



FAMILY LAW SECTION

THE STATE BAR OF CALIFORNIA

LEGISLATIVE PROPOSAL (FL-2008-02) PRENUPTIAL AGREEMENTS: VALIDITY RETROACTIVITY

TO: Larry Doyle, Chief Legislative Counsel,
State Bar Office of Governmental Affairs

FROM: Sherry Peterson

DATE: August 10, 2007

RE: Family law: Clarifies non-retroactivity of Family Code §1615 relating to prenuptial agreements
An act to amend §1615 of the Family Code

SECTION ACTION AND CONTACTS:

Date of Approval by Section Executive Committee: June 15, 2007
Approval vote: Unanimous_(12-0-0)

<u>Contact</u>	<u>Section Affirmative Legislation Chair</u>
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SUMMARY OF PROPOSAL: Requires Family Code §1615 to be applied prospectively only.

ISSUES AND PURPOSE:

1. What is the key issue(s) raised by this proposal?

SHOULD THE LAW RELATING TO THE ENFORCEABILITY OF PRENUPTIAL AGREEMENTS, WHICH WAS AMENDED IN 2001 TO REQUIRE A PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT, HAVE BEEN REPRESENTED BY COUNSEL OR HAVE SPECIFICALLY WAIVED THAT RIGHT IN WRITING, HAVE BEEN GIVEN SEVEN DAYS TO INSPECT THE AGREEMENT PRIOR TO SIGNING, HAVE BEEN FULLY ENFORMED OF THE TERMS AND BASIC EFFECTS OF THE

AGREEMENT, THE OBLIGATIONS BEING WAIVED AND WAS PROFICIENT IN THE LANGUAGE WHICH THE EXPLANATION AND AGREEMENT WAS WRITTEN BE CLARIFIED TO SPECIFY THAT THOSE AMENDMENTS APPLY ONLY TO AGREEMENTS ENTERED INTO PROSPECTIVELY ONLY?

2. What is the deficiency in existing law that this proposal seeks to remedy?

SB 78 (Kuehl), Chapter 286, Statutes of 2001, amended Family Code section §1615 to require that require a party against whom enforcement is sought, have been represented by counsel or have specifically waived that right in writing, have been given seven days to inspect the agreement prior to signing, have been fully enformed of the terms and basic effects of the agreement, the obligations being waived and was proficient in the language which the explanation and agreement was written SB 78 itself was silent on the issue of whether or not its provisions could be applied retroactively to prenuptial agreements entered into in good faith prior to the effective date of the amendments, and the only legislative history on this point (the Senate Judiciary Committee analysis of the bill, http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0051-0100/sb_78_cfa_20010425_100434_sen_comm.html, at page 10), very strongly indicates legislative intent that the provisions of SB 78 were intended to be prospective only.¹ Nonetheless, a growing number of judges and courts appear to be applying the revised statutory provisions retroactively, citing §4 of the Family Code as authority.²

Although the amendments to §1615 by SB 78 provide reasonable and important protections to parties entering into prenuptial agreements, retroactive application of those amendments to premarital agreements entered into before those amendments took effect will create chaos by invalidating many (and perhaps a great majority) of those agreements entered into in good faith by parties prior to the effective date of those amendments. This is unfair to those parties, who were in full compliance with the law in effect at the time the agreements were entered into, and inconsistent with the Legislature's evident intent in enacting the amendments. In a number of cases, it could lead to the invalidation of agreements entered into in full compliance with the spirit and intent of SB 78, but failing in the technical letter (e.g., a party, represented by independent counsel and fully aware of all rights and implications of the agreement, signs after only five days).

¹ "Opponents of the bill further express concern over the possible retroactivity of a prohibition on spousal support waivers, particularly as some premarital agreements waiving spousal support may have been executed in reliance on the original Pendleton decision by the Court of Appeal in 1998 (upheld by the Supreme Court in 2000). This bill contains no provision for retroactive application. As a general rule, laws operate prospectively unless retroactive application is provided for specifically, or unless the new legislation clarifies existing law."

² Subdivision (c) of Family Code §4 reads: "Subject to the limitations provided in this section, the new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstances existed before, on, or after the operative date, including but not limited to, commencement of a proceeding, making an order, or taking of an action."

3. How does this proposal remedy the problem? Provide at least one specific example of how the bill would do so.

This proposal would amend §1615 to specify that the specific requirements for determining whether a premarital agreement was entered into voluntarily (e.g., the requirements that a party have been represented by independent counsel or specifically waived representation, have been given seven days to inspect the agreement prior to signing, and, if unrepresented by counsel, have signed a separate document acknowledging receipt of specified information, be fully informed of the terms and basic effects of the agreement, the rights and obligations waived, and was proficient in the language which the explanation and agreement were written) apply only to agreements entered into on or after January 1, 2002, the effective date of the amendments made by SB 78. The proposal further provides that its provisions are declaratory of existing law.

HISTORY: The statutory provisions related to this proposal were added by SB 78 (Kuehl), Chapter 286, Statutes of 2001. No legislation similar to this has been introduced.

IMPACT ON PENDING LITIGATION: None.

PURPOSE OF AMENDMENT

ANALYSIS

TEXT OF PROPOSAL

SECTION 1. Section 1615 of the Family Code is amended to read:

1615. (a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves either of the following:

(1) That party did not execute the agreement voluntarily.

(2) The agreement was unconscionable when it was executed and, before execution of the agreement, all of the following applied to that party:

(A) That party was not provided a fair, reasonable, and full disclosure of the property or financial obligations of the other party.

(B) That party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided.

(C) That party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(b) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

(c) For the purposes of subdivision (a), it shall be deemed that a premarital agreement *executed on or after January 1, 2002*, 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.

(3) The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party shall, on or before the signing of the premarital agreement, execute a document declaring that he or she received the information required by this paragraph and indicating who provided that information.

(4) The agreement and the writings executed pursuant to paragraphs (1) and (3) were not executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement.

(5) Any other factors the court deems relevant.

(d) The amendments to subdivision (c) made by the act that added this subdivision are declarative of existing law.