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Does California's public policy allow premarital agreements to contain provisions that "promote divorce"? The court narrowly avoided this issue in *In re Marriage of Bellio*, 105 Cal.App.4th 630 (2003). The court stated that whether a provision that promotes divorce in a premarital agreement is enforceable is an undecided issue under current law.

However, the court concluded that did not need to address that issue because, in the agreement before it, a provision that required the husband to pay the wife a certain amount of money upon divorce did not promote divorce, so the agreement was enforceable.

The husband and wife were married in 1987. At the time of marriage, the wife was 48 years old and had a net worth of approximately \$60,000. She was earning about \$12 per hour. The wife was receiving \$933 per month spousal support from a prior marriage, which had lasted 24 years. The husband was a multimillionaire and 71 years old.

About one month prior to marriage, the husband asked the wife to sign a premarital agreement. The agreement provided that the parties' separate property would remain their separate property and that each of the parties' earnings and accumulations during the marriage would be separate property.

Prior to signing the agreement, the wife informed the husband that she could not "afford" to get married with such a premarital agreement. If the marriage ended in a divorce, or if the husband died, she would be in a "precarious" financial situation. The support from her prior marriage would terminate if she remarried, and "she could barely make ends meet with her earnings."

The wife insisted that, to compensate her for the loss of spousal support from her prior marriage, the husband would pay her \$100,000 if the marriage ended by divorce or the husband's death.

Independent counsel represented both parties. Neither disputed that the husband signed the agreement freely, voluntarily and knowingly.

The wife's attorney told the husband in the course of negotiating the agreement that the wife probably would receive spousal support from her former husband for the rest of her life, because that marriage was lengthy and the former husband was in his early 1950s.

The husband agreed to add the \$100,000 payment provision to the agreement. The parties separated a little over one year after they were married.

The trial court held that the \$100,000 payment provision was unenforceable, but the Court of Appeal reversed. The trial court reasoned that the provision "unquestionably encouraged its beneficiary, wife, to seek a dissolution and therefore violated public policy." The trial court also noted that the provision "was reasonable to the circumstances of the parties. Its main purposes and objectives were to insulate Husband's accumulated assets and to provide Wife with a necessary level of immediate financial security upon the termination of the marriage But for the public policy limitation ... those purposes and objectives are neither inappropriate nor illicit."

The Court of Appeal reasoned that the trial court relied on the rule, reaffirmed by the California Supreme Court in *In re Marriage of Dawley*, 17 Cal. 3d 342 (1976), that a provision in a premarital agreement that promotes divorce is unenforceable. Such a provision is unenforceable because it "offends the public policy to foster and protect marriage."

Although parties may contract with respect to their property rights upon divorce, "it is only when the terms of an agreement go further - when they promote and encourage dissolution, and thereby threaten to induce the destruction of a marriage that might otherwise endure - that such terms offend public policy."

In a footnote, the court acknowledged that *Dawley* was decided prior to the enactment of California's statute governing premarital agreements, the California Uniform Premarital Agreement Act.

The court stated, "*Dawley* was decided before the adoption of the California Uniform Premarital Agreement Act. ... The Act became effective on January 1, 1986, 'and applies to any premarital agreement executed on or after that date.' ... The Act provides that permissible subjects of a premarital agreement include '[t]he disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event,' and '[a]ny other matter ... not in violation of public policy or a statute imposing a criminal penalty.'"

The trial court "believed" that two appellate cases that applied *Dawley* compelled it to hold that the \$100,000 payment promoted divorce and was thus unenforceable. The Court of Appeal, instead of deciding whether the Uniform Premarital Agreement Act prohibits provisions that promote divorce, decided that the \$100,000 provision did not promote divorce, so it did not have to reach the larger issue.

The court stated, "Because we conclude that the *Dawley* rule does not preclude the enforcement of the parties' agreement, we need not consider the effect, if any, of the Act upon that rule."

The first case that the trial court relied upon was *In re Marriage of Noghrey*, 105 Cal.App.4th 630 (1985). There, the premarital agreement provided that the husband would give the wife his house and \$500,000, or one-half of his assets, whichever is greater, in the event of a divorce. The court held that the agreement promoted divorce, because "it encouraged the wife to seek a dissolution, with all deliberate speed, lest the husband suffer an untimely demise, nullifying the contract, and the wife's right to the money and property." Thus, the agreement was unenforceable.

The other opinion that the trial court relied upon was *In re Marriage of Dajani*, 204 Cal.App.3d 1387 (1988). In that case, the parties were married by proxy in Jordan. The husband promised to pay the wife, upon divorce or his death, a dowry worth \$1,700 at the time that the wife petitioned for divorce. The *Dajani* court, following *Noghrey*, held the agreement unenforceable because it encouraged the wife to petition for divorce.

The *Bellio* court agreed with the reasoning of *Noghrey* but stated that "*Dajani* was wrongly decided." The court reasoned that a payment of \$1,700 is insufficient to "seriously jeopardize a viable marriage."

Applying *Dawley* to the facts before it, the *Bellio* court concluded that the \$100,000 payment did not threaten the parties' marital relationship. The provision was a proper planning of property rights in a premarital agreement.

The trial court found that the parties intended the \$100,000 to compensate the wife for the spousal support from the prior marriage that she lost by remarrying. The court further found that the \$100,000 was a loose calculation of the amount of the wife's forfeited spousal support from the prior marriage. Neither party challenged this finding.

The Court of Appeal found that the purpose of the \$100,000 payment was to "assure that, if husband died or the marriage was dissolved, wife would be no worse off than she would have been had she remained single." The court held that, rather than promoting divorce, the provision encouraged the parties to marry by making the marriage economically feasible for the wife.

Until the courts or Legislature make a decision concerning the issue of whether the Uniform Premarital Agreement Act allows provisions that could be interpreted as promoting divorce, the prudent practice is to assume that provisions that promote divorce will not be enforceable.

Counsel should advise clients of this undecided issue. If a client insists on a provision that clearly would promote divorce, then counsel certainly should inform that client that such a provision could be unenforceable.

The party who receives the payment should insist on provisions in the agreement that explain, as much as possible, that the purpose of the payment is to compensate that party for lost income that could result from the marriage and that the provision has encouraged that party to marry.

Additionally, counsel should discuss whether a provision that arguably promotes divorce would be severable from the remainder of the agreement. The client may view the entire agreement as a "package" and prefer that none of the agreement be enforced if the offending provision is held unenforceable. Alternatively, the client may still want the other, non-offending provisions enforced.

Concerning the larger issue, allowing the parties to agree to a provision that could promote divorce is logically consistent with a waiver of spousal support. Waivers of spousal support, in proper circumstances, are enforceable. A large payment upon divorce is the "flip side" of a waiver of support. If a spouse can agree to not receive any spousal support, then that spouse also should have the ability to receive a payment upon divorce.

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