Point/Counterpoint Regarding Provisions for Payments at the Time of Marital Dissolution in Prenuptial Agreements

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POINT: Severance Payments at the Time of Marital Dissolution May Be Against Public Policy

Peter M. Walzer

As I was giving a seminar on premarital agreements to a standing-room-only crowd, a well-appointed man raised his hand. I do not usually take questions from the floor, but there was something about this fellow that commanded attention. No sooner had I called on him than I recognized him as Frank Garfield. Few attorneys have the looks and reputation of Mr. Garfield. He is known as a fine mediator and an erudite advocate. His finely etched face and gray beard harken back to another era, an era when the practice of law was a profession and lawyers jousted only in Latin.

Mr. Garfield challenged the central doctrine of my teaching. I had admonished the class not to write agreements that provide for lump-sum payments at the time of dissolution, because California case law holds that premarital agreements that call for lump-sum payments at the time of dissolution are "promotive of dissolution" and therefore void against public policy.

I argue that, to be safe, payments in a premarital agreement in exchange for marital rights should be made in installments during the marriage and not in a lump-sum at the time of dissolution. For example, rather than have an agreement that provides for a payment of $500,000 at the time of dissolution in exchange for a waiver of community property rights, Husband would contract to transfer to Wife $50,000 annually. There are many variations on this arrangement. Part of the logic is that since community property interests accrue over time, payments made in lieu of accruing property interests should also.

Soon after the class, I challenged Mr. Garfield to a duel: pens at dawn. (It slipped by him that as the recipient of the challenge, he had the right to choose weapons.) We would write a "Point/Counterpoint" article to be published in the *Family Law News* on the issue of whether lump-sum payments at the time of dissolution were void as "promotive of dissolution." He took up my challenge. It is my move.

Marriage of Bellio (2003) 105 Cal.App.4th 630, addressed the issue of lump-sum payments at the time of dissolution. The premarital agreement provided for a payment to wife of $100,000 in the event of dissolution. The trial court upheld the agreement because the $100,000 payment was "loosely calculated upon the potential amount of spousal support forfeited by the soon to be Mrs. Bellio upon the occurrence of this marriage," *(Ibid.)* The appellate court affirmed that this payment was not "promotive of dissolution." The *Bellio* court stated, "Thus, the purpose of the $100,000 payment provision was to assure that, if husband died or the marriage was dissolved, wife would be no worse off than she would have been had she remained single. Such a provision cannot reasonably be construed as threaten[ing] to induce the destruction of a marriage that might otherwise endure . . . . [Citation.] Rather, the provision made it economically feasible for wife to enter into the marriage. [Thus,] the availability of an enforceable premarital agreement 'may in fact encourage rather than discourage marriage.'" (*Id.* at pp. 634-635.)

The *Bellio* court agreed with *Marriage of Noghrey* (1985) 169 Cal.App.3d 326, which is often cited for the proposition that lump-sum payments are "promotive

of dissolution." There, the payment of $500,000 to the wife upon dissolution was so substantial (according to the court) that it encouraged her "to seek a dissolution, and with all deliberate speed, lest the husband suffer an untimely demise, nullifying the contract, and the wife's right to the money and property." (*Id.* at p. 311.)

Bellio, supra, 105 Cal.App.4th suggested that a payment at the time of dissolution would be upheld where there is some connection between the payment and her financial loss caused by the marriage. But it did not abolish the doctrine that an agreement can be set aside if it is "promotive of dissolution."

People who make contracts expect them to be enforceable. Both clients and lawyers are looking for predictable results. A lawyer drafting a premarital agreement will not want to risk requiring a lump-sum payment if a court might set it aside. For this reason, even though *Bellio* endorses lump-sum payments in *some* instances, the case did not go far enough to reassure lawyers and their clients that a court in the future will uphold the agreement.

A well-crafted premarital agreement might tie the payment to something the wife gives up by getting married--such as spousal support from another marriage or giving up a promising career. But the law is still uncertain enough that a premarital agreement structured in this manner might not survive. Clients might still be at risk. And for the lawyer, even the best advisory letter to the client may not be enough protection.

The *Bellio* court does not address the typical arrangement where a spouse gives up the right to community property in exchange for a lump-sum payment. I do not want to take the risk that a court might void a reasonable agreement, finding it to be against public policy.

To minimize the risks inherent in a lump-payment, I provide in the agreements I draft for installment payments during the marriage, usually annually. This type of clause often steps up the payments over the term of the marriage. The amount might also increase if children are born.

This structure also has its problems. For example, a party who has agreed to make the payments and does not make them risks rescission or other remedy for breach of contract. Lawyer and client should weigh the risk of becoming unable to make the payments against the risks that flow from lump-sum payment on dissolution. Of course, the client also risks becoming unable to make a lump-sum payment at the end of a marriage.

Also consider the effect of an *in terrorem* clause in an agreement that provides for payments over the course of the marriage. Such a clause provides that a spouse who attacks the agreement forfeits the right to receive the payments. Good luck trying to force repayment of payments received and spent over a 20-year marriage.

Furthermore, making payments during the marriage does not work for everyone. Not everyone has the money to make payments during the marriage, nor can people predict what they can afford to pay over the course of many years.

Frank Garfield calls for clarification of the law, rightly reasoning that the current law is confusing and uncertain. I join in his call. Parties to a premarital agreement are entitled to some reasonable certainty that the agreement will be enforceable. Uncertainty leads to litigation. Litigation increases the costs to the parties and clogs the court system.

But until the law is clarified, a call for action does not solve the problem. A call for action does not free us to draft according to whatever we feel the law ought to be. We could wait a long time before the Supreme Court or the Legislature gives us and our clients the clarity we need.

Frank and I agree on what the law *ought* to be. We disagree on how to draft premarital agreements as long as the law remains as it now is. Until the law changes, I will do it my way, and Frank Garfield, I assume, will do it his way.

And maybe he will keep coming to my seminars. ■

COUNTERPOINT: Severance Payments Upon Marital Dissolution *Are Not* Against Public Policy

Franklin R. Garfield

The notion that a prenuptial agreement "promotive of dissolution" is invalid has been imbedded in California law for many decades.[1] The public policy of the State favors marriage; an agreement that promotes dissolution is against public policy; *ergo*, such an agreement will not be enforced by the courts.

Prenuptial agreements that provide for no community property, no substitute during the marriage, and no severance payments upon dissolution of the marriage do not contravene public policy and are routinely enforced. But some contend that an otherwise identical agreement that provides for a severance payment upon

the dissolution of the marriage would contravene public policy and be unenforceable.

This notion is a distortion of the legitimate purpose of the law and imposes an intolerable burden on the freedom of individuals to contract with respect to the financial circumstances of their marriage. It is also an outmoded concept that has already been discarded for all practical purposes and should be formally renounced by the California Supreme Court. Meanwhile, the law should not be interpreted to prohibit lump sum payments in lieu of community property rights upon the dissolution of a marriage.

First, there is a logical inconsistency in the idea that some agreements are "promotive of dissolution," but not others. Every prenuptial agreement promotes dissolution–one way or the other. In *Marriage of Noghrey* (1985) 169 Cal.App.3d 326, wife was entitled to a payment of $500,000 upon the dissolution of the marriage–even if the dissolution occurred within days after the wedding ceremony. Under these circumstances, the court held that such a provision was promotive of dissolution; presumably because the temptation to end the marriage to get the money was simply too great.

There is no issue when a prenuptial agreement provides that a wife is entitled to nothing if the marriage ends in dissolution. But if a husband can end the marriage at any time, without cost, the agreement is equally "promotive of dissolution." In short, one party or the other always obtains an advantage from a prenuptial agreement.

Second, invalidating agreements that provide for a severance payment produces an anomalous result. The public policy of the State of California promotes marriage by providing for community property. If taking away all community property in a prenuptial agreement doesn't violate public policy, neither should be giving some of it back. A spouse's right to receive half of the parties' community property upon the dissolution of the marriage is not "promotive of dissolution;" neither is a spouse's right to receive a severance payment in lieu of half the community property.

The argument that a severance payment upon dissolution of marriage was "promotive of dissolution" and hence void was most recently made in *Marriage of Bellio* (2003) 105 Cal.App.4th 630. In upholding a $100,000 payment intended to replace the spousal support wife gave up when she remarried, the Court of Appeal stated: "Neither the reordering of the property rights to fit the needs and desires of the couple, nor realistic planning that takes account of the possibility of dissolution, offends the public policy favoring and protecting marriage. It is only when the terms of an agreement go further–when they promote and encourage dissolution, and thereby threaten to induce the destruction of a marriage that might otherwise endure–that such terms offend public policy." (*Ibid.)* A severance payment upon dissolution in lieu of community property rights is no less rational or reasonable; it, too, makes it financially feasible for the parties to get married.

Third, the concept is arbitrary. Until the Supreme Court decided *Pendleton v. Fireman* (2000) 24 Cal.4th 39[2], the public policy of the State of California decreed that waivers or limitations on spousal support were also promotive of dissolution. Such waivers or limitations are now permitted by statute.[3] As a matter of fundamental fairness, how can it be that a prenuptial agreement in which Wife waives or limits her right to receive spousal support is perfectly okay, but an agreement obligating Husband to make a severance payment upon the dissolution of the marriage is void?

Turn the argument around: An agreement that provides for a severance payment that increases based on the length of the marriage is promotive of *marriage*. For example, a Wife entitled to receive $50,000 for each full year of the marriage upon dissolution would presumably be encouraged to work on the marriage for as long as possible, knowing that the longer the marriage lasted, the larger the severance payment would be if and when it ended.

Fourth, the idea that a payment upon dissolution of the marriage promotes dissolution is not only illogical and anomalous and arbitrary, it elevates form over substance: The proponents of that view must, of necessity, take the position that a payment of $50,000 for each year of the marriage in lieu of community property rights is void, but a payment of $50,000 for each year of the marriage as lump sum spousal support is valid.

Fifth, it is hypocritical for the state to get on its moral high horse about the sanctity of marriage. Many would argue that California's no-fault dissolution laws are themselves promotive of dissolution.

In conclusion, there are two points to be made. One of them is theoretical, and one of them is practical. The theoretical point: I am not suggesting that this is the way

the law should be, and that it is currently otherwise. To the contrary, I believe that *Bellio*'s gloss on *Noghrey* is a correct statement of California law: *A provision that takes into account the possibility of dissolution and effects a reordering of property rights to make the marriage economically feasible for both parties does not offend public policy.*

The practical consideration: Assume a prenuptial agreement provides for payment of $1 million in cash upon the dissolution of the marriage (or $100,000 per year for every full year of the marriage). The agreement further provides that if Husband challenges the payment provision, the agreement shall be deemed void *ab initio*, and if Wife challenges any provision, she waives her right to receive the payment. Under those circumstances, and regardless of the foregoing points and counterpoints, would either party challenge the agreement?

Apart from everything else, the notion that people marry or dissolution because of the State's public policy is questionable. The State does have legitimate interests that are appropriately the subject of public policy: Protecting each party's right to frequent and continuing contact with the children of a marriage and providing for those children financially are good examples of obligations that cannot be affected by private contracts. The State has no legitimate interest in refusing to enforce a prenuptial agreement that provides for a severance payment by one party to the other upon the dissolution of the marriage.

Leaving aside all the legal *mumbo jumbo*, we should acknowledge the facts. Prenuptial agreements disproportionately benefit the moneyed spouse. Providing that the other spouse will receive a substantial cash payment upon the dissolution of the marriage evens things up to a certain extent. That is not against the public policy of the State of California. ■

Endnotes

1. See, e.g., "Dissolution: Validity of Property Settlements Promoting Dissolution," 31 Calif. L. Rev. 596 (1943).

2. 105 Cal.App.4th at 632, quoting from Marriage of Dawley (1976) 17 Cal.3d 342, 358; Pendelton &. Fireman (2000) 24 Cal.4th 39, 51-52 is in accord.

3. Fam. Code, section 1612, subd. (c).