

## Memorandum 83-71

Subject: Study F-631 - Marital Agreements

Attached is a preliminary discussion draft of legislation that would provide statutory rules governing the content and requirements for a marital property agreement.

Under existing law, a contract between spouses is subject to the same defenses as any other contract: (1) Lack of capacity because of unsound mind or deprived of civil rights or because party is not an adult, emancipated minor, or person capable of contracting marriage. (2) Lack of consent based on duress, menace, fraud, undue influence, or mistake. It is unclear the extent to which lack of consideration is a defense if the agreement is made during marriage. In addition, Section 5103 of the Civil Code makes transactions between married persons subject to the rules which control actions of persons occupying confidential relationships.

Decisions made when divorce was based on the fault concept held that spousal support could not be limited or eliminated in a marital property agreement. For additional discussion, see the attached copy of an article from the State Bar Journal (Exhibit 1). The proposed legislation would allow a marital property agreement to eliminate or limit support subject to limitations.

The proposed legislation also would authorize a provision in a marital property agreement that upon the death of either spouse property will pass without probate. For further discussion, see Exhibit 2 attached.

Much of the proposed legislation is drawn from Uniform Acts. But the standards for enforcement of a marital property agreement (which includes agreements made before and during marriage) are drawn from the Probate Code provisions of Assembly Bill 25 relating to waiver of various rights of a surviving spouse under the Probate Code. We have modified the Probate Code provisions of AB 25 in the last part of the proposed legislation to clarify the provisions. You should first review the changes made in Probate Code Sections 142, 143, and 144 so you can see the revisions made in the Probate Code provisions. The staff has made the substance of the revised Probate Code provisions applicable to the enforcement of marital property agreements generally.

We plan to go through the proposed legislation section by section at the meeting. Please review the proposed legislation with care prior to the meeting so you can raise any matters that are of concern to you.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

Civil Code § 4390 (added). Tribal marriages and divorces

SECTION 1. Chapter 5 (commencing with Section 4390) is added to Title 1.5 of Part 5 of Division 4 of the Civil Code, to read:

## CHAPTER 5. TRIBAL MARRIAGES AND DIVORCES

4390. For the purpose of application of the laws of succession set forth in the Probate Code to a decedent, and for the purpose of determining the validity of a marriage under the laws of this state, an alliance entered into prior to 1958, which, by custom of the Indian tribe, band, or group of which the parties to the alliance, or either of them, are members, is commonly recognized in such tribe, band, or group as marriage, is deemed a valid marriage under the laws of this state. In the case of such marriages and for such purpose a separation, which, by custom of the Indian tribe, band, or group of which the separating parties, or either of them, are members, is commonly recognized in such tribe, band, or group as a dissolution of marriage, is deemed a valid divorce under the laws of this state.

Comment. Section 4390 continues without change former Section 5138.

Chapter heading (added)

SEC. 2. A chapter heading is added immediately preceding Section 5100 of the Civil Code, to read:

## CHAPTER 1. GENERAL PROVISIONS

Civil Code § 5103 (technical amendment). Transactions between husband and wife

SEC. 3. Section 5103 of the Civil Code is amended to read:

5103. (a) ~~Either~~ Subject to subdivision (b), either husband or wife may enter into any ~~engagement or~~ transaction with the other, or with any other person, respecting property, which either might if unmarried.

(b) ~~subject~~ Except as provided in Sections 143, 144, and 146 of the Probate Code and in Sections 5140.090 and 5140.100 of this code, in transactions between themselves, a husband and wife are subject to the

general rules which control the actions of persons occupying confidential relations with each other, as defined by Title 8 (commencing with Section 2215) of Part 4 of Division 3.

Comment. Section 5103 is amended to divide the section into two subdivisions and to add references to provisions of other sections that constitute exceptions to the rule stated in subdivision (b). The division of Section 5103 into two subdivisions facilitates reference in other sections to the rule stated in subdivision (b). See, e.g., Section 5140.090(b). The omission of the word "engagement" in subdivision (a) is not a substantive change.

36601/NZ

Civil Code § 5114 (repealed). Inventory of separate property

SEC. 4. Section 5114 of the Civil Code is repealed.

~~5114. A full and complete inventory of the separate personal property of either spouse may be made out and signed by such spouse, acknowledged or proved in the manner required by law for the acknowledgment or proof of a grant of real property, and recorded in the office of the recorder of the county in which the parties reside.~~

Comment. Former Sections 5114 and 5115 are superseded by Chapter 6 (commencing with Section 5140.010) (marital property agreements). See especially Sections 5140.130 and 5140.140. See also Section 5140.050.

36602/NZ

Civil Code § 5115 (repealed). Filing inventory

SEC. 5. Section 5115 of the Civil Code is repealed.

~~5115. The filing of the inventory in the recorder's office is notice and prima facie evidence of the title of the party filing such inventory.~~

Comment. See the Comment to former Section 5114.

36603

Civil Code § 5133 (amended). Statutory property rights subject to marital property agreement

SEC. 6. Section 5133 of the Civil Code is amended to read:

5133. The property rights of husband and wife are governed by this title, unless ~~there is a marriage settlement containing stipulations contrary thereto~~ a marital property agreement enforceable under Chapter 6 (commencing with Section 5140.010) otherwise provides.

Comment. Section 5133 is amended to make clear that the provisions of this title may generally be varied by a marital property agreement under Chapter 6 (commencing with Section 5140.010). However, Chapter 6 itself imposes certain limitations on the spouses' ability to contract. See, e.g., Section 5140.040 (child and spousal support), 5140.110 (void marriages), 5140.140 (protection of third parties).

36604/NZ

Civil Code § 5134 (repealed). Contracts for marriage settlements

SEC. 7. Section 5134 of the Civil Code is repealed.

~~5134. All contracts for marriage settlements must be in writing, and executed and acknowledged approved in like manner as a grant of land is required to be executed and acknowledged or proved.~~

Comment. Former Sections 5134-5137 are superseded by Chapter 6 (commencing with Section 5140.010) (marital property agreement). See also Sections 5140.130 and 5140.140 (recording and effect of recording marital property agreement).

36605/NZ

Civil Code § 5135 (repealed). Recording of contract

SEC. 8. Section 5135 of the Civil Code is repealed.

~~5135. When such contract is acknowledged or proved, it must be recorded in the office of the recorder of every county in which any real estate may be situated which is granted or affected by such contract.~~

Comment. See the Comment to former Section 5134.

35050

Civil Code § 5135.5 (repealed). Rights at death governed by Probate Code

SEC. 9. Section 5135.5 of the Civil Code is repealed.

~~5135.5. A marriage settlement which affects rights described in Section 141 of the Probate Code is to that extent governed by Chapter 1 (commencing with Section 140) of Part 3 of Division 2 of the Probate Code, and not by Section 5134 or 5135 of this code.~~

Comment. See the Comment to former Section 5134. See also Section 5140.160.

36606/NZ

Civil Code § 5136 (repealed). Effect of recording contract

SEC. 10. Section 5136 of the Civil Code is repealed.

~~5136. The recording or nonrecording of such contract has a like effect as the recording or nonrecording of a grant of real property.~~

Comment. See the Comment to former Section 5134.

35090/NZ

Civil Code § 5137 (repealed). Capacity to make marriage settlement

SEC. 11. Section 5137 of the Civil Code is repealed.

~~5137. A minor capable of contracting marriage may make a valid marriage settlement.~~

Comment. See the Comment to former Section 5134. See also the Comments to Sections 5140.060 and 5140.080.

36607/NZ

Civil Code § 5138 (repealed). Tribal marriages and divorces

SEC. 12. Section 5138 of the Civil Code is repealed.

~~5138. For the purpose of application of the laws of succession set forth in the Probate Code to a decedent, and for the purpose of determining the validity of a marriage under the laws of this state, an alliance entered into prior to 1958, which, by custom of the Indian tribe, band, or group of which the parties to the alliance, or either of them, are members, is commonly recognized in such tribe, band, or group as marriage, is deemed a valid marriage under the laws of this state. In the case of such marriages and for such purpose a separation, which, by custom of the Indian tribe, band, or group of which the separating parties, or either of them, are members, is commonly recognized in such tribe, band, or group as a dissolution of marriage, is deemed a valid divorce under the laws of this state.~~

Comment. Former Section 5138 is continued without change in Section 4390.

36608

Civil Code §§ 5140.010-5140.170 (added). Marital property agreements

SEC. 13. Chapter 6 (commencing with Section 5140.010) is added to Title 8 of Part 5 of Division 4 of the Civil Code, to read:

CHAPTER 6. MARITAL PROPERTY AGREEMENTS

§ 5140.010. Definitions

5140.010. Unless the provision or context otherwise requires, as used in this chapter:

(a) "Dissolution" means a decree of legal separation or separate maintenance, a declaration of invalidity, or the termination of a marriage by a decree of dissolution, divorce, or annulment.

(b) "Marital property agreement" means a written agreement signed by both spouses that complies with the requirements of this chapter, whether executed before or during their marriage.

(c) "Premarital property agreement" means a marital property agreement between spouses made in contemplation of marriage which became effective upon their marriage.

(d) "Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

(e) "Spouse" includes a prospective spouse in the case of a premarital property agreement.

Comment. Section 5140.010 defines terms used in this chapter. The definition of "marital property agreement" is limited by various provisions of this chapter so that this chapter applies to agreements that govern property matters during an ongoing marriage. The agreement may be a premarital or postmarital agreement. By altering the rules for property ownership, management and control, and disposition, the marital property agreement permits the parties "to structure their legal relationship in a manner more suited to their needs and values." In re Marriage of Dawley, 17 Cal.3d 342, 358, 551 P.2d 323, 333, 131 Cal. Rptr. 3, 13 (1976). See also Section 5133.

Although a marital property agreement under this chapter may take into account the possibility of divorce, it is to be distinguished from a marital termination settlement made after dissolution proceedings are begun. See Section 5140.150 (marital termination settlement excluded from application of this chapter). Also to be distinguished is a waiver of the rights of a surviving spouse under Sections 140-147 of the Probate Code. See Section 5140.160. See also Prob. Code § 150 (contract to make a will or devise, or not to revoke a will or devise, or to die intestate). A contract between spouses (including a premarital property contract) to make a will or devise, or not to revoke a will or devise, or to die intestate, is subject to the provisions of this chapter. See Probate Code § 151.

The definitions of "marital property agreement" and "premarital property agreement" require a marriage before this chapter applies. As a consequence, this chapter does not cover the situation where persons live together without marrying. In that situation, the rights of the parties are governed by other law. See Marvin v. Marvin, 18 Cal.3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); Marvin v. Marvin, 122 Cal. App.3d 871, 176 Cal. Rptr. 555 (1981). However, this chapter does apply where a marriage is later determined to be void. In this situation, Section 5140.110 permits limited enforcement of the marital property agreement under certain circumstances.

This chapter does not apply to a marital agreement insofar as it governs the personal aspects of marriage. See Section 5140.030 (marital property agreement concerns "property" matters, including support). See

also Section 5140.010 (defining "property"). This is because the enforcement provisions of this chapter--Sections 5140.080-5140.100--are not appropriate to apply to an agreement concerning the personal aspects of marriage. See also Sections 4802 ("a husband and wife cannot, by any contract with each other, alter their legal relations, except as to property"), 5103 ("either husband or wife may enter into any transaction with the other . . . respecting property, which either might if unmarried"). Moreover, many attorneys believe that the parties themselves should develop their own separate agreement to cover the personal aspects of the marriage without the involvement of attorneys. Rothschild, Ante-nuptial and Postnuptial Agreements, in 2 California Marital Dissolution Practice § 29.24, at 1189 (Cal. Cont. Ed Bar 1983). Section 5140.080 makes clear that the inclusion of provisions relating to the personal aspects of the marital relationship in a marital property agreement does not affect the enforceability under this chapter of the provisions of the agreement relating to the matters described in Section 5140.030. This eliminates uncertainty that existed under former law. See discussion in Rothschild, supra.

"Property" is defined in the broadest possible sense. It embraces all forms of property and interests therein. The reference in the definition to income or earnings includes both income from property and earnings from personal services, whether or not as an employee.

36609

§ 5140.020. Formalities

5140.020. . A marital property agreement shall be in writing and shall be signed by both spouses.

Comment. Section 5140.020 is the same in substance as a portion of Section 2 of the Uniform Premarital Agreements Act (1983) and a portion of the first sentence of subsection (a) of Section 10 of the Uniform Marital Property Act (1983). See also Section 5140.130 (additional requirement if agreement is to be recordable). As to agreements made before January 1, 1985, see Section 5140.170.

Section 5140.020 continues the requirement of former Section 5134 that the agreement be reduced to writing and signed by both parties. Section 5140.020 does not continue the requirement of former Section 5134 that the agreement "be executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved." Acknowledgment is necessary, however, if the agreement is to be recorded. See Section 5140.130.

A marital property agreement can be amended or revoked only by a later marital property agreement (Section 5140.070) or by a valid marriage termination settlement (Section 5140.150). This means that the amendment or revocation by a later marital property agreement requires the signatures of both spouses, and to be recordable the execution of the amendment or revocation must be acknowledged by both spouses. See Section 5140.130.

§ 5140.030. Subject matter of marital property agreement

5140.030. Subject to Section 5140.040, in a marital property agreement, the spouses may agree with respect to any one or more of the following:

(a) The rights and obligations of each in any of the property of either or both of them whenever acquired and wherever located.

(b) The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property.

(c) The disposition of property upon separation, dissolution of the marriage, death, or the occurrence or nonoccurrence of any other event.

(d) The modification or elimination of spousal support.

(e) The making of a will, trust, or other arrangement to carry out the agreement.

(f) The provision that upon the death of either of them, any of their property, including after-acquired property, will pass without probate to a designated person, trust, or other entity by nontestamentary disposition.

(g) The ownership rights in and disposition of the death benefit from a life insurance policy.

(h) The choice of law to govern the construction of the agreement.

(i) Any other matter affecting their property not in violation of public policy or any statute imposing a criminal penalty.

Comment. Section 5140.030 is drawn from subsection (a) of Section 3 of the Uniform Premarital Agreements Act (1983) and subsection (c) of Section 10 of the Uniform Marital Property Act (1983). The listing of matters in Section 5140.030 which a marital property agreement can cover is not exclusive. Subdivision (i) extends the opportunity for contracting between spouses to any other matter affecting their property unless the contract would violate public policy or constitute a crime.

Section 5140.030 authorizes a provision in a marital property agreement that limits or eliminates the duty of one spouse to support the other. California courts apparently would not enforce such a provision under prior law. See In re Marriage of Higgason, 10 Cal.3d 476, 485-88, 516 P.2d 289, 110 Cal. Rptr. 897 (1973); see also Marriage of Dawley, 17 Cal.3d 342, 351, 551 P.2d 323, 329, 131 Cal. Rptr. 3, 9 (1976). But see Zolla and Strick, Prenuptial Agreements and Freedom of Contract in California, Cal. St.B.J. 26 (1981). A provision limiting or eliminating a support obligation is not effective to the extent that it would make a spouse dependent on welfare in case of a marriage dissolution. See Section 5140.040. Section 5140.030 also authorizes a marital property agreement to impose a duty to support a spouse at a higher level or for a longer period than would otherwise be required.

This continues prior law. See In re Marriage of Dawley, supra, at 353-54, 551 P.2d at 330-31, 131 Cal. Rptr. at 10-11. See also Rothschild, Antenuptial and Postnuptial Agreements, in 2 California Marital Dissolution Practice § 29.17, at 1184 (Cal. Cont. Ed. Bar 1983). As to the effect of a marital property agreement on the right of a child to support, see Section 5140.040(a).

Subdivision (f) of Section 5140.030 specifically authorizes a provision that upon the death of either spouse property will pass without probate. However, such a provision is not effective with respect to real property unless the marital property agreement has been recorded in compliance with Section 5140.050. Subdivision (f) is substantially similar to a provision in a Washington statute. See Wash. Rev. Code Ann. § 26.16.120 (19\_\_). The provision is included in Section 10(c)(6) of the Uniform Marital Property Act (1983). Subdivision (f) constitutes a statutory authorization for a disposition other than one under the statute of wills. In this respect, the provision is consistent with Probate Code Section 160. If provisions of the type authorized under Probate Code Section 160 or subdivision (f) of Section 5140.030 are incorporated into a marital property agreement, the provisions cannot be changed unilaterally. See Section 5140.070. For a discussion of the use of the provision in Washington, see Cross, The Community Property Law of Washington, 49 Wash. L. Rev. 729, 798, 805 (1974).

36611

§ 5140.040. Child and spousal support

5140.040. (a) The right of a child to support may not be adversely affected by a marital property agreement.

(b) If a provision of a marital property agreement modifies or eliminates spousal support and that modification or elimination causes one spouse to be eligible for support under a program of public assistance at the time of dissolution, the court may require the other spouse to provide support to the extent necessary to avoid that eligibility, notwithstanding the terms of the agreement.

Comment. Section 5140.040 is the same as subsections (b) and (i) of Section 10 of the Uniform Marital Property Act (1983).

Subdivision (a) recognizes that a parent has a duty to support and educate his or her child. See Sections 196, 242, 4700. Although the parties to a marital property agreement cannot adversely affect the right of a child to support, a party to the agreement may undertake support obligations that the law does not otherwise impose, such as the obligation to support a child of the other spouse. See In re Marriage of Dawley, 17 Cal.3d 342, 354, 551 P.2d 323, 331, 131 Cal. Rptr. 3, 11 (1976). See Rothschild, Antenuptial and Postnuptial Agreements, in 2 California Marital Dissolution Practice § 29.18, at 1184-85 (Cal. Cont. Ed. Bar 1983). As to marriage termination settlement agreements, see Sections 4811 and 5140.140.

Subdivision (b) is designed to protect against the expenditure of public funds for welfare or other governmental support programs. Section 5140.030 specifically authorizes the spouses to modify or eliminate

spousal support in a marital property agreement. Subdivision (b) limits this authority. The agreement cannot deprive a spouse of support if at the time the marriage is dissolved the spouse would become eligible for public assistance. The obligation to support can be enforced to the extent of such eligibility notwithstanding the marital property agreement.

28460

§ 5140.050. Provision passing real property without probate not effective unless agreement recorded

5140.050. (a) A provision of a marital property agreement that upon the death of either of the spouses real property will pass without probate to a designated person, trust, or other entity by nontestamentary disposition is not effective for any purpose unless, while both spouses are alive, the marital property agreement is recorded in the office of the county recorder of each county in which the real property, or any portion thereof, is located.

(b) A provision of a later marital property agreement that affects a provision described in subdivision (a) in an earlier recorded marital property agreement is not effective for any purpose until the later agreement has been recorded in like manner as under subdivision (a) while both spouses are alive.

Comment. Section 5140.050 is drawn from Idaho Code Section 15-6-201(d) (19    ). See also Section 5140.130 (requirements for recordable agreement).

36612

§ 5140.060. Premarital property agreements

5140.060. Persons intending to marry each other may enter into a marital property agreement as if married, but the agreement becomes effective only upon their marriage.

Comment. Section 5140.060 is the same as subsection (e) of Section 10 of the Uniform Marital Property Act (1983). Since prospective spouses may enter into the agreement "as if married," minors have the capacity to contract as emancipated minors. See Sections 62(a), 63(b)(1). For this reason, it is unnecessary to continue the specific provision found in former Section 5137 giving a minor the capacity to make a valid marriage settlement.

36613

§ 5140.070. Amendment or revocation

5140.070. Except as provided in Section 5140.150, a marital property agreement may be amended or revoked only by a later marital property agreement.

Comment. Section 5140.070 is the same in substance as the first sentence of subdivision (d) of Section 10 of the Uniform Marital Property Act (1983). By requiring that the amendment or revocation be by a later "marital property agreement," Section 5140.070 requires the same formalities for execution for an amendment or revocation as are required for original execution. See Section 5140.020. See also Section 5140.130 (recording of agreements). As recognized in the introductory clause, the provisions of a marital property agreement may be changed by the provisions of a later valid marital termination settlement which contains inconsistent provisions relating to property or support. See Section 5140.150. See also Section 5140.050 (provision of later marital property agreement that affects provision of earlier recorded agreement passing real property without probate not effective unless later agreement recorded).

36619

§ 5140.080. Enforceability of agreement generally

5140.080. (a) Subject to subdivision (b) a marital property agreement, including a marital property agreement that amends or revokes a prior marital property agreement, is enforceable only if both of the following requirements are satisfied:

(1) The requirements of Section 5140.020 are satisfied.

(2) The marital property agreement is enforceable under either Section 5140.090 or Section 5140.100.

(b) Enforcement of a marital property agreement is subject to the same defenses as any other contract, except that lack of consideration is not a defense to the enforcement of a marital property agreement.

(c) The inclusion in a marital property agreement of provisions relating to the personal aspects of the marital relationship does not affect the enforceability under this chapter of the provisions of the agreement that relate to matters described in Section 5140.030.

Comment. Subdivision (a) of Section 5140.080 makes clear that a marital property agreement is enforceable if it is enforceable under either Section 5140.090 or 5140.100. Section 5140.090 makes the agreement enforceable if (1) the spouse against whom enforcement is sought had independent legal counsel and (2) there was a fair and reasonable disclosure of the property and financial obligations of the other spouse or a waiver of disclosure after advice by independent legal counsel. Section 5140.100 permits enforcement of a marital property agreement where one or more of the requirements of Section 5140.090 are not met.

For further discussion of the requirements for enforcement under Section 5140.090 or 5140.100, see the Comments to those sections.

To be enforceable under either Section 5140.090 or 5140.100, the agreement must satisfy the requirements of Section 5140.020 that the agreement be in writing and be signed by the parties.

Subdivision (b) makes clear that enforcement of a marital property agreement is subject to the same defenses as any other contract (other than lack of consideration). A party to the marital property agreement can raise as a defense that the party lacked the capacity to contract. See Section 1556 (unsound mind or deprived of civil rights). The party must either be an adult, emancipated minor (Section 63), or a person capable of contracting marriage (see Section 5140.060 and Comment thereto). The defense of lack of consent because of duress, menace, fraud, undue influence, or mistake (Sections 1565-1579) also is available. But see the Comment to Section 5140.090.

The unavailability of the defense of lack of consideration is drawn from Sections 4 and 5 of the Uniform Premarital Agreements Act (1983) and subsections (a) and (d) of the Uniform Marital Property Act (1983). This exception applies to an original agreement as well as to any modification or revocation of an agreement.

Subdivision (c) is included to deal with the case where the marital property agreement includes provisions that are not of the type described in Section 5140.030. Subdivision (c) makes clear that the inclusion of the additional provisions does not make the entire agreement unenforceable. However, only the provisions that fall within the scope of Section 5140.030 are enforceable under this chapter.

36620

§ 5140.090. Enforcement where independent legal counsel and disclosure or waiver of disclosure

5140.090. (a) A marital property agreement is enforceable under this section unless the spouse against whom enforcement is sought proves either of the following:

(1) A fair and reasonable disclosure of the property or financial obligations of the other spouse was not provided to the spouse against whom enforcement is sought prior to execution of the agreement unless the spouse against whom enforcement is sought waived such a fair and reasonable disclosure after advice by independent legal counsel.

(2) The spouse against whom enforcement is sought was not represented by independent legal counsel at the time of execution of the agreement.

(b) Subdivision (b) of Section 5103 does not apply if the marital property agreement is enforceable under this section.

Comment. Section 5140.090 is the same in substance as Section 143 of the Probate Code (waiver of rights of surviving spouse). For provisions governing enforcement of a marital property agreement where there is not both independent legal counsel and disclosure or waiver of disclosure, see Section 5140.100.

Enforcement under Section 5140.090 is subject to the ordinary

defenses to the enforcement of any other contract (except lack of consideration). See Section 5140.080. However, the requirement of representation by independent legal counsel and disclosure or waiver of disclosure on the advice of independent legal counsel should permit enforcement of the marital property agreement against a claim of undue influence or duress or mistake except where the party making the claim lacked sound mind or there was some type of duress, mistake, or fraud that the independent counsel and disclosure requirements do not protect against. Thus, parties who seriously want an enforceable agreement should obtain independent legal counsel despite the added expense. See Rothschild, Antenuptial and Postnuptial Agreements, in 2 California Marital Dissolution Practice § 29.2, at 1175, § 29.4, at 1176 (Cal. Cont. Ed. Bar 1983). However, even if the requirements of Section 5140.090 are not satisfied, the agreement may be enforceable under Section 5140.100.

Subdivision (b) makes clear that the fiduciary standards normally applicable to spouses pursuant to Section 5103 do not apply if the requirements of Section 5140.090 are satisfied.

Note. Section 143 of the Probate Code is amended in the legislation proposed in this recommendation.

36621

§ 5140.100. Agreement enforceable in discretion of court

5140.100. (a) Except as provided in subdivision (b), a marital property agreement is enforceable under this section if the court determines either of the following:

(1) The marital property agreement at the time of execution made a fair and reasonable disposition of the rights of the spouse against whom enforcement is sought.

(2) The spouse against whom enforcement is sought had, or reasonably should have had, an adequate knowledge of the property and financial obligations of the other spouse and the spouse seeking to enforce the agreement did not violate the duty imposed by subdivision (b) of Section 5103.

(b) If, after considering all relevant facts and circumstances, the court finds that enforcement of the marital property agreement pursuant to subdivision (a) would be unconscionable under the circumstances existing at the time enforcement is sought, the court may refuse to enforce the marital property agreement, enforce the remainder of the agreement without the unconscionable provisions, or limit the application of the unconscionable provisions to avoid an unconscionable result.

(c) Except as provided in paragraph (2) of subdivision (a), subdivision (b) of Section 5103 does not apply if the marital property agreement is enforceable under this section.

Comment. Section 5140.100 permits enforcement of a marital prop-

erty agreement where the requirements of Section 5140.090 are not met. Thus, under Section 5140.100 an agreement may be enforced where the spouse against whom enforcement is sought did not have independent legal counsel or where there was not a fair and reasonable disclosure or waiver of disclosure after advice by independent legal counsel.

Subdivision (a) of Section 5140.100 provides two independent grounds for enforcement of the marital property agreement:

First, the agreement may be enforceable if it is shown that the agreement at the time of execution made a fair and reasonable disposition of the rights of the spouse against whom enforcement is sought.

Second, the agreement may be enforceable if it is shown that spouse against whom enforcement is sought had, or reasonably should have had, an adequate knowledge of the property and financial obligations of the other spouse.

Enforcement under Section 5140.100 is subject to the ordinary defenses against enforcement of any other contract (except lack of consideration). See the Comment to Section 5140.080. In addition, if the agreement is sought to be enforced under subdivision (a)(2) on the ground of adequate knowledge of the property and financial obligations, the marital property agreement (whether made before or during marriage) is subject to the general rules that govern transactions between persons occupying confidential relationships between each other. See Section 5103(b). Under former law, it was unclear whether this rule applied to a premarital agreement. See Rothschild, Antenuptial and Postnuptial Agreements, in 2 California Marital Dissolution Practice § 29.4, at 1177 (Cal. Cont. Ed. Bar 1983).

Subdivision (b) provides an "escape valve" from the liberal standards of enforceability provided by subdivision (a). It permits the court to refuse to enforce all or a portion of the agreement if the court finds that enforcement would be unconscionable under the circumstances existing at the time enforcement is sought. For example, the court could refuse to enforce a provision of the agreement eliminating the right to spousal support if the court found that enforcement of that provision would be unconscionable under the circumstances at the time enforcement is sought. However, in exercising the authority granted by subdivision (b), the court should not enforce the provisions that are against the interest of one spouse and, at the same time, refuse to enforce the provisions that are against the interest of the other spouse. It should be emphasized that subdivision (b) never applies where the conditions required by Section 5140.090 are met.

Section 5140.100 is the same in substance as Section 144 of the Probate Code (waiver of rights of surviving spouse).

Note. Section 144 of the Probate Code is amended in the legislation proposed in this recommendation.

36622

§ 5140.110. Void marriage

5140.110. If a marriage is determined to be void, an agreement which would otherwise have been an enforceable marital property agreement is enforceable only to the extent necessary to avoid an inequitable result.

Comment. Section 5140.110 is the same in substance as Section 7 of the Uniform Premarital Agreements Act (1983). Under Section 5140.110, a void marriage does not completely invalidate a marital property agreement but does substantially limit its enforceability. Where the parties have married and lived together for a substantial period of time and one or both have relied upon the existence of a marital property agreement, the failure to enforce the agreement may well be inequitable. This section, accordingly, gives the court discretion to enforce the agreement to the extent necessary to avoid the inequitable result.

36623

§ 5140.120. Statute of limitations

5140.120. Any statute of limitations applicable to an action asserting a claim for relief under a marital property agreement is tolled during the marriage of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party.

Comment. Section 5140.120 is the same as Section 8 of the Uniform Premarital Agreements Act (1983). In order to avoid the potentially disruptive effect of compelling litigation between the spouses in order to escape the running of an applicable statute of limitations, Section 5140.120 tolls any applicable statute during the marriage.

37007

§ 5140.130. Recording of agreements

5140.130. (a) A marital property agreement may be recorded in the office of the county recorder only if its execution is acknowledged by each spouse in the manner prescribed for the acknowledgment of a conveyance of real property.

(b) A marital property agreement may be recorded in the office of the recorder of any county in this state.

(c) A premarital property agreement may be recorded before or after the marriage of the parties to the agreement.

Comment. Section 5140.130 permits but does not require recording of a marital property agreement in any county in California. Recording in any county is permitted because the effect of an agreement may depend on its being made a matter of public record in order to establish its priority. See Section 5140.140(e). Recording is required before a provision becomes effective to pass real property without probate (see Section 5140.050), but otherwise failure to record the agreement does not affect its validity between the parties and as to third persons who have actual notice of it. See Section 5140.140(c). Recording may, however, be useful or necessary to protect a spouse's interest in property against a claim by a bona fide purchaser or creditor who does not have notice of the agreement. See Section 5140.140. See also Rothschild,

Antenuptial and Postnuptial Agreements, in 2 California Marital Dissolution Practice § 29.7, at 1178 (Cal. Cont. Ed. Bar 1983).

Subdivision (a) of Section 5140.130 is drawn from a portion of former Section 5114 and from former Section 5134. The agreement satisfies the requirements of subdivision (a) only if the execution of the agreement is acknowledged by "both" spouses.

Subdivision (b) is drawn from a portion of former Section 5114 which was limited to recording an inventory of separate personal property. Subdivision (b) expands the former provision to permit a recording of the marital property agreement and this protects both real and personal property against claims of persons who thereafter become creditors. See Section 5140.140. Subdivision (b) also supersedes former Section 5135 which required contracts for marriage settlements to be recorded in the office of the recorder of every county in which any real estate affected by the contract was situated.

Subdivision (c) makes clear that a premarital property agreement may be recorded before marriage. Subdivisions (a) and (b) apply to all marital property agreements, including premarital property agreements. See Section 5140.010 (defining "marital property agreement" to include an agreement executed before or during marriage).

38028

§ 5140.140. Protection of third parties

5140.140. (a) As used in this section:

(1) "Creditor" means a person, including a public entity, that has a claim against one or both of the parties to a marital property agreement, whether the claim is due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, but does not include a bona fide purchaser for value.

(2) "Purchaser" includes encumbrancer.

(b) Except as otherwise provided in this section, a marital property agreement does not affect the rights of a creditor or a bona fide purchaser for value.

(c) The rights of a creditor or purchaser are subject to the terms of a marital property agreement if the creditor or purchaser has actual notice of the existence of the agreement before becoming a creditor or purchaser.

(d) The rights of a creditor or purchaser are subject to the terms of a marital property agreement insofar as it relates to an interest in real property if, before the creditor or purchaser becomes a creditor or purchaser, the agreement is recorded in the office of the recorder of each county in which any of the real property is located.

(e) Except where there is a misrepresentation to the creditor as to the existence or contents of the agreement, the rights of a creditor are

subject to terms of a marital property agreement insofar as it relates to real or personal property if, before the creditor becomes a creditor, the agreement is recorded in the office of the county recorder of any county in this state.

Comment. Section 5140.140 is drawn in part from former Sections 5114, 5115, and 5133-5136. If the execution of the agreement is not acknowledged as required by subdivision (a) of Section 5140.130, the agreement may not be recorded. Failure to record does not affect the validity of the agreement as between the spouses except as provided in Section 5140.050 (provision passing real property without probate). If the agreement is not recorded, it does not affect the rights of a creditor or bona fide purchaser or encumbrancer for value unless the creditor, purchaser, or encumbrancer has actual notice of the existence of the agreement.

Recording of a marital property agreement in the office of the recorder in the county where the real property is located gives constructive notice of the marital property agreement, and under subdivision (d) the rights of a person who thereafter becomes a creditor or purchaser or encumbrancer are subject to the terms of the marital property agreement insofar as it relates to the real property in that county described in the agreement.

Subdivision (e) makes the rights of a creditor (defined in subdivision (a)) subject to the terms of a recorded marital property agreement if the agreement is recorded before the creditor becomes a creditor.

38033

§ 5140.150. Marital property agreement approved by court

5140.150. Nothing in this chapter affects the validity or effect of either of the following:

- (a) A marriage termination settlement made after a proceeding has been commenced under this part.
- (b) An agreement that is approved by the court in a proceeding under this part.

Comment. Section 5140.150 makes clear that the provisions of this chapter concerning the formalities and enforcement of a marital property agreement do not apply to a marriage termination settlement made after a proceeding for dissolution of the marriage has been commenced. The validity and enforceability of such a marriage termination settlement is determined by the law other than this chapter. An agreement approved by the court under this part is treated the same as a marriage termination settlement discussed above. A valid agreement described in Section 5140.150 can supersede a marital property agreement, notwithstanding Section 5140.070.

38200

§ 5140.160. Waiver of certain rights of a surviving spouse

5140.160. (a) Nothing in this chapter limits or affects the provisions of Chapter 1 (commencing with Section 140) of Part 3 of Division 2 of the Probate Code.

(b) A waiver of any of the rights listed in subdivision (a) of Section 141 of the Probate Code may be made in a marital property agreement, whether executed before or during marriage; but, to the extent such rights are waived in the agreement, the agreement and the waiver are governed by Chapter 1 (commencing with Section 140) of Part 3 of Division 2 of the Probate Code and the provisions of this chapter do not apply.

Comment. Section 5140.160 is comparable to former Section 5135.5 and is included to make clear the relationship between this chapter and Sections 140-147 of the Probate Code. The rights listed in subdivision (a) of Section 141 of the Probate Code that may be waived under Sections 140-147 of the Probate Code are the rights of a surviving spouse to any of the following:

- (1) Property that would pass from the decedent by intestate succession.
- (2) Property that would pass from the decedent by testamentary disposition in a will executed before the waiver.
- (3) A probate homestead.
- (4) The right to have exempt property set aside.
- (5) Family allowance.
- (6) The right to have an estate set aside under Article 2 (commencing with Section 640) of Chapter 10 of Division 3 of the Probate Code.
- (7) The right to elect to take community or quasi-community property against the decedent's will.
- (8) The right to take the statutory share of an omitted spouse.
- (9) The right to be appointed as the executor or administrator of the decedent's estate.

38201

§ 5140.170. Pre-existing agreements

5140.170. (a) As used in this section, "pre-existing agreement" means a written agreement made before January 1, 1985, by spouses or unmarried persons who subsequently married each other insofar as the agreement relates to matters described in Section 5140.030.

(b) Except as provided in subdivision (c), nothing in this chapter affects the validity or effect of a pre-existing agreement, and the validity and effect of the pre-existing agreement shall continue to be determined by the law applicable to the agreement prior to January 1, 1985.

(c) A provision of a marital property agreement may affect a pre-existing agreement if the marital property agreement is made after December 31, 1984, and the provision of the marital property agreement that affects the pre-existing agreement is enforceable under this chapter.

Comment. Section 5140.170 is drawn from subsection (j) of Section 10 of the Uniform Marital Property Act (1983) and from subdivision (b) of Section 147 of the Probate Code.

38883

Government Code § 27251 (amended). Index of marital property agreements

SEC. 14. Section 27251 of the Government Code is amended to read:

27251. The recorder shall keep an index of ~~the separate property of married women martial property agreements~~, labeled: "Separate property," "Marital property agreements," each page divided into ~~five~~ two columns, headed respectively: "Names of married women," "Names of their husbands," "Nature of instruments recorded," "When recorded," and "Where Parties to the agreement," and "When and where recorded."

Comment. Section 27251 is amended to reflect the repeal of the former Section 5114 of the Civil Code (relating to the recording of an inventory of separate property) and the enactment of Sections 5140.010-5140.170 of the Civil Code relating to marital property agreements.

15900

Probate Code § 142 (amended). Formal requirements of waiver; general rule on enforceability

SEC. 15. Section 142 of the Probate Code is amended to read:

142. (a) A waiver under this chapter shall be in writing and shall be signed by the surviving spouse.

(b) Subject to subdivision (c), a waiver under this chapter is enforceable only if it satisfies the requirements of subdivision (a) and is enforceable under either Section 143 or Section 144.

(c) Enforcement of the waiver against the surviving spouse is subject to the same defenses as enforcement of a contract, except that lack of consideration is not a defense to enforcement of the waiver.

Comment. Subdivision (c) is added to Section 142 to make clear that the waiver is enforceable without consideration and that the enforcement of the waiver is subject to the same defenses as a contract. See Civil Code §§ 1556 (lack of capacity), 1565-1579 (duress, menace, fraud, undue influence, or mistake). See also the Comment to Section 143.

Subdivision (a) is consistent with Civil Code Section 5140.020 (marital property agreements). Subdivisions (b) and (c) are consistent with Civil Code Section 5140.080(a), (b) (marital property agreements).

15915

Probate Code § 143 (amended). Enforcement where independent legal counsel and disclosure or waiver of disclosure

SEC. 16. Section 143 of the Probate Code is amended to read:

143. (a) A waiver ~~that complies with Section 142~~ is enforceable under this section unless the court determines surviving spouse proves either of the following:

~~(a)~~ (1) A fair and reasonable disclosure of the property or financial obligations of the decedent was not provided to the surviving spouse prior to the execution of the waiver unless the surviving spouse waived such a fair and reasonable disclosure after advice by independent legal counsel.

~~(b)~~ (2) The surviving spouse was not represented by independent legal counsel at the time of execution of the waiver.

(b) Subdivision (b) of Section 5103 of the Civil Code does not apply if the waiver is enforceable under this section.

Comment. Section 143 is amended to make the section consistent with Section 5140.090 (marital property agreements).

Subdivision (b) is added to Section 143 to make clear that the fiduciary standards normally applicable to spouses pursuant to subdivision (b) of Section 5103 of the Civil Code do not apply if the requirements of Section 143 are satisfied. But enforcement under Section 143 is subject to the ordinary defenses to the enforcement of a contract (other than lack of consideration). See Section 142. However, the requirement of representation by independent legal counsel and disclosure or waiver of disclosure on the advice of independent legal counsel should permit enforcement of the waiver against a claim of undue influence or duress or mistake except where the surviving spouse lacked sound mind or there was some type of duress, mistake, or fraud that the independent legal counsel and disclosure requirements do not protect against. Thus, parties who seriously want an enforceable waiver should obtain independent legal counsel for the surviving spouse despite the added expense. See Rothschild, Antenuptial and Postnuptial Agreements, in 2 California Marital Dissolution Practice § 29.2, at 1175 and § 29.4, at 1176 (Cal. Cont. Ed. Bar 1983). However, even if the requirements of Section 143 are not satisfied, the waiver may be enforceable under Section 144.

15916/NZ

Probate Code § 144 (amended). Enforcement in discretion of court

SEC. 17. Section 144 of the Probate Code is amended to read:

144. (a) Except as provided in subdivision (b) a waiver ~~that complies with Section 142 but is not enforceable under Section 143~~ is enforceable under this section if the court determines either of the following:

(1) The waiver at the time of execution made a fair and reasonable disposition of the rights of the surviving spouse ~~and the surviving spouse understood the effect of and voluntarily executed the waiver.~~

(2) The surviving spouse had, or reasonably should have had, an adequate knowledge of the property and financial obligations of the decedent and ~~understood the effect of and voluntarily executed the waiver~~ the decedent did not violate the duty imposed by subdivision (b) of Section 5103 of the Civil Code.

(b) If, after considering all relevant facts and circumstances, the court finds that enforcement of the waiver pursuant to subdivision (a) would be unconscionable under the ~~existing facts and~~ circumstances existing at the time enforcement is sought, the court may refuse to enforce the waiver, enforce the remainder of the waiver without the unconscionable provisions, or limit the application of the unconscionable provisions to avoid an unconscionable result.

(c) Except as provided in paragraph (2) of subdivision (a), subdivision (b) of Section 5103 of the Civil Code does not apply if the waiver is enforceable under this section.

Comment. Section 144 is consistent with Civil Code Section 5140.100 (marital property agreements). See the Comment to that section.

Paragraphs (1) and (2) of subdivision (a) are amended to delete the requirement that the surviving spouse understood the effect of and voluntarily executed the waiver. This deleted language is superseded by subdivision (c) of Section 142 which makes a waiver subject to the same defenses as a contract (other than lack of consideration). See the Comment to Section 142. In addition, paragraph (2) of subdivision (a) of Section 144 is amended to include a reference to Section 5103 of the Civil Code. As a result of this amendment, if the waiver is sought to be enforced on the ground of adequate knowledge of the property and financial obligations, the waiver (whether made before or during the marriage) is subject to the general rules that govern transactions between persons occupying confidential relationship between each other. See Civil Code § 5103. This is consistent with the rule of Section 5140.100 (enforcement of marital property agreements). The amendment to subdivision (b) is clarifying and not substantive.

15917

Probate Code § 146 (amended). Agreement altering, amending, or revoking a waiver

SEC. 18. Section 146 of the Probate Code is amended to read:

146. (a) As used in this section, "agreement" means a written agreement signed by each spouse or prospective spouse altering, amending, or revoking a waiver under this chapter.

(b) A waiver under this chapter may not be altered, amended, or revoked except by a subsequent written agreement signed by each spouse or prospective spouse.

(c) Subject to subdivision (d), the agreement is enforceable only if it satisfies the requirements of subdivision (b) and is enforceable under either subdivision (e) or subdivision (f).

(d) Enforcement of the agreement against a party to the agreement is subject to the same defenses as enforcement of any other contract, except that lack of consideration is not a defense to enforcement of the agreement.

~~(e)~~ (e) An agreement is enforceable under this subdivision against a unless the party to the agreement against whom enforcement is sought unless the court determines proves either of the following:

(1) A fair and reasonable disclosure of the property or financial obligations of the other spouse was not provided to the spouse against whom enforcement is sought prior to the execution of the agreement unless the spouse against whom enforcement is sought waived such a fair and reasonable disclosure after advice by independent legal counsel.

(2) The spouse against whom enforcement is sought was not represented by independent legal counsel at the time of execution of the agreement.

~~(d)~~ (f) Except as provided in subdivision ~~(e)~~ (g), an agreement ~~that is not enforceable under subdivision (e)~~ is enforceable under this subdivision if the court determines that the agreement at the time of execution made a fair and reasonable disposition of the rights of the spouses ~~and the spouse against whom the agreement is sought to be enforced understood the effect of and voluntarily executed the agreement.~~

~~(e)~~ (g) If, after considering all relevant facts and circumstances, the court finds that enforcement of the agreement pursuant to subdivision ~~(d)~~ (f) would be unconscionable under the ~~existing facts and~~ circumstances existing at the time enforcement is sought, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provisions, or limit the application of the unconscionable provisions to avoid an unconscionable result.

(h) Subdivision (b) of Section 5103 of the Civil Code does not apply if the agreement is enforceable under this section.

Comment. Section 146 is amended to conform to Sections 142-144.

15920

Probate Code § 151 (added). Enforceability of contract between spouses

SEC. 19. Section 151 is added to the Probate Code, to read:

151. A contract described in Section 150 made between spouses, whether executed before or during their marriage, is enforceable only to the extent that the contract is a marital property agreement enforceable under Chapter 6 (commencing with Section 5140.010) of Title 8 of Part 5 of Division 4 of the Civil Code.

Comment. Section 151 makes clear that the requirements for execution and enforceability of a marital property agreement apply to a contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if the parties to the contract are spouses or are prospective spouses who subsequently marry.

# Prenuptial agreements and freedom of contract in California

Marshall S. Zolla and  
Laurence D. Strick

CALIFORNIA courts have long enforced prenuptial agreements settling prospective spouses' property rights. Indeed, the law favors such agreements. (*In re Marriage of Dawley* (1976) 17 Cal.3d 342; *Barker v. Barker* (1956) 139 Cal.App.2d 206.) In the courts' view, prenuptial property settlement agreements promote the spouses' welfare and the best interests of the marital relationship by preventing disagreement and strife. These prenuptial agreements also simplify division of community and separate property if the marriage dissolves; thereby, the agreements eliminate prolonged litigation and emotional debate. (*In re Marriage of Higgason* (1973) 10 Cal.3d 476, 485.)

In contrast, California courts have long refused to enforce prenuptial agreements prescribing spousal support rights on marital dissolution. According to the courts, these agreements conflict with the state's interest in preserving marriages. Thus, in *Pereira v. Pereira* (1909) 156 Cal. 1, the court reasoned that if a husband could contractually limit his wife's right to support, he might "yield to his baser inclinations" and commit immoral acts which were then grounds for divorce, secure in the knowledge that he faced only limited liability for spousal support if his wife sued for divorce. In *Whiting v. Whiting* (1923) 62 Cal.App. 157, the court similarly refused to enforce, as against public policy, part of a prenuptial agreement which limited the wife's spousal support in the event of a divorce.

Unfortunately, the courts have not reexamined these holdings in the 57 years since *Whiting* was decided. Meanwhile, ideas about marriage have changed dramatically. No longer is marriage the inviolate, enduring relationship it once was. Today, nearly one of every three marriages ends in divorce. (See Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract of the United States (100th ed. 1979).) Under no-fault divorce statutes, like California's, it is often easier to dissolve a marriage than to dissolve a business partnership.<sup>1</sup> Changes in public morals and public perceptions of marriage have led courts and commentators increasingly to recognize that men and women should be able to contract with each other freely, openly and fairly in order to structure their relationships according to their own needs, desires and values.<sup>2</sup>

## The trend in other states

An increasing number of other states have reevaluated the public policy against prenuptial spousal support agreements, concluding

that such agreements do not contravene modern public policy or current notions of the institution of marriage.

Starting this line of modern cases was the 1970 Florida Supreme Court decision in *Posner v. Posner* (Fla. 1970) 233 S.2d 381. Under the prenuptial agreement in that case, the wife was to receive \$600 a month as alimony if the marriage dissolved. In considering whether to enforce the agreement, the Florida court observed that the concept of marriage as an insoluble relationship has greatly eroded in the last several decades. The old rule invalidating prenuptial spousal support agreements was fashioned when a spouse had to prove fault to get a divorce; and, said the court, the old rule removed any incentive to commit such fault. However, citing California's no-fault divorce law as a prime example, the Florida Supreme Court found that modern notions of divorce had changed, leaving the rule without a purpose. In view of modern notions of marriage and divorce, the court abrogated the old rule and enforced the prenuptial spousal support agreement.

Several other states rapidly followed the Florida Supreme Court's lead, overturning old prohibitions against prenuptial spousal support agreements for the reasons *Posner* stated. For example, in *Valid v. Valid* (Ill.App. 1972) 286 N.E.2d 42, an Illinois appellate court enforced another prenuptial agreement which also provided for the wife to receive \$600 per month as alimony upon di-

<sup>1</sup>In California, uncontested divorces may be handled by affidavit without court appearance under a new law which goes into effect on January 1, 1981. (Civ. Code, §4511; Stats. 1980, ch. 367, §1, p. 1040.)

<sup>2</sup>*Marvin v. Marvin* (1976) 18 Cal.3d 660; Weitzman, *Legal Regulation of Marriage: Tradition and Change* (1974) 62 Cal.L. Rev. 1169.

voice. The state's role in marriage must, the court said, be reexamined in light of modern concepts of the marital relationship. Rejecting contrary arguments, the *Valid* court found that prenuptial spousal support agreements may promote marital harmony, not divorce. (*Id.*, at p. 46.)

Similarly, in *Unander v. Unander* (Ore. 1973) 506 P.2d 719, the Oregon Supreme Court overruled prior precedents and upheld a prenuptial agreement which limited the husband's spousal support obligation to \$500 a month. The Oregon court found the rationale for invalidating such agreements to be of "extremely doubtful validity." (*Id.*, at p. 720.) According to the *Unander* court, the state has no interest in preserving a bad marriage or one held together only by the threat of a large alimony award. As the Oregon Supreme Court said:

The adoption of the 'no fault' concept of divorce is indicative of the state's policy as exhibited by legislation, that marriage between spouses who 'can't get along' is not worth preserving. (*Id.*, at p. 721.)

As these cases show,<sup>3</sup> there is no modern reason for California's lingering hostility to prenuptial spousal support agreements. If spouses may contract to divide property which potentially is far more valuable than spousal support, there is no reason why they should not also be allowed to bargain about support. *Pereira's* arguments about preserving marriages are anachronistic in California, a community property state with a no-fault divorce law.

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### Indications of a more liberal California view

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Two recent California Supreme Court cases recognize that changing notions of marriage require more flexible rules, allowing prospective spouses or cohabitants to arrange and structure their relationship more freely according to their particular needs.

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<sup>3</sup>In addition to the decisions discussed in the text, see *Parniaowski v. Parniaowski* (Conn. 1976) 359 A.2d 719; *Tomlinson v. Tomlinson* (Ind. 1976) 352 N.E.2d 785; *Buettner v. Buettner* (Nev. 1973) 505 P.2d 600.

*In re Marriage of Dawley, supra*, 17 Cal.3d 342 is significantly more liberal than either *Pereira* or *Whiting* in upholding contracts between persons contemplating marriage. Mrs. Dawley became pregnant out of wedlock. She told Mr. Dawley that she feared a non-marital pregnancy would cost her her job. She threatened him with a paternity suit. As a solution, the two agreed to a temporary marriage. Mr. Dawley insisted on a prenuptial agreement to protect his property and earnings from his prospective wife's claims, and she demanded support for herself and her as-yet unborn child. The resulting prenuptial agreement provided, among other things, that Mr. Dawley would support his wife at a specified sum for at least 14 months after dissolution of their marriage.

When the "temporary" marriage ended seven years later, Mrs. Dawley contended the agreement was against public policy and unenforceable. The California Supreme Court held otherwise, stating:

Spouses who enter into an antenuptial agreement cannot forecast the future; they must, as a realistic matter, take into account both the possibility of lifelong marriage and the possibility of dissolution. (17 Cal.3d at p. 352.)

This language implicitly recognizes that a prenuptial agreement may settle matters other than property rights and that prenuptial

spousal support agreements do not necessarily promote divorce. Moreover, in acknowledging that many marriages end in divorce, the *Dawley* court disapproved language in a prior decision (*In re Marriage of Higason, supra*, 10 Cal.3d 476) which suggested that a prenuptial agreement could be enforced only if the spouses had contemplated a lifelong marriage when they signed it. Recognizing the increased frequency of divorce and reflecting a greater tolerance for realistic and explicit marital planning for the possibility of divorce, the *Dawley* court held a prenuptial agreement is unenforceable only when it objectively facilitates divorce.

*Marvin v. Marvin* (1976) 18 Cal.3d 660 also grants couples greater freedom to contract about property and support rights. In that case, Michele Triola sued Lee Marvin claiming that under an oral contract she was entitled to half the property she and Marvin had acquired while they were living together pretending to be husband and wife. She also asked for support when that relationship ended. According to Michele, she agreed to serve as Marvin's companion, homemaker, housekeeper, cook and confidante, holding herself out as his wife, in exchange for Marvin's agreement to share with Michele their efforts and earnings, to share the property accumulated from



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those efforts, and to support Michele for the rest of her life. Relying on prior holdings that those in a meretricious relationship have no rights in each others' property, Marvin successfully demurred.

The Supreme Court reversed, finding an adequately alleged cause of action for breach of the alleged oral agreement. Societal morals about non-marital relationships have drastically changed, the high court found, and courts should not alter or abrogate contracts which express the parties' legitimate concerns about property and support rights. Significantly, the Supreme Court compared the alleged Marvin agreement with the agreement in *Dawley*, concluding both were enforceable.

*Dawley* and *Marvin* show that the California Supreme Court will extend legal protection to spouses who contract for a marriage of short duration and to persons who cohabit in a non-marital relationship. Are spouses who contemplate a long marriage but who are concerned about support rights if the marriage ends in divorce any less worthy of legal protection? When a third of all marriages are dissolved, couples are almost foolhardy if they do not recognize and minimize the risk they are taking in getting married. The state should not prevent them from planning responsibly for the unwelcome future. Prenuptial spousal support agreements are a useful tool in that planning.

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### A modern, realistic approach

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Instead of invalidating all prenuptial spousal support agreements, California should enforce such contracts so long as they pass two practical tests.

First, a spousal support agreement should not be enforced unless it is fair and reasonable when it is entered into. Before the agreement is made, each spouse should be required to make a full, fair and frank disclosure of his or her financial condition. Each party should have a generally accurate knowledge of the other's financial worth and of the rights being waived by the contract. If, as in *Valid v. Valid*, *supra*, the spouse with less property gives up marital rights but is fully aware of the circumstances surrounding the

prenuptial agreement and the other spouses's finances, the prenuptial agreement should be enforced.

Second, a spousal support agreement should not be enforced unless it is fair at the time it is enforced. This condition is necessary to preserve the state's interest in marriage and in adequate maintenance of ex-spouses after a divorce. To this end, spouses should be able to apply to the court for spousal support apart from the prenuptial agreement upon proof of changed circumstances. The court should examine the agreement and the parties' present circumstances to assure adequate provision for support of each spouse in accordance with their resources at the time of marital dissolution.

Thus, under a modern, realistic approach, a court would examine a prenuptial agreement's support provisions in light of the circumstances at the time the agreement was made and at the time it is to be enforced. If the agreement is unfair at either or both times, the court could invalidate it in whole or in part, or modify the spousal support provision in view of changed circumstances.<sup>4</sup>

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### Conclusion

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Unless the courts adopt a more reasonable approach to prenuptial spousal support agreements, the present confusing conflict in family law will continue. In *Dawley* the California Supreme Court held that public policy does not invalidate a prenuptial agreement which alters or characterizes spouses' property rights merely because the agreement simplifies the division of property upon divorce. The same rationale should, but does not yet, apply to the spousal support provisions of the same agreement. So long as courts retain the power to modify contractual spousal support provisions to assure adequate and fair support in light of all past and present circumstances, public policy should promote, not deter, prenuptial spousal support agreements.



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<sup>4</sup>See *Posner v. Posner*, *supra*, 233 S.2d 381; *Ulander v. Ulander*, *supra*, 506 P.2d 719; *Tomlinson v. Tomlinson*, *supra* fn. 3.

## EXHIBIT 2

The Commission's wills and intestate succession recommendation (proposed Section 160) authorizes pay-on-death provisions in bonds, mortgages, promissory notes, conveyances, and other contracts, even though not executed with the formality of a will. There is a similar but more sweeping provision, drawn from Washington statute, in the Uniform Marital Property Act:

Section 10. Marital property agreements

(a) A marital property agreement must be in writing and signed by both spouses. It is enforceable without consideration.

. . . .  
 (c) . . . [I]n a marital property agreement spouses may agree with respect to:

. . . .  
 (6) a provision that upon the death of either of them, any of their property, including after-acquired property, will pass without probate to a designated person, trust, or other entity by nontestamentary disposition;

. . . .  
 (d) A marital property agreement may be amended or revoked only by a later marital property agreement. The agreement as amended or the revocation is enforceable without consideration.

Such an agreement prevails over an inconsistent will. Cf. In re Estate of Brown, 29 Wash.2d 20, 185 P.2d 125 (1947).

This provision permits complete flexibility in dispositive schemes: (1) The agreement may affect all assets or merely certain described assets; (2) multiple agreements may be executed, each affecting certain assets but not others; (3) dispositions at death may be to anyone, not merely to the surviving spouse. Cf. Cross, The Community Property Law in Washington, 49 Wash. L. Rev. 729, 801 (1974).

Such a provision offers a number of practical benefits. Although existing California law permits the spouses to take title to property in joint tenancy form even though the property is acquired with community funds, one spouse may unilaterally sever the joint tenancy and destroy the automatic survivorship feature. (The Commission's Recommendation Relating to Joint Tenancy and Community Property proposes creation of a new kind of property--"community property with right of survivorship"--but does not prevent unilateral destruction by one spouse of the survivorship right.) The Uniform Marital Property Act provision would permit a

survivorship feature that could not be unilaterally destroyed by one spouse.

The Uniform Marital Property Act provision also permits creation of a binding right of survivorship in favor of a third person without interfering with the spouse's management and control of the community property during their lifetimes. In this respect, the provision is similar to a multiple-party account created under Commission-recommended legislation just enacted (1983 Cal. Stats. ch. 92), except that one of two joint depositors may unilaterally destroy the survivorship right of a third person by withdrawing all of the funds on deposit.