

Post-Marital Agreements

By Mitchell A. Jacobs and David L. Marcus *

In a recent case, a wife's insistence on a postnuptial agreement came back to haunt her. The Court in In re Marriage of Friedman (July 17, 2002, D.A.R.), upheld a postnuptial agreement which provided that each parties' business would be his/her separate property. Wife originally insisted on the agreement, but during the marriage husband started a business which grew into a valuable asset. Husband's attorney prepared the agreement, creating a potential conflict of interest. The Court liberally construed the requirement that wife sign a waiver of conflict of interest because she was an attorney, was orally and in writing advised of the potential conflict of interest, and the agreement acknowledged that she was advised. The Court also held that the specific rules regarding premarital agreements do not apply to post-marital agreements.

The wife worked at the time of marriage as an attorney for a prestigious law firm. In 1990, she met her future husband, who had just sailed around the world and wanted to start a forensic accounting business. Wife informed husband that if they married, she wanted to keep her law practice as her separate property, and husband agreed.

Weeks after they met, husband was diagnosed with leukemia. He did not have medical insurance, and told wife that he would "go off sailing and just die." The wife proposed marriage to husband so that he could be placed on her medical insurance and undergo a bone marrow transplant. They were married in January, 1991. Within days after marriage, husband contacted his attorney. Husband desired to protect his wife from creditors if he did not survive the medical treatment.

About one month later the parties met with husband's attorney at his office. The attorney suggested a postnuptial agreement, pursuant to which each of their income, business property, and debts would become his/her respective separate property. The husband's prior marriage ended in a bitter fight which he wanted to avoid. The attorney explained to both parties he only represented husband, and wife would either need to retain her own counsel or represent herself.

Husband's attorney sent a letter containing the following, apparently addressed to both parties: "In the execution of this Agreement and the other documents we are undertaking at this time, I, and my firm, can only represent Keith, as it would be a conflict of interest on our part to represent both parties in these transactions. Since Jill is an attorney, I presume that she will review the documents herself, or to the extent she

chooses, have them reviewed by an attorney of her choice."

The agreement contained a similar provision: "Jill is an attorney licensed to practice in California and is currently employed full time in that profession; and Keith is a self-employed business person. In entering this Agreement Keith is represented by S. Timothy Buynak, Jr., of Hatch and Parent, a Professional Corporation; Jill is acting as her own legal counsel. Each party acknowledges that as to the preparation and review of this Agreement, that he or she has read this Agreement and is fully aware of the terms and contents of this Agreement."

Husband's attorney referred the parties to another attorney in his firm to prepare the parties' estate plan. The estate plan consisted of simple wills and durable powers of attorney.

Wife made changes to the Agreement, which was signed on March 20, 1991, approximately three weeks after the parties first met with husband's attorney.

Husband then underwent a bone marrow transplant which was successful. During the marriage, the parties kept their funds in separate bank accounts and kept their businesses separate. Wife started her own law practice, and also helped husband to start his own "fledgling business."

The husband's business grew beyond his and his wife's dreams. In 1997 or 1998, the parties had difficulties in their

marriage. The wife told the husband to "get rid" of the postnuptial agreement, and that she did not want "that postnuptial agreement hanging over my head anymore." Husband did not agree with her request.

On May 1, 2000, wife filed a petition for dissolution of marriage. Husband sought to enforce the postnuptial agreement. Wife claimed that the agreement was invalid because husband's attorney prepared it without obtaining a written conflict of interest waiver pursuant to California Rules of Professional Conduct, rule 3-310(c).

The Court of Appeal affirmed the Trial Court's decision to uphold the validity of the agreement. The Court stressed that it examined the validity of the agreement according to the expectations of the parties at the time they signed the agreement. The parties' expectations was that each of their respective businesses would be his/her separate property. Subsequent events, regardless of whether they are foreseen, and regardless of who they benefit, does not change the analysis of the validity of the agreement.

The trial court held that husband's attorney did not represent the wife. She is an attorney (with three years of experience at that time) and a bright woman. She had ample time to consult with an attorney if she wanted. Wife was under no

pressure to sign the agreement. Wife signed the agreement "freely, voluntarily, intelligently and with superior knowledge of the law and the rights she was relinquishing."

On the issue of dual representation, the Court of Appeal stated that rule 3-310 requires a written consent by all parties if their interests actually, or potentially conflict. This applies to preparation of a post-marital agreement. The Trial Court found that husband's attorney did not represent wife.

On appeal, wife argued that husband's attorney's dual representation of the parties with respect to the estate plan created a conflict of interest which voided the postnuptial agreement. The Court of Appeal rejected this argument, holding that dual representation with respect to the estate plan did not create a conflict of interest with respect to the postnuptial agreement unless there was evidence of "misrepresentation, fraud, or overreaching." None of these occurred in this case.

Wife argued that she never read the letter from husband's attorney, and that the provisions in the agreement quoted above were false. The court discredited her testimony, and found that she was advised of the potential conflict, and agreed to act as her own attorney. Because there was no actual conflict, the advise to her orally one time and in writing twice of a potential conflict of interest, her voluntarily entering into

the agreement, her acting as her own attorney and making changes to the agreement, satisfied the requirements of rule 3-310. The Court further reasoned that even if rule 3-310 required a written waiver signed by wife, her signing the agreement constituted this waiver. Finally, the court held that "even if there was a technical violation of rule 3-310, the violation was not serious enough to render the agreement enforceable."

For these reasons, the Court also found that husband successfully overcame the presumption that a postnuptial agreement is induced by undue influence.

Wife next argued that a newly enacted section of the Family Code concerning premarital agreements, Section 1615, provides a basis for her to challenge the antenuptial agreement by analogy. That section provides that a premarital agreement is presumed not to be executed voluntarily if a party is not represented by independent counsel, or the party fails to waive in a separate writing representation by an independent counsel. The Court held that interspousal agreements are not interpreted under the same standards as premarital agreements, and that "property settlement agreements occupy a favored position in California."

It is very interesting that the Court ruled that the statutes covering premarital agreements do not apply to postmarital agreements. After marriage, the duties between

spouses (such as fiduciary duties) are the highest imposed by law. It would seem that the protections which the legislature found were needed to protect potential spouses before marriage would apply with greater force after the marriage. It does not make logical sense that the same agreement between parties can be unenforceable if executed prior to marriage, but unenforceable if executed after marriage. The post-marital agreement was not an agreement settling a pending divorce action, which the policy of the law may favor enforcement in order to reduce litigation.

In this case husband was lucky to have very favorable facts. It behooves attorneys to obtain an explicit signed waiver of a conflict of interest if one of the parties is not represented by an attorney. Relying on oral advisements, letters which may or may have been read, and acknowledgments in the agreement appears to be a risky strategy. Moreover, a signed written consent would seem to be obligatory if the party representing himself/herself is not an attorney.

* Mitchell A. Jacobs, a certified family law specialist in Los Angeles, limits his practice to marital dissolution and other family law matters. David Marcus, an attorney with the Law Offices of Mitchell A. Jacobs, also practices exclusively in the area of family law.