

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.



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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.

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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.

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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:

[I]f 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.

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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. ■

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