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New Requirements for Premarital Agreements

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In our legislature's zeal to protect marrying individuals from independently crafted marital property and support rights, California's premarital agreement statutes have once again been changed.

[AB 1380](#), enacted last year and effective January 1, 2020, amends [Family Code 1615 \(c\)](#) and imposes new procedural requirements on the negotiation and signing of premarital agreements, to assure they are enforceable. Even if parties are represented by counsel, the statute now imposes a seven-day waiting period from completion of the "final" agreement, until its signing. The days of negotiating substantive terms up to the time of signing are now over. Except for "nonsubstantive amendments that do not change the terms of the agreement", no changes will be tolerated within the seven-day period. Clients will need to postpone their wedding plans, or hold a ceremony, just not the "real" one, in the face of this new statutory requirement.

As background, under prior law, a premarital agreement was not enforceable if a party against whom enforcement is sought proved that the party did not execute the agreement voluntarily. [Fam. Code 1615 (a)(1)]. Family code 1615 (c) then set forth five findings a court was required to make to find that an agreement was, in fact, executed voluntarily. Among these were 1615 (c) (1) and (2) which stated:

(c) For the purposes of subdivision (a), it shall be deemed that a premarital agreement was not executed voluntarily unless the court finds in writing or on the record all of the following:

(1) The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel.

(2) The party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.

Family Code 1615 (c) (2) was interpreted in two court decisions. In *Marriage of Cadwell-Faso & Faso* (2011) 191 Cal. App. 4th 945, the appellate court held the seven-day waiting period of (c) (2) did not apply in circumstances where the parties were both represented by counsel “from the outset”, had negotiated over multiple drafts of the agreement, but signed the final version after six, not seven days. The court reasoned that the purpose and construction of (c) (2) only made sense as applied to an unrepresented party, who would be both handed the agreement and “advised” to seek legal counsel no less than seven days prior to signing. In the *Cadwell-Faso* circumstances, this was clearly not the case.

Family lawyers, relying on *Cadwell-Faso*, felt free to negotiate and change the terms of agreements well into the seven-day waiting period, confident that the agreement would be valid, even if signed less than seven days from a “final” version.

After *Cadwell-Faso*, in 2018, the decision in *Marriage of Clarke & Akel* (2018) 19 Cal. App. 5th 914 also addressed the meaning of Family Code 1615(c)(2). In *Clark & Akel*, the appellate court upheld a trial court decision finding that, in a situation with one unrepresented party, the seven-day waiting period of 1615 (c) (2) commenced from receipt of the final draft.

Enter our legislature and recently enacted AB1380. Declaring in committee reports that premarital agreements are “often hastily negotiated by parties with considerable imbalances in sophistication and bargaining power” and that “if the client feels rushed and pressured to succumb to a hasty decision in such emotionally fraught circumstances, their attorney’s advice may be difficult to heed”ⁱ, our legislature imposed a seven-day “cooling off” period for all premarital agreements. Now, even in situations where both parties are represented by counsel, seven days must pass from the “final” draft before the agreement can be signed, to assure the agreement is “voluntarily” executed.

But AB1380 goes beyond just enacting new, **prospective** procedural requirements. The bill also claims to: “[C]larify that the seven-day period is commenced only when the final version of the agreement has been presented”ⁱⁱ even for agreements executed during the years January 1, 2002 to December 31, 2019. See, Family Code 1615 (c) (2) as modified by under [AB 1380](#).

By this new statutory language, the legislature has created ambiguity regarding the validity of already executed premarital agreements, even those negotiated through counsel, if they were signed within seven days of the final version. This is not a procedural change only, but, potentially amounts to an unconstitutional taking of vested property rights. (*See In re Marriage of Buol* (1985) 39 Cal. 3d. 751.) Undoubtedly, thousands of premarital agreements were negotiated by counsel, with substantive changes made during the seven-day window prior to signing.

It is not clear that the legislature intended this draconian result. In the [bill](#) itself, although not in the new statutory language, at Section 2, it reads:

“The Legislature finds and declares both of the following:

(a) The amendments to paragraph (1), and subparagraph (A) of paragraph (2), of subdivision (c) of Section 1615 of the Family Code made by this act are declaratory of existing law and do not constitute a change in law.

(b) The addition of subparagraph (B) of paragraph (2) of subdivision (c) of Section 1615 of the Family Code made by this act is intended to supersede, **on a prospective basis**, the holding in re Marriage of Cadwell-Faso & Faso (2011) 191 Cal.App.4th 945.” [emphasis added]

If *Cadwell-Faso* is only superseded on a prospective basis, this should mean that all past premarital agreements that were negotiated between counsel are valid, even if drafts were revised within the seven-day period, as was the situation in that case. To reconcile the statutory language with its statement of legislative intent, the retroactive provision of 1615 (c) (2) (A) can reasonably be construed to apply only to an unrepresented party, as was the case in *Clarke & Akel*.

But there are additional questions as to the validity of previously signed premarital agreements, negotiated with the benefit of counsel, that will need to be sorted out in appellate decisions in the years to come. For example, how does the retroactive provision apply to agreements that were first created less than seven days before signing? Even with the benefit of counsel, these seem vulnerable to attack, as not falling squarely within the *Cadwell-Faso* situation where the parties negotiated over several months, not days.

In addition, there are agreements that were first created at the seven-day mark, with counsel already retained by both parties, but then substantively revised, and signed, within the seven-day period. These, too, seem vulnerable to challenge.

Yet a third set of agreements may be vulnerable to challenge, even if both parties were represented, but the first draft did not circulate until within the seven-day window pre-signing.

And is it our fiduciary responsibility to our clients to review prior agreements we signed to ascertain any vulnerabilities under the new statute?

At least, for the future, make sure AB1380’s new seven-day waiting period is religiously followed.

ⁱ Senate Rules Committee Analysis, Third Reading, AB 1380 as amended in Senate, 6/10/19

ⁱⁱⁱ Senate Rules Committee Analysis, Third Reading, AB 1380 as amended in Senate, 6/10/19, Analysis