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Robert P. Aguilar

Elva Soper Aguilar

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## PROPERTY AGREEMENTS BETWEEN SPOUSES IN CALIFORNIA

*Robert P. Aguilar\** and *Elva Soper Aguilar\*\**

The community property system as it is practiced in California allows married couples or couples planning marriage to enter into agreements concerning the manner in which they will hold title to property regardless of when the property is acquired. Today's lawyer is frequently called upon to advise clients of the method which would be most advantageous to them under the circumstances and to draw up the necessary agreement.

These agreements generally fall into three categories: (1) an antenuptial agreement; (2) a postnuptial agreement when the parties are not contemplating a divorce or separation; and (3) an agreement entered into after, or at the time of a separation whether or not the separation or the intention thereof is mentioned in such agreement.

### ANTENUPTIAL AGREEMENTS

Antenuptial agreements are regulated by statute<sup>1</sup> in California and may include both presently owned real and personal property, as well as after-acquired property. While no particular words are necessary for their creation, there can be no provision in them which would tend to induce a separation or divorce. For example, in *Whiting v. Whiting*,<sup>2</sup> the court held void a provision calling for payment of a fixed sum to the prospective wife in case of separation or divorce, said sum to cover all her claims, including attorney fees.

The marriage itself is adequate consideration for the agreement. It may be revoked or modified by post-marital agreements as long as they are based on sufficient consideration. These agreements, as with other types, are regulated by the rules of contract law.

Antenuptial agreements are often entered into where a prospective wife desires to convert all of her separate property into community property, or where one or both of the parties has a going business and desires to continue it without having the income therefrom, or the increment in value of said business, being classified as community property. The use of an antenuptial agreement could have avoided the problem

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\* LL.B. Hastings College of Law. Member of the State Bar of California. Associated in the general practice of law in San Jose, California.

\*\* LL.B. University of Southern California. Member of the State Bar of California. Associated with the legal staff of Moore & Minor, official court reporters, San Jose, California.

<sup>1</sup> CAL. CIV. CODE § 178.

<sup>2</sup> 62 Cal.App. 177, 216 Pac. 92 (1923).

posed in the well known cases of *Pereira v. Pereira*,<sup>3</sup> *Van Camp v. Van Camp*,<sup>4</sup> and in *Estate of Pepper*.<sup>5</sup>

Another situation where this type of agreement might be useful is where a prospective husband is paying alimony or child support as a result of a prior marriage and desires to release all interest in his future wife's acquisitions. The legal effect of such an agreement from the standpoint of the husband's duty of support arising out of a prior marriage is somewhat dubious insofar as the courts may at least consider that the present wife has an independent income and is, therefore, perhaps, not in need of his support—at least to the extent that his previous wife and children are in need of it.

Antenuptial agreements under Civil Code Section 178 must be in writing and executed and acknowledged or proved in the same manner as a grant of land is required to be executed and acknowledged or proved. However, like other contracts, the courts have held that once an oral agreement is fully executed the provisions of the Statute of Frauds<sup>6</sup> are not applicable.<sup>7</sup> To go a step further, the court in *In re Piatt's Estate*,<sup>8</sup> held that since the requirements of Civil Code Section 178 are to protect the wife against fraud by the husband, she may waive the requirement of a writing by a special agreement or by affirmance of the oral agreement.

Antenuptial agreements are not transactions in which the parties are deemed to occupy a confidential relationship since they are not yet man and wife.

#### POSTNUPTIAL AGREEMENTS

Agreements between husband and wife are provided for in Civil Code Section 158.<sup>9</sup> Although the majority of contracts entered into by a married couple under the sanction of the above section are those in anticipation of divorce, couples will, on occasion, enter into a postnuptial agreement with no thought of separation or divorce. Such agreements are valid if there is adequate consideration.<sup>10</sup> As a rule they fix the property rights of both spouses in whole or in part.

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<sup>3</sup> 156 Cal. 1, 103 Pac. 488 (1909).

<sup>4</sup> 53 Cal.App. 17, 199 Pac. 885 (1921).

<sup>5</sup> 158 Cal. 619, 112 Pac. 62 (1910).

<sup>6</sup> *Freitas v. Freitas*, 31 Cal.App. 16, 159 Pac. 611 (1916).

<sup>7</sup> CAL. CIV. CODE § 164.

<sup>8</sup> 81 Cal.App.2d 348, 183 P.2d 919 (1947).

<sup>9</sup> This Section states: "Either a husband or wife may enter into any engagements or transaction with the other, or with any other person, respecting property, which either might if unmarried, subject in transaction between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts."

<sup>10</sup> *Smith v. Smith*, 94 Cal.App. 35, 270 Pac. 463 (1928).

Prior to the enactment of Civil Code Section 163.5,<sup>11</sup> couples could enter into a post-marital agreement that any recovery in a personal injury action would be the wife's separate property.<sup>12</sup> These agreements were only valid when entered into prior to the accident and have now fallen into disuse.

The most frequent type of post-marital agreement is an informal and, in many cases, an unintentional one. A leading example of this type is the agreement to change the manner in which title to property is held. With the exception of the conversion of property into joint tenancy, it is not necessary that such an agreement be reduced to writing.<sup>13</sup> "It is well settled that property may be converted into community property at any time by oral agreement between the spouses."<sup>14</sup>

An illustration of this is the case where a couple orally agreed that all property owned or subsequently acquired by them should belong to them "fifty-fifty." This agreement was held to sustain a community property finding.<sup>15</sup> In another case, a couple executed a joint and mutual will in which they made certain declarations as to the character of their property. The court stated: "A single written instrument may constitute both a will and a contract and we believe that the declarations contained in a joint and mutual will must be held to have constituted an agreement between the spouses fixing the status of the property as community property."<sup>16</sup>

The parties may agree that the wife's earnings will be her separate property. Such an agreement is one which relates to the acquisition of property and is an engagement or transaction respecting property within the meaning of Civil Code Section 158.<sup>17</sup> Circumstantial evidence is admissible to prove that such an agreement existed between the parties.<sup>18</sup>

Courts have used income tax returns, prepared by the parties, to show that they treated property which by statutory definition would be the separate property of one as community thereby changing the character.<sup>19</sup> However, evidence may also be produced to show this was not their intent.<sup>20</sup>

Placing community funds into a joint bank account does not prevent the operation of the usual community property rules. Section 852 of the

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<sup>11</sup> This Section provides that all damages, special and general awarded to a married person in a civil action for personal injuries are that person's separate property.

<sup>12</sup> *Zaragosa v. Craven*, 33 Cal.2d 315, 202 P.2d 73 (1949); *Flores v. Brown*, 39 Cal.2d 622, 248 P.2d 922 (1952); *Kesler v. Pabst*, 43 Cal.2d 254, 273

<sup>13</sup> *Estate of Patterson*, 46 Cal.App. 415, 189 Pac. 483 (1920).

<sup>14</sup> *Tomaier v. Tomaier*, 23 Cal.2d 754, 146 P.2d 905 (1944).

<sup>15</sup> *Kenney v. Kenney*, 220 Cal. 134, 30 P.2d 398 (1934).

<sup>16</sup> *Estate of Watkins*, 16 Cal.2d 793, 108 P.2d 417 (1940).

<sup>17</sup> *Wren v. Wren*, 100 Cal. 276, 34 Pac. 775 (1893).

<sup>18</sup> *Kaltschmidt v. Weber*, 145 Cal. 596, 79 Pac. 272 (1904).

<sup>19</sup> *Estate of Raphael*, 91 Cal.App.2d 50, 206 P.2d 391 (1949).

<sup>20</sup> *Hopkins v. Detrick*, 97 Cal.App.2d 50, 217 P.2d 78 (1950).

Financial Code was designed for the bank's protection and not to control the character of the property.<sup>21</sup> Civil Code Section 683 requires a writing which expressly creates a joint tenancy before such a tenancy is created in law. The application to open a joint bank account is, generally, not a sufficient writing.

#### AGREEMENT CONTEMPLATING SEPARATION

The agreement which is most frequently employed by couples and the one most familiar to the public is that made in contemplation of an immediate separation or divorce or one made after the separation has occurred. These agreements are valid<sup>22</sup> and are highly favored in the law.<sup>23</sup> In *Adams v. Adams*, Justice Traynor, speaking for the Court, states:

Property settlement agreements occupy a favored position in the law of this state and are sanctioned by the Civil Code . . . Such agreements are usually made with the advice of the counsel after careful negotiations, and the courts, in accord with legislative sanction, prefer agreement rather than litigation. . . . When the parties have finally agreed upon the division of their property, the courts are loath to disturb their agreement except for equitable consideration.<sup>24</sup>

Provision in the statutes which refer to agreements made in contemplation of immediate separation are equally applicable to agreements for support entered into after a separation has taken place.<sup>25</sup> The primary reason for these agreements is to provide for a transfer of property to the wife or for payments to her by the husband which they agree will preclude further or other liability on the part of the husband for support. The wording varies but generally includes such clauses as the wife "waives any and all claims to any further support"<sup>26</sup> and releases the husband "from all claims to arise in the future in the nature of support."<sup>27</sup> Often the parties will include provisions pertaining to child support and custody, agreements as to insurance policies, and they may agree to terms which a court in a divorce action would not have jurisdiction to determine, such as agreeing to provide for the wife's support after her remarriage.<sup>28</sup>

While adequate consideration must be present to support these agreements, mutual promises of support have been held to be sufficient con-

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<sup>21</sup> Basically, this section provides that money deposited in a bank by two or more persons to be payable to the survivor or survivors shall be held by them as joint tenants; it also sets forth the rules governing such deposits and the liability of the bank with regard to the payments of such funds.

<sup>22</sup> *Hill v. Hill*, 23 Cal.2d 82, 142 P.2d 417 (1943); *Robertson v. Robertson*, 34 Cal. App.2d 113, 93 P.2d 175 (1939).

<sup>23</sup> *Hensley v. Hensley*, 179 Cal. 284, 183 Pac. 445 (1918).

<sup>24</sup> 29 C.2d 621, 624; 177 P.2d 265, 267 (1947).

<sup>25</sup> *Kemper v. Waldon*, 17 Cal.2d 718, 122 P.2d 1 (1941).

<sup>26</sup> *Sanguinetti v. Sanguinetti*, 51 Cal.App. 347, 196 Pac. 799 (1921).

<sup>27</sup> *Gazave v. Gazave*, 97 Cal. App. 603, 275 Pac. 996 (1929).

<sup>28</sup> *Rasson v. Crellin*, 10 Cal.App.2d 753, 203 P.2d 841 (1949).

sideration.<sup>29</sup> In *Price v. Price*,<sup>30</sup> the husband and wife orally agreed to reduce the amount of payments due to the wife under a separation agreement. This modification was held to be effective since an executed oral agreement will serve as a modification or release of a written agreement without regard to the presence or absence of consideration.

### FRAUD AND DURESS

As with other contracts, these agreements are invalid when they are secured through fraud, undue influence or duress. In dealings with each other, the parties are governed by the general rules which control the action of persons occupying confidential relations with each other.<sup>31</sup> The mere existence of a marriage does not in and of itself support a presumption of undue influence;<sup>32</sup> but the courts will scrutinize an agreement to see that it is fair and reasonable, and if it appears that the husband has secured an advantage over the wife, the existence of the confidential relationship may be invoked to bring the presumption into play.

In short, a husband . . . if he would avoid the presumption of undue influence emanating from the procurement of any advantage over her (must) make full and fair disclosure to her of all that she should know for her benefit and protection concerning the nature and effect of the transaction, or else he must deal with her at arm's length and as he would with a stranger, all the while giving her the opportunity of independent advice as to her right in the premises.<sup>33</sup>

Where an agreement is based on fraud, undue influence or duress, the wife is not required to account for money received thereunder in a subsequent action for separate maintenance,<sup>34</sup> nor does the acceptance and retention of the benefits act as an estoppel.<sup>35</sup>

If at the time the agreement is entered into the relationship of the parties is unfriendly—especially when they have been living separate and apart for some time and the negotiations are conducted between their attorneys—there is no presumption of undue influence.<sup>36</sup>

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<sup>29</sup> CAL. CIV. CODE § 160; *Briner v. Briner*, 63 Cal.App.2d 429, 146 P.2d 709 (1944); *Gummerson v. Gummerson*, 14 Cal.App.2d 450, 58 P.2d 394 (1936).

<sup>30</sup> 24 Cal.App.2d 462, 75 P.2d 655 (1938).

<sup>31</sup> CAL. CIV. CODE § 158, see *supra* note 9.

<sup>32</sup> *Tillaux v. Tillaux*, 115 Cal. 663, 47 Pac. 691 (1897); *McDougall v. McDougall*, 135 Cal. 316, 67 Pac. 779 (1902).

<sup>33</sup> *Estate of Cover*, 188 Cal. 133, 144, 204 Pac. 583, 588 (1922); see also *Marsiglia v. Marsiglia*, 78 Cal.App.2d 701, 178 P.2d 478 (1947).

<sup>34</sup> *Davis v. Davis*, 49 Cal.App.2d 239, 121 P.2d 523 (1942).

<sup>35</sup> *Estate of Cover*, 188 Cal. 133, 204 Pac. 583 (1922); *Paddon v. Paddon* 194 Cal. 73, 227 Pac. 715 (1924).

<sup>36</sup> *Hensley v. Hensley*, 179 Cal. 284, 183 Pac. 445 (1918); *Chadwick v. Chadwick*, 95 Cal.App. 690, 273 Pac. 86 (1928); *Migala v. Dakin*, 99 Cal.App. 60, 277 Pac. 898 (1924).

In *Senter v. Senter*,<sup>37</sup> the wife's attorney had asked the husband certain questions relating to the extent of his property. The husband intentionally misinformed the attorney. The court held that although the requested information was a matter of public record, the attorney had a right to rely on the defendant husband's representation and therefore set aside the property settlement agreement that had been entered into based upon his misrepresentations.

#### TERMINATION OF AGREEMENT

A property or support agreement once entered into may be terminated by rescission,<sup>38</sup> subsequent agreement or by its own terms. The parties may not, however, discharge their obligations under the agreement in bankruptcy.<sup>39</sup> Nor will a divorce decree *per se* terminate a property agreement that was entered into before a separation or divorce was contemplated.<sup>40</sup> The agreement may or may not, depending upon its terms, survive the death of one or both of the parties.

Ordinarily, the fact that the parties to a divorce later cohabit and resume the marital rights, duties and obligations<sup>41</sup> terminates the agreement as far as the executory provisions are concerned<sup>42</sup> and revives the husband's duty of support. Generally, in such a case, no court proceeding is necessary to set aside the agreement; but in the event the issue does go to trial, the evidence to sustain a finding that the parties did intend to reconcile and resume the marital relations and, in addition, terminate the agreement must be clear and convincing.<sup>43</sup> Destruction of the document, execution of reconveyances when necessary, or restoration of control of the one who formerly exercised it, would tend to show such an intention.<sup>44</sup>

Reconciliation will not relieve the parties of obligations which arose under the agreement prior to the date of reconciliation unless they consent thereto. Nor will reconciliation revoke the property settlement provisions if the parties agree otherwise.

If the parties enter into an agreement, the main purpose being to induce one of the parties to procure divorce, such agreement is void as

<sup>37</sup> 70 Cal. 619, 11 Pac. 782 (1886).

<sup>38</sup> *LoVasco v. LoVasco*, 46 Cal.App.2d 242, 115 P.2d 562 (1941).

<sup>39</sup> *D'Andria v. Hageman*, 253 App. Div. 518, 2 N.Y.S.2d 832 (1938).

<sup>40</sup> *Estate of Brimhall*, 62 Cal.App.2d 30, 143 P.2d 981 (1943); *Plante v. Gray*, 68 Cal.App.2d 582, 157 P.2d 421 (1945).

<sup>41</sup> *Estate of Boeson*, 201 Cal. 36, 255 Pac. 800 (1927).

<sup>42</sup> *Lloyd Corp. v. Industrial Accident Commission*, 61 Cal.App.2d 275, 142 P.2d 754 (1943); *Mundt v. Conn. Gen. Life Ins. Co.*, 35 Cal.App.2d 416, 95 P.2d 966 (1939).

<sup>43</sup> *Estate of Boeson*, 201 Cal. 36, 255 Pac. 800 (1927).

<sup>44</sup> *Plante v. Gray*, 68 Cal.App.2d 582, 157 P.2d 421 (1945); *Crossley v. Crossley*, 97 Cal.App.2d 627, 218 P.2d 132 (1950); *DeVault v. DeVault*, 90 Cal.App.2d 15, 202 P.2d 375 (1949).

being contrary to public policy. For instance, an agreement not to defend or contest a divorce suit by the other spouse,<sup>45</sup> or to withdraw opposition thereto,<sup>46</sup> has been held void for that reason. A contract to pay attorney fees in a contemplated divorce was held invalid as promotive of divorce because it tended to deter reconciliation.<sup>47</sup> But it has been held that a contract for dismissal or continuance of a divorce action based on consideration is valid when it contains a provision to pay the wife a certain sum if in the future the husband gives her further cause for divorce.<sup>48</sup>

In *Hill v. Hill*,<sup>49</sup> a separation agreement was made in contemplation of divorce and conditioned thereon to the extent that it was not to become effective except on the obtaining of a decree of divorce by one or the other spouse. The court found that this agreement was valid and enforceable since prior to the agreement the parties were living separate and apart as a result of a marital offense committed by the husband which constituted good grounds for divorce, and the parties had no intention or expectation of resuming marital relations. The court stated therein:

Public policy seeks to foster and protect marriage, to encourage parties to live together, and to prevent separation . . . But public policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed. . . In the absence of fraud, collusion or imposition upon the court, public policy does not prevent parties who have separated from entering into a contract disposing of their property rights which shall become effective only in the event one of the parties obtains a divorce, even though such a contract may be a factor in persuading a party who has a good cause for divorce to proceed to establish it.<sup>50</sup>

Thus, it would seem that if the parties were already separated on a permanent basis and grounds for divorce were in existence at the time the agreement was drawn, and there was no intention or expectation of resuming marital relations, they could make an agreement which in effect encouraged them to obtain a divorce. However, unless all these elements were present, it would seem that the agreement would be void as against public policy.

### CONCLUSION

A detailed discussion of the so-called "Integrated Property Settlement Agreement" has been avoided for the reason that such would warrant

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<sup>45</sup> *Lanktree v. Lanktree*, 42 Cal.App. 648, 183 Pac. 954 (1919).

<sup>46</sup> *Loveren v. Loveren*, 106 Cal. 509, 39 Pac. 801 (1895).

<sup>47</sup> *McCahan v. McCahan*, 47 Cal.App. 173, 190 Pac. 458 (1920).

<sup>48</sup> *Bowden v. Bowden*, 175 Cal. 711, 167 Pac. 154 (1917); *dist. Pereira v. Pereira*, 156 Cal. 1, 103 Pac. 488 (1909).

<sup>49</sup> 23 Cal.2d 82, 142 P.2d 417 (1943).

<sup>50</sup> *Id.* at 93, 142 P.2d at 422.



an article in itself. Furthermore, the legislature amended Civil Code Section 139, thereby making those integrated agreements subject to modification by the court except where there is no issue born of the marriage.

In summary, then, it should be noted there are many ways by which married couples may contract with reference to property presently or prospectively owned by them. To be sure, not all the possible methods presently used have been outlined. However, the methods discussed above are the ones most frequently used and certainly the ones most frequently ending in litigation. A properly drafted agreement, prepared pursuant to existing authority, may serve a useful and sometimes advantageous purpose to a California husband and wife.