TO HAVE AND TO HOLD

Most premarital agreements are binding and enforceable

By Peter M. Walzer

Unless you have been vacationing on Mars, you are aware of the attention premarital agreements have been receiving in the media. The Trump affair has provided supermarket tabloids with enough grist to speculate endlessly on whether the Trumps premarital agreement will stand up in court. On television, a recent episode of *L.A. Law* had divorce specialist Arnold Becker bragging, “I’ve never seen a prenup I couldn’t break.”

Don’t be surprised to hear a client or even an opposing attorney take Arnold Becker’s challenge seriously. Similarly most casual observers expect Ivana Trump to get more than the $20 million her premarital agreement guarantees. Given Donald Trump’s wealth, this expectation would be reasonable if not for the reality of the law.

Despite the media hype, properly drawn premarital agreements are binding and enforceable. They are rarely set aside. The California Legislature has recognized the importance of these agreements by enacting the Uniform Premarital Agreement Act (CC§5200 et seq). This statute outlines the basic requirements for a valid premarital agreement and states the specific circumstances under which an agreement is unenforceable.

Under this statute an agreement may be set aside if shown to be unfair at the time it was executed. An agreement also may be set aside if assets and liabilities were not fully disclosed, unless the parties expressly waived disclosure or knew apart from the agreement the full extent of the other’s economic circumstances.
Even before the Legislature stepped in, the courts consistently enforced premarital agreements. In 1976 the state Supreme Court upheld an agreement where the operative clause stated that all earnings and accumulations during the marriage were to be kept separate. *Marriage of Dawley*, 17 C3d 342. The court generously cited the entire text of the Dawleys’ agreement with approval, providing a working guide for attorneys looking for some simple but potent premarital language.

The kicker in the agreement was “Betty Jean Calvert Johnson acknowledges that she understands that, except for this agreement, the earnings and income resulting from the personal services skill, effort, and work of James R. Dawley after the marriage would be community property, but that by this agreement such earnings and income are made his separate property.” Because of this all-inclusive wording, the court found that the couple’s 31-foot sloop purchased in joint tenancy was James Dawley’s separate property. Even though both spouses had signed for the initial credit union loan used to purchase the boat, James had provided the down payment, made the payments and financed the upkeep of the yacht out of his own funds. According to the court, the presumption that property acquired on credit during marriage is community property did not apply because Civil Code section 5133 (now superseded) “specifies that the presumptions of the Family Law Act do not govern the status of marital property when ‘there is a marriage settlement containing stipulations contrary thereto.’” 17 C3d at 357.

Despite the imprimatur given California premarital agreements by the Legislature and the courts, it remains the attorney’s responsibility to draft an agreement that can withstand the bombast of an Arnie Becker and perhaps prevent a costly challenge. Also, because divorces are often emotion-filled disputes, you should take care to protect yourself from any claim that might
be brought by a distraught client.

Begin by documenting all of your advice to your client in writing. State the conditions under which the agreement was drafted and any recommendations you made that the client rejected.

Make sure your client understands the need to keep the agreement up to date. Agreements should be designed to accommodate the passage of time and changes in status, such as the birth of children, an increase or decrease in wealth or the disability of either party. Since no agreement can take into account all possible eventualities, however, recommend in writing that the client review the agreement periodically, with an attorney, to keep it current.

Take every possible step to document that the parties knew what they were doing. This is important not because premarital agreements are being invalidated on technicalities but because, in this television age, both attorneys and clients believe such agreements are not taken seriously. Careful documentation of the circumstances surrounding the drafting of an agreement can preclude a challenge.

Draft a balanced agreement. If your client wants his or her earnings to remain separate, ensure that the spouse’s earnings also remain separate. Try to mitigate any greed on the part of your client. Advise the client to provide some consideration for the other party’s waiving of property rights, such as a payment at the time of dissolution or the ceding of the family home. If the parties feel they have been treated fairly, they are less likely to challenge the agreement later.

You can include a formula that increases benefits according to the length of the marriage, and perhaps again after the birth of children. While consideration is not essential to the enforcement of a premarital agreement (CC §5311), it can forestall a claim that the agreement is
unfair. Accepting the benefit of the bargain leaves a party in a poor position to argue that the agreement was unjust.

Make sure that the terms of the agreement do not promote dissolution. While generally enforcing or promoting premarital agreements, courts have consistently held that agreements encouraging dissolution are unenforceable as against public policy. See, for example, *Marriage of Noghrey* (1985) 169 CA3d 326.

Include in the agreement full disclosure of all assets and liabilities, including the value of each asset. While the Uniform Premarital Agreement Act allows the parties to expressly waive full disclosure, better practice is to disclose assets in order to preclude an attack on this basis. In *Posner v Posner* (Fla 1970) 233 So2d 381, the court invalidated an agreement after concluding the wife had not been expressly advised the husband had the right to obtain money from a multimillion-dollar trust fund. Furnishing a list of the assets and their value has the additional benefit of providing a good record if the agreement is later set aside or revoked by the parties.

Do not attempt to limit or waive spousal support or attorneys fees unless you have fully advised your client in writing of the risk that such a provision will invalidate the agreement. The California version of the Uniform Premarital Agreement Act does not explicitly preclude limitations on support. Generally, however, courts have held that to limit or waive spousal support is against public policy, ever since *Pereira v Pereira* (1909) 156 C1. If you do decide to limit spousal support, specifically state that should that clause be invalidated, the rest of the agreement will still be enforceable.

You should also consider taking the following precautions:
• Give the other party sufficient time to have the agreement reviewed by a lawyer. Avoid the “shotgun” approach of presenting the agreement to the other party just days or weeks before the wedding. Clients often call you on Monday and expect you to draft an agreement, negotiate it and push it to completion in time for a wedding on Thursday. This is a situation ripe for a claim of undue influence. Ask yourself if the risk and aggravation is worth the money.

• Be sure the other party obtains legal advice and representation. Never represent both sides. If you choose to act as mediator, make sure both sides have counsel. Do not allow yourself to take on this role as a favor to a friend. Favors have a way of becoming burdens.

• Don’t recommend an attorney for the other side. You may be accused of referring the party to inadequate counsel. Direct the party to a lawyer referral service.

• Have the agreement executed in the presence of a notary who immediately acknowledges the signatures. Have witnesses present who can verify that the parties did not exhibit any obvious signs of being under the influence of drink or drugs. In some cases, videotaping or recording the execution of the agreement, with careful questioning as to whether the parties are signing voluntarily, may be appropriate.

• Send both parties and their attorneys executed copies.

These safeguards are not critical to the validity of the agreement. In Marriage of Cleveland (1977) 76 CA3d 357, the court upheld an agreement signed just 15 minutes before the wedding ceremony. The agreement in Marriage of Dawley clearly was approved even though
Mrs. Dawley clearly had been under great stress at the time the agreement was signed; she was pregnant and risked losing her job if she did not marry. Still, these safeguards may protect you and your client against needless challenge.

After negotiating the agreement, make sure your client understands its terms and the importance of abiding by them. An agreement followed by both parties is more likely to stand the test of time. A premarital agreement was set aside after the death of one spouse because the parties had not followed the terms of the agreement while living together. *Estate of Warner* ((1907) 6 CA 361, rev’d on other grounds 158 C 441 and 168 C 771.

Your final advice to your client should be to avoid commingling assets and to keep careful records. A qualified accountant or bookkeeper can assist the client here. Even if the agreement is set aside or revoked, careful bookkeeping will make it easier for the court to trace assets and will save your client many thousands of dollars.

Finally, remind yourself of the real-life Arnold Beckers willing to take on any premarital agreement for the right price. By carefully negotiating and drafting these agreements, you can provide a valuable lesson on the difference between real law and its media representations.