

Prenuptial Agreements

Alexandra M. Kwoka, a Certified Specialist in Family Law, is a 1974 graduate of the University of Chicago Law School, who has practiced in San Diego since moving from Chicago, Illinois and leaving the Department of Justice SCRS in 1980. She also has an L.L.M. degree in Taxation from the University of San Diego, and a special interest in complex community property and marital tax issues such as retirement benefits, stock options and QDROs.



Alexandra M. Kwoka

What Is A Prenuptial Agreement? When Is It Enforceable?

When you read newspaper accounts concerning the divorce of a public figure, such as Tom Cruise or Donald Trump, and you see the term "prenuptial agreement" used, do you know what is being described? Are you thinking of marriage, and wondering if you, too, should have a "premarital agreement"? Recent amendments to statutory law have both clarified and made more difficult, answering these and other questions. This article provides an overview.

What is a prenuptial agreement?

A prenuptial agreement is the written agreement of parties contemplating marriage. The provisions of the agreement become effective only upon marriage, and are intended to define the rights and duties of the parties as to those matters addressed in the agreement. Even if the parties agree to a provision, the agreement may not be enforced if any of its terms are "against public policy." For example, a term in a prenuptial agreement that requires children be raised with a particular religion is not enforceable. *In re: Marriage of Bonds* (2000) 24 cal.4th 1; neither is an agreement whose effect is to relieve either party of his/her statutory duty to support minor children. *Shasta v Caruthers* (1995) 31 Cal.App.4th 1838.

When is a premarital agreement needed?

Because California law provides that all earnings during marriage are "community earnings", and that the "community" has an interest in all assets acquired during marriage if held in joint title, even if those

assets are purchased with a separate property down payment, there is no easy answer to this question. Significantly different views are held by financial advisers, attorneys, and parties — accountants, business lawyers and estate planning attorneys may prefer that "separate property" be defined and remain separate, especially when either or both parties have significant separate assets, or a business acquired and owned prior to marriage. The concept of "co-mingling" — where separate assets become community assets if "co-mingled" with community funds — may prompt parties to enter into a premarital agreement, especially if one party has an inheritance he/she wishes to keep separate. Where parties have children or obligations prior to marriage, a premarital agreement may be necessary or prudent to ensure that both parties are in agreement as to how the children will be supported, or how business or personal obligations will be met.

What may the parties agree to do, or what rights may be waived in a prenuptial agreement?

California law governing prenuptial agreements is set forth both in a statute, the Uniform Premarital Agreement Act, Family Code §1600 et seq., and "case law" — that is, written decisions of the Courts. Enactment of a predecessor statute, Civil Code §§177-180, in 1872 permitted parties by contract to define their rights in marital and other real and personal property. By several amendments over the years, the acceptable topics of a premarital agreement were expanded to include not only ownership in, and disposition of, marital and separate property, and the making of a will, trust or other arrangement, but also "any other matter, including personal rights and obligations not in violation of public policy or a statute imposing a criminal penalty." Relying on this latter "catch-all" provision, premarital

By Alexandra M. Kwoka

tal agreements were drafted and entered into which also set terms for, or waived, spousal support.

However, the first version of the Uniform Premarital Agreement Act as enacted in 1983 in California, did not include a provision that authorized parties to contract with regard to spousal support rights and obligations. When the issue was presented to the Courts, opinions differed as to whether or not such provisions concerning spousal support, or one waiving support, were enforceable, or whether they were "against public policy."

Responding to the conflict among the Courts, as well as several highly publicized divorce rulings by the California Courts, including in the proceedings brought by Mrs. Barry Bonds entitled *Marriage of Bonds* 24 Cal.4th 1 (2000), the California Legislature last year amended Family Code Section 1612. By Stats.2001, c. 286 (S.B. 78)§1. Parties in a premarital agreement now may contract with regard to spousal support §1612(c).

When is a premarital agreement enforceable?

When the Legislature amended §1612, it also amended §1615, which governs enforcement of premarital agreements. Now, the Court must consider whether the agreement was entered into voluntarily or under duress or fraud, questions which determine the validity of contracts in the business arena, and also the requirements of §1615. Summarizing some of these, the agreement will not be enforced if the party against whom enforcement is requested proves that the agreement was "unconscionable when executed" and certain facts relating to the negotiation and drafting of the agreement:

1. The party was not provided a fair, reasonable, and full disclosure of the property or financial obligations of the other;
2. The party did not voluntarily and expressly waive in writing any right to disclosure;
3. The party did not have, or reasonably could not have had, an adequate

knowledge of the property or financial obligations of the other party.

Whether a premarital agreement or one or more of its terms was "unconscionable when executed" will be decided by the Court. The Court is now authorized to consider "any other factors the court deems relevant" in making its decision. In ruling on the validity of a premarital agreement, the Court will presume the premarital agreement was voluntarily entered into, unless certain specific proof is presented, as specified in the Code, including the adequacy of legal representation, and the nature and explanation of rights and obligations relinquished. If an agreement is entered into within 7 days of the document being presented for signature, this fact may permit the Court to find that it was unconscionable.

If the premarital agreement includes provisions regarding spousal support, Family Code §1612(c) provides: "Any provision regarding spousal support...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 was signed, or if the provision regarding spousal support is unconscionable **at the time of enforcement...**"

With the standards for determining what is or is not an enforceable premarital agreement now having been revised and purportedly "clarified", one might expect that resolution of the enforcement issue will be simple. In fact, the many Court opinions written before the Act was amended, which seek to resolve questions raised concerning "undue influence" and "duress", demonstrate that parties in a divorce proceeding often disagree about and litigate the circumstances existing that led them to sign a premarital agreement. Attorneys and the parties now know that an agreement that includes spousal support will not automatically be held in violation of public policy. But now such agreement will be scrutinized to determine "unconscionability" **both** at the time of negotiation/signature and when the Court is asked to enforce support terms/waiver.

The law and rules have not been made simple with recent amendments to the Uniform Premarital Agreement Act. If the agreement includes a provision concerning spousal support, the parties must discuss the future, and document their intentions. Thought must be given by the parties and legal and financial advisers prior to drafting and executing any premarital agreement as to its language and terms.

Firm: Law Office of Alexandra M. Kwoka
Address: 12707 High Bluff Drive, Suite 100
San Diego, CA 92130
Phone: (858) 481-1773
Fax: (858) 481-5783