Santa Clara University School of Law

Santa Clara Law Review

Volume 8 | Number 1 Article 4

1-1-1967

Integrated Property Settlement Agreements: Constitutional Problems with the 1967 Amendment to California Civil Code Section 139

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COMMENTS

INTEGRATED PROPERTY SETTLEMENT AGREEMENTS: CONSTITUTIONAL PROBLEMS WITH THE 1967 AMENDMENT TO CALIFORNIA CIVIL CODE SECTION 139

INTRODUCTION

California public policy favors effective settlement of support and property rights prior to divorce, where divorce is unavoidable.[1] Accordingly, California courts recognize and incorporate[2] integrated property settlement agreements[3] in decrees for divorce. Since 1957, however, judicial interpretation of integrated agreements[4] has resulted in the loss of the original value of the agreement[5] and its diminished use by attorneys, due to the uncertainty of the law involved.

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1 "Property settlement agreements occupy a favored position in the law of this state and are sanctioned by the Civil Code." Adams v. Adams, 29 Cal. 2d 621, 624, 177 P.2d 265, 267 (1947). *Accord*, Hill v. Hill, 23 Cal. 2d 82, 142 P.2d 417 (1943); Hensley v. Hensley, 179 Cal. 284, 183 P. 445 (1918).

2 "Incorporate," in this article, refers to the inclusion of the agreement in the judicial decree. "Merge" refers to the effect of incorporation, *i.e.*, upon incorporation the agreement merges with the decree and becomes an order of the court.

3 There are three types of agreements through which spouses may settle their rights prior to divorce:

1. *Pure Support Settlement Agreement*—provides for support and maintenance. Payments are modifiable by the court, and enforceable by contempt.

2. *Pure Property Settlement Agreement*—provides for division of property. It is neither modifiable by the court, nor enforceable by contempt.

3. *Integrated Property Settlement Agreement*—provides for simultaneous settlement of support, maintenance, and property rights. Originally, payments under the agreement were not modifiable by the court but were enforceable by contempt. (1937-1957) Then the remedy of contempt was withheld. (1957-1967) Under the new amendment to section 139 of the California Civil Code, CAL. STAT. 1967, ch. 133, the payments are modifiable in the absence of a specific provision to the contrary, and are enforceable by contempt.

See Adams v. Adams, 29 Cal. 2d 621, 624-26, 177 P.2d 265, 267-68 (1947).

4 "Integrated agreements" hereafter refers to *integrated property settlement agreements*, and "integrated payments" refers to the payments under the integrated agreement.

5 The original value of such an agreement was that, "it provided security of payment for the husband who could plan his affairs in the assurance that his payments could not be increased by the court; and it provided a secure payment to the wife together with the assurance that the payments could be enforced by contempt if they were made a part of the judgment." From material prepared for Herbert E. Ellingwood, Legislative Representative, State Bar of California, *Effect of S.B. 230 on the Integrated Property Settlement Agreement* (1967).

In May, 1967, section 139 of the California Civil Code was amended to clarify the law for the attorney and permit modification of integrated agreements and enforcement of payments under such agreements through contempt proceedings.[6] However, some question exists as to whether the amendment is unconstitutional as a violation of article I section 15 of the California constitution,[7] in view of the California Supreme Court's decision in *Bradley v. Superior Court*.[8]

THE PROBLEM (1957-1967)

Originally there were three requirements for an integrated property settlement agreement:

1. A provision "that the purpose of the parties is to reach a final settlement of their rights and duties with respect to both property and support . . . ."[9] (Finality Clause)

2. A provision "that they intend each provision to be in consideration for each of the other provisions . . . ."[10] (Consideration Clause)

3. A provision "that they waive all rights arising out of the marital relationship except those expressly set out in the agreement . . . ."[11] (Waiver Clause)

The presence of the above clauses constituted conclusive evidence of an integrated property settlement agreement which could

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6 Section 139 reads in part:

"The provisions of any agreement for the support of either party shall be deemed to be separate and severable from the provisions of the agreement relating to property. All orders for the support of either party based on such agreement shall be deemed law imposed and shall be deemed made under the power of the court to make such orders. The provisions of any agreement or order for the support of either party shall be subject to subsequent modification and revocation by court order except as to any amount that may have accrued prior to the order of modification or revocation, and except to the extent that any written agreement, or if there is no written agreement, any oral agreement entered into in open court between the parties, specifically provides to the contrary. All such orders of the court for the support of the other party, even if there has been an agreement of the parties, may be enforced by the court by execution, contempt, or by such other order or orders as the court in its discretion may from time to time deem necessary." CAL. STAT. 1967, ch. 133.

7 "No person shall be imprisoned for debt in any civil action . . . unless in cases of fraud . . . ." CAL. CONST. art. I, § 15 (1953).

8 48 Cal. 2d 509, 310 P.2d 634 (1957).

9 Plumer v. Plumer, 48 Cal. 2d 820, 825, 313 P.2d 549, 552 (1957). *Accord*, Anderson v. Mart, 47 Cal. 2d 274, 303 P.2d 539 (1956); Messenger v. Messenger, 46 Cal. 2d 619, 297 P.2d 988 (1956).

10 Plumer v. Plumer, 48 Cal. 2d at 825, 313 P.2d at 552 (1957).

11 *Id.*

not be modified without the consent of both parties. Such an agreement was enforceable through contempt proceedings.[12]

The initial problem created by judicial interpretation of the integrated agreement evolved from the fact that payments under such agreements are not solely for support, but include payment for property given or received.[13] With respect to this *dual nature* of the payments, Mr. Justice Traynor, now Chief Justice, indicated, in 1954,[14] that to the extent that the payments satisfy the legal duty of marital support and maintenance,[15] they are "law imposed" alimony.[16] To the extent, however, that the payments represent the division of property, they are "negotiated" contractual debts.[17]

This *dual nature* distinction became important in 1957. At that time the supreme court decided, in *Bradley v. Superior Court*,[18] that because the payments under an integrated agreement represent *property*, are negotiated between the parties, and are contractual debts, they are not pure alimony and therefore constitute a "debt" within the constitutional prohibition against imprisonment for debt.[19] Consequently the payments, though merged in the judicial decree, are unenforceable through contempt proceedings.

Although *Bradley* withheld the remedy of contempt when the agreement was integrated, the decision did not preclude effective settlement or enforcement through agreement of the parties. Theoretically the parties could still draft an agreement with a provision that it was a non-modifiable settlement of both property and support, and stipulate in the agreement that the payments were solely for support

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[12] *Id.*

[13] *E.g.*, in settlement of support and property rights, the wife may demand the house, furniture, car and $100 each month for support. The husband may counteroffer the house and half the furniture and $200 each month. If the wife accepts and an agreement containing the requisite clauses is signed, the payments will really be the $100 for support and an additional $100 in consideration for letting the husband keep the car and half the furniture. (Of course in actual practice it is much more complicated and less susceptible to division.)

[14] Dexter v. Dexter, 42 Cal. 2d 36, 41, 265 P.2d 873, 876 (1954).

[15] CAL. STAT. 1967, ch. 133. (*I.e.*, upon marriage, the husband is under a legal obligation to support his wife during their joint lives. If through his own fault, the husband forces the wife to terminate the relation, thus depriving her of the benefit of the obligation, the law requires that he pay compensation to her in the form of alimony.)

[16] This term is also used in the new amendment. *See* note 6 *supra.*

[17] The distinction between "law imposed alimony" and a "contractual debt" is most important where the remedy of contempt is involved. If the payments are "law imposed alimony" they are an exception to article I section 15 and are therefore enforceable by contempt. *See* Bradley v. Superior Court, 48 Cal. 2d 509, 519, 310 P.2d 634, 640 (1957). *Accord*, Miller v. Superior Court, 9 Cal. 2d 733, 72 P.2d 868 (1937); *Ex parte* Spencer, 83 Cal. 460, 23 P. 395 (1890).

[18] 48 Cal. 509, 310 P.2d 634 (1957).

[19] *See* note 7 *supra.*

and separate from any property interest. If the parties deleted the requisite clauses of the integrated agreement, the remedy of contempt could be used without violating the constitutional prohibition.

A further problem was created by judicial interpretation, however, when the California Supreme Court held that the requisite clauses of the integrated agreement could be implied from the intent of the parties in spite of the presence of statements that certain payments were solely for support. In *DiMarco v. DiMarco*[20] the husband agreed to pay the wife "as and for alimony and support money the sum of $150.00 each month." The agreement contained no mention of consideration evidencing the consideration clause required for an integrated agreement. Nevertheless, the court concluded that the parties intended that the agreement be integrated and consequently nonmodifiable and unenforceable by contempt. Mr. Justice McComb declared that "the inference is clear that they intended an integrated agreement. It is unnecessary that the parties recite such intent when the agreement itself makes the intent clear."[21]

Following the reasoning set forth in *DiMarco*, the appellate courts made similar determinations. In *Biagi v. Biagi*[22] the trial court held the husband in contempt where the agreement did not contain a consideration clause and stated that the money was to be paid "as alimony." Relying on *DiMarco*, the appellate court reversed after determining that the parties *intended* it to be an integrated agreement. Similarly, the trial court in *Levy v. Levy*[23] held the agreement not integrated where the payments were designated "for support, care, and maintenance," and the agreement lacked express recital that the wife waived her right to future alimony, or to any payment other than that in the agreement. The appellate court determined that the parties *intended* an integrated settlement and reversed the trial court on the authority of *DiMarco* and *Biagi*.

As a result of the judicial interpretation in *Bradley*, *DiMarco* and their progeny, the law concerning integrated property settlement agreements became such that the attorney could not assure his client that an agreement, settling both property and support rights, was modifiable upon changed circumstances or enforceable by contempt proceedings. Consequently, attorneys were reluctant to use an integrated agreement to settle the rights of spouses relating to property and support.

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[20] 60 Cal. 2d 387, 385 P.2d 2, 33 Cal. Rptr. 610 (1963).

[21] *Id.* at 392, 385 P.2d at 6, 33 Cal. Rptr. at 613.

[22] 233 Cal. App. 2d 624, 43 Cal. Rptr. 707 (1965).

[23] 245 Cal. App. 2d 341, 53 Cal. Rptr. 790 (1966).

Moreover, practical social problems developed when the parties found themselves "trapped" in an integrated agreement. If the husband was unable to modify the agreement upon changed circumstances and refused to pay, the wife was left without effective remedy, and had to turn to the state for support for herself and her children.

THE SOLUTION (1967)

In an effort to clarify the law concerning integrated property settlement agreements after the *Bradley* decision, section 139 of the California Civil Code was amended in 1959, 1961, and 1963.[24] None of the amendments were broad enough or explicit enough, however, to clarify the law and provide for effective enforcement of integrated agreements.

The present amendment, passed on May 12, 1967, abolishes the integrated property settlement agreement in its classical form.[25] The amendment replaces it with guidelines constructed to give effect to the intention of the parties and maintain the integrated agreement as an effective means of settling marital obligations.

Whereas the *Bradley* court, in considering the *dual nature* of payments under an integrated agreement, emphasized the *contractual* debt nature,[26] the new amendment emphasizes the "law imposed" *support* nature of the payments. The amendment suggests that, although to some extent the integrated payments may be a negotiated contractual debt, inasmuch as the payments under such an agreement satisfy the legal obligation of marital support and maintenance, they are "law imposed" alimony, and consequently modifiable by the court in the absence of a specific provision to the contrary, and are within the exception[27] to the constitutional prohibition against imprisonment for debt.

If, under the new amendment, the parties want an integrated

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[24] The 1959 amendment provided for modification of *child* support orders based on integrated agreements. CAL. STAT. 1959, ch. 1399. In 1961, the Legislature gave the courts the power to modify support orders "to the other spouse" based on integrated agreements, *unless* "there are no minor children of the parties to the agreement." CAL. STAT. 1961, ch. 2098. The confusion resulting from the 1961 amendment terminated when it was repealed by the 1963 amendment. CAL. STAT. 1963, ch. 861. For discussion of the amendments and their effect see Heller v. Heller, 230 Cal. App. 2d 679, 41 Cal. Rptr. 177 (1964); 38 CAL. ST. B. J. 637 (1963).

[25] Traditionally, the finality, waiver, and consideration clauses had to be present. *See* discussion p. 85 *supra.*

[26] *See* p. 86 *supra.*

[27] *See* note 17 *supra.*

agreement to be modifiable, the attorney need not mention modification in the agreement and the law presumes the intention to make it modifiable.[28] If modification is not desired, a specific statement to that effect will prevent any modification without consent from both parties.[29] The guidelines of the amendment eliminate the uncertainty involved when a court is allowed to determine the intent of the parties to the agreement.

No provision need be inserted in the agreement by the attorney to protect the right of the spouse to enforce payments by contempt proceedings. It is advisable, nevertheless, that steps be taken to insure that the agreement is incorporated into the judgment of the court. This may be best accomplished either by having the agreement read into the judicial decree, or the performance described in the decree, and the performance specifically ordered by the court with a copy of the agreement attached to the judgment.[30] Incorporated in this manner, the agreement is merged with the decree of the court and the payments of the decree can be considered "law imposed" and within the power of the court to order "allowance for support and maintenance."[31]

In addition, provision should be made in the agreement for the termination of payments upon the remarriage of the wife. In this way the payments retain the indicia of *support* and are not susceptible to contrary interpretation.[32]

Thus, where the finality, waiver, and consideration clauses were previously required to establish an integrated agreement which was non-modifiable and enforceable by contempt, under the present law all that is needed is a specific provision that the agreement is non-modifiable.

UNCONSTITUTIONALITY

On the basis of *Bradley v. Superior Court*,[33] it could be argued that section 139 of the California Civil Code[34] violates the constitu-

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28 "The provisions of any agreement . . . shall be subject to subsequent modification or revocation by court order . . . except to the extent that any written agreement . . . specifically provides to the contrary." CAL. STAT. 1967, ch. 133. *See* note 6 *supra*.

29 *Id.*

30 *See generally* 34 WASH. L. REV. 196 (1959).

31 CAL. STAT. 1967, ch. 133. (If the court merely approves the agreement by reference and orders it performed, the agreement might not be considered so merged with the judicial decree as to be "law imposed." *See* Bradley v. Superior Court, 48 Cal. 2d 509, 513, 310 P.2d 634, 636 (1957).)

32 There was no such provision in *Bradley*, where it was determined that the payments were not for support.

33 48 Cal. 2d 509, 310 P.2d 634 (1957).

34 CAL. STAT. 1967, ch. 133. See note 6 *supra*.

tional prohibition against imprisonment for debt.[35] In providing that enforcement by contempt is available "even if there has been an agreement[36] of the parties,"[37] section 139 permits imprisonment for failure to pay a *negotiated contractual debt* contrary to the supreme court's holding in *Bradley* that to do so violates article I section 15 of the California constitution.

The basis of the decision in *Bradley* is the court's adoption of a policy of strict interpretation of the constitutional prohibition against imprisonment for debt, resolving all doubt in favor of the liberty of the citizen.[38] Accordingly, where the court can label integrated payments either alimony or a contractual debt, the court favors that construction which preserves the liberty of the individual. Section 139, however, implies that the payments under the integrated agreement will always be interpreted as "law imposed" alimony, and therefore enforceable through contempt proceedings.[39] Thus, the new amendment may be said to be contrary to the basic constitutional principles as interpreted by the court in *Bradley*.[40]

Furthermore, in order to make the provision for payment in an integrated agreement "law imposed," the court must incorporate the agreement in the judgment so that the agreement will merge with the decree of the court. If it is not incorporated, it remains merely a contract between the parties with no judicial sanction. However, *Bradley* declares that the integrated payment will *not* be enforceable by contempt *even though* merged in the judgment.[41]

Finally, it has been argued that the *Bradley* court implies that it will not allow contempt proceedings to enforce integrated payments under an agreement which it is unable to modify upon changed conditions.[42] Accordingly, where the agreement is not modifiable by

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35 CALIF. CONST. art. I, § 15 (1953).

36 "Agreement" is interpreted to include integrated property settlement agreements. *See* note 3 *supra*.

37 CAL. STAT. 1967, ch. 133. *See* note 6 *supra*.

38 Quoting 11 AM. JUR. *Constitutional Law* § 327 (1937), *Bradley v. Superior Court* declared at 48 Cal. 2d at 519, 310 P.2d at 640: "'As in the case of all constitutional provisions designed to safeguard the liberties of the person, every doubt should be resolved in favor of the liberty of the citizen in enforcement of the constitutional provision that no person shall be imprisoned for debt.'" *See* People v. Power, 159 Cal. App. 2d 869, 324 P.2d 113 (1958); 16 C.J.S. *Constitutional Law* § 204(1) (1956).

39 "*All* orders for . . . support . . . shall be deemed law imposed . . . . *All* such orders . . . may be enforced . . . by contempt . . . ." CAL. STAT. 1967, ch. 133 (emphasis added).

40 *See generally* 9 HASTINGS L.J. 57 (1957).

41 "Inclusion of such a contract in a judgment for divorce . . . cannot support a commitment to imprisonment for failure to pay the judgment debt." 48 Cal. 2d 509, 521, 310 P.2d 634, 641 (1957).

42 If it were otherwise, the court might be forced to imprison a person for failure

the court without the consent of both parties, there would be no remedy of contempt. Section 139, however, asserts that the remedy of contempt is available *even though* the agreement is made non-modifiable by the specific provision of the parties.[43]

Thus the basic provisions of section 139 would be contrary to the constitutional determinations and reasoning of the California Supreme Court as asserted in *Bradley v. Superior Court.*

CONSTITUTIONALITY

Section 139 establishes constitutionally valid guidelines for the creation, modification, and enforcement of integrated agreements. Its constitutionality is supported by both formal and substantive arguments.

Formal Arguments

The constitutionality of section 139 depends on the interpretation of article I section 15 of the California constitution,[44] and the validity of the reasoning and decision of the California Supreme Court in *Bradley v. Superior Court.*[45]

The use of contempt to enforce recurring payments under an integrated agreement is in harmony with the rationale behind article I section 15. The constitutional prohibition against imprisonment for debt is *restricted* to the protection of the "poor but honest debtor who is unable to pay his debts."[46] The prohibition does not intend its use to "shield a dishonest man."[47]

If contempt proceedings are brought, the husband is not automatically incarcerated if he does not pay. It must first be proven that he has the present ability to make the payments, and that he

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to pay under an agreement which the court found manifestly inequitable due to changed circumstances, such as a new family or loss of job, but which it could not change. *See* 47 CALIF. L. REV. 756, 757 (1959).

[43] "All such orders of the court for the support of the other party, *even if there has been an agreement of the parties*, may be enforced by . . . contempt . . . ." CAL. STAT. 1967, ch. 133 (emphasis added). *See* note 6 *supra.*

[44] "No person shall be imprisoned for debt in any civil action . . . unless in cases of fraud . . . ."

[45] 48 Cal. 2d 509, 310 P.2d 634 (1957).

[46] "The historical background of section 15 of article I and similar constitutional guaranties of other states *clearly shows* that the provisions were adopted to *protect the poor but honest debtor who is unable to pay his debts*, and were *not* intended to *shield a dishonest man* who takes unconscionable advantage of another." *In re* Trombley, 31 Cal. 2d 801, 809, 193 P.2d 734, 740 (1948) (emphasis added); *cf.* Bradley v. Superior Court, 48 Cal. 2d 509, 525, 310 P.2d 634, 644 (1957) (dissenting opinion).

[47] *Id.*

has not paid.[48] A valid inability to pay or excuse for not paying is a good defense to a contempt proceeding.[49] Even where the husband is incarcerated, however, he may gain his liberty by merely paying the amount owed. Thus, the "poor but honest debtor" is protected while the "dishonest man" is incarcerated.

If contempt, in its application, is in harmony with article I section 15, then the principal objection to section 139 must be found in its contradiction of *Bradley*. However, *Bradley* itself was a contradiction of the law as it had been established twenty years earlier in *Miller v. Superior Court*.[50] In *Miller* the husband appealed a contempt conviction on the ground that the payments were part of an integrated agreement and constituted a debt within article I section 15. The court declared that, even though the agreement was integrated, upon incorporation and merger of the agreement with the judgment, the payments lost their contractual nature and became an "allowance to the wife for her support" under section 139, and thereby enforceable by contempt.

It is significant that the court in *Bradley* did not expressly overrule *Miller*. Instead, *Miller* was distinguished. *Bradley* determined that the holding in *Miller* allowed *support* payments to be enforced through contempt.[51] The court then concluded that, since it was determined in the lower court that the payments in *Bradley* were *not* for *support*, *Miller* did not apply.

Aside from the validity of the distinction, it is notable that *Bradley* agreed with *Miller*, that if payments are determined to be in satisfaction of the marital obligation of *support* they will be enforceable by contempt.[52] Thus, *Bradley* implied that if the payments (in *Bradley*) had been for *support* they would have been enforceable by contempt. Therefore, if it is determined that certain payments are in satisfaction of the marital obligation of *support*, they will be enforceable by contempt according to *Bradley*,[53] *Miller*,[54] and section 139. Accordingly, throughout section 139 reference is made only to *provisions for support* or *orders for support*, providing that only these are enforceable by contempt.[55]

Thus, the key to section 139 lies in the stipulation that the

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48 *See* Darden v. Superior Court, 235 Cal. App. 2d 80, 45 Cal. Rptr. 44 (1965).

49 *See* Cagwin v. Cagwin, 112 Cal. App. 2d 14, 245 P.2d 379 (1952).

50 9 Cal. 2d 733, 72 P.2d 868 (1937).

51 "[T]he decision in the Miller case actually rested on the theory of marital support." 48 Cal. 2d 509, 521, 310 P.2d 634, 641.

52 *Id.* at 520, 310 P.2d at 641.

53 *Id.*

54 9 Cal. 2d 733, 739, 72 P.2d 868, 872 (1937).

55 CAL. STAT. 1967, ch. 113. *See* note 6 *supra*.

support provisions are "deemed to be separate and severable from the provisions of the agreement relating to property."[56] In this way the amendment separates the integrated agreement at the outset into those provisions relating to *support* and those relating to *property*.[57] It then provides that only the provisions and orders relating to *support* will be enforceable by contempt.[58] Hence, the amendment is in accord with the statement in *Bradley* that provisions relating to *support* may be enforced by contempt, and does not contravene the holding in *Bradley* that provisions relating to *property* are a debt and not enforceable by contempt.

After distinguishing *Miller*, the court in *Bradley* was unable to find a California case in point.[59] Consequently, it cited cases from Washington, Maryland, and Michigan in support of its decision. Washington, however, is the only state with a system of law comparable to California, including community property.[60] It is therefore significant that the two Washington cases,[61] as relied on in *Bradley*,[62] were overruled a year later in *Decker v. Decker*.[63]

In *Decker* the court upheld contempt to enforce integrated payments and declared that the constitutional prohibition against imprisonment for debt[64] related only to "run-of-the-mill debtor-creditor relationships"[65] where the judgment of the court was merely a declaration of an amount owing. Problems in domestic relations were excluded from the debtor-creditor category by the court because the judgment in such cases is an *order* by the court that an amount be paid, not merely a *declaration* that an amount is owing.[66]

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[56] *Id.*

[57] Where the payments are labeled "support" or "alimony" as in *DiMarco*, *Biagi*, and *Levy supra*, the court should have no problem dividing the provisions. However, where the payments are thoroughly integrated and not susceptible to separation (see note 13 *supra*), the amendment does not indicate how the payments for support are to be determined so that they can be severed from the payments in consideration of property. It is suggested in this respect that the courts hold *all* payments under an integrated agreement as provisions for support.

[58] "All such orders of the court *for the support of the other party* . . . may be enforced by . . . contempt . . . ." CAL. STAT. 1967, ch. 133 (emphasis added). *See* note 6 *supra*.

[59] "No California case has been cited or discovered in which the point has been squarely presented and passed on." 48 Cal. 2d 509, 520, 310 P.2d 634, 641.

[60] *See* 45 CALIF. L. REV. 782, 784 (1957).

[61] Robinson v. Robinson, 37 Wash. 2d 511, 225 P.2d 411 (1950) and Corrigeux v. Corrigeux, 37 Wash. 2d 403, 224 P.2d 343 (1950).

[62] 48 Cal. 2d at 519-20, 310 P.2d at 640-41.

[63] 52 Wash. 2d 456, 326 P.2d 332 (1958).

[64] WASH. CONST. art. I, § 17.

[65] 52 Wash. 2d 456, —, 326 P.2d 332, 333 (1958).

[66] *Id.* The same distinction is pointed out in Miller v. Superior Court, 9 Cal. 2d 733, 739, 72 P.2d 868, 870-71 (1937).

In obvious reference to *Bradley* and the cases quoted therein, the *Decker* court stated: "Certain language in some marital relations decisions of this and other courts appears to emphasize unduly the *contractual rights* of the parties in the settlement of their marital difficulties by agreement or contract."[67]

Further indication of the diminished effect *Bradley* should have on section 139, is that the 1961 amendment[68] to section 139 was interpreted as permitting contempt to enforce payments under an integrated agreement, and no constitutional issue was raised. *Heller v. Heller*[69] involved a contempt action, brought under the 1961 amendment, to enforce payment under an integrated agreement. The court upheld the contempt proceedings against the husband by interpreting the 1961 amendment as basing *all* payments to the wife, *even in an integrated agreement*, on the statutory obligation of marital support.[70] This interpretation is the essence of the 1967 amendment.[71] However, rather than pointing to the *contractual nature* of the agreement, the *Heller* court emphasized the state's interest in the marital relationship, and found no constitutional issue raised by the amendment as it related to contempt.

In light of the above discussion, section 139 does not violate the basic purpose of article I section 15. Neither does section 139, as interpreted, contravene the reasoning and decision in *Bradley v. Superior Court*.[72]

Substantive Arguments

An integrated property settlement agreement is not the result of voluntary bargaining between two people wishing to contract. The entire agreement arises out of the marital relationship and is marital in nature. Consequently, it has been argued that there should be no distinction in an integrated agreement between the contractual element concerning property and the law-imposed element concern-

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67 52 Wash. 2d 456, —, 326 P.2d 332, 336 (1958).

68 The 1961 amendment gave the court the power to modify or revoke support provisions for the "other spouse" contained in an integrated agreement unless "there are no minor children of the parties to the agreement." No mention was made in the amendment concerning enforcement by contempt. CAL. STAT. 1961, ch. 2098.

69 230 Cal. App. 2d 679, 41 Cal. Rptr. 177 (1964).

70 "By the passage of the 1961 amendments, the Legislature deliberately based the separate maintenance of the wife . . . on the statutory obligation of marital support even in cases of integrated agreements and thus, the support provision became subject to court modification and enforcement by contempt." 230 Cal. App. 2d at 686, 41 Cal. Rptr. at 181.

71 *See* note 6 *supra*.

72 For criticism of *Bradley* see Armstrong, *Family Law: Order Out of Chaos*, 53 CALIF. L. REV. 121, 143-50 (1965); 45 CALIF. L. REV. 782 (1957); 34 N.D.L. REV. 170 (1958); 10 STAN. L. REV. 321 (1958).

ing support.[73] All obligations satisfied by the agreement arise out of the marital relationship. As such, all obligations under the agreement should be enforceable by contempt, whether they relate to property or support.

Moreover, if contempt is not permitted as a means of enforcing payment under an integrated agreement, the wife is left without an effective remedy. Her only alternative is to seek execution upon the contract.

It is generally understood, however, that execution is neither effective nor practical to enforce recurring payments.[74] First, it is a discretionary remedy. *Messenger v. Messenger*[75] held that it was within the discretion of the court to grant or withhold execution after consideration of the circumstances.[76] However, even if execution is granted, the husband can liquidate the assets which would be attached by the court. In most cases, where the salary is low or the husband has remarried, his salary is immune from execution because it is needed for his own or his family's support.[77] Finally, even though execution is successful, it is still not practical because it does not accelerate the payments and must therefore be brought periodically. Consequently, the husband may prevail if the wife cannot afford frequent execution proceedings, and the wife will turn to the state for her support.

The state therefore has an interest in providing the divorced wife and children with an effective means of enforcing payments under an integrated agreement. The state's interest was asserted in *Decker v. Decker*[78] which upheld contempt on facts similar to *Bradley*.

> It is clear that the parties to a divorce action cannot foreclose the public interest in their marital responsibilities by a contract or an agreement of settlement. *Marital problems involve something more fundamental than nomenclature and technical contract rights.* There is no sound reason for allowing a husband to contract away his duty to support his wife . . . under the guise of a "property settlement agreement."[79]

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[73] *See* 6 U.C.L.A. L. REV. 328, 331 (1959).

[74] "[I]t is beyond argument that execution is not a practical method of enforcing the obligation to make recurring support payments." Armstrong, *supra* note 72, at 148.

[75] 46 Cal. 2d 619, 297 P.2d 988 (1956).

[76] In *Messenger* the court withheld execution because the husband was a doctor and the stigma attached to execution would ruin his business, thus making him not only unwilling to pay, but also unable. *Query*: How is the wife to collect the money?

[77] *See* Final Report of the *Assembly Interim Committee on Judiciary Relating to Domestic Relations*, 23 ASSEMBLY INTERIM COMM. REP. 1963-1965, No. 6, at 104 (1965).

[78] 52 Wash. 2d 456, 326 P.2d 332 (1958).

[79] *Id.* at —, 326 P.2d at 337 (emphasis added).

CONCLUSION

The remedy of contempt is a form of coercion, the threat of which forces the husband who can pay, to either pay or show cause why he should not be incarcerated until he does pay. When available to enforce integrated payments, contempt saves both the state and the parties time and money.

Execution is a costly and time consuming remedy, is not always effective, and is not practical where recurring payments are concerned. Consequently, the wife is left without an effective remedy and must rely on the state for the support of herself and her children. This increase in welfare responsibilities creates an interest in the state in providing an effective remedy.[80]

Consequently, the state, upon the urging of the State Bar of California and numerous legislative and executive committees,[81] passed the 1967 amendment to section 139 of the California Civil Code. Through section 139 the legislature effectively overrules *Bradley* insofar as that case neither effectively promoted the public welfare nor conformed to established public policy developed during the twenty years prior to its decision. The legislature asserted the state's interest in protecting the marital rights of the wife through encouraging effective settlement prior to divorce and effective enforcement of the settlement agreement subsequent to the divorce.[82]

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80 "[P]ublic policy requires the protection of the wife . . . in a divorce action . . . ." Adams v. Adams, 29 Cal. 2d 621, 627, 177 P.2d 265, 269 (1947) (Traynor, J.).

"The state has an interest in the support of the wife, lest she become a public charge." Miller v. Superior Court, 9 Cal. 2d 733, 737, 72 P.2d 868, 872 (1937).

"Since enforcement of [either alimony or property settlement agreements] may eliminate the possibility of the wife becoming a public charge, both are public in nature in that the state has an interest." 6 U.C.L.A. L. REV. 328, 331 (1959). *See* 26 CALIF. L. REV. 707, 710 (1938); 2 STAN. L. REV. 731, 739 (1950).

81 The amendment was sponsored by the State Bar of California and was previously determined to be in the public interest by the Governor's Commission on the Family (Dec. 1966) and the Assembly Interim Committee on the Judiciary Relating to Domestic Relations (Jan. 1965).

82 The possibility of the constitutionality of section 139 is increased by the fact that Mr. Justice McComb is the only member of the six man majority in *Bradley* remaining on the court. Mr. Chief Justice Traynor, then Justice, was the lone dissenter.