RECENT CASE MODIFIES CURRENT LAW ON ENFORCEMENT OF PRENUPS

and Katherine Su, Esq.

The very recent case of *Marriage of Cadwell-Faso and Faso* (2011) 2011 WL 72179 was decided by the First Appellate District on January 11, 2011. This decision reversed the trial court's ruling. Now, *Family Code* §1615(c)'s requirement that a party against whom enforcement of a premarital agreement 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" *does not apply "where the party against whom enforcement is sought was represented by counsel from the outset of the transaction."* (Emphasis added).

In *Caswell,* the facts were that, when Husband and Wife met, she had owned and operated her own business. Husband, who was 21 years older than Wife, was a wealthy retired businessman. Before they married, they discussed having a premarital agreement, which both of them wanted. In fact, Wife refused to marry Husband without one. Both parties had attorneys. Husband's attorney prepared the first draft but Wife was dissatisfied and had her attorney prepare a draft addendum. The addendum went through five different drafts and Wife even called off the wedding because at first Husband refused to sign the final draft. However, after reviewing it with his attorney he made a minor change, signed the addendum and the parties were married two days later.

In the decision, the justices explained that "[s]ubstantively, the Addendum provided that within 10 years following the marriage, Faso would pay off the mortgage of approximately $400,000 on Cadwell-Faso's Sea Ranch property, an obligation that was binding even if the marriage terminated. As well, the Addendum restricted Faso's ability to alienate certain real property holdings, and gave Cadwell-Faso certain rights in those holdings should he sell them during the marriage, or predecease her while still married. Further, Faso undertook to provide for Cadwell-Faso's reasonable health care needs, for life, even if the marriage terminated or he predeceased her. In the event of a dissolution, Faso agreed to pay Cadwell-Faso spousal support in the amount of $1,000 per month for each year of the marriage, up to a maximum of $5,000 per month, for a period equal to one-half the length of the marriage."

Their marriage lasted 18 months. After they separated, Wife petitioned for legal separation and H responded with a petition for dissolution of marriage. After Wife filed a motion for temporary spousal support and attorney fees, Husband moved to vacate the addendum, arguing that he had not had seven days between the addendum's presentation and its execution as required by Family Code §1615(c)(2). At trial, Wife claimed that the issue of the seven-day period "never came up." H testified that he signed it only because Wife told him that her attorney said that they had passed that time limit, and that his attorney had confirmed this, telling both parties "that the Addendum was not a binding

agreement 'and the only way that it's going to be is if you come back and sign a post-nuptial.'"'

The trial court found that Husband's attorney advised prior to signing that the addenda was unenforceable because it had not been presented within seven days of the day that they were signing it. It found that Husband did not tell Wife about the issue or discuss the possibility of waiting one more day to eliminate that problem and that he signed it in reliance on his attorney's opinion that it was unenforceable, whereas Wife signed it "because she believed that she and Husband had in fact reached an agreement." The trial court also found that "there was 'strong evidence that Husband, a sophisticated business executive, was . . . playing "hardball." He was refusing to negotiate with W and, at the very end when she threatened to call the wedding off, he agreed to sign only because the matter had come to a head within the seven day window and he had legal advice that he could sign with impunity. Rather than being a "victim" of circumstances, Husband shrewdly maneuvered Wife to the alter [sic] in a manner that frustrated her desire to reach a mutually acceptable agreement.'"

Nevertheless, the trial court held that the seven-day rule applied and that the statute applied to both represented and unrepresented parties because the statutory language did not contain an exception and the drafters could have put one in if they intended that the requirement not apply to represented parties. It also reasoned that "although the seven-day rule arguably was intended to allow the unrepresented party time to seek out counsel and made little sense when counsel was already onboard,...it was equally plausible that the Legislature intended to allow even represented parties time to consult with counsel and avoid a last minute rush that might leave one party with insufficient time to consult and consider complicated revisions."

The Court also held that the seven-day period did not begin to run on the date of the presentation of the first draft, but the one the parties' finally signed. It held "that the seven-day rule was mandatory, and the statute as drafted did not limit the rule to the unrepresented. Because presentation of the Addendum ran afoul of the seven-day rule in this case, Faso's execution of the document was deemed involuntary and the Addendum was unenforceable." It also held that promissory estoppel principles could not render an agreement signed within the seven-day period enforceable, although the court could consider the parties' conduct – including Wife's sale of her business in reliance on the agreement and Husband's intentional decision to sign it relying on its unenforceability – when setting spousal support for Wife at the second phase of the trial. It denied any permanent spousal support to Wife.

On appeal, the panel discussed the Legislature's 2001 amendments to Family Code §1615 that imposed the seven-day requirement. It said that "the parties have focused on whether the seven-day period is mandatory and absolute, and the companion question of when the seven-day period commences. However, we are concerned with the threshold matter addressed below, namely does section 1615(c)(2) apply to parties such as Faso

who, from the outset, are represented in the transaction by independent counsel, or does it apply only to unrepresented parties? Having requested and received supplemental letter briefing on this issue, we conclude subdivision (c)(2) does not apply in the present situation. The question, of course, is one of statutory interpretation."

The court first held that Section 1615(c)(2) was ambiguous because it could not tell from its face whether the seven-day rule applies only to unrepresented parties and "an ambiguity arises from the conjunctive phrase stating there must be at least seven days between the time the party 'was first presented with the agreement and advised to seek independent legal counsel . . . .' §1615(c), (italics added.)" It then said that while the legislative history did not resolve the ambiguity, it made it "abundantly clear that the Legislature was concerned about the presumed voluntariness of premarital agreements in situations such as *Bonds*, where one party is not represented by independent counsel." Analyzing the subsection in great detail, the court concluded that "the flow and sense of the statute is that section 1615(c)(2) is a continuation of the requirements pertaining to an unrepresented party." It then reasoned that "(f)rom a practical and common sense perspective, it would be absurd to require a party pursuing enforcement to advise the other party to seek independent legal counsel when that party is already represented in the transaction by independent counsel. In other words, were we to interpret subdivision (c)(2) as applying to represented parties, the advisement requirement becomes meaningless surplusage. Yet, when applied to an unrepresented party, the advisement proviso is critical.

Moreover, the seven-day period makes sense as a necessary condition to finding voluntary execution on the part of an unrepresented party because the requirement affords a reasonable period of time to obtain and consult with independent counsel prior to signing a premarital agreement. On the other hand, when a party is already represented by counsel in the transaction, obtaining the requisite advice can occur very quickly and no purpose is served by imposing a statutory waiting period. Retained counsel can control the timeline. If not available straight away to review a document, any competent attorney would advise the client not to sign it until he or she reviewed the document and consulted with the client. Whether this occurred within the seven-day period or beyond it, the client is protected. The same cannot be said for the unrepresented party. Further, as we have shown, the legislative history reveals that the Legislature was concerned with protecting unrepresented parties. The seven-day rule allows time for the unrepresented party to locate and consult with independent counsel, or time to consider the agreement after receiving it."It disagreed with H's arguments to the contrary, and held that "(f)or all these reasons, we conclude that section 1615(c)(2) does not pertain to Faso, a party who was represented in the transaction from the outset. Hence the trial court erred in deeming that his execution of the Addendum was involuntary and therefore unenforceable."

Some lawyers practicing family law believe that this decision is a very welcome answer to an issue that we have been struggling with since January 1, 2002, when Section 1615(c) was effective. The seven-day rule has been used as a bludgeon, an escape route

and a legitimate reason not to enforce an agreement that was presented on the eve of marriage. Now, with logic that blends practicality with the policy of protecting the unwary, that the rule applies only to those without counsel. The question remains as to whether an appellate court will rule whether or not it applies retroactively.

Some lawyers have taken a different position as to the importance of this decision. They believe that the Court appeared" to limit its holding to the unique, specific facts present. Mr. Faso was extremely wealthy (worth $30 million) and was attempting to set aside a prenuptial agreement, despite his legal sophistication, representation by counsel throughout the negotiations, and his voluntary execution of the agreement.

The California Legislature created laws encompassing marital property and spousal rights and obligations such as the basic law that property acquired during the marriage, subject to a few exceptions, is "community property." In addition, the legislature fashioned a law which supports our public policy that spouses have a duty to support each other. Nevertheless, individuals can contract with each other to opt out of these, among other rules, which would otherwise automatically apply. Such contracts are known, if entered into prior to marriage, as "premarital," "prenuptial" or "antenuptial" agreements, and become effective upon the Parties' marriage.

Premarital agreements have many benefits. When prepared and executed properly, a premarital agreement can preserve the rights of both parties as well as strengthen the base of the marriage. In preparing a premarital agreement, the Parties will need to engage in open and honest discussions about finances, which is one of the most difficult aspects of a marriage. Broaching the subject of financial issues prior to marriage will enlighten the couple about each others expectations.

A properly executed premarital agreement can ensure that property will be distributed in accordance with the couple's wishes. This can be especially important in the case of a spouse who has children from a prior marriage. A premarital agreement may be utilized to guarantee a distribution to the children upon death or divorce. Premarital agreements can aid in the protection of business assets in a closely held corporation or partnership. For couples where one spouse enters the marriage with substantial debt, a premarital agreement can be used to protect certain property from creditors. Drafted properly, a premarital agreement can provide for any number of outcomes which the Parties desire in the unfortunate event that they do dissolve their marriage or one of them suffers an untimely death.

Depending on what the Parties decide to include in their premarital agreement, a premarital agreement has the effect of overriding the laws regarding marital property and fiduciary duty between spouses. Couples often joke about having certain clauses in their premarital agreements including a maximum weight for the husband and wife, limits on how much television is watched, minimum conjugal duties, etc. Despite these cheeky stipulations, premarital agreements are not limitless in what they can contract away;

spouses cannot alter their legal relations to each other, the agreement cannot be contrary to California public policy and the contract cannot be illegal. For example, a premarital agreement cannot make conjugal requirements because it is against public policy and could be considered a form of prostitution, which is illegal in California.

In addition to these basic threshold limitations, the Uniform Premarital Agreement Act, starting with Section 1600 of the *California Family Code*, governs premarital agreements entered into on or after January 1, 1986. (Agreements entered into on or before January 1, 1986 are governed by the applicable laws in effect before January 1, 1986, and are not discussed herein.)

All premarital agreements must be in writing and signed by both Parties to the agreement. Premarital agreements can also be amended or revoked in their entirety, but only by a written agreement signed by the Parties. However, in order to be enforceable, certain requirements must be met. If any of the conditions are not met, then the premarital agreement may potentially be unenforceable.

First of all, the agreement must be entered into voluntarily. An agreement is entered into voluntarily if the Parties had sufficient capacity to enter into the agreement, meaning that the Parties were over the age of eighteen (18) and not otherwise disqualified from forming a legally valid marriage or, if under the age of eighteen (18), emancipated or otherwise capable of forming a legally valid marriage.

As we learned above, if either Party is not represented by an attorney, the unrepresented Party(ies) must be are given at least seven (7) days between the date he or she is first presented with the agreement and advised to seek independent legal counsel, and the date he or she signs the agreement. Moreover, this seven (7) day time period only runs once the signing Party has been provided with the <u>final</u> version of the premarital agreement which is ultimately signed. Furthermore, it is clear that multiple versions of the "final version" where the attorney makes corrections to the original document which has already been signed by both parties, will simply not do, as was the case in the *McCourt* matter.

The Parties must also each be represented by independent legal counsel at the time he or she signs the agreement, unless he or she expressly waives such right in a <u>separate</u> writing after being advised to seek independent legal counsel. However, if a Party is unrepresented by legal counsel, the terms and basic effect of the agreement, including the rights and obligations he or she is giving up by signing the agreement, must still be explained to the Party. The explanation must also be made in a language which the unrepresented Party understands and the explanation memorialized in writing and provided to the unrepresented Party prior to signing the premarital agreement. The unrepresented Party must also execute a document declaring that the explanation provided to him or her was actually provided and identify who provided that information. All of these documents, where applicable, must be executed free of duress, fraud or

undue influence.

Secondly, the agreement cannot be unconscionable at the time it was signed and the Parties provided full financial disclosures. The agreement must be fair and reasonable at the time it is signed. Prior to signing, the Parties must provide a full disclosure of their property and financial obligations and the Parties must have, or reasonably should have, adequate knowledge of the full extent of the other Party's property and financial obligations. However, although it is not recommended, the disclosure agreement can be waived in writing.

While these requirements may seem simple enough, they are highly nuanced. Given the substantial rights that may be contracted around, modified or altogether waived by a premarital agreement, premarital agreements are not to be taken lightly. However, given the myriad, complicated requirements necessary to enter into a valid premarital agreement as briefly discussed only in brief above, there are many difficulties and complications in trying to prepare and execute a binding and enforceable premarital agreement. In order to determine whether a premarital agreement is right for you and your partner, it is important to consult an attorney with experience in this field. When done properly, the agreement can be tailored to meet your needs for a more peaceful marriage, and, if necessary, a more peaceful, less costly divorce or probate proceeding.