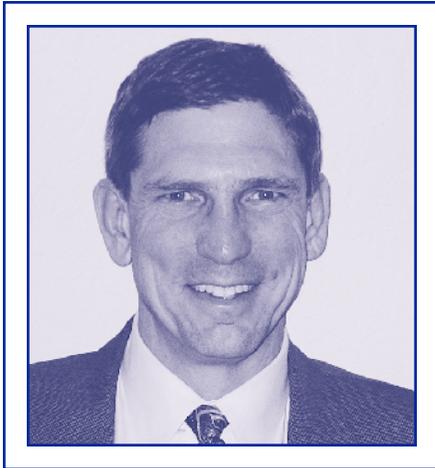


POSTMARITAL AGREEMENTS CONTAINING A “NOT MADE IN CONTEMPLATION OF DIVORCE” CLAUSE: FISH OR FOUL?

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Introduction

You have seen postmarital agreements that contain a clause stating “This agreement is not made in contemplation of divorce” and, in fact, you may have drafted postnups containing this clause (hereafter, the “Not Made in Contemplation of Divorce Clause”). The first paragraph of the postmarital agreement form found at section 210.31 of Matthew Bender’s *California Family Law Practice and Procedure, Second Edition* states:

Purpose

1. The parties to this Agreement intend to transmute the character of personal property. This Agreement is not made in contemplation of a separation or marital dissolution.

The use comment to the section 210.31 form warns drafting attorneys:

This form is not designed to be used by parties contemplating dissolution or legal separation. For discussion and forms relating to agreements between spouses incident to legal separation or dissolution proceedings, see Chapter 211.

The third paragraph of the postmarital agreement form found at section 9.B of the Rutter Group’s *California Practice Guide: Family Law* states:

- C. The parties do not presently contemplate a separation and have no intention of obtaining a dissolution of marriage.

This article analyzes the Not Made in Contemplation of Divorce Clause in our post-*Delaney*, post-*Burkle II* world.

Five Kinds of Postnups

Most postnups fall into one of five categories:

1. The “Tardy Prenup” Postnup;
2. The “Shift Happens” Postnup;
3. The “Estate Planning” Postnup;
4. The “Reconciliation” Postnup; and
5. The “Divorce Preparation” Postnup.

The Tardy Prenup Postnup

The Tardy Prenup Postnup results from fiancées who find themselves unable to finalize their prenup before the wedding. Factors contributing to this inability include:

- The Family Code section 1615(c)(2) requirement that a party sign the prenup no sooner than seven calendar days after being first given the prenup and advised to seek independent legal counsel;
- The Family Code section 1615(c)(1) requirement that each party have independent legal counsel;
- The difficulty in finding competent family law attorneys still willing to draft prenups;
- The complexities of prenup drafting; and
- Normal human procrastination when faced with a disagreeable task.

The Shift Happens Postnup

The Shift Happens Postnup results from a shift in financial fortune, such as:

- An inheritance;
- A separate property gift;
- A creditor problem;
- A spouse’s decision to use separate funds to benefit community property; or
- A business venture.

The Estate Planning Postnup

The Estate Planning Postnup is made in conjunction with estate plan revisions.

The Reconciliation Postnup

The Reconciliation Postnup occurs when reconciling spouses wish to define their respective property interests. *Burkle II, infra*, involved a Reconciliation Postnup.

The Divorce Preparation Postnup

The Divorce Preparation Postnup occurs when a person tricks his or her spouse into signing a postnup waiving rights and files for divorces once the ink on the spouse's signature is dry. The Divorce Preparation Postnup is a breach of fiduciary duties.

***Burkle II* Validated a Reconciliation Postnup, Holding That it Wasn't a Divorce Preparation Postnup**

In *In re Marriage of Burkle* (2006) 139 Cal.App.4th 712 (*Burkle II*), Wife unsuccessfully attempted to set aside a postnup. Husband argued that it was a valid Reconciliation Postnup, in contrast to Wife's characterization of the postnup as a sneaky Divorce Preparation Postnup. "Ms. Burkle protests the parties did not agree to reconcile; the [postmarital] agreement constitutes a 'pre-packaged divorce;' and a dissolution proceeding was pending when the agreement was executed." *Id.*, at p 748.

The court rejected Wife's argument, upholding the agreement as a valid Reconciliation Postnup. It observed that it would be good practice for parties entering into a Reconciliation Postnup to first dismiss any dissolution proceeding pending between them.

"Needless to say, given the vagaries of available proof, the parties to a dissolution proceeding who hope to reconcile and at the same time resolve property issues in a postmarital agreement would be well advised to dismiss the proceeding before executing an agreement. Dismissal will avoid the uncertainties attendant upon the need to later present sufficient proof that an agreement was executed while the dissolution proceeding was in abeyance and that neither party contemplated the **imminent** dissolution of the marriage." *Id.*, at p 749, footnote 32; emphasis added.

Note the court's observation that

"... neither party contemplated the **imminent** dissolution of the marriage." *Id.*, at p 749, footnote 32; emphasis supplied.

The court rejected Ms. Burkle's contention that the postnup was invalid on grounds that the parties failed to satisfy the disclosure requirements of Family Code sections 2104 and 2105, holding that "because the postmarital agreement was not executed in connection with the **imminent** dissolution of the marriage, Family Code sections 2104 and 2105 do not apply." *Id.*, at p 749; emphasis supplied.

Again, note the court's observation that "the postmarital agreement was not executed in connection with the **imminent** dissolution of the marriage..." *Id.*, at p 749; emphasis supplied. Perhaps you should take a hint from *Burkle II* and use this clause in your next postnup: "This agreement is not made in contemplation of imminent divorce." Or, as this article suggests, perhaps you should eliminate the Not Made in Contemplation of Divorce Clause from your next postnup altogether.

Benefit of a Not Made in Contemplation of Divorce Clause: Uncovering a Hidden Divorce Preparation Postnup

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 misrepresents the reason for the postnup, disguising it as an Estate Planning Postnup or, perhaps, a Shift Happens Postnup. 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.

Disadvantage of a Not Made in Contemplation of Divorce Clause: Uncomfortable Cross Examination of Postnup Proponent

If a postnup you draft includes a Not Made in Contemplation of Divorce Clause and the agreement's validity is litigated, the party contending that the agreement is valid may have to endure some uncomfortable cross examination. Consider the following hypothetical case. When Harold and Wanda married each other, they each had a child by a prior marriage. After ten years of marriage Wanda inherited a million dollars, which Harold wants to use to start a business. Wanda asked you what effect her contribution of the inherited funds to the new business would have in the event of divorce or her death. You discussed with Wanda the wonders and uncertainties of *Pereira v. Pereira* (1909) 156 Cal. 1 and *Van Camp v. Van Camp* (1921) 53 Cal.App. 17.

Wanda asked you to draft a postnup. You prepared a good faith Shift Happens Postnup. Under its terms, the method by which Wanda and the community share any increase in the business's value during coverture is fairly determined with mathematical formulae rather than through the vagaries of *Pereira/Van Camp*. You included a Not Made in Contemplation of Divorce Clause in the postnup.

Harold filed a dissolution petition against Wanda on October 15, 2007, two years after the postnup was signed. The issue of its validity has been bifurcated for early determination and today, October 15, 2008, Judge Solomon decides whether or not it is valid. Harold contends that it is invalid, while Wanda desires its enforcement. Like Wanda, you would like to see the postnup held valid. (You hate it when an agreement you drafted is invalidated.)

Watch the sport Harold's Attorney has with Wanda regarding the Not Made in Contemplation of Divorce Clause.

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GRANBERG

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H's Attorney Good morning, Your Honor. As his first witness Petitioner Harold Bickerson calls Respondent Wanda Bickerson to the stand pursuant to Evidence Code section 776.

Judge Come forward and be sworn, Ms. Bickerson.
[clerk administers oath]

H's Attorney Ms. Bickerson, I'm going to ask you some questions about opinions you held approximately three years ago. Is that all right?

Wanda I suppose so. At least to the extent that I can remember what I believed three years ago.

H's Attorney Of course. In the following questions, when I use the term "at that time," I will be referring to three years ago, is that acceptable?

Wanda Yes.

H's Attorney Approximately three years ago did you have any idea what the divorce rate was in the United States?

Wanda I remember reading a statistic of 50% around that time. So my best recollection is that three years ago I believed that the divorce rate was around 50%.

H's Attorney At that time were you familiar with a document called a "prenuptial agreement," sometimes nicknamed a "prenup"?

Wanda Yes.

H's Attorney At that time what was your understanding about what a prenup was?

Wanda My understanding was that a prenup was an agreement people signed before they got married that would determine what happened to their property if they divorced.

H's Attorney At that time were you also familiar with a document called a "postnuptial agreement," sometimes nicknamed a "postnup"?

Wanda Yes.

H's Attorney What was your understanding about what a postnup was?

Wanda My understanding was that a postnup was an agreement people signed during their marriage that would determine what happened to their property if they divorced.

H's Attorney I'll show you a document that has been pre-marked as Petitioner's Exhibit 1 for identification, and ask you if you recognize it.

Wanda Yes. That's the postnup Harold and I signed.

H's Attorney Can you identify your signature on Exhibit 1 for identification?

Wanda Yes – that's my signature on page 18.

H's Attorney Can you identify Harold's signature on Exhibit 1 for identification?

Wanda Yes – that's Harold's signature, also on page 18.

H's Attorney How long ago was the postnup signed?

Wanda Harold and I signed it three years ago, on October 15, 2005, just like it says here on page 18.

H's Attorney Your Honor, I move Petitioner's Exhibit 1 for identification into evidence.

Judge Any objection from Respondent?

W's Attorney No, Your Honor

Judge It is admitted as Petitioner's Exhibit 1.

H's Attorney Whose idea was it that you and Harold sign a postnup?

Wanda It was my idea.

H's Attorney Why?

Wanda Because in August 2005 I inherited a million dollars from my Uncle Jed.

H's Attorney Was a million dollars a substantial sum of money relative to your and Harold's circumstances three years ago?

Wanda Yes. A million dollars a huge amount of money relative to our circumstances at the time. At that time Harold and I had been able to accumulate assets totaling only about \$50,000 after ten years of marriage. Rearing children is expensive.

H's Attorney So I've heard. What was your understanding regarding the purpose of the postnup?

Wanda Harold had an idea for a business he wanted to start, and he wanted to use my million dollars to start it.

H's Attorney What was the problem with that?

Wanda Well, I'm not sure I can explain what the law is on that subject. Since you're a lawyer and I'm not, that's not really a fair question, is it?

H's Attorney This isn't a test of your legal knowledge, Ms. Bickerson. That would be unfair. Please just tell Judge Solomon what your **understanding** was at the time.

Wanda My cousin Vinnie – Vinnie's a lawyer, you see – told Harold and me that if we got a divorce, lawyers and business appraisers would receive huge fees handling our case.

H's Attorney Did Vinnie tell you why that was?

Wanda Vinnie said it was because of two things called "Piranha" and "Van Camp."

H's Attorney Do you know what "Piranha" and "Van Camp" mean?

Wanda No. Just that they make divorces expensive.

H's Attorney So what did you do?

Wanda I consulted a lawyer, who prepared a postnup.

H's Attorney Did Harold have lawyer, too?

Wanda Yes.

H's Attorney Who were the lawyers?

Wanda I hired Teresa Truth to prepare the postnup and Harold hired Jeremy Justice to review it on his behalf.

H's Attorney Did Ms. Truth prepare the postnup?

Wanda Yes.

H's Attorney Is it your understanding that the postnup benefits Harold or you?

Wanda It is my understanding that the postnup benefits me.

H's Attorney Are you asking Judge Solomon to rule that the postnup is legally binding?

Wanda Yes.

H's Attorney How is it, according to your understanding, that the postnup benefits you?

Wanda It is my understanding that the postnup makes a portion of my inheritance community property, but not as large a portion of my inheritance as "Piranha" and "Van Camp" would have made community property.

H's Attorney I am now showing you lists of assets and liabilities attached to the postnup. Do you see the exhibit entitled "Wanda Bickerson's Assets And Liabilities"?

Wanda I do.

H's Attorney Is the list of assets and liabilities on that exhibit accurate?

Wanda It most certainly is!

H's Attorney Is it your practice to tell the truth in documents you sign?

Wanda It most certainly is!

H's Attorney When someone enters into a contract with you, is he justified in relying on the statements in the contract as being true?

Wanda Absolutely.

H's Attorney When someone enters into a contract with you, is it your intention that he rely on the statements in the contract as being true?

Wanda I suppose so.

H's Attorney Did you know that the postnup was an important document before you signed it?

Wanda Yes.

H's Attorney Did you read the postnup carefully before you signed it?

Wanda Of course I did.

H's Attorney Please listen carefully to my next question. I don't want you to reveal the contents of your conversations with Ms. Truth. Please answer my question with a simple "yes" or "no." My question is: before you signed the postnup did Ms. Justice thoroughly discuss its contents with you?

Wanda Yes.

H's Attorney Did you understand the postnup before you signed it?

Wanda I believe so.

H's Attorney Was it your intention that all statements in the postnup be true?

Wanda It certainly was.

H's Attorney Was it your intention that Harold rely on all statements in the postnup as being true?

Wanda Yes.

H's Attorney Were all of the statements in the postnup in fact true?

Wanda Absolutely.

H's Attorney Ms. Bickerson, please read the first sentence of the postnup out loud to Judge Solomon.

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Wanda “This agreement is not made in contemplation of divorce.”

H’s Attorney Is that a true statement?

Wanda Yes.

H’s Attorney Do you remember testifying as follows a couple of minutes ago, and I quote: “My understanding at that time was that a postnup was an agreement people signed during their marriage that would determine what happened to their property if they divorced?”

Wanda I remember saying that, yes.

H’s Attorney Three years ago at the time the postnup was signed you believed that the **very purpose** of a postnup was to determine what happened to married persons’ property **if they divorced**, isn’t that correct?

Wanda I guess so.

H’s Attorney Is it still your contention that this statement in the postnup was true: “This agreement is not made in contemplation of divorce”?

Wanda Yes, that certainly is my contention. I know what you’re doing – you’re trying to confuse me with lawyer word tricks. Although our postnup was made “in contemplation of divorce” **in the abstract**, it certainly wasn’t made “in contemplation of **my divorce**”! I had no intention of getting a divorce.

H’s Attorney Then **whose divorce** did you contemplate when you made it?

Wanda Well. My divorce, I guess. But only if it happened. And I didn’t think it would.

H’s Attorney Do you remember testifying a couple of minutes ago that when you signed the postnup it was your belief that approximately 50% of the marriages in the United States ended in divorce?

Wanda I remember saying that, yes. But I never thought Harold and I would divorce.

H’s Attorney If you and Harold were never going to divorce, then why have a postnup?

Wanda Just in case.

H’s Attorney So your testimony is that your postnup didn’t contemplate **certainty** of a divorce, but it did contemplate **possibility** of a divorce, is that a fair statement?

Wanda I guess so.

H’s Attorney But the postnup would be meaningless – a useless exercise – unless there was a divorce, is that your understanding?

Wanda I don’t know. I guess that’s right.

H’s Attorney So you did enter into the postnup “in contemplation of divorce,” isn’t that true?

Wanda No. I didn’t say that. The fact that something is a possibility doesn’t mean that it is planned for.

H’s Attorney Do you carry a spare tire in your car?

Wanda Yes.

H’s Attorney You do so in case you have a flat tire?

Wanda I suppose.

H’s Attorney You don’t expect to have a flat tire, do you?

Wanda No.

H’s Attorney In your opinion, would it be fair to say that you carry a spare tire “**in contemplation of having a flat tire**”?

W’s Attorney Objection, Your Honor. Argumentative.

Judge Sustained.

H’s Attorney No further questions.

Fiduciary Duties versus Not Made in Contemplation of Divorce Clause

California law is well equipped to invalidate a sneaky Divorce Preparation Postnup on breach of fiduciary duty grounds (e.g., Fam. Code §721(b); *Marriage of Delaney* (2003) 111 Cal.App.4th 991). The puny Not Made in Contemplation of Divorce Clause pales in comparison with such mighty fiduciary duty authorities when it comes to protecting spouses against postnup abuse.

Conclusion

Where does this leave us?

Should your next postnup include a Not Made in Contemplation of Divorce Clause?

Here are three suggestions:

1. Include the clause in the initial draft that you show your client, to help you decide if you have been asked to facilitate a Divorce Preparation Postnup disguised as a Shift Happens Postnup.
2. Continue the representation if you determine that the agreement is in good faith.
3. Omit the clause from your final draft.