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Drafting Premarital and Postmarital Agreements
Strategies for Crafting an Enforceable Agreement

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Today’s faculty features:

Christopher C. Melcher, Partner, Walzer & Melcher, Woodland Hills, Calif.
Peter M. Walzer, Partner, Walzer & Melcher, Woodland Hills, Calif.
Richard G. Kent, Partner, Meyers Breiner & Kent, Fairfield, Conn.

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Advice to a Client Before Signing a Premarital Agreement

By

Peter M. Walzer, J.D., CFLS

Although it is impossible to protect your clients from every eventuality, it would be wise to memorialize your advice as to the possible circumstances that might make the agreement unenforceable. Some of the risk of a set-aside can be ameliorated by a client who takes certain precautions. Encourage your client to consult with you in the future if there is a change in its circumstances.

Mr. Wainwright owns homes in several countries and states. He is wealthy. He is getting married to Ms. Cherie. They already have a child. You have been asked to represent him in the event the couple ends up getting divorced in California. What follows is a letter you may want to write him.

Re: Wainwright and Cherie Premarital Agreement

Dear Mr. Wainwright:

The purpose of this letter is to summarize some of the issues we have discussed in connection with the premarital agreement you have asked me to prepare. Some of these points have been made before; they are repeated here so that you have in one document all of the advice I have given you.

The Risks of Marriage and Divorce

Even with a premarital agreement, marriage is a risky partnership. Under California law, the working spouse can be ordered to pay 60 percent of his income in child and spousal support. In a divorce, businesses are valued for more than they can be sold for; in fact, even if your business cannot be sold, it can have a value in a divorce. Attorney and accounting fees can be extraordinary with or without a premarital agreement. On occasion courts set aside premarital agreements and do not enforce them. The only sure way to shield yourself from a costly divorce is not to get married.

Selecting a Suitable Place to Marry and Be Domiciled

You have chosen to marry and reside (at least part of the time) in California. A person with significant wealth such as you may choose a domicile such as Texas, where there is only limited alimony, or Florida, where child support is based on the reasonable needs of the children and not necessarily on the standard of living of the payor. You have analyzed these alternatives and rejected them. I do not make a recommendation as to where you should be married and later domiciled.

Why You May Need a California Premarital Agreement Even if You Do Not Plan to Live Here

Even if you personally do not live here, California can assert jurisdiction over you for the purposes of ordering support and attorneys' fees, and possibly make orders for the division of certain property, if you are personally served with a Petition for Dissolution of Marriage, legal separation or annulment in California, owned property in California, had certain minimum contacts with the State of California (including possibly doing business here), or caused an effect in California. Making a threat over the telephone to your wife could be considered causing an effect in California. Sending an email could conceivably be considered sufficient contacts with this state to establish jurisdiction.

A court can grant a divorce as to status only to your wife even without jurisdiction over you (but it would not make monetary orders). We are a "no fault" state, so there does not have to be proof of some wrong such as adultery. But, if a party commits domestic violence against the other; that fact can be considered by a court in ordering higher support or awarding sole custody to the non injured party with very limited visitation to the perpetrator. There could be serious criminal consequences as a result of committing domestic violence.
We also follow a rule of law called the doctrine of divisible divorce. That means that each aspect of a divorce is treated differently for jurisdictional purposes. For example, if your wife has been here six months with your child with your consent, California could maintain jurisdiction over custody and visitation, but unless you had minimum contacts with the state a court could not make any financial orders against you, including child support. If your wife were to come here with a child without your permission, you would have to act promptly to seek return of the child. If she remained here six months, California could acquire jurisdiction over custody. If she came here while pregnant and did not return, California could acquire custody jurisdiction, even if she were here less than six months.

By preparing this California agreement, I have not recommended California as a "good" place to obtain a divorce. In fact, it may be one of the worst states to get divorced. Our spousal and child support are high compared to some other states. The child support is based on the standard of living of the father. Our spousal support is based on the marital standard of living, whether the parties save their money or lavishly spend it on G5 jets and mansions.

Here is what a California premarital agreement does and does not do. It is designed to apply if you are divorced in California only. It may apply if you are divorced in any of the other 49 states, but that is not assured. If you want to ensure that it would be enforced in other states such as New York or Florida, I recommend that you authorize us to retain counsel in those states on your behalf. The agreement will probably not be enforced in foreign countries. Many countries have matrimonial regimes based on an entirely different system of marital law. In those countries, persons who are getting married can select one of various marital regimes. This is done before a notary, a quasi-judicial official who allows the parties to elect a separate property regime or a regime of shared property. France, Portugal, and Austria are examples of countries that have marital regimes.

Premarital Agreements Cannot Regulate Child Custody, Religion, or Personal Issues

Premarital agreements cannot regulate child custody. Custody decisions are based on what is in the best interest of the children at any given time (with certain exceptions). Premarital agreements cannot limit child support, as it is regulated by public policy considerations. Premarital agreements cannot regulate a party's right to worship in a certain religion or regulate how a child will be raised in a certain religion. Premarital agreements cannot cover a person's habits, such as who will wash the dishes, whether a person will drive quickly or slowly, or whether someone will pick up his or her clothing. Nor can they punish someone for being unfaithful.

Premarital agreements are contracts that can modify only certain California laws.

Primary Value of Premarital Agreements: Waiving Community Property Law

The primary use of premarital agreements is to waive California's community property law. Community property must be divided equally by a court. Community property is any property acquired during the marriage while the parties are living in California that is not a gift or an inheritance (which is separate property and awarded to the party who received it). Property owned before marriage is separate property and cannot be divided by a court. Efforts to enhance separate property businesses or other separate property, create a community property interest in that separate property. The determination of what is separate and what is community property often requires the use of forensic accountants. In high-asset cases, the accounting and legal fees can run into the hundreds of thousands, or even millions, of dollars.

Furthermore, in determining whether a business owned before marriage has any community interest, the property must be valued both at the time of marriage and at the time of separation, and sometimes again at the time of the divorce trial, which can be years after filing for divorce. Similar calculations are made for real estate and intellectual property. Furthermore, earnings are community property. If you married without a premarital agreement and earned $50,000,000 during your marriage, that entire sum would be community property. That means your wife would own one-half of that property and anything purchased with that property.

Furthermore, if you lost any of that money in a bad investment or mismanaged your assets, your wife may have an action against you for a breach of fiduciary duty. And if you reinvested those earnings in a separate property business or any other property, your wife could request that you reimburse the community for the money spent. In a long marriage, that tracing may be impossible to do, and sometimes the separatizer forfeits his interest.

Under California law, the proceeds of loans are community property under certain circumstances. If an individual owns companies and uses financing or factoring to finance a business, the loan proceeds can be so commingled in the business, that the owner can end up losing his separate property interest. If you refinance your real estate, you may be contributing community property to your separate property asset.

Community property law fills many volumes of legal books, and the field is becoming more complex. It is impossible to outline every circumstance that is covered by the law. Suffice it to say that with a proper premarital agreement, the parties can waive their community property rights - if they comply with the executory terms of the agreement and if they keep their separate property separate.

Estate Planning Aspects of the Agreement

A premarital agreement will also allow people to waive their probate rights. If a party dies without a will or trust made during the marriage, the spouse has certain property rights and rights to support from the estate of the person who dies. The premarital agreement that I drafted waives these rights of intestacy as well as the right of your wife to administer your estate. It creates a situation where the only way your wife could make a claim on your estate is through a will or trust that you write. This can avoid unnecessary and expensive will contests where a spouse makes claims based on the law when there is a will or trust.

I advise you to prepare proper estate planning documents that will protect your wife and your children. Proper estate planning can avoid ugly postmortem fights about your estate and avoid certain estate taxes. This could be difficult because it is not clear in what state or country you will be residing when you die.

Often the estate planning aspects of the agreement are negotiated with the other party to the agreement. In the current draft of the agreement that is being sent to your wife, she is entitled to nothing at your death. You should consult with estate planning counsel to determine whether your estate plan should be modified in light of this agreement, your marriage, or the birth of your child.

I expect Ms. Cherie's attorney to demand that she be guaranteed in the document some portion of your estate at your death. In that way, the agreement will act as a contract to make a will or trust. I would encourage you to be flexible on this point. Life insurance can also be considered as part of the estate planning process. At your age, it is inexpensive and may make sense in the context of your overall estate plan. Many clients retain an expert in estate planning to draft this aspect of the agreement. I do not specialize in this area of law. If Ms. Cherie asks to be named in your will or trust, tax consequences will need to be considered. If this is an issue, I will recommend estate planning counsel. Special planning will need to be made if Ms. Cherie is not a United States citizen.
Spousal Support

Until very recently, under California law, parties to a premarital agreement could not waive or limit spousal support. Many other states permit this waiver. The law currently allows parties to waive or limit spousal support, unless that limitation or waiver is deemed unconscionable at the time of the divorce. Because our statute is new, we do not know how a court will interpret the word "unconscionable." We can only speculate as to whether the court will interpret an unconscionable agreement to be one that leaves a person on "state aid," as do many other states, or whether they will look at the relative circumstances of the parties. At this point, I cannot advise you on whether a court will enforce this provision. In some cases, we set up a trust to provide for the spouse. If the spouse seeks spousal support or contests the support waiver, she forfeits the right to benefits under the trust.

You have insisted that the agreement not provide for any spousal support to Ms. Cherie. Due to your significant wealth, a waiver of spousal support may be determined to be unconscionable by the court who receives the agreement. By waiving spousal support, I believe that you are jeopardizing the value of this paragraph. I recommend that the agreement provide for a reasonable amount of spousal support to Ms. Cherie. Otherwise, a court may set spousal support on its own, in an amount which you do not find reasonable.

Consideration or Payments to Ms. Cherie

A well-drafted premarital agreement provides an incentive for the persons signing it to honor it. If the agreement is not sufficiently generous, there is an incentive for your spouse to attack the agreement. A good agreement will be fair. If the agreement does not provide sufficient assets for a party, that party is likely to file an action to set aside the agreement, leading to an expensive divorce. Furthermore, there is the chance that a court might set the agreement aside. We have included in our agreement an interroonum clause which states that a party who contests the agreement, will forfeit any benefits under the agreement. Although this clause may not be enforceable, it may provide a disincentive to litigate the validity of the agreement. This clause may not be enforceable in California and other states.

The agreement provides for payments to be made to Ms. Cherie upon each yearly anniversary of marriage for the first 10 years. These sums must be paid when due. Otherwise, your lack of performance under the agreement may prevent you from enforcing the agreement. We have placed a cap on the amount of these payments that limits their total to one-half of your net worth.

Tax Issues

We have discussed that the transfers you make to Ms. Cherie during marriage strengthen the agreement. Typically, property transferred between United States residents who are married is tax free. In the United States, non-resident aliens are taxed on transfers, which are treated either as a gift on which the transferor will pay a gift tax or as a payment of income or a sale. You should consult with competent tax counsel in the countries where you are living to determine the best way to treat the transfers between you and Ms. Cherie. You must make sure that you and Ms. Cherie file tax returns that are consistent and that take into account the transfers mandated by the agreement.

Further, you have indicated that you paid Ms. Cherie $500,000 prior to marriage. This transfer may have tax consequences, either in the United States or elsewhere. I recommend that both of you seek competent tax counsel to advise you with regard to the consequences of the transfers made to Ms. Cherie both before and during marriage.

Amendments to Agreement

A marriage can be relatively short or last for 40 years. Over that period, laws change, fortunes can be made and lost, and where you live can change many times. Because of these changes, it is hoped that when there is a major change or a passage of time you will have your attorneys' review the agreement and make sure it still applies to your situation.

The California agreement is currently a "back-up" agreement, written in the event one of you files for divorce in California. In the event that you and/or Ms. Cherie move to California, buy property here, or begin to travel regularly here, you should amend the agreement to cover the specific situation at the time.

If your assets decrease, you may also want to change aspects of the agreement so the burden of the property settlement is not so heavy that you cannot meet it. At the moment you have wealth, but circumstances change and it may be, however unlikely, that Ms. Cherie has the wealth and that you do not. Because you have waived spousal support, you would have no right to obtain support from Ms. Cherie. You have waived all your rights to share any of Ms. Cherie's property.

In the past five years, there have been two major revisions in California case law relating to premarital agreements. It is likely the law will continue to change. I recommend that you review the agreement regularly to protect against changes in the laws of the jurisdictions you live in.

Disclosure

The problem of how much disclosure is sufficient is a difficult one under California law. Ordinarily, unmarried persons do not have a fiduciary duty to each other, so the level of disclosure may be less than full, although California law is conflicting on this point. One sentence of the Family Code §1515 says "a full, fair and reasonable disclosure" is required, and the next sentence permits parties to waive disclosure beyond the disclosure that is provided.

On the other hand, it could be argued that you have a fiduciary duty to Ms. Cherie which would require full disclosure because Ms. Cherie and you have a child and you live together.

We have discussed various possibilities for providing providing Ms. Cherie a full disclosure without being specific about exact values. At the time of this letter, we have prepared a very general disclosure that states that the net worth of your businesses and properties is not less than $20,000,000. This may not be sufficient disclosure.

I am concerned that a court would find that Ms. Cherie could not properly negotiate the agreement and give a knowing waiver of her rights without having adequate knowledge of your finances.

I am willing to work with you in providing Ms. Cherie a disclosure that protects your privacy, but provides her attorney with sufficient information to negotiate.

You have elected not to provide us with detailed information regarding the nature and extent of your assets. You have also asked that we not provide your tax returns or any detailed disclosure of your assets. Although we are cognizant of your need for privacy, please keep in mind that the limited disclosures made in the agreement may not be deemed sufficient and may impair the validity of the agreement.

Confidentiality

Ordinarily, discussions between an attorney and client are confidential under California law, but it could be argued that by my certification of the premarital agreement you are waiving the attorney - client privilege, even though the certification says you are specifically not waiving the privilege. I recommend that you do not show or discuss this letter with anyone because that could be considered a waiver of the attorney - client privilege.
Signing the Agreement

Perhaps the best way to ensure that the agreement is understood and entered into voluntarily, is to videotape the signing of the agreement. Short of doing that, we must arrive at a way of making sure that Ms. Cherie confirms that she understands the entire agreement and that she has been properly advised of all its terms. Ms. Cherie must notarize the agreement. I suggest that the agreement be executed with six "original" signatures. It is critical that you work with me to make sure I receive a fully signed agreement before you marry. You must also maintain a copy with your records, assuming I may not be practicing law or alive. I recommend that you maintain several copies in safe deposit boxes.

I would like an opportunity to review the agreement with you over the telephone before the final version is mailed to Ms. Cherie and her attorney. I will ask you to acknowledge that you have been provided with the opportunity to ask any questions of me or any other adviser, to seek a second opinion, or even to have another attorney take over the preparation and negotiation of the agreement, if you so choose.

By countersigning this letter below my signature, you confirm that each and all of the following are correct:

1. You understand the provisions of this letter.

2. You agree to the terms that will be presented to Ms. Cherie in the California premarital agreement.

3. You understand what the California premarital agreement does and what it does not do.

4. You understand that you have an absolute right to independent legal counsel to advise you with regard to your rights and the advisability of signing this letter, and that if you have any reservations at all about doing so, I recommend you obtain independent legal counsel.

Enforceability of the Agreement

Enforceability depends on facts or laws that arise in the future. I do not guarantee that the agreement is enforceable. It is best to view the agreement as a document that can strengthen your bargaining position in the event of divorce. At that time, you can determine whether it is applicable and enforceable.

Possible reasons the agreement may not be enforced:

1. It may not be enforceable if you do not live in California.

2. The spousal support clause may not be enforceable even if you do live in California because it is deemed unconscionable at the time of the divorce.

3. It may not be enforceable if California law changes.

4. It may not be enforceable if you do not keep your separate property separate.

5. It may not be enforceable if you enter into conflicting agreements in other states or countries.

6. It may not be enforceable if you do not keep a copy of the agreement.

7. It may not be enforceable if Ms. Cherie establishes that she was forced into signing the agreement or that she did not know what she was doing when she signed it. Ms. Cherie could even claim that you were in a "confidential relationship" under California law, that you owed her a fiduciary duty at the time of marriage, and that you breached that duty.

8. It may not be enforceable if Ms. Cherie claims she was not adequately represented by a competent and independent attorney.

9. It may not be enforceable if the California premarital agreement statute was not followed in that you did not provide Ms. Cherie with a full disclosure of your assets and obligations.

10. It may not be enforceable if you do not comply with your obligations under the agreement.

11. It may not be enforceable if it is deemed to be promotive of divorce.

12. It may not be enforceable for reasons that we cannot anticipate.

13. It may not be enforceable if one of you sign it less than seven days after the last draft or version is presented.

In spite of the pitfalls, most premarital agreements are enforced in California with regard to the division of property. Whether a court will enforce the waiver of spousal support is a question that would be up to a judicial officer, who must determine whether the waiver or limitation is unconscionable at the time of divorce.

Thank you for your understanding and cooperation, and this opportunity to represent your interests in negotiating this premarital agreement.

Yours very truly,

Counsel for Mr. Wainright

Acknowledgment

I have read and understood the foregoing, and I authorize my attorney to release the Agreement dated 17 July 2003 to Ms. Cherie's attorney, I am signing this letter of my own free will, without duress or undue influence.

Dated: ______

Bentley Wainright

Caveat: The people in this letter are fictional. The names used here are not the names of clients, nor are the facts the facts in any case I have handled. Any resemblance to actual people is coincidental. The legal issues represent some possible issues that may arise in a premarital agreement. Other issues not covered here may arise in your own premarital agreement, and the advisory letter should be tailored to that situation.
Evaluating the Enforceability of a Premarital Agreement

Christopher C. Melcher

Premarital agreements are like parachutes. You never know if they will work until you hit the ground. Although premarital agreements are favored under the law, a one-sided agreement is risky. Enforceability depends on compliance with the California Premarital Agreement Act (the “Act”), which allows parties to make a valid premarital agreement provided they follow the rules. For premarital agreements executed after January 1, 2002, the Act provides that a premarital agreement will not be enforceable if: (1) The agreement was not made voluntarily; (2) The agreement is unconscionable and the disclosure requirements of the Act were not met; or (3) The agreement violates public policy.

Involuntary Agreement

All premarital agreements executed after January 1, 2002, are deemed to have been executed involuntarily, unless the court finds that the party had independent legal counsel (or properly waived that right); waited at least seven days before signing the agreement; had legal capacity to enter into the agreement; and did not act under fraud, duress, or undue influence. (Fam. Code, § 1615, subd. (c).) Therefore, the party seeking to enforce the agreement bears the burden to prove all of these elements or the agreement will be invalidated.

Independent Counsel or Waiver of Counsel

The court must find that the party against whom enforcement is sought was represented by independent counsel or, after being advised to seek independent counsel, expressly waived such representation in a separate writing. (Id.) The separate writing requirement means that the waiver of counsel may not be contained in the premarital agreement. The requirement that a party have “independent” legal counsel signifies that his or her counsel must be free of conflicts of interest. If one party is paying both attorneys, it could suggest a lack on independent counsel. The best practice is to give or loan funds to the party who cannot afford an attorney, and allow that party to make the payment directly to his or her attorney of choice. Another issue arises when a party suggests that the other party use a particular attorney. If a referral is given, it should be made to at least two attorneys to avoid the claim that the party was directed to use his or her fiancé’s hand-picked attorney. Or, the unrepresented party can be directed to a list of certified family law specialists.

Full Disclosure to Unrepresented Party

If a party waives the right to counsel, the court must find that the party (a) was fully informed of the terms of the agreement and the rights and obligations he or she was relinquishing by signing the agreement; and (b) was proficient in the language in which the explanation of his or her rights was conducted and in which the agreement is written. (Id.) The advice concerning the effect of the agreement must be memorialized in writing and the unrepresented party must acknowledge that he or she received it. (Id.) Also, if the unrepresented party is not proficient in English, the explanation of the agreement must be translated into his or her language. Giving advice as to the legal effect of the agreement might create an attorney-client relationship with the unrepresented party, and will certainly invite claims by the unrepresented party that he or she was misled into signing the agreement. The best practice is never to draft a premarital agreement when the other party is unrepresented.

Seven-Day Waiting Period

The court must find that the party had at least seven calendar days between the date he or she was “first presented” with the agreement and advised to seek independent counsel and the time the agreement was signed. (Id.) It is not clear whether the seven-day period runs from the date the first draft of the agreement was presented, or from the date the agreement, in its final form, was presented. Until the rule is clarified, the most conservative measure is to count seven days from the date the final version of the agreement was presented. No substantive changes to the proposed agreement should be made within seven days of it being executed to ensure compliance with the rule.

Christopher C. Melcher is a partner in the law firm of Walzer & Melcher LLP in Woodland Hills, California. He is a member of the Family Law Executive Committee of the State Bar of California. He is a frequent lecturer on family law issues and is a co-author of the upcoming Family Law Financial Discovery Handbook by CEB.
When a wedding date is approaching, some lawyers have been known to engage in the sharp practice of demanding changes within the seven-day waiting period—setting up a later defense to the agreement. This can only be avoided by requiring that the agreement be finalized well before the marriage.

The Act does not address whether the seven-day rule applies to any disclosures exchanged between the parties. It makes sense to exchange the disclosures in sufficient time before execution of the agreement so each party has had an adequate opportunity to review them. The agreement should recite when the proposed agreement was presented and when the disclosures were exchanged, to avoid a dispute later on about when these events occurred.

No Fraud, Undue Influence, Etc

The court must find that the party did not act under duress, fraud, or undue influence, and that the parties had the capacity to enter into the agreement. (Id.) Fraud is the intentional misrepresentation or concealment of a material fact with the intent to deprive another party of a legal right. (Civ. Code, § 1572.) Duress exists when a party has been deprived of the free exercise of his or her will by signing an agreement under a threat to the safety of his or her person, family, or property. (Civ. Code, § 1569; In re Marriage of Gonzalez (1976) 57 Cal.App.3d 736, 743-744.) Undue influence occurs when one takes an unfair advantage of another’s weakness of mind, takes “a grossly oppressive and unfair advantage of another’s necessities or distress,” or uses a confidential relationship for the purpose of obtaining an unfair advantage. (Civ. Code, §1575.)

No presumption of undue influence arises in the context of a premarital agreement because unmarried persons do not owe fiduciary duties to each other. (Marriage of Bonds (2000) 24 Cal.4th 1, 27-29.) Prospective spouses are not presumed to be in a confidential relationship with each other either. (Id.) Nevertheless, a confidential relationship may, in fact, exist if a party knows that the other party has reposed confidence in him or her. (Civ. Code, §1575, subd. (1); Vai v. Bank of America (1961) 56 Cal.2d 329, 388.) The parties should terminate or deny the existence of a confidential relationship prior to negotiating and executing the premarital agreement. (See In re Marriage of Connolly (1979) 23 Cal.App.3d 590, 600.)

If a de facto confidential relationship is established and a party obtained an unfair advantage in the agreement, a presumption of undue influence will then arise. (Johnson v. Clark (1936) 7 Cal.2d 529, 534-535.) Undue influence does not occur when a party uses powers of persuasion to negotiate an agreement, or when one party has a strong need to be married. For example, the mere fact that one party is pregnant with the other’s child and is concerned about her financial security does not, by itself, create undue influence. (In re Marriage of Dawley (1976) 17 Cal.3d 342, 355.) Instead, as discussed, proof is required that a party took an “unfair advantage” of another’s weakness of mind, or took a “grossly oppressive and unfair advantage of another’s necessities or distress”, or betrayed a trust. The overall fairness of the agreement, or failure of consideration, is not the test for its validity. (Bonds, supra, 7 Cal.2d at p. 28; Fam. Code, § 1611.) A court is more likely to find undue influence if threats were made to sign the agreement, or if there is a history of domestic violence between the parties, evidencing that the agreement was not freely and voluntarily made. (In re Marriage of Balcof (2006) 141 Cal.App.4th 1509, 1520-1521.)

To protect against undue influence claims, the recitals to the premarital agreement should set forth the age, health, education, and work experience of each party, their understanding of the English language, the length of their relationship, whether there has been any domestic violence, whether they are living together or have any children together, whether each party had independent counsel or waived that right, and any other fact bearing upon their relative bargaining power. The recitals can reflect whether the agreement was negotiated between the parties directly or through their respective attorneys. The recitals can also state, if true, that the wedding date could have been postponed to allow additional time to negotiate the agreement, but the parties elected to keep their wedding date. Counsel should maintain a file showing how long the negotiations took, how many drafts of the agreement were made, and which party requested each change.

Any Other Factor

Finally, the court may consider “any other factor” it deems relevant in determining whether the agreement was made voluntarily. (Fam. Code, § 1615, subd. (c)(5).) This catch-all provision is misplaced in the list of factors the court must find before a premarital agreement may be enforced. It poses great concern to spouses who seek to enforce an agreement because it appears to give the court discretion to invalidate the agreement on grounds not specified in the Act.

If the court does not make all of the findings listed above, the agreement shall be deemed to have been
executed involuntarily. Thus, as indicated above, it is the burden of the party seeking to enforce the agreement to establish each of the foregoing factors.

**Unconscionability and Inadequate Disclosure**

A separate defense is available under the Act for premarital agreements which were unconscionable when executed and the party seeking enforcement failed to comply with the disclosure requirements of the Act. (Fam. Code, subd. (a)(1).) The burden to establish this defense is on the party resisting enforcement of the agreement. (Id.)

**Unconscionability.** Proof is required of an absence of meaningful choice, together with contract terms that are unreasonably favorable to the other party. Unconscionability has procedural and substantive elements, both of which must be present. (Little v. Auto Stiegler, Inc. (2003) 29 Cal.4th 1064, 1071–1072; Civ. Code, § 1670.5.) Procedural unconscionability refers to oppression caused by unequal bargaining power and surprise due to hidden and unexpected provisions. Substantive unconscionability involves a one-sided, unreasonable agreement lacking in justification. The issue of unconscionability under the Act is to be decided as a matter of law as of the time the agreement was executed, except for limitations on spousal support which are tested at time of enforcement. (Fam. Code, § 1615, subd. (a)(2).)

**Disclosure Requirements**

In addition to unconscionability, the party seeking to invalidate the agreement must establish the following: (1) He or she was not provided a “fair, reasonable, and full disclosure” of the other party’s property or financial obligations; (2) He or she did not voluntarily and expressly waive a disclosure beyond that which was provided; and (3) He or she did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party. (Fam. Code, § 1615, subd. (a)(2).) Proof of all of these elements is required or the agreement will be upheld. It is not sufficient, for example, to show that a failure to disclose if the party seeking to invalidate the agreement knew, or reasonably should have known, of the other party’s finances. The best practice is to provide a full disclosure of all assets, debts, income, and expenses. The agreement should also state that the parties waive any disclosure beyond that which was provided. Otherwise, a party could claim he or she did not receive a “full” disclosure because, for example, real estate appraisals or business valuations were not obtained. The disclosures can be attached as an addendum to the agreement so there is no question what was provided.

Note that proof of unconscionability or lack of disclosure, alone, is not enough sufficient to avoid enforcement of a premarital agreement; instead, proof of both elements is required. (Bonds, supra, 7 Cal.2d at p. 15.) This implies that an unconscionable agreement may be enforced, provided there was full disclosure—and that a conscionable agreement is acceptable even if there was a failure to disclose. It is not clear whether the traditional contract defense of unconscionability remains a viable defense to a premarital agreement. Counsel should anticipate that a court of equity will find a way to avoid enforcement of an unconscionable agreement, perhaps as one of those “other factors” the court may consider in determining whether the agreement was executed voluntarily.

**Violation of Public Policy**

Some parties are concerned about ensuring moral or religious behavior by their soon-to-be spouse, and will insist on penalty provisions in the agreement for failure to adhere to their own personal standards of conduct. Such provisions are void against public policy, and may make the entire agreement unenforceable. (Fam. Code, § 1615, subd. (a)(7); Marriage of Mehren & Dargan (2004) 118 Cal.App.4th 1167, 1171–1172.) For example, a premarital agreement may not provide for liquidated damages for breach of a covenant to maintain marital fidelity. (Diosdado v. Diosdado (2002) 97 Cal.App.4th 470.) Agreements requiring domestic services or companionship are also void. (Bonds, supra, 7 Cal.2d at p. 25.) So are agreements requiring the parties to raise a child in a particular religion. (Id.)

Finally, premarital agreements which promote divorce are against public policy. (Dawley, supra, 17 Cal.3d at p. 352.) The promotive of divorce defense was developed before premarital agreements were recognized by the Act in 1986. It is questionable whether the defense is still viable since the Act provides authority for the parties to re-order their property rights upon dissolution in a premarital agreement. (Fam. Code, § 1612, subd. (a)(3); Marriage of Bellio (2003) 105 Cal.App.4th 630, 633, fn. 1 (raising but not deciding issue).) Public policy favors premarital agreements and realistic planning that takes into account the possibility of dissolution does not violate public policy. (Id. at pp.634-635.) Still, until this issue is clarified, it is wise not to include a provision requiring a lump sum payment to a spouse upon divorce unless it is
tied to money the spouse lost because of the marriage, such as the loss of the right to spousal support from a prior relationship.

Special Rules for Limitations on Support
Any provision in a premarital agreement regarding spousal support, including a limitation or waiver of it, is unenforceable if the party against whom enforcement is sought was not represented by independent counsel at the time the agreement containing the provision was signed. (Fam. Code, § 1612, subd. (c).) The Act requires the party to have counsel, and does not appear to allow for a waiver of that right. Furthermore, the spousal support provision will not be enforceable if it is unconscionable at time of enforcement. There is no way to predict what the circumstances of the parties will be at the time the parties separate and the spousal support is tested. The court could consider the length of the marriage, whether the parties have children, the age and health of the parties, the income and assets of each party, the martial standard of living, and the earning capacity of each party in determining whether the spousal support provision is unconscionable. The court will also consider whether the parties had unequal bargaining power and whether enforcement of the support provision would lead to an unexpected result.

The strengthen the agreement, the parties should acknowledge that there may be significant changes in their health and finances over the course of the marriage, that they might have children, and that they might have been married for many years and then divorce. This will establish their expectations when they made the agreement. Nevertheless, a court may be unwilling to enforce a waiver of spousal support when it would be inequitable to do so. Therefore, it may be better to limit spousal support rather than waive it outright.

In addition, child support may not be “adversely affected” by a premarital agreement. (Fam. Code, § 1612, subd. (b).) To avoid violating this rules, a premarital agreement should not address child support as there is no way to tell if guideline child support is being adversely affected until the court calculates it.

Amending a Premarital Agreement After Marriage
The Act provides that a premarital agreement may be amended or revoked after marriage “without consideration” by a signed writing. (Fam. Code, § 1614.) However, this provision of the Act predates the fiduciary statutes, which were created in 1993. Permitting an amendment to be made during marriage without consideration is inconsistent with the fiduciary duties married persons owe to each other. (Fam. Code, §§ 721 & 1100, subd. (e).) If a spouse obtains an unfair advantage in marital transaction, it will be presumed to be the product of undue influence. (In re Marriage of Burkle (Burkle II) (2006) 139 Cal. App.4th 712.) Although the Act does not require consideration for an amendment to a premarital agreement, an amendment which makes substantive changes to the rights of the spouses will not be enforceable without consideration. (See In re Marriage of Delaney (2003) 111 Cal.App.4th 991, 997, fn.6.) Furthermore, there is a duty to disclose between spouses. For these reasons, amending a premarital agreement after marriage should be avoided.

Premarital Agreements Executed Prior to 2002
There is a question whether the 2002 amendments to the Act apply retroactively. The 2002 amendments added the requirements of independent legal counsel, “fair, reasonable, and full” disclosure, and the seven-day waiting period. The general rule is that all new Family Code sections are applied retroactively. However, there is an exception when the retroactive application of a new law will interfere with the rights of the parties. (Fam. Code, § 4, subd. (h).) It impermissible for a new law to retroactively impose duties on a party which did not exist under prior law. (In Marriage of Walker (2006) 138 Cal. App.4th 1408, 1427-1428; In Marriage of Fellows (2006) 39 Cal.4th 179, 189-190.) Indeed, the legislative history leading up to the 2002 amendments states that there is “no provision for retroactive application” of the proposed amendments. (Senate Judiciary Committee Analysis to Sen. Bill No. 78, (2001-2002 Reg. Sess.) 4/25/01, p.11.)

Voiding a pre-2002 agreement for failure to comply with the requirements of the 2002 amendments would appear to constitute a violation of due process, as the contracting parties could not have anticipated those changes in the law when the agreement was made. Parties to pre-2002 agreements have property rights that cannot be altered by a later-enacted statute. The legislature did not clarify existing law in enacting the 2002 amendments—it created new law. There was no requirement in the law before then for a seven-day waiting period, or that a party must be represented by counsel when limiting or waiving the right to support.

When the Act first became effective in 1986, it was applied prospectively to agreements made on or after the effective date of the Act. (Fam. Code, § 1601.) Since the Act itself was given only prospective effect when it
was first created, it makes little sense to apply the 2002 amendments, which made substantive changes to the Act, retroactively.

Amending an old prenuptial agreement to bring it in compliance with the 2002 changes to the law is not a practical solution for the following reasons:

(a) Sufficient consideration is required to validly amend a premarital agreement during marriage, even though no consideration was needed for the premarital agreement itself.

(b) The parties will have to incur legal fees to negotiate and prepare the amended agreement.

(c) One of the parties may not be willing to amend the premarital agreement to fulfill the procedural requirements of the 2002 amendments because he or she is no longer satisfied with the terms of the agreement, or is planning on a divorce.

(d) Requiring married persons to renegotiate the terms of their premarital agreement during marriage is an unnecessary intrusion into the private lives of the parties. Premarital agreements are supposed to provide certainty in the event of dissolution and avoid litigation. (See *Estate of Butler* (1988) 205 Cal.App.3d 311, 314-315; *In re Marriage of Pendleton & Fireman* (2000) 24 Cal.4th 39, 53.) Legislation cancellation of agreements that were valid when executed frustrates the legitimate expectations of the parties, and constitutes a violation of due process. Therefore, the 2002 amendments should be applied prospectively only.

**Conclusion**

Compliance with the Act for post-2002 agreements will ensure the validity of those agreements. The challenge for counsel is to create an agreement that will survive a challenge many years in the future, when the circumstances of the parties may have changed dramatically from when they were married. A balance between protecting the rights of the client and providing an equitable result upon dissolution is the best way to pack the client’s parachute.
Warning Signs

1. Your Client Is Reluctant to Turn Over Documents Relating to Income of the Business
   When you told John that the Family Code requires him to provide Jane with information and documentation relating to the income of the business, he would either ignore you or say he would get the records to you—and they would never come.

2. Your Client’s Tax Returns Do Not Match His Lifestyle
   When you saw John’s personal tax returns for the first time, you quietly laughed to yourself—how could he afford his house, the place at the beach, the nice cars, and the trips to Europe on the income he was reporting.

3. The Business Tax Returns Do Not Match The Loan Applications
   When Jane’s attorneys went after the business loan applications; that was Warning Sign No. 3.

4. The Other Side Hires A Second Attorney For No Apparent Reason
   When Jane hired a second attorney who apparently had no previous Family Law experience to act as co-counsel; that was Warning Sign No. 4.

5. Opposing Counsel Focuses Discovery on the Receipt of Currency, the Payment of Personal Expenses by the Business, and the Loan Applications
   When Jane’s two attorneys began to bombard you with interrogatories and document production requests regarding the receipt of currency, payment of personal expenses by the business and loan applications—their motives should have been clear—they are trying to prove that the tax returns are false.

6. Opposing Counsel Files Motions to Compel Relating to Information and Documents Relating to Currency
   When John provided evasive responses to discovery and John produced practically no useful documents, opposing counsel filed motions to compel. You should have appreciated the significance of the motions to compel—the information contained in the motions has now become a matter of public record and anyone (including the IRS and FBI) has access to these documents. That was Warning Sign No. 6 and, more significantly, the dispute is no longer a private matter between John, Jane, and their respective counsel. In other words, the genie is out of the bottle and there is no putting him back.

What Could You Have Done Differently?
You are the type of attorney who learns from his mistakes and you vow to yourself that this will never happen again. You put together a checklist of the things that you have learned from John’s case, which you intend to use with each new client from now on. It looks something like this:

Find Out if Your Client’s Business Receives Large Amounts of Currency and Find Out Where It Goes: At the beginning of your representation, sit down with your client and have him explain in detail how his business works and make sure you understand the flow of money into and out of the business. Find out what your client’s gross receipts were for each of the last six years and determine what percentage of the receipts were by check and what percentage was in currency. Do not blindly accept what your client tells you. If your gut is telling you that your client is not telling the truth, you better dig further and demand documentation that supports your client’s contentions. If your client claims that all cash is recorded on the books and records have him show you the accounting records that support this claim.

If Your Client Is Reluctant to Turn Over Documents, Find Out Why: If your client is reluctant to turn over documents, you need to find out why. If he is concerned that these documents will prove he is a criminal, you better consult with a criminal defense attorney immediately because the marital dissolution action may become the least of his worries.

If Your Client’s Tax Returns Don’t Match His Lifestyle, You May Not Be The Only One Who Realizes That: When you see your client’s tax returns for the first time and you wonder how could afford all of the houses, cars, and trips on the amounts he was reporting, you must ask your
client to explain this. If his explanation does not make sense, you should consider hiring a forensic accountant to determine what the truth really is. The bottom line is that if you don’t buy your client’s explanation, no one else will either.

**Compare the Business Tax Returns With Any Loan Applications:** If opposing counsel seeks discovery of the business loan applications, you need to immediately compare the amounts reported on the business tax returns with the amounts reported on the business loan applications.

**If the Other Side Hires A Second Attorney, Find Out Why:** If the other side hires a second attorney to act as co-counsel, you should check out the attorney’s background to figure out why he or she is being hired.

**If it Looks Like Your Client May Have Criminal Exposure, Tell Him:** If and when you conclude your client may have committed tax fraud and/or bank fraud, you need to tell your client of your concern as soon as possible. Your client needs to understand the seriousness of the situation and what his rights are. Your client must also understand that a criminal investigation running parallel with a civil case presents a host of unique problems and issues that must be addressed.

**Advise Your Client of His Fifth Amendment Privilege Against Self Incrimination:** Your client needs to understand that anything he says in discovery in the marital dissolution case can be used against him if and when there is a later criminal prosecution and that he has a Fifth Amendment privilege against self-incrimination. Finally, your client must be told that exercising the Fifth Amendment privilege may have negative ramifications in the marital dissolution action.

**Explain To Your Client That Settlement Before the Commencement of Extensive Discovery May Be In His Best Interest:** At the beginning of the representation, your client tells you that his spouse does not deserve a single dime and he wants to fight this matter to the death no matter how much it costs or how long it takes. Once it is determined that he has criminal exposure, you may want to advise him that that pursuing a “scorched-earth” policy may result in him being the one who is burned.

**Conclusion**

As a Family Law attorney, the next client who walks into your office seeking representation in their dissolution action may not completely forthright regarding the fact that he has committed tax fraud and/or bank fraud and that his spouse knows where all the skeletons are buried. The question is—will you find this out before the Feds are knocking at your client’s door?
While California courts have never ruled directly on the enforceability of foreign prenuptial agreements, the threshold for enforcement is likely to be high.

When Louis XIV and Marie-Thérèse, daughter of Philip IV of Spain, were married in 1659, their marriage contract was part of the Treaty of the Pyrenees, which ended France's war with Spain. The contract also provided for the payment of a large dowry by Spain to France, which was never paid because Spain ran out of money. Imagine, if you can, that Marie-Thérèse becomes fed up with her husband's numerous infidelities, moves to California, and files for divorce.1 Louis XIV may have thought that California was an island populated by Amazons, but if he had worries about whether California would enforce his foreign premarital contract, they might be more realistic.

If two people divorce in California, they are subject to California's community property and support laws. However, a couple may modify their default marriage contract by entering into a premarital agreement. But California premarital agreements are significantly different from foreign marital contracts, which allow a couple to elect a regime of marriage—for example, joint or community property regimes, a separate property regime, or a variation thereof—depending on the country.

Whether a California court will enforce a foreign marital contract may depend on whether the court applies California law or foreign law. California's law is set forth in the Premarital Agreement Act, which was modeled after the Uniform Premarital Agreement Act (UPAA).2 The National Conference of Commissioners on Uniform State Laws approved the act in 1983,3 and since then various states have become signatories to it.4 California enacted the UPAA in 1986 but revised the statute in 20025 in response to In re Marriage of Bonds6 and Marriage of Pendleton and Fireman.7

The California statute provides that certain conditions must be met for a premarital agreement to be enforceable:

- The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, rep-
representation by independent legal counsel.\(^8\)

- The party against whom enforcement is sought had 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.\(^9\)

- The party against whom enforcement is sought, if unrepresented by legal counsel, 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 the party was proficient in the language in which the explanation of the party's rights was conducted in which the agreement was written. The explanation of the rights and obligations relinquished was in writing and was delivered to the party prior to signing the agreement. The unrepresented party executed a document declaring that he or she received the information and indicating who provided that information.\(^10\)

- A provision in a premarital agreement regarding spousal support is not enforceable if the party was not represented by independent counsel when signing the agreement or if the provision regarding spousal support is unconscionable at the time of enforcement.\(^11\)

- The agreement was not executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement.\(^12\)

- The party against whom enforcement is sought was provided a fair, reasonable, and full disclosure of the property or financial obligations of the other party, unless that party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided, or that the party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.\(^13\)

- The agreement did not promote divorce.\(^14\)

- The agreement was not against public policy.\(^15\)

If a California court were to interpret a foreign marital contract according to the strict statutory provisions set forth above, few foreign contracts would be enforced, because the statutory requirements are different for a foreign marital contract. The main difference between a foreign marital contract and a California agreement is that the parties in most foreign countries are not represented by independent legal counsel. In France, for example, the parties meet together with a notary, who advises the couple on the law and drafts the agreement.\(^16\) For all practical purposes, California law requires that parties have independent counsel advise them prior to executing their premarital agreement. Thus, unless the parties to the foreign marital contract had independent counsel, the attorney asserting that the foreign marital contract is valid in California would have to argue that the foreign law should apply to the agreement.

California has no case law addressing the issue of whether a foreign marital contract is enforceable,\(^17\) nor are there any cases on point from states that are signatories to the UPAA. On the other hand, New York has addressed this issue on several occasions, and it always has enforced the foreign marital contract.

In *Stausko v. Stausko*,\(^18\) the New York appellate court upheld the findings of a special referee that a marital contract made before a notary in Germany was valid and enforceable, despite the fact that the couple were not represented by independent counsel. The court found that there was no evidence of duress, the wife was educated, and the parties followed the agreement throughout their marriage. However, a strong dissent in this case foreshadows how a California court could view the German marital contract. The dissenting justice wrote:

Wife, with no advance notice, was brought to the office of Husband's family's lawyers, and presented with a German document that, while purporting to be simple, dealt with unfamiliar concepts of German marital property "regimes," in German. The purportedly neutral [notary] whose obligation was to ensure that everything was handled fairly and properly, failed to check that plaintiff [wife], a United States citizen, was fluent in German, or understood the concept of the property regime she purportedly was selecting, or had received any legal advice or explanation of the document in advance.\(^19\)

To avoid the risk that a California court would apply California law and determine that the foreign law violated California's particular statutory provisions, the marital contract should include a choice-of-law clause to ensure that the foreign law is used to interpret the contract. When a contract has no such clause, California courts will apply the law of the jurisdiction in which the contract was made and performed to determine questions of enforceability.

In *Henderson v. Superior Court*, the court determined that the law of Florida should be applied to the interpretation of a cohabitation agreement. The court held:

In California a contract is governed by the law and usage of the place where it is to be performed, or, if place of performance is not indicated, by the law and usage of the place where it is made. (Civ. Code, § 1646.) When the application of section 1646 is obscure, California courts are guided by the factors set out in Restatement Second, Conflict of Laws section 188, in determining what law to apply to the contract. Section 188 declares that the rights and duties of the parties to a contract are determined by the law of the state which has the most significant relationships to the transaction and the parties. Factors to be taken into account include, (a) the place of contracting; (b) the place of negotiation;
(c) the place of performance; (d) the location of the subject matter of the contract; (e) the domicile and residence of the parties. In Black v. Powers, a court in Virginia (a UPAA state), using that rationale, applied the law of the U.S. Virgin Islands to the interpretation of a premarital agreement, because the contract was to be performed there. The court found that because the parties were married in the U.S. Virgin islands, the contract was performed there despite the fact that they intended to live in Virginia. In that case, the court held that the act that was to be performed was the wedding.

If a foreign marital contract has a choice-of-law clause, California courts may be expected to follow it. The UPAA and California law provide that parties may contract regarding “[t]he choice of law governing the construction of the agreement.” There are no California cases interpreting the UPAA’s choice-of-law provision, but in a case in Oregon (a UPAA state), Marriage of Proctor, the court interpreted a choice-of-law clause in a California premarital agreement. In the case, the choice-of-law clause provided only that California law applied to the construction of the agreement but not that California property law would apply. Thus, the Oregon court refused to apply California property law and applied Oregon law relating to various reimbursement issues. This case instructs that to be effective, choice-of-law clauses must provide for the application of substantive and procedural law of the foreign jurisdiction.

The parties also may be able to select the forum and the form of dispute resolution they will use to resolve any disputes related to the interpretation or application of the contract. If parties to a German marriage contract, for example, agree that the German contract will be construed under German law and that German substantive law will apply, it may be prudent to select a judicial or extrajudicial body that could effectively apply German law. In New Jersey (a UPAA state), a court deciding Delorean v. Delorean, applauded the parties’ stipulation to use a California private judge to interpret the premarital agreement. The court stated, “Indeed, since the antenuptial agreement specifically provides in paragraph eight that it ‘shall be construed under the laws of the State of California’ there was obvious logic in having a retired California judge pass upon that issue.” Although the parties agreed at the time of their divorce to use a private California judge to interpret the agreement, the parties could have included a provision in the premarital agreement that they would use a California private judge to decide any issues relating to the interpretation or enforcement of the agreement.

To ensure that a foreign marital contract will be enforceable in California, the parties should be represented by independent counsel. There should be an adequate disclosure of assets and obligations, and there should be an adequate time to review the agreement before signing it. The premarital agreement should include a choice-of-law clause that applies to the construction of the agreement and the substantive law of the selected forum. The parties should also select a dispute resolution process by which any disputes relating to the agreement will be decided. Counsel should have the agreement translated if one of the parties does not speak the language of the country and make sure the party acknowledges in writing that the agreement has been translated and understood. Another safeguard is to videotape the execution of the agreement and the voir dire of the parties to ensure their assent to the contract was not procured by duress or fraud, that they understand the contract, and that they had capacity to sign the contract.

To analyze whether a foreign marital contract may be enforced in California, attorneys should determine which country’s laws should apply to construction of the agreement and which country’s laws should apply to the executory provisions of the contract. Unless the marital contract specifically states that the parties’ contract should be construed under the foreign law and the foreign law should govern the division of the property, counsel may argue that the agreement called for performance in the foreign country, and therefore the foreign law should apply. Applying the choice-of-law doctrine to the marriage contract between Louis XIV and Marie-Thérèse, it would appear that French law should apply to the interpretation of the contract, even if a divorce in California could mean renewed hostilities between France and Spain.

1 Although this scenario is unlikely, in 1602, the Spaniard Sebastián Viscaino explored California’s coastline as far north as Monterey Bay, where he put ashore. He ventured inland south along the coast and recorded a visit to what is likely Carmel Bay.
3 Id. at 371.
5 When California enacted the UPAA in 1984, it did not include the provision in the uniform act that permitted the limitation on spousal support (alimony or maintenance). This provision became law after the California Supreme Court decided in re Marriage of Pendleton & Fireman, 24 Cal. 4th 39 (2000).
Prudent Practitioners Must Place a Premium on Careful Premarital Practices

By Peter M. Walzer*

Premarital agreements are ice water on romance. When marrying, people are full of hope. They are looking forward to a life of happiness. However, when faced with negotiating a premarital agreement, they realize that not only do they have to decide what will happen to them when they divorce or die, but that they also have to negotiate these issues with their fiancé(e). Under these circumstances, clients are understandably protective, wary, and emotional. They often put off to the last minute important decisions relating to the agreement. They pressure their attorney to make exceptions to the rules. Despite the pressure, we must follow formal practices and procedures to ensure an enforceable agreement. Because the statutory premarital law is comparatively new, we must establish a model we can follow. What follows are procedures that I have implemented in my practice.

In 2002, the legislature revised California’s version of the Premarital Agreement Act. (Fam. Code, §1600 et seq.) The revisions to the Code addressed certain issues that were adjudicated by the California Supreme Court in Marriage of Bonds (2000) 24 Cal.4th 1 and Marriage of Pendleton and Fireman (2000) 24 Cal.4th 39. These issues include the interval between the day the agreement is presented and when it is signed, whether parties need representation to enter into an agreement, and whether spousal support can be limited in a premarital agreement. While the Legislature clarified some of these issues, it created ambiguities in others.

Seven-Day Waiting Period

Because the Bonds court validated an agreement that was signed the day before the marriage, the legislators amended the law to provide a waiting period during which the parties could consider the agreement. The Code now requires that there be "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. Code, § 1616, subd. (c)(2).) To avoid argument that the agreement was substantially altered before it was signed, count the seven days from the date the last draft of the agreement was delivered to the other party.

Although it seems simple to count "seven calendar days," confusion can occur. The seven days begin the day after the agreement is received by opposing counsel. The parties should sign the agreement on the eighth day. To ensure there is a record of receipt of the final version of the agreement before the first day of the seven-day waiting period, both parties should acknowledge receipt of the agreement in writing. Attach a copy of the signed acknowledgments to the agreement. If possible, arrange a four-way meeting so that all the documents can be signed and notarized at one time. In this way, the attorneys can ensure that all of the documents are signed and dated and that each page is initialed.

* Certified Specialist, Family Law, the State Bar of California, Board of Legal Specialization.
Execution of the Agreement

When the matter warrants the expense, namely, when there are issues relating to a party's competency or understanding of the agreement retain the services of a private judicial officer to preside over the execution of the agreement. The judicial officer can then ask the parties whether each had an opportunity to review the disclosures well in advance of receipt of the final version of the agreement, whether each understands the terms of the agreement, and whether either of them was under any duress to sign the agreement. Additionally, a reporter should be present to make a record of the testimony. In some cases, counsel may feel more comfortable videotaping the signing of the agreement. Under all circumstances, the signatures of the parties must be notarized.

It is common for clients to forget to date the document. The date on the document is critical to counting the days between the date the document is "first presented" and the date it is signed. When the signing is handled by mail or email, make certain that the agreement is dated and signed and that two duplicate originals are returned to you so you have one for your file and your client has the other. The agreements should be sent by certified mail, return receipt requested, or by an overnight mail service so that you have an accurate record of the delivery date.

Do not delegate any duties to the clients as they are focused on their wedding. Take all precautions to ensure that the agreement is properly executed. If your client lives out of town, and the agreement is going to be signed out of your presence, retain counsel to supervise the execution of the agreement just as you would do if your client's deposition were being taken and you were not able to be present.

"Do not delegate any duties to the clients as they are focused on their wedding. Take all precautions to ensure that the agreement is properly executed."

Exchanging the Agreement with Counsel

When the documents are delivered by email, send them back and forth in Portable Document Format (PDF) so that opposing counsel cannot edit the document or view the "metadata" or hidden information in the document. That hidden information could reveal confidential information such as who originally drafted the form agreement or the name of another client for whom you drafted another version of the document. The metadata may also include the many changes to the agreement over the course of the negotiations. This is information you may not want opposing counsel to see.

Insist that the clients acknowledge receipt of all drafts of the document by email so that there is a record that the clients reviewed every draft. Keep all drafts, correspondence, and notes so that the file reflects the negotiations and the various resulting revisions. Name and number the drafts in consecutive order e.g., "draft seventeen." This record will be helpful if the agreement is later contested.

Because Family Code Section 1615, subdivision (a)(2)(A) requires "a fair, reasonable, and full disclosure of the property or financial obligations of the other party," you will want to have evidence as to both the date on which the financial data were finalized and when the disclosure was delivered to counsel for the other party. Deliver the disclosure packet as a separate velobound document with the last three years' personal and business tax returns, a balance sheet (Schedule of Assets and Debts), and a profit and loss statement. The cover sheet should reflect the parties and the contents of the packet, such as "John Jones's Separate Disclosure Packet to the Premarital Agreement of John Jones and Susan Smith." Attach the balance sheets as Exhibits A and B to the agreement. The kind of documents included in the packet depends on the complexity of the assets and the importance of the disclosure to the agreement. Prepare an acknowledgment of receipt for both clients to sign confirming that each received the disclosure on a certain date.
This date should be well before the first day of the seven-day waiting period for signing the agreement. This precludes any dispute as to whether one of the parties would have negotiated different terms if he or she had known the nature and extent of the disclosure well in advance of the date on which the agreement was presented.

Maintaining the Agreement

There are various other housekeeping details to which you should attend. The parties should initial each page of four "original" premarital agreements. Provide each client and the attorneys with an original. Bind your original agreement to the "separate disclosure packet" so that everything is in one place. It is recommended that these agreements be stored at a location where they can be retrieved if needed even if they are needed 20 years from now.

Both Parties must be Represented by Counsel

The revisions to the premarital agreement statute make it difficult for unrepresented parties to enter into premarital agreements. The requirements are set forth in Family Code section 1615, subdivision (c)(1) as follows:

The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel expressly waived, in a separate writing, representation by independent legal counsel.

Family Code section 1615, subdivision (c)(3) further requires:

[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.

"Generally, parties do not record their entire premarital agreement because they have a desire to keep their personal information private."

The problem with these provisions is that the attorney for one party is obligated to explain to and virtually represent an unrepresented party. This is an untenable position for both the attorney and the adversarial party. The attorney's explanation of the agreement is likely to be attacked at the time of enforcement as being insufficient. If a court sets the agreement aside on the basis that the explanation was insufficient, your own client could assert that you did not do an adequate job in explaining the agreement.

The Code does not provide any guidance to two unrepresented parties as to how they should draft an enforceable agreement. Presumably each party would have to explain to the other one the "basic terms and effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement." It should also be noted that Family Code section 1612, subdivision (c) provides that a spousal support waiver "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." The better practice is not to draft an agreement where there is an unrepresented party.
Record the Agreement
A premarital agreement may be recorded with the county recorder's office. Generally, parties do not record their entire premarital agreement because they have a desire to keep their personal information private. A memorandum of the agreement containing selected provisions that summarize the basic terms of the agreement provides notice to creditors that the party's income and property are separate property and may not be subject to garnishment or execution, and permits real property to be sold without the necessity of obtaining the spouse's consent. The purpose of including the basic terms of the agreement in the memorandum is to have a record of the agreement in the event the original and duplicate originals are lost. The basic terms should include the acknowledgment that disclosures were provided, the purpose for which the agreement was entered into, and executory provisions. Here is an example of a notice to creditors:

Notice to Creditors
This Memorandum of Premarital Agreement also serves as notice to all creditors that John Jones and Susan Smith intend that all property and income of any nature or source or in any place, including, but not limited to, the earnings and income resulting from their personal services, skill, effort and work during the marriage, and all property acquired by or coming to either of them by purchase, gift, bequest, exchange, devise, inheritance, profit, rent, accretion, appreciation, accumulation or increase during the marriage, or by any other means during the marriage shall be their respective separate property.

[Recording a document with the following language may work effectively to allow specified real property to be transferred without the title company requiring a spouse to execute a quitclaim deed as a condition precedent to the transfer of the property. Include the legal description of the property in the document.]

Transfers Of Real Property
The parties agree that the properties listed in this Memorandum of Premarital Agreement under Susan's real property are Susan's sole and separate property and that a community interest will not be created in the properties set forth herein. The parties intend that, by recording this Memorandum of Premarital Agreement, Susan may buy, sell, transfer, exchange, encumber, mortgage, assign, create a security interest in, hypothecate, or lease her respective parcels of separate real property without the signature or permission of the other party. The parties specifically instruct any title officer to authorize the transfer of the property described herein without the signature of the other party to this Memorandum of Premarital Agreement. Furthermore, Susan instructs any title officer to authorize the transfer of either party's property, even though not mentioned herein, as the parties intend, by their Premarital Agreement and this Memorandum, to create no community interest whatsoever in any property they own. This document is not intended for either party to have permission to transfer the other party's real property to themselves or others.

This document should be notarized and recorded in the county recorder's office of any county where the parties own real property.

Conclusion
The law relating to premarital agreements is evolving rapidly. It will take several years to give these changes practical application. Because the law relating to these agreements is changing and agreements are subject to challenge, it is incumbent on the practitioner to follow the existing rules and establish routines to preserve the integrity of the document execution process.

Walzer & Melcher
A Limited Liability Partnership
499 N. Canon Drive Fourth Floor, Beverly Hills, CA 90210
Telephone: (310) 557-0915 • Facsimile: (818) 591-3774 • E-mail: peterwalzer@california-divorce.com
www.california-divorce.com
The Gender Factor of *Marriage of Facter*

**FAMILY LAW DISPUTES** can easily lapse into a battle of the sexes. This became clear to my partner, Christopher Melcher, and me when we tried to reach a consensus with various amicus committees to file a request to depublish part of a recent decision, *Marriage of Facter*,
 but were never able to get a consensus. The women members voted against filing an amicus brief, and the men voted for it. *Facter* sets aside a waiver of spousal support in a 1994 premarital agreement. The court held that the sentence in the agreement that waives spousal support was unconscionable. The court compared the income, assets, education, and standard of living of the parties at the time of execution of the agreement and of enforcement and found a significant disparity between the parties at both times. We contended that the law in 1994 required the court to examine those circumstances only as they stood on the date of the agreement. We were also concerned that the court did not define “unconscionability” for purposes of a premarital agreement.

A little background on prenups may be in order. California adopted the Uniform Premarital Agreement Act in 1986. The provision in the act relating to the limitation on spousal support was not adopted by our legislature. Many practitioners believed that one could not limit spousal support in an agreement because there was no specific statutory authorization. In 2000, the California Supreme Court weighed in on this issue in *Pendleton and Fireman* and held “no public policy is violated by permitting enforcement of a waiver of spousal support executed by intelligent, well-educated persons, each of whom appears to be self-sufficient in property and earning ability, and both of whom have the advice of counsel...” In 2002, the legislature clarified the law relating to limitations on spousal support in premarital agreements by enacting Family Code Section 1612(c), which allows for a limitation of spousal support but specifically requires that for the limitations to be enforceable, a party must be represented by independent counsel. The code states that unconscionability will be determined at the time of enforcement. Some states refuse enforcement if the waiver of spousal support would make the claimant eligible for public assistance; other states hold that the court may set aside a waiver if it is necessary to avoid undue and unforeseeable hardship, and still others hold that the standard is whether extreme circumstances warrant a set-aside. The courts look at several different factors: What level of hardship must there be to justify setting aside the support provision? Must the circumstances have changed since the execution of the agreement? Must those circumstances be unforeseeable? When there must be an award of support, what are the criteria for determining amount and duration? Unfortunately, the *Facter* court did not address any of these issues, and the court did not create a clear standard.

When we voiced our concerns to our colleagues about whether this opinion was good law, we found that the viewpoints were divided along gender lines. The female faction wanted to make it easier for parties to void an agreement that waives spousal support. They like the *Facter* opinion because it does not restrict a trial court’s wide latitude in setting aside a clause limiting spousal support in a premarital agreement. These attorneys contend that prenups hurt women and that courts need to have the ability to determine whether the waiver is fair. The opposing view is that parties who enter into these agreements with the advice of counsel should be held to their promises unless the terms of the agreement or the way in which it was negotiated shock the conscience of the court. It is important that prospective spouses be able to make an enforceable premarital agreement that they can both rely upon. The legal standard for setting aside a limitation on spousal support should be clear, as it is in many other states.

It is not only men who want to limit their liability to pay spousal support. Successful women also want this right, and they enter into prenups. The common view, however, is that women are more vulnerable than men and they need the protection of the courts. Unfortunately, a vague standard as to the meaning of the word “unconscionability” will lead to considerable litigation over the enforceability of prenups. This loose standard will cost parties money, and it will bog down an already overburdened court system. It also fosters a paternalistic view of women as being unable to protect themselves in a premarital agreement that was negotiated at arm’s length.

Since we were unable to get consensus, our firm sent a letter on its own asking the California Supreme Court to depublish the section of the opinion dealing with unconscionability. Those of us who draft prenups regularly want clear guidance on what provisions of an agreement will be enforceable and why.

It is not clear who will win this battle. Men and women see these issues differently, but the battle lines are changing as more women want the ability to enter into a contract that can be enforced. Perhaps a word to both sides is in order: Be careful what you wish for—an ironclad rule can bring harsh results, and a loose one creates uncertainty. Courts will continue to wrestle with these issues as prenups become more common. Perhaps the best the court can do is to strike a balance—and maybe that was what the *Facter* court was trying to do.

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Peter M. Walzer is the founding partner of Walzer & Melcher LLP, which specializes in premarital agreements and family law appeals.