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May 2, 2022

Chief Justice Tani Gorre Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
Room 1295
San Francisco, CA 94102-4797

Re: **Request for Depublication**

In re the Marriage of Kim and Mark S. Zucker
(2022) 75 Cal.App.5th 1025
Certified for Partial Publication, Filed 3/3/2022
Modified 4/1/2022 on Denial of Rehearing
Court of Appeal, Second District, Division 4, B281051
(Consolidated with B284981)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

On behalf of non-party Walzer Melcher & Yoda LLP, I respectfully request the depublication of section III of the opinion referenced above (the "Opinion") per rule 8.1125 of the California Rules of Court.

Statement of Interest

Walzer Melcher & Yoda LLP ("Requesting Party") is a law firm specializing in California family law. Its partners, Peter M. Walzer and Christopher C. Melcher, have written treatises and articles on premarital agreement law, have commented on proposed legislative changes to the California Uniform Premarital Agreement Act (Cal-UPAA, Fam. Code §§ 1610-1617), and have given continuing education seminars on premarital agreements.

⅄ *Partner*
**Certified Specialist, Family Law, The State Bar of California, Board of Legal Specialization*
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Requesting Party received no compensation for the position taken in this letter, has no financial interest, and does not represent a party.

Reason for Depublication

In the published portion of the Opinion, the appellate court affirmed the trial court's invalidation of a spousal support limitation in a premarital agreement, which the family court concluded was unconscionable. The holding should be depublished because it relies on a judicially-created defense that conflicts with the elements needed under the Cal-UPAA to demonstrate unconscionability for a premarital agreement of this vintage. Also, the Opinion is not useful as precedent because the statement of facts is not published.

For premarital agreements made between 1986 and 2001, the Cal-UPAA provided a defense of unconscionability that required proof the agreement, or any portion, "was unconscionable *when it was executed* and, before execution of the agreement," there was a failure to disclose financial information unknown to the party against whom enforcement is sought, unless the right to disclosure was waived. (Fam. Code, § 1615, subd. (a)(2), italics added.) Both elements are required to mount the unconscionability defense. (*In re Marriage of Bonds* (2000) 24 Cal.4th 1, 15 (*Bonds*).)

The Cal-UPAA, in its form between 1986 and 2001, "was intended to enhance the enforceability of premarital agreements…." (*Bonds,* p. 29.) The drafters of the Uniform Premarital Agreement Act (the "Uniform Act"), which was mostly adopted by the Legislature in 1986, decided that unconscionability had to be tested when the agreement was made and there had to be a lack of disclosure for the defense to apply. (*Bonds,* p. 16.) As this Court explained in *Bonds*:

> Indeed, over sharp and repeated objection from commissioners of the minority view [in debating the Uniform Act], eventually it was settled that the party against whom enforcement of a premarital agreement was sought only could raise the issue of unconscionability, that is, the substantive unfairness of an agreement, if he or she also could demonstrate lack of disclosure of assets, lack of waiver of disclosure, *and* lack of imputed knowledge of assets. The language adopted was intended to

> enhance the enforceability of premarital agreements and to convey the sense that an agreement voluntarily entered into would be enforced without regard to the apparent unfairness of its terms, as long as the objecting party knew or should have known of the other party's assets, or voluntarily had waived disclosure. [Citation.]

(*Bonds*, pp. 16–17, italics in original.)

The law changed for premarital agreements made on or after January 1, 2002. For those agreements, a waiver or limitation on spousal support in a premarital agreement is deemed invalid unless the proponent of the provision shows that the party against whom enforcement is sought had independent counsel when the agreement was made, "or if the provision regarding spousal support is unconscionable *at the time of enforcement*." (Fam. Code, § 1615, subd. (c).) The new defense does not require a disclosure violation and tests unconscionability under the circumstances of the parties at trial in a marital dissolution action, rather than upon making the agreement. The change in the law applies only to post-2001 premarital agreements, and does not affect the rights or obligations of parties to agreements made between 1986 and 2001. (*In re Marriage of Melissa* (2012) 212 Cal.App.4th 598, 610-611.)

The agreement here was made in 1994, so the old law applies. The version of the Cal-UPAA that existed between 1986 and 2001 controls, not the amendments that became effective in 2002.

The Opinion acknowledges the 2002 amendments to the Cal-UPAA do not apply retrospectively, so "we apply the version of section 1615 in effect at the time of execution of the PMA in January 1994.…"(Opinion, p. 1029.) But the appellate court did not feel constrained by the defense of unconscionability in the Cal-UPAA and forged its own defense—identical to the one created by the 2002 amendments.

The *Zucker* court arrived at that conclusion by focusing on the portion of the Cal-UPAA that describes the provisions which may be included in a premarital agreement, noting a catch-all that permits "[a]ny other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty." (Fam. Code, § 1612, subd. (a)(7); see

Opinion, p. 1038-1039.) The *Zucker* court concluded that section 1612, subdivision (a)(7) grants to the courts "the power … to shape public policy regarding premarital spousal support agreements to the extent not inconsistent with Legislative declarations of such policy, and to declare … that a premarital spousal support agreement is unenforceable as against public policy solely because it is unconscionable at the time of enforcement." (Opinion, p. 1039.) The *Zucker* court explained:

> Thus, despite the non-retroactivity of section 1612, subdivision (c), we hold that the court retains the power under section 1612, subdivision (a)(7) (identified in *Pendleton*) to shape public policy regarding premarital spousal support agreements to the extent not inconsistent with Legislative declarations of such policy, and to declare (as suggested in *Pendleton*) that a premarital spousal support agreement is unenforceable as against public policy solely because it is unconscionable at the time of enforcement. In the instant case, therefore, the trial court did not err in considering whether the spousal support provision of the [premarital agreement] was unconscionable at the time of enforcement.

(Opinion, p. 1042, citing *In re Marriage of Pendleton & Fireman* (2000) 24 Cal.4th 39 (*Pendleton*).)

The Opinion incorrectly relied on a code section that allows parties to include provisions in their premarital agreement which do not violate public policy as legislative authority for courts to create defenses to the enforcement of premarital agreements. Even if this implied authority exists, it would not authorize courts to create defenses that contradict the statutory defenses to a premarital agreement or allow for the retroactive application of changes to the Cal-UPAA when courts have held those amendments apply only prospectively. The Opinion is contrary to law so it should not stand as precedent.

Had the family court and the appellate court in *Zucker* applied the test for unconscionability in section 1612, subdivision (a)(7), the defense would have failed. The family court found that the premarital agreement was made voluntarily and that no disclosure violation occurred. That finding was affirmed: "[T]here was sufficient disclosure of assets for Kim to understand

that she was waiving substantial potential future community property interests. In short, substantial evidence supports the trial court's conclusion that Kim entered the [agreement] voluntarily." (Opinion, p. 1029.)

An additional ground for depublication is that the statement of facts in the Opinion was not published. (See Opinion, p. 1029 [section 1, "Factual Background and Procedural History" not published].) Without the facts, the Opinion has little usefulness as precedent.

Timeliness

The Opinion was filed March 3, 2022, and became final April 2, 2022. (Rule 8.490(b)(2).) The Opinion was modified on April 1, 2022, without changing the appellate judgment, so the modification order did not extend the date of finality. (See rule 8.490(b)(2)(C).)

A request for depublication is due within 30 days after the decision is final in the Court of Appeal. (Rule 8.1125(a)(4).) This request was made within that period.

Conclusion

The Opinion does not meet the publication standards in rule 8.1105. Walzer Melcher & Yoda LLP respectfully requests depublication of the Opinion.

WALZER MELCHER & YODA LLP

By: /s/
Christopher C. Melcher

PROOF OF SERVICE

State of California)
County of Los Angeles)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 5941 Variel Avenue, Woodland Hills, California 91367.

On **May 2, 2022**, I served the foregoing document described as **REQUEST FOR DEPUBLICATION** upon the following:

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Executed on **May 2, 2022** at Woodland Hills, California.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

/s/
Annais Alba