

Agreements Between Domestic Partners

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I. INTRODUCTION

§5.1 A. Scope of Chapter

This chapter discusses agreements entered into by California domestic partners before (see §§5.7-5.18) and after (see §§5.19-5.25) registration of their partnerships with the Secretary of State (see Fam C §298.5), as well as agreements entered into in contemplation of a dissolution of their partnership or a legal separation of the partners (see §§5.26-5.40).

§5.2 B. Agreements in Context of Domestic Partner Relationships

Although the agreements discussed in this chapter are similar in form and content to those used by married couples, the unique circumstances of domestic partners, and particularly same-sex partners, should be kept in mind in drafting or advising a client about agreements. Many same-sex domestic partners have lived together for long periods before the opportunity to register their partnerships came to pass, and therefore many may already have accumulated substantial property, have children, and otherwise be in relationships of such confidence that the law imposes fiduciary standards in evaluating transactions between the partners. See generally Fam C §721. The attorney must pay particular attention to the need for disclosure of assets and obligations in the course of preparing agreements (see §§5.10, 5.21, 5.28), as well as to considering the need for separate counsel for each partner (see §§5.9, 5.21, 5.29, chap 3).

In addition, because registered domestic partners do not enjoy the benefits that federal law confers on married couples (see 1 USC §7), the attorney must take into account such key matters as tax consequences of property transfers and payment of support, as well as the ability to secure for each partner his or her share of any federally regulated benefit, such as pension and retirement benefits under the Employee Retirement Income Security Act of 1974 (ERISA), military retirement benefits, and the like. On tax issues in general, see chap 15. On employee benefits under ERISA and related issues, see chap 8.

The date of domestic partnership registration is now viewed as tantamount to “the date of marriage” for purposes of property rights and financial support between registered domestic partners (see Fam

C §297.5(m)(1)). This chapter uses the terms “preregistration domestic partnership agreement” as the analog of “premarital agreement,” “postregistration domestic partnership agreement” as the analog of “marital” or “postmarital agreement,” and “domestic partnership dissolution agreement” as the analog of “marital settlement agreement” in discussing the various agreements domestic partners may need and that are largely governed under the Family Code. For a comprehensive general discussion of agreements in the family law context, with multiple forms, see *California Marital Settlement and Other Family Law Agreements* (3d ed Cal CEB 2005).

§5.3 C. Overview of Types of Agreements

There are a variety of agreements that domestic partners may enter into, or have entered into, before or after registering as domestic partners. Outside the context of state registration, some domestic partners have entered into agreements required by their employers in order for both partners to enjoy certain benefits, such as health care coverage (see §5.4). Other partners may have retained counsel to draft nonmarital cohabitation agreements. And some have drafted their own cohabitation agreements either ad hoc, by using a form book, or by receiving some assistance from a legal clinic. Domestic partners may have entered into an oral agreement to share their property or support each other; and still others have implied contracts to share property and take care of each other (see §5.6). Finally, partners may enter, or have entered, into agreements specifically in contemplation of domestic partner registration (see §§5.7-5.18), or while registered (see §§5.19-5.25), or with the expectation of dissolving their partnership (or legally separating) (see §§5.26-5.40).

PRACTICE TIP► If domestic partners who registered between January 1, 2000, and December 31, 2004, entered into written or oral contracts—either before registration or while registered—it can be argued that these contracts are extinguished as a matter of law, or are at least voidable, as of January 1, 2005, when Fam C §297.5(m) became operative. This interpretation is possible because the Domestic Partner Rights and Responsibilities Act of 2003 (DPRRA) (Stats 2003, ch 421) imposed on registered domestic partners the community property and support laws that were not contemplated by any prior agreement, and may render any prior agreement meaningless. See Fam C

§297.5(m)(1). It is true that in the future a court may hold that the new law should not be applied retroactively and that any agreement entered into before January 1, 2005, is a valid and enforceable agreement, but until then registered domestic partners are advised to rewrite their agreements. In contrast, otherwise valid agreements entered into before January 1, 2005, by unmarried persons who *have not* registered as domestic partners should still be enforceable because the law has not changed for same-sex or opposite-sex couples who are simply living together (see discussion of “*Marvin*” agreements in §5.6).

II. AGREEMENTS MADE OUTSIDE OF REGISTRATION CONTEXT

A. Agreements Required by Employers

§5.4 1. Nature of Employer-Required Agreements

In order to receive various types of employee benefits for the domestic partners of unmarried employees, some employers have required that employees seeking such benefits show evidence of having entered into a standard form agreement—as drafted by the employer. For example, an agreement was required by the University of Southern California (USC) entitled “Mutual Agreement of Financial Dependence.” The university did not require the parties to be represented by counsel in entering into the agreement, despite the fact that the parties may have been in a fiduciary relationship. The agreement stated that “Both of us agree to jointly hold property in equal shares and to be legally responsible for each other’s debts, both to the extent delineated for community estates under California law.” USC required an unmarried couple who wished to share benefits to agree that the community property laws of California would apply to them. USC is no longer requiring that couples enter into this agreement. Now, in order to be eligible for benefits, they must be registered domestic partners.

In the future, employers should require only that the couple be in a registered domestic partnership. They should not require that partners enter into an agreement like the one that USC required.

Because of the lack of uniformity in the law over time, there may be many forms of employer-required agreements circulating that affect couples who entered into them before registering as domes-

tic partners. As partners' relationships terminate, these agreements will be litigated and their enforceability will be tested. The standard contractual defenses will be used to attempt to defeat the enforceability of the agreements, *e.g.*, lack of capacity to enter into a contract, duress, fraud, statute of frauds, laches, and estoppel. See CC §§1567; *Wells Fargo Bank v Bank of America* (1995) 32 CA4th 424, 439, 38 CR2d 521 (discussing estoppel and laches); *Whorton v Dillingham* (1988) 202 CA3d 447, 456, 248 CR 405 (estoppel to assert statute of frauds).

Furthermore, domestic partners who entered into employer-required agreements *after* registering their partnership may now be deemed to have been in a fiduciary relationship, and because of insufficient disclosure, the agreement would be subject to invalidation. See Fam C §297.5(a); *Marriage of Bonds* (2000) 24 C4th 1, 29, 99 CR2d 252.

§5.5 2. Rescission of Employer-Required Agreements

Rescission is a procedure to undo or cancel a contract, in order to return nonbreaching parties to the positions they occupied before a transaction. If you are representing a party who wishes to terminate an employer-required agreement, you should serve a notice of rescission if you wish to assert the defense of fraud, mistake, duress, undue influence, or failure of consideration. See CC §§1689(b)(1), 1691. These grounds may be applicable in situations in which the parties were presented with an agreement drafted by an institution as a requirement for the parties to share medical benefits. The partner who wishes to end the relationship, the rescinding party, must give prompt notice of rescission to the other partner.

NOTE► In representing a party who seeks to terminate an employer-required agreement, attorneys have to be careful, because the parties entered into this agreement to obtain medical coverage, and if the other partner cannot obtain new medical coverage, and especially if the other partner becomes ill, the partner who wishes to terminate the contract may be subject to liability. In addition, if the parties sign a CC §1542 mutual waiver of release of known and unknown claims, both parties may be waiving their right to sue each other for a sexually transmitted disease, or for any other tort that may have occurred

during the relationship. Therefore, an attorney who is advising a client to terminate this type of contract must advise the client of the potential consequences of signing a mutual waiver of known and unknown claims.

§5.6 **B. Nonmarital Cohabitation (“Marvin”) Agreements**

Some domestic partners may have entered into a nonmarital cohabitation agreement before registering their partnership. This type of an agreement would have been voluntarily entered into by the parties (and not required by a third party) for the purpose of ordering their financial affairs during and after cohabitation. Since the landmark decision of *Marvin v Marvin*, these agreements have been called “Marvin Agreements,” or “palimony” agreements. These agreements address the ownership of property and the payment of support, just as a premarital agreement would. *Marvin v Marvin* (1976) 18 C3d 660, 665, 134 CR 815.

The law of contracts governs this type of agreement under the Civil Code. The Family Code does not apply, except insofar as parentage and child support are concerned—and those issues generally are not subject to contractual modification. Express or implied contracts between unmarried cohabitants are enforceable, except to the extent the contracts are explicitly founded on meretricious sexual consideration or otherwise violate established contractual principles. *Marvin v Marvin* (1976) 18 C3d 660, 665, 134 CR 815; *Milian v DeLeon* (1986) 181 CA3d 1185, 1193, 226 CR 831 (implied contract to own and divide property equally). On the selection of a *Marvin* agreement as an alternative to registering as a domestic partner, see chap 2. For a more complete discussion of agreements for nonmarital cohabitation and sample forms, see *California Marital Settlement and Other Family Law Agreements*, chap 19 (3d ed Cal CEB 2005).

III. AGREEMENTS MADE IN ANTICIPATION OF REGISTRATION ("PREREGISTRATION")

A. Overview

§5.7 1. General Nature and Scope of Preregistration Domestic Partnership Agreements

Unregistered domestic partners who are otherwise competent to contract and who intend to register their partnerships with the Secretary of State—like couples who intend to marry—are free to enter into a preregistration agreement that is the equivalent of a “premarital” agreement if it complies with Fam C §§1600-1617 (California’s Uniform Premarital Agreement Act). See generally Fam C §§297.5, 1610(a), 1613. The agreement must be in writing and signed by both parties. It is enforceable without consideration and becomes effective on the partners’ registration. Fam C §§1611, 1613.

The agreement may concern any of the matters included within Fam C §1612(a):

- The rights and obligations of each of the parties in any of the property of either or both of them, whenever and wherever acquired or located;
- The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
- The disposition of property on separation, partnership dissolution, death, or the occurrence or nonoccurrence of any other event;
- The making of a will, trust, or other arrangement to carry out provision of the agreement;
- The ownership rights in and disposition of the death benefit from a life insurance policy;
- The choice of law governing the construction of the agreement; and
- Any other matter, including the parties’ personal rights and

obligations, not violating public policy or a statute imposing a criminal penalty.

The parties may not adversely affect the right of a child to support in their preregistration agreement (Fam C §1612(b)), and should not include provisions attempting to control a child's religious upbringing in the event of a dissolution. See, e.g., *Marriage of Weiss* (1996) 42 CA4th 106, 117, 49 CR2d 339 (premarital agreement to raise children in spouse's faith was unenforceable). In addition, personal issues and penalties for bad behavior during the registered partnership cannot be part of the agreement, because a court may find that they are unenforceable and void the entire agreement. See, e.g., *Diosdado v Diosdado* (2002) 97 CA4th 470, 474, 118 CR2d 494 (liquidated damages provision for sexual infidelity during marriage was invalid). On provisions concerning support of a party during the partnership or thereafter, see §§5.16, 5.37-5.38.

Under the law of premarital agreements, persons who enter into such an agreement traditionally are not *presumed* to owe a fiduciary duty to each other. See *Marriage of Bonds* (2000) 24 C4th 1, 61, 99 CR2d 252; *Fernandez v Fernandez* (1961) 194 CA2d 782, 790, 15 CR 374. However, because many domestic partners may have lived together for many years before registration, accumulated property, had children together, and otherwise formed relationships of confidence, the law may find that a fiduciary standard does apply with respect to transactions between the partners. Therefore, the parties may be held to a higher standard of good faith and fair dealing with each other in making agreements than other unmarried individuals. See *Marriage of Bonds* (2000) 24 C4th 1, 61, 99 CR2d 252; *Marvin v Marvin* (1976) 18 C3d 660, 682 n22, 134 CR 815.

If the parties are in a confidential relationship, they must make a full disclosure to each other of assets and financial obligations in advance of entering into the agreement, or risk having the agreement found unenforceable, even though the Family Code permits a waiver of the disclosure. See Fam C §1615(a)(2)(A)-(B). Most of the defenses to a premarital agreement concern grounds for finding unconscionability and voluntariness, as described in Fam C §1615, and these will now apply to domestic partners. Fam C §297.5.

On special rules for partners who registered their partnerships before 2005, see §5.8. On the need for independent counsel and disclosure of assets and liabilities, see §§5.9-5.11. For a clause acknowledging that the partners are in a confidential relationship, see

§5.42. For a full discussion of premarital agreements, see California Marital Settlement and Other Family Law Agreements, chap 17 (3d ed Cal CEB 2005).

NOTE► Although at this time few states recognize California domestic partnerships, it is possible that in the future another state may have jurisdiction to dissolve the domestic partnership, and California law may not apply. It would be prudent to include a choice-of-law clause in the agreement and also address the application of other states' laws. Other states have enacted their own versions of the Uniform Premarital Agreement Act, some of which, like California, have elected to vary from the original version promulgated by the Conference of Commissioners on Uniform State Laws. There is a uniform annotated code that shows how sister states have interpreted various sections of that Act.

§5.8 2. Agreements for Domestic Partners Registered Before 2005

Domestic partners who registered their partnerships with the Secretary of State before January 1, 2005, have been given a "window period" within which to draft an agreement that complies with the provisions of Fam C §§1600-1620 (all but §1620 govern premarital agreements). Under Fam C §297.5(m)(2), such an agreement must be fully executed and in force as of June 30, 2005, to be effective. Family Code §297.5(m)(2) was added to Fam C §297.5—which grants registered domestic partners nearly all the same rights, duties, and obligations as spouses—in connection with a companion provision (Fam C §297.5(m)(1)) that makes §297.5 retroactive to the date of partner registration with respect to property and support rights of the partners. The intended purpose of the window period, therefore, was to enable this group of registered domestic partners to have an opportunity to create a premarital-type agreement to govern their financial affairs, just as if they had not yet registered.

At least two issues are raised by these provisions. First, there is a question concerning whether this retroactive legislation is constitutional, as noted below. Second, because the partners who registered before January 1, 2005, stand in a posture essentially analogous to that of married persons, they have a presumptively higher level of duty to each other with respect to negotiating and implementing

the agreement. *Marriage of Bonds* (2000) 24 C4th 1, 61, 99 CR2d 252. That is, their duty would be subject to Fam C §§721 and 1620, which collectively impose a fiduciary standard requiring the highest good faith and fair dealing, require full disclosure of assets and liabilities, and restrict the parties in “alter[ing] their legal relations, except as to property.” Therefore, “window period” agreements entered into by pre-2005 registrants are arguably more in the nature of “postmarital” agreements than traditional “premarital” agreements. For discussion of postmarital agreements (referred to as “postregistration” agreements in this chapter), see §§5.19-5.25.

NOTE► It may be unconstitutional to apply Fam C §297.5 retroactively to partners who registered before January 1, 2005, the general operative date of that statute. See *Marriage of Buol* (1985) 39 C3d 751, 218 CR 31; *Marriage of Fabian* (1986) 41 C3d 440, 451, 224 CR 333. It could be argued, however, that *Buol* and *Fabian* can be distinguished because domestic partners who had registered before 2005 were given written notice by the Secretary of State in three letters of their right to terminate their registration before January 1, 2005. Fam C §299.3. For a clause addressing the retroactive application of Fam C §297.5 to property acquired before January 1, 2005, that may be included in an agreement intended to be effective on or before June 30, 2005, see §5.41.

B. Need for Independent Counsel and Disclosure of Assets and Liabilities

§5.9 1. Independent Counsel

To ensure that an agreement made in contemplation of partnership registration is enforceable, both parties must be represented by independent counsel. Although technically attorneys are required only if there is a provision concerning “spousal” support for a partner (Fam C §1612(c)), it is better practice for both parties to obtain representation even if there is no limitation on “spousal” support. On the specific need for counsel in contracting for a limitation or waiver of support, see §5.16.

If a party or both parties are not represented, the requirements are as follows: “after being advised to seek independent legal counsel, [the party] expressly waived, in a separate writing, representation

by independent legal counsel.” Fam C §1615(c)(1). Family Code §1615 goes on to state that “if unrepresented by legal counsel, [the party] was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party’s rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party shall, on or before the signing of the premarital agreement, execute a document declaring that he or she received the information required by this paragraph and indicating who provided that information.” Fam C §1615(c)(3).

The requirement that a party who is opposing the enforcement of the agreement be “fully informed of the terms and basic effect of the agreement . . . [and that] explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement” gives discretion to the trial court to determine that the explanation of the agreement was not adequate. This creates uncertainty about the enforceability of the agreement that can lead to litigation, not only over the terms of the agreement, but about whether the “memorialization” was adequate. The parties are looking for predictability and certainty, which cannot be afforded to the parties when one or both of them are unrepresented by counsel.

PRACTICE TIP ► Family Code §1615 effectively provides that to be enforceable the agreement must not have been executed under duress, fraud, or undue influence, and the parties must not have lacked capacity to enter into the agreement. Independent representation of each of the parties by counsel will help avert a claim that a party was under duress, undue influence, or lacked capacity to enter into the agreement. This is yet another reason to encourage each party to the agreement to have independent representation.

2. Disclosure of Assets and Liabilities

§5.10 a. Need for Disclosure, Unless Waived

As part of the process of entering into an agreement made in

contemplation of domestic partnership registration, there must be a “fair, reasonable, and full” disclosure of assets and liabilities, unless there is a waiver of that disclosure. Fam Code §1615(a)(2)(A)-(B). The agreement must be presented at least seven days before it is signed (not seven days before the registration), as discussed in §5.11. Fam C §1615(c)(2). For a more complete discussion of these agreements, see *California Marital Settlement and Other Family Law Agreements*, chap 17 (3d ed Cal CEB 2005).

PRACTICE TIP► The attorney should advise the client that fraud in the disclosures could make the agreement unenforceable. It is better practice to provide a minimum value or a range of values for assets when the value is difficult to determine, such as with businesses and real estate. Although the Family Code permits the parties to waive disclosure beyond that which is provided (Fam Code §1615(a)(2)(B)), it is not recommended that there be any waiver of disclosure for parties who are already living together and are registered domestic partners (which could be the case for partners drafting a “preregistration” agreement under Fam C §297.5(m)(2)).

§5.11 b. “Seven Calendar Day” Rule

Under Fam C §1615, the parties must have “not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.” Fam C §1615(c)(2). The Family Code does not make it clear whether the party must be presented with the final draft seven days before the agreement is signed or just with the first draft. Because of this ambiguity, it is better practice to wait seven days after the final draft is served to sign the agreement. Note that there is no requirement that the agreement be signed a certain number of days before the date of registering a domestic partnership. It is recommended that the agreement not be signed on the registration date (or on any ceremony commemorating the partners’ commitment through registration), to avert a later claim that the party signed the agreement under duress.

PRACTICE TIP► Attach a proof of delivery showing the date the final draft is delivered to the other party to the agreement for the record or include in the agreement an acknowledgment

of the date the other party received the final draft of the agreement. Make sure that the signatures on the agreement are dated on the eighth day after the final agreement was delivered to the parties.

§5.12 C. Confirmation Versus Separate Property Agreements

There are two main categories of agreements that are typically used in a premarital agreement situation, which should be applicable to a preregistration domestic partner agreement: “confirmation” agreements and “separate property” agreements.

§5.13 1. Confirmation Agreements

A “confirmation” agreement confirms that certain property of the parties will remain separate property, such as a business, various items of personal and real property, or a retirement plan owned before domestic partnership registration. This type of agreement does not change the default rule that property acquired during the domestic partnership is presumed to be community property. See Fam C §§297.5(a), 760. It is designed to avoid the often expensive disputes about how much of the appreciation in a listed asset is community property and how much is separate property.

This type of agreement is simple and relatively easy to negotiate. It does not address newly acquired property and therefore does not protect property acquired after registration, leaving that subject to the general community presumption. This kind of agreement may not be sufficient for a client with extensive real estate or business holdings. The proceeds of a loan are often treated as community property without an agreement (based on the intent of the lender doctrine). See *Gudelj v Gudelj* (1953) 41 C2d 202, 210, 259 P2d 656; *Marriage of Grinius* (1985) 166 CA3d 1179, 1186, 212 CR 803. When separate property is financed or refinanced, what was once separate property can become infused, or commingled, with community property. A confirmation agreement is also not well suited to deal with multiple future transactions and acquisitions.

§5.14 2. Separate Property Agreements

A “separate property” agreement fundamentally changes the de-

fault laws of community property in the Family Code. The cornerstone of the agreement is the provision that there is *no* community property except what the agreement designates as community. See generally *Marriage of Dawley* (1976) 17 C3d 342, 31 CR 3. Accordingly, by operation of the agreement there is *no presumption* that property acquired during the registered domestic partnership is community property. This type of agreement is useful when there is a lot of income or other property and many transactions are anticipated. This agreement can protect the propertied partner against inadvertently commingling separate and community property.

PRACTICE TIP► The separate property agreement can offer better protection for a client's separate property estate than a confirmation agreement but is often more difficult to negotiate than a confirmation agreement because often the client must designate property he or she is willing to share as a *quid pro quo* for a signature on the agreement. Furthermore, the agreement cannot provide for *lump sum* payments at the time of a dissolution of the domestic partnership, because they may be considered promotive of dissolution and therefore are against public policy in California. *Marriage of Dajani* (1988) 204 CA3d 1387, 251 CR 871; *Marriage of Noghrey* (1985) 169 CA3d 326, 215 CR 153. Any interest that is transferred to the partner or to the community must be made during the ongoing domestic partnership. This kind of agreement is easier to negotiate for "second" domestic partnerships or for an individual with significant wealth who can afford to make transfers during the partnership.

§5.15 D. Limitations Posed by Federal Law in Transferring or Dividing Property

Many property rights are dependent on federal law, which is unlikely to recognize domestic partnership rights (see chap 1). See 1 USC §7 (federal Defense of Marriage Act, or DOMA). Examples are federal retirement rights under the Employee Retirement Income Security Act of 1974 (ERISA) and the Uniformed Services Former Spouses' Protection Act (USFSPA). It is doubtful that California courts will be able to order these assets directly divided for domestic partners in the manner of marital interests, in the event the parties dissolve their registered domestic partnership. See 10 USC

§1408(d)(2) (USFSPA); 29 USC §1056 (ERISA). On domestic partner rights to employee benefits, see chap 8.

Courts can, however, order a domestic partner employee (the recipient of employment benefits) to receive the funds as constructive trustee for the nonemployee domestic partner and pay over the community share to the other partner. See *Marriage of Beltran* (1986) 183 CA3d 292, 227 CR 924; *Marriage of Fithian (Fithian II)* (1977) 74 CA3d 397, 141 CR 506. Of course, this assumes that federal courts will agree that California courts have the jurisdiction to divide these federal benefits in the case of nonmarital domestic partnerships, which is uncertain. Such a transfer may also have tax consequences to both the employee partner and nonemployee partner (see chap 15).

Clients who are considering a domestic partnership should be advised that until the law is settled, they must each be responsible for his or her own retirement planning because it is not clear that the community property laws relating to the division of retirement plans can be enforced.

In addition, any transfers of property between domestic partners must be analyzed in light of both potential income and gift tax consequences. On tax issues concerning a transfer or division of property, see §§5.30-5.31 and chap 15.

§5.16 E. "Spousal" Support Planning

Domestic partners who are planning to register their partnership may make provision in their agreement for the support of either partner in the event the partnership terminates or the parties legally separate. A waiver or limitation of support of either partner in the event of dissolution of the partnership or legal separation is also possible. Fam C §§1612(c), 1620; *Marriage of Pendleton & Fireman* (2000) 24 C4th 39, 99 CR2d 278. Accordingly, whether the client is planning to enter into a confirmation agreement or a separate property agreement, he or she may choose to have a clause that limits the amount of spousal support that the client will be obligated to pay if the parties' relationship ends.

In the context of spousal support after a marriage is terminated, Fam C §4320(I) provides that one of the considerations by the court is the "goal that the supported party shall be self-supporting within a reasonable period of time [and] [e]xcept in the case of a marriage of long duration as described in [Fam C] §4336, a 'reasonable period

of time' for purposes of this section generally shall be one-half the length of the marriage [but] nothing in [section 4320] is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in [section 4320], Section 4336, and the circumstances of the parties." Under Fam C §4336, there is a presumption that a marriage of 10 years or more is one of "long duration." Fam C §§4320(l), 4336. For longer than a 10-year marriage, the support may be ordered for an indefinite period. The supported spouse is entitled to live according to the marital standard of living. This obligation can be significant and if coupled with child support can amount to more than 50 percent of net income. There is no guarantee that a limitation or waiver of spousal support will be enforced. A court will determine whether the limitation is unconscionable at the time of enforcement (dissolution of partnership). Fam C §1612(c). These principles will now also apply in the context of domestic partners. Fam C §297.5.

On tax issues related to support planning for a partner, see §5.36 and chap 15. On determining "length of the partnership" and related issues for purposes of determining the duration of support, see §5.37 and chap 13.

PRACTICE TIP ► Family Code §1612(c) states that any provision in a premarital agreement regarding spousal support, including but not limited to a waiver of it, is not enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement containing the provision was signed, or if the provision regarding spousal support is unconscionable at the time of enforcement. It further provides that an otherwise unenforceable provision in a premarital agreement regarding spousal support may not become enforceable solely because the party against whom enforcement is sought was represented by independent counsel. This provision makes it imperative for a party who agrees to a limitation or waiver of support in a preregistration-type agreement to be independently represented by counsel.

§5.17 F. Amending or Revoking Agreement After Registration

After domestic partners register their partnership, a preregistration

agreement that was entered into by the partners may be amended or revoked only by a written agreement that is signed by both parties. Such an agreement is enforceable without consideration. Fam C §1614.

NOTE ➤ It is unclear whether an amendment will be treated as a postregistration agreement (for married persons, a “postmarital agreement”) under *Marriage of Haines* (1995) 33 CA4th 277, 39 CR2d 673, under which if one party gains an advantage, the agreement will be presumed to be made by undue influence. It is not clear whether the parties who are amending a preregistration agreement can waive disclosure as provided under Fam C §1615(a)(2)(B). It is better practice to provide a “fair, reasonable, and full disclosure of the property or financial obligations of the other party” by analogy to Fam C §1615(a)(2)(A) and not attempt to waive the disclosure in whole or in part. In a particular case, rather than amending the agreement, counsel may consider drafting another agreement that does not modify the terms of the preregistration agreement. This “stand alone” document would not alter the original agreement.

§5.18 G. Statute of Limitations and Equitable Defenses

Under Fam C §1617, as applied to domestic partners, any statute of limitations applicable to an action asserting a claim for relief under a preregistration agreement is tolled during the period of registered domestic partnership of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party. Fam C §1617.

IV. AGREEMENTS MADE WHILE REGISTERED (“POSTREGISTRATION”)

A. Overview

§5.19 1. General Nature and Scope of Postregistration Domestic Partnership Agreements

Agreements entered into by domestic partners who have already registered their partnership may be termed “postregistration” (or

“postmarital”) if made with the intention of keeping the partnership intact, and not as a prelude to a separation of the parties or termination of their partnership. If, however, the agreement is made in contemplation of a separation or dissolution of the partnership, it comes within the framework of a partnership termination (“marital settlement”) agreement (see §§5.26-5.40).

Parties may desire to enter into a postregistration agreement for a number or reasons, including, for example:

- To transmute the character of property from community to separate, or vice versa (see Fam C §852);
- To clarify the ownership of property or the terms of a preregistration agreement; or
- To revoke a preregistration agreement. See Fam C §1614.

Thus, for example, a postregistration agreement might be used to govern the character of property acquired before or after registration, or to change what would otherwise be community property to the separate property of one party. See Fam C §852.

Registered domestic partners are given wide latitude concerning the subjects of their agreements, particularly with respect to property, so long as they observe the fiduciary standards of disclosure and fair dealing imposed on them by statute. See Fam C §§721, 1500, 1620. They are constrained, however, not to make an agreement that is promotive of dissolution of the partnership, or that “alters their legal relations” as registered domestic partners, except with respect to property. See Fam C §1620; *Marriage of Higgason* (1973) 10 C3d 476, 487, 110 CR 897, overruled on other grounds in *Marriage of Dawley* (1976) 17 C3d 342, 352, 131 CR 3. The parties’ mutual consent to the agreement is apparently the only consideration needed. See *Estate of Wilson* (1976) 64 CA3d 786, 798, 134 CR 749. On divergent views taken regarding whether a presumption of undue influence applies to the partners in contracting, see §§5.22-5.23.

As in the case of preregistration and partnership dissolution agreements, significant tax effects may accompany any property transfer or transmutation, and counsel must analyze these with respect to potential gift, estate, and income tax implications. On tax effects of property transfers between registered domestic partners, see chap 15.

§5.20 2. Special Rules for Partners Registered Before January 1, 2005

Under a special, retroactive statute applicable to domestic partners registered before January 1, 2005, the partners are permitted to make an agreement that they intend to be governed by Fam C §§1600-1620 (all but §1620 govern premarital agreements). Fam C §297.5(m)(2). This provision was included as part of an amendment to Fam C §297.5 that retroactively treats the date of partnership registration as the “date of marriage” for purposes of property and support rights. Fam C §297.5(m)(1). Such an agreement must be fully executed and in force as of June 30, 2005, to be effective. Fam C §297.5(m)(2). Although this type of agreement would normally be termed a preregistration agreement, it is more in the nature of a postregistration agreement to the extent the parties’ preexisting relationship as registered partners raises their duties to one another to those of a fiduciary. See *Marriage of Bonds* (2000) 24 C4th 1, 61, 99 CR2d 252. See also Fam C §721. For further discussion of the law concerning partners who registered before January 1, 2005, see §5.8.

§5.21 3. Disclosure and Need for Independent Counsel

While there is no statutory requirement that parties to a postregistration agreement be represented by independent counsel, it is more likely that the agreement will withstand attack if both are represented. See, e.g., *Marriage of Friedman* (2002) 100 CA4th 65, 122 CR2d 412 (one party was attorney and signed conflict waiver, and other party was represented by counsel). The comments in §§5.9-5.10 concerning the need for a full disclosure of the parties’ assets and liabilities and need for independent counsel in the preregistration agreement situation also apply regarding postregistration agreements. Unlike preregistration agreements, however (see §5.11), there is no “seven day rule” (see Fam C §1615(c)(2)) before signing a postregistration agreement, but it is recommended that rules for preregistration agreements also be followed for postregistration agreements.

B. Views on Validity of Postregistration Agreements

§5.22 1. Presumption of Undue Influence

There are two divergent lines of cases on the validity of postmarital agreements. One line, beginning with *Marriage of Haines* (1995) 33 CA4th 277, 39 CR2d 673, holds that any contract entered into during marriage (and by extension, registered domestic partnership) in which one party gains an advantage is presumed to be procured by undue influence. Courts of equity view gifts and contracts that are made or take place between parties occupying confidential relations "with a jealous eye." *Marriage of Haines* (1995) 33 CA4th 277, 294, 39 CR2d 673. Other cases hold similarly, as in the case of stock transfer during marriage. *Marriage of Barneson* (1999) 69 CA4th 583, 81 CR2d 726.

A fiduciary obtains an advantage if his or her position is improved, or he or she obtains a favorable opportunity or otherwise gains, benefits, or profits. *Marriage of Lange* (2002) 102 CA4th 360, 125 CR2d 379.

§5.23 2. Parties Free to Contract If No Unfair Advantage Taken

A line of cases holds that parties to a postnuptial agreement are free to contract with one another if no unfair advantage is taken. The reasoning underlying this viewpoint may be summarized as follows. The general rule is that married people, and therefore registered domestic partners, may enter into any contract between themselves that they might enter into if they were unmarried (or unregistered). Fam C §721(a). These agreements must be in writing and are subject to the same rules as contracts generally. See *Marriage of Iberti* (1997) 55 CA4th 1434, 64 CR2d 766. See also Fam C §852(a) (requiring express written declaration for transmutation of property). For example, in *Marriage of Friedman* (2002) 100 CA4th 65, 122 CR2d 412, an appellate court upheld a postmarital agreement that provided for certain income and businesses to be separate property. In that case, the court also found that the agreement did not favor either party and actually protected the contesting party from the other party's creditors. 100 CA4th at 67.

PRACTICE TIP ► It is important that both parties be represented

by independent counsel—though this is not a strict requirement—and that there is adequate consideration for the agreement. If it is perceived by a court that one party obtained an unfair advantage in the agreement, the agreement is likely to be set aside.

§5.24 C. Prohibited Subjects of Agreement

In addition to provisions “altering the parties’ legal relations, except with respect to property” (see Fam C §1620), there are some provisions that likely will not be upheld in a postregistration agreement on public policy grounds. These include, for example:

- Provision for liquidated damages for sexual infidelity during the relationship (*Diosdado v Diosdado* (2002) 97 CA4th 470, 474, 118 CR2d 494);
- Provision of a financial penalty if a party’s drug addiction recurs (*Marriage of Mehren & Dargan* (2004) 118 CA4th 1167, 13 CR3d 13); and
- Payment for personal services, such as nursing services, during the relationship (*Borelli v Brusseau* (1993) 12 CA4th 647, 651, 16 CR2d 16).

§5.25 D. Support of Partner

During the course of an ongoing marriage or registered domestic partnership, there is a mutual duty of support that is imposed by statute. See Fam C §§297.5(a), 720, 4300. Although for preregistration agreements there is a special statutory provision regarding limiting or waiving spousal support by agreement (see Fam C §1612(c)), there is no specific statute or case law regarding limitations or waivers of support in a postregistration agreement. On the one hand, it is arguable that if there is full disclosure and the parties are each represented by counsel, they should be able to limit or waive support by postregistration agreement. Conversely, the mutual duty of support during an ongoing marriage conceivably may be seen as one of the “legal relations” that spouses and registered domestic partners cannot alter (see Fam C §1620), and early case law on prohibiting provisions that tend to “promote dissolution of marriage” may also come into play. See *Marriage of Higgason* (1973) 10 C3d 476,

487, 110 CR 897, overruled on other grounds in *Marriage of Dawley* (1976) 17 C3d 342, 352, 131 CR 3. As a result, it is recommended that the attorney proceed with great caution in including a provision limiting or waiving support by means of a postregistration agreement.

Note that, in any event, by analogy to the preregistration agreement (see Fam C §1612(c)), it appears that a court construing a support limitation or waiver may decide to determine the unconscionability of the provision as of the time of *enforcement*. On income and gift tax considerations with respect to support of a partner during an ongoing registered partnership or after its dissolution, see chap 15.

V. AGREEMENTS TO TERMINATE PARTNERSHIP OR FOR LEGAL SEPARATION (“DISSOLUTION AGREEMENT”)

A. Overview

§5.26 1. General Nature and Scope of Domestic Partnership Dissolution Agreements

Registered domestic partners who contemplate a dissolution of their partnership (or obtaining a judgment of legal separation) may enter into a written agreement that fully settles their financial and related affairs, including matters related to children. See Fam C §§721, 1500, 1620, 3580. The parties’ mutual consent is sufficient consideration for the agreement. Fam C §3580. The agreement made by the parties can be termed one for “partnership termination” or dissolution that is analogous to a “marital settlement agreement.”

Registered domestic partners who meet the requirements for administrative termination of their partnership *without* court action— analogous to summary dissolution of marriage (see Fam C §299)— are *required* to have executed a written agreement describing a division of their assets and liabilities, as well as all other legal instruments needed to effectuate the agreement as one condition of using the administrative procedure. Fam C §299(a)(7).

Registered domestic partners who require *court action* to terminate their partnerships (see chap 20) are not required to enter into a dissolution agreement, but are encouraged to do so as part of the settlement process. In the absence of a written agreement (or oral stipulation in open court), the family court is required to divide

any community property of the parties equally and make other necessary orders as provided in the Family Code. See Fam C §§2010, 2550. If the partners have reached agreement, they may submit their written agreement to the court for approval, or may enter into a written “stipulation for judgment” that has the effect of a written agreement. See Fam C §2550; Cal Rules of Ct 5.116.

Provisions of an agreement concerning child custody and visitation, child support, and support of the partners are subject to court approval and are deemed made under the power of the court; therefore they are always made a part of the court’s judgment of dissolution, annulment, or legal separation, in addition to being recited in the parties’ written agreement. See Fam C §§2010, 3022, 3585, 3590; *Marriage of Goodarzirad* (1986) 185 CA3d 1020, 1027, 230 CR 203 (continuing jurisdiction of court over custody).

NOTE► The agreement should be notarized and signed by both parties (and their respective attorneys), although notarization is technically required only if one of the parties defaults in the underlying proceeding or if the parties wish to record the agreement. See Fam C §§1502, 2338.5. For a full discussion of drafting agreements of this kind, see *California Marital Settlement and Other Family Law Agreements*, chap 4 (3d ed Cal CEB 2005).

§5.27 2. Matters Generally Included Within Agreement

In drafting an agreement in anticipation of terminating a registered domestic partnership, the parties typically include provisions covering matters such as these:

- The facts of their partnership registration;
- Date of the parties’ separation;
- Listing of the parties’ minor children;
- Listing of the parties’ community assets and obligations;
- Listing and confirmation of the parties’ individual separate assets and obligations;
- Child custody, visitation, and child support;

- Division (allocation) of community assets and liabilities between the parties (including any reimbursements);
- Support of either or both parties (or waiver of support);
- Payment of attorney fees;
- Handling later-discovered assets or liabilities;
- Handling income tax returns and any assessed tax deficiencies;
- Waiving rights to inherit or administer the estate of the other;
- Governing law, severability, indemnification, and acknowledgment of disclosure; and
- Any other issues unique to the parties' situation.

B. Disclosure and Need for Independent Counsel

§5.28 1. Disclosure

Like spouses, registered domestic partners are subject to the fiduciary standards of persons in confidential relationships (see Fam C §721). These standards do not necessarily end when the parties separate, but extend to management and control of community assets and liabilities until such time as these are divided by the parties' agreement or by the court. Fam C §1100(e). This duty includes the obligation to make full disclosure between the parties of all material facts and information regarding the existence, characterization, and valuation of all assets the community has or may have an interest in, and debts for which the community is or may be liable. In addition, each party must provide the other with access to all information, records, and books that pertain to the value and character of those assets and debts, on request. Fam C §1100(e). See Fam C §2102 (special disclosure duties until date of distribution of community and quasi-community assets and liabilities).

Moreover, as part of the dissolution (or legal separation) proceeding, the parties must exchange prescribed initial and final declarations of disclosure, which include an income and expense declaration and a schedule of assets and debts. The final declaration of disclosure may be waived by the parties under certain circumstances; however, the waiver cannot be made in the parties' dissolution agreement and must be made by execution of a waiver under penalty of perjury

in open court or by separate stipulation. Fam C §§2103, 2105–2106. The waiver of the final declaration of disclosure may increase the risk that the agreement will later be set aside, and is not advised.

§5.29 2. Need for Independent Counsel

As in the case of other agreements discussed in this chapter (see §§5.9, 5.21, and chap 3), separate representation of each party to the partnership dissolution agreement is strongly recommended, and correspondingly, dual representation of the parties is discouraged.

C. Special Issues for Domestic Partners

1. Tax Issues

a. Property Divisions

§5.30 (1) No Treatment Under IRC §1041

One of the problems particular to domestic partners is the issue of tax consequences of transactions between the partners. The Domestic Relations Tax Reform Act of 1984 (DRTRA) drastically changed prior law that had provided for a recognition of gain on certain transfers of properties between spouses incident to dissolution. See, e.g., *U.S. v Davis* (1962) 370 US 65, 8 L Ed 2d 335, 82 S Ct 1190; *Carrieres v C.I.R.* (9th Cir 1977) 552 F2d 1350. As a result of DRTRA, IRC §1041 prohibits the recognition of any gain on any transfers of property between spouses during marriage, or after the marriage if the transfer was incident to divorce. “Incident to divorce” was defined in a subsequent regulation as being any transfers between ex-spouses within one year of the dissolution and, presumptively, any transfers within six years of divorce. Any property transferred between spouses, for any reason, is treated as a gift. The transferee takes the transferor’s basis with no step-up for any payments that may have been made.

Because of the federal Defense of Marriage Act (DOMA) (1 USC §7), IRC §1041 does not apply to registered domestic partners, because neither partner would qualify as a “spouse” under the limitations of DOMA. Therefore, property transactions between registered domestic partners are potentially taxable and may be categorized as a gift, a sale, or a payment for services rendered, depending on the type of transaction and the IRS interpretation (see chap 15).

In addition, the domestic partners are unable to file joint income tax returns, and any provision in their dissolution agreement will need to describe how they will treat filing of any final returns and handling of any tax deficiencies assessed against either or both partners by the IRS or California taxing authorities. See Fam C §297.5(g). For a form concerning the exchange of tax returns that may be adapted for use in a partnership termination agreement, see §5.45.

§5.31 (2) Consideration of Possible California Real Property Reassessments

Under California Proposition 13 and its progeny, transfers of real property between spouses are not treated as changes of ownership for property taxation purposes. Rev & Tax C §63. Because rights created by initiative cannot be extended by legislative action (Fam C §297.5(j)), it is presently unclear whether this marital benefit will be available to registered domestic partners. Fam C §297.5(j).

b. Child Support and Dependency Exemption

§5.32 (1) Child Support

In the marital context, payment of child support is not taxable to the recipient of support (usually the parent with primary custody) or deductible from income by the support payor. IRC §§71, 215. While it is unclear how the IRS will handle payments of child support by domestic partners, it appears that payments will still be nondeductible by the payor. Whether the recipient partner will need to recognize the payment as taxable income is less clear, but it is possible that recognition may be required. On how the federal Defense of Marriage Act (DOMA) may affect treatment of child support, see chap 15.

§5.33 (2) Dependency Exemption

Under IRC §152, a registered domestic partner may be eligible to claim a dependency exemption with respect to a child who is a subject of the parties' family law proceeding. Normally, the exemption is taken by the parent who has physical custody of a child for the greater portion of a tax year. See IRC §152(a), (c)(1), (e).

A special rule permits the other parent to take the exemption pursuant to the parties' agreement and a written declaration by the custodial parent (on IRS Form 8332) that he or she will not claim the child as a dependent for the tax year in question. See IRC §152(e).

Under an alternative basis for the exemption, a child potentially may be a "qualifying relative" if two conditions are met: (1) The child had the same principal place of abode as the partner and was a member of the taxpayer's household, and (2) more than half of the child's support was paid by that partner. See IRC §152(d)(1)-(2). For further discussion of dependency exemptions, see chap 15, and Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §7.3 (Cal CEB Annual).

c. Living Expenses and Support of Partner

(1) Consideration of Gift Tax in Contracting About Living Expenses

§5.34 (a) Why Gift Tax Issue Arises

All lifetime transfers of property for which the donor receives less than full and adequate consideration are subject to federal gift tax. See Treas Reg §25.2512-8. Annual gift tax returns are due generally on April 15 of the following year. See IRC §6075(b). The gift tax is cumulative for all taxable gifts made by an individual throughout his or her lifetime; *i.e.*, all taxable gifts made by an individual in applicable previous years are carried forward and added to the present year's gifts to determine the marginal gift tax rate applicable to the present year's gifts. See IRC §2502.

Under limited circumstances, the value of a gift reported on a gift tax return will become binding on the IRS when that value becomes relevant for purposes of determining the tax on later gifts and the tax on the donor's estate. Generally, there must have been adequate disclosure on the gift tax return and the time for assessment of tax must be closed. IRC §§2001(f), 2504(c), 6501(e).

In order to avoid the gift tax, there must be adequate consideration for the transfer. See Treas Reg §25.2511-1(g)(1). If it is not a gift, it will be treated as a sale or an exchange and must be bona fide, at arm's length, and free from any donative intent.

PRACTICE TIP ▶ There is a danger that a domestic partnership

might be construed as an employee-employer relationship and that the payments are for services rendered. There is a panoply of labor laws that would apply to this type of relationship that are beyond the scope of this publication. The problems include complying with minimum wage laws, withholding requirements, overtime regulations, workplace rules, and so forth. The partners might *choose* this arrangement, however, so that the "employee" can qualify for Social Security benefits, which may be the only way to acquire "retirement benefits." In that event, the parties would need to enter into an appropriate employment agreement drafted by experienced employment counsel.

§5.35 (b) Agreement for Gift of Living Expenses

To clarify the nature of any living expenses that are provided from one registered domestic partner to the other that are not otherwise to be treated as support, the parties may wish to include a clause in their agreement that the provision of expenses is to be treated as a gift.

§5.36 (2) Support of Partner

For married (or formerly married) individuals, spousal support is deductible from gross income for the payor and includable in the payee's income for income tax purposes. IRC §§71, 215. Because of the federal Defense of Marriage Act (1 USC §7), the alimony (spousal support) provision of the Internal Revenue Code apparently will not apply to registered domestic partners. While treatment of support by the IRS is still unclear, it is possible the IRS will treat the payment of partner support as income to the payee, while not permitting deduction by the payor as alimony. On various positions the IRS might take, see chap 15.

The family law courts must consider the different tax consequences in awarding partner support to domestic partners under Fam Code §4320(j), which provides that the court must consider the "immediate and specific" tax consequences to each party. Running computer support programs to calculate "spousal support" for domestic partners will lead to incorrect results, however, because these are calibrated to include certain tax effects applicable to spouses. Thus, in drafting an agreement, the special tax issues involved in domestic partner

“spousal support” should be considered. On making adjustments to the support programs, see chap 13.

2. Determining Duration and Amount of Support for Partner

§5.37 a. Support Duration

In the area of providing support for a domestic partner, the process of integrating domestic partnership law into family law is going to be difficult and will likely result in an examination of the history of sexual-orientation-based discrimination and the judicial interpretation of the legislature’s intent with regard to issues that were not considered but are very real. For example, Fam C §4320 states that the duration of the marriage is a key factor to be considered when awarding spousal support. Fam C §4320(f). This will also be true for partner support, but how is the duration of the partnership to be measured? If the length of the union is measured solely by the date that the couple first registered as domestic partners, then it would be interpreted consistently with marriages—regarding which a period of prior cohabitation cannot be considered for spousal support purposes. *Marriage of Burlini* (1983) 143 CA3d 65, 191 CR 541. Consistent interpretation is the stated intention of the legislature. See Fam C §297.5.

However, unlike different-sex couples (who could marry), same-sex couples did not have the ability to register as domestic partners in California until comparatively recently. Thus, using a “date of registration” marker for support—regardless of how long and stable the relationships were—could produce an inequitable result. An argument will be made that when measuring the length of the union, “it would be both unreal and unjust to preclude judicial consideration of the entire [domestic partner relationship] history of the parties.” *In re Marriage of Chapman* (1987) 191 CA3d 1308, 1315, 237 CR 84. For further discussion of this issue, see chap 13.

§5.38 b. Support Amount

In addition to differences in determining the duration of support for a partner in comparison with spouse or former spouse (see §5.37), there are differences in calculating the amount of partner support. The *temporary* spousal support guidelines, as incorporated into com-

puter programs such as SupporTax and DissoMaster, assume that unless the parties are filing joint tax returns, an option not open to domestic partners, the support will be deductible to the payor and taxable to the payee. The spousal support result is adjusted to take these tax effects into consideration. This often results in a significantly higher spousal support award. Because partner support likely will not be deductible for income tax purposes and is likely to be taxable to the recipient, these results must be adjusted.

Failure to make this adjustment will often result in too high an award. It also means that the amount awarded to a domestic partner may be significantly lower than the amount awarded to a spouse in identical circumstances. On making adjustments to support programs, see chap 13.

Note that use of temporary support guidelines is not permitted in determining long-term or "permanent" support. *Marriage of Burli-ni* (1983) 143 CA3d 65, 69, 191 CR 541.

§5.39 3. Child Custody and Visitation

Registered domestic partners may make provision for the custody and visitation of their children in their dissolution agreement. Agreements on child custody and visitation are generally well received by the family court and much preferred over litigation of these issues. See, e.g., Fam C §3061 (temporary custody order to be made in accordance with parties' agreement, absent exceptional circumstances). However, custody and visitation provisions are subject to court approval and are deemed made under the power of the court to act in the best interest of the child. The parties can neither confer custody jurisdiction on the court nor divest it from the court by their agreement. See Fam C §§2010, 3022; *Marriage of Goodarzirad* (1986) 185 CA3d 1020, 1027, 230 CR 203 (continuing jurisdiction of court over custody).

Note that provisions of a custody agreement that attempt to regulate a parent's religious upbringing of a child or exposure of the child to particular religious beliefs are unlikely to be enforceable. See, e.g., *Marriage of Weiss* (1996) 42 CA4th 106, 117, 49 CR2d 339 (court refused to enforce agreement whose purpose was to prevent parent from involving child in religious activities, unless there was clear showing of harm). On custody and visitation proceedings generally,

see chap 14, and Practice Under the California Family Code: Dissolution, Legal Separation, Nullity, chap 7 (Cal CEB Annual).

§5.40 4. Choice of Law and Jurisdiction

Parties to an agreement settling their rights with respect to property and other matters frequently include a “choice of law” provision, as well as provisions concerning court jurisdiction. In view of the unique situation involving the development and implementation of domestic partnership law in California, any provision on choice of law should refer to interpreting the agreement under “the law of the state of California.” In addition, by statute, California courts have jurisdiction over all proceedings relating to the dissolution of domestic partnerships, legal separation of partners in a domestic partnership, and nullity of domestic partnerships, even if neither domestic partner is a resident of, or maintains a domicile in, California when the proceedings are filed. Fam C §299(d). This provision was necessitated by the reality that California registered domestic partners may not be able to have their rights and obligations determined by courts of states that have analogous substantive or procedural law. Therefore, parties should ordinarily not attempt to vary from this mandate in drafting any provision concerning court jurisdiction, keeping in mind that they cannot otherwise confer jurisdiction by their own agreement or divest a court of jurisdiction—particularly in matters such as child custody and child support. There may be future litigation over the application of conflicting state and federal statutes relating to support and custody jurisdiction. See 28 USC §1738A (Parental Kidnapping Prevention Act), 28 USC §1738B (Full Faith and Credit for Child Support Orders Act). See also the Hague Convention on the Civil Aspects of International Child Abduction; Uniform Child Custody Jurisdiction and Enforcement Act (as applied by jurisdictions other than California).

NOTE► By statute, a legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction and that is substantially equivalent to a California domestic partnership must be recognized as a valid domestic partnership in California regardless of whether it bears the name domestic partnership. Fam C §299.2. It appears that California does not have continuing jurisdiction over proceedings relating to those unions (because they were not registered in California using the forms

advising parties of such jurisdiction), but the California courts may be utilized to terminate them or grant a legal separation.

VI. FORMS

A. Special Provisions for Domestic Partnership Agreements

§5.41 1. Form: Waiver of Rights Provided by Fam C §297.5 for Pre-2005 Period of Registration as Domestic Partners

Partner A and Partner B registered their Domestic Partnership with the Secretary of State of California on __[date, e.g., April 1, 2002]__. They acknowledge that Family Code §297.5(m)(1) has the effect of applying statutes, cases, and other sources of law concerning community property, responsibility for debts to third parties, other rights and duties concerning property, and rights to support retroactively to the date of registration of their Domestic Partnership. Partner A and Partner B agree to vary from this provision of the Family Code, in that they agree that the Family Code will apply retroactively only to January 1, 2005, __[or the date of this agreement]__. Partner A and Partner B understand and acknowledge that by agreeing to alter Family Code §297.5(m)(1) there may be a resulting loss of community property rights and support rights, but they agree to waive these rights under the Family Code with respect to the time period before January 1, 2005.

Comment: Family Code §297.5(m)(1) provides that with respect to property and support rights of domestic partners, any reference in statutes, case law, or otherwise to the “date of marriage” is deemed to refer to the date of the partners’ registration. Under Fam C §297.5(m)(2), domestic partners have until June 30, 2005, to execute and have in force an agreement that complies with Fam C §§1600–1620. This provision is a simple agreement intended to waive any rights involving property or support that might otherwise accrue to either partner before January 1, 2005, as a result of the retroactive application of the law to the date of the partners’ registration. A variation of this clause would permit the parties to use the date of the agreement, instead of January 1, 2005, as the commencement date for rights under the Domestic Partner Rights and Responsibilities Act of 2003 (Stats 2003, ch 421).

§5.42 2. Form: Acknowledgement by Registered Domestic Partners of Confidential Relationship and Representation by Counsel, and Agreement to Provide Full Disclosure

Partner A and Partner B are registered domestic partners, as provided under Family Code §§297 and 298.5. They desire to enter into an agreement governing their rights and liabilities with respect to property and related matters. They agree that they are in a confidential relationship and are held to the highest standards of good faith and fair dealing, and therefore they agree to provide to each other full, fair, and reasonable disclosure of their assets and obligations, and each partner confirms that he or she understands the disclosure provided and that the disclosure provided was a full, fair, and reasonable disclosure. Both parties are benefiting from this agreement and neither party is gaining an unfair advantage. Furthermore, they each have retained counsel to represent them in this matter in order to ensure that they each fully understand their rights and responsibilities pursuant to this agreement.

Comment: This form may be used to recite the acknowledgement by registered domestic partners that they stand in a relationship of confidence that imposes on each of them the duty of the highest good faith and fair dealing toward each other, in the manner of a fiduciary. See, e.g., Fam C §721. It further acknowledges that each party does not waive any right to disclosure of assets and liabilities in entering into the agreement, and that each party is separately represented by counsel with respect to the agreement. The form may be used as part of a postregistration agreement, or as part of a preregistration agreement for parties who registered their domestic partnership before January 1, 2005, and are making an agreement in compliance with Fam C §297.5(m)(2).

§5.43 3. Form: Provision That All Property Acquired During Partnership Is Separate Property, Except as Otherwise Designated in Agreement

Partner A covenants and agrees that all of the following are the separate property of Partner B, and shall be enjoyed by him and subject to his disposition as his separate property

in the same manner as if no domestic partnership had been entered into, except as specified in this Agreement in __[specify sections of agreement describing community property, e.g., sections 7 and 8]__: all property and income currently owned by Partner B and hereafter directly received by Partner B of any nature or source or in any place, including but not limited to income from those assets listed on Exhibit "A" attached hereto, as well as all the earnings and income resulting from Partner B's personal services, skill, effort, and work during the registered domestic partnership, and all property acquired by or coming to Partner B by purchase, gift, bequest, exchange, devise, inheritance, profit, rent, accretion, exchange, appreciation, accumulation, or increase during the domestic partnership, or by any other means during the registered domestic partnership.

Partner A acknowledges that he understands that, except for this Agreement, the earnings and income resulting from the personal services, skill, effort, and work of Partner B during the parties' domestic partnership, including the real and personal property purchased with such earnings and income and a portion of Partner B's existing real and personal property maintained with said earnings and income, would be community property in which Partner A would have a one-half interest, but that by this Agreement Partner B's earnings and income and the property acquired, as well as the property that is maintained with said earnings and income, are made Partner B's separate property, free and clear of any actual or potential (be it community property or otherwise) right, title, interest, or claim of Partner A.

Partner B covenants and agrees that all of the following are the separate property of Partner A, and shall be enjoyed by him and subject to his disposition as his separate property in the same manner as if no domestic partnership had been entered into, except as specified in this Agreement in __[specify sections of agreement describing community property, e.g., sections 7 and 8]__: all property and income currently owned by Partner A and hereafter directly received by Partner A of any nature or source or in any place, including, but not limited to, income from those assets listed on Exhibit "B" attached hereto, as well as all the earnings and income resulting from Partner A's personal services, skill, effort, and work during the registered domestic partnership, and all property acquired by or coming

to Partner A by purchase, gift, bequest, exchange, devise, inheritance, profit, rent, accretion, exchange, appreciation, accumulation, or increase during the registered domestic partnership, or by any other means during the registered domestic partnership.

Partner B acknowledges and understands that, except for this Agreement, the earnings and income resulting from the personal services, skill, effort, and work of Partner A during the parties' registered domestic partnership, including the real and personal property purchased with such earnings and income and a portion of Partner A's existing real and personal property maintained with said earnings and income, would be community property in which Partner B would have a one-half interest, but that by this Agreement Partner A's earnings and income and the property acquired, as well as the property that is maintained with said earnings and income, are made Partner A's separate property, free and clear of any actual or potential (be it community property or otherwise) right, title, interest, or claim of Partner B.

Comment: This form may be used to create a "separate property" agreement, either before or after the registration of domestic partners. On the use of this agreement, see §5.14.

§5.44 4. Form: Treatment of Loan Proceeds

Should the parties, or either of them, borrow any funds or acquire any asset or assets with borrowed funds during the registered domestic partnership, the presumption created by the time of acquisition under Family Code §§760 and 803 or any similar statute or holding shall not apply. Such loan proceeds and/or any property acquired with such loan proceeds shall belong to the party or parties in the manner that title is held to it. Therefore, if title to that property is held in one party's name alone, it shall be and remain that party's separate property, subject to change only as provided for in this Agreement. Such property can only be community property or have any community property interest if there exists an Agreement, in writing, signed by both parties, expressly creating such community property. The manner in which the loan proceeds or credit was obtained shall *not* be a factor in determining the character, separate or community, of loan

proceeds or property acquired with loan proceeds. This includes but is not limited to

- a. whether the loan was applied for in both names;
- b. whether any loan documents, including applications, financial statements, promissory notes, or security documents, refer to or are signed by both parties;
- c. whether information was provided to the lender concerning the income or assets of both parties; and
- d. whether the lender intended to and/or did rely on community income and assets, separate property of one or both parties, or a combination for security or repayment.

The parties expressly intend that this Agreement will override the doctrines of *Marriage of Grinius* (1985) 166 CA3d 1179, and *Gudelj v Gudelj* (1953) 41 C2d 202, and any similar or later case that looks to the lender's intent and time of acquisition to determine the characterization of loan proceeds and/or property acquired with loan proceeds.

If __[specify party, e.g., Partner B]__ borrows funds in __[his/her]__ name for business or personal use, the repayment of that loan shall be __[specify party, e.g., Partner B]__'s sole responsibility.

Comment: This form may be used by domestic partners in an agreement made before or after registration of their partnership. Both "separate property" and "confirmation" type agreements should include a clause that addresses characterization of loan proceeds. In *Gudelj v Gudelj* (1953) 41 C2d 202, 259 P2d 656, and *Marriage of Grinius* (1985) 166 CA3d 1179, 212 CR 803, courts looked to the intent of the lender in order to characterize property as either separate or community. If you are using a confirmation agreement, you must ensure that if certain property is characterized as separate, a future encumbrance on the property does not change its character to community. If you are drafting a separate property agreement, you must ensure that the overall separate property scheme is not diluted by future loans against the property. For related discussion of separate property and confirmation agreements, see §§5.13-5.14.

**§5.45 5. Form: Provision for Exchange of Income
Tax Information and Use of Same Tax
Return Preparer**

Partner A and Partner B agree that they will use the same income tax preparer and will exchange a pro forma tax return on or before February 1 of each year in which they are registered domestic partners, so that their individual tax returns are consistent with each other.

Comment: This form may be used by domestic partners in an agreement made before or after registration of their partnership. Registered domestic partners are not permitted by law to file joint income tax returns (see Fam C §297.5(g)), so it may not be clear to each partner how the other partner is handling various aspects of income tax reporting. This form assures that the partners will make use of a common income tax preparer, the partners will have access to the tax returns of each other, and the tax returns will be consistent between the taxpayers.

**§5.46 6. Form: Provision for Filing of Separate
Income Tax Returns**

Partner A and Partner B agree that they will each file separate state and federal income tax returns. Partner A agrees to declare all [his/her] personal earned income on [his/her] state and federal tax returns. Partner B agrees to declare all [his/her] personal earned income on [his/her] state and federal income tax returns.

Comment: This form may be used by domestic partners in an agreement made before or after registration of their partnership. Registered domestic partners are not permitted by law to file joint income tax returns, and earned income may not be treated as community property for income tax purposes (see Fam C §297.5(g)). Because the domestic partners may not be familiar with the law, this form specifies that the partners will file separate returns.

**§5.47 7. Form: Provision for Declaring Proceeds of
Sale of Joint Property on Tax Returns**

[Choose one of the following alternatives]

[Alternative 1]

If Partner A and Partner B own real property in joint tenancy or as community property, they agree that they will each declare one-half of the proceeds of sale as capital gains income on their separate income tax returns.

[Alternative 2]

If Partner A and Partner B own real property in tenancy in common or in a business partnership, they agree that they will each declare a percentage of the proceeds of the sale as capital gains income on their separate income tax returns according to their respective ownership interests in the property. In the event the deed or partnership agreement does not specify their ownership interests, they shall each __[specify: declare one-half the proceeds of the sale or declare a percentage interest according to their initial capital contribution to the purchase price of the property]__.

Comment: This form may be used by domestic partners in an agreement made before or after registration of their partnership. The agreement should provide a way to address the issue of declaring gain from the sale of jointly held property (or property that is otherwise community property).

§5.48 8. Form: Provision for Indemnification for Unforeseen Tax Consequences

Partner A shall indemnify and hold Partner B harmless from all tax liability (including penalties, interest, and additional assessments) asserted by federal or state taxing authorities arising out of __[his/her]__ transfer to Partner B of any property.

Partner A shall hold Partner B harmless from all fees and expenses in connection with any examination, negotiation, or litigation regarding such liability.

Partner B shall indemnify and hold Partner A harmless from all tax liability (including penalties, interest, and additional assessments) asserted by federal or state taxing authorities arising out of __[his/her]__ transfer to Partner A of any property.

Partner B shall hold Partner A harmless from all fees and

expenses in connection with any examination, negotiation, or litigation regarding such liability.

Comment: This form may be used by domestic partners in an agreement made before or after registration of their partnership, including as part of a partnership dissolution agreement.

§5.49 9. Form: Provision Addressing Tax Liability for Assets Acquired Before 2005 That Are Retroactively Treated as Community Property

Partner A and Partner B recognize that the retroactive application of the Family Code to property either of them acquired since __[date of partnership registration, e.g., January 1, 2002]__, under Family Code §297.5(m) may create a taxable transaction. If a tax is assessed, Partner A and Partner B agree that __[specify, e.g., each pays one-half of the federal and state tax obligation due/Partner A agrees to pay the federal and state tax due, including penalties and interest, and hold Partner B harmless therefrom]__.

Comment: This form may be used by domestic partners who registered their partnership before January 1, 2005, in an agreement made under Fam C §297.5(m)(2). On when such an agreement may be used, see §5.8. Family Code §297.5(m)(1) applies the domestic partnership laws as they relate to property and support of registered domestic partners retroactively to the date of the partners' registration. What formerly was the sole property of one partner could have become community property or partially community property. Because the IRS may treat this as a taxable transaction, the form addresses how the partners will allocate responsibility between each other for paying any resulting tax liability.

§5.50 10. Form: Provision for Gift of Living Expenses

Partner A's payment of partner B's living expenses is intended to be a gift and is to be assessed against Partner A's lifetime annual gift tax.

Comment: This form may be used by domestic partners in an agreement made before or after registration of their partnership, including as part of a partnership dissolution agreement. It is intended

to clarify the nature of the payments being made, and to distinguish them from traditional support of a partner.

B. Sample Complete Agreements

§5.51 1. Form: Preregistration Domestic Partnership Agreement—Confirmation Style Agreement

PREREGISTRATION DOMESTIC PARTNERSHIP AGREEMENT

THIS AGREEMENT is made on _____, 2005, between Jane Smith ("Jane") and Mary Jones ("Mary").

1. RECITALS

1.1. Jane and Mary are each unmarried adults, have no children, and are contemplating registering together as domestic partners with the State of California. Each is a resident of the State of California.

1.2. Jane and Mary intend by this Agreement to define the rights and obligations of each of them in the property of the other whenever and wherever acquired or located.

1.3. Jane and Mary have been advised by their respective legal counsel of the California Supreme Court decision in *Marvin v Marvin* (1976) 18 C3d 660, and its progeny. Jane and Mary desire to disavow any claims or rights that, except for the operation of this Agreement, either might have acquired in the property of the other by virtue of their relationship before registering as domestic partners, and to renounce any claims or rights, except for this Agreement, either might acquire in the future in the property of the other by reason of their registered domestic partnership relationship or otherwise.

1.4. Jane and Mary have also been advised by their counsel of the California Supreme Court decision in *Estate of MacDonald* (1990) 51 C3d 262. Jane and Mary acknowledge that this Agreement may change the characterization or ownership of property that either or both of them now own or that they may hereafter acquire. Jane and Mary expressly acknowledge and understand that, but for this Agreement, some or all of their property rights and interests in and to the property that

they now own or that they may hereafter acquire might be different.

1.5. This Agreement constitutes a Preregistration Domestic Partnership Agreement, as defined in California Family Code §1610(a). This Agreement shall be effective upon actual registration of a domestic partnership between the parties with the State of California. If for any reason such registration does not take place, this Agreement shall be void.

1.6. Jane and Mary each own certain property and have certain debts that are each party's sole and separate property and debts. Jane and Mary acknowledge that each party possesses adequate knowledge of the property, income, earning capacity, and financial obligations of the other by reason of disclosures heretofore made and made in this Agreement. Furthermore, both Jane and Mary have had an opportunity to see and review an unaudited financial statement of the other showing the approximate composition and estimated amount of the property and debts of the other. Also, both parties understand and acknowledge that Jane and Mary may each at some time receive property in the form of gifts, devises, bequests, or inheritances that are not certain or ascertainable at this time but are, nevertheless, covered by this Agreement.

1.7. Each party is willing to enter into this Agreement voluntarily regardless of the nature or extent of the assets, liabilities, income, or expenses of the other, and voluntarily and expressly waives any right to disclosure of the property or financial obligations of the other beyond the disclosures previously provided.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, including the contemplated registered domestic partnership between the parties and the mutual promises set forth in this Agreement, Jane and Mary agree as follows with respect to their rights in the property, income, assets, and liabilities that either party may have or may acquire:

2. SEPARATE PROPERTY

2.1. All property now owned by each of Jane and Mary,

whether or not specifically disclosed to the other, is and shall remain the separate property of Jane or Mary, as the case may be.

2.2. All property received by either party before the parties' domestic partnership registration (including, but not limited to, property received as salary, bonus, royalty, residual, override, profit participation, deferment, or other similar forms of compensation), and all property received at any time as a gift, bequest, or inheritance, including any interest Jane or Mary may hereafter acquire from a trust heretofore established by either party's relatives, shall be the separate property of the party who receives it.

2.3. The parties understand that Jane owns shares of stock in Acme, Inc. ("Acme"), and it is their intention that these shares of stock, and any interest in any successors thereto, whether or not incorporated, shall be and remain the separate property of Jane and not the community property of the parties. Jane shall be entitled to vote any shares in Acme or any interests in any successors thereto owned by her, or by a trust for her benefit of which she is the trustee, and Mary shall not at any time have any voting rights with respect to such shares or interests.

2.4. All income, rents, profits, reinvestment, dividends, interest, accumulations, and appreciation in value derived from a party's separate property shall also be such party's separate property, irrespective of whether such income, rents, profits, reinvestments, dividends, interest, accumulations, or appreciation in value is attributable solely to market conditions, the passage of time, or the personal services, skill, effort, management, talent, or work of either party. The parties understand that, but for this Agreement, some or all of such income, rents, profits, reinvestment, dividends, interest, accumulations, and appreciation in value would or might be the community property of the parties.

2.5. Each party shall, to the extent possible, maintain sufficient books and records in order to account for or trace each party's separate property. Although failure to maintain these books and records with respect to any particular item or account may prevent a party from proving the separate

property character of such property, such failure shall not constitute a waiver or modification of either party's rights or obligations with respect to any other property as expressly set forth in this Agreement.

3. COMPENSATION AND EARNINGS FROM ACME

The parties understand and acknowledge that Acme, an enterprise having shares that are owned entirely by Jane as her separate property (as provided in Paragraph 2.3), is a personal services company for which Jane is likely (but not required) to render services from and after the parties' domestic partnership registration. Any compensation or earnings received by Jane or any employee benefit plans (hereafter "Plans") for Jane's benefit from Acme during the parties' registered domestic partnership as compensation for personal services, skill, effort, or work, including bonuses, shall be characterized as follows:

3.1. If such compensation or earnings received by Jane or such Plans are attributable to receipts by Acme on account of services, effort, or work that was furnished before the date of the parties' domestic partnership registration, such compensation or earnings shall be and remain Jane's separate property as provided in Paragraph 2.

3.2. If such compensation or earnings received by Jane or such Plans are attributable to receipts by Acme on account of services, effort, or work that was furnished on or after the date of the parties' domestic partnership registration, such compensation or earnings shall be and remain the parties' community property as provided in Paragraph 4.

3.3. To the extent of the community property determined under Paragraph 3.2 in a fiscal year of Acme during the parties' registered domestic partnership, such Plans shall be the parties' community property, and Jane shall have a separate property interest in such contributions only to the extent that such community property in such fiscal year is less than the aggregate amount received by such Plans during such fiscal year. Thus, for example, if in a fiscal year of Acme (i) it receives \$200,000 from sources described in Paragraph 3.1 and \$800,000 from sources described in Paragraph 3.2, and (ii) distribution of \$980,000 is made to Jane and \$20,000 to such Plans, then

the amount received by such Plans shall be the parties' community property, and the amount received by Jane shall be \$780,000 community property and \$200,000 Jane's separate property. If the facts are the same as in the preceding sentence except that Acme receives \$980,000 from sources described in Paragraph 3.1 and \$20,000 from sources described in Paragraph 3.2, then the amount received by such Plans shall be the parties' community property, and the entire amount received by Jane shall be her separate property. If the facts are the same as in the preceding sentence except that such Plans receive \$25,000, then \$20,000 received by such Plans shall be the parties' community property, \$5000 received by such Plans shall be Jane's separate property, and the entire amount received by Jane shall be her separate property.

4. COMMUNITY PROPERTY

4.1. Except and to the extent provided in Paragraph 3 with respect to compensation or earnings received by Jane from Acme, all compensation and earnings received by Jane or Mary during their registered domestic partnership as compensation for personal services, skill, effort, or work furnished after registration of their domestic partnership shall be the parties' community property (the "community property earnings"). Community property earnings shall exclude receipts and accumulations described in Paragraph 2.4, but shall include all other compensation and earnings received for personal services, including, but not limited to, amounts received as salary, bonus, royalty, residual, override, profit participation, deferment, or other similar forms of compensation.

4.2. The interest of each party as a participant in any Plans with respect to contributions made on and after the date of registration of the parties' domestic partnership shall be the community property of the parties.

4.3. Notwithstanding Paragraph 4.1, compensation for personal services, skill, effort, or work earned by either party from and after the date of their separation shall be and remain the separate property of such earning party.

4.4. Both parties acknowledge that neither party is under any obligation to generate any minimum amount of community property earnings at any time. Furthermore, each party waives

any claim that the community property earnings received by the earning party is insufficient to compensate the community for the efforts expended by such earning party. If either party renders services to any partnership or corporation in which such party or either party's family may have an interest from time to time, and such party receives inadequate or no compensation for such services, that fact shall neither be a basis for (i) converting any interest such party (or any trust for either party's benefit) owns in such partnership or corporation into the parties' community property nor be a basis for (ii) giving rise to a claim of reimbursement by the community from such party.

4.5. All income, rents, profits, reinvestments, dividends, interest, accumulations, and appreciation in value derived from community property earnings also shall be the parties' community property, irrespective of whether such income, rents, profits, reinvestments, dividends, interest, accumulations, or appreciation in value is attributable solely to market conditions, the passage of time, or the personal services, skill, effort, management, talent, or work of either party.

4.6. The parties' community property shall not be directly or indirectly invested in any corporation, partnership, joint venture, or other business entity in which either party or either party's family now has or may in the future have an ownership interest, nor shall the parties' community property be loaned to any person or entity without the written consent of both parties. If, however, either party invests or loans any of the parties' community property without complying with the foregoing formalities, the community shall be entitled to reimbursement from the investing or loaning party for the monies so invested or loaned, with interest at the federal midterm rate of interest from time to time, compounded semiannually, from the date of investment or loan, reduced by the amounts recovered or received on account of such investment or loan. (It is the parties' intention by the preceding sentence that the community receive the greater of interest on the amount improperly invested or loaned under this Paragraph or the actual return on such investment or loan.) However, the community shall be a creditor only with respect to any such investment or loan and shall not hold any equity interest in nor be entitled to any portion of any appreciation in such

corporation, partnership, joint venture, or other business entity, and the sole remedy of the community shall be reimbursement from the investing or loaning party as provided in this Paragraph.

4.7. As used in this Paragraph 4, references to a party's family shall refer to the issue of such party's grandparents and the spouses of any such issue (excluding the other party). For purposes hereof, a party and each party's family shall be deemed to have an interest in an entity if such party and that party's family, or trusts for the principal benefit of any one or more of them, in the aggregate hold more than forty percent (40%) of the outstanding ownership interests, directly or indirectly, in such entity.

4.8. The parties may establish one or more savings or checking accounts into which the parties can deposit their community property income; the expenses set forth in Paragraph 5.2 shall be paid from such accounts. The rights to the parties' community property shall be as determined under the laws of the State of California from time to time.

5. DEBTS

5.1. Debts incurred by either of the parties before their domestic partnership registration date shall be the separate property debts of and paid by the party who incurred them from each party's separate property, and the separate property of the other shall not be charged with or be liable for such debts, except as provided in Paragraph 6.2.

5.2. Community debts incurred on and after the parties' domestic partnership registration date shall be paid from community income or community property funds. Unless the parties otherwise agree, community debts shall include, without limitation, the expenses of food; household supplies; furniture; furnishings; utilities; clothing; medical and dental care; medical, life, accident, and automobile insurance; gasoline; auto repair; property taxes; assessments; ordinary repairs on any residence used by the parties as their home from time to time; entertainment; reasonable joint travel; and joint gifts.

5.3. If separate income or separate property funds of a party are used to satisfy a community debt or obligation or a separate

debt or obligation of the other party, then the party who contributes such separate income or separate property funds shall be entitled to reimbursement for such expenditures from community property or the other's separate property thereafter acquired, without interest, as provided in California Family Code §920, provided, however, that the parties may agree at the time of the advance or at any time thereafter that the party who contributes such separate income or separate property funds either is entitled to interest or is not entitled to any reimbursement, in which event the contribution of separate income or separate property funds shall be deemed a gift to the community or the other party, as the case may be. Notwithstanding the preceding sentence, there shall be no right to reimbursement if a party uses each party's separate property funds in discharge of each party's obligation of support under California Family Code §914. The agreement referred to in this Paragraph shall be evidenced by a written instrument signed by both parties.

6. GIFTS TO MARY ON REGISTRATION OF DOMESTIC PARTNERSHIP

Notwithstanding any other provision of this Agreement to the contrary, within thirty (30) days following the parties' domestic partnership registration, Jane shall transfer the following to or for the benefit of Mary, as Mary's sole and separate property, in which Jane shall have no interest and for which Jane shall be entitled to no reimbursement:

6.1. The 1995 Volvo 855 turbo station wagon currently being used by Mary; and

6.2. Sufficient cash to satisfy Mary's separate property debts on the date of their domestic partnership registration, which cash may be paid directly to Mary's creditors.

7. AGREEMENT CHANGES CHARACTERIZATION OR OWNERSHIP OF PROPERTY

Jane and Mary acknowledge that this Agreement may change the characterization or ownership of property that either or both of them now own or that they may hereafter acquire. Jane and Mary expressly acknowledge and understand that, but for this Agreement, some or all of their property rights and interests

in and to the property that they now own or that they may hereafter acquire might be different under California law.

8. FEDERAL AND STATE INCOME TAX RETURNS

8.1. The parties agree that they will each timely file separate state and federal income tax returns. Mary agrees to declare all of her personal income on her state and federal tax returns. Jane agrees to declare all of her personal income on her state and federal tax returns.

8.2. The parties agree that they will use the same income tax preparer and will exchange a pro forma tax return on or before February 1 of each year in which they are registered domestic partners, so that their individual tax returns are consistent with each other.

9. OWNERSHIP OF TANGIBLE PROPERTY

9.1. Any property, such as furniture, appliances, or furnishings located in or around the residence that the parties occupy from time to time, for which no documents of title exist that is in the possession of either or both parties shall have the same character as the property used to acquire such property. If both parties have furnished such consideration from their separate property, each party shall be deemed to have a separate property interest in a fraction of such property, the numerator of which is the amount of the consideration furnished by either party and the denominator of which is the aggregate consideration furnished by both parties. For purposes of this Paragraph, a written document, signed by the party who furnished all or a portion of the consideration necessary to acquire an item of property, and stating that such party is making a gift of the item or either party's interest in the item to the other party, shall be deemed to be the document of title indicating that the item is the separate property of the other party.

9.2. Notwithstanding any provision of this Agreement to the contrary, gifts from one party to the other of clothing, jewelry, personal effects, books, or other items of similar nature costing less than Five Thousand Dollars (\$5000) per item shall not require a written document to evidence their character as the

donee's separate property nor shall the donor be entitled to any reimbursement of her contribution.

10. DISSOLUTION OF DOMESTIC PARTNERSHIP

This Agreement does not purport to cover all of the consequences of a dissolution of a registered domestic partnership of Jane and Mary, it being understood that such dissolution is neither desired nor contemplated. However, in the unfortunate event that the parties' registered domestic partnership is legally terminated, other than by reason of death, that is, by dissolution, or the parties' legal separation pursuant to court order or written or oral agreement, or in the event the parties hereto cease living together for a continuous period of twelve (12) months and one of the parties intends to remain separate and apart, the parties agree that their rights with respect to the property owned by them, or either of them, shall be settled and determined in accordance with this Agreement. In particular, the parties agree as follows:

10.1. As provided in this Agreement, neither party shall have any interest in the separate property of the other, and nothing in this Agreement shall divest a party from that party's property as determined under this Agreement. Both parties understand that the laws of many states give courts the power to require a husband or a wife, upon separation or divorce, to transfer a share of either party's property, whether separate property, domestic partnership property, or community property, to the other party. This power is sometimes referred to as the power to require "equitable distribution." Neither party wishes a court to have this power. Therefore, each party hereby waives any right either party would have had, in the absence of this Agreement, to receive a share of the separate property of the other upon separation or dissolution and agrees that if the parties are separated or the registered domestic partnership is dissolved or terminated (other than by either party's death), neither party will assert any claim to receive a share of the separate property of the other, whether by way of equitable distribution or otherwise.

10.2. Nothing in this Agreement shall be construed as a waiver of either party's right to receive spousal (domestic

partnership) support as determined under the laws of the State of California.

10.3. If the parties own undivided interests in real or personal property as community property, tenants in common, or as joint tenants, such property shall be divided in kind as the parties agree, in proportion to their respective ownership interests therein. If the parties cannot agree upon such division with respect to any such property, those properties shall be sold, and the net proceeds of sale shall be divided between the parties in proportion to their respective ownership interests therein.

11. ACTIONS THAT DO NOT CONSTITUTE CHANGE IN OWNERSHIP OF PROPERTY

If any of the following events occurs during the parties' registered domestic partnership, under no circumstances shall any or all of such events be evidence of either party's express or implied intention or agreement to convert the separate property of either party into the community property of the parties nor to convert the community property of the parties into the separate property of either party: (i) the filing of joint income tax returns; (ii) the designation of either party as a beneficiary or as an Executor, Trustee, or other fiduciary with respect to the property or estate of the other, whether during lifetime or at death; (iii) the fact that a creditor has relied on the property or credit of one party for the purpose of extending credit to the other party or to Jane or Mary jointly; (iv) any oral statements or representations by the parties or either of them, whether made to the other or to third parties, including family members, friends, business associates, creditors, or otherwise; (v) the commingling by one party of either party's separate property with the separate property of the other party or with the parties' community property; or (vi) the payment by either party from either party's separate property of any obligation for the benefit of the other party or the parties jointly, including, but not limited to, the payment of mortgages, interest, assessments, taxes, or improvements.

12. LIMITATION ON APPLICABILITY OF COMMUNITY PROPERTY LAWS

The community property and quasi-community property laws of the State of California shall not apply to change the separate property of either party, or the income therefrom, to community or quasi-community property. Moreover, the marital property laws of any other state shall not apply to give either party any property rights other than those provided for in this Agreement.

13. BINDING AGREEMENT

13.1. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their heirs, successors, personal representatives, and assigns. All references herein to Jane or Mary shall also refer to their respective heirs, successors, personal representatives, and assigns where necessary to carry out the intent of this Agreement. Neither party intends by this Agreement to make any provisions for the other party's relatives, and none of such relatives shall be considered third party beneficiaries of this Agreement. No other party shall have any rights to enforce any of the provisions of this Agreement.

13.2. This Agreement shall remain in full force and effect even if the parties marry under the laws of any state of the United States or under the laws of any other country.

14. ENTIRE AGREEMENT; NO CHANGES WITHOUT WRITING

This Agreement is the entire understanding of the parties. There are no promises, representations, or undertakings by either party to the other except as herein set forth. No portion of this Agreement may be canceled or amended except by a written instrument executed and acknowledged by both parties.

15. ENFORCEMENT OF AGREEMENT

No failure of a party to enforce any part of this Agreement shall affect either party's right to enforce any part of this Agreement, and no waiver of a breach of any part of this Agreement shall waive any succeeding breach of any part of this Agreement. The form of this Agreement has been prepared,

and negotiations in connection herewith have been carried on, by both parties and their attorneys, and this Agreement shall therefore be construed simply and fairly and not strictly for or against either of the parties.

16. OWNERSHIP OF PROPERTY OUTSIDE CALIFORNIA

If during their registered domestic partnership the parties are residents of, or own property situated in, any state other than the State of California, their interests and rights in such property shall, notwithstanding the law of such state, be determined under this Agreement.

17. RESIDENCE OUTSIDE CALIFORNIA

17.1. The parties agree that if they establish a residence outside the State of California, each party shall agree to amendments to this Agreement that are reasonably necessary to conform to the law of the state of the parties' residence and that as closely as possible effect the parties' original intentions as expressed in this Agreement.

17.2. Each party shall reexecute this Agreement or agree to other formalities necessary to conform to the law of the state of the parties' residence.

17.3. None of the above provisions shall be construed as negating the parties' intention to have the validity, interpretation, construction, legality, and enforcement of this Agreement, the obligations and rights hereunder, the terms and conditions hereof, the meaning hereof, or any other matter relating hereto governed by the internal laws, and not the law of conflicts, of the State of California, regardless of whether this Agreement has been reexecuted or amendments made hereto.

18. GOVERNING LAW; CONSTRUCTION

The validity, interpretation, construction, legality, and enforcement of this Agreement, the obligations and rights hereunder, the terms and conditions hereto, the meaning hereof, or any other matter relating hereto shall be governed by the internal laws, and not the law of conflicts, of the State of California. If any part of this Agreement is found invalid, such part shall be deemed severed herefrom, and this Agreement shall other-

wise remain in full force and effect. Paragraph headings are used for convenience only and are not to be considered in the construction hereof.

19. EXECUTION OF NECESSARY DOCUMENTS

Each party, at the request of the other or either party's successors or assigns, shall execute, acknowledge, and deliver (i) whatever additional documents may reasonably be required to carry out the intention of this Agreement, including but not limited to any consent required under the Retirement Equity Act of 1984 so as to permit the designation of a beneficiary other than the domestic partner for death benefits payable under a qualified retirement plan, and (ii) any deeds or other documents in order that good and marketable title to any separate property can be conveyed by the requesting party, free from any claim of the other party arising by reason of their domestic partnership.

20. THIS AGREEMENT VOLUNTARY

Each party acknowledges that this Agreement has been made freely and voluntarily and that each party is signing this Agreement with a thorough understanding of the meaning, significance, and potential consequences of every term and provision hereof.

21. ATTORNEY FEES

If either party reasonably retains counsel for the purpose of enforcing or preventing the breach of any provision of this Agreement, for damages by reason of any alleged breach of any provision hereof, for a declaration of such party's rights or obligations hereunder, or for any other judicial remedy, then, if such matter is settled by judicial determination (which term includes arbitration), the prevailing party (whether at trial or on appeal) shall be entitled, in addition to such other relief as may be granted, to be reimbursed by the losing party for costs and expenses incurred thereby, including, without limitation, reasonable, itemized, and documented attorney fees and costs for the services rendered to such prevailing party. Notwithstanding any provision of this Paragraph 21 to the contrary, the aggregate amount recovered by the prevailing party under this Paragraph 21 shall not exceed Twenty Thou-

sand Dollars (\$20,000). This Paragraph 21 shall apply only to the enforcement or prevention of the breach of any provisions of this Agreement and shall not otherwise prevent a court of competent jurisdiction from awarding attorney fees and costs in connection with a dissolution of the parties' registered domestic partnership or the determination of custody or support of any minor children as provided in the California Family Code.

22. ADVICE OF COUNSEL

Each of the parties has been advised by separate and independent legal counsel of each party's own choosing; each party has given careful and mature thought to the making of this Agreement and is fully aware of the contents hereof; each party has had the Agreement fully explained by such legal counsel; and each party understands that the obligations assumed hereunder are in full satisfaction of all obligations that such party has now or might otherwise have to the other. Each party has been advised by each party's own legal counsel of the substantial rights (to inheritance and to property that such party could have under the laws of the State of California if the parties were to become registered domestic partners and then terminate or dissolve the registered domestic partnership, or if one party should die while the parties were in a registered domestic partnership with one another) that either party has renounced, waived, released, or relinquished by this Agreement. It has been acknowledged and agreed between the parties that the Attorney Certifications attached hereto are not intended to be and are not waivers of the attorney-client privilege.

23. COUNTERPARTS

This Agreement may be executed in counterparts.

THIS AGREEMENT is executed at _____, California, this _____ day of _____, 2005.

Jane Smith

Mary Jones

STATE OF CALIFORNIA)
)
) ss
)
 COUNTY OF LOS ANGELES)
 _____)

On _____, 2005, before me, _____, Notary Public, personally appeared Jane Smith, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

 Notary Public

STATE OF CALIFORNIA)
)
) ss
)
 COUNTY OF LOS ANGELES)
 _____)

On _____, 2005, before me, _____, Notary Public, personally appeared Mary Jones, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

 Notary Public

ATTORNEY CERTIFICATIONS

The undersigned hereby certifies that he is an attorney at

law duly licensed and admitted to practice in the State of California, that he has fully advised and consulted with Jane Smith in connection with her property rights and has fully explained to her the legal effect of the foregoing Agreement and the effect that it has upon rights otherwise obtaining as a matter of law, and that Jane Smith, after being duly advised by the undersigned, acknowledged to the undersigned that she understood the legal effect of the foregoing Agreement and executed the same freely and voluntarily. Nothing in this certification shall be deemed to waive the attorney-client privilege.

LAW OFFICES OF _____

Date: _____

Name of Attorney
Attorney for Jane Smith

The undersigned hereby certifies that she is an attorney at law duly licensed and admitted to practice in the State of California, that she has fully advised and consulted with Mary Jones in connection with her property rights and has fully explained to her the legal effect of the foregoing Agreement and the effect that it has upon rights otherwise obtaining as a matter of law, and that Mary Jones, after being duly advised by the undersigned, acknowledged to the undersigned that she understood the legal effect of the foregoing Agreement and executed the same freely and voluntarily. Nothing in this certification shall be deemed to waive the attorney-client privilege.

Date: _____

Name of Attorney
Attorney for Mary Jones

JANE SMITH FINANCIAL STATEMENT

CURRENT ASSETS

LIABILITIES

APPROXIMATE NET WORTH

ANTICIPATED INCOME FOR 2005 APPROXIMATELY

APPROXIMATE NET WORTH

ANTICIPATED INCOME FOR 2005 APPROXIMATELY

ACKNOWLEDGMENT RE: FINANCIAL DISCLOSURES

The undersigned, Jane Smith, hereby acknowledges receipt of the financial statement of Mary Jones and that she has carefully and completely examined Mary Jones's financial condition, including assets and liabilities, as disclosed on said financial statement. The undersigned further acknowledges that she has made all inquiries of Mary Jones or of her attorneys that she has deemed necessary or appropriate regarding Mary Jones's financial condition and that she voluntarily and expressly waives any right to disclosure of the property or financial obligations of Mary Jones beyond the disclosures provided in said financial statement.

Date: _____, 2005

Jane Smith

STATE OF CALIFORNIA)

)

)

ss

)

COUNTY OF LOS ANGELES)

)

On _____, 2005, before me, _____, Notary Public, personally appeared Jane Smith, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Notary Public

Comment: This form is an illustrative version of a complete pre-

gistration domestic partnership agreement, with attached financial disclosures of the parties and acknowledgement of the disclosures. It is intended to illustrate the type of matters to be addressed by parties who intend to register as domestic partners with the California Secretary of State. See Fam C §§298.5, 1600-1617. The disclosures should be made before the agreement is signed (preferably early on in the negotiations), but the agreement and disclosure acknowledgment may be signed on the same day. On the special “seven calendar day” rule, see §5.11.

This form of agreement is cast in the form of a “confirmation style agreement”—an agreement that confirms that certain property of the parties will remain separate property, such as a business, various items of personal and real property, or a retirement plan owned before domestic partnership registration. This type of agreement does not change the default rule that property acquired during the domestic partnership is presumed to be community property. See Fam C §§297.5(a), 760. For alternative clause language in the form of a “separate property agreement,” see §5.43.

Note that with respect to a clause providing for the payment of attorney fees, the clause illustrated in the agreement above should be used with caution, because it may provide an incentive for the impecunious partner to litigate, since he or she might feel there is “nothing to lose.” On related clauses that may be utilized in a preregistration agreement, see §§5.41-5.49. On the possibility that parties to this type of agreement may be held to a higher standard of disclosure of their assets and liabilities before entering into the agreement than other unmarried persons, see §§5.7-5.8.

It is important for the attorney to keep in mind that there are important potential income, gift, and estate tax consequences that may attend a property agreement in the domestic partnership context, because the rules applicable in traditional premarital situations do not apply (see chap 15). Family law and estate planning attorneys are urged to consult with tax counsel and accountants, as needed, in connection with the drafting of an agreement governing the rights of persons intending to register as domestic partners.

For a general discussion of preregistration and similar agreements, respectively, see §§5.7-5.18, and California Marital Settlement and Other Family Law Agreements (3d ed Cal CEB 2005).

§5.52 2. Form: Postregistration Domestic Partnership Agreement**Postregistration Domestic Partnership Agreement**

This Agreement, effective as of the date of the second party to sign (the "Effective Date"), is made between Robert Allen Jones ("Robert") and Raymond Thomas Brown ("Raymond").

1. PURPOSE

This Agreement is made pursuant to California Family Code §721, and in a spirit of mutual cooperation. We desire to define our respective property rights in our registered domestic partnership in an effort to strengthen our bond to each other.

2. CONSIDERATION

We realize that under California community property law, or under the laws of other states or countries that provide for various forms of marital or domestic partner property rights, each of us might acquire an interest in property that the other owned before our registered domestic partnership, or in specified other properties that we acquire during our registered domestic partnership. It is our desire that certain properties owned by each of us shall remain separate property, and that the other party shall acquire no interest in these properties by virtue of our registered domestic partnership relationship. We have divided our property equitably between us partly on the basis of who was primarily responsible for earning it. We understand that under California law, we are both deemed to have contributed equally to the acquisition of this property; however, to us, dividing the property according to who was directly responsible for earning it is fair and will strengthen our union. Thus, Raymond will receive more of our existing property but will waive any interest that he has in Robert's dental practice and the future income therefrom. Thus, each of us preserves certain assets as that party's respective separate property to the exclusion of the other, and waives certain property rights that he would or might acquire in the property of the other, and these benefits and waivers form the consideration for this Agreement.

3. STATISTICAL INFORMATION

The following information is set forth by us:

Parties' domestic partnership registered on: _____, 2005

Robert's Information

Full Legal Name: Robert Allen Jones
Mailing Address:
Date of Birth:
Citizenship: U.S.
Residence for Tax Purposes: California

Raymond's Information

Full Legal Name: Raymond Thomas Brown
Mailing Address:
Date of Birth:
Citizenship: U.S.
Residence for Tax Purposes: California

4. DISCLOSURES

4.1. *Separate Property.* We acknowledge that we have each made to the other a full and complete disclosure of the nature, extent, and probable value of all of our assets and liabilities, and these disclosures are set forth in Exhibits _____. We are aware of no unique investment opportunities that have not been disclosed to the other. We are aware of no obligations for which the registered domestic partnership community may be liable, other than those disclosed in the Exhibits hereto. The values of the assets set forth on the Exhibits hereto represent either the values set forth on the latest statements, the cost of the investment, or our best opinion of value.

4.2. *Income.* Robert had income in 2000 of \$570,000 from his dental practice, \$533,000 from interest and dividends, and \$76,000 in capital gains from investments. Raymond had income in 2000 of \$96,000 in salary, \$721,000 in bonuses, \$996,000 from interest and dividends, and \$5,323,000 in capital gains from investments. Raymond represents that this level of income is historically extraordinary.

4.3. Accuracy of Information. It is understood that the figures and amounts listed in section 4.2 and in Exhibits _____ are intended to be reasonably accurate and do not differ substantially from what each of us believes is correct regarding his respective property. It is further understood that no appraisals have been done on any of the properties for purposes of this Agreement. We agree that the foregoing disclosures are not an inducement to enter into this Agreement, nor do they constitute any consideration for this Agreement. We agree that we would enter into this Agreement regardless of the nature, extent, and value of each other's assets, liabilities, income, or expenses, and regardless of any financial arrangements for the benefit of either of us by the other. Therefore, no error, omission, or inaccuracy in section 4.2 or in Exhibits _____ shall create any legal right in favor of either of us, nor shall any such error, omission, or inaccuracy constitute grounds for any legal remedy by either of us against the other, including but not limited to challenging the validity or enforceability of this Agreement. The present value of the assets is agreed to be the value as of the dates shown in Exhibit _____.

5. PROPERTY CONSIDERATIONS AND AGREEMENTS

5.1. Community and Separate Property. We have been advised by our respective counsel that under California law:

5.1.1. Any property owned by a party before registration of a domestic partnership is presumptively the separate property of that party.

5.1.2. Any property received after registration of a domestic partnership by gift from a registered domestic partner or any other person, and any property received as the result of the death of any person by will, trust, or intestate succession, is presumptively the separate property of the person receiving it.

5.1.3. After registration of our domestic partnership, the income from separate property presumptively remains separate property and the increase in value of separate property presumptively remains separate property. There are some California cases that have held that when the increase of value, profits, or extraordinary income results specifically from the

efforts of a spouse after marriage, a portion of the increase in value, profits, or income can be apportioned to the community. We understand that the effect of these cases may be modified by an agreement, and it is our intent to modify such effect by this Agreement.

5.1.4. Family Code §2640 provides that in the event of a dissolution of our registered domestic partnership, contributions from separate property to the acquisition of jointly held property will be reimbursed to the contributing party without interest or adjustment for change in value. This rule may be waived, but requires a specific waiver in writing.

5.1.5. We may change the character of property from separate to community or community to separate by the terms of this Agreement or by another instrument in writing. If this is done, it should be done very carefully, and preferably with legal advice, with full understanding of the consequences, including the relationship of the change to the death of either of us or to the termination of our marital status.

5.1.6. If one registered domestic partner obtains an advantage over the other in an interpartner transaction, the law presumes that such transaction was induced by undue influence.

5.1.7. There are additional rules based on case law and statute that affect the character of whether property is community property or separate property and when rights of reimbursement apply. Each of us has been advised to discuss the applicable law with his or her own attorney to fully understand the concepts of community and separate property and the effect of this Agreement. Nothing in this section 5.1 shall have the effect of determining or changing our rights.

5.1.8. Notwithstanding the foregoing, and absent a future agreement in writing by us, our intent is to specifically define property that hereafter remains the separate property of each of us or becomes under the terms of this Agreement either community property or separate property of the other party.

5.2. *Description of Separate Property.* We agree that the property described in Exhibit _____, attached to and made a part of this Agreement by reference, is the separate property of Raymond, and the property described in Exhibit _____,

attached to and made a part of this Agreement by reference, is the separate property of Robert. We agree that the property described in Exhibit _____ shall remain the sole and separate property of Raymond, and the property described in Exhibit _____ shall remain the sole and separate property of Robert. Except as otherwise specifically provided herein, all separate property shall be confirmed without offset to the person owning it and no separate property belonging to one party shall be awarded to the other party. To the extent that either of us has a community property interest in the property confirmed as the separate property of the other, our intention is to waive any community property interest that we may have therein.

5.3. Community Property. We have community property as set forth in Exhibit(s) _____ to this Agreement. We agree to utilize the Bank of America account listed on Exhibit _____ to pay a portion of our income tax liability for the year _____.

5.4. Management of Property. As provided by the law of the State of California, each of us shall have the right of management of his or her separate property, and community property shall be subject to joint management.

5.5. Increased Value of Separate Property During Registered Domestic Partnership. Except as provided below, we agree that all rents, issues, profits, appreciation, or increase in the value of property described in Exhibit(s) _____ that shall result for any reason, including but not limited to the personal services, skill, and work of either of us, shall remain the separate property of the owner of that property. Each of us understands that, except for this Agreement, the earnings, income, and increase in value of such property resulting from personal services, skill, effort, and work of one of us could, under certain case law, in whole or in part, be determined to be our community property, but under the terms of this Agreement shall specifically remain the separate property of the owner. We acknowledge that it is our intent to avoid any apportionment of ownership of this property as was applied or discussed in *Pereira v Pereira* (1909) 156 C 1, *Van Camp v Van Camp* (1921) 53 CA 17, *Todd v McColgan* (1949) 89 CA2d 509, *Beam v Bank of America* (1971) 6 C3d 12, *Marriage of*

Dekker (1992) 17 CA4th 842, and like cases. Notwithstanding anything in this Agreement to the contrary, we agree that the following property shall be treated specially.

5.5.1. Family Residence

5.5.1.1. We live in the residence located at 21757 Moorpark Avenue, Los Angeles, California ("the Family Residence"). A legal description of the Family Residence is attached as Exhibit _____.

5.5.1.2. We agree that the Family Residence shall be community property on the Effective Date. The community shall assume any loans outstanding on the Family Residence on the Effective Date. This residence is currently titled in our family trust and it is our intention for the trust to maintain title to this property. We agree that neither party shall unilaterally attempt to remove it from the trust.

5.5.1.3. The increase in equity in the Family Residence after the Effective Date and during the registered domestic partnership because of appreciation and pay down of the encumbrance against the residence shall be community property, regardless of which of us makes the payments on the "mortgage." Neither of us shall have a right of reimbursement for payments that we make from our separate property that reduce the encumbrance. If either of us makes substantial improvements to the residence using separate property, we agree that that person's separate property shall not be reimbursed for the cost of the improvements.

5.5.1.4. We shall agree from time to time on the allocation of the payment of expenses associated with the family residence.

5.5.1.5. We expect that in the future we may sell the Family Residence and purchase a new residence (the "New Residence"). The net proceeds of the sale of the Family Residence (after subtracting commissions and other expenses of sale) shall be applied towards the New Residence. If the net proceeds exceed the purchase price of the New Residence, the surplus shall be our community property. If the purchase price of the New Residence exceeds the net proceeds from the sale of the Family Residence, the balance shall be paid by us equally

unless we agree to a different proportion, in which case all of the funds for the purchase price will be deemed to have been contributed to the community and neither of us shall have any right of reimbursement for our separate property contributions thereto, and we hereby waive any right to reimbursement under Family Code §2640.

5.5.2. *Tooth & Gum Partnership.* "TOOTH & GUM" is a dental firm partnership that acquired Robert's prior dental firm (Jones Dental Group). It is anticipated that Robert will devote long hours to TOOTH & GUM PARTNERSHIP and that as a result thereof, the value of this partnership interest will grow rapidly. We agree that, despite California community property law to the contrary, it is fair that all income, profits, appreciation, and increase in the value of said TOOTH & GUM PARTNERSHIP, or any future dental firm that Robert may join or form, shall remain Robert's separate property. Each of us understands that (1) as a general rule the earnings, income, and increase in value of property acquired during our registered domestic partnership is community property and (2) earnings, income, and increase in value of community property attributable to personal services, skill, effort, and work of one or both of us is community property. Raymond further understands that the value of Robert's former dental practice was also a community asset. Nevertheless, we agree that any increased value in Robert's dental practice, including but not limited to "goodwill," shall be and remain the separate property of Robert and that any claim for a community interest in the increased value based on the above concepts is specifically waived by Raymond.

5.5.3. *Waiver of Community Property Rights in Intangible Assets.* Each of us waives any claim to any community property interest in the following assets the other may now have or may create during our registered domestic partnership: (1) intangible career assets, including education, training, degrees, and licenses, and any goodwill related to a business (including but not limited to Raymond's interests in Penner Capital Management) or profession and (2) intellectual property rights, including publications, writings, musical creations, inventions, film, video, software, ideas, and other creative works. This waiver includes any rights to copyright, trademark, prizes, awards, and other creative work regardless of whether or not they have been realized in the form of monetary compensation

or a contract for payment of money during our registered domestic partnership (and before any separation of us, should that occur). Any claim that such assets have a community property component resulting from efforts of the other party during our registered domestic partnership (and before any separation of us, should that occur) is waived.

5.5.4. *Deferred Compensation.* As used in this section, the term “deferred compensation” shall include employee benefit plans of all types, pension plans, annuity plans arising in connection with employment, defined contribution or account balance plans, SEP IRAs, SEP plans, profit-sharing plans, 401(k) plans, ERISA-governed plans, qualified plans, nonqualified plans of deferred compensation, statutory entitlements connected with employment, and IRA accounts for which voluntary contributions are made during the registered domestic partnership, but the term “deferred compensation” shall not include any deferred performance fees or other compensation or benefits arising from or accruing to any of Raymond’s separate property listed in Exhibit _____. Each of us agrees that all money and other assets contained in any “deferred compensation” as broadly defined herein, including any future contributions, shall be our community property without right of reimbursement despite the contributions thereto being made with our separate property earnings.

5.6. *General Debts, Known and Unknown.* The owner shall be responsible for paying any and all debts, liabilities, or obligations (“obligations”) secured by or directly related to property designated as separate under the terms of this Agreement unless otherwise specifically provided in this Agreement. All other obligations incurred before our registered domestic partnership shall be paid by the person responsible for incurring such obligation. Each of us agrees that the party whose responsibility it is to pay an obligation shall hold the other party free and harmless from that obligation.

5.7. Maintaining and Changing Character of Property

5.7.1. *Title Determines Ownership.* Title shall determine the ownership interest of each of us in any real property held by us or in any personal property that is specifically titled unless we agree otherwise in writing, including in this Agreement.

However, titling errors that are made by third parties, or incorrect titling that clearly conflicts with the intent of a party or parties changing or taking title, are subject to correction. We understand that holding property as community property, tenants in common, in joint tenancy, or in other forms may have important legal consequences to each of us. We have been advised that we should review and understand the consequences of the form of ownership at any time we take title to assets or property in any form as joint owners.

5.7.2. *Change in Form of Property.* We agree that a change in the form of separate or community property shall not constitute a change of character of that property. For example, if an asset is purchased using funds from a party's separate property bank account, the asset remains that party's separate property.

5.7.3. *Transfers of Ownership.* Notwithstanding the provisions of this Agreement, either of us may transfer, convey, devise, or bequeath any property to the other after the Effective Date. Neither of us intends by this Agreement to limit or restrict in any way the right to receive any such transfer, conveyance, devise, or bequest from the other at such future time. Any such transfers in excess of \$5000 in value must be evidenced by a written instrument signed by the transferor, except for clothing, jewelry, or personal effects.

5.7.4. *Commingling of Property.* The occurrence of transfers through a community account or other form of community ownership or the mistaken commingling or otherwise failing to segregate the separate property or separate income of either of us by a third party or by either of us shall not change or constitute a change of character of that property or income, nor shall it constitute a transmutation of that separate property or income into community, quasi-community, joint marital, or other similar type of property, and vice versa, except that the terms of sections 5.7.1 and 5.7.2 shall prevail.

5.7.5. *Use of Community Credit or Payments.* If either of us signs a loan for the benefit of the separate property of the other, this shall not be the basis for any claim that such separate property is transmuted in whole or part to community property, and each of us waives any community interest that

might otherwise be made in such separate property. Any payments from community property on a loan, taxes, maintenance, or improvements for the benefit of separate property shall not change the character of such property but shall be subject to reimbursement to the community with reasonable interest subject to any offsets allowed by law.

6. INCOME

6.1. *Earnings During Registered Domestic Partnership.* We agree that all earnings, salaries, commissions, income, stock, stock options, or other employee benefits (except deferred compensation as described in section 5.5.4 of this Agreement) resulting from personal services, skills, and efforts of either of us shall be and remain the sole and separate property of the acquiring party. Each of us voluntarily relinquishes all of his or her interest in all such property of the other; each acknowledges and understands that earnings, salaries, commissions, income, stock, stock options, or other employee benefits resulting from personal services, skills, and efforts of the other party would be our community property in the absence of this Agreement.

6.2. *Compensation for Personal Injuries.* All compensation for personal injuries received by either of us shall be the separate property of the injured party.

7. TRANSFERS ON DEATH

Each of us shall have the right to make his own respective distribution of separate property and of his respective share of the community property as provided for under the laws of the State of California. We agree to keep each other reasonably advised of the contents of our respective wills or trust agreements so that at all times each of us shall know what each of our expectations under any will or trust agreement will be. Failure to keep the other party informed shall not be a basis for declaring this Agreement or any will or trust agreement invalid, but we do agree from time to time to exchange information concerning disposition of our respective estates.

8. TAX RETURNS

8.1. *Tax Filing.* We shall mutually agree whether to file separate federal and state income tax returns. Each of us shall cooperate and furnish all necessary documentation to the other party for the timely preparation and filing of a separate return. We acknowledge that under Family Code §297.5(g), registered domestic partners must utilize for state income tax returns the same filing status as would be used in filing federal income tax returns, and that at this time it appears that only separate returns may be filed by registered domestic partners.

9. WAIVER OF MARVIN CLAIMS

We acknowledge that we have been advised by our attorneys of the principles enunciated by the California Supreme Court in the case of *Marvin v Marvin* (1976) 18 C3d 660, which addressed claims arising by virtue of couples living together before marriage. We have not entered into any express or implied agreement as contemplated in that case. In consideration for all of the other provisions of this Agreement, each of us expressly relinquishes any rights, claims, or remedies arising out of our relationship before registration of our domestic partnership.

10. TESTAMENTARY DOCUMENTS

In the event that either of us executes a will, living trust agreement, or other estate planning document after the Effective Date, we agree that any such document shall not be admissible in evidence in a subsequent proceeding for dissolution of our registered domestic partnership, legal separation, or nullity to determine whether or not any property owned by either of us is community property or separate property. We have no present expectation, however, that such proceeding will ever take place.

11. ATTORNEY REPRESENTATION AND FEES

11.1. *Attorney Representation.* Raymond has retained _____, an attorney at law duly licensed to practice in the State of California, to advise him in connection with this Agreement. Robert has retained _____, an attorney at law

duly licensed to practice in the State of California, to advise him in connection with this Agreement.

11.2. *Attorney Fees.* Each of us shall pay his own respective attorney fees and costs incurred in the negotiation and preparation of this Agreement.

12. MEDIATION OF DISPUTES

If any dispute arises under the terms of this Agreement, we agree to submit the dispute to mediation. The mediator shall be selected by the presiding judge of the family law court in the county where we reside. The costs of the mediation shall be paid one-half by Robert and one-half by Raymond. Each of us shall pay his own respective attorney fees incurred in connection with the mediation.

13. ADDITIONAL PROVISIONS

13.1. *Definition of Separation.* The term "separation" as used in this Agreement shall mean that each of us is living separate and apart from the other with the intent to end our registered domestic partnership. A statement of separation in writing by either of us shall be determinative. Neither of us has any present intention to separate from the other, however, or to end our registered domestic partnership.

13.2. *Entire Agreement.* This Agreement is intended to be our final, complete, and exclusive agreement on the matters it covers. It supersedes any previous or contemporaneous oral or written agreements between us with respect to these matters. There are no representations, warranties, promises, or agreements with respect to these matters except as set forth in this Agreement.

13.3. *Amendments and Waivers.* This Agreement may not be amended or terminated except by an instrument in writing, signed by each of us. No failure to exercise and no delay in exercising any right, remedy, or power under this Agreement shall operate as a waiver thereof. No modification, alteration, or waiver of any term, covenant, or condition of this Agreement shall be valid unless it is in writing and signed by each of us. We understand that oral promises or promises inferred from conduct that would modify the terms of this Agreement will

not be binding on either of us. We have been advised that we should obtain the advice of independent counsel before entering into any future agreement between us.

13.4. *Statements or Acts Inconsistent With This Agreement.* We recognize the possibility that we may from time to time discuss the possibility of altering or amending the terms of this Agreement (e.g., by acquiring jointly owned property, or entering into a partnership or joint venture, etc.). It is specifically agreed that any statements made during those discussions, whether or not phrased in terms of promises, agreements, representations, or otherwise, shall not be binding, and shall be null and void, and of no force and effect, and shall be considered as discussions only, unless and until they are reduced to a written agreement signed by both of us. We further recognize the possibility that each of us may, from time to time, act in such a way and engage in such conduct as to lead the other to believe that he or she intends to alter or amend the terms of this Agreement. It is specifically agreed that any such act or conduct by either of us shall not be binding, and shall be null and void, and of no force and effect, regardless of the inference drawn therefrom by the other party, in the absence of a written agreement signed by both of us setting forth our understanding.

13.5. Binding Effect

13.5.1. This Agreement shall inure to the benefit of, be enforceable by, and be binding on, us and our heirs, personal representatives, assigns, and any other successors in interest. The terms of this Agreement shall not benefit any other person or entity, except as specifically enumerated in this Agreement.

13.5.2. This agreement shall remain in full force and effect even if the parties marry under the laws of any state of the United States or under the laws of any other country.

13.6. *Severability.* If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions shall remain in full force and effect and shall in no way be affected, impaired, or invalidated.

13.7. *Governing Law.* We intend to domicile in California,

and this Agreement shall be governed by and construed in accordance with the laws of the State of California in all respects, including but not limited to any liability for the obligations of the other, and the characterization and division of property.

13.8. *Change of Residence.* We have been advised that certain provisions of this Agreement may be in conflict with the law of other jurisdictions. If we change our residence from California to another state, we agree to consult with an attorney or attorneys in the new jurisdiction to determine if this Agreement presents any problems in the new jurisdiction. If either of us is advised that there are sufficient legal issues to constitute a problem, this Agreement may be reformed to effectuate the original intent by mandatory mediation upon the request of either of us.

13.9. *Interpretation.* This Agreement shall be construed as a whole, according to its fair meaning, and not in favor of or against either of us. For example, no provision shall be construed in favor of the party receiving a benefit nor against the party responsible for any particular language. Section headings are used for reference purposes only and should be ignored in the interpretation of this Agreement.

13.10. *Counterparts.* This Agreement may be executed in any number of counterparts, each of which shall constitute one and the same original.

13.11. *Execution of Other Instruments.* We agree that we shall willingly, at the request of the other party or the successors or assigns of the other party, execute, deliver, and properly acknowledge whatever additional instruments may be required to carry out the intention of this Agreement.

13.12. *Acknowledgments.* Each of us acknowledges that he (a) is fully informed about the facts relating to the subject matter of this Agreement and about the rights and liabilities of both of us; (b) enters into this Agreement voluntarily, free from fraud, undue influence, coercion, or duress of any kind; (c) has read, considered, and understands each provision of this Agreement and its consequences; and (d) believes this Agreement to be fair, reasonable, and not unconscionable.

13.13. Confidentiality. We understand and agree that this Agreement and each of its terms and the negotiations surrounding it are confidential and shall not be disclosed by either of us to any entity or person for any reason at any time without the prior written consent of the other party, unless required by law; except that, if necessary, either of us may disclose the terms of this Agreement to legal, financial, and tax advisors.

Each undersigned party agrees to the terms and conditions of this Agreement.

Robert Allen Jones
Date Executed: _____

Raymond Thomas Brown
Date Executed: _____

Approved as to Form and Content:

Attorney for Robert Allen Jones

Attorney for Raymond Thomas Brown

STATE OF CALIFORNIA)
)
) ss
)
COUNTY OF LOS ANGELES)

)

On __[date]__, before me, the undersigned, a Notary Public, personally appeared Robert Allen Jones, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Notary Public

STATE OF CALIFORNIA)
)
)
)
COUNTY OF LOS ANGELES)

)

On __[date]__, before me, the undersigned, a Notary Public, personally appeared Raymond Thomas Brown, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Notary Public

[Attach Exhibits, e.g., of each party's separate assets and liabilities, including liabilities for which community may be liable]

Comment: This form is an illustrative version of a complete postregistration domestic partnership agreement. It is intended to illustrate the types of matters that parties to an ongoing registered domestic partnership (who do not intend to separate or dissolve the partnership) may wish to address if they desire to clarify their rights and responsibilities with respect to property and other matters during the existence of their domestic partnership. For additional clauses that may be utilized in a postregistration agreement, see §§5.41-5.49. On the nature of postregistration agreements and the level of disclosure required in connection with drafting them, see §§5.19, 5.21.

It is important for the attorney to keep in mind that there are important potential income, gift, and estate tax consequences that may attend a property agreement in the domestic partnership context, because the rules applicable in marital situations do not apply (see

chap 15). Family law and estate planning attorneys are urged to consult with tax counsel and accountants, as needed, in connection with the drafting of an agreement governing the rights of domestic partners in an ongoing relationship.

For a general discussion of postregistration and similar agreements, respectively, see §§5.19–5.25, and California Marital Settlement and Other Family Law Agreements, chap 18 (3d ed Cal CEB 2005).

**§5.53 3. Form: Simple Domestic Partnership
Dissolution Agreement—Partners Waive
Support and Own Primarily Separate
Property**

**Simple Domestic Partnership Dissolution Agreement—Partners
Waive Support and Own Primarily Separate Property**

1. *Identification of Parties.* This agreement is made between Thomas M. Black, hereafter referred to as “Thomas,” and Patrick A. Green, hereafter referred to as “Patrick.”

2. *Date of Domestic Partnership Registration.* The parties were registered by the California Secretary of State’s Office as domestic partners on __[date]__, 2003, and ever since then have been and are registered domestic partners.

3. *Date of Separation.* The parties separated from one another and thereby made a complete and final break in their personal relationship as of __[date]__, 2005. As used in this Agreement, the “date of separation” refers to this date.

4. *Irreconcilable Differences.* Irreconcilable differences have led to the irremediable breakdown of the registered domestic partnership, and there is no possibility of saving the domestic partnership through counseling or other means.

5. *Minor Children of the Registered Domestic Partnership.* There is one minor child of the parties’ registered domestic partnership: Jane Marie Green-Black, born May 10, 2001, and adopted jointly by the parties on __[date]__, 2004, by order of the California Superior Court, County of __[name of county]__, in action number __[number]__. This child is not related by blood to either Thomas or Patrick.

6. Dissolution Proceedings. A petition for dissolution of the registered domestic partnership of the parties was filed on __[date]__, 2005, in the Superior Court of California, County of __[name of county]__, case number __[number]__, and that action is currently pending.

7. Purpose of Agreement. Except as otherwise provided in this agreement, its purpose is to make a final and complete settlement of all rights and obligations between the parties, including all property rights and all rights and obligations concerning child custody and visitation, child support, and "spousal" (partner) support.

8. Child Custody. Thomas and Patrick will have joint legal custody of their minor child, Jane Marie Green-Black. Patrick will have sole physical custody of the minor child, subject to visitation by Thomas as set forth in Paragraph 9 of this Agreement.

9. Visitation. Thomas will have reasonable rights of visitation with the minor child.

10. Child Support. Thomas will pay to Patrick for child support for Jane Marie Green-Black the sum of \$500 per month, an amount that equals what is required under the California statewide uniform guideline, payable in advance, on or before the fifth day of each month, commencing __[date]__, 2005, and continuing until the first to occur of the following events:

(a) The child attains age 19, or has attained age 18 and either is not a full-time high school student or is self-supporting;

(b) The child dies;

(c) The child enters into a valid marriage, is on active duty with any of the armed forces of the United States of America, receives a declaration of emancipation under California law, or otherwise becomes emancipated by leaving home and becoming self-supporting;

(d) Patrick dies and Thomas assumes custody of the child;
or

(e) Further court order.

11. *Maintenance of Health Insurance for Child.* Thomas will maintain coverage for the minor child under the medical and dental insurance currently provided through his employment. To facilitate the use of such coverage for the child, both parties will cooperate fully and in a timely manner, including but not limited to obtaining and providing all necessary insurance cards and claim forms, completing and submitting all necessary documents, and delivering all insurance payments. For purposes of duration and modification, this provision will be deemed part of the child support orders made by the court in the parties' dissolution action. If such insurance becomes unavailable to Thomas on substantially the same terms as at present, he will provide similar coverage, if any, available to him at no cost or reasonable cost. This provision is intended, when ordered by the court, to be a Qualified Medical Child Support Order, as that term is used in 29 United States Code §1169. The names and last-known mailing addresses of the plan participant and each child covered by this order are Thomas M. Black, 1655 Fourth Street, Clearview, CA 95603, and Jane Marie Green-Black, 36 Parker Place, Clearview, CA 95603. The type of coverage to be provided is the group plan Coverage A provided through Thomas's employment. The period to which this order applies is the period during which Thomas's child support obligation for the child continues.

12. *Payment of Health Care Expenses Not Covered by Insurance.* Patrick will pay all medical, dental, orthodontic, optical, psychiatric, psychological, and other health care expenses of the minor child to the extent not covered by insurance. For purposes of duration and modification, this provision will be deemed part of the child support orders made by the court in the parties' dissolution action.

13. *Waivers of "Spousal" Support Between Partners.* Each party hereby waives and releases all rights and claims to receive "spousal" support from the other at any time, whether characterized as "spousal support," "domestic partner support," or otherwise. As used in this Agreement, "spousal support" and "domestic partner support" refer to support under Family Code §§3580, 3590-3604, 3650-3693, 4300-4360, 4500-4508, and like provisions of California law. No court will have jurisdiction to

order support payable by either party to the other at any time, regardless of any circumstances that may arise. This paragraph does not apply with respect to child support and maintenance of health insurance for the parties' minor child.

14. Identification and Confirmation of Separate Property. The following are the separate assets of Thomas, to be confirmed to him as his separate property. Patrick disclaims and waives any and all rights and interest in each asset:

(a) Any and all interest in Public Employees' Retirement System, account number *****-7720;

(b) Any and all beneficial interest standing in Thomas's name in the estate of Alice Louise Black, pending in Westover County Superior Court, action number 31762-2, including but not limited to a one-third share of the residue of the estate.

The following are the separate assets of Patrick, to be confirmed to him as his separate property. Thomas disclaims and waives any and all rights and interest in each asset:

(a) Any and all interest in State Teachers' Retirement System, account number ***-***-4121;

(b) 1991 Volvo I64E automobile, California license number 886DDF.

15. Warranty of Full Disclosure of Existence of Assets. Each party warrants to the other that he does not have any knowledge of any community assets other than those disclosed and listed in this agreement.

16. Remedy for Breach. If either party has any knowledge of any community asset other than those disclosed and listed in this agreement, that warrantor will transfer or pay to the warrantee, at the warrantee's election, one of the following:

(a) If the asset is reasonably susceptible to division, a portion of the asset equal to the warrantee's interest in it;

(b) The fair market value of the warrantee's interest in the asset on the effective date of this agreement, plus interest at

the rate of 10% per annum from the effective date to the date of payment; or

(c) The fair market value of the warrantee's interest in the asset on the date on which the warrantee discovers the existence of the asset, plus interest at the rate of 10% per annum from the discovery date to the date of payment.

This provision will not be deemed to impair the availability, in a court of competent jurisdiction, of any other remedy arising from nondisclosure of community assets.

17. *Warranty of Full Disclosure of Existence of Liabilities.* Each party warrants to the other that he neither has incurred nor will incur, on or before the effective date of this agreement, any liability not disclosed and listed in this agreement on which the other is or may become personally liable or that could be enforced at any time against an asset held or to be received under this agreement by the other party.

18. *Remedy for Breach.* If either party has incurred or does incur, on or before the effective date of this agreement, any liability not disclosed and listed in this agreement on which the other is or may become personally liable or that could be enforced at any time against an asset held or to be received under this agreement by the other party, that warrantor will fully indemnify the other with respect to the obligation, including but not limited to any and all liability on the obligation, attorney fees, and related costs. This provision will not be deemed to impair the availability, in a court of competent jurisdiction, of any other remedy arising from nondisclosure of such liabilities.

19. *Warranty Regarding Undisclosed Gifts or Transfers.* Each party warrants to the other that he has made no undisclosed gifts or transfers for less than adequate consideration of any community assets with fair market values over \$250 without the other party's knowledge.

20. *Remedy for Breach.* If either party has made any undisclosed gift or transfer for less than adequate consideration of any community asset with a fair market value over \$250 without the other party's knowledge, that warrantor will pay to the warrantee a sum equal to half of the fair market value

of the asset transferred, with the fair market value to be determined, at the warrantee's election, as of either (a) the effective date of this agreement or (b) the date on which the warrantee discovers the transfer, less any appreciation in the asset's value attributable solely to acts of the transferee(s) and successor(s). The warrantor will further pay to the warrantee interest at the rate of 10% per annum from the date elected for determination of the fair market value of the asset to the date of payment. This provision will not be deemed to impair the availability, in a court of competent jurisdiction, of any other remedy arising from undisclosed gifts or transfers for less than adequate consideration.

21. Warranty Regarding After-Acquired Liabilities. Each party warrants to the other that he will not incur, after the effective date of this agreement, any liability on which the other will be or may become personally liable or that could be enforced against an asset held by the other party.

22. Remedy for Breach. If either party incurs, after the effective date of this agreement, any liability on which the other will be or may become personally liable or that could be enforced against an asset held by the other party, that warrantor will indemnify the other for any liability on the obligation, attorney fees, and related costs.

23. Identification and Division of Community Property. Thomas will be awarded and assigned, as his share of the community property, the following assets:

(a) All household furniture, furnishings, and appliances at the residence at 1655 Fourth Street, Clearview, California 95603.

(b) Balance on deposit in Thomas's name with Acme Bank, 1500 University Avenue, Clearview, California, account number ***-27312;

Patrick transfers to Thomas as his separate property all of his rights and interest in each asset.

Patrick will be awarded and assigned, as his share of the community property, the following assets:

(a) All household furniture, furnishings, and appliances at the residence at 36 Parker Place, Clearview, California 95603.

(b) Balance on deposit in Patrick's name with Bank of the Valley, 1403 North Ridge St., Clearview, California, account number ****-3456.

Thomas transfers to Patrick as his separate property all of his rights and interest in each asset.

The parties agree and acknowledge that they have no community liabilities.

24. Payment of Attorney Fees and Costs. Each party will bear all of his own respective attorney fees and costs incurred in connection with the negotiation, preparation, and execution of this agreement and the pending proceeding for dissolution of the registered domestic partnership.

25. Tax Returns. Thomas and Patrick agree to file separate income tax returns with the State of California and the Internal Revenue Service for the current tax year, to utilize the same tax preparer, and to provide one another with a specimen copy of their respective returns. They further agree to separately pay for the preparation of their own respective returns. Should either party fail to cooperate fully, or in a timely manner, in the filing of income tax returns or in providing information to each other regarding income and deductions, that party will indemnify the other for any increased tax liability, attorney and accountant fees, and related costs resulting from that failure.

26. Allocation of Tax Refunds or Amounts Owed. The parties acknowledge that each has filed separate state and federal income tax returns throughout the period of their registered domestic partnership. The parties agree that should any refund be paid to either of them after the execution of this Agreement, or any liability for underpayment of income taxes be assessed on prior income tax returns or for returns filed hereafter for the current tax year, any refund shall be the sole and separate property of the recipient, and any liability shall be the sole liability of the party against whom it was assessed. In the event that the taxing authorities assess a liability against both parties for the same income in the current year or for prior years that

occurred during the registered domestic partnership, the parties agree to equally share the payment of that liability.

27. Release of Liabilities and Claims. Except as otherwise provided in this Agreement, each party hereby releases the other from all interpartner obligations, whether incurred before or after the effective date of this Agreement, and all claims to the property of the other. This release extends to all claims based on rights that have accrued before the domestic partnership was registered, including but not limited to property and support claims. The parties have considered such claims in this agreement.

28. Waiver of Rights on Death of Other Party. Each party hereby waives the right to receive any property or rights whatsoever on the death of the other, unless such right is created or affirmed by the other under a will or other written document executed after the effective date of this agreement. Each party believes that he has received a fair and reasonable disclosure of the property and financial obligations of the other party. Each party's waiver is intended to be an enforceable waiver of that party's rights under Probate Code §§140-147.

The rights waived include, but are not limited to, rights to any of the following:

- (a) Property that would pass from the decedent by intestate succession;
- (b) Property that would pass from the decedent by testamentary disposition;
- (c) A probate homestead;
- (d) The setting aside of exempt property;
- (e) A family allowance;
- (f) The setting aside of an estate;
- (g) An election to take community property against the decedent's will;

(h) The statutory share of an omitted registered domestic partner;

(i) An appointment as executor or administrator of the decedent's estate, except as the nominee of a third party legally entitled to make such a nomination;

(j) Property that would pass from the decedent by nonprobate transfer, such as the survivorship interest under a joint tenancy, a Totten trust account, or a payable-on-death account; and

(k) Proceeds as beneficiary of any type of insurance policy.

29. Entire Agreement. This agreement contains the entire agreement of the parties on these matters, superseding any previous agreement between them.

30. Modification by Subsequent Agreement. This agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them, an oral agreement to the extent that the parties execute it, or an in-court oral agreement made into an order by a court of competent jurisdiction.

31. Attorney Fees in Action to Enforce or Modify Agreement. The prevailing party in any action or proceeding to enforce or modify any provision of this agreement, or any corresponding provision of a subsequent judgment into which the provision is merged, will be awarded reasonable attorney fees and costs. For the moving party to be deemed the prevailing party for purposes of this provision, at least 10 days before the filing of any motion he must provide written notice to the other party specifying the alleged breach or default, if capable of being cured, or the modification requested. The other party must then be allowed to avoid implementation of this provision by curing the breach or default specified or executing an agreement for the modification requested during the 10-day period.

32. Effective Date. The effective date of this agreement will be the date of its execution by the second of the parties to do so.

33. Court Action. If a judgment of dissolution of registered domestic partnership is obtained by either party, the original

of this agreement will be attached to the stipulated judgment. The court will be requested to do the following:

- (a) Approve the entire agreement as fair and equitable;
- (b) Order the parties to comply with all of its executory provisions;
- (c) Merge the provisions relating to child custody and visitation, child support, "spousal" support, future acts with respect to property division, and income tax returns, and only those provisions, into the judgment; and
- (d) Incorporate the remainder of the agreement in the judgment for the sole purpose of identification.

34. Legal Representation. Each party has been represented in the negotiations and in preparation of this agreement by an independent attorney of his own choosing: Thomas by [name of attorney] , and Patrick by [name of attorney] . Each party has carefully read this agreement in its entirety, and his attorney has fully explained its contents and legal effect.

The foregoing is agreed to by:

Date: _____

Thomas M. Black

Date: _____

Patrick A. Green

Approved as conforming to the agreement of the parties:

Date: _____

Attorney for Thomas M. Black

Date: _____

Attorney for Patrick A. Green

[Include Notarial Acknowledgements for Parties' Signatures]

Comment: This form is an illustrative version of a complete domestic partnership dissolution agreement. It is intended to illustrate the types of matters that parties may wish to address in settling

their rights to property, child custody, visitation, child and "spousal" support, and attorney fees in anticipation of dissolving their registered domestic partnership or seeking a legal separation. See generally Fam C §§299, 3580. The form is representative of a "simple" agreement, with the parties having few assets (and primarily separate property assets) and agreeing to waive any right either may have to support from the other. See Fam C §§3580, 3591.

In the fact pattern illustrated, the parties have a minor child (by adoption, in this version) and the agreement makes provision for that child's custody, visitation, and support. Note that if the support amount agreed to is less than what would be required under the statewide uniform support guidelines, the agreement must recite all of the factors listed in Fam C §4065(a):

- The parties are fully informed of their rights;
- The support amount (which will be implemented as a court order) is being agreed to without coercion or duress;
- The agreement is in the best interest of the children involved;
- The needs of the children will be adequately met by the stipulated amount; and
- The right to support has not been assigned to the county (see Welf & I C §1477) and no public assistance application is pending.

The agreement is not required to be notarized, as such, but notarization permits the parties to record it, and notarization is required if the agreement is submitted to the court after one party defaults in the proceeding. See Fam C §§1502, 2338.5.

It is important for the attorney to keep in mind that there are important potential income, gift, and estate tax consequences in a division of property or provision of support between domestic partners, because the rules applicable in marital situations do not apply (see chap 15). Keep in mind that IRC §1041, in particular, is inapplicable, and that rules have not yet been promulgated by the IRS or California taxing authorities to handle California domestic partnerships. Family law and estate planning attorneys are urged to consult with tax counsel and accountants, as needed, in connection with the drafting of an agreement governing the rights of domestic partners in terminating their partnership.

On further considerations in preparing a domestic partnership dissolution agreement, see §§5.26–5.40. For a general discussion of marital settlement agreements, see *California Marital Settlement and Other Family Law Agreements* (3d ed Cal CEB 2005).