

# Industry Guidance for Documenting a Sole and Separate Property Interest

Under the Gambling Control Act (Act) all persons identified under Business and Professions Code sections 19850 and 19852 are required to be licensed. This includes all individuals and their spouses that own an interest in a gambling enterprise as a community property interest.

California Code of Regulations, Title 4, Division 18, section 12112 (Initial License Applications; Required Forms.) provides a list of forms and other required items that persons applying for state gambling licenses (applicants) must submit to the Bureau of Gambling Control (Bureau). Importantly, this includes the Spousal Information Form, CGCC-CH2-12 (Rev. 03/21) (Spousal Form). The Spousal Form provides a straightforward way for applicants who are seeking owner category licenses to provide information to the Bureau and the Gambling Control Commission (Commission) about the factual and legal status of the applicant's property as it relates to operating and conducting controlled gambling or third-party provider of proposition player services to determine if their spouse must also secure a state gambling license.

Recently, questions have been raised regarding specific documentation that meets the requirements in Section 4 of the Spousal Form to substantiate a declaration of sole and separate property under Section 3 of the Spousal Form. This guidance attempts to show how an applicant can assist the Bureau and Commission in making the important determination of whether the spouse of an applicant seeking an owner category license has a community property interest (therefore requiring licensure) or if the ownership interest is held as sole and separate property.<sup>1</sup> This guidance is **not intended** to be an authoritative guide as to California Family Law generally, nor dispositive as to the characterization of community and sole and separate property specifically. You are strongly encouraged to secure the assistance of a competent attorney regarding compliance when completing the Spousal Form and in determining how the information you provide on the Spousal Form may impact your property rights in the future.

## **Sole and Separate Property vs. Community Property**

Under California Law, there is a legal presumption that all property acquired during a marriage is Community Property. (Family Code § 760.)<sup>2</sup> However, there is also a legal presumption that all property acquired by a spouse *prior to marriage* is the sole and separate property of that spouse. (Family Code §

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<sup>1</sup> Please note that this guidance does not address situations in which an applicant acknowledges a community property interest or has significant influence over an owner category licensee for which licensure would be required including for instance because the spouse has direct or indirect authority or influence in decision-making, is involved directly or indirectly in management decisions, or is required to be licensed for other reasons under the Act.

<sup>2</sup> Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property. (Fam. Code, § 760.)

770; *In re Marriage of Valli* (2014) 58 Cal.4th 1396, 1400.)<sup>3</sup> Marriage alone, absent more, does not convert or transmute that sole and separate property to community property.

Additionally, the community property presumption can be rebutted by a preponderance of evidence which shows the property was acquired as a result of a gift, a bequest, devise, or descent where property can be traced to a sole and separate property source, or earned or accumulated while the spouses are living separate and apart. (*Id.*)

Moreover, spouses can freely transmute property from sole and separate to community property or vice versa.<sup>4</sup> Importantly though for purposes of the Spousal Form, *a bare statement or declaration that an ownership interest in an owner licensee is held as sole and separate property, even if both spouses agree, is not sufficient as a transmutation* unless the statement itself expresses the transmutation of that property from community to sole and separate property. (*Estate of MacDonald* (1990) 51 Cal.3d 262, 272.)

### **Spousal Form Documentation**

To substantiate a married applicant's characterization of their ownership interest being held as sole and separate property in Section 3 of the Spousal Form, the applicant is required to include applicable documentation described under Section 4. Pursuant to Section 4 of the Spousal Form, the four pertinent categories of required documentation are as follows:

- ANY PRENUPTIAL, POST NUPTIAL, OR DOMESTIC PARTNERSHIP AGREEMENT WHICH CONFIRMS THE CHARACTERIZATION OF THE APPLICANT'S INTEREST IN THE OWNER CATEGORY LICENSEE AS SOLE AND SEPARATE PROPERTY AND COMPLIES WITH FAMILY CODE SECTION 1615
- ANY DOCUMENTATION THAT REFLECTS THE APPLICANT'S ACQUISITION OF THE INTEREST IN THE OWNER CATEGORY LICENSEE AS SOLE AND SEPARATE PROPERTY THROUGH GIFT OR INHERITANCE
- ANY DOCUMENTATION THAT DEMONSTRABLY SHOWS THE ACQUISITION OF THE OWNER CATEGORY LICENSEE INTEREST TRACED TO SOLE AND SEPARATE PROPERTY OR FUNDS OF APPLICANT
- ANY COURT ORDERS CONCERNING THE OWNERSHIP CHARACTERIZATION OF THE OWNER CATEGORY LICENSEE INTEREST AS SOLE AND SEPARATE PROPERTY

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<sup>3</sup> (a) Separate property of a married person includes all of the following:

- (1) All property owned by the person before marriage.
- (2) All property acquired by the person after marriage by gift, bequest, devise, or descent.
- (3) The rents, issues, and profits of the property described in this section.

(b) A married person may, without the consent of the person's spouse, convey the person's separate property. (Fam. Code, § 770.)

<sup>4</sup> This guidance does not seek to provide applicants instruction in how to effectively transmute property under Family Code section 850, but please note that such transmutions must comport with the requirements of Family Code section 852.

These categories are all directed to the various ways an applicant can meet their burden under the Act to establish that their ownership interest in the owner category licensee is held as sole and separate property rather than community property. These categories may be supplemented by other documents as highlighted by the last box in Section 4, indicating the Bureau may require additional documentation. As discussed below, applicants may be able to provide documents not specifically delineated which confirm the character of an applicant's ownership interest in an owner licensee as sole and separate property.

- 1) ANY PRENUPTIAL, POST NUPTIAL, OR DOMESTIC PARTNERSHIP AGREEMENT WHICH CONFIRMS THE CHARACTERIZATION OF THE APPLICANT'S INTEREST IN THE OWNER CATEGORY LICENSEE AS SOLE AND SEPARATE PROPERTY AND COMPLIES WITH FAMILY CODE SECTION 1615

Under the first category, an applicant may have a prenuptial agreement that defines certain property as sole and separate prior to marriage. This category may also include post nuptial agreements such as a transmutation agreement that converts property from community to sole and separate property that comports with applicable Family Law. These documents are all potentially satisfactory for this category and greatly aid the Bureau and Commission in substantiating the characterization of the ownership interest in the owner category licensee as sole and separate property.

- 2) ANY DOCUMENTATION THAT REFLECTS THE APPLICANT'S ACQUISITION OF THE INTEREST IN THE OWNER CATEGORY LICENSEE AS SOLE AND SEPARATE PROPERTY THROUGH GIFT OR INHERITANCE

The second category of documentation concerns sole and separate property acquired through a gift or inheritance. For instance, an applicant may have been given an interest in an owner licensee by a family member or friend, or inherited it through the same. A copy of any relevant documentation which demonstrates this transfer is satisfactory for this category. This category may even include communications concerning the transfer or documentation identifying the source of inherited property from a will or trust. If these documents are unavailable, for instance due to the passage of time, declarations from an applicant, their spouse, or from the giver would help to substantiate the characterization of the ownership interest in the owner category licensee as sole and separate property.

- 3) ANY DOCUMENTATION THAT DEMONSTRABLY SHOWS THE ACQUISITION OF THE OWNER CATEGORY LICENSEE INTEREST TRACED TO SOLE AND SEPARATE PROPERTY OR FUNDS OF APPLICANT

The third category of documentation is the broadest of the four categories on the Spousal Form. The documentation an applicant and their spouse can provide to show that an interest is traceable to sole and separate property may vary, as each situation is unique. This documentation can include, for instance, bank statements, voided checks, wire transfers, etc.<sup>5</sup> These documents can also be combined with a marriage certificate with an official date *after* the acquisition of the property. In addition, if these documents are not available, including for instance because they are lost due to the passage of time or

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<sup>5</sup> To be clear, a bank statement or check from an account only in the name of the owner licensee is not dispositive as to the issue of whether funds are community or sole and separate property. In the absence of evidence showing that the funds contained in the account are exclusively separate property funds, they will be presumed to be community property if acquired after marriage. (See *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426, 441-442; *In re Brace* (2020) 9 Cal.5th 903, 914.)

destroyed under document retention policies, an applicant may be able to provide declarations from the applicant and their spouse that explain the nature of the sole and separate property interest in the owner licensee and its acquisition with the applicant's sole and separate property or funds.

4) ANY COURT ORDERS CONCERNING THE OWNERSHIP CHARACTERIZATION OF THE OWNER CATEGORY LICENSEE INTEREST AS SOLE AND SEPARATE PROPERTY

The last category is self-explanatory and concerns any final Court documents that confirm the property as sole and separate, which should identify the relevant owner licensee interest and confirm its character.

### Declarations

As explained above, declarations may be provided to assist the Bureau and Commission in determining the nature of an applicant's interest in an owner licensee as sole and separate property as opposed to community property. While documents that directly confirm a transfer, gift, transmutation, or purchase for the sole and separate property are preferred, declarations that attest to the same and provide assurances to the Bureau and Commission greatly aid in the licensure process. The inclusion of some or all of the following is preferred:

1) Sworn Declarations

These declarations may be signed under penalty of perjury before a notary to aid in their value. This element is not required for these declarations to aid in the Bureau and Commission's process, but sworn signatures carry more evidentiary value in confirming the nature of the property as sole and separate or community property for purposes of the Act. Applicants should consult with an attorney as to the significance of this element.

2) Property Identification

It is important that any declarations provided with the Spousal Form clearly and specifically identify the sole and separate property interest in the owner licensee, as applicable. The Act requires the owner and all endorsees of a gambling enterprise to secure licensure. Commission regulations include third-party providers of proposition player services in this requirement and a specific term identifies the entity in question as the "owner category license" held by the "owner category licensee." This owner category licensee must be identified on page 1 of the Spousal Form. It is very helpful to the Bureau and Commission that any accompanying declaration directly references this owner category licensee, and the related applicant interest therein to ensure there is no confusion as to the sole and separate property interest. For instance, it is very helpful for an applicant whose sole and separate property is held as a partner, member, or shareholder to identify that interest as part of the partnership, limited liability company, or corporation in any declarations made by the applicant and their spouse.

3) Date of Acquisition/Marriage

Declarations may also be utilized to aid in determining the date property was acquired relative to the date of marriage. Although transaction documents may ultimately be more informative, if property was acquired before marriage, declarations that affirm that fact are likely very helpful in light of the presumption under Family Code § 770. If acquired *during* marriage, the date is also important as it will provide context to any statements about the character of the property being transmuted or the source

of the property being from sole and separate property in light of the presumption under Family Code § 760. If the date is clearly stated and affirmed by both the applicant and spouse, it is also helpful.

#### 4) Source of Property

Lastly, declarations which confirm that the property was acquired either through the use of sole and separate property or as a gift, devise, etc., can be very helpful to the Commission and Bureau in light of the foregoing documents and presumptions. Although transactional documents which document the sole and separate property source may be more dispositive, declarations confirming the source of the property and explaining the absence of other documents are exceedingly useful.