

Preserving Premarital Agreements

A Cooling-Off Period Alone Would Provide Enough Safety For All Parties

By Fred Silberberg

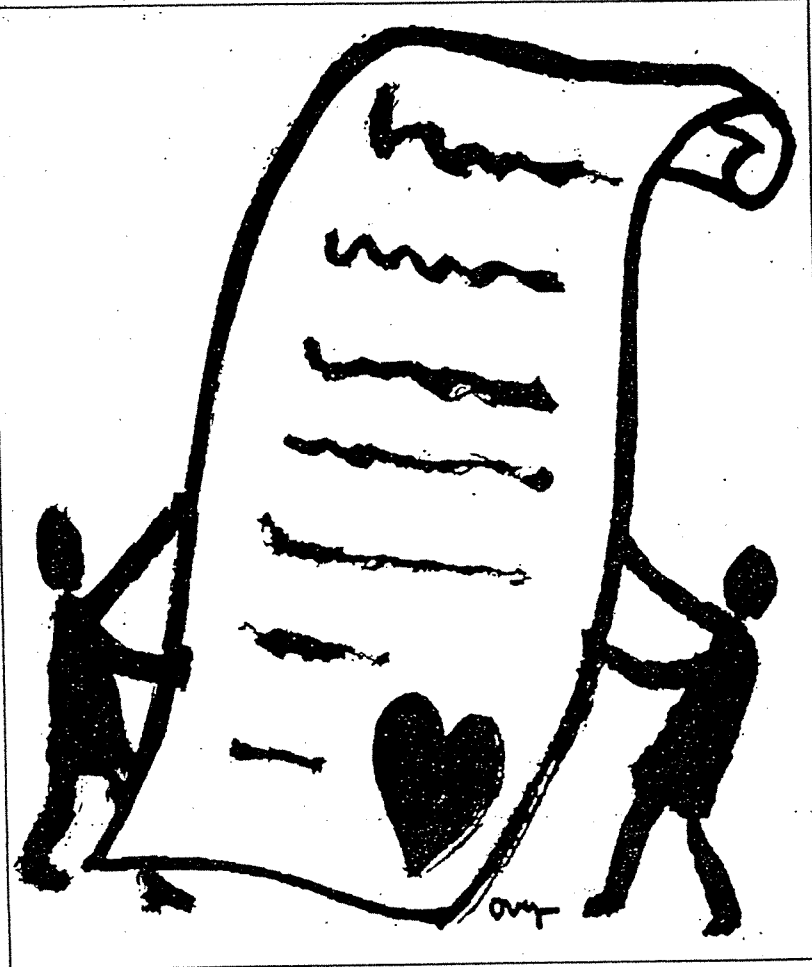
Pity those poor people who are asked to sign prenuptial agreements. They are clearly the downtrodden members of society who need the protection of such people as Sen. Sheila James Kuehl. It appears that Kuehl, well-known for working to protect those supposedly needing protection, has added to her list of "those incapable of protecting themselves" people asked to sign prenuptial agreements. But this time she has gone too far.

I advocate a cooling-off period for people signing a prenuptial agreement — a short time when parties to an agreement could change their minds and opt out of the agreement, in the same way that parties to a consumer contract can invalidate a decision made under pressure. The theory behind this is the elimination of the possibility of a claim of duress, giving parties to such an agreement a period to reflect on the contract.

This idea seems to have struck a chord with Kuehl, and she has placed before the Legislature SB78, which addresses the cooling-off period in a convoluted way. And unfortunately, it does a lot more than that. If passed, this bill possibly could be used to invalidate many prenuptial agreements. The concept of trying to provide certainty in the area of community property and spousal support before getting married would be out the window. The bill also provides various "tests" to determine unconscionability of such agreements, which go beyond existing case law, and invalidates waivers of future spousal support.

The senator's proposal addresses the cooling-off period issue by invalidating a prenuptial agreement as a matter of law if a 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 counsel and the time the agreement was signed."

Although I applaud Kuehl for attempting to address the problem of execution of agreements under duress, the rest of her proposed legislation is an overzealous attempt to interfere with an adult's right to contract and an inappropriate modification of California's adoption of the Uniform Premarital Agreement Act.



should have the right to negotiate their property arrangements and waive spousal support if they choose to do so. The draft of the pending bill would make it difficult to sustain an agreement where both parties were not represented by counsel. If the agreement is being enforced against a party who was not represented by counsel, the statute requires that the court find that the unrepresented party was "fully informed of the terms and basic effect of the agreement" and was "proficient in the language in which the explanation of the party's rights was conducted or the agreement was written" and that the unrepresented party executed a separate document declaring that he or she was provided with this information.

The bill also provides multiple bases for a court to find inadequate disclosure, duress or unconscionability. Moreover, the proposed legislation would specifically prohibit a waiver of spousal support in a prenuptial agreement.

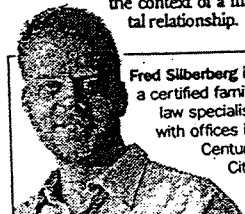
support waiver was addressed in *In re Marriage of Pendleton and Fireman*, 24 Cal.4th 39 (2000), where the California Supreme Court upheld the waiver of future rights to spousal support in a premarital agreement. Moreover, in *In re Marriage of Bonds*, 24 Cal.4th 1 (2000), the California Supreme Court made clear its belief that premarital agreements should be upheld generally. In *Bonds*, the court upheld a premarital agreement signed only days before the wedding, and without the benefit of counsel, by baseball star Barry Bonds' wife, whose native language was Swedish. If passed, SB78 would overrule by legislative fiat both *Pendleton* and *Bonds*.

Granted, some situations require setting aside an agreement, particularly if informed consent is lacking or duress is clear. But SB78 would tilt the scales too far against upholding the validity of premarital agreements, thereby opening the door to increased litigation. In this way, the bill holds that prospective spouses are subject to the same

fiduciary obligations as those who are married.

Plenty of issues in our society need to be addressed. Placing restrictions on the ability to contract property and support rights before a marriage doesn't seem high on the list of priorities. People who consider these agreements are not in need of state protection. No one is forced to get married. And as for the Uniform Premarital Agreement Act, it would no longer be "uniform" in California.

Kuehl needs to address the real problems in our state and not insult our intelligence by telling us to what we can and cannot agree in the context of a marital relationship.



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