

Family Law Focus

www.FamilyTrustsandEstates.com



CASE SUMMARY

This article examines the benefits and safeguards of premarital agreements.

Premarital agreements are contracts between prospective spouses that foster an environment of trust and confidence.

California recognizes the right of engaged couples to modify the rules of marriage that would otherwise automatically apply absent such an agreement. Premarital agreements (PMA's) can modify, clarify or strengthen rules including those that determine how community property is accumulated, how separate property is protected, how title to assets will be vested during marriage, how assets will be divided if the marriage ends by divorce or separation and how spouses will support each other after marriage.

Premarital agreements are contracts between prospective spouses that foster an environment of trust and confidence between the parties by defining property and support rights and obligations that will develop during the marriage. At one time premarital agreements were looked at as an expression of greed and distrust at a time when affianced couples should otherwise be promising a lifelong bond. As the mechanics of premarital agreements have developed over the years and as the legislature and the courts have supported the enforceability of premarital agreements a consensus has developed that the "availability of enforceable premarital agreement may in fact encourage rather than discourage

marriage." *Marriage of Pendleton & Fireman* (2000) 24 Cal. 4th 39, 99 Cal.Rptr.2nd 278.

The existence of an enforceable premarital agreement provides a sense of certainty that allows newly married couples to enjoy marriage without concern that property rights and support obligations are developing in a way that is not designed by the parties or even understood.

Premarital agreements executed after January 1, 1986 are governed by the Uniform Premarital Agreement Act

The existence of an enforceable premarital agreement provides a sense of certainty that allows newly married couples to enjoy marriage without concern that property rights and support obligations are developing in a way that is not designed by the parties or even understood.

which was adopted in [California Family Code Section 1600, et. seq.](#) The statutes were amended in 2002 to reflect a legislative response to the court cases of *Marriage of Bonds*, and the *Marriage of Pendleton & Fireman*, (2000) 24 Cal. 4th 39, 99 Cal.Rptr.2nd 278., both of which broadly supported the enforceability of premarital agreements.

Property and Income Rights
Premarital agreements frequently modify or supplement the way



Terence Daniel Doyle

community property laws would govern assets and income accumulated or earned during marriage. Absent a premarital agreement all income earned during marriage as a result of labor or efforts of a spouse and assets acquired other than by gift or inheritance is community property, i.e. owned equally by the spouses. A premarital agreement can change the way income is allocated between the spouses by confirming some or all earnings to the producer as separate property. Similarly, a premarital agreement can confirm assets acquired by the spouses during marriage to one or the other spouse either partially or entirely as that spouse's separate property.

Support Rights

Premarital agreements can modify statutory and case law as it would otherwise define the obligation of the spouses to support each other after the marriage. As long as both parties are represented by counsel during the negotiations of a spousal support waiver or limitation, the parties are not suffering from undue influence, that a full, fair and reasonable disclosure of assets and relevant facts has been made and the parties have had at least seven days to review the premarital agreement before signing a spousal support waiver or limitation is not impermissible.

Notwithstanding the fact that such a waiver or limitation is not impermissible it is important to note that the waiver or limitation will be tested at the time of implementation for purposes of conscionability. In other words, an agreement that seems fair at the time of entry into a premarital agreement might not be found to be fair at the time of implementation. For this reason extra caution should be taken when a spousal support waiver or limitation is desired.

Child Support

Parents cannot negotiate away the right to child support before, during or after a marriage. The right to child support follows the child and is not property of either parent.

Protections and Risks Applicable Without a Premarital Agreement

It should be noted that there are many automatic protections and risks applicable to spouses who do not have premarital agreements. The most notable protection is provided by [California Family Code Section 2640](#). This code section returns separate property to a divorcing spouse who used that property to acquire community property. In other words, if a party uses separate property as a down payment to buy a house during marriage (which is community property because it was acquired during marriage) that person would get her separate property back at the time of divorce without interest or appreciation.

Likewise, there are statutes and cases that cause an erosion of separate property interests due to the use of community property to service the asset. For example, when community property is used to pay down the principal on a mortgage on separate property the community not only received an interest in the property equal to the principal pay down but it acquires an interest in the appreciation of the property as well.

Separate property can also be put at risk if caution and precision are not used when funding a joint estate plan with a spouse. Transmutation of separate property to community property can occur if common errors are made in drafting revocable trusts and related estate planning documents. Spouses should be careful to retain experienced counsel familiar with both family law

Page 3 of 3

and trust and estate planning before transferring separate property to a joint revocable trust.

There are many more automatic protections and processes of erosion of a separate estate that deserve review with a qualified family law attorney.

Second Marriages

The commonality of second marriages has also helped bring premarital agreements into the mainstream. It is obvious that parents of children from previous relationships want to ensure the existence of an estate distribution plan to benefit the children of a previous relationship as well as children of the new marriage. A premarital agreement can confirm the separate treatment of property that is most appropriately designated for children of a prior relationship. The premarital agreement can work with a separate or joint estate plan so as to ensure that assets owned prior to marriage or assets earned during marriage are available to provide for children of the prior relationship as well as children from the new marriage.