

What You Need to Know

TRANSMUTATION AGREEMENT

In a community property state like California there are two types of property: separate and community. Separate property includes: (i) property acquired prior to marriage; (ii) property acquired during marriage by gift or inheritance; and (iii) property acquired during marriage but as to which the spouses entered into an agreement treating it as separate property.

The distinctive feature of community property is that both spouses own coextensive interests in all of community property. This means that a creditor of one spouse can reach all the community property of the spouses, not just 50%. The liability of community property extends to contracts entered into by either spouse during marriage, to torts of either spouse during marriage, and to most pre-marriage obligations of either spouse.

Married persons may, by agreement or transfer, and with or without consideration, change or “transmute” the character of their property in any of the following ways: (i) from community property to separate property of either spouse; (ii) from separate property of either spouse to community property; (iii) from separate property of one spouse to separate property of the other spouse. A transmutation agreement may also be used to change the character of property to be acquired in the future.

To be effective, a transmutation agreement must be in writing, the spouses must fully disclose their properties to each other, and a transmutation of real property will be effective as to third-party creditors only if it is recorded.

Transmutation agreements are particularly effective when only spouse is exposed to the risk of a lawsuit, and the other is not. We strongly encourage our clients to enter into transmutation agreements that accomplish an equal split of the assets, by value.

An equal split makes it more difficult to challenge the transmutation of assets as a fraudulent transfer, and it also does not disadvantage either spouse in the event of a divorce (transmutation agreements are binding for all legal purposes).

When you retain us to complete a transmutation agreement, we will first analyze the optimal asset split. Not only should the assets be split based on value, but we also want to pick and choose which spouse gets which asset. Some assets are more or less desirable to creditors, and some assets are easier to protect.

Once we agree on a split up of the assets, you will execute the transmutation. If real estate is being transmuted, then we will also prepare a memorandum of transmutation and a quitclaim deed. Both of these documents will be recorded with the County Recorder to provide notice of the transmutation as to real estate. The memorandum will not disclose any other assets that may have been transmuted.

FREQUENT QUESTIONS

Can I just transfer title of the real property to my spouse?

Yes, but title by itself is not conclusive as to the nature of an asset as either community or separate property. The transfer must make it clear that it is accomplished with the intention of transmuting the character of the property. Our quitclaim deed includes special language to that effect and is supported by the memorandum of transmutation.

Can I transfer all my assets to my spouse?

Yes, but it is not likely to be effective from an asset protection standpoint. The split of the assets should be equal.

What types of assets can be transmuted?

Any and all types of assets, whether owned today or will be acquired in the future.

Is the transmutation a public record?

No, the transmutation agreement is private. Only the memorandum of transmutation and the quitclaim deed are recorded.

Will we be able to unwind the transmutation agreement?

Yes. You can always enter into another transmutation at any point in time and transmute assets back to community property.

Are there tax consequences?

There are no income tax consequences, as income of both spouses is aggregated on a joint income tax return. For estate tax purposes, if assets are not community property, then only the assets owned by the decedent spouse will receive a step-up in basis on death.

Schedule Your Free Consultation

Phone: 1-818-933-3838 | Email: info@aliantlaw.com

CREATIVE AND AGGRESSIVE ASSET PROTECTION PLANNING