

AVOID THE FRAUDULENT POSTNUP

RON GRANBERG, CFLS | MONTEREY COUNTY | RON@GRANBERGLAW.COM

Have you ever questioned the propriety of a postmarital agreement a client has asked you to prepare? Let's explore your attitude toward a hypothetical situation.

You've always respected Harold, your daughter's soccer coach. Two weeks ago, Harold had his first client meeting with you. During that meeting, Harold described his recent unpleasant discovery that his wife Wanda had been doing [Bad Things]. Harold, incensed over his discovery, immediately left the family residence, retained you, and requested divorce proceedings be filed on his behalf. That same day, you filed Harold's petition and had it served on Wanda.

When Harold met with you again last week, he described Wanda as embarrassed, remorseful, and pleading to reconcile. Harold hasn't yet mentioned the Bad Things to Wanda's family, but she is terrified that he will do so at any time.

Harold just called you, announcing his decisions to keep the Bad Things secret, dismiss the divorce case, and reconcile with Wanda, on condition that Wanda signs a postnup containing certain provisions. You asked about his proposed provisions. Harold described transmutation to his separate property of most of the parties' substantial community property assets, including real estate, stocks, and bonds. You told Harold you doubted that Wanda would sign a postnup containing such [Unfair Advantages] favoring him. Harold quoted Wanda as assuring him that she "will sign absolutely any agreement you put in front of me, and promise not to discuss the agreement with any lawyers."

Before ringing off, Harold asked you whether there was a minimum legal waiting period between the date he and Wanda sign the postnup and the date he can refile for divorce. You told him that there was not. Do you question the propriety of the postnup Harold has asked you to prepare?

Question: If you decline drafting the postnup he wants, how can you try to explain your refusal to Harold without offending him? **Answer:** By writing a diplomatic letter attempting to persuade Harold that you'll be acting in his best interests by not preparing his proposed postnup. Here is some suggested meat for your letter. Season to taste.

Dear Harold:

Thank you for your telephone call this morning. Over the past couple of weeks, you have informed me that since Wanda received your divorce petition, she: (1) has indicated embarrassment and regret over the Bad Things you caught her doing, (2) has promised that she will never again do the Bad Things, (3) has implored you not to tell her family about the Bad Things, and (4) has pleaded with you to take her back.



Ronald S. Granberg (ron@granberglaw.com) is an ACFLS member practicing primarily in Monterey County. He is a past-president of the Monterey County Bar Association, a past-president of ACFLS, and a past-president of the AAML Northern California Chapter. Ron is a recipient of the AAML Northern California Chapter "Fellow of the Year Award," a recipient of the ACFLS "Hall of Fame Award," and a co-recipient of the AAML Southern California Chapter "Family Law Person of the Year Award."

This morning you informed me that you would be willing to dismiss the pending divorce proceeding and reconcile with Wanda if she signs a postnup that would give you Unfair Advantages if the two of you divorce. When you described your proposed reconciliation terms to Wanda, she assured you that she "will sign absolutely any agreement you put in front of me, and promise not to discuss the agreement with any lawyers."

Family lawyers commonly deal with three categories of agreements: premarital agreements ("prenups"), postmarital (during marriage) agreements ("postnups"), and divorce marital settlement agreements ("MSAs"). Different laws apply to each.

*Spouses owe each other strict fiduciary duties. Family Code section 721(b) states: "in transactions between themselves [such as postnups], spouses are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the **highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other.**"*

Fiduciary and confidential relationship duties don't apply to prenups because fiancées aren't yet spouses. Confidential relationship duties do not apply to MSAs because California law recognizes that divorcing spouses deal with each other "at arm's length."

Fiduciary and confidential relationship duties apply full-strength to postnups.

Under a case called *Marriage of Delaney*,¹ **an agreement in which Spouse A obtains an unfair advantage over Spouse B is presumed to be unenforceable.** A judge will rule that such an agreement is enforceable only if Spouse A is able to prove at trial that the agreement passes all three parts of an onerous legal test. Under the *Delaney* test, the agreement will be enforced only if Spouse A proves that Spouse B signed it:

1. freely and voluntarily;
2. with full knowledge of all the facts; and
3. with a complete understanding of the effect of the agreement.

You know that your proposed postnup would give you Unfair Advantages over Wanda by changing to your separate property most of Wanda's and your substantial community property assets, including real estate, stocks, and bonds.

During my years of practice, I have sometimes provided an MSA to an opposing spouse who chooses not to be represented by counsel. A signed MSA is presumed to be valid and enforceable. If the opposing spouse signs the MSA without having it reviewed by a lawyer, ordinarily **that isn't my client's problem.**

In contrast, I have never provided a postnup to an opposing spouse with the option of not being represented by counsel. Only if the opposing spouse has the agreement reviewed by a lawyer will he or she have the requisite "complete understanding of the effect of the agreement." My client owes strict fiduciary duties to his or her spouse. If the opposing spouse signs the postnup without having it reviewed by a lawyer, **that is my client's problem.** Therefore, I never let it happen. To avoid unenforceability risks, I always insist that an opposing spouse who is receiving a postnup I draft be represented by an attorney—and that the attorney acknowledge the representation by also signing the agreement.

These "must-have-a-lawyer" comments relate to the "complete understanding of the effect of the agreement" burden you would have to bear in order to have your postnup ruled enforceable. What about your burden of proving that Wanda signed the postnup "freely and voluntarily"?

Obviously, Wanda has treated you horribly and she knows it. Wanda admits having done Bad Things. You are divorcing Wanda, who desperately wants to remain married to you, and desperately wants to keep secret from her family the Bad Things you know about. If Wanda signs a postnup under these circumstances, how in the world would you be able to prove to a judge that she signed it freely and voluntarily?

If you and Wanda reconcile and remain married, a signed postnup would gather dust on a shelf. You two would live your lives the way other spouses live theirs. It is only if you and Wanda divorce that you will have cause to attempt to enforce the postnup against

her. As you can see from this letter, your divorce judge will in all likelihood rule the postnup invalid and unenforceable.

I hope this letter explains why a postnup giving you Unfair Advantages under these circumstances would be a bad idea. A lawyer who drafts an unenforceable agreement is not doing his client a favor. To the contrary, an unenforceable agreement commonly ends in bitter feelings, costly litigation, an angry judge, and a courtroom loss.

Please contact me to further discuss this matter, Harold. I'm here to help.

Best regards,

Dana
Dana Divorcer, Esq.

The above article can be read in conjunction with my previous article ("Postmarital Agreements Containing a 'Not Made in Contemplation of Divorce' Clause: Fish or Foul?") published in the Fall 2008 ACFLS *Family Law Specialist* (then called the ACFLS *Newsletter*). In the earlier article, I suggested five categories into which postnups may be grouped: 1) Tardy Prenup Postnups, 2) Shift Happens Postnups, 3) Estate Planning Postnups, 4) Reconciliation Postnups, and 5) Divorce Preparation Postnups. The article stated:

The Divorce Preparation Postnup occurs when a person tricks his or her spouse into signing a postnup waiving rights, then files for divorce once the ink on the spouse's signature is dry. The Divorce Preparation Postnup is a breach of fiduciary duties. A Not Made in Contemplation of Divorce Clause may save you from becoming an unwitting accomplice to a Divorce Preparation Postnup. Consider the following hypothetical case. Harold Bickerson hires you to draft a postnup between wife Wanda and him. Harold doesn't inform you of his intention to divorce Wanda the minute the postnup is signed. He also fails to mention the financial/emotional control he is exerting over Wanda to extort her into signing the agreement. When you show Harold a draft of the postnup containing the Not Made in Contemplation of Divorce Clause, Harold blanches and asks you to delete the clause. The discussion that follows alerts you to the fact that you have been hired to prepare a Divorce Preparation Postnup. You decline the representation, refusing to draft a deceitful agreement.

The 2008 article suggested ways for you to identify a fraudulent postnup. This 2017 article suggests ways for you to decline drafting a fraudulent postnup, while hopefully remaining on good terms with your daughter's soccer coach.

¹ In re *Marriage of Delaney*, 111 Cal. App. 4th 991, 1000 (2003)