

You're Right Until You're Wrong

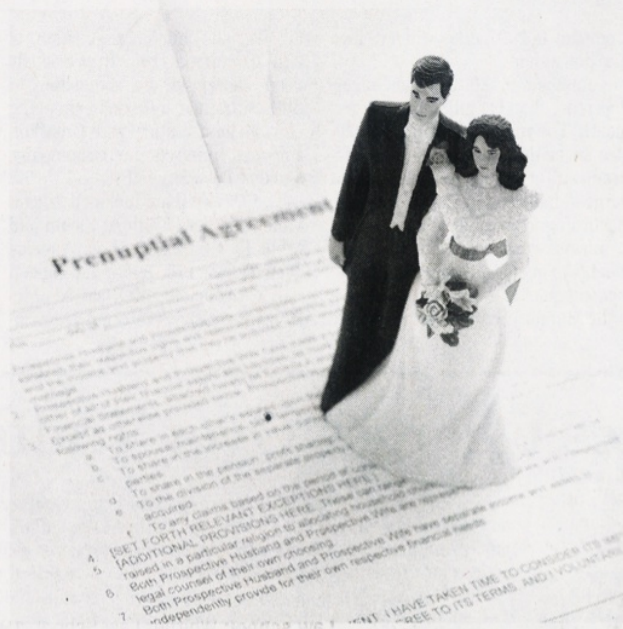
By Mitchell A. Jacobs
and Ryan McEachern

As legal practitioners, many of us have faced the scenario where we have provided advice to a client, based upon the clear language of a statute and the general understanding of practicing lawyers and judges, only to have that advice deemed incorrect by a later case. It is much rarer that the matter in which we provide the advice is the very case that made it incorrect.

In the recent matter of *Faso v. Caldwell Faso* (2011) 191 Cal App. 4th 945, Joseph Faso's attorney was a victim of providing advice to his client, which was "right" when it was given, but "wrong" shortly thereafter. Faso's attorney had advised him to execute a premarital agreement before seven days had passed pursuant to Family Code Section 1615(c)(2), believing that the agreement would ultimately be found unenforceable. The appellate court, however, held that the 7-day rule only applied to unrepresented litigants, and found that Faso's attorney's advice was wrong and the premarital agreement valid and enforceable.

Family law practitioners who have drafted, challenged, or even read a premarital agreement are familiar with the "seven-day rule" found in Section 1615(c)(2). The general understanding and application of this rule, until *Faso*, required a delay of seven days from the presentation of a premarital agreement until its execution in order to be effective. The *Faso* court held this understanding and application to be true, but only to unrepresented parties. Previously, Section 1615(c)(2) applied to all parties, represented and unrepresented. Now, the seven-day rule only applies to parties who were unrepresented when the premarital agreement was presented to them, and not to parties who had representation at the time the agreement was presented.

Faso involved the marriage of two well-off individuals, with Faso considerably wealthier than his bride to be, Cari Caldwell-Faso. The parties agreed to enter into a premarital agreement, and each hired an attorney. Ultimately, the parties could not agree on a final version, and as a result, Caldwell-Faso called off the wedding. Shortly before the wedding date, the parties realized they truly loved one another and wanted to get married, and would figure out how to resolve their differences. Caldwell-Faso's attorney provided the last modified draft to Faso's attorney. Faso was reluctant to sign the final version because he was not fully satisfied



with its terms. He agreed to sign, however, on the recommendation of his attorney who told him that because the premarital agreement was being signed less than seven days after presentation, the agreement would not be enforceable. The parties separated a few years later and Faso filed for divorce. He alleged that the premarital agreement was invalid because it was

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signed in violation of the seven-day rule, as his attorney had explained to him. But the trial court found that the seven day rule applied and invalidated the premarital agreement. Caldwell-Faso appealed.

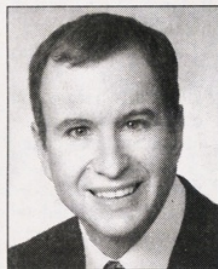
In reaching the conclusion that the seven day rule only applied to unrepresented parties, the appellate court performed an analysis of Section 1615(c)(2) as a whole and reviewed the legislative history. It determined that the rule was ambiguous due to the conjunction "and" in the statute, which created a logical conclusion that this section only applies to unrepresented parties because a represented party need not be advised to seek representation, and the language

is not specific to unrepresented or represented parties. In contrast, the appellate court pointed out that other subsections of Section 1615 did specifically refer to unrepresented parties, represented parties, or both.

The court then looked at the legislative history behind the statute and determined that this section was drafted in direct response to the holding in *Marriage of Bonds* (2000) 24 Cal 4th 1, which invalidated a premarital agreement because the wife was not represented by counsel during its negotiation. The Legislature found that the *Bonds* decision opened the door for a slew of challenges to the validity and enforceability of premarital agreements when one party was represented and the other was not. However, the initial drafts of Section 1615 and notes in the legislative record did not provide a clear resolution of intention.

With the legislative history unable to resolve the issue, the appellate court turned towards the statutory construction of the entire statute as a whole. The court noted that elsewhere in Section 1615, the statute makes clear and unambiguous references to represented and unrepresented parties, strongly suggesting that the lack of distinction in Section 1615(c)(2) was intentional. However, the court found that Section 1615(c)(1) contains specific requirements relative to an *unrepresented party* only, and that Section 1615(c)(2) merely continued this treatment. Thus, while Section 1615(c)(2) does not specifically limit itself to unrepresented parties, the context of the subsection commencing with 1615(c)(1) clearly demonstrates that the seven-day rule only applies to unrepresented parties. In fact, the court goes on to find that advising an already represented party to seek independent counsel upon presentation of the premarital is "absurd."

What is the immediate impact of this clarification of the law? Obviously, limiting the seven-day rule to represented parties means that parties negotiating premarital agreements have more flexibility regarding when they can sign the agreement and still feel secure that the agreement will not be invalidated. It is not good practice, however, to advise a client to sign anything they are reluctant to sign because some technicality will later render that agreement invalid or unenforceable. While that technicality may be right today, it might be wrong tomorrow.



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