WRITTEN AGREEMENTS CAN MITIGATE UNINTENDED CONSEQUENCES OF CALIFORNIA'S DIVORCE LAWS

By Franklin R. Garfield

The vast majority of couples marry without a prenuptial agreement to govern their rights and duties in the event of a divorce. They are also unfamiliar with the divorce laws of the State of California. A recent appellate case – MULLONKAL v. KODIYAMPLAKKIL (June 29, 2020) -- highlights three areas in which conduct that is commonplace during the course of a marriage may have consequences that are both unintended and unanticipated if the marriage ends in divorce.

In *MULLONKAL*, wife was a physician who earned in excess of $200,000 per year. Her husband was a foreign national who was not allowed to work legally in the United States. During the course of the parties' three year marriage, wife paid back institutional education loans and education and other loans from her parents out of her earnings; she also paid for various gifts and trips for her parents and other members of her family.

At trial, husband requested reimbursement for these three categories of expenditures that totaled in excess of $300,000. The trial judge denied reimbursement. The Court of Appeal reversed on all three counts.

With respect to the education loans, Section 2641 of the *California Family Code* mandates reimbursement to the community of community funds used to repay separate school loans absent "an express written agreement of the parties to the contrary." Section 2641(e). There are exceptions if the community has substantially benefitted from the education, or the education of the party is offset by the education of the other party paid for by the community, or the education reduces the party's need for support. None of the statutory exceptions applied and there was no written agreement. The appellate court specifically disapproved of the trial judge's belief that her discretion trumped the plain language of the statute.

Section 920 of the *California Family Code* applies to repayment of non-education loans. With no exceptions comparable to those listed in Section 2641, Section 920 reimbursement can be avoided only by an "express written waiver." Section 920(a).

When it came to the trips and gifts, Husband sought to recover funds paid to benefit wife's family as a breach of her fiduciary duty. The appellate court noted that Section 1101 of the *California Family Code* applies to a breach of fiduciary duty that results in impairment to the other spouse's interest in the community estate and proscribes a spouse from gifting or otherwise disposing community property "for less than fair and reasonable value." There are exceptions for gifts given by one spouse to the other, or gifts that are given to others by both spouses, or if the spouse who does not make the gift provides "written consent." Section 1100(b). The appellate court held that wife made gifts of significant value to her family, the statutory exceptions did not

apply, and reimbursement was mandatory.

Even without a prenuptial agreement, there are options available to the parties to avoid the potential application of California law to the facts of their case that one of them is likely to consider extremely unfair. In each of these situations, the statute that mandates reimbursement to the community also provides that the parties may moot the issue of reimbursement with a written agreement. Such an agreement in no way requires the parties to acknowledge that their marriage may end in divorce.

When the parties are recently married, and divorce is merely a remote possibility, it is the rare spouse who would decline to sign such a written agreement. After all, even if each party's earnings during the marriage are community property owned half by each party, the fairness of allowing wife to repay education loans and other loans from her family out of her own earnings would be apparent to all concerned. In most cases, there would be no other way those loans could be repaid. (Admittedly, the argument for denying reimbursement to the community is less compelling if one party is using his or her earnings during the marriage to repay the *other* party's separate loans.)

There is another commonplace occurrence with consequences in the event of a divorce that could be avoided without the formality of a prenuptial agreement or, indeed, any agreement between the parties. Husband and wife want to buy a house and take title as community property. They earn enough to make the payments; they do not have the money for a down payment.

Wife's parents are willing to provide that money. The potential issue arises because wife's parents do not consider the possibility that their daughter and son-in-law may someday divorce. In this instance, wife's parents must think about the result they intend. There are various possibilities:

First, wife's parents could intend to make a loan. If that is the case, there should be a note signed by their daughter and son-in-law and secured by a deed of trust on the property. This option provides wife's parents with maximum flexibility as the marriage unfolds.

Second, wife's parents could intend to make a gift to both parties. If that is the case, no further action is necessary.

Third, wife's parents could intend to make a gift to wife alone. Under California law, if wife contributes that gift, which is her separate property, to the acquisition or improvement of a community residence, she is entitled to dollar-for-dollar reimbursement if and when the marriage ends in divorce. If that is the result wife's parents intend, they must create a paper trail evidencing that the gift is to their daughter and their daughter alone; and that it is intended to be her sole and separate property.

To illustrate, a check payable to wife for the amount of the down payment that is clearly labeled "gift" (perhaps accompanied by a letter or other document that confirms her parents' intent) is by far preferable to a transfer from wife's parents to escrow "for the benefit of wife and her

husband."

In the former case, wife's right to reimbursement of her separate property contribution is rock solid because of the contemporaneous evidence of her parents' intent. In the latter case, wife's parents have inadvertently failed to keep a contemporaneous record of their intent *and* have simultaneously created evidence that the gift is to both parties by transferring the funds into an escrow in the names of both parties.

The fundamental problem is that the general public has no way of knowing how California law regulates these commonplace transactions; they also have no way of knowing that there are simple and straightforward work arounds. Most individuals would only rarely consult an attorney with respect to these matters. For these reasons lawyers should be alert to opportunities to educate members of the public both in formal presentations and in informal conversations.

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