

RESOLUTION 07-12-2018

DIGEST

Premarital Agreements: Commencement of Seven-Day Waiting Period

Amends Family Code section 1615 to clarify that when a party is not represented by counsel the required seven-day waiting period runs from the date the final draft is provided.

STATEMENT OF REASONS

The Problem: Section 1615 provides that a premarital agreement is not enforceable if the party against whom enforcement is sought was not represented by counsel and received the agreement less than seven days before it was signed. Family law attorneys are not presently clear if the seven days runs from the presentation of the first draft of the agreement, or revised drafts. Further, this section is ambiguous as to whether the seven day period applies to parties who have attorneys (case law has determined that it does not).

The Solution: Legislation to amended Section 1615 to clarify its application.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 1615 to read as follows:

- 1 § 1615
- 2 (a) A premarital agreement is not enforceable if the party against whom enforcement is
- 3 sought proves either of the following:
- 4 (1) That party did not execute the agreement voluntarily.
- 5 (2) The agreement was unconscionable when it was executed and, before execution of the
- 6 agreement, all of the following applied to that party:
- 7 (A) That party was not provided a fair, reasonable, and full disclosure of the property or
- 8 financial obligations of the other party.
- 9 (B) That party did not voluntarily and expressly waive, in writing, any right to disclosure
- 10 of the property or financial obligations of the other party beyond the disclosure provided.
- 11 (C) That party did not have, or reasonably could not have had, an adequate knowledge of
- 12 the property or financial obligations of the other party.
- 13 (b) An issue of unconscionability of a premarital agreement shall be decided by the court
- 14 as a matter of law.
- 15 (c) For the purposes of subdivision (a), it shall be deemed that a premarital agreement
- 16 was not executed voluntarily unless the court finds in writing or on the record all of the
- 17 following:
- 18 (1) The party against whom enforcement is sought was represented by independent legal
- 19 counsel at the time of signing the agreement or, after being advised to seek independent legal
- 20 counsel, expressly waived, in a separate writing, representation by independent legal counsel.
- 21 (2) The party against whom enforcement is sought, if unrepresented by legal counsel, had
- 22 not less than seven calendar days between the time that party was first presented with the final
- 23 draft of the agreement and advised to seek independent legal counsel and the time that the
- 24 agreement was signed.

25 (3) The party against whom enforcement is sought, if unrepresented by legal counsel, was
26 fully informed of the terms and basic effect of the agreement as well as the rights and obligations
27 he or she was giving up by signing the agreement, and was proficient in the language in which
28 the explanation of the party's rights was conducted and in which the agreement was written. The
29 explanation of the rights and obligations relinquished shall be memorialized in writing and
30 delivered to the party prior to signing the agreement. The unrepresented party shall, on or before
31 the signing of the premarital agreement, execute a document declaring that he or she received the
32 information required by this paragraph and indicating who provided that information.

33 (4) The agreement and the writings executed pursuant to paragraphs (1) and (3) were not
34 executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter
35 into the agreement.

36 (5) Any other factors the court deems relevant.
(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE WITH RECOMMENDED AMENDMENTS

History:

No similar resolutions found.

Reasons:

This resolution amends Family Code section 1615 to clarify that when a party is not represented by counsel the required seven-day waiting period runs from the date the final draft is provided. This resolution should be approved in principle with recommended amendments because it clarifies the application of the seven-day waiting period.

Family Code section 1615 establishes numerous requirements for a valid premarital agreement. One of these requirements is a seven-day waiting period between the time a party against whom enforcement is sought is "first presented with the agreement and advised to seek legal counsel and the time that the agreement is signed." A recent case, *In re Marriage of Clarke and*

Akel (2018) 19 Cal.App.5th 914, held that even if an unrepresented party drafted the first draft of the premarital agreement at issue, the seven day waiting period still applied between the date of receipt of the final draft of the premarital agreement and the date the agreement was signed. The resolution attempts to clarify the code section to reflect this holding that the waiting period applies to the final draft of the agreement rather than any earlier draft, and as written this amendment appears to effect this change.

However, the resolution also appears to change the application of the waiting period only to unrepresented parties against whom enforcement is sought, which is a fundamental change to the current application of this code section. This fundamental change could be avoided by moving the suggested language of “if unrepresented by legal counsel” to modify who is advised to seek legal counsel rather than to modify the party against whom enforcement is sought, such that the resolution would read as follows, “[t]he party against whom enforcement is sought, had not less than seven calendar days between the time that the party was first presented with the final draft of the agreement and advised to seek legal counsel, if unrepresented by legal counsel, and the time that the agreement was signed.”

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FAMILY LAW SECTION – APPROVE IN PRINCIPLE

FLEXCOM approves the clarification proposed here for Family Code section 1615 with regard to the pre-signing time period. This clarification will provide clear guidance that is needed.

TRUSTS AND ESTATES SECTION

TEXCOM is supportive of the concept of clarifying changes to the law that will ensure that unrepresented parties have adequate time to consider the contents of premarital agreements. However, TEXCOM has questions about this resolution as drafted.

First, TEXCOM believes the proposed reference to a “final draft” is potentially ambiguous. If a party is “first presented” with a “final draft” of an agreement to review, makes no changes after reviewing, and is then “presented” with a “final agreement” to execute several days later, does the “final draft” or the “final agreement” trigger the seven days? Consistent with the goals of this resolution, it might be clearer if the statute referred to the “final agreement” instead of the “final draft.” But even with that change, TEXCOM has questions regarding the document that should be used to trigger the seven-day waiting period, as a matter of policy. Under existing Family Code section 1615(c), it is deemed that a premarital agreement was not executed voluntarily unless the court finds certain specific facts, including that:

- (1) The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel.

(2) The 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 legal counsel and the time the agreement was signed.

If an unrepresented party is “first presented” with an initial draft of an agreement, advised to seek independent legal counsel, and expressly waives, in a separate writing, representation by independent legal counsel, does the presentation of subsequent drafts trigger (1) a new obligation to advise the unrepresented party to seek independent counsel; (2) a new requirement that representation by independent legal counsel be expressly waived in a separate writing; and (3) a new seven-day waiting period? Under the resolution, a minor and non-material change could render the agreement unenforceable or initiate a new seven-day waiting period, even where the unrepresented party has already expressly waived his or her right to seek independent legal counsel (at least with respect to a prior draft of the agreement) and continues to discuss subsequent drafts. Moreover, section 1615(c)(3) provides additional protections for the unrepresented party, prior to signing the agreement, by also requiring the court to find that:

(3) The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party’s rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party shall, on or before the signing of the premarital agreement, execute a document declaring that he or she received the information required by this paragraph and indicating who provided that information.