal. App. 4th 344, 363-364, 50 Cal. Rptr. 3d 398 (when parents have joint physical custody and one parent plans to move, trial court has wide discretion to choose parenting plan that is in best interest of child); *In re Marriage of Edlund & Hales* (1998) 66 Cal. App. 4th, 1454, 1466, 78 Cal. Rptr. 671 (actual time-share is controlling, not label that parties attach to arrangement in their agreement or order)]. Therefore, the forms in [3], *below*, are not made unenforceable by *Burgess* in the case of joint or shared physical custody. However, there may be more concerns with a provision that attempts to actually prohibit a joint custodial parent from moving than with one that simply recognizes that the move constitutes a change of circumstances, and the court will have to decide whether to give primary physical custody to the move-away parent or the stay-behind parent.

[2] Notice of Change of Residence

Notice of Change of Residence

Notice of Change of Residence

_____. A party who intends to change residences to a place more than _____ miles from his or her current home shall give written notice of the intended move to the other party. Notice shall be given no less than _____ [e.g., 45] days before the contemplated move, by mail, return receipt requested, postage prepaid to the last known address of the party

to be notified. A copy of the notice shall also be sent to the party's counsel.

[3] Change of Residence Restricted

Change of Residence Restricted

Change of Residence

[Both parents restricted:]

_____. The parties recognize that it is in the best interest of their children that both parties maintain frequent and continuous contact with them, and that it may be detrimental to the children for either to change his or her residence to a place where contact with the other will be significantly decreased. Therefore, neither party shall change the residence where the children live during the time when that party has primary physical responsibility for the children to a location that is more than _____ miles from the residence of the other. Therefore, neither parent shall change his or her residence without the prior written consent of the other parent or an order of the court.

[OR custodial parent's change of children's residence restricted:]

_____. The parties recognize that it is in the best interest of their children that both parties maintain frequent and continuous contact with them, and that it may be detrimental to the children for _____ *[custodial parent, e.g., Mother]* to change _____ *[her or his]* residence to a place where contact with _____ *[noncustodial parent, e.g., Father]* will be significantly decreased. Therefore, _____ *[custodial parent, e.g., Mother]* shall not change the residence of the children to a location that is more than _____ miles from the residence of _____ *[noncustodial parent, e.g., Father]* without the prior written consent of _____ *[e.g., Father]* or an order of the court.

[OR: restraint on move prohibited, but modification of custody permitted:]

_____. Neither party may be restrained from changing his or her residence or from removing the children from the state or changing the children's residence solely to ensure and facilitate the custody and visitation rights and schedule provided for in this Agreement. However, the party who is not changing residences may petition the court for any modification of custody and visitation orders as may be in the best interests of the children, including a change granting that parent the primary physical custody of the children so that they may remain in their current community.

[OR: change of residence permitted within specified area without constituting change of circumstances:]

_____. _____ *[Either parent or the custodial parent, e.g., Mother]* shall have the right to change _____ *[her or his]* residence, and that of the children, to any place within _____ *[specify area, e.g., the nine-county region that constitutes the San Francisco Bay Area]*, and any such change of residence, alone, shall not constitute a change of circumstances sufficient to support a motion for modification of the custody provisions of this Agreement. However, any change of residence *[by either parent]* outside of this area shall be deemed a material change of circumstances sufficient to support a modification of this Agreement and any custody and visitation orders issued on it. The parties recognize that any such modification will be subject to mandatory mediation.

[4] Taking Children Outside of State

Taking Children Outside of State**Removal of Children From State**

_____. Neither party shall remove any of the children from the state of California [*add if desired: for a period of more than _____ days*] for any reason without the prior written permission of the other parent or a court order permitting the removal of the children. Neither parent shall unreasonably or arbitrarily withhold his or her permission if the other wishes to take any child out of California for legitimate vacation, educational, or recreational purposes and with the clear intent to return to the state after a limited period of time.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyAwardsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 124 PROVISIONS FOR CHILD CUSTODY AND VISITATION
PART IV. FORMS
C. Related General Provisions

34-124 California Legal Forms--Transaction Guide § 124.241

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.241 Notice of Whereabouts

[1] Comment--Use of Form

The form in [2], *below*, requires each parent to keep the other informed of his or her whereabouts and those of the children. It is broader than a change-of-residence provision [*see* § 124.240], in that it requires specific information to be provided. On the other hand, it is not a substitute for a change-of-residence provision in that it does not specify any specific number of days of advance notice, nor any consequences to arise from an intended relocation to another geographical area. This provision is most likely to be useful to keep track of a parent who is unlikely to be spending much time with the children. For related provisions related to child support, see Chapter 123.

[2] FORM

Notice of Whereabouts

Notice of Whereabouts

_____. Each party shall, at all times, provide the other with his or her current address and home and work telephone numbers. Whenever the children are outside the boundaries of [*specify geographical area, e.g., Los Angeles County*] with a party for more than [*e.g., 24 hours*], the traveling party will inform the other party of the children's whereabouts and a contact number where the children may be reached.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyAwardsGeneral Overview



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DIVISION VII: PERSONAL TRANSACTIONS
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34-124 California Legal Forms--Transaction Guide § 124.242

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.242 Children's Surnames

[1] Comment--Use of Form

The form in [2], *below*, is a provision affirming the surnames of the children and prohibiting a parent from changing the surnames of the children, either legally or for purposes of usage. The form in [3], *below*, requires that a child's surname be changed. Legal change of name must be by petition under *Code of Civil Procedure Section 1275 et seq.*, which requires notice to any nonpetitioning parent [*Code Civ. Proc. § 1277(a)*]. For further discussion of the statutory procedures for a change of name, see California Forms of Pleading and Practice(Matthew Bender), *Name, Change of* [see also Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., ch. 30, *The Parent-Child Relationship* (Matthew Bender) (standards for court's ruling on contested change-of-name motion in family law proceeding)].

[2] Change of Children's Surname Prohibited

Change of Children's Surname Prohibited

Children's Surnames

_____. The children shall continue to bear the surname [*specify*]. Neither party shall institute a proceeding under *Code of Civil Procedure Section 1275 et seq.* to change the surname of the children. Neither party shall use or permit to be used any surname other than the children's above legal surname for purposes of school enrollment, church attendance, other organizational identification, or any other purpose. It is the intention of the parties, and they expressly agree, to use their best efforts to ensure that the children be known by their legal surname to family, friends, associates, and peers.

[3] Change of Children's Surname Required

Change of Children's Surname Required

Children's Surnames

_____. The surname of the children shall be changed from _____[*birth certificate surname*], as currently shown on the children's birth certificates, to _____[*new surname*]. Father/Mother shall institute a proceeding under *Family Code section 7638* and *Code of Civil Procedure section 1275 et seq.* for change of name. Mother/Father shall cooperate in all respects in the proceeding. Neither party shall use or permit to be used any surname other than the children's new legal surname for purposes of school enrollment, church attendance, other organizational identification, or any other purpose. It is the intention of the parties, and they expressly agree, to use their best efforts to ensure that the children be known by their new legal surname to family, friends, associates, and peers.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyAwardsGeneral Overview



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34-124 California Legal Forms--Transaction Guide § 124.243

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.243 Right to Telephone Contact With Children

[1] Comment--Use of Forms

The forms in [2] and [3], *below*, are provisions regarding the right to speak with the children by phone when they are in the actual physical custody of the other parent. In cases in which the level of antipathy between the parents is very high, it may be necessary to provide specifically for the right of the noncustodial parent to speak to the children by telephone on a regular basis. That right is generally presumed, but not always specifically set forth. Form [2] provides for unspecified reasonable access, and Form [3] provides for restrictions. A provision should be included regarding long-distance charges if these charges will be incurred.

[2] Reasonable Telephone Contact

Right to Telephone Contact With Children--Reasonable Telephone Contact

Telephone Contact

_____. Each parent, when that parent has the actual physical custody of the children, shall permit reasonable telephone contact between the other parent and the children. The parent shall permit the children to both receive calls from and make calls to the other parent at any reasonable time and for any reasonable length of time. *[Add if applicable: All long-distance telephone charges that are incurred shall be paid by _____ (specify how changes are to be paid, e.g., the parent making a call to or receiving a call from the children).]*

[3] Restricted Telephone Contact

Right to Telephone Contact With Children--Restricted Telephone Contact

Telephone Contact

_____. Each parent, when that parent has the actual physical custody of the children, shall permit reasonable telephone contact between the other parent and the children, but not more often than [e.g., once each week] and for no longer a period of time than _____ minutes. Telephone contact shall not occur earlier than [e.g., 8:00 a.m.] or later than [e.g., 8:00 p.m.]. [Add if applicable: All long-distance telephone charges that are incurred shall be paid by _____ (specify how charges are to be paid, e.g., the parent making a call to or receiving a call from the children).]

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyAwardsGeneral OverviewFamily LawChild CustodyAwardsPhysical CustodyGeneral OverviewFamily LawChild CustodyEnforcementGeneral Overview



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34-124 California Legal Forms--Transaction Guide § 124.244

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.244 Encouragement of Love and Affection and Prohibition of Disparagement

[1] Comment--Use of Form

The form in [2], *below*, is a provision that is designed to encourage the parties to foster a healthy relationship between the children and the other parent, and to prohibit the parties from speaking ill of each other in the presence of the children. The importance of refraining from disparagement should be emphasized to the parties in the context of discussing the terms of a separation agreement. The inclusion of this provision is useful as a way of expressing this important concern.

[2] FORM

Encouragement of Love and Affection and Prohibition of Disparagement

Disparagement Prohibited

_____. Each parent shall exercise, in the utmost of good faith, his or her best efforts at all times to encourage and foster the maximum relations of love and affection between the children and the other parent. Neither parent shall, in any way, impede, obstruct or interfere with the exercise by the other of his or her right of companionship with the children, and neither of them, at any time, shall, in any manner, disparage or criticize the other parent, or allow any other person to do so, to, or in the presence of, the children.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyGeneral OverviewFamily LawChild CustodyAwardsGeneral Overview



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34-124 California Legal Forms--Transaction Guide § 124.245

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 124.245 Anti-Abduction Provisions

[1] Comment--Use of Form

Every custody or visitation order must contain all of the following [*Fam. Code § 3048(a)*]:

- The basis for the court's exercise of jurisdiction [*see Fam. Code § 3421*];
- The manner in which notice and opportunity to be heard were given;
- A clear description of the custody and visitation rights of each party;
- A provision stating that a violation of the order may subject the party in violation to civil or criminal penalties; and
- Identification of the country of habitual residence of the child or children.

If there are facts that indicate there is a risk of abduction of a child [*see Fam. Code § 3048(b)* (factors to be considered in making determination)], the court may include provisions in the custody order to facilitate use of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) [*Fam. Code § 3400 et seq.*] and the Hague Convention on the Civil Aspects of International Child Abduction [42 U.S.C. § 11601 *et seq.*]. These provisions might include (1) identifying California as the home state of the child or otherwise defining the basis for the California court's exercise of jurisdiction under the UCCJEA; (2) identifying the United States as the country of habitual residence of the child under the Hague Convention; (3) defining custody rights under the Hague Convention; and (4) obtaining the express agreement of the parties that the United States is the country of habitual residence of the child or that California or the United States is the most appropriate forum for addressing custody and visitation orders [*Fam. Code § 3048(b)(2)(J)*].

The form in [2], *below*, addresses these statutory provisions in the context of a marital settlement agreement. The manner in which notice and opportunity to be heard is given is not of concern in an agreement; the custody and visitation rights of the parties will be set forth in other paragraphs. However, setting forth the jurisdictional basis under the UCCJEA and the country of habitual residence of the children under the Hague Convention may prove to be useful in the future, regardless of whether there is any current concern over child abduction [*see, e.g., In re Marriage of Nurie* (2009) 176 Cal. App. 4th 478, 506-508, 98 Cal. Rptr. 3d 200 (California court that dissolved marriage had initial home-state jurisdiction under UCCJEA and never lost jurisdiction, so that its custody order remained valid, and subsequent foreign custody decree was not enforceable in California)].

[2] FORM

Anti-Abduction Provisions

Interstate and International Child Custody Jurisdiction

The basis for a California court to exercise initial child custody jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act is that _____ [California is the home state of the _____ (child/children), as "home state" is defined in the UCCJEA, *Family Code Sections 3402(g)* and *3421(a)(1)* or the _____ (child has/children have) no home state or _____, the home state of the _____ (child/children), has declined to exercise jurisdiction because California is the more appropriate forum, and the _____ (child/children) and at least one party to this Agreement have a significant connection with California other than mere physical presence, and substantial evidence is available in California concerning the _____ (child/children)'s care, protection, training, and personal relationships or all courts otherwise having jurisdiction under the UCCJEA have declined to exercise jurisdiction on the ground that a California court is the more appropriate forum to determine the custody of the _____ (child/children) or no court of any other state has jurisdiction under the UCCJEA]. The United States is the country of habitual residence of the _____ [child/children] under the Hague Convention on the Civil Aspects of International Child Abduction. The parties agree that California is the most appropriate state forum, and that the United States is the most appropriate national forum, for addressing custody and visitation orders. The parties understand that a violation of the child custody provisions of this Agreement may subject the party in violation to civil or criminal penalties or both.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family LawChild CustodyEnforcementGeneral OverviewFamily LawChild CustodyInterferenceGeneral OverviewFamily LawChild CustodyInterferenceCriminal InterferenceFamily LawChild CustodyInterferenceInternational Child Abduction Remedies ActFamily LawChild CustodyInterferenceParental Kidnapping Prevention Act



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DIVISION VII: PERSONAL TRANSACTIONS

CHAPTER 125 PROVISIONS FOR PAYMENT OF INCOME TAXES, ATTORNEYS' FEES, AND COSTS

34-125 California Legal Forms--Transaction Guide 125.syn

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.syn Synopsis to Chapter 125: PROVISIONS FOR PAYMENT OF INCOME TAXES, ATTORNEYS' FEES, AND COSTS

§ 125.01 California Sources

[1] Statutes

[2] Rules of Court

§ 125.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 125.03-125.04 [Reserved]

§ 125.05 Law Reviews and Periodicals

§ 125.06 Annotations

§ 125.07 Text References

[1] Matthew Bender Sources

[2] Legal Encyclopedias

[3] Additional Text References

§§ 125.08-125.09 [Reserved]

§ 125.10 Agreements on Income Tax Matters

§ 125.11 Agreements on Attorneys' Fees, Costs, and Related Matters

§§ 125.12-125.19 [Reserved]

§ 125.20 Right to File Joint Returns

[1] General Rules

[a] Marriage Requirement

[b] Determination of Marital Status

[i] Federal Law

[ii] California Law

[c] Effect of Parties' Intent to Make Joint Return

[2] Final Decree of Divorce

[3] Legal Separation

[4] Judgment of Nullity

[5] Liability for Tax

[a] Joint and Several Liability

[i] Assessments Against One or Both Spouses

[ii] Standing to Sue for Refund

[iii] Offsetting Interests

[b] Failure to File

[c] Notice of Separation to IRS

[6] innocent spouse Relief

[a] Overview of Current and Former Law

[i] Current Law

[ii] Former Law Contrasted

[b] Relief for All Joint Filers

[c] Separate Liability Election for Divorced or Separated Taxpayers

[i] Generally

[ii] Allocation of Deficiency

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[e] California Law

[f] Family Court Enforcement of Tax Liabilities Despite Federal "Innocent Spouse" Treatment

§ 125.21 Married Taxpayers Filing Separately

[1] Separate Returns Are Allowed

[2] Spouses Living Apart

[a] Requirements for Separate Property Tax Treatment

[b] Mechanics of Separate Property Treatment

[3] Spouse Not Notified of Community Income

[4] Recharacterization of Community Income

[a] Allowed for Relief From Liability

[b] Recharacterization Requirements

[c] Community Income Subject to Recharacterization

[d] Nonresident Aliens

§ 125.22 Right of Certain Separated Persons to File as Head of Household

§§ 125.23-125.29 [Reserved]

§ 125.30 General Rules

[1] Nondeductibility in General; Exceptions

[2] Attorneys' Fees Paid by Other Spouse

[3] Allocation of Attorneys' Fees

§ 125.31 Attorneys' Fees Incurred for Production of Income

[1] Production of Spousal Support

[2] Production of Income Other Than Spousal Support

[3] Resisting Other Spouse's Claims for Income

[4] Attorneys' Fees Relating to Child Support

§ 125.32 Attorneys' Fees Incurred for Tax Advice

§ 125.33 Attorneys' Fees Incurred for Division of Property

§§ 125.34-125.99 [Reserved]

§ 125.100 Provisions for Filing of Income Tax Returns and Payment of Taxes

Scope

§ 125.101 Provisions for Payment of Attorneys' Fees and Costs

Scope

§§ 125.102-125.199 [Reserved]

§ 125.200 Provision for Filing Joint Income Tax Return

[1] Comment--Use of Form

[2] FORM

Provision for Filing Joint Income Tax Return

§ 125.201 Provision for Filing Separate Income Tax Returns

[1] Comment

[a] Use of Form

[b] Community Property Consequences Associated With Filing Separately

[c] Allocation of Deductions

[2] FORM

Provision for Filing Separate Income Tax Returns

§ 125.202 Provision for Payment of Prior Tax Deficiencies

[1] Comment

[a] Use of Form

[b] Spouses' Liability on Joint Returns

[2] FORM

Provision for Payment of Prior Tax Deficiencies

§ 125.203 Provision Allocating Tax Refund

[1] Comment--Use of Form

[2] FORM

Provision Allocating Tax Refund

§§ 125.204-125.209 [Reserved]

§ 125.210 Provision for Payment of One Spouse's Attorneys' Fees and Costs by Other Spouse

[1] Comment

[a] Use of Form

[b] Tax Considerations

[2] FORM

Provision for Payment of One Spouse's Attorneys' Fees and Costs by Other Spouse

§ 125.211 Provision That Each Party Shall Bear Own Attorneys' Fees and Costs

[1] Comment--Use of Form

[2] FORM

Provision That Each Party Shall Bear Own Attorneys' Fees and Costs

§ 125.212 Provision for Payment of Attorneys' Fees and Costs on Installment Basis

[1] Comment--Use of Form

[2] FORM

Provision for Payment of Attorneys' Fees and Costs on Installment Basis

§ 125.213 Provision for Payment of Attorneys' Fees and Costs as Additional Spousal Support

[1] Comment

[a] Use of Form

[b] Discharge of Fee Obligation in Bankruptcy

[2] FORM

Provision for Payment of Attorneys' Fees and Costs as Additional Spousal Support

§ 125.214 Provision for Payment of Attorneys' Fees and Costs From Community Personal Property

[1] Comment

[a] Use of Form

[b] Effect of Attorneys' Fees Award on Division of Community Property

[2] FORM

Provision for Payment of Attorneys' Fees and Costs From Community Personal Property

§ 125.215 Provision Permitting One Spouse to Encumber Community Real Property for Payment of Attorneys' Fees

[1] Comment--Use of Form

[2] FORM

Provision Permitting One Spouse to Encumber Community Real Property for Payment of Attorneys' Fees

§ 125.216 Provision Allocating Payment of Attorneys' Fees and Costs in Future Litigation to Enforce Agreement

[1] Comment

[a] Use of Form

[b] Payment of Future Fees and Costs to Prevailing Party

[2] FORM

Provision Allocating Payment of Attorneys' Fees and Costs in Future Litigation to Enforce Agreement

Editorial Consultants: Kathryn Kirkland, Esq.,
Ira Lurvey, Esq., and Diana Richmond, Esq.n*

FOOTNOTES:

(n176)Footnote *. Ms. Kirkland, Mr. Lurvey, and Ms. Richmond are Certified Family Law Specialists practicing in California. They are also editorial consultants for Kirkland, Lurvey, Richmond and Wagner, CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed. (Matthew Bender), as well as editorial board members for the CALIFORNIA FAMILY LAW MONTHLY (Matthew Bender).



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DIVISION VII: PERSONAL TRANSACTIONS CHAPTER 125 PROVISIONS FOR PAYMENT OF INCOME TAXES, ATTORNEYS' FEES, AND COSTS

34-125 California Legal Forms--Transaction Guide Scope

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

Scope

Editorial Consultants: Kathryn Kirkland, Esq.,
Ira Lurvey, Esq., and Diana Richmond, Esq.n* Scope

This chapter contains forms for use in marital settlement agreements to set forth provisions for the filing of the parties' income tax returns and the payment of their income taxes, as well as for the payment of attorneys' fees and costs incurred by the parties during dissolution proceedings. The Legal Background contains a brief summary of the factors involved in drafting provisions related to these matters, as well as related tax considerations. The Transaction Guide sets out a checklist of alternative provisions for use in this context, and the Forms illustrate those alternatives. The forms set forth in this chapter are intended to be used in conjunction with the complete forms of marital settlement agreement set forth in Ch. 120, *Complete Marital Settlement Agreements*.

In *In re Marriage Cases*, the California Supreme Court held that differential treatment of opposite-sex and same-sex couples in California's marriage statutes violated the California Constitution's guarantees of privacy, due process, and equal protection [*In re Marriage Cases* (2008) 43 Cal. 4th 757, 784, 847-856, 76 Cal. Rptr. 3d 683, 183 P.3d 384]. That holding was superseded by the subsequent adoption of Proposition 8, which amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California [see Cal. Const. art. I, § 7.5 (eff. Nov. 5, 2008)]. The Supreme Court upheld Proposition 8 against a constitutional challenge, but in doing so the Court reaffirmed the continuing validity of same-sex marriages entered into before November 5, 2008, the effective date of Proposition 8 [Strauss v. Horton (2009) 46 Cal. 4th 364, 470-474, 93 Cal. Rptr. 3d 591, 207 P.3d 48 (estimating 18,000 same-sex marriages lawfully entered into before Proposition 8 took effect)]. If a form in this chapter is used in the context of a same-sex marriage lawfully entered into before that date, the language in the form should be modified accordingly. For example, the names of the parties may be used instead of terms like "Husband" and "Wife."

The chapter does not discuss the potential tax consequences of property division, property transfers, and support payments. For coverage of those tax considerations, see Ch. 121, *Provisions for Division of Property*, and Ch. 123, *Spousal and Child Support Provisions*. Agreements for attorneys' fees in general are covered in Chapter 86A, *Agreements for Legal Services*. For additional coverage in the context of family law proceedings, see Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice And Procedure*, 2nd ed., Ch. 61, *Attorney Fee Agreements*, and Ch. 62, *Awards of Attorney's Fees in Family Law Proceedings* (Matthew Bender).

FOOTNOTES:

(n177)Footnote *. Ms. Kirkland, Mr. Lurvey, and Ms. Richmond are Certified Family Law Specialists practicing in California. They are also editorial consultants for Kirkland, Lurvey, Richmond and Wagner, CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed. (Matthew Bender), as well as editorial board members for the CALIFORNIA FAMILY LAW MONTHLY (Matthew Bender).



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A. Primary Sources

34-125 California Legal Forms--Transaction Guide § 125.01

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.01 California Sources

[1] Statutes

Attorneys' fees and costs.

Recovering attorneys' fees on contract. *Civ. Code § 1717.*

Harassment cases. *Code Civ. Proc. § 527.6(i).*

Requirements for award. *Fam. Code §§ 270, 271.*

Direct payment to attorney. *Fam. Code § 272.*

Authority of court to award attorneys' fees and costs in proceedings for dissolution, nullity, and separation. *Fam. Code § 2010(f).*

Costs and fees before or after commencement of proceedings. *Fam. Code §§ 2030-2032.*

Family law attorney's real property lien. *Fam. Code §§ 2033, 2034.*

Annulment proceedings. *Fam. Code § 2255.*

Failure to assume caretaker responsibility or interfering with custody or visitation rights. *Fam. Code § 3028(d).*

Compensation of appointed counsel in custody proceeding. *Fam. Code § 3153.*

Enforcement of custody decree of another state. *Fam. Code § 3452.*

Proceedings for spousal or child support. *Fam. Code § 3557.*

Modification or termination of child support order. *Fam. Code § 3652.*

Paternity proceedings. *Fam. Code § 7640.*

Separation agreements. *Fam. Code §§ 3580-3593.*

Attorneys' fees as matter of agreement. *Code Civ. Proc. § 1021.*

Joint and several liability on California returns. *Rev. & Tax. Code § 18555(b).*

[2] Rules of Court

Family Rules. *Cal. Rules of Ct., Rule 5.5 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Costs & Attorney Fees General Overview Contracts Law Remedies General Overview



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PART I. RESEARCH GUIDE
A. Primary Sources

34-125 California Legal Forms--Transaction Guide § 125.02

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.02 Federal Sources

[1] Statutes

Rates of tax. *I.R.C. § 1.*

Head-of-household filings. *I.R.C. §§ 2(b), (c), 7703(b).*

Eligibility for joint filings. *I.R.C. § 6013.*

Joint and several liability on joint returns. *I.R.C. § 6013(d)(3).*

Innocent spouse doctrine. *I.R.C. § 6015.*

Additional assessments on joint returns.

Interest. *I.R.C. §§ 6601, 6621.*

Taxes. *I.R.C. § 6651.*

Negligence penalties. *I.R.C. § 6653.*

Underpayment penalties. *I.R.C. § 6656.*

Fraud penalties. *I.R.C. § 6663.*

Definition of husband and wife. *I.R.C. § 7701(a)(17).*

Definition of joint return. *I.R.C. § 7701(a)(38).*

Determination of marital status. *I.R.C. § 7703.*

[2] Regulations

Deduction of expenses for production or collection of income. *Treas. Reg. § 1.212-1.*

Personal, living, and family expenses not deductible. *Treas. Reg. § 1.262-1.*

Eligibility for joint filings. *Treas. Reg. §§ 1.6013-1(a), 1.6013-4(a).*

Power of attorney to sign joint return. *Treas. Reg. § 1.6013-1(a)(2).*

Innocent spouse doctrine. *Treas. Reg. § 1.6015-2.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Costs & Attorney Fees General Overview Contracts Law Remedies General Overview Tax Law Federal Tax Administration & Procedure General Overview Tax Law State & Local Taxes Administration & Proceedings General Overview



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A. Primary Sources

34-125 California Legal Forms--Transaction Guide §§ 125.03-125.04

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 125.03[Reserved]



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PART I. RESEARCH GUIDE
B. Secondary Sources

34-125 California Legal Forms--Transaction Guide § 125.05

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.05 Law Reviews and Periodicals

Acoba, *Recovery of Attorney's Fees in Actions to Enforce Contracts: California Civil Code Section 1717*, 12 West. St. U. L. Rev. 751 (1985).

Comment, *Innocent Spouse Rule: Recent Developments and Proposed Changes*, 14 Sw. U. L. Rev. 129 (1983).

Hull, *E.R.T.A.'s Effect on Property Division Upon Marital Dissolution*, 121 Trusts & Estates 21 (1982).

King, *Save the Court, Save the Family*, 12(1) Cal. Lawyer 42 (1992).

Lathrope, *State-Defined Marital Status: Its Future as an Operative Tax Factor*, 17 U.C.D. L. Rev. 257 (1983).

O'Connell, *The Domestic Relations Tax Reform Act: How We Got It and What We Can Do About It*, 18 Fam. L.Q. 473 (1985).

Parsons & Vaughn, *Income Tax Considerations in Divorce Negotiations*, 8 Com. Prop. J. 3 (1981).

Rosenson, *The Use of Tax Returns in Domestic Relations Matters*, 14 Bev. Hills B.J. 293 (1980).

Vaughn, *Pub. L. 96-605: Tax Relief for the Abandoned Spouse in a Community Property State*, 8 Com. Prop. J. 53 (1981).

Walther, *Contingent Fees in Divorce Cases*, 4 Am. J. Fam. L. 199 (1990).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Costs & Attorney Fees General Overview Contracts Law Remedies General Overview



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B. Secondary Sources

34-125 California Legal Forms--Transaction Guide § 125.06

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.06 Annotations

Annot., State Court's Authority in Marital or Child Custody Proceedings, to Allocate Federal Income Tax Dependency Exemption for Child to Noncustodial Parent Under S 152(e) of the Internal Revenue Code (26 U.S.C. 152(e)), 77 A.L.R.4th 786 (1990).

Annot., Attributing Undisclosed Income to Parent or Spouse for Purposes of Making Child or Spousal Support Award, 70 A.L.R.4th 173 (1989).

Annot., Negligence, Inattention, or Professional Incompetence of Attorney in Handling Client's Affairs in Tax Matters as Ground for Disciplinary Action-Modern Cases, 66 A.L.R.4th 314 (1988).

Annot., Right to Attorneys' Fees in Proceeding, After Absolute Divorce, for Modification of Child Custody or Support Order, 57 A.L.R.4th 710 (1987).

Annot., Authority of Divorce Court to Award Prospective or Anticipated Attorneys' Fees to Enable Parties to Maintain or Defend a Divorce Suit, 22 A.L.R.4th 407 (1983).

Annot., Validity of Statute or Rule Providing for Arbitration of Fee Disputes Between Attorneys and Their Clients, 17 A.L.R.4th 993 (1982).

Annot., Amount of Attorneys' Fees in Matters Involving Domestic Relations, 59 A.L.R.3d 152 (1974).

Annot., Enforcement of Claim for Alimony or Support, or for Attorneys' Fees and Costs Incurred in Connection Therewith, Against Exemptions, 54 A.L.R.2d 1422.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Costs & Attorney Fees General Overview Contracts Law Remedies General Overview Family Law Marital Termination & Spousal Support Costs & Attorney Fees



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B. Secondary Sources

34-125 California Legal Forms--Transaction Guide § 125.07

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.07 Text References

[1] Matthew Bender Sources

California Forms of Pleading and Practice, (Matthew Bender)

Ch. 72, *Attorney Practice and Ethics* , § 72.190 et seq.

Ch. 174, *Costs and Attorneys' Fees* , §§ 174.10 et seq., 174.50 et seq.

Ch. 226, *Dissolution of Marriage: Attorney's Fees* .

Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution* .

Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed. (Matthew Bender).

California Points and Authorities (Matthew Bender)

Ch. 25, *Attorney's Fees* .

Ch. 60, *Costs* .

Denner, Rothschild & Johnson, *California Family Law Trial Guide*, Unit 34 (Matthew Bender).

Rice, *California Family Tax Planning*, Chs. 1, 14 (Matthew Bender).

Lindey on Separation Agreements and Antenuptial Contracts

Ch. 19, *Tax Matters*, Forms 19.01- 19.03 (liability for taxes on prior joint returns).

Ch. 22, *Counsel Fees* , Forms 22.01-22.05 (provisions for payment of attorneys' fees).

Rabkin and Johnson, *Current Legal Forms With Tax Analysis*, (Matthew Bender), Ch. 10, *Husband, Wife, and Family Transactions* , Forms 10.52 (payment of attorneys' fees), 10.53 (filing joint and/or separate tax returns and allocation of tax obligations).

[2] Legal Encyclopedias

33 Cal. Jur. 3d Family Law §§ 723-728.

[3] Additional Text References

California Taxation, chs. 1, 3, 12, 21 (CCH 2d ed.).

CCH Federal Tax Service, chs. A:1, A:2, A:3, A:4, A:5, A:7, A:19, A:23, A:24, A:25, C:22, E:13, G:4, G:6, K:2, N:4, N:13, P:15, P:25, P:35 (CCH).

Witkin, Summary of California Law, vol. 11, *Husband and Wife*, §§ 9, 10, 176, 179, 182, 184, 185, 188, 190, 193-196 (10th ed. 2005).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Costs & Attorney Fees General Overview Contracts Law Remedies General Overview Family Law Marital Termination & Spousal Support Costs & Attorney Fees



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B. Secondary Sources

34-125 California Legal Forms--Transaction Guide §§ 125.08-125.09

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 125.08[Reserved]



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PART II. LEGAL BACKGROUND

A. Validity of Agreements for Paying Income Taxes, Attorneys' Fees, and Costs

34-125 California Legal Forms--Transaction Guide § 125.10

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.10 Agreements on Income Tax Matters

Responsibility for the payment of taxes is set forth by state and federal statute, but the parties may allocate responsibility for the payment of taxes as between themselves by agreement.

The forms in this chapter permit the parties to agree to a variety of matters, including the filing of joint and separate income tax returns, payment of prior tax deficiencies, and allocation of refunds. Provisions for allocating a dependency exemption are discussed in Ch. 123, *Spousal and Child Support Provisions*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewTax LawFederal Tax Administration & ProcedureGeneral OverviewTax LawState & Local TaxesGeneral Overview



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PART II. LEGAL BACKGROUND

A. Validity of Agreements for Paying Income Taxes, Attorneys' Fees, and Costs

34-125 California Legal Forms--Transaction Guide § 125.11

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.11 Agreements on Attorneys' Fees, Costs, and Related Matters

Whether a court will order the payment of attorneys' fees and costs in connection with a particular proceeding is largely regulated by statute [*see Fam. Code §§ 270 et seq., 2030 et seq.; see generally* Kirkland, Lurvey, Richmond and Wagner, *California Family Law Practice and Procedure*, 2nd ed., Ch. 62, *Awards of Attorney's Fees in Family Law Proceedings* (Matthew Bender)]. However, the parties may instead allocate responsibility for the payment of attorneys' fees and costs by agreement [*see generally Code Civ. Proc. § 1021*].

The forms in this chapter permit the parties to agree to a variety of matters, including provisions for payment of one spouse's fees and costs by the other spouse, payment by each spouse of his or her own attorneys' fees and costs, payment by one spouse of attorneys' fees and costs as additional support, allocation of payment by particular property, encumbrance of community property to secure payment, and provision for payment in future litigation.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Costs & Attorney Fees General Overview Contracts Law Contract Conditions & Provisions General Overview Contracts Law Remedies General Overview Contracts Law Types of Contracts General Overview



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PART II. LEGAL BACKGROUND

A. Validity of Agreements for Paying Income Taxes, Attorneys' Fees, and Costs

34-125 California Legal Forms--Transaction Guide §§ 125.12-125.19

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 125.12[Reserved]



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PART II. LEGAL BACKGROUND
B. Income Tax Returns

34-125 California Legal Forms--Transaction Guide § 125.20

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.20 Right to File Joint Returns

[1] General Rules

[a] Marriage Requirement

Spouses are entitled to file joint returns [*I.R.C. § 6013(a)*] if they are married as of the end of the taxable (calendar) year, except that, if a spouse dies during the taxable year, the date of the spouse's death will be used to determine marital status for filing purposes [*I.R.C. § 7703(a)(1)*]. Problems may arise in determining the right to file a joint return when spouses have taken action to terminate their marriage, to live separately under a judgment of legal separation, and in other cases. Therefore, the determination of marital status plays an important role in evaluating whether filing a joint return is appropriate. General rules for determining marital status are discussed in [b], *below*. Special rules concerning final judgments of dissolution of marriage, legal separation, and nullity of marriage are discussed in [2]-[4], *below*.

[b] Determination of Marital Status

[i] Federal Law

The determination of whether a particular individual is married or single for income tax purposes generally is made by reference to state law [*Calhoun (Robert)*, *T.C. Memo. 1992-246*] . However, for purposes of federal law, including federal tax law, "marriage" refers only to opposite-sex unions [*1 U.S.C. § 7*].

An individual who is legally separated from his or her spouse under a judgment of dissolution or legal separation is not considered as married for income tax purposes [*I.R.C. § 7703(a)(2)*]. In certain cases, spouses living apart are not considered as married [*I.R.C. § 7703(b)*]; *but see Patterson v. Commissioner*, *T.C. Memo. 1989-193* (legally married taxpayer not permitted to file as single taxpayer, despite prohibition of divorce by taxpayer's religion; treatment of estranged spouse as unmarried person for tax purposes does not necessarily entitle other spouse to same treatment)]. A taxpayer is not considered as married as of the close of the taxable year, and is not permitted to file a joint return, if at

any time during the taxable year the taxpayer's spouse was a nonresident alien [I.R.C. § 6013(a)(1)].

Note that a taxpayer's marital status not only determines whether a joint return may be filed but also is decisive in determining whether the gross income filing requirement has been met [see I.R.C. § 6012], how many personal exemptions may be claimed [see I.R.C. §§ 151-153], whether the spouse's medical deductions may be claimed [see I.R.C. § 213], and other tax related consequences. In addition, each spouse is liable for tax on half of the community income even though the dissolution becomes final and separate returns must be filed. This liability is further discussed in § 125.21.

[ii] California Law

In general, for purposes of filing a California personal income tax return, marital status is to be determined in accordance with *Internal Revenue Code Section 7703* [see *Rev. & Tax. Code* § 17021.5; 18 Cal. Code Reg. § 18402(a)], keeping in mind that federal law must look to state (California) law concerning marriage in assessing whether an individual is married or single [see *Calhoun (Robert)*, T.C. Memo. 1992-246]. Like federal law, California law defines "marriage" as referring only to opposite-sex unions [see 1 U.S.C. § 7 (for purposes of federal law, including federal tax law, "marriage" refers only to opposite-sex unions); *Cal. Const. art. I, § 7.5* (only marriage between man and woman is valid or recognized in California); *Strauss v. Horton* (2009) 46 Cal. 4th 364, 463-469, 93 Cal. Rptr. 3d 591, 207 P.3d 48 (upholding validity of *Cal. Const. art. I, § 7.5*)]. However, registered domestic partners have the same right as spouses to file joint California tax returns [*Rev. & Tax. Code* §§ 17024.5(h)(2)(B), 18521; Stats. 2006, ch. 802, § 1(d) (expressing legislative intent that same-sex registered domestic partners be permitted to file state income tax returns jointly or separately on terms similar to those governing spouses); see *Strauss v. Horton* (2009) 46 Cal. 4th 364, 412, 93 Cal. Rptr. 3d 591, 207 P.3d 48 ("In sum, although Proposition 8 [*Cal. Const. art. I, § 7.5*] changes the state Constitution ... to provide that restricting the family designation of 'marriage' to opposite-sex couples only, and withholding that designation from same-sex couples, no longer violates the state Constitution, in all other respects same-sex couples retain the same substantive protections embodied in the state constitutional rights of privacy and due process as those accorded to opposite-sex couples and the same broad protections under the state *equal protection clause* that are set forth in the majority opinion in [*In re*] *Marriage Cases*, including the general principle that sexual orientation constitutes a suspect classification and that statutes according differential treatment on the basis of sexual orientation are constitutionally permissible only if they satisfy the strict scrutiny standard of review.")].

California law imposes special requirements concerning the filing of joint returns when one of the taxpayers is a nonresident or part-time resident of the state during the taxable year [see *Rev. & Tax. Code* §§ 17045, 17046, 18521, 18522, 19006]. Also, California law permits registered domestic partners to file their state income-tax returns jointly or separately on terms similar to those governing spouses [*Rev. & Tax. Code* §§ 17024.5(h)(2)(B), 18521], even though federal law does not provide for the same treatment of registered domestic partners' federal tax returns [I.R.C. §§ 1(a), 7703].

PRACTICE TIP:

It is often necessary to explain to a client the difference between living separate and apart and being legally separated. When spouses simply are separated awaiting a judgment of legal separation or dissolution of their marriage, even though their separation has legal effects (that is, earnings received after separation are the separate property of the receiving spouse) [*Fam. Code* § 771], the spouses nevertheless are not divorced or legally separated and therefore may file joint federal and state income tax returns. *Commentary by Ira H. Lurvey.*

[c] Effect of Parties' Intent to Make Joint Return

Whether an income tax return is a joint return depends on the intent of the spouses. Intent may become a key issue

particularly if only one of the spouses signs the return (for the signing spouse or for both spouses), or when a spouse claims that a signature was made by mistake, under duress, without knowledge of the contents of the return, or was forged [see, e.g., *Stanley (Diane)* (1983) 81 T.C. 634, 637-638 ; *Douglas (J.)* (1956) 27 T.C. 306, 312-314 , *aff'd*, 256 F.2d 4 (5th Cir. 1958)] . An extensive treatment of the intent issue is beyond the scope of this work, and therefore only the following general principles are discussed.

Although the federal tax regulations generally require that joint returns be signed by both spouses, the presence or absence of a signature is not determinative of the validity of a joint return, and the parties' intent in making the return must be examined. For example, a "filing spouse" may have implied authority to file a joint return on behalf of a nonsigning spouse if the nonsigner's signature has been a mere formality or the parties have filed a joint return for many years [*Estate of Quirk v. C.I.R.* (1995) T.C. Memo 1995-234 ; see *Treas. Reg. 1.6013-1(a)(2)*; see also *Treas. Reg. 1.6013-1(a)(5)* (permitting authorized agent to sign return, when accompanied by required form)]. Similarly, a joint return may be binding on a nonsigning spouse if the facts show that both parties intended to file a joint return [see *Noonan (Daniel C.) v. Commissioner*, T.C. Memo 1997-22 (ex-wife who refused to sign joint return was held to have consented to filing jointly when she was obligated to do so under binding agreement); *Ashworth v. C.I.R.* (1990) 60 T.C.M. 454 ; *Parker v. C.I.R.* (1978) 37 T.C.M. 144 , *contra Levitt v. C.I.R.* (1993) 66 T.C.M. 40] .

In addition, although the burden of proof rests on the spouse seeking to disavow a joint return, the courts generally are willing to disregard a spouse's signature if the other evidence indicates that a joint return was *not* intended [*Sharwell v. Commissioner* (6th Cir. 1969) 419 F.2d 1057 ; *Warmack v. Commissioner*, T.C. Memo. 1992-431 ; see *Hoyle (Lawrence T., Jr.)* T.C. Memo. 1994-592 (although husband signed both his own and wife's names to tax return and testified he believed he had her consent to do so, there was insufficient evidence of wife's intent to hold that joint return had properly been intended)].

PRACTICE TIP:

Apparently the IRS will accept a joint return signed by only one spouse, particularly when there is an accompanying statement to the effect that the spouses are in the midst of a marital dissolution and the signature of the other spouse cannot readily be obtained. The spouse refusing to sign may suppose that there will some benefit under the innocent spouse rule, but a good deal more than the absence of a signature is considered by the IRS in determining whether a spouse was "innocent." As a general rule, the spouse wanting to file jointly should make a record of having delivered the return for signature and having provided ready access to all supporting financial books and records so the other spouse can make his or her own independent investigation of the surrounding facts. When one spouse does not want to be covered by a joint return, a court order should be obtained precluding the other spouse from filing a joint return, and each spouse should proceed to file a return as "married filing separately." *Commentary by Ira H. Lurvey.*

[2] Final Decree of Divorce

In California, the judgment of dissolution is equivalent to the final judgment of divorce [see *Fam. Code § 2300*], and terminates the right to file a joint return [*I.R.C. §§ 6013(d)(2), 7703(a)(2)*]. A final judgment of divorce, for purposes of filing a joint return, includes a judgment that is on appeal as of the end of the taxable year [*Sullivan v. Commissioner* (1957) 29 T.C. 71 , *aff'd* (4th Cir. 1958) 256 F.2d 664].

However, note that entry of an interlocutory judgment of dissolution does not terminate the right to file jointly, as it is not sufficient to terminate the parties' marital status. This concept remains of at least limited importance in California, because, while interlocutory dissolution judgments have been abolished, there may remain some spouses who obtained an interlocutory judgment under former law but who never applied for and obtained the final judgment [*Treas. Reg. 1.6013-4(a)*; *Commissioner of Int. Rev. v. Ostler* (9th Cir. 1956) 237 F.2d 501 ; *Rev. Rul. 75-536*, 1975-2 C.B. 462 ; see *McDonald (Bill)* T.C. Memo 1994-607] . With respect to parties who only obtained an interlocutory judgment, an

attempt to retroactively enter a final judgment through the use of a *nunc pro tunc* order is technically possible, but such an order will be recognized for tax purposes only if it is consistent with underlying state law. The Tax Court has, in effect, taken the position that it may look behind a California trial court's entry of a *nunc pro tunc* order to determine whether the order is contrary to or consistent with state law when the issue is raised [see *McDonald (Bill) T.C. Memo. 1994-607* (nunc pro tunc order was not consistent with California law)].

[3] Legal Separation

The fact that the taxpayer and his or her spouse became legally separated or had their marriage dissolved at any time after the close of the taxable year does not deprive them of their right to file a joint return for that taxable year [*Treas. Reg. § 1.6013-4(a)*; see 18 Cal. Code Reg. § 18410 et seq.]. Nevertheless, the entry of a judgment of legal separation [see *Fam. Code* §§ 2310, 2333, 2334, 2345, 2347] terminates the right to file a joint return for the current taxable year [see *I.R.C. §§ 6013(d)(2), 7703(a)(2)*; *Rev. & Tax. Code § 17021.5*; 18 Cal. Code Reg. § 18402(a); see also *Klementowski v. Commissioner, T.C. Memo. 1986-145*]. Spouses who are not legally separated under a court judgment of legal separation, even though they are living apart under a written separation agreement, are considered as married for tax purposes [see, e.g., *Ashby v. Commissioner, T.C. Memo. 1984-121*; *Donigan v. Commissioner (1977) 68 T.C. 632*]. Furthermore, the Tax Court holds that an order granting exclusive possession of spouses' residence to one of the spouses, without more, does not meet the statutory requirements of a legal separation accomplished by a decree of divorce or separate maintenance [*Klementowski v. Commissioner, T.C. Memo. 1986-145*]. The mere fact that spouses have not lived together during the course of the taxable year does not prohibit them from making a joint return [*Treas. Reg. § 1.6013-4(a)*]. Physical separation of the spouses during the taxable year, however, coupled with other factors, may qualify a spouse to file as a "head of household" [see *I.R.C. § 2(b)*; see also § 125.22].

[4] Judgment of Nullity

A judgment of nullity based on the fact that the marriage was void [*Fam. Code* §§ 2200, 2201] terminates the right to file a joint return for the taxable year in which the judgment is entered. A judgment of nullity may relate back to rescind any joint returns made for previous taxable years, because the marriage was never valid; and amended separate returns must be filed for these years [*Rev. Rul. 76-255, 1976-2 C.B. 40*; *Wilson v. Commissioner, T.C. Memo. 1976-285*]. However, this rule may not apply when the rights of third parties (including the IRS) are adversely affected [*Shackelford v. C.I.R., T.C. Memo. 1995-484* (laches prevents retroactive application)].

A judgment of nullity based on the fact the marriage was voidable [*Fam. Code § 2210*] terminates the right to file a joint return for the taxable year in which the judgment is entered but does not operate retroactively because the marriage was only voidable and thus valid until the judgment [*Estate of Gregorson (1911) 160 Cal. 21, 26-27*; see *Estate of LeMont (1970) 7 Cal. App. 3d 437, 439, 86 Cal. Rptr. 810*; see also *Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 12, Nullity of Marriage* (Matthew Bender)].

[5] Liability for Tax

[a] Joint and Several Liability

[i] Assessments Against One or Both Spouses

If spouses file a joint return, each spouse is jointly and severally liable for the tax due, even if only one spouse had income [*I.R.C. § 6013(d)(3)*; *Treas. Reg. § 1.6013-4(b)*; cf. *Carrick v. Commissioner, T.C. Memo. 1991-502* (wife who did not actually sign joint returns prepared by husband held not to have joined in them; no evidence existed of tacit consent to join in returns)]. The full amount of tax, penalties, and interest may be assessed against either spouse [*Furnish v. Commissioner (9th Cir. 1958) 262 F.2d 727, 731*]. An allocation and indemnification clause in a couple's marital settlement agreement, under which one spouse promises to indemnify the other for all tax liabilities, will not prevent the IRS from collecting a deficiency from the supposedly indemnified spouse, because the IRS is not a party to

the agreement [*Alioto (Angelina G.) v. Commissioner, T.C. Memo. 1994-51* ; but see *Karp v. U.S. (1994) 868 F. Supp. 235* (if IRS officially knows of agreement and includes it in its settlement agreement, it can be bound)].

PRACTICE TIP:

Although an indemnification clause does not bind the IRS, because it is not a party to the agreement, such a provision is nonetheless a good idea and may actually have potential enforcement power. Note that the I.R.S. has announced a policy of notifying both spouses when a collection action is brought against one of them [*I.R.S. Notice 9619, 1996-14 I.R.B. 28*]. *Commentary by Publisher's Editorial Staff.*

One spouse may be relieved from joint and several liability, however, when the innocent spouse rule is applicable [see [6], *below*] or when the civil fraud penalty is imposed [I.R.C. § 6663(c); see *Kaye v. Commissioner, T.C. Memo. 1995-345*]. Nevertheless, the fact that the IRS designates a party as an "innocent spouse" will not preclude a state family law court from enforcing a preexisting provision of an agreement and judgment requiring both spouses to equally share tax obligations, because the IRS's designation does not preempt state law efforts to impose liability for federal income taxes [*In re Marriage of Hargrave (1995) 36 Cal. App. 4th 1313, 1320-1321, 43 Cal. Rptr. 2d 474* ; see [6] [f], *below*].

Under California law only, the joint liability of one spouse with respect to income earned by or subject to the exclusive management of the other spouse may be revised by the Franchise Tax Board or by a court in a dissolution proceeding [Rev. & Tax. Code § 19006; see *Murchison v. Murchison (1963) 219 Cal. App. 2d 600, 33 Cal. Rptr. 285*].

An assessment against one spouse does not prevent assessment against the other [*Bloomfield v. Commissioner (1969) 52 T.C. 745* ; *Dolan v. Commissioner (1965) 44 T.C. 420, 426*]. Thus, the IRS may assess an entire deficiency against one spouse even after paying a refund to the other spouse [*Bloomfield v. Commissioner (1969) 52 T.C. 745, 751-752* ; see *Gordon v. United States (11th Cir. 1985) 757 F.2d 1157, 1159-1160*]. This assessment power, however, does not extend to the civil fraud penalty for underpayment of tax unless the government can prove that some part of the underpayment was due to fraud on that spouse's part [I.R.C. 6663(c); *Treas. Reg. § 301.6653-1(f)*; see *Meier v. Commissioner (1988) 91 T.C. 273* ; *Turner v. Commissioner, T.C. Memo. 1988-339*]. This exception to joint and several liability applies only to the addition of tax for fraud and does not prevent a spouse from being held liable for the tax deficiency itself if the spouse is otherwise unable to meet the requirements of the innocent spouse rule [see *Hicks Co. v. Commissioner (1971) 56 T.C. 982, 1030* , *aff'd on another issue, 470 F.2d 87 (1st Cir. 1972)* ; *Keene v. Commissioner (1979) 38 T.C.M. 553, T.C. Memo. 1979-121* ; see also [6], *below* (innocent spouse rule)]. In addition, even though a return may be fraudulent only with respect to one spouse, the unlimited period for assessment and collection of tax applies to both spouses [*Hicks Co. v. Commissioner (1971) 56 T.C. 982, 1030* , *aff'd on another issue, 470 F.2d 87 (1st Cir. 1972)* ; see I.R.C. § 6501(c)]. Thus, the nonfraudulent spouse still may be jointly and severally liable for the tax owed because of omissions of income [*Furnish v. Commissioner (9th Cir. 1958) 262 F.2d 727, 731-732* ; *United States v. Diehl (S.D. Tex. 1978) 460 F. Supp. 1282, 1287-1288* , *aff'd per curiam, 586 F.2d 1080 (5th Cir. 1978)*].

One appellate court held a divorced spouse jointly and severally liable for a tax deficiency ultimately attributable to her former spouse's separate tax obligation [*Gordon v. United States (11th Cir. 1985) 757 F.2d 1157, 1158-1161*]. In that case, the IRS applied the spouses' joint refund for two taxable years to the husband's outstanding separate tax liability and assessed a deficiency against both taxpayers for those taxable years. On review, the court upheld the IRS's actions as proper, holding that the IRS had followed mandatory procedures in its collection method and ruling that, because the taxpayer had signed a joint return for the deficiency years, she therefore was jointly and severally liable for the deficiency [*Gordon v. United States (11th Cir. 1985) 757 F.2d 1157, 1160-1161*].

Disclosure of tax return information to a former spouse as part of an audit of both former spouses is not prohibited by the Internal Revenue Code [I.R.C. § 6103(h)(4); *Duquette, Inc. (Norman E.) v. Commissioner (U.S. Dist. Ct., D.C.*

2000) 110 F. Supp. 2d 16, 19-22 (tax information disclosed to former wife, used in property settlement proceedings)). Although a broad range of tax information is confidential [see I.R.C. § 6103], disclosure of such information is permissible in a tax administration proceeding if the treatment of an item reflected on a return is directly related to the resolution of an issue in the proceeding [I.R.C. § 6103(h)(4); *Duquette, Inc. (Norman E.) v. Commissioner* (U.S. Dist. Ct., D.C. 2000) 110 F. Supp. 2d 16, 21 (audit of former spouses' personal tax returns was integrally related to audit of closely held corporation that had been solely owned by spouses)].

[ii] Standing to Sue for Refund

An issue related to joint and several liability is the question of standing to sue for a tax refund. This issue may pose problems, particularly when a spouse has acquired property in a divorce context that is subject to a tax lien as a result of deficiencies assessed against the other spouse. Although parties may not generally challenge the tax liabilities of others, the U.S. Supreme Court has held that a spouse who, under protest, pays taxes owed by the other (former) spouse in order to remove a lien from the paying spouse's property, has standing to sue for a refund [*United States v. Williams* (1995) 514 U.S. 527, 115 S. Ct. 1611, 131 L. Ed. 2d 608, *aff'g*, *Williams v. U.S.* (9th Cir. 1994) 24 F.3d 1143; *see* 28 U.S.C. § 1346(a)(1)].

In addition, one court has held that a spouse who is made responsible for payment of any deficiency by a marital settlement agreement has the authority to engage counsel to settle the joint tax liability [*Dahl v. Commissioner* (1995) T.C. Memo 1995-179, *aff'd*, 85 F.3d 643 (11th Cir. 1996)] .

[iii] Offsetting Interests

With respect to satisfying a tax liability by offsetting another interest, note that a spouse's community property interest in a joint income tax refund may be used to offset the other spouse's separate premarital tax liability if the state law permits all community assets to be reached to satisfy premarital debts [*Rev. Rul. 85-70, 1985-1 C.B. 361*]. Under California law, the community property generally is liable for a debt incurred by either spouse before or during marriage [see *Fam. Code* § 910(a)]. The nondebtor spouse's community property earnings are not liable for the other spouse's premarital debts, however, as long as the earnings are held in a deposit account in which the debtor spouse has no right of withdrawal and are not commingled with other community property, except for property insignificant in amount [*Fam. Code* § 911; *see Com. Code* § 9102(a)(29) ("deposit account" defined)]. In addition, for this purpose, "during marriage" does not include the period during which the spouses are living separate and apart before a judgment of dissolution or legal separation is entered [*Fam. Code* § 910]. The same result should be reached if the parties have a valid premarital agreement that characterizes each party's income during marriage as separate property.

[b] Failure to File

Failure to file a return does not preclude spouses from filing a joint return even after expiration of the three-year limitation period [*Rev. Rul. 72-539, 1972-2 C.B. 634*; *see I.R.C. § 6013(b)(2)* (limitation period); *but see Durovic v. Commissioner* (7th Cir. 1973) 487 F.2d 36, 41-42 (determination of deficiency as if separate returns had been filed served as election to file separate returns that triggered three-year limitation period, even though taxpayers never filed separate returns)]. If separate deficiency notices have been issued to each spouse, however, the spouses may not thereafter elect to file a joint return [*Thompson v. Commissioner* (1982) 78 T.C. 558, 561; *Dritz v. Commissioner* (1969) T.C. Memo. 1969-175, 28 T.C.M. 874, 879-880, *aff'd per curiam*, 427 F.2d 1176 (5th Cir. 1970); *but see Phillips v. Commissioner* (D.C. Cir. 1988) 851 F.2d 1492, 1496, 1498 (three-year limitation period for filing joint return did not apply when taxpayer had not already filed separate return)]. Failure to file a joint return precludes the application of joint rates to the spouses' taxable income [*Anderson v. Commissioner* (1973) 32 T.C.M. 762, T.C. Memo. 1973-155; *see Letter Rul. 7825086* (Mar. 27, 1978); *but see Stone v. Commissioner* (1954) 22 T.C. 893, 901, *acq.* 1954-2 C.B. 5 (taxpayers' failure to file return for particular taxable year did not preclude imposition of joint liability when manifest intent was to file joint return)]. The Tax Court, however, reversing long-established authority,

holds that a taxpayer may elect joint tax rates even after the IRS has filed a "substitute return" on his or her behalf [*Millsap v. Commissioner* (1988) 91 T.C. 926 , *acq. in result* 1991-2 C.B. 1].

Individual liability has been upheld even in cases in which the spouses filed joint returns for the taxable years before and after the year for which no return was filed [*Simms v. Commissioner* (1968) T.C. Memo. 1968-298 , *aff'd*, 422 F.2d 340 (4th Cir. 1970)] . Joint and several liability may be imposed, however, if the spouses in effect have authorized the computation of the deficiency as if a joint return had been made [*United States v. Martin* (E.D. Mo. 1967) 274 F. Supp. 1002, 1005 , *aff'd*, 411 F.2d 1164 (8th Cir. 1969) ; *but see* *Estate of Quirk v. C.I.R.* (1995) T.C. Memo. 1995-234]. Spouses may be deemed to have filed a joint return, and thus be jointly and severally liable, if they jointly file certain forms such as a waiver of restrictions (IRS Form 870) [1974-1 C.B. 330]. A spouse is jointly and severally liable even though that spouse gains no benefit from filing the form [see *Fine v. Commissioner* (1978) 70 T.C. 684, 690] .

[c] Notice of Separation to IRS

Separated spouses should notify the IRS that they are separated and living apart. Many problems can arise when the IRS is not kept informed of the separated taxpayers' filing status and current address. Thus, for example, although separate joint deficiency notices must be sent to each spouse if the IRS has notice that spouses maintain separate addresses, even if it only knows one of the addresses [*Kirk v. Commissioner* (1991) T.C. Memo. 1991-504 ; *see* *Abeles v. Commissioner* (1988) 91 T.C. 1019] , the Tax Court has dismissed an action as untimely filed despite the taxpayer's delayed receipt of a tax deficiency notice that had been forwarded to a former spouse in the United Kingdom [*Wisdom v. Commissioner* (1991) T.C. Memo. 1991-327 ; *see* I.R.C. § 6213 (taxpayer ordinarily has 90 days after receiving deficiency notice to petition Tax Court)]. In a similar case, the Tax Court held that a former wife's failure to notify the IRS of her new address precluded her from complaining that she had not received a copy of a joint deficiency notice in time to file a petition with the Tax Court [*Kirk v. Commissioner* (1991) T.C. Memo. 1991-504 ; *see* I.R.C. § 6213].

[6] innocent spouse Relief

[a] Overview of Current and Former Law

[i] Current Law

The innocent spouse provisions of the Internal Revenue Code are intended to ameliorate some of the hard, practical consequences of the joint income tax return. In filing jointly, the spouses merge their incomes and deductions, and no attempt is made to attribute tax items to one spouse rather than the other. A natural consequence is that both spouses are made jointly and severally liable for the payment of the tax [I.R.C. § 6013(d)]. But problems arise when a tax deficiency is subsequently determined for the taxable year, whether due to the omission of taxable income or to the disallowance of a deduction or credit. As these adjustments should have been made on the original joint return, they are not attributed to either of the individual spouses. The additional tax becomes part of the amount for which both spouses are jointly and severally liable.

If the spouses are still married (or at least not legally separated) at the time the deficiency is established, there will generally be no unfairness in collecting the tax from both spouses. The spouses are yet in a marital property relationship. But if the spouses are divorced or legally separated, it may be unfair to impose joint and several liability for tax liabilities arising during the marriage, perhaps many years before. The innocent spouse provisions of current and prior law have sought to define the circumstances under which a spouse (or, more typically, an ex-spouse) may be relieved of joint and several liability. The key word is "innocent." Relief is premised on the idea that a spouse should be relieved of liabilities that are attributable to the other spouse if the spouse seeking relief played no part in creating the tax deficiency and did not know of it.

The current innocent spouse provision is found in I.R.C. § 6015. That section provides for two overlapping types of relief. One type, contained in subsection (b), applies to all taxpayers, regardless of whether they are still married and

living with the spouse with whom they filed the joint return [see [b], *below*]. A second, and more liberal provision, is available to a taxpayer who is divorced, separated from, or not sharing the same household with, the other spouse. This type of relief, under *I.R.C. § 6015(c)* provides an election to limit liability to each spouse's allocated share of the deficiency [see [c], *below*].

It is important to understand that state community property law is irrelevant to innocent spouse relief [*I.R.C. § 6015(a)*]. When a joint return is filed, all income, both community and separate, is lumped together without distinction. When a taxpayer seeks relief under Section 6015, the determination of whether a tax liability is attributable or allocable to the other spouse is made without regard to community property law. Thus the earnings of one spouse are allocated to that spouse, regardless of the fact that they would constitute community property under state law.

Note that, in addition to relief provided under *I.R.C. § 6015(b)* and (c), *I.R.C. § 6015(f)* provides for general equitable relief. Under that provision, if, taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency (or portion of either), and relief is not available under *I.R.C. § 6015(b)* or (c), the Internal Revenue Service is authorized to relieve the individual of liability [*I.R.C. § 6015(f)*; see *Mitchell (Herbert L.) v. Commissioner, T.C. Memo. 2000-332* (equitable relief denied when spouse was aware of and significantly benefited from omitted income)].

The current provisions, which were initiated through enactment of the Internal Revenue Service Restructuring and Reform Act of 1998 [Pub. L. No. 105-206], became operative as follows. In general, the amendments made by the Act apply to any liability for tax arising after the date of its enactment (July 22, 1998), and any liability for tax arising on or before that date but remaining unpaid as of that date. However, under a special provision, the two-year period set forth in *I.R.C. § 6015(b)(1)(E)* [see [b], *below*] or *I.R.C. § 6015(c)(3)(B)* [see [c], *below*] will not expire before a date that is two years after the date of the first collection activity after the date of the enactment of the Act [Pub. L. No. 105-206, § 3201(g)].

Note that in January 2001, the I.R.S. issued proposed regulations governing innocent spouse relief under *I.R.C. § 6015* [Prop. I.R.S. Regs. 1.6015-0-1.6015-9 (Reg.-106446-1998), pub. at 66 *FR* 3888 (*January 17, 2001*)] .

[ii] Former Law Contrasted

innocent spouse relief has existed for many years, and has been periodically revised to address perceived inadequacies. The present version of the statute, in particular, can only be understood in the light of its antecedents. Originally, the law applied only to cases in which one spouse omitted income from the tax return that the other spouse knew nothing about, but the law as it stood before the I.R.S. Restructuring and Reform Act of 1998 [Pub. L. No. 105-206] was more expansive, and fairly complex.

Former *I.R.C. § 6013(e)*, the innocent spouse provision prior to the 1998 Act, provided relief from joint and several liability in the following situations:

1. A joint return was filed;
2. There was a substantial understatement of tax attributable to grossly erroneous items of the other spouse on the return;
3. The spouse seeking relief established that, in signing the return, he or she did not know (or have reason to know) of the substantial understatement; and
4. Under all the circumstances, it would be inequitable to hold the spouse liable for the tax deficiency.

A "substantial understatement" was defined by a dollar amount or percentage of adjusted gross income (AGI) that eliminated controversy over small sums, and this requirement was rarely a barrier to relief. The requirement that the deficiency be attributable to "grossly erroneous" items, however, has been a considerable source of trouble. Such items included all forms of omitted income, but only such disallowed deductions and credits that had "no basis in law or fact." Congress was unclear concerning what unlawful deductions or credits should provide the basis for innocent spouse relief. At one extreme, purely fraudulent deductions taken by one spouse were clearly covered. But most disallowed deductions had some legal premise, however weak, and courts were often reluctant to permit a spouse to disavow liability for run-of-the-mill disallowed tax deductions that seemed to involve little or no fraud [*see Dillon v. Commissioner (1998) T.C. Memo. 1998-5*].

The largest problem area in former Section 6013(e) was in the "lack-of-knowledge" requirement. A spouse could hardly claim to be innocent of misreported items of which he or she had knowledge. But it was often unclear how to treat a spouse who had knowledge of the underlying economic facts behind a tax decision, but no knowledge that the decision was unlawful. For example, a spouse might well know of a tax shelter investment, and even know that deductions had been claimed, but not know that the deductions were illegal. Another aspect of the "knowledge" problem has been in the requirement that the spouse seeking relief did not have reason to know of the deficiency, even if he or she did not have actual knowledge. This requirement was intended to cull out culpable negligence, and to preserve a minimum sense of responsibility in signing a joint income tax return. But it has proved troublesome and inconsistent in application because it often turns on a court's assessment of the sophistication of the spouse seeking relief [*see Infelise v. Commissioner (1998) T.C. Memo. 1998-191*].

The 1998 Act repealed *I.R.C. § 6013(e)* and replaced it with two provisions found in new *I.R.C. § 6015*. A revised version of the traditional innocent spouse provision was placed in subsection (b), and this provision applies to all taxpayers seeking relief from joint return liability [*I.R.C. § 6015(b)*]. Subsection (c) applies only to a taxpayer who is divorced or legally separated from the person with whom he or she filed a joint return [*I.R.C. § 6015(c)*].

Because subsection (c) is considerably more lenient than subsection (b), and because the overwhelming majority of persons seeking innocent spouse relief are divorced or separated, it is not clear how often subsection (b) will apply in practice. The prior statute made no formal distinction between taxpayers who were still married and living with the fraudulent spouse and those who were divorced or legally separated. But marital status found its way into the statute obliquely, through the requirement that relief be justified on equitable grounds. innocent spouse relief was generally intended to protect taxpayers who have broken their economic ties with the fraudulent spouse, and taxpayers who remained married had difficulty asserting the unfairness of joint liability. The 1998 Act acknowledges that divorce or legal separation is a factor in providing expanded relief under subsection (c), yet it still provides more basic relief to all taxpayers. Thus it is arguable that the new statute intends greater protection for taxpayers who are still married to fraudulent spouses than was available under prior law.

[b] Relief for All Joint Filers

I.R.C. § 6015(b) provides for relief to all taxpayers who filed a joint return, regardless of their current marital or household status. To qualify for relief under this section--which includes relief from liability for tax (including interest, penalties, and other amounts) to the extent that liability is attributable to an understatement of tax--the following requirements must be met [*I.R.C. § 6015(b)(1)*]:

1. A joint return has been made for the taxable year;
2. The return contains an understatement of tax attributable to erroneous items of one individual filing the return;
3. The other individual filing the joint return establishes that in signing it, he or she did not know, and

had no reason to know, that there was an understatement;

4. Taking into account all the facts and circumstances, it is inequitable to hold that other individual liable for the deficiency in tax that is attributable to the understatement; and

5. That other individual elects the benefits of *I.R.C. § 6015* not later than a date that is two years after the date that the IRS has begun collection activities with respect to him or her.

A special apportionment provision permits an individual who would be relieved from liability but for the "knowledge" requirement of item 3, above [*I.R.C. § 6015(b)(1)(C)*], to limit the *amount* of his or her liability by establishing that in signing the return he or she did not know, and had no reason to know, the *extent* of the understatement. In that case, the individual will be relieved of liability for tax (including interest, penalties, and other amounts) to the extent that the liability is attributable to the portion of the understatement of which that individual did not know and had no reason to know [*I.R.C. § 6015(b)(2)*].

This language largely tracks the provisions of former *I.R.C. § 6013(e)*, and to the extent that it does, prior case law should presumably still govern. The deficiency must, obviously, not be attributable to the spouse seeking relief [see *Marzullo v. Commissioner* (1997) *T.C. Memo* 1997-261]. As under prior law, the spouse claiming relief must demonstrate lack of knowledge (or constructive knowledge), and relief must be equitable under the circumstances.

Actual knowledge of the impropriety of the tax return always forecloses relief, but the courts have been inconsistent in the treatment of taxpayers who knew of the underlying economic facts, but not of their proper tax effect. There is important authority for the proposition that knowledge of the transaction alone is sufficient to deny relief [*Purcell v. Commissioner* (6th Cir. 1987), 826 F.2d 470 ; *Quinn v. Commissioner* (7th Cir. 1975) 524 F.2d 617]. However, other decisions have granted relief when the spouse knew of the transaction--such as the payment of an item that was claimed as a deduction--but did not understand the impropriety of its treatment by the other spouse on the joint tax return [*Price v. Commissioner* (9th Cir. 1989) 887 F.2d 959 ; *Guth v. Commissioner* (9th Cir. 1990) 897 F.2d 441]. A taxpayer with actual knowledge of a claimed deduction must lack actual knowledge of the *factual circumstances* that made the item at issue nondeductible [*King (Kathy A.) v. Commissioner*, 116 T.C. 198 (2001) (spouse unaware that husband lacked profit motive for cattle-raising activity); see *I.R.C. § 6015(c)(3)(C)*]. Also, a taxpayer with actual knowledge of income but with only a superficial knowledge of a spouse's complex business transactions and the amount of financial gain [*Martin (Evelyn M.) v. Commissioner*, *T.C. Memo.* 2000-346], or a taxpayer unaware that a spouse has not accounted for all income [*Charlton (Fredie L.) v. Commissioner*, 114 T.C. 333, 341-342 (2000)] may be granted relief. By contrast, a taxpayer who is aware of omitted income but unaware of applicable tax laws [*Cheshire (Kathryn) v. Commissioner*, 115 T.C. 183 (2000)] or who merely avoids reviewing or "turns a blind eye" to facts on a joint tax return [*Von Kalinowski (Julian O.) v. Commissioner*, *T.C. Memo.* 2001-21] will be denied relief. Nevertheless, even when there was actual knowledge of the impropriety of the tax return, the Tax Court has granted innocent spouse relief in compelling circumstances, such as when a battered wife was too frightened to question her husband about their return [*Aude v. Commissioner* (1997) *T.C. Memo.* 1997-478].

When a taxpayer lacks actual knowledge, he or she must not have had "reason to know" of the deficiency. The following factors are generally consulted in making this determination [*Laird v. Commissioner* (1994) *T.C. Memo.* 1994-564] :

1. The presence of unusual or lavish expenditures;
2. Whether the couple's standard of living improved significantly;
3. Participation in business affairs or bookkeeping by the party claiming innocent spouse status;

4. The culpable spouse's openness or refusal to be forthright concerning the couple's income and business transactions; and
5. The level of education, business knowledge, and experience of the party claiming innocent spouse status.

In determining whether, under all the facts and circumstances, it is inequitable to impose joint and several liability, certain factors have been given special weight under prior law. The most important is whether the spouse claiming relief significantly benefited from the understatement of tax [*Ebeling v. Commissioner* (1994) T.C. Memo. 1994-277 ; *Walker v. Commissioner* (1985) T.C. Memo. 1985-278] . But the significance of the benefit is measured against the taxpayer's normal standard of living, and thus more affluent taxpayers are more likely to obtain relief than less affluent ones [*Hinds v. Commissioner* (1988) T.C. Memo. 1988-426] . The courts have also weighed the probable future hardship to the spouse if relief is not granted, and have found such hardship even when a spouse, now divorced, received a fair distribution of the marital assets [*Dillon v. Commissioner* (1998) T.C. Memo. 1998-5] .

I.R.C. § 6015(b) departed from prior law in eliminating any requirement that the understatement of tax be "substantial," and thus relief is available without regard to the dollar amount of the deficiency [see former *I.R.C. § 6013(e)(3),(4)*].

A much more important change, however, was the removal of the former requirement that the tax items at issue be "grossly" erroneous, having "no basis in law or fact" [see former *I.R.C. § 6013(e)*; *Friedman v. Commissioner* (2d Cir. 1995) 53 F.3d 523] . The practical impact of this revision in the courts is uncertain. For example, assume that (as is very common) a husband takes a tax position on the advice of an accountant for which there was significant legal support. If this position is ultimately rejected in the Tax Court, the wife (or ex-wife) may attempt to disavow liability simply on the basis that the "erroneous" deduction was attributable to the husband. The statute would seem to allow relief in cases in which there is no serious claim of fraud toward either against the spouse or the fisc, and perhaps only honest error. The courts may choose to place greater emphasis on the requirement that relief be equitable in order to prevent dilution of the principle of joint and several liability when both spouses benefited financially from a disallowed deduction or credit [*Von Kalinowski (Julian O.) v. Commissioner*, T.C. Memo. 2001-21 (educated wife had constructive knowledge of husband's tax shelter losses)].

Prior law was confusing on the issue of whether innocent spouse relief was available when the spouse knew something of the deficiency, but not of its magnitude. The language of the statute could be read to eliminate relief when a spouse had knowledge to any extent, although at least one court had decided otherwise [*Wiksell v. Commissioner* (9th Cir. 1996) 90 F.3d 1459] . The new statute explicitly provides that, when the spouse is unaware of the extent of the understatement, relief is available as to the portion of the understatement of which he or she was without knowledge [*I.R.C. § 6015(b)(2)*].

[c] Separate Liability Election for Divorced or Separated Taxpayers

[i] Generally

I.R.C. § 6015(c), applicable only to taxpayers who are no longer married to or living with the other joint filer, is significantly more liberal than *I.R.C. § 6015(b)* [see [b], above]. It provides for what amounts to an election to revoke joint return status with respect to tax deficiencies determined after separation or divorce. Subject to limited exception, subsection (c) limits a taxpayer's liability on the joint return to his or her "portion" of the deficiency, which is determined under *I.R.C. § 6015(d)* [see [ii], below].

A person who elects the application of subsection(c) bears the burden of proof with respect to establishing the portion of the deficiency allocable to that person, except as provided in *I.R.C. § 6015(c)(3)(A)(ii)*, or *I.R.C. § 6015(c)(3)(C)*--which, respectively, concern persons who were not members of the same household during the 12

months preceding the filing of the election, and certain deficiencies not covered by the election (discussed below) [I.R.C. § 6015(c)(2)].

The threshold issue is whether a taxpayer can elect relief. An individual is eligible to elect the application of I.R.C. § 6015(c) in the following situations [I.R.C. § 6015(c)(3)(A)(i)]:

1. At the time the election is filed, the individual is no longer married to, or is legally separated from, the person with whom he or she filed the joint return to which the election relates; or
2. The individual was not a member of the same household as the person with whom the joint return was filed at any time during the 12-month period ending on the date the election is filed.

However, the election may nonetheless be voided by a fraudulent transfer of assets between individuals. Statute provides that if the Internal Revenue Service demonstrates that assets were transferred between individuals filing a joint return as part of a fraudulent scheme by them, an election under I.R.C. § 6015(c) by either individual will be invalid and joint and several liability will apply to the joint return [I.R.C. § 6015(c)(3)(A)(ii)]. The intention is to prevent spouses from colluding to defraud the public fisc by transferring assets to a spouse who then seeks innocent spouse relief.

With respect to timing of the election, the statute provides that an election for any taxable year must be made not later than two years after the date on which the Internal Revenue Service has begun collection activities with respect to the individual making the election [I.R.C. § 6015(c)(3)(B)].

The only significant barrier to relief applies to a taxpayer who, at the time he or she signed the return, had *actual knowledge* of the tax item giving rise to the deficiency. The statute, significantly, places the burden on the Internal Revenue Service to demonstrate that the individual making an election had actual knowledge at the time he or she signed the return of any item giving rise to a deficiency (or portion of it) that is not allocable to that individual under I.R.C. § 6015(d) [see [ii], *below*]. If this is shown, the election will not apply to the deficiency (or portion) [I.R.C. § 6015(c)(3)(C); *Culver (Michael G.) v. Commissioner*, 116 T.C. 189 (2001) (burden on I.R.S. to prove by preponderance of evidence that husband had actual knowledge of wife's embezzlement activities)].

Nevertheless, even a taxpayer with actual knowledge may still obtain relief if he or she can establish that the return was signed under *duress* [I.R.C. § 6015(c)(3)(C); see *Aude v. Commissioner* (1997) T.C. Memo. 1997-478 (construing prior law)].

Note that the "actual knowledge" standard is much more liberal than the "reason to know" standard in subsection (b) and in prior law. If a taxpayer did not know of the other spouse's understatements, it does not matter whether he or she was negligent or reckless in failing to notice the problem. The courts often see cases in which a wife signs a joint return reporting little or no income for a year in which the couple spent considerable amounts of money. Under prior law, a court could readily find that the wife "had reason to know" that the tax return was false or fraudulent, and thus avoid the issue of whether she had actual knowledge [see [b], *above*]. Unlike subsection (b), the subsection (c) separate liability election does not contain an equity standard that a court might use to protect the public fisc [*but see* I.R.C. § 6015(f); cf. *Mitchell (Herbert L.) v. Commissioner*, T.C. Memo. 2000-332 (equitable relief denied when spouse with actual knowledge significantly benefited from omitted income)].

I.R.C. § 6015(c)(4) provides that the portion of any deficiency for which an individual making an election is otherwise liable will be increased by the value of any "disqualified asset" transferred to the individual, but the election is not invalidated, and only the value of the transferred assets is excluded from the amount of the deficiency covered by the election [I.R.C. § 6015(c)(4)]. In general, a "disqualified asset" is any property or right to property transferred to an individual making the election by the other individual filing the joint return if the principal purpose of the transfer was the avoidance of tax or payment of tax. For this purpose, any transfer that is made after a date that is one year before the

date on which the first letter of proposed deficiency that allows the taxpayer an opportunity for administrative review in the Internal Revenue Service Office of Appeals is sent will be presumed to have as its principal purpose the avoidance of tax or payment of tax. However, this presumption will not apply to any transfer pursuant to a decree of divorce or separate maintenance or a written instrument incident to such a decree, or to any transfer that an individual establishes did not have as its principal purpose the avoidance of tax or payment of tax [I.R.C. § 6015(c)(4)].

[ii] Allocation of Deficiency

I.R.C. § 6015(c) limits an electing taxpayer's liability to the portion of the joint return deficiency "properly allocable to the individual under subsection (d)" [I.R.C. § 6015(c)(1)]. As explained further hereafter, the statutory allocation is achieved by dividing the items of omitted income or disallowed deductions that generated the deficiency between the spouses, and then dividing the tax liability in the same proportion [I.R.C. § 6015(d)(1)]. The fact that the division is based on items of income and deduction explains the special rule for tax credits and taxes other than the income tax or minimum tax, which are allocated separately [I.R.C. § 6015(d)(2)].

Under I.R.C. § 6015(d), the portion of any deficiency on a joint return allocated to an individual is the amount that bears the same ratio to the deficiency as the net amount of items taken into account in computing the deficiency and allocable to the individual under paragraph (3) of that section bears to the net amount of all items taken into account in computing the deficiency [I.R.C. § 6015(d)(1)].

If a deficiency (in whole or in part) is attributable to (1) the disallowance of a credit, or (2) any tax (other than tax imposed by I.R.C. § 1 or 55) required to be included with the joint return, and that item is allocated to one person under I.R.C. § 6015(d)(3), the deficiency will be allocated to that person. Any item of that nature will not be taken into account under I.R.C. § 6015(d)(1)--the general deficiency apportionment discussed in the first paragraph above [I.R.C. § 6015(d)(2)].

Statutory law sets forth an allocation of items giving rise to the deficiency. Subject to two exceptions discussed hereafter, any item giving rise to a deficiency on a joint return must be allocated to the individuals filing the return in the same manner as it would have been allocated if the individuals had filed *separate* returns for the taxable year [I.R.C. § 6015(d)(3)(A)]. Note that community property laws are disregarded [see [a], *above*], which would otherwise require each spouse to report half of all community income and deductions on separate returns [I.R.C. § 6015(a)]. Wage income is allocated to the spouse performing the job and receiving the Form W-2. Business and investment income (including capital gains) is allocated in the same proportion as the ownership of the business or investment that produces the income. If the ownership of the business or investment is held by both spouses as joint tenants, it is expected that any income is allocated equally to each spouse, in the absence of clear and convincing evidence supporting a different allocation. The allocation of business deductions is expected to follow the ownership of the business. Personal deductions are expected to be allocated equally between the spouses, unless the evidence shows that a different allocation is appropriate--such as the situation in which an overvalued charitable deduction is made with the sole property of one of the spouses [S. Rep. No. 105-174].

There are, however, exceptions to the general allocation rule discussed above. First, an item otherwise allocable to any individual under I.R.C. § 6015(d)(3)(A) must be allocated to the other individual filing the joint return to the extent the item gave rise to a *tax benefit* on the joint return to the other individual [I.R.C. § 6015(d)(3)(B); see *In re Shafman (Jeremy B.)* (U.S. Bankr. Ct., N. Dist. W.Va. 2001) 267 B.R. 709 (bankruptcy court granted relief under I.R.C. § 6015(c) except for innocent spouse's own wages and tips)]. Second, the Internal Revenue Service may provide for an allocation of any item in a manner not prescribed by I.R.C. § 6015(d)(3)(A) if the Internal Revenue Service establishes that the allocation is appropriate due to the *fraud* of one or both individuals [I.R.C. § 6015(d)(3)(A)].

Under I.R.C. § 6015(d), limitations on separate returns are disregarded. Accordingly, if a deduction or credit is disallowed in its entirety solely because a separate return is filed, that disallowance must be disregarded and the item

computed as if a joint return had been filed and then allocated between the spouses appropriately [*I.R.C. § 6015(d)(4)*].

In addition, if the liability of a taxpayer's child is included on a joint return, that liability must be disregarded in computing the separate liability of either spouse and that liability must be allocated appropriately between the spouses [*I.R.C. § 6015(d)(5)*].

[d] Tax Court Review

The election procedures for both innocent spouse relief under *I.R.C. § 6015(b)* and the separate liability election under *I.R.C. § 6015(c)* anticipate a determination by the I.R.S. If the election is denied, the taxpayer may petition the Tax Court for review. The petition must be filed 90 days following the date on which the denial is mailed or (if earlier) six months after the election is filed [*I.R.C. § 6015(e)(1)*]. The Tax Court is given jurisdiction to decide the applicability of relief. But, the Tax Court loses jurisdiction if the year at issue is the subject of a tax refund suit in the other federal courts [*I.R.C. § 6015(e)(3)(C)*].

If a spouse or ex-spouse seeks innocent spouse relief from the I.R.S. outside a deficiency proceeding, the other ("nonelecting") spouse may participate in any administrative proceedings and seek judicial review of any grant of relief [*I.R.C. § 6015(e)*; see also *Corson (Thomas) v. Commissioner*, 114 T.C. 354, 364-365 (2000) (in deficiency proceeding, participation by nonelecting spouse); *Hale Exemption Trust v. Commissioner*, T.C. Memo. 2001-89 (in deficiency proceeding, participation by estate representative of deceased spouse)]. The Tax Court is required to establish rules that provide an individual who has filed a joint return but who has not made the election adequate notice and an opportunity to join the proceeding as a party [*I.R.C. § 6015(e)(4)*].

An individual who has participated meaningfully in a court proceeding may not elect relief under *I.R.C. § 6015(b)* or (c) for the same taxable year after the decision of the court becomes final [*Vetrano (Michael) v. Commissioner*, 116 T.C. 272 (2001) (former wife could not withdraw innocent spouse claims from court consideration without prejudice); see *I.R.C. § 6015(g)(2)*].

[e] California Law

The California personal income tax law contains an innocent spouse provision similar to the federal provision in effect prior to 1998 [see *Rev. & Tax. Code § 18533*; see also [a], above]. In addition, the Franchise Tax Board may relieve a spouse of liability for nonpayment of taxes (including interest and penalties) for any year for which a joint return is filed. The spouse must establish that he or she did not know, and had no reason to know, of the nonpayment at the time the return was filed [*Rev. & Tax. Code §§ 18533(b)(2), 19006(c)(2)*].

A spouse cannot be relieved of liability for tax on income earned by, or subject to the exclusive management of, that spouse. The liability of a spouse for the tax, penalties, and interest due for the taxable year must be in the same ratio to the total tax, penalties, and interest due for the taxable year as the income earned by or subject to the management and control of the spouse is to the total gross income reportable on the return [*Rev. & Tax. Code § 19006(c)(1)(A)*]. A spouse cannot be relieved of liability below the amount actually paid on the liability before a grant of relief, including credits from other taxable years available to be applied against the liability [*Rev. & Tax. Code § 19006(c)(1)(B)*].

The FTB must wait at least 30 days after notifying the other spouse before revising the liability of the innocent spouse. The FTB must decide whether, under all the facts and circumstances, it would be inequitable to hold the spouse requesting relief liable [*Rev. & Tax. Code § 19006(c)(4)*].

[f] Family Court Enforcement of Tax Liabilities Despite Federal "Innocent Spouse" Treatment

Despite the treatment of a party as an "innocent spouse" under federal law, a state family law court is not precluded

from enforcing a preexisting provision of an agreement and judgment that requires both spouses to equally share tax obligations. Federal recognition of a party as an "innocent spouse" is an administrative determination--typically involving an administrative hearing or informal negotiations--and is not a formal adjudication of rights and duties as between the spouses. The federal statute that permits innocent spouse relief [*see I.R.C. § 6015*] does not preempt a state court's ability to impose federal tax liability on an innocent spouse [*In re Marriage of Hargrave* (1995) 36 Cal. App. 4th 1313, 1320-1321, 43 Cal. Rptr. 2d 474] . Courts have observed that the "federal government has no interest in how states allocate tax liability between divorcing spouses, as long as they do not attempt to interfere with IRS collection efforts." The important federal interest, in those courts' view, is the right of the IRS to obtain direct payment of federal taxes from the party of its choosing, rather than in determining how state court's allocate liability between the spouses [*In re Marriage of Hargrave* (1995) 36 Cal. App. 4th 1313, 1321, 43 Cal. Rptr. 2d 474 ; *see Ravetti v. United States* (9th Cir. 1994) 37 F.3d 1393, 1395-1396] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Income Tax ComputationDependent & Personal Exemptions (IRC secs. 151-153)Tax LawFederal Taxpayer GroupsIndividualsGeneral Overview



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California Legal Forms--Transaction Guide

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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 125 PROVISIONS FOR PAYMENT OF INCOME TAXES, ATTORNEYS' FEES, AND COSTS
PART II. LEGAL BACKGROUND
B. Income Tax Returns

34-125 California Legal Forms--Transaction Guide § 125.21

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.21 Married Taxpayers Filing Separately

[1] Separate Returns Are Allowed

Spouses may file separate income tax returns and be subject to the rate schedules for married persons filing separately [I.R.C. § 1(d)]. The use of separate returns almost always results in a higher total tax than a joint return, and precludes eligibility for the earned income credit [*Becker v. C.I.R. (1995) T.C. Memo. 1995-177*]. Thus, separate returns typically are used only when a spouse seeks to avoid joint and several tax liability, as when the spouses are separated. If separate returns are used in a community property state, the general rule is that each spouse must report half of the community income and all of his or her separate income [*Poe v. Seaborn (1930) 282 U.S. 101, 51 S. Ct. 58, 75 L. Ed. 239* ; *Mischel (Francis Z.) v. Commissioner (1997) T.C. Memo. 1997-350*].

The Tax Court has held that wife filing separate income tax returns was taxable on half of her husband's community property income, notwithstanding the wife's claimed oral transmutation agreement under which the spouses allegedly agreed to keep their respective incomes separate. The Tax Court rejected the transmutation argument because the spouses had obviously commingled their funds and did not maintain separate bank accounts [*Edelson v. Colmmissioner (1993) T.C. Memo. 1993-511* ; see also *Vincent v. Commissioner (1994) T.C. Memo. 1994-345* (wife liable for tax on one-half reported income of husband's business because wife did not prove validity of written interspousal agreement treating business income as husband's separate property)].

PRACTICE TIP:

The Tax Court apparently will respect a genuine and substantiated transmutation agreement effective under state law. Such an agreement, however, should be in writing. Thus, if each spouse formally agrees that the income of the other spouse is that spouse's separate property, a spouse apparently can file a separate return without being taxed on half of the other spouse's income as community property. This may be advantageous if the other spouse is a tax protestor and the spouse seeks to avoid liability for IRS deficiency claims based on the other spouse's income. However, in many cases the tax benefit may be outweighed, in the event of dissolution, by the spouse's having relinquished claims to the other spouse's

income and to assets that may have been purchased with the that income. *Commentary by Publisher's Editorial Staff.*

The earnings of either spouse or the income from community property (including gains and losses from any sales or exchanges) are divided equally between the spouses. Income from separate property is taxable to the owner spouse alone. Quasi-community property is separate property during marriage; therefore, the income from quasi-community property is separate income for tax purposes [see *Estate of Shicca v. Commissioner* (1960) 35 T.C. 96]. For discussion of characterization of property as community or separate, see Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2d ed., Ch. 20, *Community Property: General Characterization and Division Principles* (Matthew Bender).

In short, federal tax law follows state-created property rights in determining what income is taxable to each spouse filing a separate return. This rule may represent a hardship when, despite each spouse's legal right to half of the community income, one spouse is taxed on community income to which he or she has no practical access. In recognition of this problem, the Internal Revenue Code provides that, in specified instances, community income can be treated as separate income for income tax purposes. Community income may be recharacterized as separate income when the spouses are separated for the entire year [I.R.C. § 66(a); see [2], below], when one spouse does not notify the other spouse of the existence of community income [I.R.C. § 66(b); see [3], below], or when it is inequitable to one of the spouses to treat income as community property [I.R.C. § 66(c); see [4], below].

If either spouse is a nonresident alien, the community income of the spouses is recharacterized as separate income for income tax purposes according to special rules [I.R.C. § 879(a); see [4][d], below]. In addition, the earnings of a child are taxable to the child alone, regardless of whether the earnings belong to the parents under state law [I.R.C. § 73].

PRACTICE TIP:

A joint return filed early can be changed to a separate filing if the separate return is filed before the last filing date for either spouse. A joint return filed after the last filing date cannot be changed. A separate return can be changed to a joint return at any time within three years of the last date to file a separate return (without extensions). If one spouse has a risky financial record, file a separate return, with an agreement to amend the filing to a joint return (if this is otherwise permissible) after an audit or other protection is in place. *Commentary by Susan Jeffries.*

[2] Spouses Living Apart

[a] Requirements for Separate Property Tax Treatment

Under California law, the earnings of a spouse while living separate and apart from the other spouse are the separate property of the earning spouse [Fam. Code § 771]. This provision applies only when the spouses have separated with no present intention of resuming the marital relationship [*In re Marriage of Imperato* (1975) 45 Cal. App. 3d 432, 119 Cal. Rptr. 590 ; see *In re Marriage of Manfer* (2006) 144 Cal. App. 4th 925, 929-930, 50 Cal. Rptr. 3d 785 (date of separation occurs when either party does not intend to resume the marriage and his or her actions bespeak finality of marital relationship)]. Thus, when spouses separate without intending a final break in the marital relationship, the earnings of each spouse continue to be treated as community property. If the earnings of separated spouses are treated as separate property under California law, they are treated as separate property for both federal and California income tax purposes.

However, community income of separated or abandoned spouses may be recharacterized as separate income for federal income tax purposes. If statutory recharacterization requirements are met, each spouse files a separate return reporting only his or her separate income as recharacterized. To qualify for separate property tax treatment of community income, the taxpayers must meet all of the following requirements [I.R.C. § 66(a)]:

- (1) Be married to each other at any time during the year;
- (2) Live apart at all times during the year;
- (3) Not file a joint return with each other for the year; and
- (4) Have earned income that is community income for the year, no portion of which income is transferred directly or indirectly between the taxpayers before the close of the year.

For purposes of the no-transfer requirement, the legislative history indicates that *de minimis* transfers of earned income between spouses are to be disregarded. Also, payments to, or for the benefit of, the spouses' dependent children are not to be considered indirect transfers to the recipient spouse solely because the payments satisfy the recipient spouse's child support obligations [H.R. Rep. No. 1278, 96th Cong., 2d Sess. 7 (1980); see Federal Tax Information on Community Property, IRS Pub. 555]. Legislative history also indicates that Congress conceived of *Internal Revenue Code Section 66(a)* as a protection for abandoned spouses [H.R. Rep. No. 1278, 96th Cong., 2d Sess. 7 (1980)]. Its application is much broader, however, and the statute applies to separated spouses in general. For example, it could apply when spouses are separated for work reasons.

Earned income is defined as wages, salaries, or professional fees, together with other amounts received as compensation for personal services actually rendered. Earned income does not include compensation for personal services rendered by the taxpayer to a corporation if the compensation represents a distribution of earnings and profits rather than a reasonable allowance for services actually rendered. If the taxpayer is engaged in a trade or business in which both personal services and capital are material income-producing factors, a reasonable allowance as compensation for the personal services of the taxpayer, not to exceed 30 percent of his or her share of the net profits of the trade or business, is considered earned income [I.R.C. §§ 66(d)(1), 911(b), (d)(2); see I.R.C. § 911(b), before amendment by Pub. L. No. 97-34, § 111(a)].

[b] Mechanics of Separate Property Treatment

Provided the requirements discussed in [a], *above*, are met, the community income of the spouses is recharacterized as follows [I.R.C. §§ 66(a), 879(a); Treas. Reg. § 1.879-1(a)]:

- Earned income, other than trade or business income and a partner's distributive share of partnership income, is treated as the separate income of the spouse who rendered the personal services [I.R.C. § 879(a)(1)].
- Community income and deductions derived from a trade or business, other than a trade or business carried on by a partnership, are treated as the gross income and deductions of the spouse carrying on the trade or business or, if such trade or business is jointly operated, treated as the gross income and deductions of each spouse on the basis of their respective distributive share of the gross income and deductions [I.R.C. §§ 879(a)(2), 1402(a)(5)(A)].
- Any portion of a partner's distributive share of ordinary income and loss that is considered community income under state law is treated as the separate income and loss of the partner spouse [I.R.C. §§ 879(a)(2), 1402(a)(5)(B)].
- Community income not described above that is derived from the separate property of one spouse is treated as the separate income of that spouse [I.R.C. § 879(a)(3)].

No other community income is recharacterized for federal tax purposes [I.R.C. § 879(a)(4)].

[3] Spouse Not Notified of Community Income

The IRS may disallow the benefits of state community property laws to any taxpayer with respect to any income if the taxpayer acted as if solely entitled to the income and failed to notify his or her spouse of the nature and amount of the income before the due date, including extensions, for filing the return for the taxable year in which the income was derived [I.R.C. § 66(b); see *Drummer v. Commissioner* (1994) T.C. Memo. 1994-214 (rule cannot be used to preclude liability by spouse living separately and apart for taxes on share of community income)]. Thus, a taxpayer who fails to notify his or her spouse of his or her earnings may be required by the IRS to report all of those earnings (rather than half) as separate income if separate returns are filed. This statute apparently is directed at instances in which unreported income is uncovered by the IRS, and the spouse to whom it is attributable tries to cause half to be taxed to the other spouse.

[4] Recharacterization of Community Income

[a] Allowed for Relief From Liability

If certain conditions are satisfied, a taxpayer is permitted to recharacterize community income as separate income for federal tax purposes [I.R.C. § 66(c)]. Thus, if the taxpayer is unaware of certain community income and fails to report half of it on a separate return, the reporting will be upheld if requirements are met for the recharacterization of community income.

Special recharacterization rules apply to the community income of certain nonresident aliens and their spouses [see [d], below].

[b] Recharacterization Requirements

A taxpayer meeting statutory requirements [see I.R.C. § 66(c)] need not report his or her share of certain items of community income, and those items will be included in the income of his or her spouse. The following requirements must be met [see, e.g., *Dooley v. Commissioner* (1992) T.C. Memo. 1992-39] .

- (1) The taxpayer must not file a joint return for the taxable year in question [I.R.C. § 66(c)(1)].
- (2) The taxpayer must not include in gross income for the taxable year a properly includible item of community income that, in accordance with the rules contained in *Internal Revenue Code Section 879(a)*, would be treated as income of the other spouse [I.R.C. § 66(c)(2)].
- (3) The taxpayer must establish that he or she did not know of, and had no reason to know of, the items of community income to be recharacterized [I.R.C. § 66(c)(3)].
- (4) It must be inequitable to include the items of community income in the taxpayer's gross income, taking into account all of the facts and circumstances [I.R.C. § 66(c)(4)].

Thus, although a taxpayer initiates the process by failing to include the items of community income in his or her gross income, this action is subject to the IRS determination that recharacterization is equitable and that the taxpayer had no reason to know of the income [see I.R.C. § 66(c)].

A spouse's lack of knowledge about community income has been difficult to prove in claiming relief under the statute [see I.R.C. § 66(c)(3)]. For example, a wife who filed a separate return was held to be required to report half of her husband's community property earnings, even though he placed his earned income in a savings account with his mother

and transferred funds from that account to another account he shared with the wife. The wife knew of his earned income, but did not initially know about the separate account. The Tax Court denied relief under *I.R.C. § 66(c)* because she knew the husband was earning income, which was community property under state law. It noted that she suffered no hardship because the husband used the funds for community expenses [*Bozek v. Commissioner (1986) T.C. Memo. 1986-37*] .

Similarly, the Tax Court denied relief to a former wife who taught at the same university as her former husband, filed joint returns with him for several years, and knew that his income was the family's main source of support. No reasonable view of the evidence would support a finding that she did not know, or have reason to know, of her former husband's income for the years in question. Thus, the court held that it would not be inequitable to subject her to tax on the income because the husband's salary had been used to support her and their three children [*Baldwin v. Commissioner (1986) T.C. Memo. 1986-342*] .

Relief also was denied to a former husband when he and his former wife were separated for a portion of the taxable year, and he did not have direct access to the wife's income tax return, but he knew that she had earned income [see *Warner v. Commissioner (1987) T.C. Memo. 1987-219*] . Similarly, in another case, a former wife was aware that her former husband was involved in real estate transactions during the taxable year and that these activities generated income from commissions or fees. The Tax Court denied her relief regarding income from those transactions, even though she was unable to ascertain the exact amount of commissions or fees involved. She was granted relief, however, for certain interest income from certificates of deposit purchased with the proceeds of his real estate transactions because she neither knew, nor had reason to know, of this income [see *Roberts v. Commissioner (1987) T.C. Memo. 1987-391*] . In yet another case, the Tax Court held that a wife could not obtain tax relief under the income recharacterization provisions when she knew of the existence of disputed income from her husband's dental laboratory, even though she was unaware that it legally constituted community income [*Thatcher v. Commissioner (1988) T.C. Memo. 1988-537* ; cf. *McGee v. Commissioner (1991) T.C. Memo. 1991-510* (relief denied: wife knew of husband's earned income from dental practice, but argued she had no idea of how much)].

Legislative history indicates that, in determining whether a recharacterization is equitable, the IRS may consider whether the taxpayer benefited from the income and whether the defense was promptly raised so as to prevent the limitation period from running on the other spouse [H.R. Rep. No. 432, 98th Cong., 2d Sess. 1501-1503 (1984)]. Further, if this determination is made, the IRS must cause the income to be included by the taxpayer's spouse and invoke a deficiency assessment if the spouse has not already reported all of the recharacterized income [*I.R.C. § 66(c)*].

Apart from the general requirements for recharacterization of income discussed above, the Internal Revenue Service Restructuring and Reform Act of 1998 added a special provision to relieve a spouse from liability on equitable grounds. It provides that, if, taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency (or any portion of either) attributable to any item for which relief is not available under (*I.R.C. § 66(c)*), the I.R.S. may relieve that individual of the liability [*I.R.C. § 66(c)* (as amended by Pub. L. No. 105-206, § 3201(b))].

[c] Community Income Subject to Recharacterization

The community income items subject to recharacterization as separate income of the other spouse are those items that would have been treated as separate income of the other spouse if *Internal Revenue Code Section 66(a)*, relating to spouses living apart, had applied [*I.R.C. §§ 66(c)(2), 879(a); Treas. Reg. § 1.879-1(a); see [2], above*]. Thus, the earned income of the other spouse, other than trade or business income and a partner's distributive share of partnership income, is treated as the separate income of that spouse [*I.R.C. § 879(a)(1)*]. Community income and deductions derived from a trade or business, other than a trade or business carried on by a partnership, are treated as the gross income and deductions of the spouse carrying on the trade or business or, if such trade or business is jointly operated, treated as the gross income and deductions of each spouse on the basis of their respective distributive share of the gross income and

deductions [I.R.C. §§ 879(a)(2), 1402(a)(5)(A)].

If a spouse is a partner, partnership income and loss that is considered community income or loss under state law may be treated as the separate income of the partner spouse. Any other community income, not described above, that is derived from the separate property of the other spouse may be treated as the separate income of that spouse [I.R.C. § 879(a)(3)].

[d] Nonresident Aliens

If a spouse is a nonresident alien, the community income is recharacterized for federal income tax purposes according to the following rules [I.R.C. § 879(a); *Treas. Reg. § 1.879-1(a)*]. Earned income, other than trade or business income and a partner's distributive share of partnership income, is treated as the separate income of the spouse who rendered the personal services [I.R.C. § 879(a)(1)]. Community income and deductions derived from a trade or business, other than a trade or business carried on by a partnership, are treated as the gross income and deductions of the spouse carrying on the trade or business or, if such trade or business is jointly operated, treated as the gross income and deductions of each spouse on the basis of their respective distributive share of the gross income and deductions [I.R.C. §§ 879(a)(2), 1402(a)(5)(A)].

Any portion of a partner's distributive share of partnership ordinary income or loss that is considered community income or loss under state law is treated as the separate income or loss of the partner spouse [I.R.C. §§ 879(a)(2), 1402(a)(5)(B)]. Community income, not described above, that is derived from the separate property of one of the spouses is treated as the separate income of that spouse. No other community income is recharacterized for federal tax purposes [I.R.C. § 879(a)(4)].

The recharacterization rules do not apply for any taxable year for which an election to treat a nonresident alien as a resident is in effect [I.R.C. §§ 879(b), 6013(g), (h)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Taxpayer GroupsIndividualsFiling Status (IRC secs. 1-2)



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DIVISION VII: PERSONAL TRANSACTIONS
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PART II. LEGAL BACKGROUND
B. Income Tax Returns

34-125 California Legal Forms--Transaction Guide § 125.22

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.22 Right of Certain Separated Persons to File as Head of Household

Head-of-household status ordinarily is confined to single persons [*I.R.C. § 2(b)(1)*]. A married taxpayer living apart from his or her spouse, however, is not deemed married and therefore is eligible to file as a head of household if he or she otherwise qualifies, provided the individual meets all of the following requirements [*I.R.C. §§ 2(c), 7703(b); Rev. & Tax. Code §§ 17021.5, 17042*]:

- (1) Files a separate income tax return;
- (2) Maintains as his or her home a household that is, for more than half of the taxable year, the principal place of abode of a dependent child or stepchild [*compare Treas. Reg. § 1.2-2(c)(1)*] (temporary absences from household because of special circumstances may be disregarded; absence for education can be disregarded if it is reasonable to assume dependent will return to household) *with Chappell (Michael T.) v. Commissioner, T.C. Memo. 2001-146* (head of household status denied when separated husband's home had only one bed and nowhere for child to sleep, work, and play); *Addison v. Commissioner, T.C. Memo. 1992-349* (mother did not meet requirements for head-of-household filing status because daughter's absence from home to attend school was not deemed temporary)];
- (3) Is entitled to a dependency deduction for the child or stepchild;
- (4) Furnishes more than half of the cost of maintaining the household; and
- (5) Does not have, for the last six months of the taxable year, his or her spouse as a member of the household.

Although spouses can be living separate and apart under California law and yet reside under the same roof, the Tax Court refuses to follow this approach, holding instead that a married taxpayer living in the same household with his or

her spouse while obtaining a divorce is not eligible to file as a head of household [*Hopkins v. Commissioner, T.C. Memo. 1992-326* (head of household status denied taxpayer who occasionally allowed former spouse to sleep in living room because of former spouse's inability to secure housing for himself); *Dawkins v. Commissioner, T.C. Memo. 1991-225* (filing status of divorcing taxpayer who lived in separate quarters under same roof with spouse was "married filing separate," not "head of household")]. As a result, because the Ninth Circuit has not specifically addressed this issue, the current rule is that both spouses cannot live under the same roof and be deemed living separate and apart [see *Hopkins v. Commissioner, T.C. Memo. 1992-326* ; see also *Jackson v. Commissioner (1996) 71 T.C.M. 2022* (taxpayer's home may not constitute "separate household" if it lacks kitchen and telephone privileges)].

Filing as "head of household" in such circumstances will result in lower taxes than filing as "married filing separately" [compare *I.R.C. § 1(b)* with *I.R.C. § 1(d)*].

PRACTICE TIP:

Caution: the I.R.S. regularly matches returns of alimony payors and payees. A deficiency notice may be sent to both parties if the payor reports a deduction while the payee fails to include the payments in income. *Commentary by Susan Jeffries.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Taxpayer GroupsIndividualsFiling Status (IRC secs. 1-2)



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B. Income Tax Returns

34-125 California Legal Forms--Transaction Guide §§ 125.23-125.29

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 125.23[Reserved]



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C. Deductibility of Attorneys' Fees

34-125 California Legal Forms--Transaction Guide § 125.30

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.30 General Rules

[1] Nondeductibility in General; Exceptions

As a general rule, attorney's fees or other costs paid in connection with a dissolution, judgment of nullity, separation, or decree for support are not deductible by either spouse [*Treas. Reg. § 1.262-1(b)(7)*; *Wolfson v. Commissioner* (1966) 47 T.C. 290, 294]. A deduction does exist for expenses, including legal expenses, incurred for the production or collection of income or for expenses incurred for the management, conservation, or maintenance of income-producing property, and this deduction may be applicable to legal fees involving dissolutions, judgments of nullity, separations, or decrees for support [*see I.R.C. § 212(1), (2)*; *see Jasko v. Commissioner* (1996), 107 T.C. 30 (legal fees incurred to recover fire insurance proceeds on family home were not deductible, as property was not held for income-producing purposes)]. This deduction is limited to expenses in a taxpayer's profit-seeking or business activities. Personal expenses are not deductible [*United States v. Gilmore* (1963) 372 U.S. 39, 83 S. Ct. 623, 9 L. Ed. 2d 570; *United States v. Patrick* (1963) 372 U.S. 53, 83 S. Ct. 618, 9 L. Ed. 2d 580].

The characterization of expenses as personal or business depends upon whether the expense arose in connection with the taxpayer's profit-seeking activities and not upon the consequences that might result to the taxpayer's income producing property [*United States v. Gilmore* (1963) 372 U.S. 39, 83 S. Ct. 623, 9 L. Ed. 2d 570]. Because legal expenses relating to dissolution or separation arise from the marital relationship, they are deemed to be personal expenses rather than expenses relating to profit-seeking activities [*United States v. Patrick* (1963) 372 U.S. 53, 83 S. Ct. 618, 9 L. Ed. 2d 580].

Two exceptions exist to the general rule that legal expenses or attorney's fees paid in connection with a dissolution, judgment of nullity, or separation are not deductible expenses. Legal expenses or attorney's fees paid in connection with a dissolution, judgment of nullity, or separation may be deductible when the legal fees or expenses actually were incurred for the production of income [*see § 125.31*] or when they were incurred for tax advice [*see § 125.32*]. To qualify for a deduction under one of these exceptions, the taxpayer has the burden of establishing his or her right to the

deduction [*Rose v. Commissioner* (6th Cir. 1972) 459 F.2d 28, 29 , cert. denied 409 U.S. 879].

The amount that can be deducted is limited. As one of the miscellaneous itemized deductions, the deduction for attorney's fees is allowed only to the extent that the aggregate of all miscellaneous itemized deductions claimed exceeds 2 percent of adjusted gross income [see *I.R.C. § 67(a), (b)*].

[2] Attorneys' Fees Paid by Other Spouse

The deduction permitted for expenses for the production of income or for tax advice is personal to the spouse seeking the production of income or the tax advice. Thus, when one spouse incurs attorney's fees in a dissolution or separation proceeding to produce income or for tax advice, and the other spouse either agrees to pay the fees or is ordered by the court to do so, the expenses are not deductible [see *I.R.C. § 212*; *Treas. Reg. § 1.212-1*; *Carpenter v. United States* (Ct. Cl. 1964) 338 F.2d 366, 368 (tax advice)].

Payments to the other spouse that qualify for alimony tax treatment, however, are deductible by the payor spouse and includible in the income of the payee spouse [*I.R.C. §§ 71, 215*]. If the payments are used by the payee spouse to pay deductible legal expenses, they are deductible by that spouse, subject to the limitations discussed in [1], *above*. In addition, payments may qualify for alimony tax treatment if they are made to a third party on behalf of the payee spouse. Thus, for example, direct payments made by a payor spouse to the payee spouse's attorney for fees incurred by the payee spouse are deductible. If the direct payment is not required by the terms of the divorce or separation agreement, however, the payee spouse must give the payor a written request, consent, or ratification to obtain alimony tax treatment stating that the parties intend the payment to be treated as an alimony or separate maintenance payment to the payee spouse. The request, consent, or ratification must be received by the payor spouse before the date he or she is to file his or her first return for the taxable year in which the payment was made. The direct payment is treated as though it were paid to the payee spouse, who then pays it to the attorney. Thus, the payment is deductible by the payor spouse, includible in the income of the payee spouse, and then deductible by the payee spouse to the extent that the payment of attorney's fees is deductible [Temp. *Treas. Reg. § 1.71-1T*, Q&A 6, 7]. For further discussion, see *Chapter 123, § 123.31*.

PRACTICE TIP:

In many cases, a settlement hinges on how the nonearning spouse's attorney's fees will be paid. The tax treatment of "spousal support" and "attorney's fees incurred for the production of income" (or for tax advice) may afford an acceptable compromise. Awarding spousal support in an amount and for a period sufficient to cover the supported spouse's attorney's fees can work to everyone's advantage. The payor spouse can deduct the payments as spousal support, and the payee spouse can deduct his or her attorney's fees (that he or she pays directly) as expenses incurred for the production of income. *Commentary by Hon. Thomas Murphy.*

[3] Allocation of Attorneys' Fees

Before the taxpayer may qualify for a deduction for attorney's fees, he or she has the burden of allocating or proving those fees attributable to the production of income or obtaining tax advice [see *Treas. Reg. § 1.262-1(b)(7)*; *Rev. Rul. 72-545, 1972-2 C.B. 179* ; see also *Jasko v. Commissioner* (1996), 107 T.C. 30 ; *Mirsky v. Commissioner* (1971) 56 T.C. 664, 677] . Thus, when an attorney charges fees for obtaining spousal support or other forms of income for the client, or for giving tax advice, it is important that the attorney provide a breakdown of fees charged and carefully itemize the number of hours and expenses incurred, both in his or her own records and in the client's bill. If the attorney provides such a breakdown, the client should have adequate proof to enable him or her to claim the deduction for attorney's fees. When the bill for attorney's fees is not specifically itemized and the attorney cannot give any specific information as to the number of hours worked on the support issues or giving tax advice, it may be difficult to determine the amount of the fee allocable to those matters. Such a failure, however, does not preclude an allocation. Rather, an

allocation may be made by looking to the record as a whole and examining documents such as the bill for fees and the attorney's ledger sheets that deal with the taxpayer's account [see *Van Sickle v. Commissioner*, T.C. Memo. 1986-538 ; *Goldaper v. Commissioner*, T.C. Memo. 1977-343 ; see also *Munn v. United States* (Ct. Cl. 1972) 455 F.2d 1028, 1035] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Income Tax ComputationDeductions for Business ExpensesGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesGeneral OverviewTax LawFederal Taxpayer GroupsIndividualsGeneral Overview



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C. Deductibility of Attorneys' Fees

34-125 California Legal Forms--Transaction Guide § 125.31

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.31 Attorneys' Fees Incurred for Production of Income

[1] Production of Spousal Support

Attorney's fees paid in connection with a dissolution, judgment of nullity, legal separation, or decree for support that are properly attributable to the production or collection of spousal support payments includible in the gross income of the recipient spouse [see *I.R.C. § 71*; see also Ch. 123] are deductible as an expense for the production of income [*Treas. Reg. § 1.262-1(b)(7)*; *Wild v. Commissioner* (1964) 42 T.C. 706, 709-711, acq. 1967-2 C.B. 4]. Even legal expenses that are incurred in obtaining temporary support or support arrearages are deductible, as long as the support will be included in the recipient's gross income when it is obtained [*Wolfson v. Commissioner* (1966) 47 T.C. 290, 294-296; *Dalton v. Commissioner* (1960) 34 T.C. 879, 884-885].

Only expenses attributable to the production of spousal support included in the recipient's gross income qualify for deduction. If the entire amount incurred cannot be attributed to spousal support, the taxpayer has the burden of allocating the portion of attorney's fees spent on the production of spousal support [see *Mirsky v. Commissioner* (1971) 56 T.C. 664, 677]. The evidence necessary to satisfy the taxpayer's burden varies from case to case [see *Munn v. United States* (Ct. Cl. 1972) 455 F.2d 1028, 1035; see also *Merians v. Commissioner* (1973) 60 T.C. 187, acq. 1973-2 C.B. 2 (any bill for legal or accounting services should be itemized to reflect portion for deductible or tax-related services)]. If, however, there are sufficient facts in the record as a whole, it is possible that an allocation may be inferred despite the taxpayer's failure to provide a breakdown of legal fees incurred [see *Porter v. Commissioner*, T.C. Memo. 1966-79, *aff'd* (6th Cir. 1968) 388 F.2d 670]. For discussion of limitations on the amount of fees, see § 125.30[1].

[2] Production of Income Other Than Spousal Support

Attorney's fees incurred during dissolution or separation attributable to the production of income other than spousal support may be deductible. A deduction for attorney's fees incurred for the production of income in connection with a profit-seeking activity is not precluded merely because the fees arose as part of a dissolution or separation proceeding [*Hahn v. Commissioner*, T.C. Memo. 1976-113; see *Van Sickel v. Commissioner*, T.C. Memo. 1986-538; see also §

125.30]. Thus, for example, in a dissolution proceeding in which legal expenses were incurred by the wife to establish her right to possession of, or participation in, the income of property she jointly owned with her husband, the costs were deductible. These expenses, however, were carefully distinguished from expenses incurred to establish ownership of property [*Hahn v. Commissioner, T.C. Memo. 1976-113*].

See § 125.33 for discussion of the deductibility of attorney's fees when the primary issue to be resolved is ownership of property. For discussion of limitations on the amount of fees deductible, see § 125.30[1].

[3] Resisting Other Spouse's Claims for Income

Legal expenses incurred by one spouse in resisting the other spouse's income demands, as opposed to expenses incurred for the actual production or collection of income, are not deductible. Resisting the other spouse's money demands in a dissolution or separation proceeding does not create legal expenses that are deductible as expenses for the management, conservation, or maintenance of property within the meaning of the statute [see *Wild v. Commissioner (1964) 42 T.C. 706, 710*, acq. 1967-2 C.B. 4].

[4] Attorneys' Fees Relating to Child Support

Attorney's fees incurred in connection with demands for child support are not deductible as an expense for the production of income. The deduction is limited to expenses related to the production of income that must be included in the spouse's income [see *Treas. Reg. § 1.212-1(a)(1)*].

Similarly, attorney's fees incurred in resisting demands for child support are not deductible. Resisting money demands in a dissolution or separation proceeding does not create legal expenses that are deductible as expenses for the management, conservation, or maintenance of property within the meaning of the statute [see *Wild v. Commissioner (1964) 42 T.C. 706, 710*, acq. 1967-2 C.B. 4].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Costs & Attorney Fees General Overview Family Law Marital Termination & Spousal Support Costs & Attorney Fees Tax Law Federal Taxpayer Groups Individuals General Overview



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34-125 California Legal Forms--Transaction Guide § 125.32

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.32 Attorneys' Fees Incurred for Tax Advice

Legal expenses incurred in connection with the determination, collection, or refund of any tax are deductible [I.R.C. § 212(3); *Treas. Reg. § 1.212-1(a)(1)(iii)*]. This deduction applies not only to expenses relating to a contest of tax liability or preparation of tax returns for a single year but also to expenses relating to tax advice obtained for tax planning purposes [*Carpenter v. United States (Ct. Cl. 1964) 338 F.2d 366, 369*]. The deduction clearly extends to tax advice regarding dissolution, judgments of nullity, or separation. Thus, legal advice regarding issues such as the tax consequences of a property settlement agreement or proposed property transfer or division between spouses, the consequences of various forms of spousal and child support payments, and the right to claim a dependency exemption for a child, all are deductible [see *Rev. Rul. 72-545, 1972-2 C.B. 179*].

For discussion of the limitations placed on the amount of the deduction, see § 125.30[1].

PRACTICE TIP:

To be in compliance with California law [see *Bus. & Prof. Code § 6148(b)*], attorneys should be generating monthly statements that specifically and accurately describe the activities for which the client is billed. Providing the small degree of extra specificity required to categorize attorney fees will give the client a clear record of attorney fees that are deductible (for example, fees for tax advice). *Commentary by Publisher's Editorial Staff.*

PRACTICE TIP:

Counsel should be wary of clients' requests (often coming near April 15th) to modify or allocate billed time so as to reflect tax advice. Such a request should alert counsel to the possibility that tax problems were not adequately considered. In any event, it is always advisable to ensure that billing practices honestly reflect the work that was done. *Commentary by Hon. Thomas Murphy.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Income Tax ComputationGeneral OverviewTax LawFederal Income Tax ComputationDeductions for
Business ExpensesGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Business
ExpensesExpenses for Production of Income (IRC sec. 212)



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34-125 California Legal Forms--Transaction Guide § 125.33

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.33 Attorneys' Fees Incurred for Division of Property

Legal expenses arising from dissolution or separation that are attributable to division of property or claims regarding the existence of community property and the spouses' rights in it are not deductible by either spouse as expenses incurred either for the production of income or for the management, conservation, or maintenance of property held for the production of income [see, e.g., *Melat v. Commissioner* (1993) 65 T.C.M. 2868 (legal fees for valuing law partnership interest)]. Rather, these expenses arise from the marital relationship and therefore are considered to be personal and not related to business or profit-seeking activities [*United States v. Gilmore* (1963) 372 U.S. 39, 83 S. Ct. 623, 9 L. Ed. 2d 570] . Thus, to the extent that they relate to the issue of obtaining or relinquishing ownership in property because of a marital interest in the property, the fees are not deductible [*Neill v. Commissioner* (1964) 42 T.C. 793, 798-799 ; *Hahn v. Commissioner*, T.C. Memo. 1976-113] .

PRACTICE TIP:

Although legal fees spent on acquiring property through dissolution of a marriage are not deductible, they do constitute capital expenditures [*Hahn v. Commissioner*, T.C. Memo. 1976-113] . As capital expenditures, the fees may be added to the taxpayer's basis in the acquired asset [*George v. United States* (Ct. Cl. 1970) 434 F.2d 1336, 1338-1340] . Similarly, expenses incurred in protecting title to a capital investment have been held to constitute capital expenditures [see *Berger v. Commissioner* (1954) 13 T.C.M. 177 , *aff'd per curiam* (2d Cir. 1956) 234 F.2d 959] . Therefore, it could be argued that legal fees spent protecting the title to property should be allowed as an addition to the taxpayer's basis in the property. *Commentary by Publisher's Editorial Staff.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marital Termination & Spousal Support Costs & Attorney Fees Family Law Marital Termination & Spousal Support
 Dissolution & Divorce Property Distribution General Overview Tax Law Federal Income Tax
 Computation Deductions for Nonbusiness Expenses General Overview



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34-125 California Legal Forms--Transaction Guide §§ 125.34-125.99

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 125.34[Reserved]



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PART III. TRANSACTION GUIDE
A. Drafting Guide

34-125 California Legal Forms--Transaction Guide § 125.100

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.100 Provisions for Filing of Income Tax Returns and Payment of Taxes

NOTE:

The forms in this chapter are provisions that are designed to be used in a marital settlement agreement. For examples of complete marital settlement agreements, as well as checklists of additional provisions that may be included in a marital settlement agreement, see Chapter 120.

The parties may wish to include the following provisions regarding filing of income tax returns and allocation of tax liability:

1. Provisions for filing income tax returns returns.

a. Agreement to file joint income tax returns, including such clauses as [see § 125.200]:

(1) Specification of tax years for which the parties agree to file jointly.

(2) Final date for execution of returns, subject to extension for stated causes, such as unavailability of required information.

(3) Clause requiring cooperation in supplying information necessary to prepare and complete returns by date stated for execution of returns.

(4) Clause setting forth consequences if either spouse fails to cooperate with the other in the preparation of the joint return.

(5) Clause apportioning cost of return preparation.

b. Agreement to file separate income tax returns, including such clauses as [see § 125.201]:

- (1) Specification of tax years for which parties agree to file separately.
- (2) Clause requiring cooperation in supplying community property information and other information necessary to complete returns.
- (3) Clause setting forth consequences if either spouse fails to cooperate with the other in the preparation of their respective returns.
- (4) Clause specifying allocation of cost of preparing separate returns.

2. Provision allocating tax liability.

a. Provision for liability under joint returns filed after separation but before final judgment of dissolution is obtained, including one of following [see § 125.200]:

- (1) One spouse to assume all deficiencies.
- (2) Each spouse to pay certain percentage of taxes owed on joint returns.
- (3) Tax liability divided proportionately.

b. Provision allocating liability for tax deficiencies from prior tax years, including one of following [see § 125.202]:

- (1) Provision in which one spouse assumes responsibility for payment of tax deficiencies, including:
 - (a) Which tax years during marriage joint returns were filed.
 - (b) Agreement by assuming spouse to defend and indemnify other spouse for liability on joint returns to which agreement applies.
 - (c) Agreement by nonassuming spouse to provide assuming spouse with notice of deficiency should nonassuming spouse receive notice.

(2) Provision in which both spouses assume equal responsibility for payment of tax deficiencies, including:

- (a) Statement of which years during marriage that joint returns were filed.
- (b) Agreement between spouses to provide other spouse with copy of notice of deficiency should either spouse receive notice.
- (c) Requirement for reimbursement if one spouse pays entire tax liability.

c. Provision for disposition of any tax refund now due or anticipated in the future [see § 125.203].

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Tax Administration & ProcedureAdministrationGeneral Overview



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A. Drafting Guide

34-125 California Legal Forms--Transaction Guide § 125.101

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.101 Provisions for Payment of Attorneys' Fees and Costs

1. Specify how attorneys' fees and costs will be allocated between parties.
 - a. One spouse to pay all or part of other's attorneys' fees and costs [*see § 125.210*].
 - b. Each spouse to pay his or her own attorneys' fees and costs [*see § 125.211*].
2. If one spouse is to pay some or all of other spouse's attorneys' fees and costs, specify details regarding payment, such as the following [*see §§ 125.210, 125.212, 125.213*]:
 - a. Total amount of fees and costs to be paid.
 - b. Whether payment will be made in lump sum or in installments [*see 3., below*].
 - c. Person(s) to whom fees and costs are to be paid (i.e., directly to other spouse's attorney or to the other spouse).
 - d. Statement that payment in full will fully discharge paying spouse's liability for other spouse's attorneys' fees and costs.
 - e. Statement that non-paying spouse will not be responsible for attorneys' fees and costs incurred by paying spouse.
3. If one spouse is to pay some or all of other spouse's fees and costs, specify payment method.

a. If payment is to be made in lump sum [see § 125.210]:

- (1) Specify total amount due.
- (2) Specify time for payment.
- (3) Specify consequences of failure to make payment by agreed due date.

b. If payment is to be made in installments [see § 125.212]:

- (1) Specify total amount due.
- (2) Specify amount of each installment.
- (3) Specify due date of first installment.
- (4) Specify frequency of installment payments.
- (5) Specify due date for subsequent installments.
- (6) Include provision for acceleration of maturity of unpaid balance if all or part of any installment remains delinquent more than specified period.
- (7) Include provision for interest on installments that remain delinquent for more than specified period.

4. If fees and costs are to be paid from community property [see § 125.214]:

- a. Specify exact source of property from which fees and costs will be paid.
- b. Specify that balance remaining in specific source after payment of fees and costs is to be distributed equally to parties.

5. If desired, include provision giving one spouse right to encumber his or her interest in community real property to pay his or her attorneys' fees and costs and waiving other party's right to object to the attorney's fee lien [see § 125.215; see *Fam. Code* § 2033].

6. Include provision regarding payment of fees and costs in future action to enforce agreement [see § 125.216; see also *Civ. Code* § 1717].

7. State that paying spouse will not be liable for expenses of nonpaying spouse, except as specified in agreement itself.

8. Consider including "hold harmless" clause.

a. If one spouse will pay all or part of other's fees and costs, state that paying spouse agrees to indemnify nonpaying spouse for fees and costs arising out of failure to abide by terms of agreement [see §§ 125.210, 125.212, 125.213].

b. If each party will be responsible for own attorneys' fees and costs, state that each will indemnify other against claims for other's fees and costs [see § 125.211].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Costs & Attorney Fees General Overview Contracts Law Contract Conditions & Provisions General Overview Contracts Law Types of Contracts Settlement Agreements Family Law Marital Termination & Spousal Support Costs & Attorney Fees



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 125 PROVISIONS FOR PAYMENT OF INCOME TAXES, ATTORNEYS' FEES, AND COSTS
PART III. TRANSACTION GUIDE
A. Drafting Guide

34-125 California Legal Forms--Transaction Guide §§ 125.102-125.199

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 125.102[Reserved]



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PART IV. FORMS
A. Provisions for Payment of Income Taxes

34-125 California Legal Forms--Transaction Guide § 125.200

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.200 Provision for Filing Joint Income Tax Return

[1] Comment--Use of Form

The form set forth in [2], *below*, is a provision in a marital settlement agreement under which the separating spouses agree to file a joint income tax return. It should be used when the separating spouses agree to file a joint income tax return for the tax year or years after separation, but before the final judgment of dissolution is entered [*I.R.C. § 6013(d)(2); Treas. Reg. § 1.6013-4(a)*]. There are two primary tax factors to consider in determining whether the separating spouses should agree to file jointly during the separation period between the execution of a marital settlement agreement and the year in which the final judgment of dissolution is entered. First, the couple should weigh the benefit of receiving lower tax rates applicable to a joint filing [*see I.R.C. § 1(a), (d)*], against being held jointly and severally liable for any deficiencies on the joint return [*see I.R.C. § 6013(d)(3)*]. Second, a joint filing precludes deduction of any spousal support payments [*see I.R.C. §§ 71(e), 215(a)*]. For further discussion of rules regarding filing status, see §§ 125.20-125.22.

This form provides alternative ways in which spouses may agree to allocate potential liability for taxes on joint returns [*see alternative subparagraphs (e)*]. For instance, a husband and wife may agree that one spouse, usually the supporting spouse, will be responsible for paying all taxes due on the returns. Alternatively, the spouses may agree that each is to pay a certain percentage of the tax liability. A third alternative provided below is to have each spouse agree to pay his or her proportionate share of the tax liability. The allocation of liability may also be apportioned by limiting one spouse's obligation to the amount he or she would have paid under a separate return with the other spouse paying the balance of the tax. In deciding which alternative is most appropriate for the particular circumstances, the spouse's individual needs should be taken into account. Notwithstanding which alternative the parties choose for allocating tax liability, however, the Internal Revenue Service is not bound by the spouses' agreement and the parties are jointly and severally liable for any deficiencies on the return [*see I.R.C. § 6013(d)(3); Angelina G. Alioto, T.C. Memo. 1994-51*].

[2] FORM

Provision for Filing Joint Income Tax Return

Joint Tax Return

_____. (a) The parties shall file joint federal and state income tax returns for the calendar year[s] ending December 31, [specify tax year(s) prior to the year in which a final judgment dissolving the marriage is expected to be entered].

(b) Husband/Wife shall be responsible for the preparation of the joint tax returns. Wife/Husband shall cooperate with Husband/Wife in the preparation of the joint tax return by providing all information necessary information to prepare the joint return (including but not limited to, W-2 forms from all employers, statements of income from any source other than employment, interest from bank accounts, itemized deductions, and tax credits). This information shall be provided no later than _____[specify date for provision of information].

(c) Husband/Wife shall send the completed returns to Wife/Husband for approval and signature at least [specify time period, e.g., 30 days] before the deadline date for filing the returns with the Internal Revenue Service and the Franchise Tax Board. If the tax returns as prepared are not acceptable to Wife/Husband, Wife/Husband shall notify Husband/Wife of her/his objections within [specify time period, e.g., 10 days] before the filing deadline.

(d) Should either spouse fail to cooperate in the preparation and filing of joint returns, that party shall pay any additional tax liability, late penalties, interest, attorney's or accountants' fees, and any other fees or costs incurred as a result of the failure to cooperate.

[EITHER, if the parties will share preparation costs equally]

(e) The parties agree to share equally all expenses incurred in the preparation and filing of each joint return.

[OR, if the parties will share preparation costs in specified percents]

(e) The parties shall divide all expenses incurred in the preparation and filing of the joint returns _____ percent to Husband and _____ percent to Wife.

[OR, if one party will pay all of the preparation costs]

(e) Husband/Wife shall pay all expenses incurred in the preparation and filing of the joint returns.

[EITHER, if tax liability is assumed by one spouse only]

(f) Husband/Wife shall pay all amounts owing, if any, in connection with each joint income tax return filed under this Agreement.

[OR, if each spouse pays specified percentage of tax]

(f) Responsibility for paying any amounts owing in connection with each joint income tax filed under this Agreement shall be apportioned between the parties. Husband shall pay _____ percent and Wife shall pay _____ percent of all amounts owing in connection with each joint tax return filed.

[OR, if the parties will share tax liability equally]

(f) The parties agree to share equally all amounts owing, if any, in connection with each joint income tax return filed under this Agreement

[OR, if liability will be apportioned based on other filing status]

(f) Each party shall have his or her own accountant calculate the amount of tax each party would have paid if that party had filed as [a married person, filing separately *or* a single person]. Each party's respective liability for the total tax liability for each year for which a joint return is filed under this Agreement shall be determined in the same proportion as the two separate tax liabilities bear to each other. For this purpose, the total tax owed by the parties for each year shall first be determined without considering any amounts withheld from either party's income or paid by either party as estimated taxes. After each party's proportionate liability for the total tax is determined, the actual amount paid by each party through withholding or estimated tax payments shall be deducted to determine that party's liability for the amount owing or share of any refund due.

[OR, if one spouse to pay amount he or she would have paid under separate return]

(f) Husband's/Wife's liability for income taxes owing in connection with each joint return shall not exceed the taxes that he/she would have owed had a separate return been filed. The liability shall be equal to the amount of tax liability that would have been due under his/her separate income tax return for those years. Wife/Husband shall pay the balance of the taxes due on the joint returns.

[CONTINUE]

(g) If either party fails to comply with the provisions of subparagraphs (a) through (f), that party shall indemnify the other party for, and hold the other party harmless from, any increased tax liability, late penalties, interest, attorney fees, accountant's fees, and any other fees or costs incurred by or assessed against the other party as a result of the first party's failure to comply.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Estate & Gift TaxesTaxable PropertyCommunity Property (IRC sec. 2056)Tax LawFederal Taxpayer GroupsIndividualsIncome From Joint Property (IRC sec. 6013)Election to File Joint ReturnTax LawFederal Taxpayer GroupsIndividualsIncome From Joint Property (IRC sec. 6013)Joint Returns by Spouses



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PART IV. FORMS
A. Provisions for Payment of Income Taxes

34-125 California Legal Forms--Transaction Guide § 125.201

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.201 Provision for Filing Separate Income Tax Returns

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, is a provision in a marital settlement agreement for filing separate income tax returns. It states that the separating spouses, while still married, agree to file separate income tax returns for the tax years before the year in which a final judgment dissolving the marriage is entered. While separate or joint returns may be filed for all tax years before the year in which a final divorce decree is entered, separate returns must be filed for the year in which the spouses' divorce becomes final [*I.R.C. § 6013(d)(2); Treas. Reg. § 1.6013-4(a)*].

There are two primary tax factors to consider in determining whether the separating spouses should agree to file separate returns while still married, but separated. First, the couple should consider that, while joint filings result in lower tax rates, a separate filing will not expose the spouses to joint and several liability for deficiencies on the separate returns [*see I.R.C. § 6013(d)(3)*]. Second, separate filings ensure the deductibility of spousal support payments for the payor spouse, assuming that the other requirements for deductibility are also satisfied [*see I.R.C. §§ 71(e), 215(a)*]. If the separating spouses agree to file a joint return for the tax years for which the law permits them to file jointly, the provisions in § 125.200 may be included in the agreement.

Because spouses must include certain information regarding community income in their separate returns [*see [b], below*], this form also contains provisions that each spouse will provide documentation that the other may need to file his or her separate return, that each spouse acknowledges the portion of the parties' income that is community income, and that each spouse agrees to include half that community income in that spouse's separate return.

Additionally, when separate returns are filed, each spouse is responsible for paying the taxes on his or her own return. If appropriate, however, the spouses may agree that one spouse, usually the supporting spouse, will pay all or part of the other spouse's taxes due on his or her separate return. In the latter situation, the alternatives in § 125.200 for allocating

tax liability on joint returns can be adapted for inclusion in this form.

For further discussion of filing status requirements and liability of spouses filing separate income tax returns, see §§ 125.20-125.22.

[b] Community Property Consequences Associated With Filing Separately

A married person's earnings are considered community property until the spouses are living separate and apart from each other or are legally separated [see *Fam. Code* § 760, 771, 772; *In re Marriage of Manfer* (2006) 144 Cal. App. 4th 925, 929-930, 50 Cal. Rptr. 3d 785 (date of separation occurs when either party does not intend to resume the marriage and his or her actions bespeak finality of marital relationship)]. The interests of each spouse in community property during the continuance of the marriage are present, existing, and equal interests [*Fam. Code* § 751]. Because of this interest in community property, each spouse must report one half of the community income when the spouses file separate returns [*United States v. Malcolm* (1931) 282 U.S. 792, 794, 51 S. Ct. 184, 75 L. Ed. 714] . If one spouse is required to report half the community income on his or her separate return, the other spouse is taxable only on the other half [*United States v. Mitchell* (1971) 403 U.S. 190, 196, 91 S. Ct. 1763, 29 L. Ed. 2d 406] .

[c] Allocation of Deductions

As each spouse must include one half of the community income in his or her returns, each spouse is also entitled to use half of the deductions with respect to that income. Further, each spouse may claim as a credit against the tax payable, one half of the tax withheld on the other spouse's salary [*Gilmore v. United States* (Ct. Cl. 1961) 290 F.2d 942, 948 , *rev'd on other grounds*, 372 U.S. 39, 83 S. Ct. 623, 9 L. Ed. 2d 570 (1963)] .

[2] FORM

Provision for Filing Separate Income Tax Returns

Separate Tax Returns

_____. (a) The parties shall each file separate state and federal income tax returns for the calendar year(s) ending December 31, _____ [specify each tax year or years before the year a final judgment of dissolution is entered]. Each party acknowledges that all income received by either party for services rendered before the date of separation is community income, as is all income or losses earned by community assets through the effective date of this Agreement. Each party shall report one half of the community income or losses on his or her separate federal and state income tax returns for the proper calendar year.

(b) Each party will cooperate fully with the other party by providing all information that the other party may need to report one half of the community income or loss and the deductions and credits pertaining to that income or loss (including but not limited to, W-2 statements from all employers, statements of income from any other source, and statements of itemized deductions and tax credits). Each will provide this information no later than _____ [period of time] before the filing deadline with the Internal Revenue Service and the Franchise Tax Board.

(c) If either party fails to fully cooperate in the other party's preparation and filing of the separate returns, the noncooperating party shall pay any additional tax liability, late penalties, interest, attorney's or accountants' fees and any other fees or costs incurred by the other party as a result of the failure to cooperate.

(d) [Each party or Husband or Wife] shall pay all costs associated with the preparation of [his or her or all] separate returns.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Taxpayer GroupsIndividualsFiling Status (IRC secs. 1-2)



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A. Provisions for Payment of Income Taxes

34-125 California Legal Forms--Transaction Guide § 125.202

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.202 Provision for Payment of Prior Tax Deficiencies

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, contains provisions for the payment of any potential tax liability that either party or the parties jointly may have to any taxing authority, to past joint income tax returns. Existing tax liabilities should be addressed in the division of community obligations. Chapter 121 includes provisions allocating existing tax liabilities as a part of the division of community obligations.

This clause provides three alternatives for allocating liability for tax deficiencies. One spouse may agree to pay all deficiencies subsequently assessed; or the spouses may agree to pay any subsequently assessed deficiencies equally; or the spouses may agree to each pay a specified percentage of any assessed deficiencies.

The clause also contains provisions requiring one party to notify the other party of any deficiency notices received from the Internal Revenue Service or Franchise Tax Board.

[b] Spouses' Liability on Joint Returns

Both spouses are jointly and severally liable for all tax deficiencies on joint returns [*I.R.C. § 6013(d)(3)*]. Although provisions that allocate the responsibility for paying prior tax deficiencies are not binding on the Internal Revenue Service [*Angelina G. Alioto, T.C. Memo 1994-51*], allocating potential tax liability on previous joint returns in the marital settlement agreement puts the spouses on notice of their respective obligations to each other for these taxes if the Internal Revenue Service or Franchise Tax Board audits prior joint returns and assesses additional deficiencies.

A spouse or former spouse may be relieved from liability for deficiencies attributable to the other spouse if he or she fits within the "innocent spouse" provisions of the Internal Revenue Code [*see I.R.C. § 6015*].

Note, however, that relief from joint and several liability under federal law does not, in itself, override a spouse's obligation to pay taxes under a judgment or order that requires the spouse to pay all or part of prior tax deficiencies. Thus, the other spouse may be compelled by the IRS to pay the entire deficiency, and yet seek reimbursement from the spouse who obtained relief [*In re Marriage of Hargrave* (1995) 36 Cal. App. 4th 1313, 1320-1321, 43 Cal. Rptr. 2d 474 ; see *Ravetti v. U.S.* (9th Cir. 1994) 37 F.3d 1393, 1395-1396] . The second and third alternatives contain an optional provision to avoid this result. If selected, a finding of innocent spouse status will override the party's responsibility for payment of a tax deficiency.

[2] FORM

Provision for Payment of Prior Tax Deficiencies

[EITHER if one party will pay all tax deficiencies]

Tax Deficiencies Assumed by Husband/Wife

_____. (a) Husband/Wife shall be solely responsible for paying all assessments, liabilities, deficiencies, penalties, interest, and expenses (including, but not limited to, accounting and legal fees) to any federal, state, or local taxing authorities arising out of any review of the parties' personal income tax returns for any period when the parties filed joint returns. Husband/Wife shall pay Wife's/Husband's reasonable attorney fees and otherwise indemnify and hold her/him harmless in connection with any proceeding brought by any taxing authority to collect any tax such liability.

[OR if parties will share all tax deficiencies equally]

Sharing of Liability for Tax Deficiencies

(a) Each party shall pay 50 percent of all assessments, liabilities, deficiencies, penalties, interest, and expenses (including, but not limited to, accounting and legal fees) to any federal, state, or local taxing authorities arising out of any review of the parties' personal income tax returns for any period for which the parties filed joint returns. The parties shall equally share the cost of any attorney fees and costs incurred in connection with any proceeding brought by any taxing authority to collect any such tax liability. Each party shall indemnify and hold the other party harmless for any tax liability incurred in such a proceeding in excess of the other party's 50 percent share of the liability. [However, should a party obtain relief from joint and several liability under *Internal Revenue Code Section 6015*, that party shall have no liability under this Paragraph with respect to the amount of the tax deficiency for which relief was obtained.]

[OR if parties will share tax deficiencies in specified percents]

Sharing of Liability for Tax Deficiencies

(a) Husband shall pay _____ percent and Wife shall pay _____ percent of all assessments, liabilities, deficiencies, penalties, interest, and expenses (including, but not limited to, accounting and legal fees) to any federal, state, or local taxing authorities arising out of any review of the parties' personal income tax returns for any period for which the parties filed joint returns. The parties shall share, in the same percentages, the cost of any

attorney fees and costs incurred in connection with any proceeding brought by any taxing authority to collect any such tax liability. Each party shall indemnify and hold the other party harmless for any tax liability incurred in such a proceeding in excess of the other party's percent share of the liability. [However, should a party obtain relief from joint and several liability under *Internal Revenue Code Section 6015*, that party shall have no liability under this Paragraph with respect to the amount of the tax deficiency for which relief was obtained.]

[*CONTINUE*]

(b) Each party shall forward to the other party a copy of any tax deficiency notice or other correspondence or documentation received from any federal, state, or local taxing authority relating to any joint income tax returns. Each party agrees to cooperate fully with the other and to execute any document reasonably requested by the other, and to furnish information and testimony with respect to any tax liability asserted by taxing authorities on any joint return.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Income Tax Computation General Overview Tax Law Federal Tax Administration & Procedure General Overview



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34-125 California Legal Forms--Transaction Guide § 125.203

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.203 Provision Allocating Tax Refund

[1] Comment--Use of Form

The form set forth in [2], *below*, is a provision for the allocation of tax refunds. The tax provisions of a marital settlement agreement should allocate any existing tax refunds that the separating spouses may presently possess and any potential refunds that could subsequently be awarded under any joint returns that the spouses have or will file. Specific expected refunds should be addressed in the division of the parties' community property.

Unless the parties agree otherwise, the allocation of refunds should ordinarily correspond to the allocation of tax liability [*see §§ 125.200 (allocating tax liability on joint returns after separation), 125.202 (allocating tax liability on prior returns filed jointly)*]. That is, if one spouse agrees to be solely responsible for deficiencies on a particular joint return, it may be appropriate to allocate any refunds for that return to that spouse. The spouses may also consider dividing the refund according to the same proportion that taxes were paid on the return for which the refund applies.

[2] FORM

Provision Allocating Tax Refund

Allocation of Tax Refunds

_____. Any tax refund received in connection with any joint income tax return filed by the parties, any such refund shall be [the sole and separate property of Husband/Wife *or* divided between the parties as follows: _____ (*specify percentage share of each party, e.g., each party shall receive 50 percent of the refund*)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewTax LawFederal Income Tax ComputationGeneral
OverviewTax LawFederal Tax Administration & ProcedureGeneral Overview



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A. Provisions for Payment of Income Taxes

34-125 California Legal Forms--Transaction Guide §§ 125.204-125.209

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

[Reserved]

§§ 125.204[Reserved]



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B. Provisions for Payment of Attorneys' Fees and Costs

34-125 California Legal Forms--Transaction Guide § 125.210

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.210 Provision for Payment of One Spouse's Attorneys' Fees and Costs by Other Spouse

[1] Comment

[a] Use of Form

The following form is a provision in a marital settlement agreement under which one spouse agrees to pay all of the other spouse's attorneys' fees and costs incurred during dissolution proceedings. The form can also be adapted for use when one spouse agrees to pay only part of the other spouse's legal expenses.

In the absence of an agreement regarding fees, a spouse may seek a court order requiring the other spouse to pay legal fees and costs incurred during the dissolution proceeding that are reasonably necessary for the supported spouse to present his or her case. Whether the supported spouse's motion for fees and costs will be successful depends on a number of factors, the most important of those factors being whether the applicant's need for the fee award to properly present his or her case and the other spouse's ability to pay the fees ordered [*see Fam. Code §§ 270, 2030 et seq.*]. For full discussion of attorney's fee orders in dissolution proceedings, see Kirkland, Lurvey, Richmond and Wagner, CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., Ch. 62, *Awards of Attorney's Fees in Family Law Proceedings* (Matthew Bender).

This form provides only for the payment of attorneys' fees and costs incurred up to the time that a judgment of dissolution is entered. For a provision regarding payment of attorneys' fees and costs in the event that future litigation is necessary to enforce the agreement, see § 125.216.

This form provides for payment of the other spouse's fees in a lump sum [*see subparagraph (a)*]. For an alternative provision for payment of attorneys' fees on an installment basis, see § 125.212.

[b] Tax Considerations

The parties may find it advantageous to omit a provision requiring the supporting spouse to pay the supported spouse's attorneys' fees and instead increase the periodic spousal support payments to the party whose attorneys' fees are to be paid, and have that spouse pay his or her attorney from the increased support payments [see § 125.213]. The parties may prefer this alternative because although payments for attorneys' fees are generally not tax deductible by either spouse [Treas. Reg. § 1.262-1(b)(7); *Wolfson v. Commissioner* (1966) 47 T.C. 290, 294], except to the extent the fees are incurred for production of income [Treas. Reg. § 1.262-1(b)(7)], or tax advice [Treas. Reg. § 1.212-1(a)(1)(iii)], spousal support payments can be deducted [see I.R.C. §§ 71, 215]. For a further analysis of the tax consequences involved when paying attorneys' fees in a marital dissolution proceeding, see §§ 125.30-125.33.

[2] FORM

Provision for Payment of One Spouse's Attorneys' Fees and Costs by Other Spouse

Payment of Fees and Expenses

_____. (a) Husband/Wife shall pay to _____ [Wife/Husband or _____ (name of other spouse's attorney(s)), attorney(s) for Wife/Husband,] the sum of \$_____, as Husband's/Wife's contribution to Wife's/Husband's attorney fees and costs in connection with the negotiation, preparation, and execution of this Agreement and with regard to the proceeding for dissolution of marriage/legal separation. Payment of attorney fees and costs shall be made [specify time for payment, e.g., within 30 days after the effective date of this Agreement].

(b) Full payment by Husband/Wife shall fully release him/her from all liability to Wife/Husband and to his/her attorneys for legal fees and costs associated with the negotiation, preparation, and execution of this Agreement and with regard to the proceeding for dissolution of marriage/legal separation.

(c) If payment is not made in full within the time specified above, the unpaid balance will immediately become due, with interest at the legal rate from the date of default to the date payment is finally made.

(d) Husband/Wife agrees to indemnify and hold Wife/Husband harmless from any claim, including additional attorney fees, arising from a failure to pay any of the fees and costs specified above.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions General Overview Family Law Marital Termination & Spousal Support Costs & Attorney Fees



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B. Provisions for Payment of Attorneys' Fees and Costs

34-125 California Legal Forms--Transaction Guide § 125.211

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.211 Provision That Each Party Shall Bear Own Attorneys' Fees and Costs

[1] Comment--Use of Form

The form set forth in [2], *below*, is a provision for a marital settlement agreement under which each spouse agrees to bear the costs of his or her own legal expenses.

This form provides only for the payment of attorneys' fees and costs up to the time that a judgment of dissolution is entered. If this form is used, counsel should consider including the provision in § 125.216 for payment of attorneys' fees and costs in any future action to enforce terms of the original agreement.

[2] FORM

Provision That Each Party Shall Bear Own Attorneys' Fees and Costs

Each Party to Bear Own Attorneys' Fees and Costs

_____. Each party shall be solely responsible for his or her own attorney fees and costs incurred in connection with the negotiation, preparation, and execution of this Agreement and in connection with any proceeding commenced by either party for the dissolution of their marriage. Neither party shall be liable to the other party for any of the other party's attorney fees or costs.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewFamily LawMarital Termination & Spousal SupportCosts & Attorney Fees



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PART IV. FORMS

B. Provisions for Payment of Attorneys' Fees and Costs

34-125 California Legal Forms--Transaction Guide § 125.212

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.212 Provision for Payment of Attorneys' Fees and Costs on Installment Basis

[1] Comment--Use of Form

The form set forth in [2], *below*, provides for one party's payment of the other party's attorneys' fees and costs on an installment basis. This form may be used as an alternative to § 125.210, which provides for a lump-sum payment.

The provision in § 125.213 should be used in lieu of this provision if the payment of attorneys' fees is intended to be a form of additional spousal or child support.

To encourage the prompt payment of each installment, the form provides for the payment of interest on delinquent payments and the acceleration of maturity for the unpaid balance if a particular payment is late in whole or in part for a specified number of days. When this form is used, counsel should consider including a provision concerning the payment of attorneys' fees and costs in future litigation to enforce the agreement [*see* § 125.216].

[2] FORM

Provision for Payment of Attorneys' Fees and Costs on Installment Basis

Payment of Attorneys' Fees and Costs in Installments

_____. (a) Husband/Wife shall pay to _____ [Wife/Husband or _____ (*name of other spouse's attorney(s)*), attorney(s) for Wife/Husband,] the sum of \$ _____, as Husband's/Wife's contribution to Wife's/Husband's attorney fees and costs in connection with the negotiation, preparation, and execution of this Agreement and with regard to the parties' proceeding for dissolution of marriage/legal separation. This sum shall be paid in equal installments at the rate of \$ _____ per [*specify period, e.g., month*]. Each installment shall be due on or before [*specify payment date, e.g., the first day of each month*], beginning _____ [*specify date first installment is due*], without interest, and continuing until the total amount as

specified above has been paid in full.

(b) If any monthly payment is not timely made, interest on the delinquent installment shall accrue at the rate of _____ percent per annum, calculated from the date the delinquent installment is first due and payable. If all or part of any monthly installment is in default for a period of [*specify amount of default period, e.g., 60 days*], then the entire remaining balance shall become immediately due and payable.

(c) Full payment by [Husband or Wife] shall fully release him/her from all liability to [Wife or Husband] and to _____ [his or her attorney(s)] for legal fees and costs associated with the negotiation, preparation, and execution of this Agreement and with regard to the proceeding for [dissolution of marriage or legal separation].

(d) [Husband or Wife] agrees to indemnify and hold [Wife or Husband] harmless from any claim, including additional attorney fees, arising from a failure to pay any of the fees and costs specified above.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsInstallment
ContractsFamily LawMarital Termination & Spousal SupportCosts & Attorney Fees



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DIVISION VII: PERSONAL TRANSACTIONS
CHAPTER 125 PROVISIONS FOR PAYMENT OF INCOME TAXES, ATTORNEYS' FEES, AND COSTS
PART IV. FORMS

B. Provisions for Payment of Attorneys' Fees and Costs

34-125 California Legal Forms--Transaction Guide § 125.213

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.213 Provision for Payment of Attorneys' Fees and Costs as Additional Spousal Support

[1] Comment

[a] Use of Form

The form set forth in [2], *below*, is a provision in a marital settlement agreement for the payment of attorneys' fees and costs as additional spousal or family support. The stipulated sum is paid in full satisfaction of any legal obligation for the attorney fees and litigation costs of the supported spouse.

For the paying spouse, an advantage to paying attorneys' fees as additional spousal support is that such support payments are generally tax deductible, while payments for attorneys' fees and costs are generally not deductible [*see I.R.C. §§ 71, 215; Treas. Reg. § 1.262-1(b)(7)*]. If the parties intend the additional payment to be tax deductible to the supporting spouse, the marital settlement agreement should contain provisions that qualify the additional payments as alimony or separate maintenance under the Internal Revenue Code [*see I.R.C. § 71*]. For further discussion of tax consequences of attorneys' fees and spousal support, see § 125.30[2].

When this form is used in a marital settlement agreement, counsel should also consider including the additional provision in § 125.216 regarding attorneys' fees and costs in future litigation.

[b] Discharge of Fee Obligation in Bankruptcy

From the standpoint of the supported spouse and his or her attorney, an important reason to consider a provision making the fee obligation a form of additional spousal (or family) support is to prevent the paying spouse from discharging the fee obligation in bankruptcy. Generally, a "domestic support obligation" is not dischargeable in bankruptcy [*see 11 U.S.C. § 523(a)(5)*]. In this context, a "domestic support obligation" includes any debt in the nature of alimony, maintenance, or support (whether or not designated as such) owed by a bankruptcy debtor to his or her spouse or former spouse under a separation agreement, divorce decree, or property settlement agreement [*11 U.S.C. § 101(14A)*]; *see*

Sloan v. Mitchell (1972) 28 Cal. App. 3d 47, 51, 104 Cal. Rptr. 418 (whether obligation is intended as support is determined by intent of parties, as expressed in their agreement)]. However, an obligation in the nature of alimony, maintenance, or support will not be treated as a "domestic support obligation" if the supported spouse assigns the right to receive payments to a nongovernmental entity, unless the assignment is made for the purpose of collecting the debt. For this reason, the form set forth in [2], *below*, provides that any payment of fees and costs directly to the attorney shall be deemed an assignment by the supported spouse for the purpose of collecting the debt.

Also nondischargeable in bankruptcy is a debt to a spouse or former spouse of the bankruptcy debtor that does not qualify as a "domestic support obligation," if the debt is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record [11 U.S.C. § 523(a)(15)]. Accordingly, if a marital settlement agreement obligates one spouse to make payments directly to the other spouse as reimbursement for attorneys' fees and costs incurred in connection with the dissolution or the settlement agreement, those payments will not be dischargeable in bankruptcy. It is an open question whether an assignment of the right to receive such payments will result in the dischargeability of the debt [see 11 U.S.C. § 523(a)(15) (providing for nondischargeability of such debt if owed to debtor's spouse, former, spouse, or child)].

Should obligations for spousal support be discharged in bankruptcy, the court can, as it deems just, still make all proper orders for spousal support, considering the circumstances of the respective parties and the amount of any obligations under a property settlement agreement that are discharged [Fam. Code § 3592]. For further discussion of the dischargeability in bankruptcy of an obligation to pay attorneys' fees and support payments in connection with a marital dissolution proceeding, see Kirkland, Lurvey, Richmond and Wagner, CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., Ch. 140, *General Enforcement Principles and Remedies* (Matthew Bender), and COLLIER ON BANKRUPTCY (Matthew Bender 15th ed.), § 523.15.

[2] FORM

Provision for Payment of Attorneys' Fees and Costs as Additional Spousal Support

Attorneys' Fees and Costs as Additional Spousal Support

_____. (a) Payment of attorney fees and costs under this Agreement shall be in the nature of spousal support, in addition to any other spousal support otherwise required to be paid to [Wife or Husband] under this Agreement or by court order. Any such payment of attorney fees and costs required by this Agreement to be made directly to the attorney for [Wife or Husband] shall be deemed a voluntary assignment by [Wife or Husband] made solely for the purpose of collecting the debt.

(b) The parties understand that the payments of spousal support in the nature of attorney fees and costs under this provision shall not be subject to discharge in bankruptcy. Further, they understand that the payments as spousal support are deductible by [Husband or Wife] and are includable in [Wife or Husband]'s taxable income.

(c) The obligation to pay attorney fees and costs under this provision shall terminate on the death or remarriage of [Wife or Husband]. The obligation shall [not] survive the death of [Husband or Wife].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions General Overview Family Law Marital Termination & Spousal Support Costs & Attorney Fees Family Law Marital Termination & Spousal Support Spousal Support Obligations General Overview



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B. Provisions for Payment of Attorneys' Fees and Costs

34-125 California Legal Forms--Transaction Guide § 125.214

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.214 Provision for Payment of Attorneys' Fees and Costs From Community Personal Property

[1] Comment

[a] Use of Form

This form is a provision in a marital settlement agreement stating that the spouses will pay attorneys' fees and costs incurred by both of them from a specified source of community assets.

If the spouses cannot agree on a specific item or items of community property from which to pay the legal expenses, this form can be modified to provide that the attorneys' fees and costs incurred are to be paid out of community property generally. When this form is used, counsel should consider using the additional provision in § 125.216 regarding attorneys' fees and costs in future litigation.

For a provision that permits one spouse to encumber community real property to pay his or her attorneys' fees, see § 125.215.

[b] Effect of Attorneys' Fees Award on Division of Community Property

If the spouses cannot or will not agree to pay their attorneys' fees and costs from community property, the court may order payment of attorneys' fees and costs from any type of property, whether community or separate, principal or income [*Fam. Code* § 2032(c)]. A fee award ordered by the court does not affect the spouses' community property rights and should be paid independently from the division of community property. However, under appropriate circumstances, the spouses may request that the award be treated as a community debt, allowing the court to consider the obligation as it would any other community debt and order it paid from community assets before the equal division of the property [*In re Marriage of Jafeman* (1972) 29 Cal. App. 3d 244, 266-267, 105 Cal. Rptr. 483 ; *In re Marriage of Barnert* (1978) 85 Cal. App. 3d 413, 428, 149 Cal. Rptr. 616 ; *Wong v. Superior Court* (1966) 246 Cal. App. 2d 541, 547, 54 Cal. Rptr. 782] . Furthermore, if one spouse pays his or her own attorneys' fees by withdrawing

funds from community assets before the division of the property, and the case is one in which equal division is required, the court can order that the other spouse receive a credit so that the division is equal [*Gilb v. Gilb* (1959) 170 Cal. App. 2d 379, 386, 339 P.2d 176 ; see *Fam. Code* §§ 2550, 2600, 2623(b), 2626].

For full discussion of division of responsibility for community and separate liabilities, see Kirkland, Lurvey, Richmond and Wagner, *CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE*, 2nd ed., Chapter 23, *Debt Liability and Division and Related Reimbursement Issues* (Matthew Bender).

[2] FORM

Provision for Payment of Attorneys' Fees and Costs From Community Personal Property

Payment of Both Attorneys From Community Property

_____. (a) Within [*specify when payment to attorneys is to be made, e.g., 30 days after the execution of this Agreement*], Husband and Wife agree to set aside funds from their community property for legal services rendered and other costs incurred in representation in connection with the negotiation, preparation, and execution of this Agreement and with regard to the proceeding for dissolution of marriage/legal separation. From these funds, the following amounts shall be paid:

1. \$

_____ to

_____ [*name*], the attorney for Wife.

2. \$

_____ to

_____ [*name*], the attorney for Husband.

(b) The funds for attorney fees and costs shall come from [*specify source of community property being used to pay legal expenses as specified above*], which was the community property of the parties. Any balance remaining after disbursement to the above attorneys shall be immediately distributed in equal shares to Husband and Wife.

(c) The parties understand that by paying their attorney fees from community funds, they are agreeing to treat all obligations to their respective attorneys as community debts. The division of the community estate as otherwise set forth in this Agreement is net of these obligations.

(d) Any further liability for attorney fees and costs over and above the amount to be paid under this provision will be the separate obligation of the party incurring the liability.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions General Overview Family Law Marital Termination & Spousal Support Costs & Attorney Fees Family Law Marital Termination & Spousal Support Dissolution & Divorce Property Distribution Characterization Community Property Family Law Marital Termination & Spousal Support Spousal Support Obligations General Overview



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B. Provisions for Payment of Attorneys' Fees and Costs

34-125 California Legal Forms--Transaction Guide § 125.215

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.215 Provision Permitting One Spouse to Encumber Community Real Property for Payment of Attorneys' Fees

[1] Comment--Use of Form

The form set forth in [2], *below*, is a provision for a marital settlement agreement that acknowledges the right of one spouse to encumber specific community real property for the payment of his or her attorneys' fees in a family law proceeding, and acts as an authorization for such encumbrance up to a specific amount, without the objection of the other party.

By statute, a spouse has the unilateral right to encumber his or her interest in community real property to secure the payment of attorneys' fees to retain counsel in a dissolution, legal separation, or nullity proceeding [*see Fam. Code § 2033(a)*]. The other spouse has the right to file an ex-parte objection to the attorney's fee lien [*see Fam. Code § 2033(c)*]. By including this provision in the marital settlement agreement, the other spouse waives his or her right to object to the attorney's fee lien. For further discussion of family law attorney's real property liens, see Kirkland, Lurvey, Richmond and Wagner, *CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE*, 2nd ed., Ch. 61, *Attorney Fee Agreements* (Matthew Bender).

[2] FORM

Provision Permitting One Spouse to Encumber Community Real Property for Payment of Attorneys' Fees

Authorization to Encumber Community Real Property

_____. (a) Husband/Wife shall have the right to encumber his/her interest in the community real property of the spouses described below, with a "family law attorney's real property lien" for purposes of paying his/her attorney fees in connection with the parties' proceeding for dissolution of marriage/legal separation. The maximum amount of the lien shall not exceed \$_____. The lien shall not attach to Wife's/Husband's community property interest in

the real property.

(b) The community real property that may be encumbered is described as follows: [*include sufficient identifying information, e.g., complete address, legal description, and Assessor's Parcel number*]. The parties agree that the fair market value of this real property is approximately \$ _____, and that encumbrances on the property as of the date of this agreement are [as follows: _____ (*list all encumbrances*) or as listed on the preliminary title report for the property dated _____, which is incorporated by reference in this Agreement and attached to it as Exhibit ____].

(c) No other community real property, except that described above, may be encumbered by either party.

(d) Wife/Husband shall not exercise her/his statutory right under *Family Code Section 2033(c)* to object to the family law attorney's real property lien described in subparagraph (a), provided the lien filed by Husband/Wife meets all requirements set forth above, including the maximum dollar amount of the lien. Further, the parties acknowledge that this lien will not result in an unequal division of community property between the parties and is just under the circumstances existing between the parties.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Contract Conditions & Provisions General Overview Family Law Marital Termination & Spousal Support Costs & Attorney Fees



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B. Provisions for Payment of Attorneys' Fees and Costs

34-125 California Legal Forms--Transaction Guide § 125.216

AUTHOR: Editorial Consultants: Kathryn Kirkland, Esq., Ira Lurvey, Esq., and Diana Richmond, Esq.

§ 125.216 Provision Allocating Payment of Attorneys' Fees and Costs in Future Litigation to Enforce Agreement

[1] Comment

[a] Use of Form

This form is a provision in a marital settlement agreement allocating the payment of attorneys' fees and costs incurred during any future litigation that may be brought by one of the spouses to enforce a provision or provisions of the settlement agreement. A provision providing for the payment of fees and costs in future litigation should normally be included in a marital settlement agreement.

This form provides that attorneys' fees and costs incurred as the result of future litigation will be awarded to the party prevailing in the future litigation [see [b], *below*]. It states in part that the party seeking to enforce the original agreement must give the other party notice of the future litigation and a chance to cure the underlying reasons for the additional litigation. This provision has the effect of encouraging compliance with the original terms of the agreement, as well as promoting efforts at out-of-court resolution of the parties' differences. Additionally, this form contains language stating that the statutory definition of "prevailing party" under *Civil Code Section 1717* will apply.

Note that this form assumes that at least some of its provisions will be contractually enforceable, which may not be the case to the extent that its provisions are merged in the judgment. Thus, use of the form assumes that at least some provisions will not be merged. For discussion of merger of marital settlement agreements into the judgment of dissolution, see Chapter 120.

[b] Payment of Future Fees and Costs to Prevailing Party

A provision for the payment of attorneys' fees and costs to the prevailing party in an action to enforce a marital settlement agreement is valid and binding [see *Campbell v. Campbell* (1960) 178 Cal. App. 2d 77, 83, 2 Cal. Rptr. 710; see also *Tanner v. Tanner* (1997) 57 Cal. App. 4th 419, 422, 67 Cal. Rptr. 2d 204]. Unless the agreement specifies

that both parties were represented by counsel in the negotiation and execution of the contract, the fees and costs provision will be construed as applying to the entire agreement [*Civ. Code § 1717(a)*].

In any action on a contract, when the contract specifically provides that attorneys' fees and costs incurred to enforce the contract shall be awarded to one of the parties to the contract, or to the prevailing party, the party determined to be the prevailing party is entitled to reasonable attorneys' fees and costs, regardless of whether he or she is the party specified in the contract. Such a provision for attorneys' fees and costs cannot be waived by the parties, and any attempted waiver is void [*Civ. Code § 1717(a)*].

The court must determine who is the party prevailing on the contract, whether or not the suit proceeds to final judgment. The "party prevailing on the contract" is defined as the party who received a greater relief in the action [*Civ. Code § 1717(b)(1)*]. If the defendant alleges in the answer that he or she tendered to the plaintiff the full amount to which the plaintiff was entitled, and deposits that amount with the court and the allegation is found to be true, the defendant will be deemed to be the party prevailing on the contract. If such a deposit has been made by the defendant, the court must, on application of any party to the action, order the deposit to be invested in an insured, interest-bearing account. Interest on the account must be allocated to the parties in the same proportion as the original funds are allocated [*Civ. Code § 1717(b)*].

A court may exercise its duty to determine which party is prevailing by determining that there is no prevailing party [*Civ. Code § 1717(b)(1)*]. If the action is voluntarily dismissed, or dismissed pursuant to a settlement, there will be no prevailing party entitled to an attorneys' fees award [*Civ. Code § 1717(b)(2)*].

In an action seeking relief in addition to that based on the contract, if the party prevailing on the contract has damages not based on the contract awarded against him or her, the amounts awarded to him or her on the contract must, under *Civil Code Section 1717*, be deducted from any damages awarded in favor of the party who did not prevail on the contract. If the amount awarded under *Civil Code Section 1717* exceeds the amount of damages awarded the party not prevailing on the contract, judgment may be entered in favor of the party prevailing on the contract for the net amount [*Civ. Code § 1717(c)*].

[2] FORM

Provision Allocating Payment of Attorneys' Fees and Costs in Future Litigation to Enforce Agreement

Payment of Future Fees and Costs to Prevailing Party

_____. (a) If either party to this Agreement brings an action or proceeding to enforce any provision of this Agreement, or to enforce any judgment or order made by a court in connection with this Agreement, the prevailing party in that action or proceeding shall be entitled to reasonable attorney fees and other reasonably necessary costs from the other party. The definition of "prevailing party" shall be the same as that set forth in *Civil Code Section 1717(b)*.

(b) A party intending to bring an action or proceeding to enforce this Agreement shall not be entitled to recover attorney fees and costs under this provision unless he or she first gives the other party at least [*specify amount of notice moving party must give, e.g., 30 days*] written notice before filing the action or proceeding. The written notice shall specify (1) whether the subsequent action or proceeding is to enforce the original terms of the Agreement, (2) the reasons why the moving party believes the subsequent action or proceeding is necessary, (3) whether there is any action that the other party may take to avoid the necessity for the subsequent action or proceeding, and (4) a period of time within which the other party may avoid the action or proceeding by taking the specified action. The first party shall not be entitled to attorney fees and costs if the other party takes the specified action within the time specified in the notice.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsSettlement
AgreementsFamily LawMarital Termination & Spousal SupportCosts & Attorney FeesFamily LawMarital Termination
& Spousal SupportSpousal SupportObligationsGeneral Overview